

Structuring a Tenant's Right of First Offer to Lease Additional Space

If you have a Right of First Offer (“ROFO”) on certain space, then the landlord must offer to lease the ROFO space to you (when it becomes available) before it can be put “on the market” for lease.

Most office leases structure ROFOs so that it is the landlord who makes the initial price offer, usually at a pre-negotiated price (e.g., “at market”). Less frequently, leases may merely require the landlord to advise the tenant that the ROFO space is available and it is the tenant who then makes the initial price offer, which is usually not pre-negotiated. From the tenant’s perspective, the first approach is preferred.

ROFOs offer a growing tenant less assurance that it’ll be able to meet its future space needs than either rights of first refusal or fixed expansion options and ROFOs should be thoroughly negotiated to maximize their utility.

CHECKLIST FOR NEGOTIATING A ROFO

- ❖ Do you have continuous ROFO throughout the term of the lease or for only some portion of the term? Or do you only have a one-time ROFO?
- ❖ Do you have a ROFO as to space anywhere in the building? Or only as to space that is in the same elevator bank, the same floor, or contiguous to the original premises? Is the ROFO space specifically identified?
- ❖ Length of time you have to accept the landlord’s offer of the ROFO space?
- ❖ Do you have the right to inspect the space before having to accept or reject the offer?
- ❖ Do you have to take the entire ROFO space being offered or may you take only a portion so long as the remaining space is in a leasable configuration? Are you entitled to elevator lobby exposure or some other favorable configuration so long as you take _% of the offered space?
- ❖ If you’re required to take the entire offered ROFO space and you reject the landlord’s offer, is the landlord then required to lease such ROFO space in its entirety to a single 3rd party? If the landlord subsequently offers a sub-divided portion of the ROFO space to a 3rd party, is the landlord required to re-offer the smaller space to you?
- ❖ Is the landlord offering the ROFO space to you at _% of the prevailing “market” rate, including market concessions and allowances? If you disagree with the landlord’s determination of the “market” rate, is there an arbitration procedure? Or is the landlord to offer the ROFO space to you at the then current lease rate for the original premises? Or are such concessions and allowances provided for the original premises? Or are such concessions and allowances to be prorated if past the first year of the original lease term? Is the landlord’s offer required to address other pro-rata entitlements and concessions, such as parking?
- ❖ If you reject the landlord’s offer and the ROFO space is then leased to a 3rd party, do you retain a pre-emptive ROFO superior to any renewal right contained in the 3rd party’s lease? Is the landlord required to give you advance notice of the approaching expiration of the 3rd party’s lease?

- ❖ If the landlord is to offer the ROFO space to you at the rate it intends to offer to 3rd parties, is the landlord precluded from accepting a lower rate from a 3rd party? If the 3rd party negotiates materially better terms, is the landlord required to re-offer the space to you at those terms? Do you have a pre-emptive right to take the space at those better terms?
- ❖ If the landlord does not lease the ROFO space to a 3rd party within _ months, must the landlord re-offer the ROFO space to you?
- ❖ Length of time you have to renew and sign a lease amendment after receipt of same from the landlord?
- ❖ If you accept the landlord's offer of the ROFO space, when does the lease for the ROFO space commence?
- ❖ In what condition is the landlord to deliver the ROFO space to you? "Vacant and ready for commencement of construction of Tenant Improvements" or "Substantially Completed"? Base Building as defined in the original lease?
- ❖ If the tenant improvements for the ROFO space are to be constructed by you, is rent for such ROFO space abated in full for _ months following the delivery of the space to you?
- ❖ If the tenant improvements for the ROFO space are to be constructed by the landlord, is rent for such ROFO space abated in full for _ days following the delivery of the space to you in order for you to install your furniture, fixtures, and equipment?
- ❖ Is the lease term for the ROFO space coterminous with the lease term of the original premises?
- ❖ So long as you continue to lease at least _% of the original premises, do you retain you ROFO despite having previously sublet/assigned a portion of the premises?
- ❖ So long as there is no material Tenant default that has occurred and continued beyond any applicable notice and grace period, do you retain your ROFO?
- ❖ Has landlord granted other rights to other tenants that will be superior to your ROFO?
- ❖ May any assignee or subtenant exercise the ROFO or is it personal to you?

*Understanding the Right of First Offer.
We can help.*

Mike Maroon, SIOR is the Founding Partner of The Acclaim Group, a leading real estate adviser to corporations locally, nationally and globally.