



Oregon Real Estate Continuing Education

**NEGOTIATING OPTIONS FOR BROKERS  
CE COURSE #2018-003**

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- I. Options -- Leases.
  - A. Types
    - 1. Options to Extend
    - 2. Options to Expand Premises, typically Right of First Offer or Right of First Refusal
    - 3. Options to Terminate
    - 4. Options to Purchase
  - B. Threshold Considerations
    - 1. Default
      - a. No right to exercise if Tenant has ever been in default during the lease term
      - b. No right to exercise if Tenant is in default beyond applicable cure period at the time of exercise
      - c. Option "invalid" (at Landlord's option) if Tenant is in default at the time the option is effective
    - 2. Continuous Operations - no right to exercise if Tenant has not continuously operated Tenant's business in the Premises
    - 3. Assignments/Subleases - No right to exercise if Tenant has assigned the lease or subleased the Premises (but maybe carve out "Permitted Transferees")
  - C. Options to Extend
    - 1. Monthly Base Rent
      - a. Up front agreed upon amounts with agreed upon escalations
      - b. Fair market rents

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- (1) Floor of no less than prior month's base rent
  - (2) Cap on increase in base rent?
  - (3) Discuss annual escalations (3 %?)
  - (4) Window period for Tenant to exercise option
  - (5) 5% discount since no commissions/downtime?
  - (6) Any lease concessions considered in determining fair market rent?
  - (7) Arbitration - "split the baby" or "baseball".
- 2. Any improvement allowance to be provided?
  - 3. If lease is a modified gross lease, any re-set of the Base Year?
  - 4. If lease has percentage rent, re-set the percentage rent breakpoint?
- D. Options to Expand
- 1. Right of First Offer
    - a. Identification of Right of First Offer Space
    - b. Shouldn't apply to space for which another tenant has a pre-existing extension or expansion right
    - c. Shouldn't apply to space that is occupied by a tenant without an extension right but agrees with the Landlord to extend its lease
    - d. Must exercise as to all space offered?
    - e. Tailor to work where vacant space exists at the time the lease is being negotiated?
    - f. Landlord provides terms of what Landlord will offer
      - (1) What if term is for a longer period than Tenant's existing lease?
      - (2) Base Rent - Landlord's discretion, fair market rent or then existing rent per square foot rate
      - (3) TI Allowance - none or some modified amount based on remaining term
    - g. Period for Tenant to respond

- h. If Tenant doesn't accept:
  - (1) Landlord may lease free and clear of Tenant's rights?
  - (2) Landlord must re-offer to Tenant if economic terms Landlord is prepared to accept are materially less favorable to Landlord than what was offered to Tenant? What is material?
  - (3) Landlord must re-offer to Tenant if don't do a deal within a specified period

2. Right of First Refusal

- a. Identification of Right of First Refusal Space
- b. Shouldn't apply to space for which another tenant has a pre-existing extension or expansion right
- c. Shouldn't apply to space that is occupied by a tenant without an extension right but agrees with the Landlord to extend its lease
- d. Period for Tenant to respond - note that the terms of the ROFO will never match the existing lease term so arguably, either the term for the expansion space will need to be different or the existing lease will need to be extended
- e. If Tenant doesn't accept:
  - (1) Landlord may lease free and clear of Tenant's rights?
  - (2) Landlord must re-offer to Tenant if economic terms Landlord is prepared to accept are materially less favorable to Landlord than what was offered to Tenant? What is material?
  - (3) Landlord must re-offer to Tenant if don't do a deal within a specified period

E. Options to Terminate

1. Based on a period of time

- a. Is the termination date a date certain or at any time after a date certain?
- b. Amount of advance notice?
- c. Termination fee?
  - (1) Unamortized Tis and leasing commissions?

Amortization rate?

(2) A specified number of months' rent following the termination date?

(3) Is termination fee payable when notice is given or when lease terminates?

2. Based on specified events

a. Tenant not hitting gross sales target - what is the proper measuring period

b. Occurrence of some other event

(1) Co-tenancy default

(2) Exclusive default

F. Options to Purchase

1. Exercise based on a period of time

a. Is the termination date a date certain or at any time after a date certain?

(1) Is the termination date a date certain or at any time after a date certain?

(2) Amount of advance notice?

2. "As Is" - Tenant in possession so can perform due diligence prior to closing

3. Title Issues

4. Purchase Price

a. Specified amount

b. Amount determined based on fair market values

c. Amount determined based on cap rates

5. Earnest Money?

II. Options to Purchase Property

A. Option Consideration

1. Amount? Multiple payments (for development deals, may be tied to specific milestones)

- 2. Applicable to the purchase price?
  - B. Exercise window - failure to timely exercise deemed waiver and lose option consideration
  - C. "As Is" - Optionee can perform due diligence prior to exercise of option, but need to provide Optionee access to the property during the option period
  - D. Title Issues
  - E. Option Price - typically specified amount
- III. ROFO and ROFR to Purchase Property
- A. Issues are similar to a lease (except don't have the problem of inconsistent lease terms) and similar to an option to purchase property