

Real Estate Asset Management Lease Communications and Negotiations Policy & Procedures

Effective: Upon approval of the State Building Commission on February 24, 2014.
Prepared by: Real Estate Asset Management, Tennessee (“STREAM”) Department of General Services (“DGS”)

Purpose

With respect to leases for real property, to establish a consistent, equitable process for communicating, clarifying and negotiating with Responsive and Responsible Proposers during the procurement solicitation process, and with Proposers to whom a lease award has been made, including any amendments to such awarded leases in accordance with Tennessee Code Annotated and SBC Policy and Procedures.

Scope

These policies and procedures apply to all lease procurements, awarded leases, and amendments to awarded leases when the solicitation and award are conducted by STREAM. Leases sought under new lease procurements may be negotiated only if one of the following is met:

1. If negotiations would enable the State to better define its business purpose or need; or
2. If negotiations would enable the State to identify different types of solutions to meet its business need; or
3. If negotiations would enable the State to ensure a “best value” or “most cost effective” solution; or
4. When the State’s business purpose or need is complex; or
5. When the proposer’s cost to respond is high.

The terms and conditions and/or scope of work of existing leases may also be negotiated where doing so is in the best interests of the State.

Background

Given that the goal of a lease procurement is to create competition that supports “best value” for the State, the purpose of this policy is to provide a guideline for successfully increasing the total value created by a lease and to determine the proper way to distribute both risk and value between the parties in an efficient manner while serving the best interests of the State taking into account, among other things, cost and the needs of the State entities to be housed in the leased premises.

The request for proposal initiating a lease procurement (the “RFP”) will include the terms and structure of the lease which the State believes creates the greatest value for the State taking into account, among other things, cost and the needs of the State entities to be housed in the leased premises, and that allocates the risks and rewards related to the lease in a manner that is acceptable to the State. However, the State does not and cannot know the particular situations that relate to each specific respondent which would enable greater value creation if alternative terms or structures were considered. Therefore, the RFP shall allow Proposers to propose alternative terms in their Proposals. Proposers will be given an opportunity to respond to alternative terms in accordance with the terms of this policy.

Definitions

For purposes of this policy, the following terms shall have the meanings described below:

“Best Evaluated Proposer”- means the Proposer whose proposal, under the terms of the RFP, is determined by the State to be best.

“Broker”- means the person or entity engaged by contract with the State to (i) assist with preparation of the RFP, (ii) assist the State with analysis of lease procurements and proposals, and (iii) to engage in Discussions with Proposers at the direction of the State.

“Comparable Information”- means information that is of equivalent value, as determined by STREAM, which will be relayed to Proposers on the applicable Short List during Negotiations. For example, based on a Market Survey, STREAM believes that (i) the proposal submitted by proposer A includes a rental rate that is above market, but includes allowances that are at market; and (ii) the proposal submitted by proposer B includes a rental rate that is at market, but does not include market level allowances. STREAM may engage in detailed Negotiations with proposer A to reduce the rental rate and proposer B to increase the allowances without further discussions of the portions of the proposal that STREAM believes, based on knowledge of the market, are unlikely to be improved upon. Because the net effect of these Negotiations is to encourage each of the Proposers to improve their proposals in a manner that is most likely to cause the analysis of said proposal to be improved, it is not necessary that STREAM Negotiate with each Proposer on every term in the proposals or on the same terms which STREAM Negotiates with other Proposers.

“Complex Lease”- means a Lease determined, in writing with justification, by the DGS Commissioner to be a Complex Lease. In making a determination that a proposed lease will be a Complex Lease, the DGS Commissioner, shall determine that at least one of the following is satisfied:

- Desired lease term is greater than five (5) years;
- The State’s need is for a large square footage (more than 10,000 square feet);
- Tenant Improvements that will likely cost more than \$10 per rentable square foot will be needed; or
- The agency has special or unique requirements (such as, by way of example, but not limitation, data center, hearing rooms, conference facilities or location).

“DGS Commissioner” – means the Commissioner of the Department of General Services or such Commissioner’s designee.

“Discussions” - means communications (verbal and written) between the Broker and a Proposer which may involve the authorized representative of a Proposer, regarding terms and/or conditions in a proposal received from a Proposer in response to the RFP or in response to a request for alternative terms from the State. Discussions are not binding on the State.

“Lease” - means an agreement between the State and a third party regarding the use and occupancy of real property that has been approved by all required entities.

“Market Survey”- means an analysis of existing and available real properties, including their features and amenities, that might be available for lease to the State based on the space needs requirements of the State. A Market Survey will typically include, where possible, a description of the quality of each property surveyed, as well as, the rental rates and other economic terms on which a lease may be based, and an analysis of the market forces in the area which could have an impact on such economic terms. The Market Survey should be as inclusive as possible,

covering as many properties or type of properties that may be options to meet the State's needs. The purpose of a Market Survey is for the State to determine whether competition exists for the space needs requirement of the State.

"Negotiations"- means all communications, clarifications and negotiations with Proposers, including, without limitation, Discussions, regarding terms and/or conditions of proposed lease with the State.

"Proposal Analysis" - means an analysis to measure the value to the State of each individual proposal in response to the RFP. A Proposal Analysis will include an analysis, pursuant to the terms of the RFP, of the economic cost to the State of each proposal; the qualitative value of each proposal as measured by the qualitative factors, if any, included in the RFP; and the risk to the State posed by the terms of each proposal. The result of a Proposal Analysis will be a ranking of the proposals in order of the best evaluated. A Proposal Analysis will be completed at the end of each round of Negotiations.

"Proposer" - includes a "respondent" or "proposer" that is a legal entity that has properly registered as required by the State. The terms "respondent" and "proposer" may be used interchangeably for the term "proposer".

"Responsible" – with respect to a Proposer means a person or entity which has the capacity in all material respects to perform fully the Lease requirements, and the integrity and reliability that will assure good faith performance.

"Responsive" – with respect to a Proposer means a person or entity which has submitted a proposal, which conforms in all material respects, to the RFP.

"Revised Statement of Procurement Goal" – means the written document approved by the STREAM Director and prepared after completion of the Market Survey and prior to issuance of the RFP which sets forth the desired terms on which the State would like to enter into a Lease. The Revised Statement of Procurement Goal will be based on the Statement of Procurement Goal but will include revisions to terms in the Statement of Procurement Goal based on the results of the Market Survey.

"Short List"- means the written list of Responsive and Responsible Proposers prepared by the STREAM Director pursuant to the Short List Criteria after completion of (i) the Statement of Negotiation Goal and (ii) each Proposal Analysis. Negotiations will only be held with Proposers on the applicable Short List. The initial Short List shall not be developed until the State has finalized the Statement of Negotiation Goal.

"Short List Criteria"- means no more than the five (5) highest evaluated Responsive and Responsible Proposers having an evaluation score that is within 20% of the highest evaluated Responsive and Responsible Proposer, which shall be included in the RFP.

"State"- means the State of Tennessee and its agencies, boards, institutions, and commissions that are supported by the authority granted to STREAM to centrally manage leases.

"Statement of Procurement Goal" – means the written document created in consultation with the User Agency and approved by the STREAM Director and prepared prior to the Market Survey

which sets forth the desired terms on which the State would like to enter into a Lease. The Statement of Procurement Goal will include, at a minimum, desired term length, desired amenities and finishes, desired termination options, desired base rental rate, and any other terms specifically requested by the User Agency and determined by the STREAM Director in the SNA to be appropriate.

“Standard Lease”- means all leases that are not Complex Leases.

“Statement of Negotiation Goal”- means the written document approved by the STREAM Director and prepared after issuance of the initial Proposal Analysis and initial round of Negotiations, if necessary, which sets forth the desired terms on which the State would like to enter into a lease. The Statement of Negotiation Goal will be based on the Revised Statement of Procurement Goal, but will include revisions to terms in the Revised Statement of Procurement Goal based on the initial Proposal Analysis and initial round of Negotiations, if necessary.

“STREAM Director” – means either the STREAM Director of Portfolio Management or the STREAM Director of Leasing.

“Tenant Improvements” – means alterations, improvements or other changes to the premises to be leased to put said premises in the condition required by the State for its intended use, such as, construction of hard walled offices and storage rooms, installation of cubicles, painting, changes in the flooring materials, etc.

“User Agency” – means the State agency, board, institution or commission for which the leased space is being procured.

Policy and Procedure –Negotiation Process For New Leases

Framework

This Policy and Procedure shall act as a framework for establishing a consistent, equitable process for communicating, clarifying and negotiating with Responsive Proposers and Responsible Proposers during the lease procurement process.

As appropriate, the RFP shall state whether Negotiations may be conducted with Proposers who are both Responsive and Responsible. The RFP shall also state whether or not a Broker will be involved in the Proposal Analysis and any Discussions with Proposers. All Negotiations with Proposers shall be conducted in a transparent and documented manner that is calculated to most nearly achieve or surpass the terms set forth in the Statement of Negotiation Goal on terms and conditions most advantageous to the State.

All Negotiations shall be conducted in a manner that maintains equity and transparency in the disclosure of information. There shall be no disclosure of the proposal contents until after the intent to award notice is issued by the DGS Commissioner. In conducting Negotiations with a Proposer, STREAM may use information derived from proposals submitted by competing Proposers in discussions, only if the identity of the Proposer providing the information is not disclosed to others. Proposer identity shall not be disclosed until after the intent to award notice is issued by the DGS Commissioner. There shall be no public comment by anyone involved in the procurement process that would be adverse to the procurement or the Proposers on the procurement process until after the intent to award notice is issued.

All parties involved in Negotiations and in the performance or administration of procurements and leases for STREAM shall act in good faith. All individuals involved with the development of RFP; the lease procurement process, including, without limitation, analysis and reviews of proposals; Negotiations; and recommendation for award shall complete a disclosure of conflicts of interest and statement of understanding of non-disclosure of information during the procurement process and until file is open for public inspection. All Negotiations shall be conducted in a manner that supports equity in proposal improvement and all Proposers shall be given equitable treatment. STREAM shall provide Comparable Information to all Proposers with whom Negotiations are conducted, and a consistent evaluation process and criteria shall be upheld throughout the procurement.

Process

The STREAM Director shall assign and maintain a designated point of contact for Proposers throughout the procurement process, including with respect to Negotiations. Negotiations shall be conducted by the STREAM Director or his or her appointed negotiator, but Discussions can be conducted by the Broker. In the event that the STREAM Director utilizes the Broker to conduct Discussions, the STREAM Director shall document that all negotiation strategies, lease terms and conditions and any other items discussed during Discussions have been approved by the STREAM Director and were addressed at the direction of the STREAM Director.

Negotiations shall be conducted with all Responsive and Responsible Proposers on the applicable Short List, if a Short List has been prepared. If no Short List has been prepared, then Negotiations shall be conducted with all Responsive and Responsible Proposers. During Negotiations, the State may suggest alternative terms or costs to the Proposers as long as Comparable Information is provided to every Proposer engaged in Negotiations with the State. Negotiations of economic terms may be conducted as long as written Comparable Information is provided to all Proposers having a reasonable chance for award. As used in the previous sentence, the term “written” includes email or other correspondence documenting a verbal conversation where the email or other correspondence is sent within hours of the verbal conversation. During Negotiations of economic terms, Proposers are not obligated to meet or beat suggested terms, but will not be allowed to change, to the detriment of the State, the overall economic value previously proposed.

After each successive round of Negotiations, the State will approve a new Proposal Analysis ranking the proposals in accordance with the evaluation criteria set forth in the RFP. A new Short List will also be prepared, if the Negotiations have resulted in changes in scoring evidencing the need for a new Short List. Negotiations may continue until the State believes that the greatest value has been created for the State that the market can reasonably bear.

Negotiation Documentation for Procurement File

Documentation of the procurement shall include, at a minimum, the following documents:

- A log of the dates and times of each conversation with a Proposer, including, the identity of the Proposer and its authorized representative;
- A description of the nature or reason for all material communications with each Proposer and a summary of such communication;
- A copy of all written communications, including, electronic communications, with each Proposer;
- A copy of the Statement of Procurement Goal and Negotiation Goal (including any Revised Statements of Procurement Goal or Negotiation Goal);
- A copy of every Proposal Analysis performed during the procurement;

- A copy of every State determination made with respect to a Short List; and
- A copy of all written information required by this policy and procedure.

Policy and Procedure –Negotiation Process for Amendments to Leases

Framework

This Policy and Procedure shall act as a framework for establishing parameters for STREAM to negotiate amendments to Leases to address changing agency needs or market conditions.

Process

If the STREAM Director determines that additional square footage is necessary with respect to a Lease, STREAM may enter into a lease amendment adding square footage as long as Lease term is not modified and the rental rate for the additional square footage is not more than the lesser of the current rental rate under the Lease or the highest rental rate included in the Market Survey conducted for the Lease.

If the STREAM Director determines that decreasing square footage is necessary with respect to a Lease, STREAM may enter into a lease amendment reducing the square footage as long as the total rent for the premises under the Lease does not increase and the Lease term is not modified.

STREAM may enter into a Lease amendment revising noneconomic terms of the Lease as long as the agency tenant confirms in writing that such revision will not have a materially negative effect on the agency tenant's operations conducted on the premises.

Policy and Procedure –Approvals

Additional State approvals may be required by statute or rules and regulations before such Lease or Lease amendments may be fully executed.