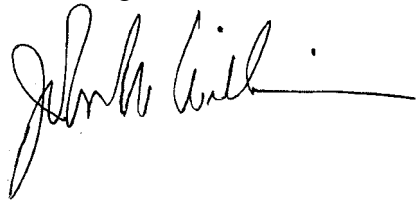


For: FSA States Offices and Service Centers

Partial Lease Termination of Collocated Space

Approved by: Deputy Administrator, Management



1 Overview

A Background

The Department of Agriculture Reorganization Act of 1994 (Pub. L. 103-354) requires that agencies initiate savings. The Food and Agricultural Council (FAC) is the organizational structure used to maximize savings from shared equipment, office space, and administrative support and provide improved service to ranchers and farmers. Savings are realized by seamless interagency program service delivery, collocated offices, and streamlined operations of the 3 Service Center Agencies (SCA). All deviations from the Reorganization Act of 1994 must be approved by the National FAC.

Departmental Regulation (DR) 1620-002, USDA Space Management Policy, is binding on all USDA agencies. The procedures in DR 1620-002 for partial lease termination must be followed where collocated leased space must be partially terminated because of the closure of 1 or more SCA offices in the space. The State FAC Handbook provides guidance and procedures to follow on partial termination of collocated leased space.

B Purpose

This notice provides:

- guidance on procedures applicable to FSA FAC when closure of an SCA necessitates partial termination of collocated leased space
- questions and answers about partial lease terminations (Exhibit 1).

Disposal Date	Distribution
June 1, 2008	FSA State Offices and Service Centers

2 Procedures

A Vacating Agency

According to State FAC Handbook, SCA vacating collocated leased space is required to notify the lead agency in the collocated space of its intent to move at least 180 calendar days in advance. The vacating SCA is responsible for the continued payment of space charges until the end of the 180-calendar-day period or the space is vacated (whichever is later) or charges for the space are discontinued.

The 180-calendar-day period begins when SCA receives written approval to vacate from National FAC.

B Lead Agency

Only a warranted leasing officer is authorized to issue termination notices to the lessors where FSA, RD, or NRCS is the lead agency. The lead agency is responsible for determining an appropriate option for re-allocation of the vacated space. Options that the lead agency can consider are:

- expansion by the remaining agencies into the vacated space, provided it is in compliance with DR 1620-002 utilization rate
- housing another USDA agency not currently collocated at the location
- housing of another Federal agency
- releasing the space to the lessor to be re-let to a non-Federal entity.

The lead agency is required to pay any required restoration costs; however, if there is a disagreement at the State level about the reimbursement from the vacating and/or remaining tenant agencies, National FAC may decide that an agency other than the lead agency should be responsible for payment of restoration costs.

The lead agency should elevate any disputes arising between the agencies about the partial termination of collocated leased space to the State FAC for resolution.

C State FAC

The State FAC is required to:

- comply with DR-1620-2 when dealing with the acquisition, management, and disposition of office space related to any relocation
- maintain accurate and up-to-date information in the Office Information Profile
- submit requests to National FAC, according to the State FAC Handbook, for approval:
 - to establish, consolidate, or reclassify a State Office or Service Center
 - to increase or decrease the total number of Service Centers in a State
 - for office relocation, new office or office consolidation.

2 Procedures (Continued)

D National FAC

The National FAC approves requests for moving and/or consolidating offices, or making other changes in operating conditions, with the understanding that the State FAC has notified other stakeholders (including the congressional delegation, State and local officials, customers, employees, and underserved communities) and addressed their concerns to ensure that they are aware of the proposed changes. States must also ensure compliance with the efficiency tenets of the Reorganization Act.

E Management Services Division

MSD receives the approved office restructuring de-collocation request from the National FAC with a copy of the State FAC or National FAC approved plan.

State Offices will be instructed to forward CCC-2 and CCC-2A's for the affected lease to MSD. If the lease is under the new leasing procedures, forward the Lease (SF-2) or (GSA Form 3626) and the Supplemental Lease Agreements (GSA Forms 276 and 875) to MSD.

The Administrative Office (AO) will prepare a Notice for the Real Property Leasing Office (RPLO) signature. RPLO will distribute certified copies of the Notices to Lessors.

MSD will work with the Agencies to determine the appropriate leasing actions to be taken to complete the office restructuring, de-collocation requests.

It is important that FSA employees understand that each situation is unique because of the existence of different lease terms, space configurations, and agency needs at individual locations. Accordingly, each partial termination situation will need to be analyzed to determine its particular issues, and each partial termination situation will need to be conducted according to the lease terms in place at that location.

Questions and Answers

The following Q&A's are provided for further guidance.

Question Set #1:

Are the protocols prescribed for partial lease termination in Departmental Regulation 1620-002 and the State FAC Handbook binding on State agencies?

Departmental Regulation (DR) 1620-002, "USDA Space Management Policy," is binding on all USDA agencies, including FSA, NRCS and RD. The procedures laid out in DR 1620-002 for partial lease termination must be followed in all states, where collocated lease space must be partially terminated due to the closure of one or more agencies' offices in the space.

The State FAC is the primary USDA interagency forum in each State or territory through which State-level agency heads of FSA, NRCS, and RD can efficiently coordinate seamless interagency program delivery, collocated offices, and streamlined operations of the three county-based USDA agencies. State FACs operate under the direction of the National FAC, which is the management entity designated by the Secretary to coordinate the Department's policies and directives related to State FAC and Local FAC activities. The State FAC Handbook is a publication of the National FAC that lays out the internal rules and procedures to be followed by State FACs and Local FACs in conducting their activities. The State FAC Handbook is binding on all three of the participant agencies whose activities are managed by the National FAC, i.e., the State FAC Handbook procedures for partial lease termination are binding on FSA, NRCS and RD.

Question Set #2:

Who is responsible for enforcing the space charges due to the lead agency for payment to the lessor (rent payment) by the vacating agency?

If a lessor is notified that an agency is vacating and is not provided the required number of days' notice, who bears the cost of rent for the vacated space?

The lead agency is the agency that executed the lease for the collocated space. After executing a lease for collocated space, the lead agency enters into a Reimbursable Agreement on form FSA-875 with the other agencies whose offices will be located in the collocated lease space. The Reimbursable Agreement lays out the portion of rental payments to be borne by each agency. Throughout the course of the lease term, initial rental payments to the lessor are paid in full by the lead agency, and the lead agency then bills (usually on an annual basis) the collocated agencies and is reimbursed according to the Reimbursable Agreement.

Questions and Answers (Continued)**Question Set #2 (Continued):**

It is the responsibility of the lead agency to determine the appropriate amounts to be billed to each collocated agency in accordance with the terms of the Reimbursable Agreement and the State FAC Handbook. These bills are normally generated at the local level. If, however, resolution of a billing dispute cannot be achieved at the local level, it becomes the responsibility of the State FAC to resolve interagency space differences. Should the State FAC be unable to resolve the issue, it should be elevated to the National FAC for resolution. State FAC Handbook ¶¶ 1.1, 2.1. Proper dispute resolution and elevation procedures are discussed in Appendix 1 of the State FAC Handbook.

On pages A-3 and A-4, DR 1620-002 lays out the procedure to be followed for partial termination. A vacating agency is required to notify the lead agency for a collocated space of its intent to vacate at least 180 days prior to vacating; and is responsible for the continued payment of space charges “until the end of the 180 day period or the space is vacated (whichever is later) or charges for the space are discontinued.”

If all procedures are followed properly, the vacating agency’s 180 day notice to the lead agency will provide sufficient time for the lead agency to give the lessor the required notice of partial termination set out in the lease. The vacating agency will be free to vacate the space prior to the end of the lease’s notification period, but will remain responsible for payment of space charges until the end of the lease’s partial termination notification period – i.e., until the “charges for the space are discontinued.”

If the vacating agency remains in the space past the lease’s notification period, they will remain responsible for space charges until they vacate the space or their 180 day notification period to the lead agency ends, whichever is later.

It may sometimes be the case, however, that proper termination procedures are not followed. In these instances, which agency is responsible for payment of the remaining space charges after space is vacated will depend on which agency is responsible for the charges being incurred. This problem is most easily illustrated by use of some examples. The examples below will deal with collocated lease space at hypothetical Site #1 where the lease requires the Government to give the lessor 120 days notice of any full or partial termination.

In Scenario A, the vacating agency sends notification to the lead agency on January 1st of its intent to vacate collocated space at Site #1 on July 31st, meeting the 180 day notification requirement of DR 1620-002. The lead agency issues a partial termination notice to the lessor on May 1st – only 92¹ days prior to the vacating agency’s intended move out date. In accordance with the DR, the vacating agency would only be responsible for continued payment of space charges until it vacates the space on July 31st². The remaining 28 days of rent due the lessor would become the responsibility of the lead agency, as it was the lead agency’s failure to notify the lessor in a timely fashion that caused the charges to be incurred.

1 All timeframes have been calculated based on a non-leap year calendar year.

2 The vacating agency would be free to move out of the space earlier than July 31st, but would remain responsible for payment of space charges until the end of the 180 day notice period - June 29th – or the date on which they vacated the space if this date was after the end of the 180 day notice period.

Questions and Answers (Continued)**Question Set #2 (Continued):**

In Scenario B, the vacating agency sends notification to the lead agency on January 1st of its intent to vacate the collocated space at Site #1 on March 31st – only 90 days notice. The same day it receives notice from the vacating agency, the lead agency issues a partial termination notice to the lessor. The vacating agency moves out of the collocated space on March 31st, but rental charges continue to accrue for the space until April 30th. In accordance with DR 1620-002, the vacating agency would be responsible for payment until “charges for the space are discontinued” – i.e., until April 30th. This is the case even though the vacating agency is no longer occupying the space, as it was the vacating agency’s failure to comply with the DR’s procedures that caused rental charges to be incurred past the date the space was vacated.

In Scenario C, the vacating agency is also the lead agency for Site #1. In this instance, the only notification period the vacating agency will be required to comply with will be the 120 day termination notification to the lessor required by the lease. The vacating agency would remain responsible for payment of space charges until the end of the 120 day notification period or it vacated the space, whichever date was later in time. Note, however, that in this scenario, the vacating agency would also be responsible for executing a supplemental lease agreement with the lessor to assign the lease to one of the agencies remaining at the collocated space. The agency assigned would become the new lead agency and would be responsible for future administration of the lease.

As stated above, if there is disagreement at the Local FAC level over which agency is responsible for space charges the disagreement should be elevated first to the State FAC and then to the National FAC, if necessary, for resolution.

Question Set #3:

Does the 180-day notification period begin after National FAC approval of a vacating agency’s restructuring plan, or when the State FAC is notified of the vacating agency’s intentions to vacate space in collocated offices?

If an agency’s Restructuring Plan has not been approved by the National FAC, have the SED and the various lessors been provided proper notification by the vacating agency of their intent to vacate the Service Centers?

When the vacating State Director verbally notified the other collocated State Leaders of a proposed restructuring, is this a proper 180 days notification and did the clock start ticking with or without National FAC approval of their restructuring plan?

These questions all have two basic parts: (1) what is the proper procedure for a vacating agency to become a vacating agency; and (2) once they have properly decided to vacate space, what is the proper procedure for a vacating agency to provide notice to the lead agency of its intentions?

Questions and Answers (Continued)**Question Set #3 (Continued):**

With respect to part (1), State FAC Handbook paragraph 2.4 states, “all requests to establish, consolidate, or reclassify a state office or service center, or to increase or decrease the total number of service centers in a State, must be approved by the National FAC.” In addition, “all requests that deviate from the 1994 Plan must be approved by the National FAC.” Accordingly, a vacating agency does not have authority to become a “vacating agency” until after approval of its State’s Restructuring Plan by the National FAC.

With respect to part (2), DR 1620-002 does not prescribe the form that a notice from the vacating agency to the lead agency must take. Had a vacating agency been a proper “vacating agency” at the time of the State FAC meeting, its verbal notification to the assembled State Agency Leaders would have been sufficient notification to start the 180 day clock ticking.

Given that a vacating agency did not have authority to become a “vacating agency” when it provided collocated agencies with notice of its intent to vacate collocated service centers, the formal 180 day clock would not have started to run until the date that vacating agency’s Restructuring Plan is/was approved by the National FAC. (3) However, because of the vacating agency’s statements of its intentions at the State FAC meeting, no further notification to the collocated agencies would have been required after the National FAC’s approval of the vacating agency’s Restructuring Plan.

In instances where a collocated agency is the lead agency, the vacating agency will remain responsible for payment of space charges until the latter of the following:

- (1) it vacates the collocated lease space,
- (2) 180 days from the date of the National FAC approval of vacating agency’s Restructuring Plan, or
- (3) rental charges stop being incurred for the vacated space in accordance with the lease (i.e., until the end of the termination notification periods required by the leases).

For leases where the vacating agency is the lead agency, it will remain responsible for payment of space charges until the end of the termination notification periods required by the leases. The vacating agency will also remain responsible for administration of the lease until it executes a supplemental lease agreement with the lessor assigning one of the remaining agencies as the lease holding lead agency.

Questions and Answers (Continued)**Question Set #4:**

FSA, in following the terms and conditions of the lease language for each affected service center, should provide proper notification to those lessors where FSA is the lease agency holding the lease contract, whether it is a 60, 90, or 120-day termination clause.

At what point should FSA issue the formal notification letters to the lessor?

What impact will the vacating agency's notification letters to the lessors have on the Lead Agency's lease?

This set of questions relate to the proper procedures for terminating or partially terminating a lease for collocated office space – e.g., who may issue a termination notice to a lessor, when should a termination notice be issued, what form should a termination notice take, etc. The controlling documents for answering all of these questions are the lease itself in conjunction with the various federal regulations governing leased space.³

Who may issue a termination notice to a lessor? Only a warranted leasing officer⁴ with the lead agency – i.e., the agency that signed the lease – is authorized to issue a termination notice to the lessor. Accordingly, any termination notices issued by the vacating agency to lessors for leases on which the vacating agency is not the lead agency have no effect as they were not issued by an authorized government representative. Lessors receiving such notices should immediately be contacted by a warranted leasing officer for the appropriate lead agency to either ratify the non-conforming termination notice or cancel it as appropriate.

What form should a termination notice take? Termination notices should always be issued in writing, and with some form of receipt confirmation.

When should a termination notice be issued? It is important to note the difference between the termination notification period required by the lease and the actual termination date given by the Government. The notice period required by the lease is merely the minimum amount of notice the lessor is entitled to, meaning that the Government will remain responsible for rental payments through the end of this period even if the actual notice given is less than the amount required by the lease.

³ No termination notices should have been sent to lessors prior to approval of the restructuring plan by the NFAC, as one or more of the leases proposed for partial termination could have been turned down by the NFAC. Assuming that the NFAC has now approved the vacating agency's Restructuring Plan, any termination notices sent to lessors that the vacating agency is the lead agency and will continue to take effect from the date they were originally sent even if that date was prior to the NFAC's approval of the vacating agency's plan. The treatment of notices sent to lessors where the vacating agency is not the lead agency is discussed elsewhere in this memorandum.

⁴ DR 5100-2 requires all persons executing or authorizing changes to USDA leases to be warranted leasing officers.

Questions and Answers (Continued)**Question Set #4 (Continued):**

Assuming that the actual termination date given by the Government is equal to or greater than the minimum amount of notice required by the lease, however, it is the actual date given that will govern the rights of the party with respect to the leased space. For example, if the lease for hypothetical Site #2 require the Government to provide the lessor with 60 days notification prior to a partial of full termination, and on January 1st the lead agency issues a termination notice informing the lessor that the space will be partially vacated on June 30th, June 30th becomes the controlling date rather than the date 60 days from January 1st. As the controlling date, June 30th will be the date that the Government remains responsible for rental payments until. It will also be the date after which the lessor will have the right to re-lease the space. If the Government remains in the space past June 30th, this would be considered a holdover tenancy situation and would be treated in accordance with the lease terms and conditions and regulations relating to holdover tenancies.

To avoid payment of rent for unoccupied space and also avoid holdover tenancy situations, every effort should be made to issue termination notices that (1) provide the lessor with the minimum notice required by the lease prior to the agency's move out date, and (2) provide a realistic actual move out date that will give the agency adequate time to find other suitable space, close out its offices, or take whatever other actions may be required. Timing decisions should also take into consideration the lead agencies responsibility to "make every effort to find other uses for the space such as expansion needs of other occupants or adding an agency not currently housed in the collocation. If no other USDA/Government group has need for the space, the lead agency will work diligently with the lessor to release the space in a timely manner in order to minimize the cost to the Government."

DR 1620-002 p. A-4.

Questions and Answers (Continued)**Question Set #5:**

How should the vacated space be handled – should the remaining agencies receive increases in their square footage and have to pay additional costs of the lease?

Who bears the costs of renovations and alterations to make the vacated space marketable?

What about non-USDA tenants leasing vacated space and increased security measures and costs?

This set of questions deals with the various issues that arise after collocated office space is partially vacated. Page A-4 of DR 1620-002 lays out a list of re-allocation options the lead agency should consider when dealing with vacated space. The list of options includes: (1) expansion of the remaining agencies into the vacated space; (2) housing of another USDA agency not currently collocated in the vacant space; (3) housing of another Federal agency in the vacant space⁵; and (4) release of the space to the lessor to be re-let to a non-Federal entity. A fifth option, not discussed in the DR, but included in USDA's Leasing Handbook, is for the lead agency to outlease or sublease the vacant space (assuming such action is consistent with the terms and conditions of the master lease). The DR lists the re-allocation options in a general decreasing order of preference, however, each service center will present a unique set of circumstances that will need to be taken into consideration when making a re-allocation decision. Ultimately, the lead agency is responsible for choosing the appropriate re-allocation option, but should always do so with full consideration of the remaining tenant agencies' input and needs.

In the event that options one or two are chosen, the lead agency would issue notification to the lessor of the change in tenants, but would not issue a partial termination notice, as the entire leased space would continue to be used. A new FSA-875 Reimbursable Agreement would then be entered into re-allocating the rental payments among the remaining and/or new USDA agency(ies) as appropriate.

In the event option three is chosen, the lead agency would need to work closely with GSA and the non-USDA Federal Agency to implement the proper leasing and interagency documents. Depending on how the space was to be configured for the non-USDA Federal Agency, a partial termination notice may need to be issued to the lessor including a statement that a new Federal tenant had been located, then the lessor and the non-USDA Federal Agency would enter into a lease and the non-USDA Federal Agency would bear any costs of space renovation.

⁵ Pursuant to FMR 102-75-70 vacant space must be offered to GSA for possible assignment to other Federal agencies.

Questions and Answers (Continued)**Question Set #5 (Continued):**

Should no Federal tenant be available, and the lead agency decides to outlease or sublease the space, the space must be advertised, and the lead agency cannot make any profit from the subleasing. Any monies received above and beyond the rent due to the lessor for the space must be turned over to the general funds of the Treasury. USDA Leasing Handbook, p. 52 and clarifying memo included following p. 52.

In the event the vacated space cannot be utilized by any Federal entity and the lead agency decides to release it back to the lessor, the lease terms and space specific circumstances will govern the parties' responsibilities. Generally, the cost to restore the vacated space to the original condition it was in when the Government first leased it, outside of repairing reasonable and ordinary wear and tear, will be the responsibility of the Government unless the lessor has waived its right to this restoration at the time of installation of any renovations. USDA Leasing Handbook p. 52.

None of the governing documents – not the DR 1620-002, nor the USDA Leasing Handbook, nor the State FAC Handbook, nor the FSA-875 Reimbursable Agreements – address the issue of responsibility for restoration costs for vacated space among the vacating agency, lead agency and remaining tenant agencies. Accordingly, it is recommended that the issue be decided by the National FAC and the State FAC Handbook be revised accordingly. Until such time as the issue is decided, any required restoration costs will fall to the lead agency to pay, with the possibility of future reimbursement from the vacating and/or remaining tenant agencies should the National FAC decide that an agency other than the lead agency should be responsible for payment of restoration costs.

As for renovation costs beyond ordinary restoration that may be required to make the space marketable, these costs will be the responsibility of the lessor, unless otherwise stated in the lease.

Once the Government returns the space to its original condition, the lessor is responsible for re-letting the space, and any renovations required by the new tenant to make the space useable would be the responsibility of the new tenant and/or the lessor as agreed between them.

With respect to security concerns the remaining agencies may have if non-Federal entities lease the vacated space, the costs of addressing any such concerns – e.g., the costs of any lessor provided alterations to the remaining occupied space to block access from the vacated space – would be the responsibility of the Government. Again, all the relevant directives and policy guidance are silent on the issue of who among the vacating, lead, and remaining tenant agencies is responsible for the payment of any such costs. As discussed above, it is recommended that the issue be decided by the National FAC and the State FAC Handbook revised accordingly. Until the issue is resolved, the lead agency will be responsible for the payment of any such costs, with the possibility of future reimbursement from the vacating agency and/or remaining tenant agencies.

Questions and Answers (Continued)**Question Set #6:**

Is it acceptable for vacating agencies' field employees to contact the lead agency's lessors, and discuss possible renovations and building add-ons when the lead agencies are not involved in the discussion?

As discussed above, the only person authorized to take any action affecting the lease is a duly warranted leasing officer of the lead agency. Vacating agency's field employees should not contact lessors for which another agency is the lead agency regarding renovations or anything else. If such contact occurs, Lead agency should take immediate action to notify the lessors that any such communication was not authorized and will not result in changes to the lease.

In addition, Lead Agencies Local FAC leaders for the State should notify their vacating counterparts of the problem and request that in the future all requests for lease actions, where the vacating agency is not the lead on the lease should be routed to the lessor through the Lead Agency. If the Lead Agency continues to experience a problem, the Local FAC should elevate the issue to the State FAC for resolution.