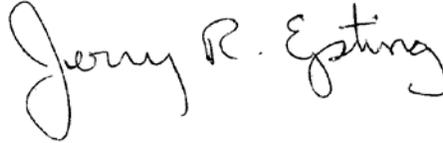


For: State Offices and Service Centers

Partial and Total Lease Termination for USDA SCA's

Approved by: Acting 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 farmers and ranchers. Savings are realized by seamless interagency program service delivery, collocated offices, and streamlined operations of the 3 SCA's. Further savings are being considered with implementing the Secretary's Blueprint for Stronger Service Initiative dated January 9, 2012.

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 closing 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.

The State FAC Handbook is written to provide guidance on office closures, but does **not** address decollocation. See DR 1620-002, Appendix A 4, for guidance about decollocation.

B Purpose

This notice provides:

- guidance on procedures applicable to FSA FAC when closing SCA's necessitates partial termination of collocated leased space
- questions and answers (Q&A's) about partial lease terminations (Exhibit 1).

Disposal Date September 1, 2012	Distribution State Offices; State Offices relay to Service Centers
---	--

2 Procedures

A Vacating Agency

According to DR 1620-002, Appendix A Section 2, Lease Provisions, Termination Clause (in-whole and in-part), the vacating Agency(ies) will notify the lead Agency at least 180 calendar days before vacating the space. Space charges will continue until the end of the 180-calendar-day period or the space is vacated; whichever is later, or charges for the space are discontinued.

On learning the space will be vacated, the lead Agency will make every effort to find other uses for the space, such as expansion needs of other occupant Agencies 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 to minimize the cost to the Government.

If a termination clause (in-whole or in-part) is not included in the lease, the vacating Agency will notify the lead Agency at least 180 calendar days before vacating, or as soon as plans are known of intent to vacate space, whichever is earlier. The lead Agency will work diligently to find other uses for the space or to release it to the lessor. If no other tenant is found for the space and the lessor refuses to accept a buyout, the vacating Agency will continue to pay up to the maximum amount due in the firm term of the lease.

The vacating Agency is responsible for 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 vacating Agency should be responsible for payment of restoration costs.

The lead Agency may have to pay the restoration cost upfront, if the bill is from the lessor, but should get reimbursed by the vacating Agency.

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.

B Lead Agency

Only the warranted leasing officer for a particular lease is authorized to issue a termination notice to the lessor where FSA, RD, or NRCS is the lead Agency.

The lead Agency is responsible for determining an appropriate option for reallocation of the vacated space, after coordinating with other remaining collocated Agencies. Options that the lead Agency can consider are any of the following:

- 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
- releasing the space to the lessor to be re-let to a non-Federal entity.

2 Procedures (Continued)

C State FAC

The State FAC is **required** to do all the following:

- 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.

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.

Note: 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.

Q&A's

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

Q1. Are the protocols prescribed for partial lease termination in DR 1620-002 and the State FAC Handbook binding on all State Offices?

A1. Yes. 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 leased 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 3 county-based USDA Agencies. State FAC's 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 and local FAC's in conducting their activities. The State FAC Handbook is binding on all 3 of the participant Agencies whose activities are managed by the National FAC, that is, the State FAC Handbook procedures for partial lease termination are binding on FSA, NRCS, and RD.

Q2: 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?

A2: 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 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.

It is the responsibility of the lead Agency to determine the appropriate amounts to be billed to each collocated Agency according to the terms of the Reimbursable Agreement, the State FAC Handbook, and DR 1620-002. The State FAC should resolve any interagency space differences. If the State FAC is unable to resolve the issue, it should be elevated to the National FAC for resolution. Proper dispute resolution and elevation procedures are discussed in the State FAC Handbook, Appendix 1, "LFAC and SFAC Dispute Resolution Procedure – Problem Resolution Worksheet".

Q&A's (Continued)

A2: (Continued)

DR 1620-002, Appendix A, Section 2 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 calendar days before vacating; and 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.

If all procedures are followed properly, the vacating Agency's 180-calendar-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 before 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 or 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-calendar-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 following examples will deal with collocated lease space at hypothetical Site #1 where the lease requires the Government to give the lessor 120-calendar-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-calendar-day notification requirement of DR 1620-002. The lead Agency issues a partial termination notice to the lessor on May 1st – only 92 calendar days 1/ before the vacating Agency's intended move out date. According to DR 1620-002, the vacating Agency would only be responsible for continued payment of space charges until it vacates the space on July 31st 2/. The remaining 28 calendar 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.

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 calendar 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. According to DR 1620-002, the vacating Agency would be responsible for payment until "charges for the space are discontinued", that is, 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 DR 1620-002 procedures that caused rental charges to be incurred past the date the space was vacated.

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-calendar-day notice period, June 29th, or the date on which they vacated the space if this date was after the end of the 180-calendar-day notice period.

Q&A's (Continued)

A2: (Continued)

In Scenario C, the vacating Agency is also the lead Agency for Site #1. In this instance, the lead Agency should give a courtesy notification to the other collocated Agencies 180 calendar days before its planned vacate date. The lead Agency would then issue its own 120-calendar-day termination notice to the lessor. The vacating lead Agency would remain responsible for payment of space charges until the end of the 180-calendar-day courtesy notification period or it vacated the space, whichever date was later in time, or until charges for the space are discontinued. 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 1 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 herein, 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.

Q3: FSA is bound by the guidelines noted in the 2008 Farm Bill, Section 14212, "Prohibition on Closure or Relocation of County Offices for the Farm Service Agency". Is FSA required to wait until after the Secretary notifies the relevant Congressional committees and the affected Senators and Congressmen before issuing the required notification to the lead Agency?

A3: No. Lease termination notices may be sent to lessors until after the office closures proposed in January 2012 receive final approval. Final approval cannot be given until 90 calendar days after the Secretary notifies Congress of the proposed office closures.

After the Congressional notification is sent, but before final approval is received, FSA may notify lead Agencies and non-lead collocated Agencies where FSA is the lead Agency of FSA's intent to vacate the space pending final approval from the Secretary. FSA should make clear that these notices are being issued subject to change and that no lease termination notices may be sent until after final approval of the office closure plan is received. Issuing the 180-calendar-day notice subject to change based on final approval action will give FSA the opportunity to begin communications with the other collocated Agencies about whether the space can continue to be used by USDA or should be terminated; these early communications will position FSA and the other SCA's to transfer or terminate space that receives final approval for closure as smoothly as possible.

MSD will notify the State Offices when final approval is received. After final approval of the proposed office closure is received, the lead leasing Agencies may begin issuing termination notices to lessors according to the terms of each individual lease contract.

Q&A's (Continued)

Q4: 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 lead Agency holding the lease contract, whether it is a 60-, 90-, or 120-calendar-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, for example, 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 contract itself in conjunction with the various Federal regulations governing leased space. 1/

Who may issue a termination notice to a lessor? Only the warranted leasing officer for a particular lease is authorized to issue termination notices to the lessors for that lease.

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 the period stated in the lease even if the actual notice given is less than the amount required by the lease.

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 requires the Government to provide the lessor with 60-calendar-days notification before a partial or 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, then June 30th becomes the controlling date rather than the date 60 calendar days from January 1st. As the controlling date, June 30th will be the date until which the Government remains responsible for rental payments. 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 according to the lease terms and conditions and regulations relating to holdover tenancies.

1/ No termination notices should have been sent to lessors before approval of the restructuring plan by NFAC, as 1 or more of the leases proposed for partial termination could have been turned down by NFAC. Assuming that 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 before NFAC's approval of the vacating Agency's Restructuring Plan. The treatment of notices sent to lessors where the vacating Agency is not the lead Agency is discussed elsewhere in this Exhibit.

Q&A's (Continued)

A4: 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 before 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 Agency's 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 Agency has need for the space, the lead Agency will work diligently with the lessor to release the space in a timely manner to minimize the cost to the Government.

What happens if the Government is unable to vacate the space by the date specified in the termination notice?

It is important to note that if the lead leasing Agency gives termination notice to the lessor and the space is still occupied by USDA past the end of the notice, then the lessor may consider USDA to have waived the termination (that is, changed our minds) requiring USDA to start the whole notice period over again. To avoid this, the lead leasing Agency should communicate with the lessor before the notice period ends to let the lessor know that the lead Agency is running behind schedule and ask if it is okay to stay an extra amount of time; this extra amount of time would then be memorialized in a letter to the lessor extending the notice period so that it does not expire with the lead Agency still in the space.

If the lessor and the lead Agency cannot reach an agreement to extend the termination date, for instance because the lessor has another tenant waiting for the space already, then USDA may have no choice but to enter into a holdover past the notified termination date and may become liable to the lessor for damages. Any claims for damages by the lessor should be handled according to the Contracts Disputes Act procedures required in the standard GSA lease contracts.

Q&A's (Continued)

Q5: 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. DR 1620-002, Appendix A Section 2, "Lease Provisions", lays out a list of reallocation 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; and (3) release of the space to the lessor to be re-let to a non-Federal entity. DR 1620-002 does not list the reallocation options in any order of preference, and, each Service Center will present a unique set of circumstances that will need to be taken into consideration when making a reallocation decision. The lead Agency should always consider the remaining tenant Agencies' input and needs when making reallocation decisions, and should elevate disputes through FAC's.

If options 1 or 2 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 reallocating the rental payments among the remaining and/or new USDA Agency(ies) as appropriate.

If the space can no longer be used by USDA, 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. The vacating Agency is responsible for restoration cost.

As for renovation costs, unless otherwise provided in the lease, the Government is responsible for making the vacated space marketable before returning to the lessor. Marketability indicates the vacated space is wholly separate, including entrance and full height walls, from the remaining USDA space, and restored to original condition, except normal wear and tear. If the vacated space cannot be made marketable, and terminated, then the contracting officers should consider using the adjustment for vacant premises clause, if provided for in the lease, or negotiate for a reduction in rental rate by that portion of the cost per square foot of operating expenses.

After the Government returns the space to its original condition, the lessor is responsible for re-letting the space, and any renovations or tenant improvements 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. If the vacated space has been made properly marketable before being turned back over to the lessor, there should be minimal security concerns.

Q&A's (Continued)

Q6: Is it acceptable for the vacating Agency's field employees to contact the lead Agency's lessor and discuss possible renovations and building add-ons when the lead Agency is not involved in the discussion?

A6: No. As discussed herein, the only person authorized to take any action affecting the lease is the duly warranted leasing officer for that particular lease contract. Vacating Agency's field employees should not contact lessors for which another Agency is the lead Agency about renovations or anything else. If such contact occurs, the lead Agency should take immediate action to notify the lessor that any such communication was not authorized and will not result in changes to the lease.

In addition, lead Agencies and 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.

Will the remaining collocated offices incur cost when the vacating Agency leaves the space?

Sometimes. If the lead Agency is able to successfully renegotiate the lesser amount of space with the landlord based on the terms and conditions of the lease in a timely fashion, then the vacating Agency should have covered all the costs and the costs should end either on or shortly after the vacate date. If the total space to be vacated cannot be released back to the lessor, the remaining Agencies will be responsible in sharing the cost of the space vacated by the vacating Agency through the end of the lease term. There could also be some additional costs to the Agencies who remain because of the potential extra costs that will be incurred for the shared space, break room, etc.