



7/25/2023

GSA Office of Governmentwide Policy

Class Deviation CD-2023-04

MEMORANDUM FOR PBS LEASING CONTRACTING ACTIVITIES

FROM: JEFFREY A. KOSES
 SENIOR PROCUREMENT EXECUTIVE
 OFFICE OF ACQUISITION POLICY (MV)

DocuSigned by:

Jeffrey A. Koses

21BD80B9E8AC4A0

SUBJECT: GSAR Class Deviation - Default by Lessor Clause

1. Purpose.

This memorandum approves a class deviation to the General Services Administration Regulation (GSAR) at 552.270 to provide updated clause language regarding defaults for lease procurements.

This deviation is amending the GSAM policy on lease contracts to maintain consistency with the GSAR and to clarify, update and incorporate existing lease guidance previously implemented through internal Public Building Service (PBS) policies.

2. Background.

Lease Acquisition Circular LAC-2012-02, issued by the Office of Leasing on June 1, 2012, issued updated templates reflecting changes to certain lease clauses and paragraphs implemented through the PBS Lease Reform Initiative. These clauses and paragraphs, which have been subsequently updated through multiple Office of Leasing policy changes since 2012, are not in alignment with GSAR part 570.

Pursuant to GSAM 501.404, this class deviation aligns the following updated leasing clauses for compliance with the GSAR and satisfies the SPE approval requirement:

Leasing Clause Title	Last Revision by Leasing	GSAR Clause Title	Last Revision by GSAR
Default by Lessor	Apr 2012	GSAR 552.270-10, Failure in Performance	Sep 1999

		GSAR 552.270-18, Default in Delivery— Time Extensions	Sep 1999
		GSAR 552.270-22, Default By Lessor During the Term	Sep 1999

Additional information regarding this matter can be found in Chapter 17 of the Leasing Desk Guide, specifically Part 7, *Enforcement Management and Failure in Performance*, and in the Lease Management Desk Guide.

3. Authority.

This class deviation is issued under the authority of General Services Administration Acquisition Manual (GSAM) 501.404.

4. Applicability.

This class deviation applies as follows:

New Leases

This updated clause must be included in all new leases. Specifically:

- For any open solicitation, the solicitation must be either amended prior to close or the clause incorporated into the award prior to signature.
- For any future solicitation, the solicitation must be amended prior to award.

Existing Leases

This updated clause must be included in all existing leases, at the time of option exercise, through a separate contract modification action.

Updating Leasing Templates

The PBS Office of Leasing will update the leasing templates to reflect this updated clause. In addition, the PBS Office of Leasing will work expeditiously to revise relevant guides and resources (e.g., Leasing Alerts (LA), Leasing Desk Guide (LDG)).

5. Deviation.

See Attachment A for the changes in the GSAR text as revised by this class deviation. Three GSAR clauses are being combined into the new GSAR 552.270-10, Default by

Lessor clause. The title of the current GSAR 552.270-10 is being changed from *Failure in Performance* to *Default by Lessor*, and the text of the new GSAR 552.270-10 is updated as well. The current text in both GSAR 552.270-18 and GSAR 552.270-22 is deleted.

6. Effective Date.

This deviation is effective immediately and remains in effect until rescinded or incorporated into the GSAR.

7. Point of Contact.

Any questions regarding this deviation may be directed to Amy Lara, GSA Acquisition Policy Division, at GSARPolicy@gsa.gov.

Attachments Attachment A – GSAR Deviation Text, Line-In/Line-Out

**Class Deviation CD-2023-04
Attachment A**

GSAR Text, Line-In/Line-Out

GSAR Baseline: Change 166 effective 05/05/2023

- Additions to baseline made by proposed rule are indicated by **[bold text in brackets]**
- Deletions to baseline made by proposed rule are indicated by ~~strikethroughs~~
- Five asterisks (* * * * *) indicate that there are no revisions between the preceding part and/or subpart, and following section
- Three asterisks (* * *) indicate that there are no revisions between the material shown within a section or subsection

PART 552 - SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

Subpart 552.000 Scope of part.

* * * * *

Subpart 552.2 - Text of Provisions and Clauses

* * * * *

552.270-10 ~~Failure in Performance.~~ [Default by Lessor (DEVIATION)].

As prescribed in 570.703, insert the following clause:

~~FAILURE IN PERFORMANCE (SEP 1999)~~

~~The covenant to pay rent and the covenant to provide any service, utility, maintenance, or repair required under this lease are interdependent. In the event of any failure by the Lessor to provide any service, utility, maintenance, repair or replacement required under this lease the Government may, by contract or otherwise, perform the requirement and deduct from any payment or payments under this lease, then or thereafter due, the resulting cost to the Government, including all administrative costs. If the Government elects to perform any such requirement, the Government and each of its contractors shall be entitled to access to any and all areas of the building, access to which is necessary to perform any such requirement, and the Lessor shall afford and facilitate such access. Alternatively, the Government may deduct from any payment under this lease, then or thereafter due, an amount which reflects the reduced value of the~~

~~contract requirement not performed. No deduction from rent pursuant to this clause shall constitute a default by the Government under this lease. These remedies are not exclusive and are in addition to any other remedies which may be available under this lease or at law.~~

~~(End of clause)~~

[DEFAULT BY LESSOR (JUL 2023) (DEVIATION)]

Occurrence of the following constitutes default by the Lessor and gives rise to the following rights and remedies of the Government:

(a) *Prior to acceptance of the space.* Failure by the Lessor to perform diligently any obligations required for acceptance of the space or other required improvements within the times specified, other than due to an excusable delay, shall constitute a default by the Lessor. Subject to provision of notice of default to the Lessor, and provision of a reasonable opportunity for the Lessor to cure its default, the Government may, in its sole discretion, terminate the lease on account of the Lessor's default.

(b) *After acceptance of the space.* Failure by the Lessor to perform any service, to provide any item, or satisfy any requirement of this lease, other than due to an excusable delay, constitutes a default by the Lessor. Subject to provision of notice of default to the Lessor, and provision of a reasonable opportunity for the Lessor to cure its default, the Government may, in its sole discretion, take one or more of the following actions:

(1) Perform the service, provide the item, or obtain satisfaction of the requirement by its own employees or contractors. If the Government elects to take such action, the Government may deduct from rental payments its costs, including administrative costs, incurred in connection with taking the action;

(2) Reduce the rent by an amount reasonably calculated to approximate the cost or value of the service not performed, item not provided, or requirement not satisfied, such reduction effective as of the date of the commencement of the default condition. If default renders the leased premises untenable, the reduction of rent may be calculated as the pro-rated portion of the monthly rent represented by all such days the leased premises is untenable;

(3) Terminate the lease if:

(i) The Lessor's default persists notwithstanding provision of notice and reasonable opportunity to cure by the Government, or

(ii) The Lessor fails to take such actions as are necessary to prevent the recurrence of default conditions, and such conditions substantially impair the safe and healthful occupancy of the premises, or render the premises unusable for its intended purposes.

(c) **Damages.** The Lessor and the Lessor sureties, if any, are jointly and severally liable for any damages to the Government resulting from default or termination, as provided in this clause.

(1) Damages include all costs associated with the replacement lease(s), which include but are not limited to the following: the Government's aggregate rent, estimated real estate taxes, operating costs, administrative costs, or other procurement costs.

(2) If the Government procures replacement premises for a term (including all option terms) in excess of this lease term, the Lessor is not liable for excess Government rent or adjustments during such excess lease term.

(3) Damages to which the Government is entitled to under this clause are due and payable thirty (30) days following the date the Lessor receives notice from the Contracting Officer specifying such damages.

(d) **Excusable delays.**

(1) The Government shall not terminate this lease under this clause nor charge the Lessor with damages under this clause, if:

(i) the delay in substantially completing any work or performing any services arises from excusable delays, and

(ii) the Lessor, within ten (10) days from the beginning of any such delay (unless extended in writing by the Contracting Officer) provides notice to the Contracting Officer of the causes of delay.

(2) The Contracting Officer shall ascertain the facts and the extent of delay. If the facts warrant, the Contracting Officer shall extend the delivery date commensurate with the delay at no additional costs to the Government. A time extension is the sole remedy of the Lessor.

(e) No deduction from rent, termination of lease, or any other action pursuant to this clause will constitute a default by the Government under this lease.

(f) The rights and remedies specified in this clause are in addition to any and all remedies to which the Government may be entitled as a matter of law.

(End of clause)]

* * * * *

~~552.270-18 Default in Delivery—Time Extensions.~~

~~DEFAULT IN DELIVERY—TIME EXTENSIONS (SEP 1999)~~

~~(a) With respect to Lessor's obligation to deliver the premises substantially complete by the delivery date, time is of the essence. If the Lessor fails to work diligently to ensure its substantial completion by the delivery date or fails to substantially complete the work by such date, the Government may by notice to the Lessor terminate this lease. Such termination is effective when received by Lessor. The Lessor and the Lessor's sureties, if any, are jointly and severally liable for any damages to the Government resulting from such termination, as provided in this clause. The Government is entitled to the following damages:~~

- ~~(1) The Government's aggregate rent, estimated real estate tax, and operating cost adjustments for the firm term and all option terms of its replacement lease or leases, in excess of the aggregate rent and estimated real estate tax and operating cost adjustments for the term. If the Government procures replacement premises for a term (including all option terms) in excess of this lease term, the Lessor is not liable for excess Government rent or adjustments during such excess lease term.~~
- ~~(2) All administrative and other costs the Government incurs in procuring a replacement lease or leases.~~
- ~~(3) Other, additional relief provided for in this lease, at law, or in equity.~~

~~(b) Damages to which the Government is entitled to under this clause are due and payable thirty (30) days following the date Lessor receives notice from the Contracting Officer specifying such damages.~~

~~(c) Delivery by Lessor of less than the minimum ABOA square footage required by this lease shall in no event be construed as substantial completion, except as the Contracting Officer permits.~~

~~(d) The Government shall not terminate this lease under this clause nor charge the Lessor with damages under this clause, if~~

- ~~(1) the delay in substantially completing the work arises from excusable delays, and~~
- ~~(2) the Lessor within 10 days from the beginning of any such delay (unless extended in writing by the Contracting Officer) provides notice to the Contracting Officer of the causes of delay. The Contracting Officer shall ascertain the facts~~

~~and the extent of delay. If the facts warrant, the Contracting Officer shall extend the delivery date, to the extent of such delay at no additional costs to the Government. A time extension is the sole remedy of the Lessor.~~

~~(End of clause)~~

~~* * * * *~~

~~**552.270-22 Default by Lessor During the Term**~~

~~**DEFAULT BY LESSOR DURING THE TERM (SEP 1999)**~~

~~(a) Each of the following shall constitute a default by Lessor under this lease:~~

~~—— (1) Failure to maintain, repair, operate or service the premises as and when specified in this lease, or failure to perform any other requirement of this lease as and when required provided any such failure shall remain uncured for a period of thirty (30) days next following Lessor's receipt of notice thereof from the Contracting Officer or an authorized representative.~~

~~—— (2) Repeated and unexcused failure by Lessor to comply with one or more requirements of this lease shall constitute a default notwithstanding that one or all such failures shall have been timely cured pursuant to this clause.~~

~~—— (b) If a default occurs, the Government may, by notice to Lessor, terminate this lease for default and if so terminated, the Government shall be entitled to the damages specified in the Default in Delivery Time Extensions clause.~~

~~(End of clause)~~

~~* * * * *~~

