Power Buyer

Managers become proactive to save energy costs

by Pamela V. Rothenberg

Energy management is still in its early stages, but it is quickly evolving into an increasingly important issue for commercial office owners and managers. More markets are becoming deregulated, entirely changing the way landlords must evaluate their energy providers and purchases.

Prudent owners and managers will soon have no choice but to identify strategies to achieve energy costs savings and operational efficiencies while concurrently attempting to minimize the related risks of power failures. They must be wary of doing business with energy suppliers and consultants or investing in energy-related technology solutions unless they have a proven track record of reliably delivering mission-critical energy needs or related management services for their buildings. A thorough due diligence review of each potential vendor, service provider and software application is essential.

Owners and managers should not even consider entering into an agreement with any supplier or service provider unless it contains favorable due diligence rights and "exit strategies" if the due diligence results are unsatisfactory. They should also attempt to include provisions in all agreements holding the vendors fully responsible for any failure in building power supply and requiring them to indemnify the owners and managers against all losses resulting from interrupted building power or other related risks caused by failed power supplies, dysfunctional energy management software applications or the incompetence of the provider.

There will be innovative opportunities to save money by managing energy costs in a more competitive environment. Whether a landlord builds the energy costs into rental rates through full-service leases or uses technology to allocate exact energy costs to specific tenants through triple net leases, the leases should include provisions identifying the landlord's plans for energy procurement.

> A landlord should pass-through to tenants energy cost savings.

As owners become increasingly proactive in the management of energy supplies to their portfolios, standard lease provisions absolving landlords from liability for events affecting building power supplies will likely be more difficult to defend. It is relatively easy to require tenants to accept lease provisions shifting the risks of power outages away from the landlord, if the landlord has contracted with a provider for all power needs of a building. However, once landlords assume responsibility for purchasing building energy requirements, they will potentially face liabilities should the power supply be interrupted in a manner that adversely affects tenants.

It is in the best interests of the tenants for a landlord to pass-through to tenants energy cost savings. The associated risks should not be borne exclusively by the landlord. Equally critical are lease provisions requiring tenants to advise a landlord in advance of anticipated changes in power usage and that hold tenants directly responsible for losses suffered by the landlord or other building tenants for any non-permitted power usage adversely affecting the building's energy supply.

Changes in the energy industry are coming. The sooner owners and managers become educated about the panoply of issues and challenges associated with this trend, the better positioned they will be to also understand and manage the related legal risks. □

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