

MODEL LEASE CLAUSE

Condition TIA Payments on Getting Proof of Proper Buildout

The following Model Lease Clause was drafted with the help of New York City attorney Nancy Ann Connery. Put it in your office lease if a tenant with some negotiating power demands that you make progress payments of its tenant improvement allowance (TIA) during the course of its buildout work.

Make sure you define “Initial Alterations” and “Landlord’s Contribution,” which is the entire TIA amount, elsewhere in the lease.

Show this clause to your attorney before putting it into your lease.

TIA PROGRESS PAYMENTS

a. Progress Payments.

(i) Landlord shall make progress payments to Tenant of Landlord’s Contribution on a monthly basis, as hereinafter provided. Each progress payment shall equal [*insert #, e.g., ninety (90)*] percent of the cost of the Initial Alterations incurred or paid by Tenant (for which no prior requests for payment have been made) for the period for which payment is requested. Each progress payment shall be made to Tenant within [*insert #, e.g., thirty (30)*] days after Landlord’s receipt of Tenant’s requisition request, together with the required documentation described below, provided such request and documentation are delivered to Landlord by the [*insert #, e.g., tenth (10th)*] day of the month and further provided that all of the following conditions are met (the “Payment Conditions”) at the time each such payment is requested and due:

(A) Tenant is not in default of this Lease; and

(B) No mechanic’s lien has been filed against Landlord, Tenant, the Premises, or the Building, which lien has not yet been discharged of record; and

(C) Tenant submits to Landlord all of the following documentation:

(1) A requisition for payment, provided, however, that Tenant shall submit such requisition for payment no more often than once monthly (and subject to the time constraints set forth above), and each such requisition shall cover services performed and materials supplied (for which no prior requests for payment have been made) for the period(s) preceding the month in which such submission is made; and

(2) A certification by the architect engaged by Tenant for the Initial Alterations stating that the portion of the work for which Tenant is applying for payment has been completed in accordance with the Plans and Specifications approved by Landlord and, to the architect’s knowledge, all applicable Laws; and

(3) Itemized bills from Tenant’s architects, consultants, contractors, engineers, and suppliers for services performed and materials supplied for those portions of the Initial Alterations for which Tenant seeks payment and for which Tenant has not previously submitted a requisition (and where Tenant elects to be reimbursed, such bills shall have been marked “paid” by the architect, consultant, contractor, engineer, or supplier); and

(4) Executed and acknowledged releases of lien in form and substance satisfactory to Landlord evidencing payment for any prior work or services performed and materials supplied for which Tenant previously applied for payment.

(ii) Provided all of the Payment Conditions have been met, each such progress payment shall be made within the time period set out above after Landlord receives from Tenant all of the required documents in support of Tenant’s request for payment. However, if such request and documentation are delivered after the [*insert #, e.g., tenth (10th)*] day of the month, the corresponding progress payment shall be made during the second month after the month in which such request and documentation are delivered to Landlord.

(iii) The progress payments shall be made, at Tenant’s option, either to:

(A) Tenant’s architects, consultants, contractors, engineers, and suppliers engaged in the performance of the Initial Alterations for whom Tenant requests payment; or

(B) Tenant, as reimbursement for the amounts paid by Tenant for such services, supplies.

b. Payment of Retainage. Provided the Payment Conditions set out in subparagraphs (A) and (B) of Paragraph a(i) hereof have been met as of the date payment is requested and due, Landlord shall pay to Tenant the aggregate of the [*insert #, e.g., ten (10)*] percent sums withheld by Landlord from the progress payments described in Paragraph a above upon Landlord’s receipt of all of the following documentation:

(i) A certificate from Tenant’s architect stating that the Initial Alterations have been substantially completed, and that the Initial Alterations have been performed substantially in compliance with all applicable Laws and in compliance with the Plans and Specifications approved by Landlord;

(ii) Final “as built” plans for the Initial Alterations;

MODEL LEASE CLAUSE (CONTINUED)

(iii) All final "sign-off" letters, letters of completion, approvals, permits (including equipment use permits), and certificates required by Law in connection with the construction and completion of the Initial Alterations and any equipment installed by Tenant in the Premises; and

(iv) Final executed and acknowledged releases of lien in form and substance satisfactory to Landlord evidencing payment for all prior work or services performed and materials supplied.

c. Suspension/Termination of Payments. If any mechanic's lien is filed against Landlord, Tenant, the Premises, and/or the Building for work, materials, or services claimed to have been furnished to Tenant, Landlord may suspend any payments of Landlord's Contribution that otherwise would be due until such lien is discharged of record. If this Lease is terminated prior to payment in full of Landlord's Contribution, Landlord's obligation to pay the balance of such contribution shall also end and terminate.

d. Deficient and Excess Amounts. If the amount of Landlord's Contribution is less than the cost of the Initial Alterations for which Tenant may seek reimbursement, Tenant shall be solely responsible for the payment of the deficiency and for the completion of the Initial Alterations. If the amount of the Landlord's Contribution exceeds the cost of the Initial Alterations for which Tenant may seek reimbursement, Tenant shall not be entitled to any portion of the excess.