Preparing for Sudden Disasters: Managing Data, Recovery Systems

By Cynthia B. Keliher and Patrick C. Toomey

In today's business environment, the seamless availability of information is both assumed and required. An interruption can cause customers to go elsewhere, a loss in productivity for employees and governmental fines pursuant to applicable law, such as the Sarbanes-Oxley Act, for failing to protect an organization's data or to provide such data when required. Today, an organization may turn to a third party to operate and manage its data center and disaster recovery operations, or lease space in a building to house its data center and disaster recovery operations. Data center space refers to that portion of the premises in which computer equipment cabinets and related facilities are located and typically includes raised flooring. Disaster recovery space refers to that portion of the premises in which computer terminals are located.

There are 10 issues a tenant needs to consider in negotiating a data center/disaster recovery lease.

• **The building.** When choosing to lease space in a building for data center/disaster recovery operations, a tenant needs to examine carefully the building itself, including the infrastructure. Of critical importance are the building's power and cooling capacity; the availability and capacity of redundant systems including emergency generators, in the event that the building itself experiences a power outage; and the security capabilities, including biometric systems, for the building and its users. A strong and experienced landlord management team may be a good indication of the building owner's commitment to the data center/disaster recovery needs of its tenants, but a tenant will need to conduct an in-house or third-party review of the building's infrastructure and security capabilities to ensure that the tenant's needs are met.

• **Location.** Location, location, location. The landlord's commitment to power and cooling, as well as the landlord's available space for data center/disaster recovery needs are unpredictable. An organization may experience substantial growth or may be acquired by another organization with unused data center/disaster recovery space. Additionally, changes in technology and equipment may result in the contraction of the space needed to address data center/disaster recovery needs. Accordingly, a tenant should negotiate expansion options, the right to convert and/or relocate disaster recovery space to data center space and vice versa, and subletting provisions that will provide a means to grow or contract as a tenant's future needs dictate.

• **Flexibility.** Data center/disaster recovery space needs are unpredictable. An organization may experience substantial growth or may be acquired by another organization with unused data center/disaster recovery space. Additionally, changes in technology and equipment may result in the contraction of the space needed to address disaster recovery needs. Accordingly, a tenant should negotiate expansion options, the right to convert and/or relocate disaster recovery space to data center space and vice versa, and subletting provisions that will provide a means to grow or contract as a tenant's future needs dictate.

• **Service level agreement.** An SLA establishes standards for the provisions of services by the landlord to the data center/disaster recovery space. The agreement should set forth the parameters for, and the consequences of, an interruption in power, temperature exceedances, and multiple outages and/or exceedances. A landlord may be willing to allow a tenant to take a credit against rent for a single outage or exceedance, but a tenant should insist on a right to terminate the lease for multiple outages and/or exceedances over a specified period of time. If a tenant obtains the right to terminate, the exercise thereof should allow the tenant a sufficient period of time within which to find replacement space.

• **Insurance.** A tenant needs to work closely with its insurance advisor in selecting space for data center/disaster recovery. A qualified insurance advisor should conduct a physical inspection of the building and determine whether the building is located in a flood zone. The amounts and types of insurance coverage needed by a tenant can differ markedly from that required in a typical office context. The lease should specify the insurance the landlord is required to maintain.
Continued from Previous Page

and the tenant's insurance advisor should review the provisions and advise the tenant of any gaps in coverage. In light of the security needs of a tenant in a data center/disaster recovery context, a tenant may want to negotiate a requirement that the employees of the landlord working at the building be bonded.

- **Assignment and subletting.** In an office lease setting, a landlord usually seeks to limit a tenant's assignment and subletting rights and may seek a right to take back space in the event of a proposed assignment or sublease. As noted above, subletting rights may provide a tenant with needed flexibility. In the case of an assignment, a tenant should negotiate broad assignment rights in the event of the sale of all or substantially all of the tenant's assets, the sale of stock or a merger due to the mission critical nature of the facility.

- **Subordination, nondisturbance and attornment agreement.** With a significant capital outlay in a data center/disaster recovery space, a tenant must be assured that if the landlord encounters financial difficulty, the tenant may continue to occupy the space. Typically, tenants give up certain rights in an SNDA. For example, a lender may insist on a longer cure period for landlord defaults. A tenant should insist on entering into an SNDA at the same time as the lease and the SNDA should indicate that any default by the landlord under the SLA will not limit any of the tenant's rights to obtain a credit against rent or to terminate the lease.

- **Casualty.** The occurrence of significant fire damage or other casualty presents critical issues for a tenant of data center/disaster recovery space. Uncertainty regarding the time needed to repair the building coupled with the time a tenant normally needs to find appropriate substitute space for this type of use creates the need for a tenant to have significant rights in the event of a casualty. A tenant should seek termination rights and/or a requirement that the landlord rebuild using all available insurance proceeds and overtime and weekend labor in order to perform the necessary repairs.

- **Parking.** Although the need for parking may be insignificant when a tenant is not reacting to a disaster, parking demand during disaster recovery needs to be anticipated. Moreover, a multitenant building may not have sufficient parking if all or several tenants are engaged in disaster recovery simultaneously. Parking and transportation demand that management must be part of the lease negotiation so that a tenant's employees will be able to get to the space during disaster recovery.

Data center and disaster recovery operations of a tenant are anything but routine. Similarly, the location of the building and a lease for space within which to conduct such operations should be anything but routine. Access to inexpensive sources of electricity and the availability of fiber-optic cables cannot be overlooked. In negotiating a lease for data center and disaster recovery uses, provisions that are negotiated with fairly predictable outcomes need to be examined anew in light of the mission critical function which such uses serve. The tenant needs to ensure that the lease provides comprehensive protection for an organization's data and comprehensive solutions when, not if, a disaster strikes.

Reprinted with permission of Banker & Tradesman.

This document may constitute advertising under the rules of the Supreme Judicial Court of Massachusetts.