Leasing a Hangar for Your Corporate Aircraft - Consider the Environment

Every corporate aircraft deserves a good home. Whether the aircraft starts out on the ramp or in the FBO's hangar, the need for security, maintenance and more hangar space often drives a flight department's decision to lease a new hangar for the corporate aircraft.

With few exceptions, the flight department will either be leasing directly from a local government, airport authority or sub-leasing from an existing airport tenant such as an FBO. The critical document is the lease or sub-lease. The typical airport lease addresses the length of term, description of the property, a listing of lessors and lessees rights and obligations, operating standards, airport access, leasehold improvements, insurance, fueling and indemnification. It is common for a lessor (landlord) to request that their lessee (tenant) provide broad indemnities to the landlord including an indemnity of the landlord's negligent acts unless they are "willful or grossly negligent." This is a very difficult standard to overcome. Such an indemnity would also extend to environmental liability. For this reason and many others, environmental liability should be an issue to be aware of for every flight department.

Since the Superfund ("CERCLA") legislation went into effect in 1976 owners, and lessees of land have faced a vast new exposure for the clean-up of environmental contamination. Other federal and state laws such as RCRA, clean air and clean water laws have added additional requirements and costs.

Historically airports have been a fertile environment for the EPA and state and local regulators. At airports where heavy maintenance has been performed for many years contamination from chlorinated solvents has been common. The main culprit is usually Trichloroethylene, the substance at issue in John Travolta's *A Civil Action.* This solvent and other close relatives were used to degrease dirty parts during overhaul and repair because of their efficiency. Unfortunately, their properties are so hazardous that five drops from an

eyedropper in an Olympic size pool is enough to exceed federal guidelines. At airports where scraping and painting of aircraft was done, heavy metal contamination is also frequently found. Hexavalent Chromium (Chrome 6) is perhaps the most serious offender, but cadmium and other heavy metals also have been found to contaminate the ground and the groundwater. For example, the clean-up of chlorinated solvents, and heavy metals and fuel by-product at the TWA Overhaul Base in Kansas City alone is projected to cost more than $30 million dollars.

Fueling operations are the most common source of contamination. The contaminants are usually referred to as total petroleum hydrocarbons (TPH). Related contaminants are benzene, toluene, ethyl benzene and xylene (BTEX). While this family of contaminants is not as toxic as chlorinated solvents or heavy metals, their presence is more common.

The presence of any of these contaminants (unless they are very limited) can result in the duty to clean up contaminated soils, sub-soils and the groundwater and the cost of this can literally drive a company into bankruptcy. The focus of CERCLA and related laws was on clean-up, with anyone in the chain of title being equally liable for the entire cost of clean-up, even if only on the site for a limited time. Thus, the "deep pocket" defendant may be forced to pay for the entire cleanup and then try to seek contribution from frequently defunct or bankrupt predecessors. There are many defenses, such as "it happened before I got here", but the science is often murky and the cost of defense can be immense.

What to do. The answer is in due diligence, very carefully worded lease documents and insurance.

Any lease agreement should address environmental matters. The lessor should be required to give the lessor the right to do a pre-closing inspection and the right to bow out if contamination is found. Such an inspection should be done by a qualified environmental company with broad experience in the area. The first inspection is generally called "Phase I". If the results show no contamination, the issue should be resolved. If not, then a "Phase II" inspection is done. If contamination is noted, the lease agreement should allow the new tenant to give notice to the lessor and require the lessor to either solve the problem or allow the tenant to

cancel the lease. Ideally, the lease should call for the lessor to hold harmless and indemnify the lessee from any environmental issues which are not the direct result of the tenant's own actions done after lease inception. If the airport is in a longtime industrial area, it may be possible that contamination exists off-site which may later migrate into the groundwater under your facility. The Phase I study should address this. The indemnity should protect you so long as the study was done correctly and the lessor remains solvent.

Your company will likely have a comprehensive general liability insurance policy. If it is a standard form, it will provide no coverage for environmental matters. A flood of insurance claims for environmental cleanup has long troubled the world insurance market. By 1970 most comprehensive general liability policies had a pollution exclusion. Policyholders had success in some states in avoiding the pollution exclusion language. Accordingly, by 1986 virtually all comprehensive general liability policy contained a so-called "absolute" pollution exclusion. In rare instances this exclusion has been avoided, but in general it has survived almost all claims for coverage. You may be able to "buy back" this exclusion for additional premium. There is another insurance product which may prove to be more suitable for your situation. Insurance called "environmental impairment liability" insurance is generally available at a relatively low cost (because your due diligence has done most of the underwriting) to provide a greater degree of assurance that some future discovery of contamination will not be ruinous.

There are other more sophisticated insurance products available such as remediation stop-loss environmental insurance, which is also known as cost cap coverage, and underground storage tank financial responsibility compliance insurance, which can be useful in isolated situations. Some insurance carriers are now marketing combined comprehensive general liability/environmental impairment liability insurance coverage which avoids gaps in coverage which may accidentally appear. Such packages provide a more complete insurance coverage because nearly all pollution insurance is written on a claims made basis and most comprehensive general liability policies are written on an occurrence basis. Blending these two coverages into a combined form may prove beneficial based on your needs.

CONCLUSION

Many people just assume that the lease is non-negotiable, which is generally far from true. If overbroad indemnity language in favor of the lessor is truly "take it or leave it", prudence may suggest you do the latter and move on. Otherwise, awareness of the issue, due diligence and proper insurance coverage can protect your company from a major liability.

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