

State of Vermont
Buildings & General Services
Property Management Services
4 Governor Aiken Avenue
Montpelier, VT 05633-7001
bgs.vermont.gov/propman

Agency of Administration

[phone] 802-828-3390
[fax] 802-828-6501

Allen Palmer
Property Management Specialist
Department of Buildings & General Services
Division of Property Management

August 6, 2015

Joint Fiscal Committee

RE: Request to consider approval of Less Than Fair Market Value Lease

Dear Committee members:

Commissioner Obuchowski has requested that I prepare a memo outlining the history of the LANDLORD-TENANT relationship between the State of Vermont and the Chittenden Unit for Special Investigations (CUSI). Additionally, I want to take this opportunity to let the Committee know how much the Commissioner and I support CUSI and their important mission. This exercise is an attempt to follow the law.

CUSI is under the auspices of The Chittenden Children's Advocacy Center, Inc. and has occupied 3,907 SF of State owned space at 50 Cherry Street in Burlington since 1999.

During their tenancy, the State has charged CUSI \$1,000.00 per year in rent, while the FFS rate has ranged from \$33,639.27 in FY 04 to \$50,673.79 in FY15. Originally it was documented through an "agreement", but more recently the State and CUSI have executed a lease outlining this arrangement.

In 2014, Commissioner Obuchowski became aware that the State's actions were in violation law since it was leasing this space to a non-State entity at less than Fair Market Value (FMV).

The State is using its Fee For Space rate for the Burlington Area to establish FMV.

The Fee for Space (FFS) program creates a square footage cost that is based on the "sum of expenses" to operate the building. Thru this mechanism the tenant rent is based on actual cost of the space. An analysis of the cost difference between what CUSI paid and what should have been paid when compared to the State's Fee For Space (FFS) Program is attached here:



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CUSI LEASE PAYMENT COMPARISON TO FFS RATES IN BURLINGTON

YEAR	CUSI PAYMENT	FFS RATE	SF	FFS TOTAL	PAYMENT DELTA	CUSI SUBSIDY
FY04	\$ 1,000.00	\$ 8.61	3,907	\$ 33,639.27	\$ 32,639.27	\$ 32,639.27
FY05	\$ 1,000.00	\$ 8.09	3,907	\$ 31,607.63	\$ 30,607.63	\$ 30,607.63
FY06	\$ 1,000.00	\$ 9.60	3,907	\$ 37,507.20	\$ 36,507.20	\$ 36,507.20
FY07	\$ 1,000.00	\$ 10.25	3,907	\$ 40,046.75	\$ 39,046.75	\$ 39,046.75
FY08	\$ 1,000.00	\$ 10.14	3,907	\$ 39,616.98	\$ 38,616.98	\$ 38,616.98
FY09	\$ 1,000.00	\$ 11.79	3,907	\$ 46,063.53	\$ 45,063.53	\$ 45,063.53
FY10	\$ 1,000.00	\$ 13.00	3,907	\$ 50,791.00	\$ 49,791.00	\$ 49,791.00
FY11	\$ 1,000.00	\$ 13.05	3,907	\$ 50,986.35	\$ 49,986.35	\$ 49,986.35
FY12	\$ 1,000.00	\$ 13.24	3,907	\$ 51,728.68	\$ 50,728.68	\$ 50,728.68
FY13	\$ 1,000.00	\$ 12.47	3,907	\$ 48,720.29	\$ 47,720.29	\$ 47,720.29
FY14	\$ 1,000.00	\$ 13.46	3,907	\$ 52,588.22	\$ 51,588.22	\$ 51,588.22
FY15	\$ 1,000.00	\$ 12.97	3,907	\$ 50,673.79	\$ 49,673.79	\$ 49,673.79
TOTAL	\$ 12,000.00			\$533,969.69	\$ 521,969.69	\$ 521,969.69
						TOTAL AMOUNT OF CUSI SUBSIDY

Although the CUSI lease started in 1999, THE FFS program did not develop until 2004. The Data above illustrates the amount of money that BGS has subsidized CUSI from 2004 through FY15.

As you can see, the State has subsidized CUSI's rent significantly (\$521,969.69) over the past 12 years based on a comparison of established the FFS rate and the fee CUSI paid.

In 2014, the Legislature passed the language stipulating that the State and CUSI would have a lease in place by July 1, 2015 that started CUSI on a gradual path to paying the State's FFS rate. The resulting lease called for Fair Market Value to be accomplished in incremental steps by July 1, 2018, see APPENDIX A.

Because CUSI was unable to budget for a rental increase in FY16, they returned to the Legislature and requested a stay on the language shown in APPENDIX A. In response to their plea, the Legislature passed language in ACT 26 CAPITAL APPROPRIATIONS BILL of 2015, see APPENDIX B.

In response, the SOV and CUSI have agreed that due to CUSI's inability to budget for the agreed upon rent increase in the lease executed in FY 2015, the lease rate for FY2016 would remain at \$1,000.00 per year with the proviso that CUSI present the Commissioner of BGS by March 1, 2016 with an incremental plan to bring their rent up to the State's FFS rate by July 1, 2019.



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The attached lease #376 memorializes that agreement. I request that you approve the enclosed lease as is required in **29 V.S.A. § 165(h) SEE APPENDIX C.**

Thank you,

Allen Palmer

APPENDIX A.

ACT 176 of the 2013-2014 Legislative Session

Sec. E.112 USE OF STATE SPACE; CLARIFICATION

(a) Notwithstanding 29 V.S.A. § 165(h) the Commissioner of Buildings and General Services shall extend through June 30, 2015 the lease for space for the Chittenden Unit for Special Investigations at current payment rates. For fiscal year 2016 and beyond, the Commissioner shall consult with the Director of States' Attorneys and Sheriffs and the Director of the Chittenden Unit for Special Investigations and develop a long-term lease or fee-for-space arrangement. In the event such arrangements include a payment below prevailing market prices, it shall be presented to the Joint Fiscal Committee as required by 29 V.S.A. § 165(h) for approval at a regularly scheduled Joint Fiscal Committee meeting after September 1, 2014.



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APPENDIX B.

ACT 26 CAPITAL APPROPRIATIONS BILL

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*** Policy ***

*** Buildings and General Services ***

Sec.23. LEASING PROPERTY; FAIR MARKET VALUE

(a) It is the intent of the General Assembly that any leases for State-owned space in any State-owned building, structure, or other real property under the jurisdiction of the Commissioner of Buildings and General Services that are in existence prior to the effective date of this act shall be renewed at fair market value by July 1, 2019.

(b) The Commissioner of Buildings and General Services shall evaluate whether to sell any State-owned building, structure, or other real property that is being leased under fair market

APPENDIX C

29 V.S.A. § 165(h)

• (h) No State-owned space in any State-owned building, structure, or other real property under the jurisdiction of the Commissioner of Buildings and General Services may be leased, occupied, or licensed for any purpose for less than its fair market value as determined by the prevailing area market prices for comparable space or property, except as follows:

(1) The Commissioner of Buildings and General Services may lease or license State-owned property under his or her jurisdiction for less than prevailing area market prices to municipalities, nonprofit organizations, school districts, or to persons whose proposed activities are determined by the Commissioner to serve a public purpose and when the term of the lease or license is less than three years.

(2) The Commissioner of Buildings and General Services may lease or license State-owned property under his or her jurisdiction for less than prevailing area market prices with the approval of the Joint Fiscal Committee when the term of the lease or license is three years or longer, or when the lease or license requested is a renewal of a lease or license issued pursuant to subdivision (1) of this subsection.



LEASE #376

between

**THE STATE OF VERMONT
DEPARTMENT OF BUILDINGS AND GENERAL SERVICES**

and

**Chittenden Children's Advocacy Center, Inc.
For
Chittenden County Unit for Special Investigations
(CUSI)**

This lease, made and entered into this 27th day of July, 2015, by and between:

The State of Vermont, Department of Buildings and General Services, 2 Governor Aiken Avenue, Montpelier, VT 05633-5801, hereinafter referred to as STATE,

and

Chittenden Children's Advocacy Center, Inc. for Chittenden County Unit for Special Investigations (CUSI) 50 Cherry Street Suit 102, Burlington, Vermont 05401, hereinafter referred to as TENANT,

WITNESSETH

In consideration of the mutual covenants and agreements hereinafter set forth, the parties do covenant and agree as follows:

- 1) The STATE hereby demises and leases to the TENANT, subject to all of the conditions and terms contained herein, the following described premises, hereinafter referred to as the "leased space":
- 2) **3907 square feet of office space located on the ground floor space at the State owned building located at 50 Cherry Street in Burlington and commonly known as the FORMAC Building. THE LANDLORD acknowledges that a portion of the demised space is used by members of the CUSI task force.**
- 3) **TO HAVE AND TO HOLD** the said leased space, with appurtenances, for the term of **ONE (1) year** commencing on **July 1, 2015** for use by the TENANT.
- 4) The TENANT shall not assign this Lease and shall not sublet the leased space except with the prior written consent of the STATE, which consent shall not be unreasonably withheld.

- 5) Either party shall have the right to terminate this lease by giving the other party at least **ninety (90) days'** prior written notice of its intention to terminate. The TENANT will pay the remaining balance due on any fit-up costs in one lump sum, together with the final rental payment.
- 6) The TENANT shall pay rent to the STATE for the said leased space at the following rate:

Beginning July 1, 2019, the STATE shall have the right to adjust the rent based on the FY16 Capital

Start date	End date	Annual Cost per Square Foot	Annual Rent	Monthly Rent
07/01/2015	06/30/2016	NA	\$ 1,000.00	NA

- 9) It is further agreed that the **CHITTENDEN CHILDREN'S ADVOCACY CENTER, INC.** Policy Board will present to the Commissioner of BGS on or before March 1, 2016, their plan to bring CUSI into compliance with Section 23 of ACT 26, The Capital Appropriations Bill as passed by the Vermont Legislature and signed by the Governor in Legislative year 2015, see **APPENDIX A.**
- 10) Rental payments are to be made monthly in advance; each monthly payment is due on the first day of the month. The first month's rent will be prorated as to the actual occupancy date.
- 11) The rental payments shall be sent to:
- BGS Accounting
6 Baldwin Street
Montpelier, VT 05633-7401
- 12) If any monthly payment of rent is not paid in full when due, the STATE reserves the right to charge a late payment fee of fifty dollars (\$50.00), plus interest on the balance of rent due at a rate of twelve percent (12%) per annum. The State reserves the right to charge a late payment fee each and every month Tenant fails to pay rent in full when due.
- 13) In the event of a change of ownership during the term of this Lease the STATE shall notify the TENANT, by certified mail, return receipt requested, that the ownership of the property has been transferred. Said notice mailed to address listed on page 1, shall specify how, when, and to whom rental payments shall be made.
- 14) In the absence of express, written agreement between STATE and TENANT to the contrary, if TENANT holds over beyond the expiration of the lease, the state reserves the right to increase the rent to 150% of the current lease rate. Insofar as is applicable, the covenants and agreements set forth herein shall remain in force during any period of holding over.

- 15) The STATE shall provide to the TENANT, during its occupancy of said leased space, as part of the rental consideration, the following:

AIR CONDITIONING

ELECTRICITY

GENERAL INTERIOR AND EXTERIOR MAINTENANCE

HEAT

HOT WATER

JANITORIAL SERVICES AND SUPPLIES

LAWN CARE

PEST CONTROL

REPLACEMENT OF LIGHT BULBS

SNOW REMOVAL AND SANDING OF PARKING AREA(S)

SNOW REMOVAL AND SANDING OF WALKWAYS AND DOORWAYS

TRASH/RECYCLING DISPOSAL

WATER AND SEWER

In addition, the STATE shall provide, at the tenant's expense, the following:

VOICE/DATA INSTALLATION, OPERATION, AND REPAIR

- 16) It is further understood and agreed that the TENANT shall obtain and pay for the following:

RENTER'S INSURANCE

in an amount appropriate to cover TENANT'S equipment and personal property. **Prior to assuming occupancy**, the TENANT shall provide the STATE with a certificate of insurance to show that this coverage is in effect. It is the responsibility of the TENANT to maintain current certificates of insurance on file through the lease term. The acceptance of such certificates of insurance should in no way be construed as an indication of the state's opinion regarding the sufficiency of such coverage.

- 17) The STATE shall maintain the leased space in good repair and tenantable condition during the term of this lease. The phrase "good repair and tenantable condition" means maintaining the leased space in a condition which complies with Vermont's fire safety, electrical, plumbing, health, and building codes, Vermont Occupational Safety and Health Act (VOSHA) standards, applicable BGS policies, and any other applicable state or federal laws or regulations.
- 18) For the purposes of so maintaining the leased space, the STATE reserves the right, at reasonable times, to enter and inspect the leased space and to make any necessary repairs thereto.
- 19) The TENANT shall give the STATE written notice of any defects in the demised leased space. The STATE agrees to remedy the defects with due diligence. If the defect or damage arose from the act or negligence of the TENANT or of the TENANT's agents, employees, or invitees, then the STATE shall remedy the defect with due diligence and back-charge the TENANT for the reasonable cost of the repair.

- 20) TENANT agrees that all personal property brought into the leased space shall be at the sole risk of the TENANT and that the STATE shall not be liable for the theft thereof or any damage thereto occasioned from the acts of any person other than STATE, its agents, or its employees.
- 21) If the leased space is totally destroyed by fire or other causes, this lease shall terminate immediately. In the event of partial destruction or damage that renders the leased space temporarily untenable, either party may terminate this lease by giving to the other party ten (10) days' written notice. The STATE may, if the parties so agree, repair and restore the leased space to be fully tenantable in accordance with the provisions hereof, in which case the rent shall be proportionately and fairly abated until the repairs are completed. This provision shall not be construed to excuse or relieve either party from any liability incurred as a result of such total or partial destruction or damage.
- 22) TENANT shall not place a load on any floor of the leased space exceeding the floor load per square foot which the floor was designed to carry and which is allowed by any law.
- 23) TENANT shall not permit its agents, employees, or invitees to smoke anywhere in the building or to loiter at the building entrances for the purposes of smoking. The STATE may, but shall not be required to, designate an area for smoking outside the building.
- 24) Hazardous materials:
 - a) TENANT shall not handle, process, store, release, or use any hazardous or toxic materials in or on the leased space without the express written consent of the STATE, which may be withheld at its sole discretion. TENANT shall comply in all respects with any applicable law, ordinance, regulation, or ruling relating to environmental protection or to the presence, use, generation, storage, release, containment, or disposal of hazardous or toxic materials.
 - b) TENANT shall indemnify, defend, and hold the STATE harmless from and against any and all damage, cost, loss, liability, or expense (including reasonable attorneys' fees) which may be incurred by the STATE by reason of, resulting from, or arising in any manner whatsoever out of the breach of the TENANT'S obligations contained in this paragraph.
- 25) Except as may be expressly provided in this lease, TENANT shall not make, or cause to be made, any changes to the leased space, the building, the building systems, or any part thereof without STATE'S prior written consent. Requests for such written consent shall be submitted in writing to: BGS Property Management, 4 Governor Aiken Avenue, Montpelier, VT 05633-7001 or via e-mail to any property management employee.
- 26) On or before the expiration date, TENANT shall remove from the premises, at TENANT'S expense, all tenant-owned equipment and personal property.

- 27) No later than ninety (90) days prior to the lease expiration date TENANT shall provide to the STATE a list of all renovations, alterations, or fixtures made or installed by TENANT and specify which fixtures TENANT intends to remove. TENANT shall repair any damage to the leased space that was caused by the installation or removal of said fixtures. The STATE reserves the right to require TENANT, at TENANT'S expense, to restore the leased space to its pre-lease condition OR to restore the property to its pre-lease condition and charge the TENANT for the full cost of such work.
- 28) Each of the following is a "default" by TENANT under this lease:
- a) Failure of TENANT to pay rent when due.
 - b) Failure of TENANT to comply with any other term of this lease, and the failure continues for thirty (30) days following STATE'S written notification to TENANT of the noncompliance. If compliance cannot, with diligence, be reasonably accomplished within that 30-day period, TENANT shall have as long as is reasonably necessary to fully comply, provided that TENANT commences compliance within that 30-day period and thereafter pursues compliance to completion with diligence.
 - c) Commencement by TENANT of any legal action seeking any relief from its debts under any law, or the commencement of any such action against TENANT by a third party, if such action is not dismissed within sixty (60) days.
 - d) Appointment of a receiver, trustee, custodian, or other similar official for TENANT or for a substantial portion of TENANT'S assets.
- 29) If a default occurs, STATE may, at any time during the continuance of the default; give notice to TENANT that this lease shall terminate on the date specified in that notice, which date shall not be less than thirty (30) days from the date of notice. If STATE gives that notice, the tenancy shall expire on the date set forth in that notice. TENANT's obligations under this lease, however, survive the termination of the tenancy.
- 30) The failure of the STATE to insist upon strict performance of any of the terms, conditions, or covenants herein shall not be deemed a waiver of any rights or remedies that the STATE may have and shall not be deemed a waiver of any subsequent breach or default in the terms, conditions, and covenants contained herein.
- 31) The remedies of the STATE herein shall be cumulative and not alternative or exclusive of any other right or remedy available to the STATE.
- 32) Applicable Law: This agreement will be governed by the laws of the State of Vermont.
- 33) Independence, Liability: The TENANT will act in an independent capacity and not as officers or employees of the State.

The TENANT shall defend the State and its officers and employees against all claims or suits arising in whole or in part from any act or omission of the TENANT or of any agent of the TENANT. The State shall notify the TENANT in the event of any such claim or suit, and the TENANT shall immediately retain counsel and otherwise provide a complete defense against the entire claim or suit.

After a final judgment or settlement the TENANT may request recoupment of specific defense costs and may file suit in Washington Superior Court requesting recoupment. The TENANT shall be entitled to recoup costs only upon a showing that such costs were entirely unrelated to the defense of any claim arising from an act or omission of the TENANT.

- 34) **Insurance:** Before commencing this Lease the TENANT must provide certificates of insurance to show that the following minimum coverages are in effect, as applicable. **It is the responsibility of the TENANT to maintain current certificates of insurance on file with the State through the term of the Lease; annual updates must be provided throughout the term.**

Workers' Compensation: With respect to all operations performed, the TENANT shall carry workers' compensation insurance in accordance with the laws of the State of Vermont.

General Liability and Property Damage: With respect to all operations performed under the Lease, the TENANT shall carry general liability insurance having all applicable major divisions of coverage including, but not limited to:

- Premises - Operation
- Independent Contractors' Protective
- Products and completed Operations
- Personal Injury Liability
- Contractual Liability

The Policy shall be on an occurrence form and limits shall not be less than:

- \$1,000,000 Per Occurrence
- \$1,000,000 General Aggregate
- \$1,000,000 Products / completed products aggregate
- \$50,000 Fire Legal Liability

Automotive Liability: The TENANT shall carry automotive liability insurance covering all motor vehicles, no matter the ownership status, used in connection with the Lease. Limits of coverage shall not be less than: \$500,000 combined single limit.

No warranty is made that the coverage and limits listed herein are adequate to cover and protect the interests of the Landlord for the Landlord's operations. These are solely minimums that have been set to protect the interests of the State.

TENANT shall name the State of Vermont and its officers and employees as additional insureds for liability arising out of this Agreement.

- 35) **No Gifts or Gratuities:** Other than the demised and leased Premises, TENANT shall not give title or possession of any thing of substantial value (including property, currency, travel and/or education programs) to any officer or employee of the State during the term of this Lease.

- 36) Set off: The STATE may set off any sums which the TENANT owes the STATE against any sums due to the TENANT under this agreement: provided, however, that any set off amounts due to the STATE OF VERMONT as taxes shall be in accordance with the procedures more specifically provided hereunder.
- 37) Taxes due to the STATE:
- a) TENANT understands and acknowledges responsibility, if applicable, for compliance with State tax laws, including income tax withholding for employees performing services within the State, payment of use tax on property used within the State, corporate and/or personal income tax on income earned within the State.
 - b) TENANT certifies under the pains and penalties of perjury that, as of the date of this agreement, the TENANT is in good standing with respect to, or in full compliance with, a plan to pay any and all taxes due to the State of Vermont.
 - c) TENANT understands that final payment under this agreement may be withheld if the Commissioner of Taxes determines that the TENANT is not in good standing with respect to, or in full compliance with a plan to pay, any and all taxes due to the State of Vermont.
 - d) TENANT also understands that the STATE may set off taxes (and related penalties, interest, and fees) due to the State of Vermont, but only if the TENANT has failed to make an appeal within the time allowed by law, or an appeal has been taken and finally determined and the TENANT has no further legal recourse to contest the amounts due.
- 38) This lease represents the entire agreement between the parties on the subject matter. All prior agreements, representations, statements, negotiations, and understandings shall have no effect. This lease may not be modified or amended except by written instrument, said instrument to be executed in the same manner as this lease.
- 39) Upon execution of this agreement it is agreed that this lease agreement is binding upon the parties hereto, their heirs, administrators, executors, successors, and assigns.

IN WITNESS WHEREOF, the parties hereto executed this Lease on the day and year first above written.

CHITTENDEN CHILDREN'S ADVOCACY CENTER, INC.

by: Veronica M. Rathgeb
TENANT

State of Vermont
_____ County, ss.

At 50 Cherry St., in said county and state, this 27 day of July, 2015,
Veronica Rathgeb personally appeared and acknowledged the foregoing instrument by
him/her subscribed to be his/her free act and deed **Chittenden Children's Advocacy Center, Inc.**

Michael J. Obuchowski
Notary Public
My commission expires: 2/10/19

STATE OF VERMONT

by: _____
Michael J. Obuchowski, Commissioner
Buildings and General Services

State of Vermont
Washington County, ss.

At Montpelier, in said county and state, this ____ day of _____, 20__, Michael J. Obuchowski
personally appeared and acknowledged the foregoing instrument, by him subscribed, to be his free act and deed
and the free act and deed of the STATE OF VERMONT.

Before me,

Notary Public
My commission expires: 2/10/

APPENDIX A.

ACT 26 CAPITAL APPROPRIATIONS BILL

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VT LEG #309636 v.1

***** Policy *****

***** Buildings and General Services *****

Sec. 23. LEASING PROPERTY; FAIR MARKET VALUE

- (a) It is the intent of the General Assembly that any leases for State-owned space in any State-owned building, structure, or other real property under the jurisdiction of the Commissioner of Buildings and General Services that are in existence prior to the effective date of this act shall be renewed at fair market value by July 1, 2019.
- (b) The Commissioner of Buildings and General Services shall evaluate whether to sell any State-owned building, structure, or other real property that is being leased under fair market value.