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Contract Matters



By James Zitesman

In March of 2004, the Columbus Board of REALTORS® and the Columbus Bar Association introduced the 8 page Real Estate Purchase Contract (hereinafter referred to as the "contract"). In January of 2005, the current updated version was published. As the liaison between the CBR Standard Forms Committee and the CBA Real Property Law Committee for the past several years, I have been in almost every committee and subcommittee meeting associated with the contract. Through my clients in my practice and by teaching the contract class at the CBR, I have become aware of several issues that I would like to address at this time.

First, it is important to remember to read the entire contract. The 2004 contract, along with the 2005 update, represent the largest revision to the standard purchase contract in many years. It is essential to read all provisions to understand how the entire contract works. When I am presented with a contract question, the first thing that I have to do is to read the contract again.

Appraisal and Loan Commitment

A great example of this occurred on March 15, 2006 during my last seminar at the CBR. One agent asked me about the idea of an appraisal clause and whether it was necessary. To find the answer, the first thing to do was to read paragraph 1.2 of the contract. It states that the lender's pre-approval letter was subject to an appraisal, among other things. Paragraph 1.3 of the contract states that the contract shall terminate if the Buyer does not get a loan commitment. Therefore, if the premises do not appraise, the lender will not normally give a loan commitment and the contract will terminate.

The other question I have heard a lot lately relates to the loan commitment that the seller receives from a buyer. It is common to see the commitment containing certain "subject to" provisions, such as no change in financial condition of the buyer. Some agents for sellers have voiced concerns about getting this type of loan commitment where there exists some possibility that the loan will not be issued. While that may be the case, the contract is clear that, "The delivery of the written notification to the Seller and/or Seller's Broker that a loan commitment has been obtained shall satisfy this contingency." Once a contingency is satisfied, it is no longer a contingency enabling the buyer to get out of the contract. Therefore, all the seller should care about is that the buyer delivers written notification of loan commitment which satisfies and eliminates the contingency.

Turning to paragraph 10.3b, the earnest money deposit is returned to the buyer if a contingency is not satisfied or waived. The delivery of the written notification of loan commitment satisfies the contingency. If the buyer later fails to perform due to not getting the loan after delivery of the written notice, they are in breach as that contingency is no longer available as it has been satisfied.

Inspections

The inspections section of the contract is another area of great importance and potential confusion. The concept is simple and straightforward. There is one period of time to do inspections and in which to submit request to remedies. There is another period of time, which immediately follows the first, in which the parties have an opportunity to work out a resolution to the requests, if any.

The Specified Inspection Period is the time to get any and all inspections completed by the buyer at the buyer's expense. Since the law of Ohio is strict caveat emptor, buyer beware, it is incumbent upon the buyer to inspect the premises. If the buyer is not in good faith satisfied with the condition of the premises the buyer can submit a request to remedy or in the case of a material condition, terminate.

The first area of confusion that I have heard is when does the Agreement to Remedy Period begin? Some have stated that they believe it begins when the request is submitted, however, the contract states that it begins after the end of the Specified Inspection Period. It is conceivable that the buyer could submit more than one request at anytime during the Specified Inspection Period. By having the time periods established in the contract there should be no confusion as to exactly when these time periods run.

Recently I saw a Request to Remedy that required the seller to respond on or before a specific date and time arbitrarily set by the buyer's agent. The contract states in both 4.3 and 4.4 that the time periods are, "...a specific time frame agreed upon by the Seller and the Buyer. The number of days cannot be modified or waived except by a written agreement signed by both parties." Therefore, it is inappropriate to insert an arbitrary date and time for response other than what was set forth in the contract.

Earnest Money Deposit

Paragraph 10 controls the earnest money deposit. It is important to understand what happens to the earnest money in the event of a dispute. Once either party has made a written request to the broker holding the deposit, the broker is required to notify the other party that the request has been made. If the other party objects in writing to the disbursement per the request, the broker can either hold the money until instructed by the parties or a court of competent jurisdiction, or the broker can deposit it with a court through a process called "interpleader."

The issue has come up when the other party has not objected in writing. The contract states, "If the Broker **does not** receive any written objection from the other party within the ten (10) calendar day period, then the Broker shall return or pay the earnest money deposit in accordance with the terms of the request." However, there is no provision which permits the Broker to use interpleader when there has not been a written objection as described in the contract. If there is no objection in writing, the Broker shall return or pay the earnest money in accordance with the terms of the request. By signing the contract, the parties are agreeing to the terms contained therein. The Broker needs to understand the terms and how they affect what the Broker can and cannot do with the earnest money deposit.

Mechanicals Clause

According to my research the mechanicals clause was drafted about 20 years ago when the contract was quite different. The mechanicals clause typically requires the HVAC, electrical, plumbing, drainage, etc., to be adequate and in proper working order. The problem is with the lack of definition as to the words "adequate and in proper working order." The current contract provides the buyer with very broad rights to inspect the premises and to request remedies. Years ago, there were no buyer's agents, now it is common. So while the contract and agency relationships have evolved over the years the use of a mechanicals clause does not reflect the current environment.

Paragraph 4.4 provides the buyer with very specific rights as to what they can do if the inspections discover unsatisfactory conditions. The buyer can request the seller to remedy the conditions, or the buyer can terminate. In the event that the buyer decides to submit a request to remedy or a notice of termination, it is crucial that it is done properly and in accordance with the terms of the contract.

Paragraph 12.1 states, "The Buyer has been given the opportunity to examine the premises and, in making this offer shall rely solely upon the Buyer's inspections and/or tests with reference to the condition, character and size of the premises."

Paragraph 13.2 states that, "At the time the Seller delivers possession, the premises will be in the same condition as the date of acceptance of this contract, except as provided in paragraph 9, and normal wear and tear excepted." This should be what the buyer and seller has bargained for unless there is a further agreement between the parties such as the agreement to a request to remedy.

To summarize, the mechanicals clause is not needed because the buyer has broad rights under the contract to inspect and to terminate, and likewise, the seller is obligated to deliver the premises in the condition as the date of acceptance of the contract.

Counter Offers and Signatures

Paragraph 14 of the contract states that the offer, "...shall be open for acceptance through..." a certain date and time. All paragraph 14 means is that if the seller desires to accept the buyer's offer as it is written, the offer is open for acceptance by the seller until the specified date and time. This is not a deadline for the submission of a counter offer. Certainly if the seller wants to submit a counter offer, it should be done in a timely manner, however, once it is submitted it is a proposal of new terms and

conditions and is open for acceptance through a new date and time. A counter offer is a rejection of the proposed offer from the other party.

The presence of many counter offers in a deal can be a problem. Please keep in mind that the contract will be needed by the lender and title agency. Make the contract as clear and concise as possible. If there are more than a couple of counter offers, consider re-drafting the contract onto a clean document which incorporates all the agreed upon terms.

Section 1335.05 of the Ohio Revised Code is called the Statute of Frauds. It requires that a contract for "...sale of lands... is in writing and signed by the party to be charged therewith..." There is no provision in the contract or in the Statute of Frauds which permits "signature by telephone authority." Paragraph 12.6 in the contract addresses signatures and what is permitted. Faxed or scanned and emailed signatures are permissible. In today's world of technology, this should not be a real and yet it happens frequently.

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