

TIME IS OF THE ESSENCE

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The Maryland REALTORS®' **RESIDENTIAL CONTRACT OF SALE** standard form starts off with the following notice:

This is a Legally Binding Contract; If Not Understood, Seek Competent Legal Advice.

THIS FORM IS DESIGNED AND INTENDED FOR THE SALE AND PURCHASE OF IMPROVED SINGLE FAMILY RESIDENTIAL REAL ESTATE LOCATED IN MARYLAND ONLY.

And, then, emphasized by completely outlining it in a block, is the following:

TIME IS OF THE ESSENCE. *Time is of the essence of this Contract. The failure of Seller or Buyer to perform any act as provided in this Contract by a prescribed date or within a prescribed time period shall be a default under this Contract and the non-defaulting party, upon written notice to the defaulting party, may declare this Contract null and void and of no further legal force and effect. In such event, all Deposit(s) shall be disbursed in accordance with Paragraph 20 of this Contract.*

Wow, putting words in a block is pretty important stuff: pay attention! This notice pretty much rises to the level of a warning – overriding all other terms, provisions, and conditions. Deadlines are deadlines. No room for people with excuses and bad habits. If you are someone who is chronically, genetically, and reliably late – you might have problems with this contract.

So what are these “prescribed dates” and “prescribed time periods”? Actually, in this contract, there are quite a few.

The first prescribed date or deadline is proposed by the Buyer(s) and agreed to by the Seller(s) (or negotiated to agreement) and appears in paragraph 8:

8. SETTLEMENT: *Date of Settlement _____ or sooner if agreed to in writing by the parties.*

That “or sooner” part has to be by mutual agreement of the parties. That is also true if the need arises to make it “later” – even though nothing is said about that possibility here or elsewhere in the contract. Delays do occur and they should be addressed in writing in an Amendment to the contract duly signed and dated by all parties.

The next opportunity to introduce dates comes in paragraph 10:

10. FINANCING APPLICATION AND COMMITMENT: *Buyer agrees to make a written application for the financing as herein described within _____ (_____) days from the Date of Contract Acceptance. If a written financing commitment is not obtained by Buyer within _____ (_____) days from the Date of Contract acceptance: (1) Seller, at Seller’s election and upon written notice to Buyer, may declare this Contract null and void and of no further legal effect; or (2) Buyer, upon written notice to Seller, which shall include written evidence from the lender of Buyer’s inability to obtain financing as provided in Paragraph 9 of this Contract, may declare this Contract null and void and of no further legal effect.*

Again, these dates are typically selected by the buyer(s) based on their personal schedule, along with guidance from their loan officer as to their ability to deliver that written financing commitment. And, as always this schedule is subject to acceptance by the seller(s) and is open to negotiation.

12. HOME AND/OR ENVIRONMENTAL INSPECTION: *Buyer acknowledges, subject to Seller acceptance, that Buyer is afforded the opportunity, at Buyer’s sole cost and expense, to condition Buyer’s purchase of the Property upon a Home Inspection and/or Environmental Inspection in order to ascertain the physical condition of the Property or the existence of environmental hazards. If Buyer desires a Home Inspection and/or Environmental Inspection contingency, such contingency must be included in an addendum to this Contract.*

The typical language found in the **PROPERTY INSPECTIONS ADDENDUM**, allowing insertion of the agreed upon time period for six or more key inspections is as follows:

... a separate written statement indicating what repair or corrective action is required, shall be submitted to Seller, within _____ (____) days from the Date of Contract Acceptance.

Back within the contract, along with lots of other specific provisions about wood destroying insect inspections and who is responsible for what, time deadlines are provided in the middle of paragraph 19:

19. WOOD DESTROYING INSECT INSPECTION: *... Seller's decision regarding treatment and repair of damage shall be communicated in writing to Buyer within five (5) days from receipt of the report, after which Buyer shall respond to Seller in writing with Buyer's decision within three (3) days from receipt of Seller's notification of Seller's decision . If Seller does not notify Buyer in writing of Seller's decision within five (5) days from receipt of report ...*

Curiously, for something as important as the earnest money check, there isn't a specific or prescribed time period for its return if a purchase offer is not accepted and transformed into a ratified contract. Buried in the middle of paragraph 20 is the following provision:

20. DEPOSIT: *... If Seller does not execute and accept this Contract, the initial Deposit instrument shall be promptly returned to Buyer. ...*

“Promptly”? Let's just let it go for now – attorneys are far from perfect.

The all-important “clear title” is addressed in paragraph 12, with a lengthy fourteen day provision to allow time to cure problems found with title:

21. DEED AND TITLE: *... In the event Seller is unable to give good and merchantable title or such as can be insured by a Maryland licensed title insurer, with Buyer paying not more than the standard rate as filed with the Maryland Insurance Commissioner, Seller, at Seller's expense, shall have the option of curing any defect so as to enable Seller to give good and*

merchantable title or, if Buyer is willing to accept title without said defect being cured, paying any special premium on behalf of Buyer to obtain title insurance on the Property to the benefit of Buyer. In the event Seller elects to cure any defects in title, this Contract shall continue to remain in full force and effect; and the date of settlement shall be extended for a period not to exceed fourteen (14) additional days. ...

And, last but not least, the final walk-through inspection has a time period provision:

22. CONDITION OF PROPERTY AND POSSESSION:

At settlement, Seller shall deliver possession of the Property and shall deliver the Property vacant, clear of trash and debris, broom clean and in substantially the same condition as existed on the Date of Contract Acceptance. Buyer reserves the right to inspect the Property within five (5) days prior to settlement. ...

OK, they had to be tricky and stick one in here that works in reverse. Let's say settlement is scheduled for Friday the 13th of the month. The five day count would begin with day 1: Thursday the 12th, day 2: Wednesday the 11th, and so on, until we come to day 5: Sunday the 8th. Therefore, the buyer has the right to inspect the property within that five day period. That being said, let's say that inspection reveals the fact that an agreed upon repair or some other condition had not been completed. The buyer would then have the opportunity to give notice of that fact and request resolution to the shortcoming. It would only then be reasonable for the buyer to have the opportunity for a follow-up inspection. And, that final inspection might best be accomplished immediately prior to the scheduled settlement.

Paragraph 22 continues with:

EXCEPT AS OTHERWISE SPECIFIED IN THIS CONTRACT, INCLUDING THIS PARAGRAPH, THE PROPERTY IS SOLD "AS IS."

The obligations of Seller as provided in this paragraph shall be in addition to any Disclosure and Disclaimer Statement as required by Section 10-702, Real Property Article, Annotated Code of Maryland and

any provision of any inspection contingency addendum made a part of this Contract (See Property Inspections Notice).

And then, much further down near the end of the contract form is a supporting definition of the word “day”. Seriously? Believe it or not, in the past there have been untold arguments, disputes, and lawsuits regarding the definition of the word “day”. What is the intent of the word in the contract? Does it mean a “business day”? What is the definition of a business day? Are all businesses using the same days? What about holidays? Do they count? Whose holidays? When does the clock start when counting days? When does it end?

So, we have been provided with an answer to all those questions further down near the end of the standard contract:

58. COMPUTATION OF DAYS:

As used in this Contract, and in any addendum or addenda to this Contract, the term “days” shall mean consecutive calendar days, including Saturdays, Sundays, and holidays, whether federal, state, local or religious.

A day shall be measured from 12:00:00 a.m. to and including 11:59:59 p.m. in the Eastern Time Zone. For the purposes of calculating days, the count of “days” shall begin on the day following the day upon which any act or notice as provided in this Contract, or any addendum or addenda to this Contract, was required to be performed or made.

So why all this fuss about time periods and deadlines? Fundamentally, without them the process of purchasing / selling a home would be in great jeopardy. In addition to the fact that there is a large sum of money involved, there are a lot of moving parts here: sellers, buyers, moving companies, employers, schools, utilities, lenders, inspectors, repairmen, title and settlement personnel, attorneys, insurance agents, and on, and on. All of these “players” have a part to play and they need to be orchestrated by the miracle workers that were not named above: real estate agents. Things need to be accomplished in a certain sequence and on schedule for

the benefit of all. That will also mean that cooperation and patience are of the essence as well!

What if deadlines are not met? Well, let's remember what the contract states in that all important block containing three sentences at the very top of page 1. The second sentence of the three provides:

The failure of Seller or Buyer to perform any act as provided in this Contract by a prescribed date or within a prescribed time period shall be a default under this Contract and the non-defaulting party, upon written notice to the defaulting party, may declare this Contract null and void and of no further legal force and effect.

So, the first answer to the question is: nothing. Literally, nothing happens. Nobody turns off the oxygen supply – just relax and see if something can be negotiated to keep the process moving forward. Clearly though, if a deadline is missed, it is an opportunity for the other party to get out of the contract. But when everyone wants to keep trying, simple issues like a short delay can be addressed by the parties involved. Preferably, any negotiated agreement to extend deadlines will be put in writing – probably in the form of an Amendment to the contract. This is something the real estate agents can prepare. If the issues are more complex, it is recommended that parties involved seek competent legal advice.

Ironically, the Maryland form does not provide an opportunity to establish what might be the first important deadline. When this form is completed and tendered by the buyer(s) (with their agent's assistance) it is a purchase offer (not a contract yet). How long is that offer good for? Nothing is said about a deadline for response. Is it a few hours, days, ...?

Beyond the issue of practicality and common courtesy, an uncomfortable delay may lead to a withdraw of the offer simply because the seller(s) took too long to respond – in the opinion of the buyer(s).

So, buyers may want to consider (with their agents) adding another date and time - establishing a deadline for the sellers' response. It can easily be added at the end of paragraph 18 where this opportunity is provided:

□ *Other Addenda/Special Conditions:*

Or, a blank Addendum form may be used. Suggested wording:

This offer will become a binding Contract when acceptance is signed by Seller and a signed copy delivered in person, by mail, facsimile or electronically, and received by Broker named on page 11 of this document by _____, 2017 at ___:___ a.m./p.m., Eastern Standard Time.

Buyer may withdraw this offer at any time prior to receipt of Seller's signed acceptance. If no signed acceptance is received by this date and time, this offer shall be deemed withdrawn and the Buyer's Earnest Money shall be returned.

Similar deadlines may be introduced for response to any subsequent counter-offers. A blank Addendum form may be used if necessary.

Upon receipt by all parties of a completely signed, initialed and dated copy of the document with any and all attachments, the documents become known as an "accepted", "ratified", or "executed" contract – and the clock starts ticking. TIME IS OF THE ESSENCE!

DISCLAIMER

John P. Hale is a licensed real estate agent in Maryland and Pennsylvania. He is affiliated with Coldwell Banker Residential Brokerage in Westminster, Maryland. John has been licensed since 2000 and also practiced in Tucson, Arizona for many years. Mr. Hale holds the following designations and certifications awarded by the National Association of REALTORS® (NAR) and other authorized institutions: ABR-Accredited Buyers Representative, AHWD-At Home With Diversity, CNE-Certified Negotiation Expert, CRMS-Certified Risk Management Specialist, CRS-Certified Residential Specialist, CTA-Certified Tourism Ambassador, e-PRO-Online Real Estate Practice, GRI-Graduate of Realtor Institute, MRE-Master of Real Estate, MREP-Mortgage Real Estate Professional, and MRP-Military Relocation Professional.

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