

# THE OFFER TO PURCHASE

## A Review From the Buyer's Perspective

**CAUTION:** The information provided here is not intended to be considered as legal advice. If you/the buyer wish to obtain information regarding how the clauses and contingencies in the offer relate to your specific situation, you should direct those questions to an attorney. License laws do not allow real estate agents to give legal advice unless they are a licensed attorney.

**FACT:** It is unlikely that any two Offers to Purchase are ever exactly the same. The basics of the offer are similar. The people, their agendas, the details, and the contingencies are not the same.

Note: We won't be focusing on the specific details of an offer...only tips that will enhance your knowledge of the contract before you sit down to execute the contract with an agent or an attorney. The better prepared you are when you decide to write an offer the more confident you will be and the more comfortable you will be with the process.

### Agency

Are you the customer or the client of the person helping you draft your offer? THERE IS A DIFFERENCE. I am going to assume you are working with a real estate licensee. Is the agent working in your best interest; or, is the agent working in the best interest of the seller? Is the agent drafting your contract working as a dual agent

? Whose side will the agent be on if you are on the witness stand in the chambers of the Supreme Court?

- If you want the agent/agent's company to represent your best interests, you will want to sign a Buyer's Agency agreement with the agent. The contract is actually with the company for whom the agent works and the agent helping you is the representative of that company. With this contract you become the CLIENT of the brokerage.
- If you do not execute a Buyer's Agency contract, you are the CUSTOMER of the brokerage with whom the agent is affiliated. The agent/company is the agent of the seller if that agent/company has the listing contract with the seller of your chosen property. If the property you have chosen is listed by another brokerage and you are the customer, the agent/company helping you is considered a sub-agent of the listing brokerage.
- Being the customer does not mean that you can't trust the people who are helping you. License laws require that agents are fair and honest with all parties. All agents, whether working with customers or clients, are required to tell you about anything of which they

are aware that could be considered a material adverse fact in the transaction. They are required to be aware of anything that could have been discovered with a diligent search of available information and a competent visual inspection of the property. They are NOT required to climb into crawl spaces, up on roofs, or other difficult-to-inspect areas. They are NOT expected to be experts on the mechanicals or the structure of the property. That's why you should always choose to hire a professional, arm's-length inspector, and include this as a contingency in the offer. More about that later.

- If you choose to execute a Buyer's Agency contract you will be asked to decide what kind of agency you prefer.
  - Designated Agency – *The listing agency represents the seller. That same agency/brokerage also has a buyer agency agreement with the buyer. If you, as that agency's CLIENT, choose a property whose seller is also the agency's CLIENT, a Multiple Representation agency exists. Two agents are now involved- your agent and the seller's listing agent. If your agent is the listing agent of your chosen property, that agent has TWO clients. In that case, the company will assign another agent to stand with you in the negotiations and the rest of the transaction. If your agent is not the listing agent, there are already two agents involved. **THIS CHOICE REQUIRES THAT THERE BE TWO AGENTS IN THE TRANSACTION.***
  - Multiple Representation, but do not consent to designated agency – Multiple Representation was formerly called "Dual Agency." Your agent is also the agent of the seller. The agent maintains a role of neutrality. Fairness to all parties is required. Confidential information may be expected by both the buyer/client and the seller/client. If the client chooses "but does not consent to designated agency" services provided to a particular client may be limited.
  - Reject Multiple Representation relationships. This would be considered Single Agency. In this case a Buyer's Agent would not be able to show their buyer/client any of the company's listings, including the agent's own listings.
- If it would happen that conflicting agency choices occur during the course of the event, it is possible to approach the parties to change their representation choice prior to the drafting of an offer and the subsequent negotiations. If that occurs, the transaction can proceed with amended representation that matches the situation.
- NOTE: Pre-agency is allowed while the agent for the brokerage is assisting you in browsing through listings that are available and even showing you properties. In that case he/she is assisting you with the preliminaries of purchasing a property of your choice. The agent should explain this to you before providing brokerage duties such as helping you make a buying decision by offering more property information than the basics and by discussing an offer. If you do not execute a Buyer's Agency contract, the agent will give you a form where you acknowledge that you understand that the agent is working as the agent or sub-agent of the seller and that you are the customer, rather than the client.

If this confuses you, you may want to consult an attorney for clarification and to confirm the information in this report correctly explains the differences between representation choices, and how the choices may affect you.

**Fill in the blanks:** That sounds pretty elementary. If the agent writing your offer is leaving lines on the contract blank, ask them to put a dash or “N/A” in those spaces. Blank spaces in an offer are an invitation to trouble and misunderstanding. Additionally, if the contract is sloppy or illegible, ask the agent to be more careful. If and when a conflict would arise, the side who initiated the contract could be held responsible for misunderstood and illegible phrases.

**Inclusions:** It doesn't matter what the listing contract says. It doesn't matter what the Multiple Listing information says. It doesn't matter what the Listing Office's information says. If you want it included, it **MUST** be written in the offer. Period. If you want the cupboards in the garage; if you want the work table in the workshop; if you want the water softener – whatever you want to be included should be listed. There are blank lines elsewhere in the offer if you need more space. If the you “think” it's included – write it down to be sure. Never **ASSUME** anything. You know what that happens when you divide that word into three words.

**Exclusions:** Here is a place that trouble after the accepted offer frequently occurs. The water softener often becomes a problem. Even if it's a rental, exclude it. There is verbiage in the offer regarding fixtures that could cause conflict. Other items that appear to be staying and don't could be Jungle gyms in the yard, pool equipment, fireplace inserts, decorative lighting, custom window treatments. If you want it – and if you don't – write it into your offer.

**ACCEPTANCE:** Acceptance occurs when all buyers and sellers have signed a copy of the Offer to Purchase. Binding acceptance occurs when that fully signed document is properly delivered per at least one of the options for delivery. Be aware of the differences when you are counting “Time is of the Essence” deadlines for acceptance and performance. Deadlines are commonly calculated from acceptance. Specify Binding acceptance if that's what you want. Do the printed words convey your intentions and expectations? Carefully consider how much time you need for performance of contingencies and deadlines.

**DELIVERY:**

(1) Personal Delivery – that's easy. Walk up to the Party or the Party's contracted recipient and hand it to them.

(2) Commercial Delivery – depositing it, postage/fees prepaid, addressed to the Party or the Party's contracted recipient.

(3) Fax – either the buyer's, the seller's, or the agent's fax number. If the buyer's fax is on the contract and it gets to the agent's fax - it is **NOT** properly delivered.

(4) US Mail – Depositing, postage prepaid in the mail to the address designated in the offer.

(5) E-Mail – At this writing, this clause seems to be the most misunderstood clause in the offer to purchase. **FIRST** – the transaction must be a consumer transaction (not commercial) and the property is going to be used for personal, family or household purposes. **SECOND** – “each” consumer providing their e-mail address must have first consented electronically to the use of electronic documents...” This is a federal law. In 2010 every offer I received on my listings had the agent’s or the agent’s business office e-mail address in this part of the contract. Unless the agent is the consumer AND unless that agent/consumer has first consented electronically to the use of electronic documents, the agent’s e-mail is NOT an acceptable method for binding acceptance to occur.

**OCCUPANCY:** Are you selling your current home? Do you have an accepted offer? Disclose the details of occupancy to your agent. Be sure the date you are giving occupancy coincides with the date you can get into your new home. An agent in my office, a few years back, actually let the buyer come home and stay with him because they got caught in an occupancy squeeze. Campers and tents also work well as interim housing when you haven’t coordinated occupancy dates!

**DEFINITIONS:** Don’t pass over this section. There are words in there that can bite badly if they apply and the agent doesn’t know that. The listing agent has primary responsibility to find out about these items. The sub-agent/buyer’s agent also has responsibility. Ignorance is not a defense when due diligence could have saved the situation. If you don’t understand the entire offer, take your time; ask questions; talk to an attorney...whatever it takes to fully understand what you are signing.

**CLOSING:** If your closing is delayed, you are **REQUIRED** to extend the date in writing. Verbal is not binding. There have been more than a few agents who received DRL reprimands for not putting agreements in written form on an approved form. Changes in the offer are not legal unless they are in writing and signed by all parties to the offer.

**CLOSING PRORATIONS:** The pre-printed contract verbiage is self-explanatory. Real estate taxes may be more complicated than more constant pro-rations like subdivision dues, assessments, etc. There are a few things to be considered. Are you paying a lot more for the property than the current assessment? Or, a lot less? Will there be a new assessment in place before the closing? Is the property described on the tax bill the exact same property that is being transferred? Are you buying more or less than the parcel described in the legal description? Is there an assessment payable from previous municipal or association projects? Will that be paid off at the closing which would change the pro-ration calculation.

**LEASED PROPERTY:** The word “if” defines your use of this clause. The clause is self-explanatory. If applicable, be sure you understand it. If the listing agent hasn’t provided enough information, obtain what you need or write a contingency that addresses the missing information.

**RENTAL WEATHERIZATION:** If it’s a 1-4 family and you are going to occupy the property, it is likely you will be exempt. If you aren’t going to occupy the property, you are subject to the state’s Rental Weatherization rules. In Wisconsin, you can check the DILHR web site.

**REAL ESTATE CONDITION REPORT:** Pay special attention to your rights to professionally inspect the property in a contingency clause that addresses this. The following words are part of the Wisconsin contract: “...A prospective buyer who does not receive a report within 10 days may, within two business days after the end of the 10 day period, rescind the contract of sale...by delivering a written notice of rescission to the owner or the owner’s agent...” (Regarding rescission rights, buyer should consult an attorney for additional information.)

#### **ADDITIONAL PROVISIONS/CONTINGENCIES:**

**Every Contingency requires a Condition, a Consequence, and a Deadline.  
No exceptions!**

An example: “Buyer to provide financing pre-approval 2 days from acceptance.”

So – what happens if you don’t do it? If you want the seller to do something by verbiage of a contingency, what happens if they don’t?

**Likely Nothing.**

There is no stated consequence if they do not perform. A good attorney would catch that glitch quickly and turn the situation in the other side’s favor. The writer of the contract may be ruled against in court if the contract wasn’t well-written. A well-written contingency needs some teeth in it for non-performance in a timely manner.

State the conditions of the contingency, the consequences if they don’t, and the deadline for performance. Example: “ Seller reserves the right to withdraw from this offer if buyer, within 3 working days of this accepted offer, does not provide to seller/seller’s agent a written statement from a bona fide lending institution that the buyer is pre-approved for financing as stated in this offer to purchase.”

Anytime you include a contingency for absolutely anything, you need: a **condition** (what do you want done), a **consequence** (what happens if it doesn't happen) and a **deadline** (if not performed in time). The example shown here is just a guideline. Whether the condition is a requirement of the buyer or a requirement of the seller, use the same principle:

Contingency = Condition, Consequence, and Deadline.  
**C = C + C + D**

**WHEN SHOULD YOU INCLUDE A CONTINGENCY IN AN OFFER YOU ARE EXECUTING?** When you have an expectation of use that may not be consistent with legal use or the current use; when a conditional use permit may be required; when you only want to buy the property if you will be allowed to do something – such as have a horse, a pig or a duck! Maybe you want to fence the yard, have 3 or 4 dogs; or raise chickens. Do you plan to run a home-based business in the basement? Perhaps you want to build a second garage or maybe a pole building; put in a pool, or build an addition. The list can be endless. In other words – if have specific needs, consider including a contingency that gives you time to confirm you can do what you want to do with the property.

NOTE: Story. The family who bought a property in an area that seemed like country... They were avid 4-H members and were active in the horse project. They were moving so their children could raise their horses for the fair. It surely looked like they could do that. The seller's had a horse in the back yard and there was a small barn. It turns out the property had been in the family a long time and nobody said anything about their horse. But the neighbors did say something when the "new people" moved in with their 3 horses. The residential zoning of the property didn't allow farm animals. A lawsuit ensued. A well-worded contingency would have saved a lot of heartache.

**FINANCING:** Use care when completing the finance contingency. Of special note is the blank for the interest rate "not to exceed \_\_\_\_." Be specific. Be thorough. Be correct. An actual number should be written there.

NOTE: I suggest adding at least a ¼% to the rate the you expects. If the rates fluctuate during the financing process, you could be in a position of, or asking for an amendment from the seller. If the seller has another offer in the wings they like better than yours, you could have problems with the transaction . For instance, if you state that your interest rate has to be less than 6% and the rate goes up to 7%, the seller does not have to sign an amendment raising the rate. Amendments requested may not end up being amendments accepted by all parties.

**UNAVAILABLE FINANCING:** If financing per the terms of the offer turn out to be unavailable, be sure you understand that the seller has the right to offer you seller financing at the same terms as found in the offer. If the offer is a cash offer, or you are sure you can get

financing and don't want to use a financing contingency in your offer, be absolutely certain the cash will be available at the closing. If something happens and the cash isn't available, you may not be able to rescind the offer. You could be sued for specific performance.

**BUYER'S LOAN COMMITMENT:** Pay close attention to the following and read it carefully. **BUYER, BUYER'S LENDER AND AGENTS OF BUYER OR SELLER SHALL NOT DELIVER A LOAN COMMITMENT TO SELLER OR SELLER'S AGENT WITHOUT BUYER'S PRIOR WRITTEN APPROVAL OR UNLESS ACCOMPANIED BY A NOTICE OF UNAVAILABILITY.** I encourage you to remind their loan officer not to send out a written loan commitment without your written approval.

**APPRAISAL CONTINGENCY:** Stay in touch with your lender so that the appraisal is ordered and completed in time to match with the timeline in this contingency.

**CLOSING OF BUYER'S PROPERTY CONTINGENCY:** This clause may be written differently, depending on whether you are a buyer or a seller. The seller's agent may opt to add to the blank line at lines 310-311 may include the following: "written waiver of the Closing of Buyer's Property Contingency and [the financing contingency, the professional inspection report, and any contingencies that reference property conditions required by the buyer in the accepted offer to purchase – except water, well, and sanitary disposal systems performed by a licensed plumber.] The buyer may attempt to have the clause negotiated as written. The Seller/seller's agent may not allow that. As the buyer, the financing contingency, the inspection report, etc. may give you an advantage if you would like to opt out of the accepted contract. It may not give you that advantage, too. All transactions are different.

**TIME IS OF THE ESSENCE:** When writing an offer, be aware of what "Time is of the Essence" means.

NOTE: When doing a counter, Time is of the Essence may not survive all of the dates in the offer unless "Time is of the Essence as to all dates in this offer" is restated. Consult an attorney if you have questions. If in doubt, restate it if that is the intention of the person making the offer/counter offer.

**TITLE EVIDENCE:** It is prudent for the seller's agent to do a Search & Hold on their listings to find out early if there are problems that need to be addressed. The sooner you find out about mortgages that were satisfied but not properly recorded, deaths that occurred without termination of ownership, judgments, unsatisfied liens, etc.

NOTE: If dealing with a foreclosure or short sale, special care should be taken to be sure that the lending institution has the right to foreclose, deficiencies in short sales have been satisfied, etc.

**TAKE SPECIAL CARE WITH SHORT SALE AND FORECLOSURE PROPERTIES. I**

highly recommend a consultation with an attorney! Horror stories are often told that may have been avoided with competent legal representation.

**SPECIAL ASSESSEMENTS AND OTHER EXPENSES:** Due diligence by the agents, the buyers and the sellers is important when it comes to assessments and other expenses that may be legally attached to the property being sold.

**EARNEST MONEY:** My advice? Be sure you understand, at the time of the offer, that the agent has little or nothing to say about who gets the earnest money when a transaction fails and an argument ensues over its dispersal. The procedure is specifically regulated by written rules; attorneys are involved; the verbiage in the Offer to Purchase is a very short version of the complicated process of disbursing contested funds. Every now and then a buyer they get the earnest money back if they don't close or a seller thinks they get it if the buyer doesn't close. You need to know up front that it doesn't work that way. Agents tend to be blamed if earnest money isn't disbursed according to the party's expectations. Understanding before it's a problem can often avoid contentious problems

NOTE: I learned that lesson when the septic failed on my listing. Seller wouldn't fix it. Buyer didn't want a failed septic. Buyer wanted their earnest money back. (They had the proper contingency in place.) Seller refused to sign the Cancellation and Mutual Release. In the time period as spelled out in the pre-printed portion of the offer the buyer sent off an angry letter to DRL telling them I wouldn't give them their money back. It was resolved, but I had to take the time to answer the complaint and file the papers the DRL wanted. It's called learning by doing – the old 4-H motto.

**INSPECTION CONTINGENCY:** With very few exceptions, the purchase of a home has much less chance of coming back to bite you after the closing if you have a professional inspection. For almost as many years as I was in the business I “strongly encouraged” every buyer to hire a professional inspector. If they didn't want one I would ask them to sign a statement that I told them to. If they didn't want to do that I noted their refusal on the form, dated it and put it in the file. The verbiage on the decision not to perform the inspection I used was: “Buyer has been advised of the benefits of having a third-party, professional inspection of the subject property and waives their right to said inspection.” Those words were proof I had told them to do it and they didn't want to.

NOTE: Sometimes well or septic inspections come back with notes that indicate there may be some issues with the systems. If you have questions call the inspector for clarification.

**THERE IS A DIFFERENCE BETWEEN A PROPOSED AMENDMENT AND A NOTICE OF DEFECTS.** Read the Caution aloud and mark a check by the Inspection Contingency –

**“A PROPOSED AMENDMENT IS NOT A NOTICE OF DEFECTS AND WILL NOT SATISFY THIS NOTICE REQUIREMENT.”** Often those forms are not used properly. Allow enough time if you wish to present an amendment requesting that the seller fix something. If it is a deal-breaker if they won't do the repairs you want, the deadline for Notice of Defects is crucial.

**THE LAST THING I WANT TO STRESS...**and very important to the success of your real estate purchase – select an agent who is professional, is educated way beyond the requirements to obtain a license, who knows the neighborhood of your choice, and one who has embraced the tools available to all, but are only used by the very best. If you choose to work with a new licensee, ask if they will bring in a veteran Realtor® to assist them. If, at any time during the search, the offer, and beyond you don't feel comfortable with the way things are going or have gone, you have the option of talking to their sales manager for assistance; you can call an attorney for help; and, if things, don't go well at all you have the option of calling their local Realtor® association if they are a member of their state and national associations. If they don't belong to their professional association, a call to an attorney may help. The better the agent, the better you are prepared, and the better the brokerage – the better your experience will be.

God Bless

I hope your journey into home ownership is a wonderful experience!