

**Topic:** The “New” Due Diligence Procedure – Part 2

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Though the “new” contract presents the due diligence procedure without alternatives, the parties can alter or eliminate the due diligence procedure through an addendum.

**As-Is Offers:**

To begin, the buyer can make an as-is offer. If this is the Buyer’s wish, simply strike through paragraph 8 of the contract (have it initialed) and prepare an as-is addendum (which we can furnish to you upon request).

**Modified Due Diligence Offers:**

Next the buyer can retain his due diligence period and termination right, but make termination more convenient. Because of the potential inconvenience of delivering a “Termination Fee,” certain alternatives suggest themselves -- they are designed to curtail the time involved in effecting a termination. In Part 1 of this article, we pointed to the need to at least consider how much time will be needed to effect a termination. For a terminating buyer, you should procure a cashier’s check and deliver it along with the Notice of Termination to the “Delivery Address” in the contract. This can be inconvenient, especially where you have an out-of-state buyer who will likely have to FedEx the cashier’s check to you – once you received it, you are responsible for making the delivery before the deadline. These termination logistics should be factored into your calculation of the length of the due diligence period you present with the offer. If you believe the due diligence inquiries and any negotiations can be completed in 14 days, you will probably want to add 3 more days to effect a termination (“termination days”). A 17-day due diligence period is less attractive to a seller than 14-days, so if there is an equal offer from another buyer with a 14-day due diligence period, the seller might pass on your buyer’s offer in favor of that one. You can, however, eliminate the 3 “termination days” from your buyer’s due diligence period if:

1. The Termination Fee is “zero.” To do this, simply put a “zero” in the “Termination” portion of paragraph 8 of the contract. The due diligence period and the buyer’s right to terminate both remain, but the buyer can effect a termination by simply delivering a “Notice to Terminate” by email; or
2. The parties agree the Termination Fee will be paid from the earnest money. To do this, strike through the “Termination” portion of paragraph 8 of the contract and attach an addendum (which we can furnish to you upon request) as follows:

*Termination: During the Due Diligence Period, the Buyer may unilaterally terminate the contract only by delivering to the Seller a written Notice of Termination. This termination may be for any reason or no reason.*

*Termination Fee: In the event the Buyer delivers a Notice of Termination to the Seller prior to expiration of the Due Diligence Period, the Earnest Money shall be refunded to the Buyer, except that the sum of \$\_\_\_\_\_ shall be disbursed to the Seller by the Escrow Agent and retained by the Seller as a Termination Fee. \*\**

**\*\*Note:** while this option permits contract termination with the delivery of a “Notice to Terminate,” the Termination Fee will not be paid at the same time. Instead, the Escrow Agent will disburse upon receipt of a signed “Release” or a court order. Sellers might not like this, but a buyer might “make up for it” by increasing the termination fee.

3. If the foregoing alternatives are not viable in your particular situation, consider recommending to the buyer that he send you a cashier’s check “now” (made payable to the seller) for you to hold unless and until he decides to terminate. If the buyer does this, the potentially time-consuming logistics of getting a check to you at the last minute are avoided.

These methods may serve as practical alternatives and can benefit both parties (i.e. a seller will prefer a shorter due diligence period so it improves the chance of the buyer’s offer being accepted, etc.) – ideas that benefit both parties generally lead to a better transaction experience. The methods described here are by no means the only ones. You and your clients may find other quality ideas – you are limited only by your imagination and presentation abilities.