

SCOTT B. UMSTEAD, P.A.

ATTORNEY AT LAW



Episode 14: An Approach to Back-Up Offers

Call from the Agent: My buyer wants to terminate his back-up offer and get his earnest money back – can he do that?

The Response: I like this question! Here the back-up offer was made by checking the “back-up clause” on SC State Form 391. The clause reads exactly as follows:

“This Contract, if accepted by all Parties, shall be a Back-Up (Non-Primary) Contract. This Contract is contingent upon all presently pending contracts not being enforceable and no lawsuits resulting. If any presently pending contracts close or this Contract does not become the Primary Pending Contract by November 15th (sample date), this Contract will become null and void with no action required by either Party. Any Back-Up Contract shall become the Primary Contract when its earliest date of fully negotiated terms is the earliest date of all pending contracts and all previously dated contracts have become null and void, unenforceable or released. The date this Contract is Primary and parties have Notice is the Back-Up/Primary Effective Date. If this Contract becomes the Primary Contract, the Parties agree that the Closing Date shall be adjusted by computing or adding 30 Calendar Days (sample time period) to the Back-Up/Primary Effective Date.”

In this situation, the buyer wanted to terminate the back-up offer before the contingency date of November 15th. The seller refused to allow it and the agent emailed to ask if the buyer can terminate and receive a refund of his earnest money.

Many of the state forms are very good, but this particular clause in State Form 391 is less than perfect because it doesn't address the ability to terminate prior to the contingency date. My answer to the agent pointed to this imperfection and outlined a position the buyer could take based upon other provisions in the contract itself (i.e. the definition of Effective Date and the possibly implied truth that any contract can be terminated prior to its Effective Date). The specifics of that answer were relevant to the inquiring agent and his client, but what is probably more relevant to the readers here is a broader consideration of how back-up offers can be structured with greater clarity.

Things like this hinge on the desires and concerns of each party, but we have to begin with a reminder that agents/parties aren't required to use a “state form” in anything they do. The forms are oftentimes convenient, but the drafters neither imagined nor intended the forms would be ideal in each and every circumstance. Therefore, while not completely setting aside the form, it is probably helpful to consider two possible alternatives to approaching a back-up offer:

1. Prepare a back-up offer and present it (with earnest money) with an addendum stating (among other things) the buyer can terminate the back-up offer anytime prior to the back-up offer becoming the primary contract and, upon doing so, the earnest money shall be immediately refunded to the buyer.
2. Prepare a back-up offer and present it (without earnest money) with an addendum stating (among other things) that, upon the seller notifying the buyer that the back-up offer is positioned to become primary, the buyer has 24 hours to either pay the earnest money and move forward or withdraw the back-up offer. Admittedly, this might not be very enticing to a seller because it isn't accompanied by an earnest money deposit – in other words, it lacks real commitment.

In case you feel it may be helpful to you, the next page is a Back-Up Offer Addendum I prepared for an agent friend. While today's question/answer is about the ability of a buyer to withdraw a back-up offer, you will notice the linked document deals with another knotty point by addressing how the time periods in the back-up offer are affected when the back-up offer becomes the primary contract.

Where a back-up contract becomes the primary contract, the parties or the lender may wish to memorialize the change in writing along the following lines:

“The Parties acknowledge notice of termination of the Primary Contract to Buy and Sell Real Estate has been delivered to the Buyer and the Back-Up Offer now becomes the Primary Contract with an Effective Date of _____. The Parties agree the Closing Date shall be _____. All time periods for inspections, covenants and other obligations shall be calculated and re-stated based on their time relationship to the new Effective Date set forth above. All remaining terms and conditions of the Contract not inconsistent herewith shall remain in full force and effect.”

Or re-state each time period specifically as follows:

“The Parties acknowledge notice of termination of the Primary Contract to Buy and Sell Real Estate has been delivered to the Buyer and the Back-Up Offer now becomes the Primary Contract with an Effective Date of _____. The Parties further agree as follows:

- A. Para 4: The Closing Date shall be _____.
- B. Para 8: The Repair Inspections and Requests shall be delivered to the Seller on _____.
- C. All remaining terms and conditions of the Contract not inconsistent herewith shall remain in full force and effect.”

I wish each one of you the very best!

BACK-UP OFFER ADDENDUM

ADDENDUM # _____

In reference to the Agreement to Buy and Sell Real Estate between _____ (“Buyer”) and _____ (“Seller”) dated _____ (Back-Up Offer), covering the real property located at _____, the undersigned Buyer and Seller further agree as follows:

ACKNOWLEDGMENT

Buyer and Seller acknowledge there is a previously accepted Agreement to Buy and Sell Real Estate (Primary Contract) and agree as follows:

1. EFFECTIVE

If the Primary Contract is terminated, unenforceable and no lawsuit is pending, the Seller shall notify Buyer in writing of said termination and this Back-up Offer shall become effective and binding as the Primary Contract upon Buyer’s receipt of the written notification, which date shall become the Effective Date. The Closing Date and all time periods for inspections, covenants and other obligations shall be calculated and re-stated based on their time relationship to the new Effective Date set forth above.

2. WITHDRAWN

Buyer may withdraw this Back-up Offer in writing any time prior to it becoming the Primary Contract and, in said event, the earnest money shall be immediately refunded to the Buyer.

3. EXPIRATION

Unless previous withdrawn by the Buyer, this Back-up Offer shall expire on _____ or upon closing of the Primary Contract, whichever occurs first. Upon expiration, the earnest money shall be immediately refunded to the Buyer.

4. OTHER TERMS

SELLER’S RIGHT TO MODIFY CURRENT PRIMARY CONTRACT

Buyer acknowledges nothing in this Addendum shall in any way restrict the right of Seller to modify the terms of the current Primary Contract, as Seller, in Seller’s sole discretion, may deem advisable.

CONFLICTING TERMS

The above is acknowledged by the Buyer and Seller to be part of the Agreement to Buy and Sell Real Estate/Back-Up Offer. If any dates, terms or conditions in this Back-Up Offer Addendum conflict with the above referenced Agreement to Buy and Sell Real Estate/Back-Up Offer, this Addendum shall control.

Buyer

Date: _____ Time: _____

Buyer

Date: _____ Time: _____

Seller

Date: _____ Time: _____

Seller

Date: _____ Time: _____