

# How to Build a Bulletproof Contract

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**R**EALTORS® devote hours, days, weeks and months marketing, advertising, showing property and negotiating sale and purchase transactions, but significantly less time and thought to the actual drafting of the Sales Contract.

Fortunately, NABOR®'s Legal Resources Committee has spent countless hours, days (and even years) drafting forms to streamline the drafting process and making it as foolproof as possible, and creating safety nets and default clauses to minimize potential liabilities associated with such drafting. But like any other good tool, it's only valuable if used correctly.

Following are some valuable tips to keep in mind during the drafting process, to ensure a bulletproof (or at least a well-armored) Contract:

**1. Read the Sales Contract.** You've all attended one or more NABOR Contract seminars and read various NABOR articles, but have you ever actually sat down and read the entire Contract from start to finish? Granted it's not as riveting as a good spy novel or juicy episode of Real Housewives, but you owe it to yourself and your Sellers and Buyers to take the time before season is in full swing.

Committee members receive calls weekly inquiring whether a particular timeline or deadline is to be counted in calendar or business days, or whether closing occurs on a Friday or a Monday if the Sales Contract Closing Date is a Saturday (REALTORS® tend to favor closing dates on the 15th or 30th of the month, often without consulting the calendar to confirm whether that day is a business day). Tip: Standard R of the Sales Contract, entitled MISCELLANEOUS, was created by the Committee to warehouse all the general information that applies throughout the entire Contract, and is your go-to paragraph for this type of general information.

**2. Avoid Drafting Your Own Contract Clauses and Addenda Whenever Possible.** The NABOR Legal Resources Committee has drafted Sales Contract clauses and Addenda for virtually every real estate transaction scenario you will encounter. Before you consider



drafting your own contract provisions, consult your contract documents library and scroll through all listed documents. The chances are very good that you'll find what you're looking for, and in the process you may stumble upon an Addendum or clause that you'd forgotten you needed, such as the Homeowners Association Disclosure Summary. If you don't find what you're looking for, consult your Broker or the attorney to whom you refer your Sellers and Buyers. They will likely either refer you to an applicable Addendum or assist in creating one. If you draft language yourself, you run the risk of either creating a conflict with pre-printed language within the body of the Sales Contract (hence our Paragraph 1 above), or inadvertently create open-ended or ambiguous language which could create an out for a Seller or Buyer having second thoughts about his sale or purchase or result in other unintended adverse consequences.

By way of example, the Committee has created an Addendum for Personal Property Inventory, designed to be used when the Seller didn't market the Property as furnished in MLS, but agrees during negotiations to sell the Property "fully furnished" and the value of the furnishings is included in the purchase

price. Now, if you were to poll 10 different Sellers and Buyers, there would likely be at least a half dozen different interpretations of what that term means. A Seller might consider "fully furnished" to mean all the furniture, but not the accessories, artwork, dishware, countertop appliances, etc.; whereas the Buyer considers "fully furnished" to mean every single item not glued down to or bolted into the Property, excepting only the Seller's toothbrush and undergarments. And keep in mind, this discrepancy doesn't typically arise until the pre-closing walk-through inspection when the Seller and Buyer are both emotionally, financially and otherwise significantly invested in the process.

The Personal Property Addendum gives the Seller 5 (calendar) days to create an inventory of the items included in the purchase price, and gives the Buyer 3 (calendar) days to review the inventory to confirm that the property is in fact "fully furnished" according to his interpretation, and if not, the Buyer can terminate the Sales Contract unless the Seller agrees to include the anticipated items. Although the Buyer may be perceived as having an unfair out under the Contract, the benefit to the Addendum is that any potential dispute



or discrepancy is flushed out very early on in the process.

A Contract that doesn't include the Personal Property Inventory Addendum, or contains a clause such as "property being sold fully furnished", or "all personal property items seen on 11/25/15" could very likely take a bullet along the journey toward closing.

And on the subject of personal property, be sure to review and discuss the items listed on Lines 3 through 5 of the Sales Contract with your Sellers, and specifically exclude on Lines 5 and 6 any items included in that pre-printed list, such as the family heirloom chandelier in the dining room or washer and dryer, that the Seller plans to remove from the Property at closing, or that are not located on the Property to begin with, such as storm shutters and panels. If those items aren't excluded and the Buyer is contractually entitled to receive those items, a listing realtor may spend the day prior to closing at the local appliance store or lighting shop.

**3. Don't Forget the Homeowners Association Disclosure Summary(ies).** Under Florida law and Standard H of the Contract, if the subject property is located within and governed by one or more mandatory Associations (and nearly all Associations are mandatory) and the Homeowner's Association Disclosure for each such mandatory Association is not provided to the Buyer prior to or at the time of execution of the Sales Contract, the Contract is voidable by the Buyer by delivering written notice of Buyer's intention to cancel the Contract to Seller or Seller's agent or representative (realtor or attorney) within 3 days after receipt

of the disclosure summary or prior to closing, whichever occurs first. Often times in the authors' experience, disclosure summaries are either not provided at all, provided for one but not both mandatory associations (Bay Colony in Pelican Bay for example), or are provided as a housekeeping matter after the Effective Date of the Contract. You've set yourself and your Seller up to take a bullet if your Buyer develops remorse that he's paid too much for the property, suffers a family medical crises, or the property he's been trying to buy for 2 years suddenly goes on the market.

**4. Financing Contingency.** This is without question one of the most misunderstood and misused clauses in the Sales Contract. There is not enough room in this article to identify all the ways this provision creates issues for Sellers and Buyers (and therefore realtors) if not properly drafted and managed, but the cautionary tale is this: Filling in the blanks without careful thought, consideration and discussion with your Seller or Buyer about the relative benefits and risks is a bullet hole waiting to happen.

As extreme examples, a listing realtor who allows a Seller to accept a financing contingency for a 30 year fixed rate 90% loan with a 1.95% interest rate cap is setting his Seller up for failure and potential missed sale opportunities during the contingency period (which is typically 45 days in the current lending market). A selling realtor who inserts a loan amount equivalent to 50% of the purchase price and fails to inform the Buyer that a low appraisal will still satisfy the contingency but require more cash at closing than anticipated and no mechanism

for reduction of the purchase price will likely have a very unhappy Buyer who thinks he overpaid for the Property. A selling Realtor who inserts a 20-day contingency period without discussing the pros and cons of that shortened time period with the Buyer may cause the Buyer to expend costs of inspections, loan and membership application, credit report and appraisal fees, only to have the Seller terminate the Sales Contract when the Buyer doesn't waive the financing contingency in 20 days is setting himself up for retribution from the Buyer. The takeaway from these examples is the importance of counseling your Sellers and Buyers of the associated risks and benefits of the contingency terms.

#### **5. The Good Faith/Diligence Clauses.**

Standard R(1) of the Contract states that "The parties have agreed to deal in good faith with respect to all provisions of this Contract", and the Financing Contingency clause in Paragraph 4 of the Contract requires the Buyer to "make a continuing good faith and diligent effort to obtain said loan". Standard D2b of the Sales Contract states that "Seller shall make a diligent effort to perform and complete all Remedial Action prior to the Closing Date". Without belaboring the point, be certain to encourage your Seller or Buyer to perform all his obligations in good faith and use the necessary diligence to meet all deadlines.

The takeaway from these examples is the importance of counseling your Sellers and Buyers of the associated risks and benefits of the contingency terms.

A party who fails to do so could encounter a claim of breach of contract performances. By way of example, a Buyer who doesn't meet the terms of his financing contingency prior to the contingency deadline could encounter resistance to the release of his deposit monies if the Seller has reason to believe the Buyer didn't act in good faith and with due diligence to obtain loan approval, or a Seller who dragged his feet completing the agreed-upon Remedial Action could face a Buyer demanding a delayed Closing Date...bullet holes.

**6. Parking Space(s).** If a selling REALTOR® and Buyer of a condominium unit are told or shown by the listing agent the parking space(s), cabana space(s), storage locker(s) or dock/slip space(s) allegedly assigned to and being sold with the unit, don't insert "1" or "2" or "One" or "Two" in the designated space(s) on Line 17 or 18 of the Contract. Insert the actual space number(s)/ letter(s) designation, such as "101" or "S208 and S210" or "BS6". Parking spaces perceived to be ideally located near the elevators or away from concrete poles, etc. and boat docks/slips that can accommodate Buyer's boat and/or have desirable locations for open water access have value to a Buyer. A Buyer who has his heart set

on the space(s) or location(s) he was told were assigned to the unit, but is only contractually entitled to "1" or "One" space or dock/slip whose location turns out to be different and perceived to have less value, may be obligated to proceed to closing nonetheless. Again with the bullet holes...

**7. Attorney Review.** A high percentage of Contracts written are "standard" contracts, which by their nature don't necessitate attorney review prior to execution. Having said that, never underestimate the value that certain Sellers and Buyers place on their attorney's legal counsel; especially those who express their desire for attorney review during negotiations. There is no worse position to be in than having advised your Seller or Buyer that in this market attorneys don't review contracts until they're signed, only to find out that you're missing a Homeowners' Disclosure Summary, neglected to properly address the matter of the personal property, or inadvertently drafted unachievable financing contingency provisions. Most real estate attorneys clearly understand and respect the momentum of your negotiations and need for expedited review, and especially in a single family residence scenario where a Buyer has no built-in rescission right once the Sales Contract

is executed and binding, it's far better to flush out any vulnerability in the Sales Contract early rather than later in the process.

**8. Use Only Independently Verified and Documented Information in the Contract.** Don't depend upon or use unreliable or untrustworthy information when building your Contract. Selling agents should not simply insert the outstanding CDD capital assessment balance recited in the MLS printout (which your Buyer will be assuming after closing) without searching for that information on the appropriate website or contacting the person or company that is the keeper of that information. Listing agents should not rely solely on the Seller's representation of the current assessment amounts without verifying that information with the governing Association(s).

Some would say there is no such thing as a bulletproof Contract, and that may be true, but if you familiarize and avail yourselves of all the available tools, give careful consideration to all Contract terms and their implications, and educate your Sellers and Buyers regarding same, you will successfully dodge many, if not all, of those annoying and unsettling bullets.



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