



BACK-UP CONTRACT ADDENDUM

BROKER VERSION

What's the Purpose of the Back-Up Contract Addendum?

If the seller already has their property under Contract with one buyer (called the "primary buyer"), and a second buyer wants to make an offer on that property, the Back-Up Contract Addendum will allow the seller and the second buyer to enter into a second Contract for that property. The Contract previously entered into is generally referred to as the "Primary Contract."

The Back-Up Contract Addendum is used as an Addendum to either the Offer to Purchase and Contract (Form 2-T) or the Offer to Purchase and Contract (Vacant Lot/Land) (Form 12-T).

Is the back-up buyer entitled to see a copy of the Primary Contract?

Not unless the back-up buyer gets written permission from both seller and the primary buyer. It's highly unlikely that the primary buyer would ever give that permission.

The Back-Up Contract Addendum does require the seller to disclose to the back-up buyer the Settlement Date in the Primary Contract.



When does a Contract with a Back-Up Contract Addendum become a binding contract?

Like other Contracts, a Back-Up Contract becomes binding and effective when the Contract has been signed by both parties, and when seller's acceptance of buyer's offer has been communicated to buyer or buyer's agent. That's considered the Effective Date of the Back-Up Contract.

Although a Back-Up Contract becomes binding on the Effective Date, the Contract is reliant on the Primary Contract terminating. Until that termination occurs, the parties' contractual obligations are limited.

For example, a seller isn't required to give the back-up buyer access to the property to conduct any due diligence investigation until the Primary Contract is terminated.

Does the buyer have to make any payments once a Back-Up Contract becomes effective?

If the Back-Up Contract requires the payment of an Initial Earnest Money Deposit, the "Earnest Money/Due Diligence/Settlement Dates" section of the Addendum states that the buyer must deliver that payment to the escrow agent in accordance with the Contract, even though the Back-Up Contract is in the backup position.

In contrast, the section states that any Additional Earnest Money Deposit or any Due Diligence Fee required in the Back-Up Contract aren't due and payable to seller until seller delivers a "Notice of Primary Status" to buyer. Once that notice is delivered, Buyer has two days to pay the Due Diligence Fee and an agreed-upon number of days to pay the Additional Earnest Money Deposit.

Back-up buyers who want to delay payment of any Earnest Money Deposit until after a Back-Up Contract becomes effective can offer to pay an Additional Earnest Money Deposit instead of an Initial Earnest Money Deposit.

What is a "Notice of Primary Status?"

That term is defined in the "Notification of Termination of Primary Contract" paragraph. It consists of two items that seller must promptly provide to buyer:

Written notice stating that the Back-Up Contract has become primary; and

Written notice stating the Back-Up Contract has been terminated proven by one of the documents listed in the "Termination of Primary Contract" section.

Both items must be provided to buyer before buyer is bound to all of the obligations in the Back-Up Contract. Before Notice of Primary Status is delivered, the back-up buyer can freely terminate the Back-Up Contract.

What evidence must the seller provide that the Primary Contract has been terminated?

According to the "Termination of Primary Contract" paragraph of the Addendum, termination of the Primary Contract will be proven by one of four things:

A written release signed by all of the parties to the Primary Contract;

A written notice of termination from seller to the buyer named in the Primary Contract;

A written notice of termination from the buyer named in the Primary Contract to seller; or

A final judgment from a court stating that the Primary Contract is invalid, illegal, unenforceable, or otherwise terminated.

Can the buyer terminate the Back-Up Contract without liability?

Yes. But only if the buyer gives written notice of termination to seller before receiving a Notice of Primary Status.

If buyer gives timely notice of termination to seller, buyer is entitled to a refund of any Earnest Money Deposit.



If a Back-Up Contract becomes primary, is it treated like any other contract?

Yes. If and when a Back-Up Contract becomes primary, both parties have the same rights and obligations under the contract as under any other contract written using the Offer to Purchase & Contract.

What happens if the Primary Contract Closes?

The "Closing on Primary Contract" paragraph states that if the Primary Contract closes, the Back-Up Contract becomes null and void and any Earnest Money Deposit is refunded to Buyer.

Do Back-Up Contracts ever automatically terminate?

Yes. A Back-Up Contract becomes null and void if it doesn't become primary (i.e. if the seller doesn't provide a Notice of Primary Status) by the date agreed to in the "Automatic Termination" paragraph of the Addendum.

If the Back-Up Contract automatically terminates, any Earnest Money Deposit must be refunded to buyer.



Can a seller sign more than one contract with a Back-Up Contract Addendum?

No. The Addendum is designed to be attached to only one contract.

The Addendum states that if the Primary Contract is terminated, seller shall promptly provide buyer with the two items comprising the Notice of Primary Status.

If seller has a Primary Contract in place and then signed two additional contracts, each with a Back-Up Contract Addendum, seller would be required to provide both back-up buyers with Notice of Primary Status and would be under contract with two buyers for one property at the same time.

A seller and a buyer can create a second Back-Up Contract, but an attorney needs to be involved.



Does a Back-Up Contract limit the seller's ability to amend the Primary Contract?

No. Seller's use of a Back-Up Contract has no effect on Seller's ability to modify the Primary Contract.

The "Modification of Primary Contract" paragraph of the Addendum explicitly states that any modification of the Primary Contract won't terminate the Primary Contract or cause the Back-Up Contract to move into a primary position.

Is the existence of a Back-Up Contract a material fact that must be disclosed to the primary buyer?

No. Seller's use of a Back-Up Contract has no effect on seller's ability to modify the Primary Contract.

The "Modification of Primary Contract" paragraph of the Addendum explicitly states that any modification of the Primary Contract won't terminate the Primary Contract or cause the Back-Up Contract to move into a primary position.

When must material facts about the property be disclosed to the Back-Up Buyer?

Agents have a duty to disclose material facts in a timely fashion. Generally, that disclosure must be made before the party to whom a duty of disclosure is owed changes their position in some significant way. That duty continues even after a property goes under contract.

The existence of a Primary Contract doesn't relieve a listing agent from the duty to disclose material facts to a buyer interested in submitting a Back-Up Offer.

If the listing agent learns of additional material facts after a Back-Up Contract is signed, but before the Back-Up Contract has become primary, that information should be disclosed to the back-up buyer before seller delivers Notice of Primary Status. This gives the back-up buyer an opportunity to terminate the Back-Up Contract.