



What are a buyer's rights under Form 2-T if they can't close on their existing property?

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QUESTION: If a buyer indicates in paragraph 5(b) of the Offer to Purchase and Contract (Form 2-T) that they have to sell other property in order to qualify for a new loan or to complete the transaction with the seller, does that create a contingency that would allow the buyer to terminate the contract and get a refund of their Earnest Money Deposit if they can't close on their other property?

ANSWER: No. Although in a practical sense, the buyer's ability to complete the purchase of the seller's property is contingent, or dependent, upon the buyer being able to close on their existing property, their contractual obligations are not contingent in any legal sense. This is clearly stated in the Note at the end of paragraph 5(b) of Form 2-T. It is also reiterated in paragraph 4(c), which goes on to provide that "if Buyer must sell or lease other real property in order to qualify for a new loan or to otherwise complete the purchase of the Property, Buyer should seek to close on Buyer's other property prior to the end of the Due Diligence Period or be reasonably satisfied that closing on Buyer's other property will take place prior to the Settlement Date of this Contract." Why? Because if, following the end of the Due Diligence Period, the buyer is unable to complete the transaction because they haven't closed on their other property, they would be in breach of contract and the seller would be entitled to keep any Earnest Money Deposit. See paragraph 23(a). On the other hand, because the seller's remedies are limited under paragraph 23(b), the risk to the buyer who chooses to continue with the transaction following the end of the Due Diligence Period is limited to the loss of any EMD.

If paragraph 5(b) does not create a "legal" contingency for a buyer who must sell existing property before they can complete the purchase of the seller's property, why is it in the contract in the first place? Our answer is that much like the information in paragraph 5(a) regarding the manner in which the buyer intends to fund the purchase the property, the information in paragraph 5(b) is there primarily to enable the seller to better assess the strength of the buyer's offer. An incidental benefit of requiring a buyer who must obtain a loan and/or close on existing property to disclose that information in the contract is that it also satisfies the duty of an agent working with the buyer to disclose material facts, which include facts affecting the ability of their client to complete the transaction.

Finally, as stated in the Note in paragraph 5(b), if the parties agree to make the buyer's contractual obligations contingent on the sale of the buyer's other property, they should hire an attorney to create an appropriate contingency to the contract.

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