



Can an offer include an additional earnest money deposit but no initial earnest money deposit?

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QUESTION: In order to avoid delays in returning an earnest money deposit (the “EMD”) when a contract is terminated, I encourage my buyer clients to include an Additional EMD in their offers, but no Initial EMD. I also suggest that the payment of the Additional EMD be tied to the end of the Due Diligence Period. Some brokers in my market have refused to accept those offers. They contend that a contract cannot have something designated as an Additional EMD if the contract does not also call for an Initial EMD. Are those brokers correct?

ANSWER: They are not.

The first thing to emphasize is that listing agents are not gatekeepers; they cannot refuse to deliver an offer to their clients just because they don’t like the terms. Real Estate Commission rule A.0106 mandates that brokers deliver a copy of any written offer to their client, and must do so within three days of receipt of that offer.

Also, while Standard Form 2-T allows buyers to include an EMD as part of the Purchase Price, an EMD is not required in order for a contract using Form 2-T to be binding. Should a buyer choose to offer an EMD, he or she is free to choose whether that deposit will be paid with the offer or within five days of the Effective Date of the Contract (referred to in Form 2-T as the “Initial Earnest Money Deposit”), or on some other, specified date (the “(Additional) Earnest Money Deposit”), or both. The parentheses around the word “Additional” are intended to suggest that, in some cases, the “Additional” EMD is in fact the only EMD referenced in the contract.

Form 2-T states that Buyer’s EMD must be refunded if Buyer properly terminates the contract during the Due Diligence Period. Despite this language, some sellers who receive a timely notice of termination refuse to sign a release of the deposit. For this reason, some buyer agents recommend that an EMD should not be paid until after the Due Diligence Period expires. For these buyers, it is perfectly acceptable to make an offer that sets forth an Additional EMD but no Initial EMD.

Buyer agents considering this strategy should recognize that an Initial EMD serves several valuable purposes. First, it demonstrates that the buyer has the immediate ability to commit funds to the proposed transaction. Also, an Initial EMD is an excellent way to demonstrate that the Buyer is indeed earnest (i.e. serious in intention) about proceeding with the transaction. Sellers who receive an offer with no Initial EMD may well conclude that the buyer is not truly serious about purchasing their property.

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