



Seller rights when buyer fails to deliver Due Diligence Fee

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QUESTION: My clients accepted an offer to purchase their property three days ago. Despite several calls to the buyer's agent, the Due Diligence Fee has not been delivered. Can my client terminate the contract?

ANSWER: Not quite yet.

The timing requirement for delivery of the Due Diligence Fee is set forth in paragraph 1(d) of the Offer to Purchase and Contract. That paragraph states that the Due Diligence Fee should be "made payable and delivered to the Seller by the Effective Date."

The term "Effective Date" is defined in paragraph 1(g) of Standard Form 2-T as the date that (a) both parties have signed the contract (or initialed any changes), and (b) the fact of the signing or initialing is communicated to the party making the final offer or counteroffer, as the case may be.

While a buyer's failure to deliver the Due Diligence Fee on the Effective Date is a breach of the contract's delivery requirement, that breach does not give the seller an immediate basis to terminate the contract. That is because of another provision in paragraph 1(d), the requirement that sellers give buyers an opportunity to cure their breach. Paragraph 1(d) states, in part, that should the Buyer fail to deliver the Due Diligence Fee by its due date, Buyer shall have one banking day after written notice to deliver cash, official bank check, wire transfer or electronic transfer to the payee. Paragraph 1(d) concludes with this sentence: "In the event Buyer does not timely deliver the required funds, Seller shall have the right to terminate this Contract upon written notice to Buyer."

In light of these provisions, we recommend that buyer agents have their clients' Due Diligence Fee in hand whenever an offer is presented. Likewise, we recommend that listing agents be prepared to promptly provide the written notice to Buyer called for in paragraph 1(d) in the event the Due Diligence Fee is not delivered on the Effective Date.

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