



Explanation of the State of Wisconsin **Residential Offer to Purchase**

Wisconsin REALTORS® Association

EXPLANATION OF STATE OF WISCONSIN WB-11 RESIDENTIAL OFFER TO PURCHASE

This publication is intended to help you understand the 2011 WB-11 Residential Offer to Purchase (the offer). It is a general discussion and not a substitute for the assistance of a REALTOR® or an attorney. The Wisconsin REALTORS® Association recommends that you work with an experienced REALTOR® and a real estate attorney when buying or selling real estate.

This publication should be reviewed together with the 2011 WB-11 Residential Offer to Purchase.

ROLE OF THE DRAFTING AGENT Lines 1-2

In a real estate transaction there are two parties: the seller and the buyer. Line 1 indicates for whom the real estate agent drafting the offer (called a “licensee”) is working. The licensee may work for the seller (agent of the seller/listing broker), for the listing broker (agent of the seller/listing broker), for the buyer (agent of the buyer) or for both the seller and the buyer (agent of the buyer and seller).

The party the agent is working for is known as the client. If the broker is working for one party but is also working with and helping the other party, the second party is known as a customer. Clients and customers have different rights. These differences are explained to clients in the listing contract or in the buyer agency agreement. They are explained to a customer in an agency disclosure document entitled “Broker Disclosure to Customers.” It is important to understand the different duties owed to clients and customers.

A licensee who is working for one party may still help the other party. A licensee who works with and helps the buyer may work just for the buyer as a client (buyer agency); or the license may help the buyer as a customer with the seller as the client (seller agency). The licensee may also work with both the buyer and the seller as clients (multiple representation without designated agency).

GENERAL PROVISIONS

Lines 3-22

Buyer: The offer must identify the buyer(s). The buyers' names should be printed exactly as they want their names to appear on the deed. Nicknames should not be used. Middle initials should be used. The buyers should ask an attorney about the different ways they can hold title to the property.

Address: With residential property, the street address is usually sufficient to describe the property being purchased. For some properties, the address is not enough and a "legal description" must be used. An example of this would be a house with an "extra lot." Instead of using the street address, the legal description would identify both the lots and the block where the lots are located, for example, Lots 4 and 5, Block 89. After the property is identified, it is referred to as "the Property" throughout the rest of the offer.

Purchase Price: The price should be written like it would appear on a bank check, for example, "Seventy-eight thousand, six hundred fifty and no/100 Dollars. (\$78,650.00)."

Sellers are not required to accept any offer, or even to respond to it – even if the price offered is more than the list price. Other provisions, besides price, may affect whether the seller is willing to accept the offer. For example, if a buyer cannot close for six months or is not paying any earnest money, the seller may want a higher price or may not be willing to accept the offer.

Earnest Money: Earnest money is money paid by a buyer (held by the broker) to show the seller that the buyer is serious. If the buyer decides to not buy the property or does not make a serious, good faith effort to close the transaction, the seller may be able to keep the buyer's earnest money. If the buyer's contingencies cannot be met, for example, the buyer can't get the financing described in the financing contingency, the buyer may be legally entitled to get the earnest money back. If the buyer and seller get into a dispute over the earnest money, they must work it out or go to small claims court. The broker will not decide who is entitled to the earnest money. Also see lines 369-394 of the offer.

Earnest money can be paid when the offer is submitted to the seller after the offer is accepted by the seller, or both.

Included In Purchase Price: The offer describes the real estate being purchased. Real estate includes the land, the buildings and fixtures. “Fixtures” are improvements that are attached to buildings or land (sidewalks, fences, a basketball backboard attached to the garage, kitchen cabinets, wall-to-wall carpeting, etc.) There is a list of some items that are considered fixtures at lines 185-195 of the offer. If there is something the buyer wants included but it is not clear that it is a fixture, it should be listed on lines 14-16 to include it the transaction. The offer assumes all fixtures are part of the property being purchased unless a fixture is listed as “not included” on lines 17-18 or elsewhere in the offer. The buyer may include personal property items (furniture, appliances, lawn mowers, etc.) in the offer on lines 14-16.

Not Included in Purchase Price: All fixtures listed on lines 185-195 are included in the offer unless specifically excluded. This “not included” section on lines 17-18 of the offer is used to list any rented items or other fixtures that are not included in the offer.

The parties are reminded to exclude items that the seller does not own. It is also important to include or exclude items that may not clearly be personal property or fixtures, for example, a bookshelf that may or may not be considered a “built-in.”

Remember that the offer determines what is included in the deal, not the seller’s property information sheets, the MLS or other marketing materials. Buyers should not rely on marketing information they receive before the offer is written even if it says what items of personal property will be included in the sale. If the buyer wants to include things like appliances in the purchase price, they must be listed at lines 15-16. If these items are not listed in the offer and are not fixtures, the seller will assume the buyer does not want the items and will take them out of the property before closing. It is important that the offer is written to include and exclude the correct property.

ACCEPTANCE/BINDING ACCEPTANCE

Lines 23-30

When all of the buyers and sellers have signed the offer, it is “accepted.” The date of the last of the parties’ signatures is the date of acceptance. Many deadlines in the contract will run from this date. The offer becomes a binding contract if the seller delivers the offer back to the buyer by the deadline for binding acceptance stated in the offer.

If the seller wishes to change any of the terms of the buyer’s offer instead of accepting the offer as it was written, the seller will ordinarily give a counter-offer to the buyer. The counter-offer can be made before or after the deadline for binding acceptance.

OPTIONAL PROVISIONS

Lines 31-33

The offer contains many optional provisions or choices for the buyer and seller. If the buyer wants to include an optional provision in the contract, then the box in front of it must be marked with an X or some other mark. When choosing an optional section, mark it with an X and fill in appropriate blanks in the provision. Some examples of optional provisions are the Financing, Appraisal and Inspection contingencies.

DELIVERY OF DOCUMENTS AND WRITTEN NOTICES

Lines 34-54

The buyer and seller must agree how they will deliver documents and notices relating to the offer.

The offer states five possible ways for the parties to communicate:

1. Personal Delivery
2. Commercial delivery service (UPS, FED/EX, etc.)
3. Fax transmission
4. U.S. Mail
5. E-mail

The parties must decide what methods best work for them. There may be advantages and disadvantages to each delivery method. For example, the parties may not want to use the mail because of the length of time a mailed document takes to get to the other party.

For reasons of speed, cost and convenience, fax transmission has become a common way to deliver documents. A party may use his or her real estate agent's fax number, but a party should first talk to the agent about how the office will handle faxes (will they record when the fax was received, when will the party get a copy, etc.).

Likewise, e-mail has become an efficient manner of delivering documents. Any party wishing to use e-mail delivery in a consumer transaction must give electronic consent to the use of electronic documents, electronic signatures, and e-mail delivery. Before marking the box at line 46 and filling in an e-mail address, the party must have received certain disclosures and agreed electronically (by e-mail, on a Web site, etc.) to the use of electronic documents, electronic signatures, and e-mail delivery in the transaction. A party cannot just sign or initial a consent form; a party must provide consent on the computer.

The e-mail address used in the offer may be the party's own e-mail address or the e-mail address of the real estate agent, an attorney or some other person. An agreement should be reached about how e-mails that do not come directly to the party will be handled.

With all methods, delivery is considered complete at the moment the document leaves the control of the party who is delivering it (depositing in the mailbox, completed fax transmission, etc.).

PERSONAL DELIVERY/ACTUAL RECEIPT

Lines 55-56

This section explains the delivery of documents and notices. When there are two or more buyers, or two or more sellers, delivery of a document or notice to just one of them is considered a completed delivery. See lines 62-63 for the definition of Actual Receipt.

OCCUPANCY

Lines 57-60

The right to occupy the property is usually considered the most important right of a property owner. The offer provides that, unless there are tenants, occupancy will be given to the buyer at the time the transaction closes. If the parties all agree, the time of occupancy can be changed in the Additional Provisions/Contingencies section of the offer at lines 165-172 or 435-442. The buyer could let the seller occupy for a period of time after closing, or the seller could let the buyer occupy before closing. If the buyer and seller agree to one of these different occupancy arrangements, they should have a written occupancy agreement. These occupancy agreements can be very complicated, so the parties should consider talking to an attorney about the details of the agreement.

The parties agree in the offer that all personal property that is not included in the sale, and all garbage and debris, must be removed from the house, garage and yard before the buyer takes occupancy. The seller agrees to leave the property in broom-swept condition.

If tenants occupy any part of the property at the time the offer is made, the purchase of the property does not affect the tenants' rights under their lease. The seller and the buyer may wish to have a special agreement that addresses how the seller should handle certain situations that might arise with the tenants before closing, for example, does the buyer want the seller to renew or not renew a tenant's lease that expires before closing?

DEFINITIONS

Lines 61-115

The offer contains definitions on both Pages 2 and 4. The definitions are in two places because certain pages have blanks to be filled in. To accommodate carbonless copies, blank spaces can only be on one side of a page and therefore the definitions are on the other pages.

Actual Receipt (Lines 62-63): Actual Receipt is defined to mean that a party, not the party's recipient for delivery, if any, has the document or written notice physically in the party's possession, regardless of the method of delivery. The term Actual Receipt appears on line 248 in the Seller Termination Rights section of the Financing Contingency and on lines 310-311 in the Closing of Buyer's Property Contingency. It is important to remember that timelines are triggered by actual receipt when the party actually has the notice, not when it was delivered or received by an agent.

Conditions Affecting the Property or Transaction (Lines 64-114): This list is similar to the list of defects in the Real Estate Condition Report (see lines 148-158 of the offer). This list will remind the parties about the sorts of property conditions or other concerns that may need to be addressed in the offer. This list is used with the Property Conditions Representations section on lines 159-164.

CLOSING

Lines 116-117

The transaction must close no later than the stated date unless the parties agree to close on a different date. If the buyer and seller agree to change the closing date, this agreement should be put in writing in an amendment to the offer.

It may be difficult to select a closing date because the buyer and the seller often have very different needs. For example, buyers may wish to put the closing off for several months to give them time to sell their current homes, or sellers may be looking for quick sales because they have job transfers.

The seller will decide where the closing will be held unless the parties indicate differently on the blank lines in one of the Additional Provisions/Contingencies sections or in an addendum. After the offer is accepted, any change to the closing place must be put into writing in an amendment to the offer.

CLOSING PRORATIONS

Lines 118-139

The seller and buyer will be responsible to pay their respective shares of the bills that will come due after closing (property taxes, water bills, natural gas bills, etc.). After closing, the buyer may get a bill that includes usage before and after the closing. Therefore, costs such as taxes and water and sewer charges are “prorated,” or divided between the buyer and the seller, on an estimated basis. The seller pays the buyer the estimated amount the seller owes on the bill at closing, as shown on the closing statement.

Because the actual amount of taxes often are not known at the time of closing, the parties can choose from three formulas for determining the number that will be used as the basis for the proration of real estate taxes, or provide their own formula for that computation on the blank line. The three provided formulas are:

1. Proration based on the net general real estate taxes for the preceding year, or the current year if available (this will apply if no box has been checked).
2. Current assessment times current mill rate.
3. The sale price, multiplied by the municipality area-wide percent of fair market value used by the assessor in the prior year, or the current year if known, multiplied by the current mill rate.

The formula used must be chosen on a case-by-case basis.

If the seller or a broker knows of unusual circumstances that affect the estimates for the property taxes or other bills (a tax reassessment, the passing of a school bond issue, unusually high water usage, etc.), this should be disclosed to the buyer. The second formula might be useful in situations where there has been a recent property tax reassessment. Receipt of a reassessment notice from the local assessor triggers the disclosure duty for the seller (and for the listing agent if the agent is aware of the reassessment and knows the seller failed to disclose). In transactions with new construction, the third formula might be used to compute the tax proration.

Each side takes some risk that the actual property taxes will be different than the estimates used to calculate the closing prorations. The buyer and the seller can agree on lines 135-139 to adjust the property tax proration after the actual tax bill is received. If the parties choose this option, the buyer and seller are responsible to complete the re-proration; it is not the responsibility of the brokers.

LEASED PROPERTY

Lines 140-143

If tenants occupy the property and their lease extends past the date set for closing, the buyer will assume the seller's rights and responsibilities as landlord at the time of closing. Therefore, all of the terms of the seller's rental agreement with each tenant, whether the agreement is written or oral, should be carefully reviewed. All tenants' leases, applications, payment histories, etc., should be reviewed before the offer is written or a contingency should be added for this review. These and other rental property issues should be discussed with an attorney and may be addressed in a "rental property addendum" that is made part of the offer.

RENTAL WEATHERIZATION

Lines 144-147

Wisconsin law requires many residential properties that are tenant-occupied to meet "weatherization" standards at the time they are sold. These standards are intended to ensure that rental properties are well insulated and energy-efficient. There are several exemptions from these requirements. For example, the property might already have received a "Certificate of Compliance" for these weatherization requirements. Or, if the property has four or fewer rental units and if the buyer will move into and live in one of the units within 60 days of closing, it is exempt.

If the property or transaction is not exempt, the buyer and seller must agree on who will be required to bring the property up to the standards. If the seller agrees to do this, then before closing the seller must:

1. Have the property inspected by a state-certified inspector to find out what work must be performed;
2. Do the work or hire a contractor to do it;
3. Have the property re-inspected by a state-certified inspector and obtain a Certificate of Compliance; and
4. Bring the Certificate of Compliance to closing unless it can be recorded at the County Register of Deeds office before the closing.

If the buyer will be responsible for complying with the weatherization standards, he or she must sign a form called a Stipulation. By signing the Stipulation, the buyer promises that the buyer will bring the property into compliance (items 1-4 above) within 12 months following closing.

REAL ESTATE CONDITION REPORT

Lines 148-158

A seller must provide written disclosures regarding property conditions and other matters the seller knows about and that adversely affect the property. This is done on a separate form called a Real Estate Condition Report. Sellers should complete this report when entering into a listing.

The statements made in the Real Estate Condition Report are not warranties – they are statements of things of which the seller has notice or knowledge.

A buyer who receives a Real Estate Condition Report should review it closely. If the buyer does not receive the report until after the offer has been submitted, and if any of the defects listed in the report have not been disclosed before, the buyer may be able to rescind the transaction. If the buyer submits an offer after receiving the report, the buyer does not have any rescission rights based on what is disclosed in the report. The buyer should take the information in the report into account when making an offer. By statute, if the seller does not provide this report to a buyer within 10 days after an offer is accepted, the buyer may rescind or undo the offer (must be done within two business days).

Buyers should strongly consider obtaining an expert inspection of the property and not rely just on the seller's report. See the Inspection Contingency at lines 410-433.

PROPERTY CONDITION REPRESENTATIONS

Lines 159-164

In Wisconsin, the seller of a residence is asked to disclose what the seller knows about problems related to the property. These representations are not warranties. The representations are made in two places:

1. The seller's Real Estate Condition Report.
2. Lines 159-164 of the Offer.

Sometimes the seller will not make any property condition representations (an as-is sale), but most buyers want to know what the seller knows about any problems with the property before making an offer.

Buyers and sellers should closely review the items listed on lines 66-114. Unless the offer is modified or countered, the seller is stating to the buyer on lines 159-164 that the seller knows of no such matters affecting the property except for the items disclosed in the Real Estate Condition Report or written in the offer on lines 163-164. While this list does not include all matters that could adversely affect a property, there is a "catch-all" provision at line 114. If a seller knows of any matter that a reasonable person would think is a significant defect, even if it does not fit into one of the other categories, the seller should disclose such information. This can be done at lines 163-164 or in a counter-offer.

ADDITIONAL PROVISIONS/CONTINGENCIES

Lines 165-172

The offer form is long, but it does not include all of the contract language that the buyer and seller may need in a transaction. The blank lines can be used to add a contingency or other language as needed. Any offer language that does not meet a party's needs can be changed or stricken during drafting.

While real estate agents are required to use most portions of the form, the use of some portions is optional, such as the financing and home inspection contingencies or other provisions with a box to check in front of them. A contingency in an offer describes an event that must occur before a party is legally obligated to close the real estate transaction.

DEFINITIONS CONTINUED:

Deadlines (Lines 174-181): This section establishes the rules for calculating the exact moment in time when a deadline expires. Most contingency deadlines are calculated as a certain number of days from “acceptance.” Review lines 23-26, 455 and 457 of the offer. If there was a counter-offer that was accepted, the dates on that form will determine the date of acceptance. In calculating the deadline, do not count the day acceptance occurred. For example, if line 455 indicates that the seller “accepted” your offer on July 1, and the financing contingency is to be fulfilled “within 30 days of acceptance,” then the deadline is July 31 at midnight.

Unless otherwise specified, a deadline for a certain date will run through midnight of the last day. Midnight is the last moment of the day. If the parties prefer deadlines that end when people can be reached, such as 5:00 p.m., this must be stated in the offer.

Defect (Lines 182-184): The term “Defect” is used in “Conditions Affecting the Property or Transaction” definition and in the Inspection Contingency. The definition of “Defect” matches the definition used in the Real Estate Condition Report.

Fixtures (Lines 185-195): The “Fixtures” definition is important when the parties indicate on lines 14-22 of the offer what personal property is included in the sale and what fixtures and rented property are not. The “Fixtures” definition gives examples of those items that are automatically considered part of the property and are included in the sale unless the buyer and seller exclude them. There may be items that are not listed but fall under the definition of a Fixture. Sellers should exclude any items they wish to take with them that may appear to a buyer to be part of the property or attached to the property.

Common problem areas are rented water softeners, water filtering or conditioning systems, and LP tanks. Buyers usually have no way of knowing that the seller does not own them and does not intend to include them in the sale. These items should be listed on lines 17-18 of the offer as not included in the purchase price.

Property (Line 196): “Property” is defined as the real estate described at lines 4-7 of the offer.

PROPERTY DIMENSIONS AND SURVEYS

Lines 197-201

If the boundaries or size of the lot, the square footage of the home or room dimensions are important to a buyer, the buyer should verify this information. The information provided by the seller or the broker is likely to be an estimate. Many buyers wish to know the total square footage of the home they are buying, but there are different formulas used to make this calculation. If this information is important to the buyer, the buyer should measure the rooms or the building or have someone measure them.

Buyers should not assume that things such as fences, tree lines or utility poles mark the exact boundaries of the lot. If there is any doubt about the location of the boundaries or the dimensions of the lot, the buyer should obtain a survey. The seller may have a survey map, but an older survey may not show new improvements (fences, sheds, driveways), easements or other recent changes.

BUYER'S PRE-CLOSING WALK-THROUGH

Lines 202-205

Regardless of whether the buyer has had inspections or tests done, the buyer has the right to see the property again within three days before closing. There are two purposes for this walk-through:

1. To be sure the property has been maintained in the condition it was in at the time of the offer and that any damage that occurred since then has been repaired, and
2. To make sure that any defects the seller agreed to cure were correctly repaired.

PROPERTY DAMAGE BETWEEN ACCEPTANCE AND CLOSING

Lines 206-215

If the property is damaged by fire, a tornado or other causes after the offer is accepted, the seller should immediately obtain an estimate of the cost to repair the damage. If this cost is 5 percent of the sale price or less, the seller must repair the damage and restore the property to the condition it was in on the day of the offer. Before the closing the seller must provide lien waivers, if applicable, for any repairs or restoration.

If the damage exceeds 5 percent of the sale price, the seller must notify the buyer of this fact. The buyer may then decide to proceed with the offer or to rescind (cancel) it. If the buyer decides to proceed, the buyer is entitled to the seller's insurance proceeds, if any, plus a credit against the purchase price equal to the seller's insurance deductible. The buyer will want to find out whether the seller has insurance and how much the insurance company is willing to pay before proceeding with an offer for a property that has been damaged.

FINANCING CONTINGENCY

Lines 217-263

Obtaining a loan is probably the key event in most successful residential real estate transactions. Most buyers include a financing contingency providing that they legally do not have to close if they cannot obtain a loan commitment. The financing contingency does not require that the buyer actually obtain the loan – that does not happen until the transaction closes. Instead, the buyer tries to obtain a loan commitment from a lender on the terms stated in the financing contingency or on other terms that are acceptable to the buyer.

A loan commitment is an agreement by a lender to lend money. In practice, the loan commitment itself has many conditions and requirements that the buyer must meet before the lender is obligated to make the loan. Before the buyer delivers a loan commitment to the seller, the buyer should make sure that the loan terms are satisfactory and that the buyer can satisfy the lender's requirements. If the buyer decides the terms of the 15 loan commitment are acceptable, the buyer can give written directions to deliver the commitment to the seller.

A financing contingency must contain very specific information about the terms of the loan the buyer will seek. A binding contract can only be established where all the basic elements of the financing are stated, so all of the “blanks” in the financing contingency should be filled in. If a buyer does not know exactly what loan terms are currently available, the buyer may state the least favorable terms that are acceptable to the buyer. The buyer still will be free to apply for the best financing available after the offer is accepted.

Buyer’s Loan Commitment: Unless otherwise agreed, the buyer is responsible for the costs of obtaining financing. The seller is entitled to ask for some evidence that the buyer is acting promptly to apply for the loan.

Caution: Delivery of the buyer’s loan commitment to the seller satisfies the Financing Contingency. This means that the buyer will become legally bound to close unless there are other contingencies in the offer that have not been satisfied. Therefore, a loan commitment should not be delivered to the seller if it has terms and conditions that are less favorable than those stated in the financing contingency and not acceptable to the buyer, or if it has conditions that the buyer cannot meet. The buyer can deliver the loan commitment to the seller to prove that the buyer has tried to get financing, but this should be done only if the buyer also delivers a written notice stating that the loan commitment is unacceptable.

Written Authorization to Deliver: Once the buyer receives a loan commitment, the buyer should review the commitment and decide if the terms are acceptable. If they are, the buyer can give written directions to deliver it to the seller. The buyer may, for example, sign and attach a notice, written statement or coversheet directing delivery. If a lender or a broker delivers a loan commitment without the buyer’s written directions, it will not satisfy the contingency and the seller could terminate the offer.

Seller Termination Rights: If the buyer fails to deliver a loan commitment by the deadline in the financing contingency, the contract does not automatically terminate. The seller may then terminate the contract by delivering a written termination notice to the buyer. However, if the buyer gets a written loan commitment into the seller’s hands before the seller delivers the termination notice to the buyer, the contract is not terminated even though the loan commitment was late. If the buyer cannot get a loan commitment by the deadline, the parties may choose to 1) terminate the contract, 2) extend the deadline for obtaining a loan commitment or 3) just wait to see what happens.

Financing Unavailability: If a buyer is unable to obtain a loan commitment, the buyer must deliver written notice to the seller stating that fact. The seller may keep the buyer legally bound by offering to finance the buyer's purchase on the terms and conditions stated in the financing contingency. Unless the buyer's financing contingency names a specific source of funds (such as "First United National Bank of Appleton"), the seller then has 10 days to decide whether the seller wants to finance the buyer's purchase. The seller is permitted to obtain information regarding the buyer's creditworthiness before making this decision.

If this Offer Is Not Contingent on Financing: In certain circumstances, the buyer may elect to write an offer without a Financing Contingency. In this case, the provision on lines 257-263 obligates the buyer to provide the seller with evidence that the buyer has the funds required to close at the time of the verification. This evidence should be from a financial institution (like a bank) or another third party in control of the funds (like a trustee or other fiduciary). If this evidence is not provided to the seller within seven days of acceptance, the seller has the right to terminate the offer.

In such a transaction, the buyer and seller understand that there is no Financing Contingency for the buyer's protection. However, the buyer may still obtain financing from a lender and, if the buyer does, the buyer's appraiser is allowed access to the property conduct an appraisal. The appraiser's access does not automatically create an Appraisal Contingency; if the buyer wants an appraisal contingency, the box for the Appraisal Contingency should be checked.

APPRAISAL CONTINGENCY

Lines 264-271

The Appraisal Contingency may be used when a buyer requires the property to appraise at or above the purchase price, whether or not the buyer is using a Financing Contingency. Including an Appraisal Contingency in an offer to purchase will protect the buyer against becoming contractually obligated to purchase a property that does not appraise at or above the purchase price, causing the lender to not fund the loan. If the appraisal is below the purchase price, the buyer may deliver to the seller a copy of the appraisal report and a notice terminating the offer. As an alternative, the buyer and the seller may agree to change the purchase price of the property to match the appraised value and continue with the transaction.

The Appraisal Contingency allows for an appraisal to be ordered either by the buyer or the buyer's lender. The parties must be aware that an appraisal ordered by a lender may or may not be done within the time allowed in the Appraisal Contingency. It is important to give enough time when setting the deadline on line 267.

DISTRIBUTION OF INFORMATION

Lines 272-277

The Distribution of Information provisions provide written authorization from the parties to allow the real estate agents to provide certain information relating to the transaction to persons other than the parties. The parties give authority to share three categories of information with the MLS, appraisers and other settlement service providers: 1) copies of the accepted offer; 2) financing concession and sold data; and 3) active listing, pending sales, seller concessions and assistance, and other information needed by appraisers researching comparable sales, market conditions and listings.

DEFAULT

Lines 278-297

All parties have the obligation to act diligently and in good faith to carry out all of the provisions in the contract. If a party does not perform his or her obligations under the contract, the other party may consider this to be a breach of contract or a default. The results can be very serious.

A party who believes a breach or default has occurred should:

1. Carefully review the contract and the documents related to it (offer, counter-offer, addenda, Real Estate Condition Report, amendments to the offer, etc.) to see if the documents support this belief, and
2. Seek legal advice. Real estate agents cannot give legal advice. An attorney can review the documents, investigate the facts, give an opinion about whether there is a breach, and discuss potential remedies and the time and expenses involved in pursuing such remedies.

Some of the potential legal remedies available to the buyer and seller include:

1. Asking the courts to make the buyer buy, or make the seller sell, the property (specific performance).
2. Allowing the seller to keep the buyer's earnest money (liquidated damages).
3. Asking the courts to make the other party pay money for the losses resulting from the breach (actual damages).

ENTIRE CONTRACT

Lines 298-300

In this section the parties agree that everything that has been represented or agreed to is stated in the contract. For example, if the buyer was given an information sheet before making the offer that said, "Washer and Dryer included," the washer and dryer are not included in the sale unless the offer says so. If you believe you have reached an agreement on a particular point, be sure it is written in the contract. This provision also states that the offer is binding on the parties themselves and in case a party dies, their successors (estate, heirs, etc.) will be bound by the contract.

NOTICE ABOUT SEX OFFENDER REGISTRY

Lines 301-303

The buyer should contact the Wisconsin sex offender registry by telephone or on the computer if the buyer has questions or concerns about sex offenders. If asked about sex offenders, the seller can point to this source of official information and be protected from liability without having to answer any questions with specific information the seller might know.

CLOSING OF BUYER'S PROPERTY CONTINGENCY

Lines 304-311

Many buyers do not have enough money to buy a new home until they have sold their current home. These buyers generally include a contingency for the Closing of The Buyer's Property in their offer. The contingency allows a buyer to try to sell and close on a current residence by the date specified at line 306. If the buyer's current house does not sell and close by the specified date, the buyer is not obligated to buy the new property.

During this time the seller may continue to advertise the property and look for back-up buyers. Just because a seller has accepted one buyer's offer to purchase does not mean that the seller must stop marketing his property.

If the seller accepts an offer from another buyer, the seller may notify the first buyer in writing that they have accepted another offer and require the first buyer to waive his Closing of Buyer's Property Contingency and meet any other requirements written in on lines 307-308 of the offer. If the buyer does not do this, the buyer's offer will be null and void (cancelled). In the real estate industry, this is often called the "bump" clause. It essentially permits a seller who has found another buyer with a better offer to "bump" the first buyer out of the transaction if the first buyer cannot meet the requirements stated in the offer.

The seller is not required to use this bump clause. The second offer may be for a lower price than the first offer or there may be other reasons that the seller does not wish to give the "bump" notice to the first buyer. (See the Secondary Offer clause at lines 312-317.) The seller may be willing to wait a while longer to see if the first buyer's current residence sells. The seller could, however, change his or her mind and give the "bump" notice at any time.

If the first buyer receives a “bump” notice from the seller, the buyer will have a specific number of hours (typically, 48-96 hours) in which to deliver to the seller a written waiver of the Closing of Buyer’s Property Contingency and complete any other requirements specified at lines 307-308. Because the buyer must make some difficult decisions in a short time, the time period does not commence until the buyer’s “actual receipt” of the seller’s bump notice. It would make no sense, for example, if the buyer had 48 hours from the seller’s delivery of the notice because, in most contracts, delivery can be made by dropping the document in the mailbox. The time period might expire before the buyer receives the notice.

SECONDARY OFFER

Lines 312-317

When a seller already has an accepted offer with the first or “primary” buyer, the seller must be certain that any new offer that the seller accepts states that it is “secondary” – the offer is not primary unless the seller gives a written notice to move the secondary offer into primary position. This optional provision fulfills that purpose.

The seller may elevate a secondary buyer into primary position merely by giving written notice to the secondary buyer, but this should not be done unless the primary offer has been cancelled. A secondary buyer is locked-in and cannot withdraw his or her offer for the number of days entered at line 316 of the offer. This is done to give the seller an opportunity to “bump” the primary buyer and not lose both buyers. A seller would not want to give a “bump” notice to the primary buyer, have the secondary buyer withdraw his or her offer and then also lose the primary buyer.

The seller may accept more than one secondary offer. In this situation, all offers that are not primary are considered secondary. The seller may make any of the secondary offers primary if the original primary offer is terminated. No particular secondary offer has priority over any other. There is no priority for a secondary buyer who had his offer accepted before the other secondary buyers, or for a secondary buyer who offered a higher price.

TIME IS OF THE ESSENCE

Lines 318-324

Between acceptance and closing there are many things that must happen by a deadline stated in the offer. The deadline may be a calendar date (such as closing) or a certain number of days from another event (such as acceptance). Once an offer has been accepted, it is wise to make a list of all the deadlines that must be met. Do not assume that missing deadlines will be allowed. Failure to meet a deadline may entitle the other party to terminate the offer.

Unless the Time is of the Essence provision is modified or deleted, all deadlines must absolutely be completed by the exact deadline stated in the offer. A day or two late will not be acceptable. If a deadline is approaching and a party is not sure that the deadline can be met, the party should talk to the broker or an attorney about drafting an amendment to extend the deadline in writing. Parties should never rely on verbal extensions. Be certain to get the extension amendment signed by all parties before the deadline has passed.

If Time is of the Essence is not used for some deadlines, there will be more flexibility in meeting the deadline dates; these deadlines must be met within a reasonable time. Any missed deadlines should be extended by amendment or an attorney should be consulted to determine exactly when the deadlines must be met.

TITLE EVIDENCE

Lines 325-368

In Wisconsin, when a seller gives title to the property to a buyer at closing, there are many items that affect the status of the buyer's title. The titles to most properties are subject to local zoning ordinances, utility easements, property taxes that are not paid until the end of the year, etc. The purpose of reviewing title and getting title insurance is to make sure that there are not any items affecting the buyer's title that should not be there, for example judgments, unpaid mortgages, or other claims by neighbors or the government. Title problems can be very expensive to fix and can make it hard to later sell the property.

Title evidence is a very difficult area to understand. If a title problem arises, expert advice should be obtained. Representatives of the title insurance company can be helpful in explaining title problems, but only an attorney can give legal advice.

Conveyance of Title: The seller is obligated to deliver a warranty deed to the buyer (unless otherwise agreed). However, if the seller is a trust then a trustee's deed is used and if the seller is an estate then a personal representative's deed is used. The deed is the document the seller uses to transfer title to the property to the buyer in a real estate transaction. The seller also warrants that "clear title" has been transferred. In simplest terms, this means there are no liens or encumbrances against the property when the buyer receives the deed to the property. However, there are exceptions. For example, the seller cannot control utility easements; the gas or electric company may have an easement and the right to place and maintain its lines on the property. This would be an exception.

A buyer should investigate all municipal, zoning and building ordinances and codes, utility distribution easements, and recorded building and use restrictions and covenants to make sure they do not prohibit any of the buyer's plans, especially if the buyer plans to change the way in which the property will be used.

Title Evidence: The seller must order and pay for a title insurance commitment for the buyer. In Wisconsin, private title insurance companies search the government records to determine the current status of title to the property being sold. The title company then issues a commitment in which it agrees to insure the buyer against unforeseen title "defects" if the steps listed in the commitment are followed. The commitment is an important guide for buyers and their attorneys.

The seller must be sure that the title commitment is delivered to the buyer not less than five business days before closing. This allows the buyer time to review the commitment to see if there are objectionable matters affecting the title.

Gap Endorsement: The title commitment will contain an effective date. The title company is indicating that in reviewing the title records, it did not search the records after the effective date, and the buyer will not be insured by the title company against matters appearing after this date. When the title company provides a gap endorsement, it is agreeing that it will insure the buyer against matters affecting title during the gap: between the effective date and the time the deed the buyer receives from the seller is recorded. The parties must indicate who will pay for the gap endorsement.

Title Not Acceptable for Closing: If the title commitment indicates matters that are not acceptable, or the title company will not provide a gap endorsement, the buyer must notify the seller in writing about the buyer's objections. The seller will then have 15 days to resolve the problem. If this 15 days extends past the closing date, the closing is automatically extended for this purpose.

Special Assessments: Property owners pay real estate taxes. When there is a municipal project that specially benefits particular properties (installing new sidewalks), the property owners may also have to pay a separate tax called a special assessment.

If work on the project has started, and/or the local municipality has passed a final resolution ordering the work that will be paid for with special assessments (a levy), it is assumed that the purchase price reflects this improvement and that the seller should pay the assessment. For example, the property is more appealing and valuable if the street was recently repaved. If the special assessment has not been levied and the work has not started, then the offer assumes that the assessment should be paid by the buyer when the bill comes due after closing.

EARNEST MONEY

Lines 369-394

This section deals primarily with what will happen to the earnest money if the transaction does not close and the parties fail to agree on how the money should be disbursed. The contract assumes that a real estate broker is holding the earnest money in the broker's trust account.

If the offer does not close, the broker disburses, or pays, the earnest money as directed by the written agreement of the buyer and the seller, or as ordered by the court. It is up to the seller and the buyer to find a way to settle the dispute. The broker is not permitted to decide who is legally entitled to the money. Earnest money disputes in one- to four-family residential transactions may be decided in small claims court.

The broker can take no action regarding the earnest money during the 60 days after the scheduled closing date. After the 60 days, the broker may:

1. Continue to do nothing, leaving the resolution of the dispute to the parties and their attorneys.
2. Start a lawsuit naming the buyer and the seller and asking the small claims court to resolve the dispute. The broker will then either deposit the money with the court or hold it until the suit is resolved.
3. Hire a lawyer to review the facts and determine which party should have the money. After the lawyer makes this determination:
 - a. The broker can take up to \$250 out of the earnest money to pay for the lawyer's fees, and
 - b. The broker must give 30 days advance notice by certified mail of the broker's intent to send the money to the party selected by the lawyer. This gives a party who disagrees with the lawyer's decision an opportunity to start a small claims lawsuit.

Even if the party who disagrees with the lawyer's decision does not start a lawsuit within the 30 days, the party may still do so later. The lawyer does not determine who is legally entitled to the money. The lawyer's decision merely changes the location of the money. Of course, if a lawsuit is successful, it is typically easier to collect the money from the broker than from the other party.

INSPECTIONS AND TESTING

Lines 395-409

This section sets the ground rules for any inspections and testing. The buyer may only have an inspection or test if there is a contingency included in the offer. The buyer must decide what tests or inspections are appropriate for the property.

Inspections and testing are different. Inspections are usually observations, and tests involve taking and analyzing samples of materials found at the property.

1. The buyer must notify the seller a reasonable time in advance of when the inspection or test will take place.
2. The seller must allow the inspector or tester access to all areas the buyer has included in inspection or testing contingencies in the offer. The seller must also allow appraisers access as is necessary to conduct the appraisals needed for the financing, appraisal and other contingencies in the offer.
3. The buyer must provide the seller with a copy of any written inspection or testing report.
4. If anything is moved or removed in order to complete the inspection or test, it must be restored to its pre- inspection condition.
5. The buyer and licensee may be present at the inspection or test.
6. Except for testing for leaking carbon monoxide or natural gas, the right to inspect includes only the right to observe the property. Testing for such things as lead- based paint (LBP), radon or soil contamination is not permitted under an Inspection Contingency.

If a buyer wants to test for environmental hazards such as LBP, radon, toxic mold, asbestos, soil or water contamination, the offer must contain testing contingencies. The offer form, however, does not have any standard testing contingencies, so many brokers use addenda that include testing contingencies. Testing contingencies may also be written into the Additional Provisions sections (blank lines). Testing contingencies should clearly state the purpose of the test, the area of the property that will be tested, any limitations and the timing for the testing. A seller is not required to permit any testing that has not been authorized in the offer or in an addendum to the offer. An exception to this is LBP testing; federal law requires the seller to provide the buyer with the opportunity to inspect or test for LBP in most residential properties built before 1978.

INSPECTION CONTINGENCY

Lines 410-433

The Inspection Contingency provides for three types of inspections: a home inspection, component inspections and follow-up inspections recommended in the home inspection or component inspection reports (basement contractor to look at cracks). First, the buyer may request a home inspection by a Wisconsin-registered home inspector. Wisconsin-registered home inspectors are required by law to have a certain level of expertise and to conduct their inspections and make their reports according to certain rules. If such an inspector notes a defect, there is a level of reliability in his or her conclusion.

The contingency can also provide for inspections of particular components or items by qualified independent inspectors or third parties. For example, an experienced roofer may inspect the roof and a basement contractor may inspect the basement. A follow-up inspection may be conducted if a written report from an authorized home or component inspection recommends it and it is done before the deadline at line 421.

A buyer must consider:

1. What types of inspections the buyer wants.
2. Whether the buyer will reserve the right to have any particular items specially inspected.
3. How long the buyer will have to conduct the inspections and decide what to do.
4. Whether the seller will have the right to “cure” (repair) defects.

A buyer may not:

1. Claim that an item is a defect unless it has been noted in an inspector’s written report.
2. Claim that an item is a defect, even if it is mentioned in the inspection report, unless it fits the definition of a defect at lines 182-184.
3. Claim that an item is a defect if the buyer had notice or knowledge of the nature and extent of the defect before the buyer signed the offer.

Right To Cure/No Right To Cure: If the buyer and seller agree that the seller will not have the right to cure defects, these rules apply.

1. If a defect is appropriately noted by the buyer's inspector, and
2. If the item is a defect as defined in the contract, and
3. If the defect was not disclosed to or known by the buyer before the buyer made the offer, and
4. If the defect is objected to by the buyer, then the buyer may deliver to the seller a copy of the inspection report and a written notice listing the defects to which the buyer objects, no later than the deadline specified at line 421. This notice is called a Notice of Defects. If the buyer takes this step, the offer becomes null and void and is cancelled.

Many buyers who become aware of defects remain interested in the property and do not wish to cancel the contract. A buyer in this situation may propose a different solution. The buyer may propose an amendment to the offer that calls for the seller to repair certain defects in a specific manner, or that calls simply for the seller to credit the buyer with a sum of money so the buyer can later do the repair work. (Buyers should consult with their lenders about how such a credit, if agreed to, may impact the amount of money they can borrow – a lender often views such a credit as a reduction in the purchase price.) The seller is not required to agree to a proposed amendment. The buyer will lose the protections of the Inspection Contingency if no notice of defects is given and the seller does not agree to the amendment.

If the seller has the right to cure defects, all of the above-stated rules still apply except that the buyer's delivery of a Notice of Defects will not cancel the contract. Instead, control of the situation is passed to the seller. The seller has 10 days from the buyer's delivery of a Notice of Defects to decide whether to repair or "cure" the listed defects. During these 10, days the seller may obtain estimates of repair costs and/or seek new buyers who are not as concerned with the defects. If the seller takes no action within the 10 days, the contract is cancelled. Or, if the seller has decided not to cure the defects, the seller may give the buyer a notice stating that the seller will not cure or repair the defects. This will cancel the offer.

If the seller decides to cure the defects, the seller must:

1. Deliver a written notice to the buyer, within 10 days after delivery of the buyer's Notice of Defects, stating that the seller will repair the defects.
2. Have the defects repaired in a "good and workmanlike" manner.
3. Deliver to the buyer, no less than three days prior to closing, a detailed written report describing the repair work that was done.

The buyer can walk through the property within three days before closing to confirm that the repair work was fully and adequately completed. (See lines 202-205.)

ADDENDA

Line 434

Sometimes the offer to purchase does not contain everything needed for a specific transaction. An addendum may be used to add additional contingencies or agreements between the buyer and seller. Examples of topics that could be addressed in an addendum are testing contingencies; provisions for well, water or septic testing; or LBP disclosures and inspections.

ADDITIONAL PROVISIONS/CONTINGENCIES

Lines 435-442

The offer form is long, but it does not include all of the contract language that the buyer and seller may need in a transaction. The blank lines can be used to add a contingency or other language as needed. Any offer language that does not meet a party's needs can be changed or stricken during drafting.

