

# Commercial Real Estate Contracts: Choosing the Right Form

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Commercial real estate transactions come in many “flavors” – each with its own particular strategies and objectives. Prudent buyers and sellers need to decide early on, sometimes even before they have an attorney involved, on what form to use. If you are not going to have an attorney draft the contract for you, or if you wish to use a standardized form to possibly save time or money or both, there are several key factors you should consider in selecting the form.

In Florida, there are few “standard forms” created by the Florida Association of Realtors, each of which has numerous addenda allowing the parties to change certain material terms. The forms themselves contain multiple checkboxes and options. Some are geared toward the purchase of a property with a building on it, others for the purchase of vacant land. The differences between the forms may not be apparent at first glance, and choosing the right form, the correct options, and selecting among the addenda can be confusing.

As attorneys, we often find our clients and the brokers have done an excellent job of outlining the financial terms of the deal. What is often missing are the key terms that protect our client in the event the deal goes sideways. Such provisions can either be used to get a client out of a difficult situation, or to keep the other party bound to the transaction so our client can get to the closing table. While this article focuses on some of the key optional provisions and addenda to consider, the issues addressed must also be weighed when meeting with your attorney to draft a contract suited to your particular situation and contract.

Here are some of the terms and provisions to consider as you meet with your attorney or structure your deal:

- **Financing** – Does it need to be a contingency? There are plenty of situations where securing financing is either a given or the buyer can proceed even

without financing and then address leveraging the property for future improvements or development. Consider whether financing, as a contingency, is needed, or if the deal may be more attractive to a seller without the contingency, and whether you merely disclose that financing will be used.

- **Inspections** - The standard contracts create a “free look” whereby the property is under contract while the buyer decides if it meets all of its needs and is in a suitable condition. The buyer can walk away or move toward closing and when the decision is made, the deposit typically becomes non-refundable. The standard form from the Florida Realtors includes a separate inspection rider that addresses a broader range of issues, and several options (including the obligation of seller to make certain repairs). If you are considering using this form, then an attorney drafted inspection addendum (or entire contract) will better focus in on your concerns and issues. There are also numerous issues similar to the inspection period but different enough to require separate treatment. Does the property need to have its entitlements changed for the buyer to use it as it wishes? Will the property be developed immediately upon closing? Are there other conditions that need to be addressed before the buyer is required to close? If the answer to any of these questions is yes, a contract prepared by an attorney which allows for permits and approvals periods separate from (or after) the inspection period is likely more appropriate.
- **Rentals** - when the property is occupied by tenants who will remain after closing, securing the existing leases and rent rolls should not be forgotten, and the seller should provide the buyer with estoppel letters from the tenants to verify the status of each lease. In this instance, the Seller Representations Addendum can be used but it should be reviewed carefully for any additional information the buyer needs to evaluate the leases. The main form itself addresses estoppel letters, but it does not state with any particularity what should be in the estoppel. If a form is used, consider having an attorney prepare an addendum that ensure the buyer will get the information it needs for its analysis and that the estoppels are carefully prepared so the tenants are bound by their representations.
- **Default & Remedies** - the contracts forms are reasonably balanced, but they do not allow for many options. There is an arbitration addendum that could be used, but other issues such as
  - (i) prevailing party attorney fees
  - (ii) liquidated damages
  - (iii) equitable remedies and
  - (iv) recovery of specified costs relating to inspections are among some of the more common “customizable terms” that must be carefully considered before entering into the contract.
- **Warranties & Representations** - buyers and sellers both should seek representations and warranties from the other party that address authority and ability to enter into and complete the contemplated transaction. There are numerous additional representations the seller should provide about the status of the property. Though not exhaustive, the seller should state

whether there are any of the following exist or are threatened:

- (i) litigation or claims that relate to the property,
- (ii) actions by governmental agencies that may affect the buyer's ability to use the property,
- (iii) code enforcement and building department issues that may give rise to additional liens against the property or require compliance before the buyer can move forward with any changes it may want to make to the property
- (iv) condemnation proceedings that may reduce the amount of property the buyer gets to keep after the closing, and
- (v) pending changes to curb cuts, roadways or nearby transportation facilities changes that may affect use of, and access to, the property.

These foregoing are among a few of the considerations buyers and sellers should be taken into account when structuring the legal document that will guide their transaction. Regardless of whether the parties use a preprinted form or an attorney prepared agreement, they should review the contract for how these considerations are addressed and whether they create the rights necessary to proceed through the transaction and protect them if something goes awry.