

Non-contingent Offers

What should a buyer know about non-contingent offers?

First and foremost, the buyer may be at risk for losing their deposit or paying other damages if the buyer decides not to purchase after the offer is accepted because there may be no contractual rights to cancel the contract. This risk needs to be carefully balanced against the risk of having an offer with contingencies rejected.

What are the risks to a buyer of writing an offer without a loan or appraisal contingency?

If the buyer needs a loan to purchase, the lender may not loan the full amount specified, or anything at all, which would mean the buyer would have to make up the difference in cash or cancel and be in breach of contract. If the buyer is paying cash and waives the appraisal, the buyer is at risk of overpaying for the property.

What are the risks to a buyer of writing an offer without an inspection contingency?

Even though the contract may give a buyer a right to access the property, if the buyer discovers information about the property that is unsatisfactory, and the seller will not correct the issue, the buyer will not have a contractual excuse to cancel. The buyer's choice may be to buy the property and incur the costs needed to cure the defect or refuse to perform and risk losing the deposit or other damages.

How is a liquidated damage clause relevant to a non-contingent offer?

A liquidated damage clause is an agreement in advance that a seller is entitled to the agreed-upon damage amount if the buyer defaults. For sales of residential property with one-to-four units, which the buyer intends to occupy, the presumption is that the buyer's deposit is a reasonable estimate of damages if the deposit does not exceed 3% of the purchase price. However, a subsequent sale of the property for more money within 6 months after the breach may be used by a buyer to show the estimate of damages was not reasonable.

Does a buyer have any rights to cancel a contract written without any contingencies?

If the buyer is provided a Real Estate Transfer Disclosure Statement (TDS) after the buyer submits the offer, or the TDS is updated or modified during the transaction, there is a statutory right to cancel the offer within 5 days after delivery of the TDS (or updated TDS) by deposit in mail or email, or 3 days after delivery in person.

What should a seller know before accepting a non-contingent offer?

- If the offer is written as all-cash or with no loan contingency, the seller should verify the buyer has sufficient funds for a down payment or entire purchase price before accepting the offer.
- If the offer is written without an appraisal contingency, in a rapidly rising market the property may not appraise and the buyer, even if in breach, may be willing to cancel and risk a dispute with the seller.
- There is no guarantee a lender will loan, but a fully underwritten, pre-approved buyer is as close as one can get, but there is no guarantee an all-cash buyer will perform.
- The buyer may have a statutory right to cancel, and be entitled to return of any deposit, if the seller provides the buyer with a TDS after the buyer submits the offer. If the market practice is to deliver the TDS after the offer is received, there may be little risk, and even benefit, in allowing the buyer an inspection contingency for the same time period that the statutory cancellation right is in effect.
- Deposits are not automatically released to a seller, even if the buyer does not perform. A dispute over return of a deposit may keep the seller's property off the market until that dispute is resolved through mediation or court.
- Buyers who feel powerless in the purchase process may be more likely to become disgruntled after the sale, which could increase the possibility of a legal claim. Even if the buyer's claim is contractually baseless, the seller will still have to incur time and costs to defend against any such claim.