

# Navigating Contingencies in the Contract



In a market where buyers have more leverage, it is more likely that buyers will be able to get an offer accepted with the contractual contingencies remaining intact.



Here is what buyers (and sellers) should know about contingencies in the standard Residential Purchase Agreement.



# Standard Contract Contingencies

The California Residential Purchase Agreement and Joint Escrow Instructions (C.A.R. Form RPA) includes at least five and as many as seven standard contingencies in the contract. Those contingencies are:

- Loan
- Appraisal
- Investigation of Property
- Review of Seller Documents
- Preliminary (“Title”) Report
- Common Interest Disclosures – If applicable
- Review of Leased or Leaned Items – If applicable.

The deadline for removal of each of these contingencies is 17 Days after Acceptance. However, for the contingencies that involve the buyer receiving documents to review, the deadline for removal is 17 Days after Acceptance or 5 Days after Delivery of the relevant documents, whichever is later.

# Continuation of Contingency – Active Removal Requirement

- It is important to remember that the contingencies in the RPA do not go away automatically. The RPA requires something called active removal of the contingencies.
- As outlined in Paragraph 14B(4) of the RPA, even after the deadline specified in the contract, the buyer retains the right to cancel based on the good faith exercise of any contingency that has not yet been removed in writing.
- If the seller wants to enforce the deadline, they may send a Notice to Buyer to Perform, and then cancel the contract if the buyer still does not remove the contingencies.

**14. TIME PERIODS; REMOVAL OF CONTINGENCIES; CANCELLATION RIGHTS:** The following time periods may only be extended, altered, modified or changed by mutual written agreement. Any removal of contingencies or cancellation under this paragraph by either Buyer or Seller must be exercised in good faith and in writing (C.A.R. Form CR or CC).

**A. SELLER DELIVERY OF DOCUMENTS:** Seller shall, within the time specified in **paragraph 3N(1)**, Deliver to Buyer all reports, disclosures and information ("Reports") for which Seller is responsible as specified in **paragraphs 7A, 9B(6), 10, 11A, 11B, 11C, 11D, 11H, 11K, 11L, 11M, 11N, 13A, 13C, and 28.**

**B. BUYER REVIEW OF DOCUMENTS; REPAIR REQUEST; CONTINGENCY REMOVAL OR CANCELLATION**

(1) Buyer has the time specified in **paragraph 3** to: (i) perform Buyer Investigations; review all disclosures, Reports, lease documents to be assumed by Buyer pursuant to **paragraph 9B(6)**, and other applicable information, which Buyer receives from Seller; and approve all matters affecting the Property; and (ii) Deliver to Seller Signed Copies of Statutory and Other Disclosures Delivered by Seller in accordance with **paragraph 11.**

(2) Buyer may, within the time specified in **paragraph 3L(3)**, request that Seller make repairs or take any other action regarding the Property (C.A.R. Form RR). Seller has no obligation to agree to or respond to Buyer's requests (C.A.R. Form RR or RRRR). If Seller does not agree or does not respond, Buyer is not contractually entitled to have the repairs or other requests made and may only cancel based on contingencies in this Agreement.

(3) Buyer shall, by the end of the times specified in **paragraph 3L** (or as Otherwise Agreed), Deliver to Seller a removal of the applicable contingency or cancellation of this Agreement (C.A.R. Form CR or CC). However, if any report, disclosure, or information for which Seller is responsible, other than those in **paragraph 11A or 11B**, is not Delivered within the time specified in **paragraph 3N(1)**, then Buyer has **5 Days** after Delivery of any such items, or the times specified in **paragraph 3L**, whichever is later, to Deliver to Seller a removal of the applicable contingency or cancellation of this Agreement. If Delivery of any Report occurs after a contractual contingency pertaining to that Report has already been waived or removed, the Delivery of the Report does not revive the contingency but there may be a right to terminate for a subsequent or amended disclosure under **paragraph 11G.**

(4) **Continuation of Contingency:** Even after the end of the time specified in **paragraph 3L** and before Seller cancels, if at all, pursuant to **paragraph 14C**, Buyer retains the right, in writing, to either (i) remove remaining contingencies, or (ii) cancel this Agreement based on a remaining contingency. Once Buyer's written removal of all contingencies is Delivered to Seller, Seller may not cancel this Agreement pursuant to **paragraph 14C(1).**

# Good Faith Exercise of Contingencies

- Some buyers have the mistaken impression that simply having any contingency in place is a sort of “get out of jail free” card that allows them to cancel and get their deposit back no matter what.
- Buyers need to remember that contingencies must be exercised in good faith.
- In other words, the reason the buyer is canceling must actually be tied to whichever contingency they are citing as the basis for their cancelation.





# Good Faith Exercise of Contingencies

- Such reasons may include but are not limited to:
  - ❖ canceling based on the appraisal contingency if the appraisal comes in low
  - ❖ canceling based on the loan contingency if the buyer ultimately does not qualify for the loan
  - ❖ or canceling based on the investigation contingency if buyer's inspections reveal defects that the buyer is not comfortable with.
  - ❖ Paragraph 8 of the RPA goes into more detail regarding what issues are covered by each of the contractual contingencies.



# Deposit Issues

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Remember, cancelation is a two-step process.

The buyer may unilaterally cancel the contract based on the good-faith exercise of a remaining contingency, but canceling escrow and having the deposit released to either party will always require mutually signed escrow instructions, or potentially a judicial decision or binding arbitration award. Paragraph 14H of the RPA outlines how deposits will be handled at the time of a cancelation.

**H. EFFECT OF CANCELLATION ON DEPOSITS:** If Buyer or Seller gives written notice of cancellation pursuant to rights duly exercised under the terms of this Agreement, the Parties agree to Sign and Deliver mutual instructions to cancel the sale and escrow and release deposits, if any, to the Party entitled to the funds, less (i) fees and costs paid by Escrow Holder on behalf of that Party, if required by this Agreement; and (ii) any escrow fee charged to that party. Fees and costs may be payable to service providers and vendors for services and products provided during escrow. **A release of funds will require mutual Signed release instructions from the Parties, judicial decision or arbitration award. A Party may be subject to a civil penalty of up to \$1,000 for refusal to Sign cancellation instructions if no good faith dispute exists as to which Party is entitled to the deposited funds (Civil Code § 1057.3).** Note: Neither Agents nor Escrow Holder are qualified to provide any opinion on whether either Party has acted in good faith or which Party is entitled to the deposited funds. Buyer and Seller are advised to seek the advice of a qualified California real estate attorney regarding this matter.

# Deposit Issues

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That paragraph advises the parties that they could be subject to a civil penalty of up to \$1000 if they refuse to sign cancelation instructions when there is no good faith dispute as to who is entitled to the funds. However, it also reminds both buyers and sellers that neither agents nor escrow holders can advise as to what constitutes acting in good faith, and that both buyers and sellers should seek legal advice in the event of any disagreement over the deposit release.



# Additional Resources

Quick Guide – [Navigating Contingencies in the Contract](#)