

2017 Residential Resale Purchase Contract FAQs

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In February of 2017, a revised Residential Resale Real Estate Purchase Contract will be released for use by all Arizona REALTORS®. A copy of the new contract can be found here and for ease of reference, a copy highlighting the revisions can be found here.

In conjunction with your review of the new contract, AAR has prepared the below list of frequently asked questions (FAQs), along with answers and pertinent analysis.

Please be sure to review these FAQs to better understand the changes that have been made, along with the Risk Management Committee's rationale.

Q1: Why did the Risk Management Committee elect to revise the Residential Resale Real Estate Purchase Contract ("Purchase Contract")?

A1: Other than the TILA-RESPA Integrated Disclosure (TRID) revisions made to the Financing Section in September 2015, the Purchase Contract had not been substantially revised since February 2011.

To ensure that the form remains current and continues to meet the needs of Arizona REALTORS®, the Risk Management Committee asked that a work group be formed to review the Purchase Contract and recommend revisions.

Q2: Line 11 asks the parties to identify the amount of Earnest Money. Is Earnest money required?

A2: No, Earnest Money is not required under Arizona law in order to create a valid and enforceable contract.

Q3: Why was a blank line added after "Earnest Money" on line 11 and what goes there?

A3: The parties are not required to include any verbiage on line 11 other than the amount of the Earnest Money, if any. However, the workgroup received several requests asking that a blank line be provided should the parties wish to document any special instructions regarding the Earnest Money or memorialize where the Earnest Money will be applied.

Q4: Line 18 now reads, "Upon acceptance of this offer, Earnest Money, if any, will be deposited with: Escrow Company Broker's Trust Account." Previously, the Purchase Contract stated that "Earnest Money has been received by Broker," but that language has been removed. Why was this change made?

A4: The Risk Management Committee decided to remove the statement that "Earnest Money has been received by Broker" because, in many instances, the Broker never touches the Earnest Money. For example, Earnest money is often conveyed via wire transfer. Alternatively, Buyer may deposit the Earnest Money directly with the Escrow Company.

Q5: Why did the Committee decline to draft additional language addressing when the Earnest Money must be deposited?

A5: Line 18 of the Purchase Contract already dictates when the Earnest Money must be deposited, which is "upon acceptance" of the offer. Pursuant to Section 8o, this occurs when the Purchase Contract is signed by Seller and a signed copy is delivered and received by Broker named in Section 8q.

Q6: If the Earnest Money is not deposited upon acceptance of the offer, can Seller issue a Cure Period Notice?

A6: Yes. If the Earnest Money is not deposited upon acceptance or at the first reasonable opportunity thereafter (ie., when the Escrow Company is next open for business), pursuant to Section 7a Seller can deliver to Buyer a notice specifying the non-compliance, providing Buyer with an opportunity to cure their potential breach of contract.

Sellers should be mindful of the fact that even if a wire transfer is initiated upon contract acceptance, it may take time for the funds to convey. It is therefore recommended that listing agents inquire with Buyer's agents as to the status of the Earnest Money before proceeding to issue a Cure Period Notice.

Q7: In the event of an all cash sale, what's changed in the Purchase Contract?

A7: Now, in the event of an all cash sale, Buyer is obligated to attach to their offer either a Letter of Credit or a source of funds from a financial institution documenting the availability of funds to close escrow. See lines 19-20. As a result of this change, lines 26-29 of the Additional Clause Addendum are no longer necessary and have been deleted.

Q8: Why are forms such as the Buyer Advisory and Market Conditions Advisory not included in Section 1f?

A8: Section 1f identifies addenda that are incorporated into the Purchase Contract. The Buyer Advisory and Market Conditions Advisory are not addenda in that they do not change or supplement the terms of the Purchase Contract. In fact, these forms are not contractual agreements between Buyer and Seller and are therefore not referenced in Section 1f.

Q9: As was previously the case, Section 1g titled Fixtures and Personal Property addresses outdoor landscaping. However, a change has been made to the specific language. What does the change entail?

A9: Outdoor landscaping, as set forth on lines 46-47, has been clarified to specifically reference the fact that shrubbery and trees constitute fixtures that convey with the property.

The language also explains that "unpotted plants" are included in the sale, meaning they cannot be removed by the Seller. However, potted plants, even if connected to the irrigation/drip system do not convey and can be removed by the Seller unless otherwise agreed to in writing.

Q10: Lines 49 and 50 under Fixtures and Personal Property make reference to "garage door openers and remote controls." If Seller has lost the garage door openers, is Seller required to obtain new ones and convey them to Buyer at close of escrow?

A10: No. Section 1g pertains to "existing" "means to operate fixtures and property." Therefore, if the item is not in Seller's possession, there is no obligation that it be conveyed to Buyer.

Q11: Line 65 requires Seller to deliver to Buyer a notice of all leased items within three days after contract acceptance. How does Seller comply with this requirement?

A11: To satisfy this obligation, Seller can convey to Buyer a notice as defined in Section 8m. However, the preferred method is for Seller to identify all leased items in the Seller's Property Disclosure Statement ("SPDS").

Q12: Additional verbiage has been added to Section 2c, titled Unfulfilled Loan Contingency. Has anything changed?

A12: No. The manner in which Buyer issues notice of inability to obtain loan approval and recovers the Earnest Money has not changed. However, additional language has been added to Section 2c in an effort to further clarify this process.

As has always been the case, if Buyer fails to deliver notice of inability to obtain loan approval, Seller may issue a Cure Period Notice to Buyer. If prior to expiration of the Cure Period Buyer delivers notice of inability to obtain loan approval, Buyer shall be entitled to a return of the Earnest Money.

Q13: It is one day before the COE Date and Buyer has failed to sign the loan documents or deliver either: (i) notice of loan approval without PTD conditions; or (ii) notice of inability to obtain loan approval. Seller issues a Cure Period Notice citing Buyer's failure to comply with Section 2b of the Purchase Contract. The day after the scheduled COE Date, prior to expiration of the Cure Period, Buyer delivers notice of inability to obtain loan approval. Who gets the Earnest Money?

A13: Buyer is entitled to the Earnest Money under this scenario. Buyer's failure to comply with Section 2b constitutes a potential breach of contract. Pursuant to Section 7a, a party shall have an opportunity to cure their

potential breach. In this case, by issuing notice of inability to obtain loan approval prior to expiration of the Cure Period, Buyer has cured the potential breach and is entitled to the Earnest Money.

Q14: If Buyer is obligated to provide compensation to Broker(s), can the funds come from Seller concessions?

A14: Seller concessions, as described in Section 2j, include only the following, "Buyer's loan costs, impounds, Buyer's Title/Escrow Company costs, and recording fees."

Q15: Previously, the Purchase Contract contained a Section (2k) titled "VA Loan Costs." Why has that been removed?

A15: The former Section (2k) titled "VA Loan Costs" required the Seller to pay the escrow fee, along with an amount for other loan costs not permitted to be paid for by the Buyer. Upon researching current VA loan regulations, it was determined that, depending on the loan product, a Veteran may pay the escrow fee.

Furthermore, even if the loan product does not allow the Veteran to pay the escrow fee, the fee may still be paid for from Seller Concessions. As a result, the Risk Management Committee decided to remove the Section titled "VA Loan Costs" so that all offers are viewed equally with the Veteran's offer being just as competitive as that of a buyer not utilizing a VA loan.

Q16: Section 2l explains that if the Premises fails to appraise for the purchase price, Buyer has five days after notice of the appraised value to cancel the Purchase Contract and receive a refund of the Earnest Money. The words "unless otherwise prohibited by federal law" were added to the end of this section. Why?

A16: When purchasing a home with an FHA or VA loan, the lender must ensure that the property serves as sufficient collateral for the amount it lends. FHA and VA therefore require an amendatory clause be made part of the sales contract.

The FHA/VA Amendatory Clause states in part:

"It is expressly agreed that notwithstanding any other provisions of this contract, the purchaser shall not be obligated to complete the purchase of the property described herein or to incur any penalty by forfeiture of earnest money deposits or otherwise unless the purchaser has been given in accordance with HUD/FHA or VA requirements a written statement by the Federal Housing Commissioner, Department of Veterans Affairs, or a Direct Endorsement lender setting forth the appraised value of the property of not less than \$_____."

The added verbiage reflects this language and highlights the fact that Buyer may cancel the transaction without penalty pursuant to the FHA/VA Amendatory Clause regardless of language contained in Section 2l.

Q17: The lender performs an appraisal, which reveals items that must be repaired before it will agree to fund the loan. At Buyer's request, Seller agrees to perform the repairs. After the repairs are made, the lender requires an inspection to confirm that the repairs have been completed to the lender's satisfaction. Who pays for the cost of the inspection?

A17: The Buyer. Verbiage has been added to Section 2m stating that "Any appraiser/lender required inspection cost(s) shall be paid for by Buyer." NOTE – "Appraisal costs" and "inspection costs" represent two different fees.

Q18: Why was Section 3b revised to explain that, if Buyer is married and intends to take title as their sole and separate property, a disclaimer deed may be required?

A18: Married Buyers often believe that by taking title as their sole and separate property, their spouse is not required to sign any closing or transactional documents. This belief is frequently incorrect and can prove problematic if the spouse is unwilling to sign.

The Risk Management Committee therefore thought it was important to notify married Buyers at the start of the transaction that their spouse may be required to sign a disclaimer deed, even when taking title only in their own name.

Q19: Section 4a now requires Seller to deliver and complete a Seller's Property Disclosure Statement (the "SPDS") within *three* days after contract acceptance. Why was this change made and why did the time for delivery of the insurance claims history not also move to three days after contract acceptance?

A19: To maximize the productivity of Buyer's inspection period, the Risk Management Committee deemed it beneficial for Seller to convey the SPDS earlier in the transaction. In other words, having the SPDS within three days of contract acceptance, as opposed to five, will provide Buyers more time to conduct due diligence with the SPDS in hand.

As for delivery of the insurance claims history, unlike the SPDS, Sellers must rely on a third party to assist them with this disclosure. Because this process is not entirely within Seller's control, the Committee deemed the five-day period appropriate.

Q20: Why was the IRS and FIRPTA Reporting Section in the prior version of the Purchase Contract divided into two separate sections in the new Purchase Contract and why are they not located in Section 3, Title and Escrow?

A20: Buyers and Sellers have separate and distinct obligations under FIRPTA. The obligations applicable to Sellers were moved to Section 4, Disclosure, and the obligations applicable to Buyers were moved to Section 6, Due Diligence. It is the hope of the Risk Management Committee that by moving the language into sections largely applicable to Seller and Buyer respectively, each party will take greater note of their individual FIRPTA obligations.

Q21: Why were warranted items removed from the Purchase Contract?

A21: A home consists of thousands of components, making it impossible to develop an all-encompassing list of warranted items. Without such a list, some Buyers and Sellers struggled to identify and agree on which components are warranted.

Furthermore, the term "working condition" was subject to different interpretations. Even when the parties agreed that an item is warranted, they may have still disagreed on whether the component was in working condition. To eliminate any perceived ambiguities, the Risk Management Committee elected to remove warranted items from the Purchase Contract, leaving all repairs subject to negotiation.

Q22: Pursuant to Section 5a, the Premises are now being sold in its "present physical condition as of the date of contract acceptance." Does this mean that there is no longer a need for AAR's As-Is Addendum?

A22: The change to Section 5a has eliminated the need for AAR's As-Is Addendum, which will be removed from AAR's library of forms when the revised Purchase Contract takes effect. Since the As-Is Addendum will no longer exist, reference to the form was removed from Section 1f, Addenda Incorporated.

Q23: Even though the Premises are being sold in its "present physical condition as of the date of contract acceptance," can Buyers request repairs?

A23: Yes. As stated in Section 5a, Buyers and Sellers "may, but are not obligated to, engage in negotiations for repairs/improvements to the Premises." AAR's Buyer's Inspection Notice and Seller's Response form remains available for this purpose, as set forth in Section 6i.

Q24: What happens if a Buyer, within the inspection period, delivers to Seller a notice electing to cancel the contract as permitted in Section 6j, but fails to identify items disapproved?

A24: Section 6j(1)(b) addresses this scenario and explains that if Buyer's notice fails to specify items disapproved as permitted in the contract, the cancellation will remain in effect but Buyer has failed to comply with a provision of the contract and Seller may deliver to Buyer a cure notice. If Buyer fails to cure before expiration of the cure period, Buyer shall be in breach and Seller shall be entitled to the earnest money.

Q25: Line 444 is identical to line 445 and line 458 is identical to line 459. Why have identical lines been added?

A25: It is becoming increasingly common for Buyers and Sellers to be represented by more than one agent, especially when the agents are members of a real estate team. The Risk Management Committee hopes that the aforementioned changes to Sections 8q and 9a make it easier for more than one agent to be identified on the Purchase Contract when appropriate.

NOTE: According to the Arizona Department of Real Estate, the agent in direct contact with the consumer must be identified on the Purchase Contract.

Q26: Lines 467 and 468 were revised to state that, in the event a Counter Offer is attached and incorporated by reference, "Seller must sign and deliver both this offer and Counter Offer." Why?

A26: Arizona's Statute of Frauds, ARS § 44-101(6), states in part:

"No action shall be brought in any court in the following cases unless the promise or agreement upon which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged, or by some person by him thereunto lawfully authorized: Upon an agreement for...the sale of real property or an interest therein."

As such, the Purchase Contract *and* Counter Offer are to be signed by Buyer and Seller.