

Understanding the Binder Contract

It is helpful to review and understand the binder contract before you're deep in the throes of making an offer. This description is not legal advice, and you do have a period of time after you enter into the binder contract to have an attorney review it, and cancel without penalty if the attorney does not approve it. This describes our form, a copy of which is included here for your reference.

Our binder contract can be considered an agreement to protect the buyer's right to purchase until the inspections are complete. Once our binder contract is signed by both parties, and the attorney approval time expires, the seller has an obligation to sell (and not accept other offers, even if they are higher), while the buyer has the option to buy, but can receive a full refund of the deposit if the inspections are unsatisfactory. (Or, if you cannot get a mortgage, if that is a contingency).

The first section of the binder contract specifies the buyer and seller, and describes the property being sold. Any "non-real estate items" to be included are listed. This refers to things that are not permanently attached to property, such as a refrigerator or washing machine. Include here any items of importance.

The initial deposit is customarily 1%, and is payable to the escrow account of the real estate broker. It is not deposited into escrow unless and until a binder contract signed by the seller is returned to the buyer or the buyer's agent. The additional deposit is typically an additional 4% to 9%, and usually is paid into escrow after the inspections are complete and approved by the buyer. The "on or about" date for additional deposit is a few days after the inspection period, three weeks or so after the contract is signed. After inspections are completed and approved, the seller or seller's attorney will draw up a more detailed contract of sale. The additional deposit is made at the time this more detailed contract is executed.

The mortgage amount you may need is specified in the binder contract. Whatever the amount you put down, you have the option of buying without a mortgage or with a smaller mortgage. (Of course, the smaller your mortgage needs, the stronger your offer may appear). The closing date is typically on or about 6 to 8 weeks after the binder contract, allowing time for both inspections and the obtaining of a mortgage commitment. The term "on or about" allows for flexibility for either the buyer or the seller -- either may delay the closing for a reasonable time if they need to. This can be as much as a few weeks.

Next, there is a list of contingencies that allow you to receive a refund of your deposit if they are not satisfied. The time period for those contingencies that have a time frame, such as the attorney's approval period, does not begin until both you and the seller have signed the binder contract, AND, a copy of that fully signed binder contract has been returned to you (or to your agent, and you have been notified). It is essential that you note carefully the time periods allowed for these contingencies. If you expect your deposit back due to an unsatisfactory inspection, for example, you **MUST** have your agent notify the seller timely.

It's possible the person who lists a property for sale either may not have, or lose, the right to sell the property. Before counting on the purchase and spending a great deal of time and money, this should be verified by your lawyer. We've seen binders signed by someone not entitled to sell a property.

The binder contract specifies that it is valid if faxed, and valid if signed in counterpart. The latter means that if one party signs the binder contract, and another party signs an identical copy of that contract, the copies together are valid as if the parties have signed the same document. This is useful, for example, where there are multiple sellers in different parts of the world: an identical copy can be sent to each at the same time, rather than having to circulate one document around to several people.

Some general comments, based on our experience: It is best to follow the customs in filling out a binder, unless there is a compelling reason to vary from them. Questions about this often arise; "Do I have the option of making the deposit amounts smaller?" or, "Can I have a longer time for inspections?" are common ones. The answer is yes, you can ask for those things. The down side is, usually they make your offer substantially weaker, so you are less likely to get an acceptance, and much less likely to get an acceptance at the best price. In the case of offering a smaller deposit, the seller may question whether you have the wherewithal to complete the purchase if the deposit is less than customary. If a longer than necessary inspection period is requested, the seller must factor the risk of keeping the property off the market that long, with no guarantee of a sale.