# Hunt Corp. Commercial Real Estate Q&A:  Contingencies in a contract of sale - by David Hunt

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Q: We are negotiating the sale of our industrial building, and the buyer is insisting on a long list of contingencies in the contract. What is normal?

A: There is no “normal” set of contingencies to a contract of sale, in the same way there is no “normal” real estate deal. Contingencies are simply another set of business terms that are agreed to by a buyer and seller. I have negotiated contracts that permit the buyer to cancel within a specified period of time for “any reason or no reason,” as well as contracts that took three or four years to close because of rezoning contingencies. And I have also negotiated a contract with absolutely no contingencies, in which the buyer conducted a title search and environmental research without the benefit of a contract (very unusual!)

What is a contingency? It is basically an option given to the buyer to cancel the contract under a set of specified conditions. As an example, a buyer with a financing contingency may generally cancel his contract without obligation (and receive a full refund of his down payment), if he is unable to secure financing upon terms stated in the contract. Generally speaking, the objective of the seller is to negotiate a contract with as few contingencies as possible. The buyer, on the other hand, desires to maximize the number of contingencies to allow him maximum flexibility if he discovers problems during the contract period.

The two most common contingencies in a commercial contract of sale are a marketable title and an environmental review. Even if a buyer would be willing to waive these contingencies, his lender (if he has one) will insist upon a title search and a Phase I Environmental Assessment. There is no “standard” language for these contingencies. The language that is drafted can be either quite generous to the buyer, extremely limited, or somewhere in-between. For example, if an environmental problem is found, the buyer may not have an unfettered right to cancel the contract. It is not unusual for the seller to have the right to cure the problem up to a specified limit, $50,000 - $75,000 being common.

In the end, you have to evaluate the contingencies that have been presented to you in light of your relative bargaining position. If you have multiple parties interested in the property, then you are in a position to be more demanding of a short list of tightly worded contingencies. If you have relatively little other interest in your property, then you may be forced to acquiesce to a more liberal set of contingencies.

If you have to agree to a longer list, try to limit the contingencies as much as you can. As an example, if you are willing to make the closing subject to financing, try to specify the amount and rate at which the contingency is valid. If you specify a loan-to-value ratio of 65%, instead of 75%, you increase the likelihood that your buyer will receive a financing package.

I highly recommend that you seek the benefit of legal counsel before agreeing to any contingencies. Your attorney will not only have suggestions on what contingencies should be included in your particular situation but will also give you some ideas on limiting those contingencies.

Do you have a question regarding commercial real estate or construction? Email your question to Commercial Real Estate Q & A, at email@huntcorp.com for possible inclusion in a future column.

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