

How to Use the Inspection Election Forms

By

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How many times have you signed a contract and started the inspection process, only to find out that the selling agent does not know the difference between “Defective” and “Cosmetic” items under the contract? Then you get a faulty Inspection Notice Buyer’s Election and Seller’s Response Form back and your deal goes sideways...

Your Legal Resources committee is working to make improvements to this process by updating the inspection election process under the NABOR contract, revising the Inspection Notice form and providing a new **Inspection Notice List of Systems and Equipment Not in Working Condition Form**. By understanding the contract and using these forms, you can walk your customers through the inspection process and keep your deals on a smooth and successful path for closing.

Standard D.2 of the NABOR Contract lays out a clear and concise multi-step inspection process that will guide the buyer and seller through a fair process for inspecting property and resolving inspection issues.

First, make note of your deadlines by remembering 15, 5 and 10. From the effective date of the contract, the buyer has 15 days to complete their inspections. From the completion of the inspection period, the buyer has 5 days to transmit the completed inspection reports along with an Inspection Notice Buyer’s Election and Seller’s Response Form to the seller. Upon receipt of the Inspection Notice Form, the seller then has 10 days to respond to the inspection election by agreeing, countering or refusing to repair defective items.

Once your buyer has completed his or her inspections, it is incumbent upon you, the Realtor, to explain the contract terms to the buyer because the inspection report is going to nit-pic every minute detail of the property. Nevertheless, you as the contract expert know that your buyer cannot ask that “cosmetic” items be repaired. This is where you, the Realtor, must properly set expectations for your buyer. Although the Inspection Reports will enumerate all items large and small found during their inspections, you must be able to help your Buyer to differentiate

cosmetic items from those that are truly defective and/or not in working condition. Explain to your buyer that they cannot have all of the cracked roof tiles and torn screens fixed. Explain that minor blemishes are merely cosmetic items as defined by the contract and that the seller is not obligated to repair them. Carefully review each item on the inspection report with the buyer and make a list of only the **defective** items using the Inspection Notice List of Systems and Equipment Not in Working Condition Form.

Note that the Inspection Notice List of Systems and Equipment Not in Working Condition Form is for the “systems and equipment” and that you will also want to include an WDO, Radon, mold and/or permit reports with your list. Also, note that the contract now requires you to provide a **complete copy of all reports not just summary pages.**

Once you have carefully reviewed the inspection report and determined which items are not in “Working Condition” as that term is defined under the contract, and you have made your list using the new form, you are ready to complete the Inspection Notice Buyer’s Election and Seller’s Response Form.

This Inspection Notice Buyer’s Election and Seller’s Response Form is a three-part form. In Part 1 of the new form, check off which reports you will be sending to the seller. Recall that you **must attach COMPLETE copies of each report.**

Part two, and this part requires the selling agent to be strategic, the buyer must decide whether they want a credit, remedial action or a combination of a credit and remedial action. If the buyer wants a credit, then the buyer must check Box A under Part 2. The contract only allows a credit for the estimated cost of remedial action so, for example, a buyer can request a credit for cost of repairs to a leaky roof but cannot request a credit for the cost of a new roof. Additionally, the credit request must be evidenced by **written** estimates/proposals issued by appropriately licensed persons.

If the buyer wants remedial action instead of a credit, then the buyer checks Box B under Part 2 of the contract and the burden is on the seller to complete the remedial action on the defective items prior to closing.

If the buyer elects a combination, then the buyer should check Box C on the Inspection Notice. The buyer should not check Box A and B or Boxes A, B and C. Once Box C is checked, there is

a blank where the buyer may state the credit amount and refer to the attached Inspection Notice List.

At this point in the closing process, it is strongly recommended that the selling and listing agents establish a dialogue with their respective customers and each other, to determine what the buyer should ask for and what the seller is willing to agree to. For example, if the seller states that they will not remediate but will give a credit and the Realtors wants a successful closing, then it may be best for the selling agent to recommend that their buyer ask for a credit. The reverse is also true. If the buyer wants a credit but the seller is insisting on remediating the items, the selling agent should explain to the buyer that the seller must use licensed persons for the repairs, the repairs must be completed to code and the buyer will have an opportunity to inspect the work at the walk-through inspection prior to closing. Moreover, if the seller fails to make proper repairs the contract requires that 200% of the estimated repair costs be held in escrow until the repairs are completed. Recall that it is the buyer's option to ask for a credit or remediation but the experienced Realtor will guide their customers based on the conversations with the other side.

Once Part 1 and Part 2 are completed, the Realtor should transmit the Inspection Notice, List and reports to the listing agent for a response. This transmission starts the seller's 10-day response period.

Not later than 10 days after receipt of the complete inspection report(s) and Buyer's Election, the seller shall notify the buyer whether the seller agrees to, rejects or counters the Buyer's Election. If the seller accepts the credit or remediation, the seller should indicate so in Part 3 of the form by checking Box A, and signing the form. At this point, the closing process will continue and the seller will complete remediation or give a credit.

If the seller rejects or counters the buyer's election with respect to any "Defective Inspection Item(s)", then the buyer may terminate the contract. However, the keywords are "Defective Inspection Items". If the buyer asks for a credit or remediation for cosmetic items and the seller refuses, the refusal is not a rejection or counter for which the buyer may terminate the contract. In fact, it may be a breach of the contract by the buyer, and the seller's remedy is to demand that a correct inspection election be transmitted within a reasonable time to cure the breach.

Assuming that the buyer has only asked for Defective Items to be repaired and the seller desires to reject the request, then the seller should indicate so in Part 3, Box B of the Inspection Notice Form, and return the signed form to the buyer. This will give the buyer 5 days to decide whether they want to take the property as-is or terminate the contract and receive their deposit back.

If the seller wants to counter the inspection election, then the seller should indicate so in Part 3, Box C of the Inspection Notice Form. The seller should then write their counter-proposal in the blank and sign the form. This counter to the buyer's election is deemed a rejection by the contract and the buyer will have 5 days to take the property as-is or terminate. However, by marking Box C and writing a counter-proposal, the seller is indicating that they are willing to give some concessions in the deal and the seller is opening the door for the buyer to negotiate the credit or remedial action.

At this point in the inspection process, Realtors who want to salvage the deal must work diligently with their customers. Some options include revising the list of remedial action items, decreasing the credit amount, or coming up with a combination of remedial actions and credits that both parties agree to. It may be helpful for the seller to get estimates of his or her own so that the seller can make a meaningful counter to a credit request. If remedial action is requested, the seller should definitely get estimates before countering or rejecting as most inspection items can be handled by a handyman at minimal expense.

The Inspection Period and Buyers Election for repairs comprise the most intricate and difficult portion of the contract to close cycle in the NABOR contract. Realtors must be diligent and aware during these time sensitive periods 1) Inspection Period = 15 days, 2) Buyers Election = 5 days, and 3) Sellers response = 10 Days. Agents are encouraged to communicate regularly with their Customers and with each other to insure the workflow produces the best possible results for buyer and seller alike. Buyer's agents must set realistic expectations for their buyers regarding defective versus cosmetic conditions identified during their inspections. Selling agents must encourage their sellers to address all truly defective items via agreeing to repair or provide credit to the buyer, for these items will not disappear if the current contract does not close. We hope that we have provided you with several ideas and best practices for success during this critical period in your Contract, and wish you the very best of smooth closings!!