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Key Points in Commercial Real Estate Purchase and Sale Contracts: Negotiating the Due Diligence Period

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In a multipart series, we're examining important points to consider when negotiating commercial real estate purchase and sale contracts from the perspectives of buyers and sellers. The first post in our series offered suggestions for negotiating contract terms regarding payment of the purchase price and deposit. Part two focuses on negotiating the due diligence period, which is an important part of a typical commercial real estate purchase and sale contract (the contract).

Negotiating the Due Diligence Period

The parties should specify in the term sheet or letter of intent (LOI) their agreement regarding the due diligence period (along with other key contract provisions). This allows the parties to make expectations clear, which generally leads to a more efficient negotiation process at the contract drafting phase of the transaction. The contract terms to consider with respect to the due diligence period include timing, extension rights, termination rights, and scope of inspections.

Timing and Extension

The contract should specify when the due diligence period starts and expires. The due diligence period usually begins upon the effective date of the contract. Sometimes, the parties may agree that the seller will provide the buyer with any materials in the seller's possession regarding the property – such as surveys, title reports, and inspection reports – within a certain time period after the effective date of the contract. The parties may also agree that the due diligence period will start to run on the date the seller provides any diligence materials to buyer.

The exact expiration should be specified, such as 5 p.m. on the date that is 60 days from the effective date of the contract, to avoid any disagreement about the timeliness of a termination notice within the due diligence period. The parties can also negotiate a due diligence period extension. Typically, any extension will be accompanied by an additional deposit to be paid by the buyer as consideration for extending the due diligence period and keeping the property off the market.

Buyer's Termination Rights

Tied to expiration of the due diligence period is buyer's right to terminate the contract. Typically, a buyer may terminate the contract for any reason prior to the expiration of the due diligence period. The parties will want to be clear in the contract whether the buyer's failure to terminate the contract in writing prior to expiration of the due diligence period will be an automatic waiver of the due diligence contingency. A buyer may want to push for no automatic waiver.

Scope of Inspections

The parties should also specify the scope of the buyer's inspections in the LOI. Generally, buyers will want broad rights to inspect the property for structural, environmental, and title defects. A seller will want affirmative language limiting the buyer's inspections to noninvasive testing and excluding any soil borings or similar invasive tests unless the seller expressly agrees otherwise in writing.

A seller will also typically require the buyer to:

- restore the property to the existing condition just prior to the buyer's inspections;
- produce an insurance certificate reasonably acceptable to the seller naming the seller as an additional insured; and
- agree to indemnify, defend, and hold the seller harmless from any losses occurring as a result of the entry by the buyer and its agents onto the property.

A seller may also want affirmative language stating that the buyer will not disturb or speak with any tenants at the property without the seller's prior consent.

What's Next: Negotiating Survey and Title Matters

In our next post, we will examine the importance of negotiating contract terms regarding title and survey matters and offer recommendations for buyers and sellers to consider.

If you have any questions about drafting and negotiating commercial real estate purchase and sale contracts – or handling any aspects of transactional real estate matters such as commercial leasing, acquisitions and dispositions, title matters, diligence, and financing – contact [Allison S. Mercantini](#) and [Zlata Fayer](#).