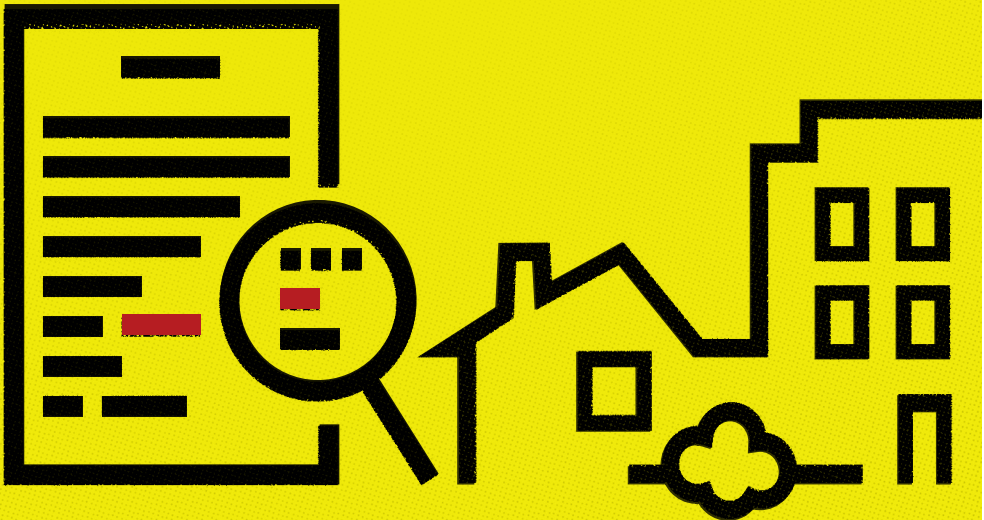




 **TEXAS REALTORS<sup>®</sup>**

# One to Four Family Residential Contract Problems

**A GUIDE COVERING  
12 CONTRACT DETAILS**



# *One to Four Family Residential Contract (Resale)*

A quick reference guide.

Get clarity about some confusing sections of the most popular TREC contract.

It's one of the most commonly used forms among REALTORS® in Texas, which means there are more opportunities to make a misstep. Use the *One to Four Family Residential Contract (Resale)* (TXR 1601, TREC 20-16) correctly with this handy guide.



**by David Jones**  
Senior Associate Counsel

## What is the “effective date” of the contract?

Page 9 of the contract contains a box to insert the date the parties execute the contract, which is called the effective date. The effective date is the most crucial date in the contract because it’s the day the contract officially binds the parties to the agreed-upon terms, and it’s the date from which performance periods within the contract are measured.

## When is the effective date?

The effective date is the date of “final acceptance.” Final acceptance means the day the last party to accept (sign) the contract *communicates* this acceptance to the other party or that party’s agent.

In a typical transaction, buyers send an offer to the sellers. If sellers accept the offer, they must communicate their acceptance of the contract to the buyers. The date the communication occurs is the date the broker fills in as the effective date. Agents can confer with one another to ensure the proper effective date is written.

## How to calculate deadlines

Most periods of performance in the *One to Four Family Residential Contract (Resale)* are written as “within X days after the Effective Date.” This means Day 1 of the performance period would be the first day *after* the effective date. The effective date should be considered “Day Zero.”

To determine a particular deadline, start with the day after the effective date as Day 1, and continue counting until you reach the number of negotiated days for that deadline.

## What is the “Property”?

Paragraph 2 of the contract defines what “Property” the seller is selling to the buyer. According to the contract, the seller is conveying “the land, improvements, and accessories.”

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The contract is still binding on the parties even if a broker doesn't fill in the effective date.

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## Paragraph 2B, Improvements

Improvements include the house, garage, and all other “fixtures” and improvements *attached* to the real property. The contract lists several items that may be considered “improvements,” however, the items must be “permanently installed and built-in” for them to be part of the “Property” being conveyed.

### What is considered permanently installed and built-in?

Whether a particular item on a property is “permanently installed and built-in” is a factual issue determined on a case-by-case basis. There is no universal rule that states a particular item is always permanently installed and built-in.

### What is considered a fixture?

A fixture is an item that began its life as personal property, but was then attached to the real property in such a manner that it became part of the real property. Therefore, when sellers convey their real property, they are also conveying the fixture along with it.

Unfortunately, what is or is not a fixture is not a simple question to answer. Texas courts look at three factors to determine if an item is a fixture:

- Did the party that installed the item intend the item to become a permanent part of the real property (intent)?
- Was there a real annexation of the item to the real property (attachment)?
- Was the item adapted to the uses or purposes of the real property (customization)?

Buyers and sellers should discuss any questionable items before executing a contract, so that all parties have the same understanding as to what items will stay with the property and which items the sellers will take with them.

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## Paragraph 2C, Accessories

Accessories do not have to be permanently installed. All the items listed under Accessories are conveyed to the buyer as part of the property under the contract.

## Paragraph 2D, Exclusions

If a seller intends to keep an item that would normally convey to a buyer, such as a fixture or an improvement, the item must be listed as an “exclusion” under this paragraph, otherwise it will convey to the buyer as part of the property.

## The Termination Option

Under Paragraph 5(B), Termination Option, a buyer may pay a fee to have the unrestricted right to terminate the contract within a negotiated number of days. Under Paragraph 5(A), the option fee must be paid to the escrow agent along with the earnest money within three days after the effective date of the contract. The earnest money and option fee may be paid separately or combined in a single payment. If the amount(s) paid by the buyer is not enough to cover the total amount of the earnest money and option fee, the option fee will be paid first, and the remaining amount goes towards the earnest money.

If the last day to deliver the earnest money or option fee falls on a Saturday, Sunday, or legal holiday, the deadline is automatically extended to the end of the next day that is not a Saturday, Sunday, or legal holiday. However, these days are still counted to determine the three-day deadline. For example, if the effective date is on a Friday, then Saturday is Day 1, Sunday is Day 2, and Monday is Day 3. The earnest money and option fee would be due on Monday. The deadline is only extended if Day 3 falls on Saturday, Sunday, or a legal holiday. The three-day period for delivery of earnest money and the option fee is the only deadline in the contract that gets automatically extended in this manner.

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Any personal property a seller intends to convey, such as a refrigerator listed in the MLS, must be included in the contract to be binding on the seller. A seller's personal property can be conveyed using the *Non-Realty Items Addendum to Contract* (TXR 1924, TREC OP-M).

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If no option fee is listed on the contract, or if the buyer fails to pay the option fee within three days, the buyer would not have the right to terminate under the Termination Option.

The buyers’ right to terminate the contract ends on the last day of the option period at 5 p.m. local time where the property is located. This is the only deadline in the entire contract that has an actual time of day for performance. For all other deadlines, a party would have until the end of the day (11:59 p.m.) to perform.

### **How the Termination Option works with Repair Amendments**

Since the contract is an “as-is” contract, the sellers only have to make repairs to the property that they agree to. If the buyers know of desired repairs when sending an offer, they can check the box in Paragraph 7(D)(2) and list the specific repairs. But buyers usually don’t know what repairs they want when they enter the contract. The buyers would check the box in Paragraph 7(D)(1) to accept the property “as-is.” They could then use the results of a property inspection to determine what repairs they want. The buyers can request the sellers make certain repairs by sending an amendment. If the sellers don’t agree to the buyers’ requested repairs, the buyers can use their termination option to terminate the contract. Of course, the buyers could continue to purchase the property “as-is” or negotiate other concessions agreeable to the sellers.

Buyers should not wait until the end of the option period to send a repair amendment. Sending an amendment right before the deadline doesn’t leave time for possible back and forth negotiations. A repair amendment should be fully executed (signed by buyer and seller) *during* the option period. An amendment is not binding on the seller until it’s fully executed and it’s not likely the seller would agree to make repairs after the option period runs out. There is no automatic

#### Notes:

A buyer is not in default of the contract for failure to pay the option fee. The only penalty for not paying the option fee is that the buyer doesn’t have the option to terminate.

extension of the option period just because negotiations began before the deadline.

## **What can REALTORS® write in Paragraph 11, Special Provisions?**

The short answer: very little.

Both The Real Estate License Act and the REALTOR® Code of Ethics prohibit REALTORS® from engaging in the unauthorized practice of law. Unless also a licensed Texas attorney, agents and brokers are crossing the line into the unauthorized practice of law by preparing or drafting a legal document or language for their clients.

The Special Provisions Paragraph provides instructions to only insert “factual statements and business details.” But what is the difference between a factual statement or business detail and language that could be considered the unauthorized practice of law?

TREC Rule 537.11(b)(5) provides guidance: “A license holder may not ... draft language defining or affecting the rights, obligations or remedies of the principals of a real estate transaction, including escalation, appraisal or other contingency clauses.” In other words, if a party has the right or is obligated to do something under the terms of the contract, an agent or broker cannot draft language changing that right or obligation.

If a client absolutely wants or needs a special term written into their contract that affects the rights, obligations, or remedies of the parties, the agent or broker should follow these steps: (1) advise the client in writing to consult legal counsel; (2) have the client provide written instructions that include the exact language to be inserted into special provisions; and (3) insert only the exact language provided by the client. Agents and brokers must not draft the language for their clients!

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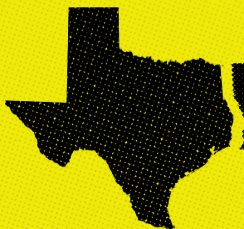
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