

Additional Observations on the Revisions to the C.A.R. and PRDS Purchase Contracts

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In my last article, I discussed the fact that the revised C.A.R. contract no longer contains the Wood-Destroying Pest Inspection Allocation of Costs addendum. The right to inspect for wood-destroying pests is now governed by Paragraph 12 of the C.A.R. contract. This paragraph gives the buyer the right to investigate or inspect the property as a contingency of the contract and to remove that contingency pursuant to the terms of Paragraph 14. Specific issues relating to this inspection are spelled out in Paragraph 12.

Under the C.A.R. contract, the inspector must be a registered structural pest control company. The pest inspector must issue a written report and separate the conclusions into Section One and Section Two findings. Section One findings are areas of evident infestation or infection, while Section Two areas are those likely to lead to infestation or infection. The inspection shall cover the main building and attached structures; it may cover detached structures, but those will need to be specified by the parties in the purchase contract before that inspection is undertaken. If the property is a unit in a condominium complex or other common-interest subdivision, the inspection shall include only the separate interest in any exclusive-use areas being transferred and specifically shall not include common areas. The inspection specifically shall also not include roof coverings and shall not include water tests of shower pans on upper-level units unless the owners of

the property below the shower consent to such an inspection.

Unlike the C.A.R. contract, the PRDS contract still includes a Structural Pest Control paragraph. This paragraph is, however, deleted where the transaction is specified as an as-is purchase. In those circumstances, the buyer using the PRDS contract has two options. The first is to incorporate or to restate the specific pest-control provisions on a separate addendum. This is necessary when the current online copy of the PRDS contract is used, because it automatically blacks out the provisions of the pest-control paragraph when the as-is provision is selected. The other option is for the buyer to rely upon the provisions in Paragraph 14(C), which authorizes the buyer, as long as an inspection contingency is in place, to inspect and investigate all issues, including but not limited to structural pest-control issues. The issue of who pays for either a Section One or Section Two item is a matter for negotiation between the parties.

There are differences, however, in how the two contracts address the issue of whether the buyer has the right to further inspections and who bears the responsibility for the payment of any entry and closure costs. Previously, these issues were addressed in the WPA addendum or in the Structural Pest Control paragraph in the PRDS contract. Both of these agreements created contractual obligations between the parties on these issues. The PRDS contract contractually requires the seller to pay for all Section One work described in the Operative Report. This contractual obligation extended to inaccessible areas that were the subject of further inspection. Under the former WPA addendum, the C.A.R. contract allowed the parties to

identify which party would be contractually responsible for Section One and Section Two repairs and any subsequent additional inspection and related entry and closure costs.

The revised C.A.R. contract does not authorize the buyer to conduct any invasive or destructive investigations "except to the extent required to prepare a pest control report." The issue is whether this language authorizes further investigations of areas that the pest-control operator identifies as inaccessible or in need of additional investigation. If it does not, then the buyer has no right to conduct any further inspection or investigation of inaccessible areas without the seller's permission. My understanding of the intent behind this language was that these invasive or destructive investigations were to be limited to the drilling of holes or probing necessary to prepare the pest-control report. If that is the intent, then the buyer would be precluded, as a matter of contractual right, from performing any further invasive testing of any inaccessible area without the seller's permission.

The solution appears to be for the buyer to include a request for such further inspections in any request for repairs that is made. C.A.R. has modified its Request for Repair document in several ways, one of which is to now specifically include requests relating to Section One and Section Two work and clearances. Although the issue of further inspections of inaccessible areas is not specifically identified in the Request for Repair, this would be the best place in the contract to include such a request.

In contrast, Paragraph 14(C) of the PRDS contract spells out that if a buyer conducts structural pest-control

inspections pursuant to the general property inspection paragraph and the structural pest-control operator identifies further inspections that the buyer then undertakes, the buyer then contractually agrees to be responsible for all related entry and closure costs irrespective of whether those further inspections identify Section One or Section Two items. This places a contractual obligation on the buyer to pay for all entry and closure costs in the absence of some other contractual agreement between the parties.

Paragraph 14(C) also provides that the buyer's obligation to pay these costs survives termination of the contract. Finally, it specifies that like any other repairs undertaken pursuant to the contract, such repairs must be done by a licensed contractor, using materials of comparable quality, and must be completed subject to local ordinances and all applicable building codes and permit requirements. There are also requirements specifying when this work must be completed and what documentation must be provided on completion of the work.

The foregoing is to be contrasted with repairs authorized under the C.A.R. contract; in that contract, the seller always retains the right to complete any repairs on their own rather than have them performed by a licensed contractor. Like the PRDS contract, the C.A.R. contract requires that any repairs undertaken by the seller must comply with applicable law, including governmental, permit, inspection, and approval requirements and must also utilize materials of quality and appearance comparable to the existing materials.

One final comment regarding conducting pest-control inspections pursuant to the general right of investigation

set forth in either contract - please remember that there will not be any specific language addressing the issue of any fumigation required by the Structural Pest Control report, including who shall pay for such fumigation, the manner in which it shall be completed, the guidelines under which it will be completed, and the cost of any damage to any landscaping or roof coverings caused by such fumigation. The only way to address these issues will be in a specific request for repair or addendum. One of the best ways to draft such language is to utilize the existing language in the pest-control paragraph of the PRDS contract to cover these issues.