

MULTIPLE OFFER NEGOTIATION

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REALTOR® members continue to ask the Legal Information Line a variety of questions regarding multiple offer transactions. The issues are complicated and the answers are different depending on which party the agent represents.

Information for Sellers' Agents: Sellers' agents (the listing broker) can offer suggestions and alternatives; decisions about how offers are presented, and dealt with, are, however, made by the sellers, not the listing broker/agent.

The Nevada Real Estate Division (R.E.D.) has published an informational bulletin (Informational Bulletin #001) which offers guidelines and enumerates several options for the seller to consider in handling a multiple offer situation.

Sellers Make the Decisions – Examples of Options

1. Accept one offer in writing, and reject all other offers in writing.
2. Reject all offers in writing and encourage higher offers.
3. Counter one offer, reject other offers in writing.
4. Delay the decision waiting for another offer informing all parties. Educate the seller that with this option the buyers' offer may expire and/or the buyers may withdraw their offer.
5. Alert one or more buyers that they are in a competing offer situation and need to submit their best offer. Reject other offers.
6. Alert all buyers that they are in a competing offer situation.
7. Counter all offers in writing. www.red.state.nv.us/bulletin

Be careful with options 5, 6 and 7. These options must be undertaken with care to ensure that the seller does not end up being bound to more than one contract. One precaution might be to add a condition in the counter-offer that the counter-offer does not become binding on the seller until he/she signs it a second time.

Multiple Counter Offers: If the sellers decide to make multiple counter-offers, it is recommended that the agent only use a multiple counter-offer form that has been prepared or reviewed by an attorney. It is not recommended that the agent just add some language to a regular counter-offer form. Without the proper language and safeguards in the counter-offer, the seller could end up with more than one binding contract. Although only one buyer gets the house, the others could still sue for damages.

NOTE: The Legal Information Line receives many calls from listing agents wanting us to tell them which of these options is the “right” one and which one they should use. First, there is no one option that is the right one for every situation. The selection depends on the sellers, their motivations, personalities and comfort level. Second, the selection the listing agent should use is the one directed by the seller; it is not the listing agent’s decision.

R.E.D. and NVAR suggest that a listing agent, when taking the listing:

1. Explain to the client that competing offers may be received.
2. Discuss with the client options for handling multiple offers.
3. Explain that the client is the one who decides how they want to handle multiple offers.
4. Advise the clients that they may wish to seek legal counsel if they do receive multiple offers.

Disclosing the Terms of a Particular Offer: In an article from the National Association of REALTORS[®], it is stated, “Purchase offers generally aren’t confidential. In some cases sellers may make other buyers aware that your offer is in hand, or even disclose details about your offer to another buyer in hope of convincing that buyer to make a “better” offer. In some cases sellers will instruct their listing broker to disclose an offer to other buyers on their behalf.”

The offer is confidential between the sellers and their agent. The offer is not confidential between the sellers’ agent and the buyer. The sellers have the right to decide whether they wish to disclose the highest offer to other buyers. Of course, the buyers’ offer is confidential between the buyers and their agent.

However, the Nevada Administrative Code places a competing duty on licensees to be “fair” to all parties. See, NAC 645.605. The R.E.D. says what is “fair” will ultimately be defined by the Real Estate Commission based on the facts of each case before it.

Example 1: An agent has two offers. Buyer number three wants to make an offer and his agent calls and says, “I have a buyer who wants to make an offer. If you tell me what your highest offer is at this time, the buyer will make his offer higher.” At this point, if the listing agent discloses to that agent what the highest offer is, he/she is violating his/her duty of fairness. However:

Example 2: An agent has three offers, the listing price is \$195,000, and the highest offer is \$210,000. The seller has decided to not accept any of the offers believing that he can get a better price. The seller decides to ask each of the buyers to submit his/her best offer. The seller indicates to all the buyers that their best offer should be for at least \$210,000. (Or the seller sends out multiple counter-offers with the price term of \$210,000). This scenario treats all parties fairly.

Information for Buyers' Agents: Buyers' agents should explain the pros and cons of the various approaches (as indicated above) a seller has to responding to multiple offers.

Also, as stated above, purchase offers are not confidential as far as the seller is concerned. The buyers' agent may want to discuss with the buyers the possibility of making their offer confidential, or of establishing a confidentiality agreement between the buyers and the seller prior to commencing negotiations.

Information for Buyers and Sellers: In discussing the multiple offer scenarios with buyers or sellers, let them know that in negotiating multiple, competing offers to purchase the same property there are a number of issues and dynamics:

- Sellers want to get the highest price and best terms for their property.
- Buyers want to buy at the lowest price and on the most favorable terms.
- Listing brokers—acting on behalf of sellers—represent sellers' interests.
- Buyers' agents represent the interest of their buyer-clients.
- Will a seller's disclosing information about a buyer's offer make a second buyer more likely to make a full price offer? Or will that second buyer pursue a different property?
- Will telling several buyers that each is being given a chance to make their "best offer" result in spirited competition for the seller's property? Or will it result in the buyers looking elsewhere?
- There is not one, single, simple way to deal with multiple competing offers.