

PRESENTATION OF MULTIPLE OFFERS BY THE LISTING AGENT

Section 54-2051(1), Idaho Code provides:

A broker or sales associate shall, as promptly as practicable, tender to the seller every written offer to purchase obtained on the real estate involved, up until time of closing. A purchase and sale agreement signed by the prospective buyer shall be deemed in all respects an offer to purchase.

Whenever more than one written offer is received in connection with the same property, special care must be taken to ensure that the duties owed to the parties, whether as clients or customers, are carried out by the licensees involved. The following is a list of some of the more common issues to be considered when multiple offers are received:

WORKING WITH THE SELLER

- 1. General Duty to Present Offers.** All licensees, whether acting as an agent or nonagent of the seller, have the duty to promptly present to the seller EVERY WRITTEN OFFER up to and until closing of the property.
- 2. Duty to Promote Client/Seller's Interest.** When acting on behalf of a Seller pursuant to an Agency Representation Agreement, licensees owe the seller/client the further, heightened duty "to promote the best interests of the client in good faith, honesty and fair dealing." This includes "seeking a buyer to purchase the seller's property at a price, and under terms and conditions acceptable to seller and assisting in the negotiation thereof." As an agent for the seller/client, the licensee should be diligent in informing the seller about any offers or possible offers on the property that might materially affect the seller/client's decisions about the sale of the property.
- 3. Making Known the Terms of the Offer to Other Buyers.** At the time of the listing, it is advisable that the licensee discusses with the seller/client the issue of disclosing the terms of any offer. Generally, the seller should decide whether to make known to other buyers the terms of the offers he or she might receive. However, **if the licensee also represents the buyer** – as a limited dual agent - **the licensee's ability to disclose the terms of the offer to other buyers may be restricted.** For this reason, it is critical that the licensee be aware of whom he or she represents, and that the licensee disclose to the client(s) any limitations upon his or her representation. However, **unless the licensee also represents the buyer, the licensee owes no duty to the buyer** to withhold terms of the offer from other buyers.

However, while the idea of disclosing offers from one buyer to another may seem appealing at first to a seller hoping to get a higher price, it can also work to the seller's detriment. For example – a property is listed for \$200,000 and seller has offer in hand for \$180,000. The seller instructs the agent to reveal this offer to another interested buyer, who then offers \$181,000 and buys the house. Actually, the second buyer had intended to offer \$195,000. The seller is out \$14,000. **For this reason, it is important to discuss with the seller, preferably beforehand, the handling of multiple offers.**

This guideline is not a new law but is an agency interpretation of existing law.

For more information on this guideline, please contact:

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4. Advising the Seller on Multiple Offers. The licensee should also inform the client/seller that the listing for sale is not an offer, but an invitation for offers from others. As such, the seller is not obligated to deal with multiple offers in any particular order, and, in fact, is not obligated to accept, or counter, or formally reject any of them. However, the seller should be advised that he or she may become contractually liable to the broker for a commission if the seller fails to accept the offer of buyer who is “ready, willing and able” to purchase the property on the listing terms.

5. Advising the Seller After an Offer has been Accepted. On occasion, a seller who has accepted an offer (i.e., entered into a contract) is presented with a better offer from a different buyer, and the seller wants out of the existing contract. In such cases, the licensee should advise the seller to seek legal advice before attempting to terminate the existing contract, and before becoming obligated under a second contract (e.g., contracting to sell the same property to two different buyers). A licensee may not give the seller legal advice; but the licensee can state that failing to perform the terms of a contract, or obligating oneself under two contracts, can have serious legal consequences for a seller. If the seller does accept a second buyer’s offer (other than as a backup offer), it is advisable that the licensee maintain documentation showing that the licensee advised the seller to seek legal advice prior to seller's agreeing to sell the same property to two different buyers.

WORKING WITH THE BUYER

Licensees working with or representing buyers have some additional issues to watch when dealing with multiple offers.

1. Offer Conditioned on Nondisclosure. A buyer may desire as a condition of his offer that the price and terms of the offer not be disclosed to any other party (e.g., other potential buyers). However, because a seller is not bound by this condition unless or until he agrees to it, the licensee working with the buyer should obtain the seller’s agreement to non-disclosure prior to presenting the buyer’s offer.

2. Multiple Offers by the Same Buyer on Different Properties. On occasion, a licensee will work with a buyer who wants to make multiple offers on a selection of properties, but only intends to close on one. This creates two burdens for the licensee working with the buyer. One is an adverse material fact, that the buyer might not elect to close with a seller who accepted the offer. The other one is a contractual issue.

The contractual issue is a deep legal subject, but essentially, you need to make sure some kind of protective clause gets included in these offers. This is because, absent that clause, the seller might be able to enforce the contract against your buyer, forcing him/her to purchase multiple properties.

Fortunately, including the protective clause in the body of the contract will satisfy both requirements. It discloses the adverse material fact along with satisfying the contractual requirements.

3. Multiple Offers Presented by a Licensee Representing Different Buyers for the Same Property. Per Idaho Code 54-2087(11), a brokerage and its licensees may represent two or more buyers interested in the same property, provided the brokerage or its licensee has notified all such buyers in writing. When this situation arises, the licensee should ensure that the buyer/clients have been notified that the licensee may be presenting competing offers of other buyer clients, and that the licensee is not permitted to promote the interests of one buyer/client over the interests of any other.

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GENERAL:

1. If questions arise on any area of contract law, such as if and when effective acceptance or revocation of an offer or counteroffer will take place, it is in the agent's best interest to advise the seller or buyer to seek legal counsel.
2. Remember that many issues in multiple offers are determined by the agency status of a real estate licensee. Be certain to follow scrupulously sections 54-2086, 54-2087, and 54-2088, Idaho Code, and to act in a manner consistent with the agency relationship you undertake.

This Guideline is general in nature and is not intended to address each and every circumstance or issue that may arise in a multiple offer situation. As with any area where a question of contract law arises, it is best to urge the seller to seek competent legal counsel before difficulties develop, and, as is always prudent, licensees would be well advised to document in writing that they have advised the client or customer to see an attorney.

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