Multiple Offers – Be Prepared

3 hours/ 3 Core NJ CE Credits

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Note:
This presentation is intended to review the key legal and ethical requirements associated with multiple offers scenarios and discuss the various options available to buyers and sellers. It includes the requirements of the Consumer Protection Enhancement Act (CPEA)

This presentation does not constitute legal advice, and each attendee is responsible to understand their own company policies and how they may impact various aspect of the discussions below.

When it comes to multiple offers situation, each case will be different.

Our obligations when representing clients (buyer/ seller agent – designated buyer/seller agent) are:

- Protect and promote our client's interest
- Give our clients all the facts/ information
- Advise our clients based on our real estate knowledge
- Remain impartial in the process
- Document the process

But the decisions along the way are our client's decisions

Keep in mind:

- As a real estate licensee, you inform based on your knowledge, you cover the pros and cons of various options, clients make decisions
- Fairness is important to most
- Managing expectation is a big part of the process – knowing what to expect makes people feel much more comfortable

Review of regulatory requirements related to multiple offers

(Licensing regulations including CPEA, Code of Ethics, MLS Rules and Regs)

General requirements:

- Be honest and competent
- No misrepresentation or false promises
- Written consent to dual agency/ designated agency
- Broker supervision
- Recommend legal counsel/ don't practice law
- Recommend experts

Fiduciary Obligations

- Reasonable care
- Undivided loyalty
- Disclosure:
  - business relationships
  - any information relevant to the transaction
- Confidentiality (does not apply to material facts):
  - Can the listing agent reveal the presence of other offers? Yes: __ No: __
  - Can the listing agent discuss the terms (price, contingencies, closing dates)? Yes: __ No: __
  - Is the buyer's offer to the seller confidential? Yes: __ No: __

Offers

- Oral offers: request them in writing *NJAC 11:5-6.4(g)*
- Back-up offers: only after "under contract" *NJAC 11:5-6.4(h)*
- Submit all offers promptly, honestly, until the closing *(COE, Article 1, SP 1-6 and 1-7)*
- Submit all offers in a timely manner and provide written confirmation (CPEA)
- Submit written offers within 24hrs: *NJAC 11:5-6.4(f) 1 ii and (g)*
- Disclosing other offers if asked and with permission *(COE, Article 1, SP1-15)*
- Disclose accepted offers *(COE, Article 3, SP3-6)*
- Confirm submission of offer if requested in writing *(COE, Article 1, SP 1-7)*
- Right of broker to participate in the presentation of offers/ counter offers *(MLS Rules and Reg)*

Representing the buyer when multiple offers is a risk

Or how to maximize the chances of the buyer's offer to be accepted

Example of information to gather before making an offer:

- Market condition
- History of the property
- Disclosures available (Lead Paint if applicable, Seller's Disclosures required to be provided by seller)
- Potential offer of compensation from seller/listing broker
- Existence/ potential of other offers (yes/no, terms, in-house?)
- Seller's preferred terms (closing date, included and excluded items, other)
- How is the offer presented to the seller?

Terms to consider besides price

(each blank space in the contract is an opportunity to improve the buyer's position)

- Earnest moneys
- Closing date
- Duration of the offer

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- Contingencies
    - Inspections (duration, max amount, limitations, other)
    - Mortgage contingency (duration, buyer's documentation, appraisal protection discussion)
- Escalation clause: the offer amount is defined as "X" above the highest offer, with a maximum the buyer would be willing to go to (cap)
  Example: $500K listed property
  The buyer makes an offer at $5,000 above the highest offer, with a maximum of $525K.
    - *If the best offer the seller has in hand is $480K, the buyer would pay $485K*
    - *If the best offer the seller has in hand is $510K, the buyer pays $515K*
    - *If the best offer is $530K, the buyer still loses the bidding war.*

  How the seller handles an offer, including an escalation clause, is discussed in the next section
- Confidentiality request:
  The buyer could request that the terms of his offer not be shared with anyone else.

Presenting offers

- Fax, email, in person (one by one, at office, group)
- How long is the offer valid? Does the buyer want to put a deadline to his offer?
- When final with deadline is requested
- Back-up offers: offers that are presented after the property is under contract
- Written confirmation of offer received to be provided to the other party (CPEA)

Additional considerations:

- What happens when the listing office also represents one of the competing buyers (other buyers in the buyer agreement)?
    - Is disclosure required?
    - Can you be impartial in your recommendation?
    - What is your company policy in this case?
- What happens when the same office represents two buyers on the same property
    - Can you share the terms of the offers with both buyers?
    - Do you need to disclose to the buyers?
    - What is your company policy?
- Dual/ variable rate commissions:
    - the listing agent needs to disclose when listing the property and the selling agent can ask about the differential between the 2 amounts

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Buyer making multiple offers on properties with the intention of only purchasing one:

- Is it legal when done at the same time?
- What happens if more than one seller accepts the offer?
- Should it be disclosed to the sellers?
- Alternative:
  Rank the properties, make an offer on one property at a time (adding a timeframe for how long the offer is valid).

Representing the seller when there are multiple offers

When taking the listing:

- Discuss the possibility of getting multiple offers based on pricing strategy and market conditions
- Get permission (or not) to mention other offers and potentially their terms – it is the seller's decision
- Discuss how offers will be submitted/ reviewed

All permissions should be obtained in writing, check with your broker for more details

When offers are coming in:

Reminder: all written offers have to be presented within 24hr, all offers until the closing, requirement to provide confirmation of receipt of offers

Sellers have no obligations to respond within a certain time frame

How are offers conveyed to seller/listing agent

- Email/ Fax/ Electronically
- Sealed bids
- Individual presentation
- Group presentation

What are the seller's options?

- Reject all, ask for revised offer with a deadline
- Reject all offers, with no specific instructions for re-submitting
- Counter all of them
- Negotiate only one - the seller chooses one of the potential buyers and negotiates with only that buyer
- Accept one - the seller decides that one of the offer stands out and chooses to move forward with that buyer

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Other consideration: If one of the offers includes an escalation clause, then what happens?

- The seller always has the option to counter with a stated price
- If none of the offers have a confidentiality request, apply the terms of the escalation clause and consider the offer at that amount, then see above.
- If one of the offer contains a confidentiality request, it might impact the ability to use the escalation clause based on that amount. Make sure to get advice from your broker and/or the attorney

Record keeping/ risk management

In the case of multiple offers, you will have disappointed parties who could question the seller's decision, the process, your impartiality and feel that they have not been treated fairly.

The most common issues arising of multiple offers are:

- Clear and timely communication
- Did my offer really get presented?
- Feeling of not being treated fairly
- Is the process truly impartial?

It is therefore critical to:

- Communicate often and clearly to all parties
- Maintain records to be able to show at any time what has been done.

Checklists are great tools to make sure that everything has been addressed as well as document the process
Make sure to check your broker's requirements and forms.
Never modify the contract language without your broker's approval

When working with a buyer, make sure you have records of:

- Discussion of the risk of multiple offers
- CMA you prepared for the property
- Questions you asked the listing agent/ Information you received and shared with the buyer
- Documentation about the buyer's decision regarding all the terms of the offer/ strategy
- All communications during the process

When taking a listing, you should document the following:

- Discussion and decisions regarding presentation of offers
- Permission to disclose other offers or not

Remind the seller that you will have an obligation to present all offers all the way to the end, but once under contract, the seller is legally bound to the buyer.

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When offers are presented to the sellers, the following information should be recorded:

- Date and time of:
  - Offer received
  - Offer submitted to seller
  - Acknowledgement to buyer's agent of receipt and submission
  - Response given to buyer's agent (note that a written rejection can also be used as confirmation that offer was presented and reviewed)

- Terms and content of each offer:

  Terms:
  - List price
  - Financing
  - Pre-approval
  - Earnest moneys
  - Date of mortgage contingency
  - Items requested
  - Other items, if applicable

  Content:
  - Opinion 26
  - Contract
  - Lead paint form if applicable
  - Property disclosures if available
  - Additional information, if applicable

  For each offer presented, make sure to also record the reason why the seller decided not to accept it (price, financing, lack of paperwork, or other.)

References:

- New Jersey Statutes – Title 45: Chapter 15 - *http://www.state.nj.us/dobi/legsregs.htm*
- Consumer Protection Enhancement Act – https://www.njrealtor.com/government-affairs/cpea/
- Bulletin 24-11: https://www.nj.gov/dobi/bulletins/blt24_11.pdf
- New Jersey Administrative Code - Title 11, Chapter 5 - *http://www.lexisnexis.com/njoal*
- NAR Code of Ethics
- Your own MLS Rules and Regulations
- Consumer Information Statement
- NJR online forms and your company specific forms