

MULTIPLE OFFERS

Summary: In a multiple offer situation, it is critical for a brokerage and all of its associate brokers and associates to conduct themselves in a manner that maintains the trust and confidence of the client in the brokerage. The general and fiduciary duties of a real estate broker to act in a client's best interests at all times, maintain utmost loyalty, avoid conflicts of interest, exercise care and skill, not misuse a client's confidential information, act honestly and obey a client's lawful instructions, form the foundation for these guidelines.

Note: For the purposes of this Information Bulletin, and where the context permits, the term "real estate broker" includes all industry members authorized to trade in real estate by the Real Estate Council of Alberta including a brokerage, broker, associate broker and associate.

One indicator of an active real estate market can be the number of sellers who receive more than one offer on their property at the same time i.e. multiple offers. As a result, the Real Estate Council of Alberta has received requests for guidelines to assist industry members who find themselves in such a situation.

Often this is a positive experience for the seller as the competitive environment may result in maximizing the value of their property. It can also be very stressful and disappointing for buyers and the real estate brokers who represent them. There is no question that multiple offer situations add additional pressure to the process for both sellers and buyers.

As a general rule, sellers or buyers, or their representatives, do not have a duty of "fairness" to each other during the buying and selling process. While fairness may not be a legal obligation in a real estate transaction, in a multiple offer situation, ensuring a standard of fairness is extended to all parties (while maintaining the fiduciary duties owed to the client) will go a long way to providing a sense of certainty and integrity to the process.

Notwithstanding the personal views of a real estate broker, or the advice they may have given to their client, the seller will determine what process will be followed when a multiple offer situation arises. The Real Estate Council of Alberta suggests real estate brokers consult their brokerage's policies, policies of their local real estate board, and adopt the following guidelines:

Seller's Agent

- Upon learning of the multiple offer situation, inform the seller immediately.
- Explain the choices and strategies available for the offer presentation prior to obtaining the seller's direction on the procedure.
- Recommend the seller review every offer prior to making a decision, if circumstances allow.
- Advise the seller of the buyers' options and advise that buyers may, and often do, revoke their offer under competitive pressure.

- After considering the options, your seller may direct you to advise the buyers and their representatives of the multiple offer situation or the seller may wish to withhold this information.
- It is important for real estate brokers to remember the existence of an offer(s), and associated information is the property and confidential information of the client. This information cannot be disclosed without the client's consent.
- Once the seller has decided how to respond, the lawful instructions of the seller must be followed.
- If the seller directs you to advise the buyer's representatives, do so.
- Attempt to have all offers presented in the same time frame.
- If one of the negotiations includes a commission adjustment, the industry member may wish to discuss with the seller sharing this information with all other buyer representatives. The industry member may not disclose this information to other buyer representatives without the consent of the seller.
- Present all incoming offers to the seller up to the completion date of a previous offer or upon expiration of the listing contract.
- Advise your seller of options such as:
 - Accept one offer, reject all others.
 - Counter one offer and set others aside pending the result.
 - Reject all offers.
 - Counter or accept more than one offer with the protection of an appropriate seller's condition, which will remove their obligation from the first contract prior to moving on to the next. (i.e. *Seller's acceptance of this back-up offer is subject to the seller ceasing to be obligated in any way by date under the previously accepted purchase contract # _____ made date . This condition is for the sole benefit of the seller.*)
 - Closed Bidding – ask each buyer to put forth a final sealed offer to bring the negotiation process to a close.
 - Open Bidding – disclose the contents of all offers and any counter offer the seller gives back. Ideally, this is done with the buyers' co-operation.

It is also possible during the process of obtaining the listing, a seller's agent may have discussed the possibility of multiple offers and what options exist when a multiple offer situation arises

Buyer's Agent

- Inform the buyer of the multiple offer situation.
- Advise the buyer of the seller's multiple offer options.
- Attempt to personally attend the offer presentations.
- Advise the buyer of his/her options such as:
 - Increase the offer prior to presentation.
 - Leave offer as it is.
 - Withdraw the offer.
 - Reconsider the fixtures, chattels, terms and conditions of the offer.
 - Other considerations which could improve the buyer's position may include:
 - a term or condition that will compel the seller to deal with the offer at the time of presentation or face withdrawal
 - a requirement that the seller not disclose the price and terms to any other buyer or face withdrawal

Market conditions may also affect the buyer's decision in multiple offer situations. For instance, in a 'hot' real estate market, buyers may be more likely to submit an offer in a multiple offer situation as there may be no other choice. Likewise, if a market is slow, a buyer may not be willing to get into a bidding war for a property.

Special Considerations – Multiple Offers & Conflict of Interest

If a real estate broker is registered with a common law brokerage and represents the seller, and one of the offers comes from a buyer with whom he or she has a buyer brokerage agreement, or from any buyer represented by anyone with the same brokerage, there is a conflict of interest. This type of conflict of interest requires extreme care.

There is the conflict of interest the brokerage has as it attempts to represent both the seller and a potential buyer with respect to the sale of the seller's property. In a situation where there is only one buyer interested in the seller's property, after disclosure of the conflict of interest and informed consent from both parties, a transaction brokerage relationship can be established to facilitate the transaction.

However, in a multiple offer situation where one of the buyers is represented by the same brokerage representing the seller, and another buyer is represented by a different brokerage, a transaction brokerage relationship will not assist the seller's brokerage in dealing with the situation. For example, in this situation, if the seller wishes to withhold the information of the existence of multiple offers, it will be impossible for you to follow the seller's instruction and also represent the buyer. In these circumstances, the best option is to advise one party to seek representation outside your brokerage.

One of the solutions to address this situation is to implement designated agency. In a designated agency brokerage, the traditional conflicts of interest can be reduced significantly. The seller and interested buyers will have written brokerage agreements that have designated individual associates within the brokerage as their sole agents and each client will receive full agency representation, even in a multiple offer situation. The buyer represented by a real estate broker within the same brokerage that is representing the seller will be in the same position as the buyer represented by a real estate broker from a different brokerage. As a result, the seller can address the multiple offers as outlined above and the seller's representative can follow the lawful instructions of his or her client without encountering any conflicts of interest. In all cases, the client confidentiality is maintained and each client receives the benefits of sole agency representation.

In the designated agency brokerage, if the real estate broker is representing the seller and also represents one of the buyers (in a multiple offer situation) then, under these circumstances, the best option is to refer one of the parties to another real estate broker within the brokerage.

Commentary

In a multiple offer situation, it is critical for a brokerage and all of its associate brokers and associates to conduct themselves in a manner that maintains the trust and confidence of the client in the brokerage. The general and fiduciary duties of a real estate broker to act in a client's best interests at all times, maintain utmost loyalty, avoid

conflicts of interest, exercise care and skill, not misuse a client's confidential information, act honestly and obey a client's lawful instructions, form the foundation for these guidelines.

Each situation will be unique and these guidelines are not intended to be all-encompassing. It is recommended that you conduct your actions with consideration of these duties and consider legal counsel to protect the parties – and yourself.