

# Multiple Offers: Negotiating the Minefield

by **Ron Farris**

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■ REALTORS® across the state are reporting a serious lack of inventory and ample demand, leading to more multiple offer scenarios. Brokers know what a minefield multiple offers can present to new and inexperienced agents. Here are some things to keep in mind:

■ The seller decides how multiple offers are going to be handled, not the buyer. The buyer and buyer's broker/agent can only respond to what the seller wants to do. Sellers and buyers have options and decisions to make. There is no "automatic" multiple offer situation.

■ In general terms, a seller can

- ▶ Accept what they consider to be the "best" offer
- ▶ Inform potential purchasers that other offers are "on the table"
- ▶ Choose to negotiate one offer and ignore others
- ▶ Choose to negotiate one offer and reject the others

Mississippi REALTORS® have the benefit of the Seller Multiple Offer Notification (F39) and the Multiple Offer Notification To Buyer and Buyer's Agent/Broker and Acknowledgment (F40) forms that cover the basic issues in a multiple offer scenario in accordance with the legal and ethical obligations of REALTORS®.

**Ethical Obligations.** REALTORS® have an ethical obligation to continue to submit all offers and counter-offers to their respective clients until closing; a seller may waive the listing broker's obligation to present all offers to them in writing. The REALTOR® Code of Ethics also requires a listing broker, with the seller's approval, to respond to a cooperating broker who enquires about the existence of offers on the property. When the seller authorizes disclosure, the broker shall also disclose, if asked, whether offers were obtained by the listing licensee, another licensee in the listing firm, or by a cooperating broker. REALTORS® are required to disclose the existence of accepted offers, including offers with unresolved contingencies, to any broker seeking cooperation.

**What about confidentiality?** Purchase offers are generally not confidential unless the parties have agreed in advance to keep them confidential. Absent a confidentiality agreement, sellers may tell other buyers about another buyer's offer in an effort to get a better offer, or instruct their broker/agent to do so. A listing broker should receive specific authority from a seller regarding disclosure of multiple offers. Use of standard form F39 satisfies this obligation.

**Buyer Broker Challenges.** Multiple offer scenarios involve

more than a single seller and buyer negotiating. A buyer broker may have more than one client interested in a property. In those situations, the buyer broker must exercise extreme caution to fulfill their fiduciary duties to each buyer they represent of honesty and fair dealing, loyalty, confidentiality, obedience, disclosure, full accounting and the duty to use skill, care and diligence. This can present possible conflicts when one buyer client discloses their willingness to negotiate things like purchase price, as with an escalation clause, and the buyer broker has another client whose negotiations might be impacted by the other buyer's strategy.

**Escalation clauses an option?** These vary in form, but generally include an original offer at a base purchase price, a provision that the offer price will increase automatically by a set amount to beat a competing offer, and a cap beyond which the offer price will no longer increase. Caps in escalation clauses "show the buyer's hand" on how much they are willing to pay, possibly giving sellers an advantage in negotiations. Sellers are not obligated to honor escalation clauses, and may simply counter a buyer with their maximum price as revealed in the escalation clause. Even if no other offers are received, a seller knows they could make a counter-offer to at least see if the buyer will accept it in order to get the contract. Escalation clauses pose liability threats to REALTORS® when the seller or buyer looks to their REALTOR® to keep up with offers and escalations, which can be confusing with so many factors to track.

**"Love letters" or "liability letters"?** Though "love letters" written by interested buyers detailing why they want a property may motivate a seller to pick one offer over a similar competing offer, the risks involved, particularly with possible Fair Housing Act violations, outweigh the benefit. Sellers should be warned to consult legal counsel before accepting them, and buyers should consult legal counsel before sending them to a seller. At a minimum, REALTORS® should make sure clients are educated concerning their use and possible pitfalls under fair housing laws. NAR attorneys have suggested "liability letters" is a better name for them. Best practice might be to refuse to participate in their use altogether.

Irrespective of how many offers come in, only one can lead to a sale. That means some buyers (and their agents) are not going to be happy if their offer is not accepted. REALTORS® can help things go more smoothly by knowing the rules and remembering that fair and honest treatment of other parties should be the goal, along with effective communication.



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