

Multiple Offer Emergency Pack

SUGGESTIONS FOR YOU -HOW TO WIN MULTIPLE OFFERS

1. Release all or a portion of the earnest money to the seller as non-refundable.
2. Contingency Removal
 - a. Pre-inspection. Use Form 35P (no inspection is permitted unless the seller agrees that a buyer has a right to conduct an inspection)
 - b. Form 17 reviewed and waived.
 - c. Information Verification in paragraph X (21/28) reviewed, researched, and waived.
 - d. Homeowners Association Review (Form 22D paragraph 8) completed and waived.
 - e. No financing or appraisal contingency (same concept can hold true for contingent house sale Form 22B or pending home sale Form 22Q) *Note: Form 21/28, paragraph A includes a buyer's promise that buyer has sufficient funds to close and is not relying on a contingent source of funds.*
 - i. If buyer is getting a loan and/or having an appraisal, it needs to be disclosed. Can use Form 22AA to allow for appraisal, but this may not be competitive.
 - ii. If buyer is not getting a loan, use Form 22EF and include bank statements
 - iii. If buyer has a house to sell (or close), but the sale is not contingent, use 22EF to disclose.
 - f. Consider adding a Windermere For 43 Cash Down to Low Appraisal if not waving the financing or appraisal contingency.
3. Use Form 35E and encourage buyer to include an escalation that is large enough to motivate a seller to choose their offer over its competition. The "step" amount can be critical.
4. Delayed possession via rent back (Form 65B) with no monthly rent for up to 60 days.

RELEASE OF ALL CONTINGENCIES

Notwithstanding any other provision in this Agreement, if Seller is in compliance with this Agreement, all contingencies in favor of the Buyer shall conclusively be deemed waived on _____(date).

DEMCO LAW FIRM NON-REFUNDABLE DEPOSIT CLAUSE

The Earnest Money shall be released to Seller as follows *(complete all that apply)*:

- ☐ \$ _____ upon [or within ____ days after] mutual acceptance
- ☐ \$ _____ upon [or within ____ days after] removal of _____ contingency
- ☐ \$ _____ upon [or within ____ days after] _____

Immediately upon release of the Earnest Money, the released funds shall become the property of Seller and a non-refundable deposit applicable toward Purchase Price and no longer Earnest Money. If this transaction fails to close for any reason other than default or breach of this Agreement by Seller said non-refundable deposit shall remain the property of Seller. Nothing in this paragraph requires a Firm or Closing Agent to release funds that have not become available from Buyer as liquid funds. Nothing in this paragraph precludes Buyer from legal remedies for Seller's default or breach.

DEMCO LAW FIRM NO APPRAISAL CONTINGENCY CLAUSE

Note: To be used when there is a Financing Addendum in place but appraisal is waived.

The Financing Addendum (NWMLS Form 22A) is amended as follows:

1. Appraisal Less than Sale Price. Paragraph 7 is deleted in its entirety.
2. Scope of Financing Contingency Limited. Buyer may not terminate this Agreement or obtain a refund of the Earnest Money in the event Buyer is unable to obtain the Loan and the sole reason for Buyer being unable to obtain the Loan is due to Buyer's lender's appraisal of the Property being less than the Purchase Price.

DISCLOSURE WHEN BUYER IS RELYING ON A LOAN, BUT THE OFFER IS NOT CONTINGENT ON SAID LOAN

Although this Agreement is not contingent on Buyer obtaining a loan, Buyer intends to seek a loan or loans to purchase the Property. Buyer warrants that Buyer has the ability and willingness to close this Agreement at the agreed Purchase Price even if the appraisal is less than the Purchase Price. Seller agrees to permit any appraisals and inspections required by Buyer's lender and completed at Buyer's expense.

OPTIONAL: If through no fault by buyer, lender is required by 12 CFR 1026 to give corrected disclosures to Buyer due to (a) a change in the Annual Percentage Rate (APR) of Buyer's loan(s) by .125% or more for a fixed rate loan or .250% for an adjustable rate loan; (b) a change in the loan product; or (c) the addition of a prepayment penalty, then upon notice from the Buyer, the Closing Date shall be extended for up to 4 days to accommodate the requirements of Regulation Z of the Truth in Lending Act.

ACKNOWLEDGEMENT OF RISK BY BUYER

It is important to document your file when buyer opts to limit their rights or eliminate contingencies. Below is a sample email that can be sent to buyer to have them acknowledge their understanding if the risks involved:

Dear [Buyer]: You have asked me to prepare an offer on your behalf to buy property, with limited or no contingencies. As we discussed, a contingency allows you to get out of a contract under certain conditions. A financing contingency may allow you to get out of the contract if you are not able to get a loan despite due diligence. An inspection contingency may allow you to get out of the contract or ask for seller concessions if you are dissatisfied with the condition of the property based on an inspection. A title contingency allows you to evaluate the condition of the title. A sale contingency may allow you to get out of the contract if you are not able to sell a property you own.

This oversimplifies these contingencies, which typically have certain limitations and deadlines. Other contingencies are possible as well. By entering into an agreement with limited or no contingencies, you take risks. You risk being legally bound to close on the purchase even if defects in the property are found, even if you are not able to get financing, and even if you are not able to sell property and you were depending on those sale proceeds for this purchase.

Please confirm that you understand these risks and chose to move forward with your offer.

TIPS FOR LISTING BROKERS

1. Suggested list day Wednesday/Thursday and offer review day of Tuesday to allow for pre-inspections to be completed.
2. Consider having seller complete a sewer scope or inspection in advance and attach to their Form 17 disclosure to minimize the number of buyers who might opt to complete them on their own (but never prohibit a buyer from completing their own inspection).
3. Upload all attached docs to listing at time of input (offer instructions, including seller's preferred close and possession dates, legal, Form 17, Lead Paint 22J, 22K, 35P, preliminary title, etc.).
4. Follow Windermere's Guidelines for Multiple Offers. (Note: in our region, listing brokers should not also represent a buyer when there are multiple offers)
5. Use the Multiple Offer Worksheet to compare offers.
6. Prepare sellers for the potential emotional nature of the decision-making process.
7. Honor your offer review date – this is ultimately the seller's decision, but a good practice.
8. Keep all selling brokers aware of status and up to date on any changes to the plan.
9. Personally call or email all brokers that did not win.
10. Remove the key box and meet the appraiser - bring comps and copies of competing offers including escalation clauses

TIPS FOR SELLING BROKERS

1. Communicate with the listing broker with respect, be attentive, responsive, and easy to work with.
2. Learn the seller's needs –move dates and preferences. If delayed possession is preferred, discuss with your buyer and have them discuss with their lender.
3. Make listing broker aware of your buyer's intent to present an offer –this minimizes the possibility that seller will except an offer without notice prior to the offer review date.
4. Have buyer prepare a compelling buyer letter that explains why they want *this* house.
5. Ask the lender, or have buyer ask the lender, to personally reach out to the listing agent via phone or email.
6. Attach a correct buyer approval letter or redacted proof of funds and copy of EM check.
7. Always prepare a cover sheet that outlines the strengths of your offer.
8. Present your offer directly to the listing broker (or seller, if allowed).
9. Never just email or fax the offer without prior communication.
10. Make yourself and your buyer immediately available during the time offers are reviewed with the seller to be able to quickly amend your offer or accept a counter from the seller.

Windermere Guidelines for **Multiple Offers***



Multiple offers are a challenge to both agents and their clients. The best way to prevent the problems often associated with multiple offers is for all agents involved to understand their responsibilities for managing the situation and to have them communicate with all parties in an ethical and timely fashion.

I. Both agents:

- A. Educate your clients on the realities of the current market.
- B. Advise your client that the order in which offers are received does not inhibit the seller from choosing the offer they prefer.
- C. Multiple offers are a response to a market condition or a particular property.
- D. Agents and buyers cannot control the seller's response.
- E. Buyers need to provide the best offer they are willing and able to make, initially, understanding they might not get another opportunity.

II. Listing agents: The listing agent bears the primary responsibility for managing a multiple offer situation.

- A. Always adhere to all MLS rules (for example, input restrictions or abnormal showing restrictions) and state laws regarding the presentation of offers. (Refer also to *Guidelines for Presentation*.)
- B. It is generally in the seller's best interest to have buyers' agents present all offers directly to the seller and their listing agent. This ensures that each offer is presented accurately and fairly.

1) Listing agent to seller relationship:

- a. Counsel sellers about possible scenarios that come up in multiple offers situations
- b. Discuss a game plan ahead of time with your seller.
- c. Establish the date and time when potential offers will be reviewed. Avoid presentations earlier than initially stated date.
- d. Make a plan for dealing with escalators and caps. (Refer to *Multiple Offer Comparison Sheet*)
- e. Discuss how an offer from the listing agent is to be managed.
- f. Make every effort to stick to the plan, but remember that your duty is to act in the seller's best interest at all times.

* State laws and MLS rules regarding the presentation of offers vary from state to state. Make sure you are familiar with state laws and MLS rules that will impact your duties under these guidelines.

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- 2) Listing agent to buyer agent relationship:
 - a. If there are set parameters for receiving and reviewing offers (i.e., when, where, etc.), include them in the agent remarks.
 - b. Inform all agents of the plan. Provide the same information regarding the *Purchase & Sale Agreement* review process to all interested parties.
 - c. Communicate to agents if the review process changes (e.g., time or day).
 - d. The listing agent should direct selling agents to confirm offer status prior to submitting their offer, if that is important to them and their buyer.
 - e. While some listing agents disclose details of an offer to another party, doing so often generates ill will and is strongly discouraged. All options should be discussed with the seller prior to disclosing any details. Always inform selling agents of the status of unaccepted offers as soon as possible.
- 3) Listing agent also representing a buyer:
 - a. Whenever you have multiple offers that include one written by you (as listing agent), disclose this to other agents presenting offers. When representing a seller, always involve your manager in the review process when multiple offers include one prepared by you.
 - b. In a multiple offer situation where the listing agent has also written an offer, if the other proposals are faxed to the office, they should be faxed to the branch manager, not to the listing agent. Accept the fact that a listing agent is sometimes asked to present an offer of their own *after* they have received a copy of other offers. In such an event, it is essential that the listing agent's branch manager be present at presentation and that the selling agents be allowed to present their own offers if at all possible.

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Windermere Guidelines for **Multiple Offers**



III. Selling agents:

- A. Call the listing agent to ask what matters most to the seller.
- B. Educate buyers on the pros and cons of all steps that can strengthen or weaken an offer, such as adding or removing contingencies.
- C. Educate buyers regarding possible outcomes of their offer. Prepare the buyer for possibly accepting a backup position and explain both pros and cons.
- D. Carefully consider the rules for presentation set by the seller, yet keep in mind that your duty is to act in the buyer's best interest.
- E. Confirm that there are still multiple offers before your presentation.



Seller-Procured Inspection Reports Present Potential Risk for Buyers, Sellers, and Brokers

by Demco Law Firm, P.S.

Recently it has become a common practice for sellers to procure inspection reports to provide to prospective buyers. This practice can benefit both sellers and potential buyers, but there can also be some potential pitfalls of which brokers should be aware. For instance, when a seller provides prospective buyers an inspection report procured by the seller, the seller and listing broker should be careful to never discourage buyers from conducting their own inspections. In addition, selling brokers representing those buyers should always advise buyers to obtain their own inspections or hire the inspector that prepared the inspection report provided by the seller.

While there is no problem with a seller procuring an inspection report per se, there could be a problem if sellers and listing brokers discourage buyers from obtaining their own inspections and insist that buyers rely only on the seller-procured inspection report. If there is a major defect that is missed by the seller's inspector, any legal claim by the buyer could be bolstered by the fact that the seller did not allow the buyer to conduct their own inspection and provided the buyer with an inaccurate report. It is therefore not a good idea to preclude or inhibit buyers from conducting their own inspections even where the seller provides an inspection report. One possible exception to this recommendation would be in the case of sewer scopes as evidently there are legitimate concerns that too many sewer scopes can damage a sewer line.

Buyers who rely on inspection reports provided by the seller have no legal recourse against the inspector in the event the inspector missed a major defect. The contractual relationship in this circumstance only exists between the inspector and the seller who procured the report. As such, the inspector only owes a duty of care to the seller and not to some unknown buyer with whom the inspector has no relationship. Some inspectors will permit a buyer to purchase the seller-procured report at a discounted price which would create a contractual relationship (or "privity of contract") between the buyer and inspector. By doing so, the buyer would have the right to rely upon the report and have legal recourse against the inspector if the inspector was negligent. This also would afford the buyer the ability to ask the inspector questions about the report and inspection.

When a buyer elects not to include an inspection contingency, or elects not to conduct an inspection or even preinspection, it is recommended that the broker still include the NWMLS Form 35 Inspection Addendum in the purchase and sale agreement. In such a case, the box at paragraph 4 "Waiver of Inspection" should be checked to indicate the election. In the case of a preinspection the box at paragraph 3 "Preinspection Conducted" should be checked. Using these provisions in such cases will serve to protect all parties to the transaction and to show that the buyer has been advised of the risks.

Finally, WRE Form 42 has been created to use when providing prospective buyers with a copy of a seller-procured inspection report. Listing brokers are strongly advised to deliver this notice to any Buyer who is given a seller-procured inspection report.

This legal bulletin is provided for informational purposes only, and to assist brokers in identifying potential legal problems. It should not be used as a substitute for obtaining the advice of an attorney when problems arise, and is not intended to constitute legal advice. A lawyer cannot give legal advice without a detailed factual background of the client's particular situation, as the same legal question may have different answers under different circumstances. Do not base any important decisions on these materials without first consulting an attorney.



NOTICE TO BUYER: SELLER-PROCURED INSPECTION REPORT

The following notice is given with respect to the Purchase and Sale Agreement dated _____
between _____ ("Buyer")
and _____ ("Seller")
concerning _____ ("the Property").

Seller has given or is giving Buyer a copy of an Inspection Report dated _____ concerning the Property. The Inspection Report is intended to be a part of any Seller Disclosure Statement (NWMLS Form 17) that is provided in this transaction, whether or not the two documents are attached to each other. The Inspection Report was procured by Seller and is provided for informational and disclosure purposes only. It is not intended to constitute a warranty, either express or implied, about the condition of the Property. Buyer is advised to procure their own inspection from a professional inspector chosen by Buyer or hire the inspector that prepared the Inspection Report. Buyer has the opportunity to inspect the Property to Buyer's satisfaction.

Seller DATE

Seller DATE

Buyer's Acknowledgment of Receipt

The undersigned Buyer acknowledges receipt of the foregoing Notice and the above-referenced Inspection Report.

Buyer DATE

Buyer DATE

Multiple Offer Worksheet

Seller Name:

Property Address:

List Price:

Broker Name

Broker Company

Broker Contact Phone

Offer Price

Escallator Maximum Price

Escallator Increment

Competing Offer Meets 3 Requirements

Concessions

Best Final Escalated Sale Price

Notes

Closing Date

Possession Date

Seller rent-Back (65B)

Notes

EM Amount

All Cash (with Evidence of Funds to Close)

Financed but No Financing Contingency

Financing Contingency (# of days)

Down Payment %

Evidence of Funds to Close

Pre-Approval Letter + Lender Contact

Appraisal

WRE 43 - Cash Down to Low Appraisal

Waived

Notes

Inspection

Pre-Inspection

Waived

Contingency (# of days)

Sewer Scope

Notes

Legal Description Initialed + Attached

Title Contingency (# of days)

Form 17 Receipted + Waived

22J Lead Paint Signed and Waived

22D HOA Minutes Review (# of days)

21 Paragraph X Waived

Offer Expiration Date

Notes