

Managing a pre-emptive offer

This bulletin explains the seller agent's obligations when managing a pre-emptive offer, commonly referred to as a bully offer, intended to disrupt a delayed offer process.

Summary

A seller's representative must have specific instructions from the seller on how to manage pre-emptive offers. The instructions must be in writing, commonly referred to as written direction.

A pre-emptive offer is one where a buyer does not comply with the process outlined by the seller to delay the presentation of offers or other process conditions. Pre-emptive offers will often stem from a delayed offer strategy, but there may be other offer conditions that can result in a pre-emptive offer.

Discussions with the seller should outline all possible options for handling any pre-emptive offers and the benefits and risks of each option. The seller's agent is encouraged to document the disclosures made during the discussion. The seller is then able to make an informed decision of the process and provide a clear and specific written direction to their agent.

A seller may change their instructions by issuing a new written direction, and they should do so only with a complete understanding of the benefits and risks of changing their instructions.

Legal obligation to convey offers

The law is clear that a seller's agent must convey an offer to the seller as soon as possible after receiving it. The only exception to this requirement is if the client (seller or buyer) has given clear and detailed written direction to do otherwise.

Written direction key steps

An agent must follow their client's lawful instructions, so it is crucial that a seller is able to make informed decisions that are documented in a clear, specific written direction.

When representing a seller, an agent is expected to advise and inform a seller of the benefits and risks of delaying the presentation of offers or applying other offer conditions, and options for managing offers that do not comply with the seller's written and express conditions.

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The following are the key steps to follow when managing pre-emptive offers.

STEP 1: EXPLAIN THE CONCEPT OF PRE-EMPTIVE OFFERS

A seller's agent is expected to outline specifically, how, when and why a pre-emptive offer might arrive, and that they often include a particularly short irrevocable period in an effort to avoid, or pre-empt, the seller's offer process and having to compete with other buyers.

STEP 2: WRITTEN DIRECTION TO INCLUDE PRE-EMPTIVE OFFER INSTRUCTIONS

In addition to the conditions applied to the process, a seller's written direction must also explicitly outline how the seller's agent is to manage pre-emptive offers. A seller's agent must help the seller understand the options for handling pre-emptive offers so the seller may make an informed decision about the direction they will provide.

Here are some sample questions a seller's agent can ask the seller when seeking instructions before proceeding with conditions on the process:

- If a pre-emptive offer came in and you were not told about it, how would you feel?
- How committed are you to the original tactic of delaying offers (or the other conditions applied to the process) or is there an offer price or term threshold that will cause you to change your mind?
- If we receive a pre-emptive offer, do you want to:
 - wait until the offer presentation date and not be informed about any pre-emptive offers at all;
 - be notified of a pre-emptive offer without seeing the details; or
 - see only offers that are above a certain price or offers that do not contain certain conditions?

This list is not all-inclusive and all possible options should be explored based on the seller's specific requirements, these are some of the key points necessary to help a seller to make an informed decision about their instructions on how to manage pre-emptive offers. If the seller is having difficulty deciding, the discussion should continue until the seller can provide clear instructions.

STEP 3: DOCUMENT THE SELLER'S INSTRUCTIONS WITH CLEARLY WRITTEN DIRECTION

Once the seller indicates they understand their options and is ready to provide informed instructions, the seller's agent will summarize the instructions in a clear and detailed written direction for the seller to confirm.

The written direction must clearly outline all the instructions the seller has provided concerning the various pre-emptive offer scenarios and how they are to be handled. This allows the seller's agent and the seller to proceed with confidence and reduces the risk of misunderstandings.

Caution: Having the seller sign a brief general direction that they do not wish to view any offers until a specified date and inserting a statement in the listing notes like "seller reserves the right to view pre-emptive offers without notice" does not satisfy the agent's obligations. The seller's agent must notify all interested parties.

Having specific written instructions from the seller allows the seller's agent and the seller to proceed with confidence and reduces the risk of misunderstandings, which could lead to complaints and disciplinary action.

Change in the seller's direction

The seller can change their written direction at any time, but the new instructions must be documented in a new written direction. For example, if a seller who previously directed that they did not want to see pre-emptive offers decides they do now want to consider offers, a new written direction needs to be made to override the previous direction.

In a situation where the seller's written direction has changed, the seller's agent must ensure that they take all reasonable steps to notify all parties, who have indicated an interest in the property. An expression of interest (interested parties) includes parties who may have:

- booked upcoming appointments;
- viewed the property (showing or open house);
- informed the brokerage or the seller's agent that they will be submitting an offer on the property; or
- submitted an offer.

The notification must include the new offer presentation date and time if changed, and that a pre-emptive offer was received, if the seller has decided to review and consider the offer.

WHY IS NOTIFYING PROSPECTIVE BUYERS NECESSARY?

The aim of delaying offers is often to generate interest in the property. This is why it's in the client's best interest to inform buyers who have shown interest in the property of any change to the offer presentation date or process so they may deliver their offers on time. It is in the seller's interest to have a transparent offer process to ensure that as many buyers as possible have an opportunity to submit offers.

WHAT HAPPENS IF THE SELLER'S AGENT IS REPRESENTING THE BUYER?

A seller's agent must deal with buyers and their agents in good faith, particularly if the seller's agent is the one bringing forward a pre-emptive offer. A seller's agent who has a buyer client making a pre-emptive offer must apprise other interested parties of this fact as soon as possible. The multiple representation must also be disclosed to all prospective buyers.

Pre-emptive offer scenarios

SCENARIO 1

The seller signs a written direction stating they do not want to be made aware of or review any pre-emptive offers under any circumstances.

Required steps: Do not notify the seller of the pre-emptive offer.

SCENARIO 2

The seller signs a written direction indicating they only want to review pre-emptive offers above \$600,000. You receive an offer for \$595,000.

Required steps: Do not notify the seller of the pre-emptive offer.

SCENARIO 3

The seller signs a written direction indicating they only want to review pre-emptive offers above \$600,000. You receive an offer for \$605,000.

Required steps: The seller must be made aware that the pre-emptive offer was received and if the seller wants to review the offer, the seller's agent must notify, in writing, anyone who has expressed an interest in the property of the change to offer presentation date and time.

SCENARIO 4

The seller sets a future presentation date by way of written direction, but indicates they want to be made aware of any pre-emptive offers. A pre-emptive offer is received.

Required steps: The seller must be made aware that the pre-emptive offer was received and if the seller wants to review the offer, the seller's agent must notify, in writing, anyone who has expressed an interest in the property of the change to offer presentation date and time.

Complaints about pre-emptive offers

When RECO receives complaints about a process that involved a pre-emptive offer, we look for clear and up-to-date written directions and request copies of all offers (or summary documents) received for the property to determine if the offer process was conducted. We also verify if the most up-to-date direction is included in all listing notes — print and online, and whether the pre-emptive offer process was conducted properly if multiple representation emerged and prompted the change in direction.

Related Information

Bulletin No. 4.2 Managing a delayed offer presentation process