
OFFER AND ACCEPTANCE

Question: When does "mutual acceptance" occur under a purchase and sale agreement?

Answer: "Mutual acceptance" occurs when the last event necessary to the formation of a contract has occurred. Under the current NWMLS purchase and sale agreement forms, mutual acceptance occurs when a copy of the agreement signed by the all offerees is actually received by the offeror (i.e., the party making the last offer), by the offeror's agent or at the licensed office of the offeror's agent. For example, if the sellers make a counteroffer, the buyers' acceptance of the counteroffer is effective when a copy of the counteroffer signed by all buyers is actually received by the sellers personally, by the listing agent personally, or at the licensed office of the listing agent. The signed agreement may be hand-delivered or faxed to the recipient. Do not rely upon the mail, because under the current forms the acceptance is not effective until the signed agreement is *received*, rather than *delivered*, as contract law would provide.

Question: Can the seller withdraw a counteroffer by the listing agent leaving a message on the Selling Associate's voice mail, where the Selling Associate has faxed the buyers' acceptance to the listing agent after the voice message was left, but before the message was retrieved? The only changes made by the seller were shortening the inspection period from 10 to 5 days and modifying the closing window. Do those changes constitute a counteroffer at all?

Answer: The seller can withdraw a counteroffer at any time prior to acceptance. Acceptance does not occur until a copy of the counteroffer signed by the buyers is actually received by or at the office of the listing agent. Under general contract law, withdrawal of a counteroffer may be accomplished orally and is effective when notice of the withdrawal is received by the buyers. A communication delivered to an instrumentality within the control of the recipient (e.g. voice mail, e-mail, fax, answering machine) is deemed received by the recipient. However, the current NWMLS forms require revocations of offers and counteroffers to comply with the same formality as other notices given under the agreement. The changes made by the sellers do constitute a counteroffer, even though they are fairly minor changes, because they are "variances in material terms affecting the legal rights or obligations of the parties."

Question: The buyers made an offer. The sellers made a counteroffer. The buyers made a further counteroffer. The listing agent has indicated that the sellers are going to consider a new offer from another buyer. Can the first buyers withdraw their further counteroffer, and accept the sellers' counteroffer?

Answer: No; the effect of the buyers making a further counteroffer is to reject the sellers' counteroffer. Once rejected, the sellers' counteroffer was terminated and the buyers no longer have the power of acceptance.

Question: When and how should an "escalator clause" be used?

Answer: The Agreement to Beat Highest Offer Addendum (JLS Form 058) is intended to be used when only one offer has been presented, but others are expected -- the idea being to induce the sellers to accept the offer without fear of losing out on a better offer that may be presented shortly thereafter. Once multiple offers have been presented, negotiate with firm prices. The sellers should consider countering to the maximum price on the best offer without the escalator clause. The sellers cannot accept more than one offer with an escalator clause. If the sellers accept an offer containing an escalator clause, the sellers are obligated to sell to those buyers, even if another offer is presented that exceeds the maximum price under the escalator clause.

Also, once the sellers have accepted an offer containing an escalator clause, the listing agent is obligated to disclose to subsequent prospective buyers the fact that the house is sold, even though the sellers

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would like to encourage higher offers during the escalation period. This is true because the sellers are bound by the first agreement and cannot sell to subsequent buyers, whose offer would only be used to escalate the price on the pending sale.

Question: The sellers made a counteroffer to the buyers on 5/30/98 with an expiration date of 5/31/98. The parties agree orally to the terms of the counteroffer. The buyers tell the agent that they do not want to sign the counteroffer until 6/1/98 in order to buy more time on the feasibility study. The signed counteroffer comes back on 6/1/98 with that date beside buyers' initials. Is this a binding contract? The sellers received a better offer on 6/1/98 and want to accept the second offer. Can they?

Answer: Acceptance of a counteroffer is not effective unless and until a copy signed by the buyers is actually received by or at the office of the listing agent. If a counteroffer expires or is revoked by the sellers before it is accepted, then no contract is created. We had nearly the same thing happen in a recent Supreme Court case that we won.

"[The buyer] stated that he would sign the counteroffer, but because he was going out of town for the weekend, he preferred to sign the counteroffer on Sunday evening when he returned or on Monday morning. [The selling agent] testified that [the buyer] wanted to wait because it would give him more time on the investigation and feasibility study contingency, since the time limit begins when the agreement is signed by both parties. On Saturday, August 19, [the selling agent] left a written message for [the listing agent] that [the buyer] was out of town for the weekend but that he would "probably" accept the [sellers'] counteroffer Sunday night or Monday morning when he returned.

"The only information [the listing agent] had was that [the buyer] would "probably" accept the counteroffer when he returned. Both [the listing agent] and [the selling agent] testified that only a signed offer is a legal contract and that it is not uncommon for potential purchasers to say they will purchase a piece of property and then never follow through. In this case, [the buyer] could have signed the counteroffer on Friday and he would have had the property. By waiting, he took a risk of someone else making a better offer that could be accepted by the [the sellers]."

Sing v. John L. Scott, Inc., 134 Wn.2d 24, 948 P.2d 816 (1997).

Question: When the sellers make a counteroffer on a separate addendum containing provisions that conflict with those in the original offer, but do not delete the inconsistent provisions in the offer, does the counteroffer supersede the offer? Does an "as is" clause in a counteroffer addendum supersede an inspection contingency in the offer?

Answer: This question illustrates one of the reasons we prefer the interlineation approach to counteroffers. The rule is that a later provision supersedes an earlier provision, but only if the provisions are *irreconcilably inconsistent*. If the provisions can *reasonably* be reconciled, then both will be given effect. A counteroffer as to the purchase price would obviously supersede that originally offered. However, an "as is" clause is not inconsistent with an inspection contingency, because both provisions can be given effect simultaneously. The buyers have the right to obtain an inspection, but the sellers are not obligated to make any repairs.

Question: An offer was written on an MLS purchase and sale agreement form, which does not require the buyers to obtain a prequalification letter or waive the financing contingency. The buyers' financing appears shaky, but they are exploring other alternatives. In the meantime, the buyers have requested several repairs as a result of an inspection. Can the sellers include, as part of their response to the buyers' notice of disapproval of the inspection report, a requirement that the John L. Scott financing contingency be substituted for the MLS form?

Answer: If the buyers' notice of disapproval is within the scope of the inspection contingency (*i.e.* does not include any items outside the scope of the agreed inspection(s)), then the sellers cannot add any additional terms or conditions to their agreement to make the repairs without giving the buyers the right to terminate the agreement. If the sellers intend to make all the requested repairs, then they should not add the requirement that our financing contingency be substituted for the MLS form. However, if the sellers are not going to make all the repairs anyway, such that the buyers will have the right to terminate the

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agreement, then they should consider substituting our addendum as a condition of their agreement to make any repairs.

Question: The seller made a counteroffer. The buyers signed the counteroffer and faxed it directly to the listing office. Before the listing agent, selling agent or sellers were aware the signed counteroffer had been faxed to the listing office, a better offer came in. Can the sellers withdraw their counteroffer before the listing agent or sellers are aware it has been signed by the buyers?

Answer: The acceptance of the counteroffer was effective when the fax was received at the listing office. Accordingly, it is too late to revoke the counteroffer.

Question: I represent buyers who made an offer of \$240,000 on a house listed for \$250,000. The sellers did not want to respond to the offer until later this week, because two other agents said they were going to be writing offers and the sellers wanted to wait to see those offers. I counseled my buyers to add an "escalator" clause, under which my buyers would beat the highest offer received by the sellers by this Saturday at 9:00 p.m. by \$1,000, not to exceed \$250,000. The sellers then accepted my buyers' offer. One of the other buyers made an offer for \$255,000 before the deadline, which the sellers want to accept. Can the sellers accept the higher offer without giving my buyers an opportunity to beat it?

Answer: Your buyers have already bought the house and are not obligated to beat the higher offer. The sellers are bound by the agreement at the agreed maximum price of \$250,000. The "escalator" clause is intended to induce the sellers to accept the offer without waiting for other offers by committing the buyers to beat the highest offer received by the deadline. But, there is a cap on the price. In effect, the parties share the risk of a better offer under an escalator clause.

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