

COUNTEROFFERS & AMENDMENTS: A REFRESHER

Buyers and sellers are often confused by the intricacies of contract law. In many transactions, offers, counteroffers, addendums and amendments fly back and forth leaving the parties (and their REALTORS®) uncertain as to their rights and obligations. This article is intended to provide a refresher as to the general contract rules relating to offers, counteroffers and amendments. As an aside, in common parlance, the terms “addendum” and “amendment” are used interchangeably and REALTORS® should attach no particular significance to the choice of either term.

A. Offer and Acceptance

A seller who receives an offer can accept, reject or counter that offer. In addition, the seller can simply do nothing. A buyer can request that the seller respond in writing, however, the seller has no legal obligation to do so.

An offer remains open until one of the following occurs: (1) the offer automatically expires at a specific time and date set forth in the offer; (2) the offer is revoked; (3) the offer is rejected or countered; or (4) the offer is accepted.

Generally, an offer can be revoked at any time before it is accepted by the seller. A revocation does not need to be in writing. Even if the offer has a stated expiration date, the Michigan Supreme Court has held that in the absence of a payment or other consideration, an offer can be revoked prior to its stated expiration date. *Hollingshead v Morris*, 172 Mich 126 (1912).

A counteroffer is deemed a rejection of the offer and itself becomes an offer. Sellers cannot simultaneously “accept” and materially modify an offer. Once an offer is rejected, it cannot be accepted. So, if a seller presents a counteroffer, and buyer rejects the seller’s counteroffer, the seller cannot resurrect and accept buyer’s original offer. A seller with two (or more) outstanding counteroffers runs the risk that both will be accepted and then the seller will be contractually obligated to sell the property to two different buyers.

An acceptance involves a signature and the communication of that fact. Unless the contract expressly provides otherwise, this “communication” must be in the form of delivery of the signed acceptance. Typically, you cannot create a binding contract by orally communicating the fact that the acceptance has been signed. Delivery of the acceptance can be to the offeror or his agent. Whether delivery of the seller’s acceptance to the cooperating agent is effective depends on who that cooperating agent represents.

Remember, a person cannot orally authorize someone else to sign a real estate contract on that person’s behalf. A party’s faxed signature should be sufficient, particularly if the contract includes a clause permitting faxed signatures.

A “bottom line” signature is not necessary for a binding contract - - a “bottom line” signature serves only as written verification that the signed purchase agreement has, in fact, been provided to the buyer as required under the rules promulgated under the Occupational Code. Even if a buyer refuses to sign the “bottom line” of a purchase agreement, it is nonetheless a contract.

The Michigan Court of Appeals has held that a listing is not an “offer” that can be accepted by the buyer. *Eerdmans v Maki*, unpublished opinion per curiam of the Michigan Court Appeals, issued November 14, 1997 (Docket No. 196898).

B. Amendments

Once the parties have entered into a valid and binding contract, either party may, at any time, propose an amendment to that contract. Any amendments to a contract should be in writing signed by all parties. Often times, contracts include merger clauses so as to prevent someone from arguing later on that the contract has been orally modified. A party is under no obligation to accept a proposed amendment; however, once accepted, it becomes a binding portion of the

original agreement. Where there is a conflict between the terms of a contract and a subsequent amendment to the contract, the latter document controls.

A seller who receives a proposed amendment can accept, reject or counter that amendment. Or the seller can do nothing. If the seller rejects a buyer's proposed amendment (or does nothing), the original contract stands "as is." A seller cannot use the fact that the buyer has proposed an amendment to a contract to get out of the original contract.

There is often confusion amongst buyers and sellers as to what is a proposed amendment to a purchase agreement and what is a counter-offer. In a typical scenario, the seller and buyer enter into a purchase agreement. Based on some subsequent event (typically, the result of an inspection), the buyer submits an addendum to the seller requesting that there be an adjustment in the purchase price or that the seller undertake certain types of repairs or other actions. Particularly in instances where a seller desires to terminate a purchase agreement, the proposed amendment by the buyer is deemed a counter-offer which is rejected by the seller, thus allegedly permitting the seller to move on to another deal. The proposed amendment by the buyer, of course, is not a counter-offer. There cannot be a counter-offer to an existing binding purchase agreement. Instead, the addendum is simply an invitation from the buyer to amend the purchase agreement. The seller's refusal to accept the invitation to amend the purchase agreement does not terminate the purchase agreement. Unfortunately, more than one seller has moved on to a new deal only to discover that the "counter-offer" was just a proposed amendment to a purchase agreement, and thus they are now stuck with two purchase agreements for the same property.

C. Changing the Rules By Written Agreement

The general rules of contract law discussed above can be changed if the parties agree that they will be changed. This is done through written provisions in the contract itself.

For example, a seller could in fact include a provision in his counteroffer stating that in order to accept the counteroffer, the buyer must not only deliver a signed contract but must also deliver a certified check in the amount of \$10,000 and copies of the buyer's last three tax returns.

There is another type of contractual change to the rules that is becoming more and more common around the state. In some areas, REALTORS® are using forms whereby the buyer's acceptance of the seller's counteroffer is only effective if the seller, in turn, accepts the buyer's acceptance of the seller's counteroffer. This method is designed to permit the seller to present counteroffers to more than one buyer at the same time.

A third example of a written change to the general contract rules involves inspection contingency clauses. Parties can agree that while the purchaser has the right to inspect the property and cancel the contract if he finds the property condition unacceptable, any proposal by the purchaser to change the price or have the seller make repairs shall, at the election of the seller, be deemed a cancellation of the contract. Sellers (or their attorneys) sometimes use this provision to discourage buyers from proposing amendments to the purchase agreement based upon the results of this inspection.

D. Conclusion

REALTORS® must have a solid understanding of the basic contract principles of offer and acceptance. Keep in mind that while the basic rules of contract formation have not changed during your lifetime, a contract itself can be used to alter these well-established rules. REALTORS® should be particularly careful when presented with offers on forms other than the ones they are used to working with. Never assume that the "boilerplate" provisions are the same.