

## Section 3

# Contract Issues



A listing agent, having received and presented an offer to the sellers, sends an email to the buyer agent stating, “My clients have reviewed your buyers’ offer and they are unable to accept it. However, they would accept an offer of \$225,000 with the same terms in your clients’ original offer.”

A few hours later the buyer agent sends an email back stating, “I spoke with my buyers and they will pay the \$225,000 your clients are looking for; we have a deal. I will have the amended paperwork to you first thing tomorrow.”

The buyer agent tells the clients that they “have a deal” and the next morning emails the amended offer signed by the buyers to the listing agent. Later that day, another email arrives from the listing agent: “My sellers have received a second offer, so we are now in a multiple-offer situation. My clients are asking the buyers to submit their highest-and-best offer.”

The buyer agent emails the listing agent stating the belief the buyers are “under contract” and the buyers expect the sellers to honor the deal. The listing agent advises the sellers that they are free to consider another offer and the sellers subsequently accept the offer of the second buyer.

May the sellers consider another offer? Why or why not? \_\_\_\_\_

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### LEARNING OBJECTIVES

After completing this Section you should be able to:

- determine when a broker is permitted to disclose the confidential terms of a buyer’s offer to competing buyers;
- define requirements for offer and acceptance;
- explain the difference between earnest money deposits and due diligence fees;
- explain how a broker must handle a disputed earnest money deposit that is being held in the broker’s trust account; and
- describe how a broker must handle earnest money deposit and due diligence fee checks made payable to third parties.

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## OVERVIEW

This Section will review the facts of disciplinary cases related to contract situations.

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### CASE # D17-0711: THE HIGHEST OFFER IS...



Read the following case summary.

Determine what, if any, errors were made by the broker(s) and which License Laws or Commission Rules were violated.

#### **PARTIES:**

The Complainant was the BIC of a firm representing a buyer. Respondents were the Listing Agent and Listing Firm for which the Listing Agent was QB/BIC.

#### **COMPLAINT:**

The BIC's complaint stated that an agent with his Firm, acting as a Buyer's Agent for a prospective buyer, submitted a written offer on behalf of the buyer to the Listing Agent for the listed property. The complaint alleged that a multiple offer situation ensued and that the Listing Agent disclosed to each of the three other prospective buyers' agents the amount of her client's offer.

#### **FACTS:**

The Complainant/Buyer's Agent stated that on December 10, 2016, she emailed to the Listing Agent a copy of her buyer's signed offer for \$176,000. On the same day, she received a voice mail from the Listing Agent stating that there were multiple offers, and, per his seller's request, he would inform all prospective buyers that the highest offer was \$176,000 and ask all buyers to submit their highest and best offers. There were four competing offers (including the Complainant's buyer-client's offer).

Two of the three other buyers' agents confirmed the allegations in the complaint. One of the three stated that shortly after he submitted an offer to the Listing Agent, the Listing Agent left a voice mail and sent an email to him giving notice of multiple offers and disclosing that the current highest offer was \$176,000. Though he no longer had a copy of the voice mail, he provided a copy of the December 10, 2016, email in which the Listing Agent stated: "Did you get my message about the other offer that was 176k in the initial offers before we called for highest and best?"

The third buyer's agent responded similarly, and provided a copy of a December 10, 2016, text message from the Listing Agent which stated: "Ok, did you hear my voice mail that we had at least a \$176,000 net to seller from initial offer? Just want to make sure."

The fourth buyer's agent, whose buyer-client's 2nd offer of \$181,000 was accepted by the seller, alleged that she had no written communications with the Listing Agent regarding terms of other offers, and that she could not recall the Listing Agent disclosing the amount of any particular offer, only that the transaction was a multiple offer situation and the Listing Agent had requested highest and best offers.

## **Main Points - The Highest Offer Is...**

Buyer's Agent emailed a signed offer for \$176,000 to the Listing Agent.

The Listing Agent replied, stating his seller had asked him to disclose the highest offer of \$176,000 to all other buyers.

Two of three other buyer's agents confirmed they had been notified of the multiple offer situation and that the highest bid was \$176,000.

## **Evaluation & Discussion - The Highest Offer Is...**

Errors made by Listing Agent: \_\_\_\_\_  
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\_\_\_\_\_

## **Related Law and Rule Considerations - The Highest Offer Is...**

### **"Shopping Offers" is Illegal**

Commission Rule 58A .0115 states:

*A broker shall not disclose the price or other material terms contained in a party's offer to purchase, sell, lease, rent, or to option real property to a competing party without the express authority of the offering party.*

Brokers may not share the price or other material terms in offers with competing parties without the express authority of the offering party (the buyer). All buyers must be treated fairly, honestly and equally. Disclosing terms of an offer to other buyers gives those receiving the information an unfair advantage over the buyer whose competing offer is disclosed. Thus, it is not in the interest of most buyers to allow disclosure of their offers.

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## CASE #D18-0511: THE MINI STORAGE FACILITY



Read the following case summary.

Determine what, if any, errors were made by the broker(s) and which License Laws or Commission Rules were violated.

### **PARTIES:**

The Complainant was the prospective Buyer in a transaction. Respondent was the Listing Agent. (The Listing Agent was not acting as a dual agent in this case.)

### **COMPLAINT AND FACTS:**

The prospective Buyer found a listing on LoopNet for a mini storage facility and reached out to the Listing Agent on October 16, 2017, for information. The Listing Agent provided a description of the property and an income summary by email. The Buyer then requested a tour of the facility and made an appointment with the Listing Agent for a showing on October 20, 2017. The Buyer drove from another state to see the property.

The Buyer arrived for the appointment on October 20, 2017, but the Listing Agent was not there. The Buyer called the Listing Agent, and the agent said that he could not make the appointment due to a problem with a closing. The Listing Agent gave the Buyer an access code for the property so that the Buyer could tour the facility on his own.

On October 23, 2017, the Buyer called the Listing Agent and told him he wanted to make an offer. The Listing Agent asked the Buyer to send his offer by email and said he would present it to the owner upon receipt. The Buyer sent an email shortly thereafter, stating he wanted to purchase the property for \$360,000. A few hours later, the Listing Agent called the Buyer and stated the owner had accepted the Buyer's offer and that the Listing Agent would send the agreement for purchase right away. At approximately 9:00 pm on the same day (October 23, 2017), the Listing Agent sent the Buyer an agreement for purchase, *Working with Real Estate Agents* brochure, and *Professional Services* form (commercial form #585).

On October 24, 2017, the Buyer sent an email to the Listing Agent, stating he was going to have the paperwork reviewed by an attorney. The Buyer then contacted a North Carolina attorney to review the paperwork and began his due diligence process by contacting companies to begin inspections.

On October 25, 2017, the Listing Agent emailed the Buyer, telling him another offer had arrived and that a 3rd party was also expressing interest (though that party had not submitted a formal offer). The Listing Agent asked the Buyer to submit his highest and best offer by 5:00 pm on October 26, 2017.

The Buyer submitted an offer of \$380,000 on October 26, 2017. On October 27, 2017, the Listing Agent contacted the Buyer and told him his bid had not won. Soon after, the Buyer filed a complaint with NCREC, alleging that the Listing Agent should not have entertained any additional offers since he (Buyer) was already under contract with the Seller.

During the Commission's investigation, the Listing Agent provided copies of all relevant documentation in a timely manner, including:

- all signed agency agreements and addenda between the broker, sellers, and prospective buyers;
- signed WWREA by sellers and prospective buyers;
- all signed agreement for purchase and sale contracts and addenda for the life of the listing;
- copies of all offers to purchase the subject property;
- copies of all correspondence with the buyer; and
- copies of all correspondence with the seller.

The emails to the interested buyers calling for highest and best offers were the same to each interested party.

## Main Points - The Mini Storage Facility

October 16: The Buyer contacted the Listing Agent about a property found on LoopNet.

October 23:

- Buyer emailed offer to Listing Agent;
- Listing Agent called Buyer to say that Seller had accepted the offer; and
- Listing Agent emailed contract forms to Buyer to be completed.

October 24: Buyer emailed Listing Agent to say he would have an attorney review the paperwork, contacted an NC attorney, and began his due diligence.

October 25: Listing Agent informed Buyer by email of multiple offers and requested that Buyer submit *highest and best* by 5:00pm on the next day.

October 26: Buyer submitted written offer.

October 27: Listing Agent informed Buyer he had not won the bid.

Listing Agent provided all requested documentation during investigation.

## Evaluation & Discussion - The Mini Storage Facility

Errors made by Listing Agent: \_\_\_\_\_  
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## Related Law and Rule Considerations - The Mini Storage Facility

### Offer and Acceptance

To create a valid real estate sales contract, there must be an **offer**, an **acceptance** of the offer, and **communication of acceptance** to the last offeror.

- Offeror: Person making an offer to enter into a contract.
- Offeree: Person to whom the offer is made.

An offer must be accepted and the acceptance must be appropriately communicated to the offeror before a contract for the sale of real estate is created.

Under contract law, offers and acceptances may be communicated in a variety of ways – orally, by personal delivery in writing, by mail, by email or text message, or by other electronic means. However, an offer can specify the exact manner in which acceptance is to be communicated, in which case the offeree must communicate acceptance in the manner directed to create a contract.

In real estate practice communicating an offer or acceptance to a principal's agent is the same as communicating directly to the principal.

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## **OTHER CONTRACT CONSIDERATIONS: EARNEST MONEY DEPOSITS & DUE DILIGENCE FEES**

### **Definitions**

- **Earnest Money Deposit (EMD)**

An EMD is the amount of money deposited by the buyer with the broker or other escrow agent to evidence the buyer's good faith.

The buyer pays the EMD to the escrow agent identified in the contract. Often, the escrow agent is a real estate company or an attorney or title company.

Form 2-T states that all earnest monies are to be held by the named escrow agent and credited to buyer at closing against the purchase price unless the contract is otherwise terminated. Additionally, if the buyer timely exercises the right to terminate the contract prior to the expiration of the due diligence period, then all earnest money deposits are refunded to the buyer.

If the seller breaches the contract, then all earnest money deposits are to be refunded to the buyer upon buyer's request, but "... shall not affect any other remedies available to Buyer for such breach."

- **Due Diligence Fee (DDF)**

The DDF is defined in Form 2T as "A negotiated amount, if any, paid by Buyer to Seller with this Contract for Buyer's right to terminate the contract for any reason or no reason during the Due Diligence Period."

The buyer pays the DDF directly to the seller, generally at the time the contract is executed. The amount of the fee may be influenced by such matters as the market for the property, number of days on the market, personal circumstances of buyer and seller, and the length of the "Due Diligence Period."

If the transaction does close, then the amount of the due diligence fee is applied against the purchase price. The DDF is non-refundable, except in the event of a material breach of the contract by the seller or if the property is destroyed prior to closing (per paragraph 12 in Form 2T).

## Disputed EMDs



***My Buyer and Seller are disputing the disbursement of the EMD, and the EMD is being held in my firm's trust account. What should I do with the money?***

Answer: While brokers should use their best efforts to assure that the contract's provisions regarding the disposition of earnest money are followed, they also are obligated to abide by Real Estate License Law and Real Estate Commission Rules governing trust funds.

Commission Rule 21 NCAC 58A.0116(d) states in part:

*In the event of a dispute between buyer and seller or landlord and tenant over the return or forfeiture of any deposit other than a residential tenant security deposit held by the broker, the broker shall retain the deposit in a trust or escrow account until the broker has obtained a written release from the parties consenting to its disposition or until disbursement is ordered by a court of competent jurisdiction. Alternatively, the broker may deposit the disputed monies with the appropriate Clerk of Superior Court in accordance with the provision of G.S. 93A-12 ...*

When the seller and buyer disagree as to whom should receive the EMD, the broker is prohibited from making an independent decision in the matter, even if it is apparent to the broker who should receive the EMD based on the language of the contract.

Instead, the broker must hold the EMD in the trust account until

**EITHER...**

1. the parties reach a written agreement concerning disbursement;

**OR**

2. someone obtains a court order stating who is to receive the earnest money deposit;

**OR**

3. the broker deposits the disputed monies with the appropriate clerk of court in accordance with the provisions of N.C.G.S. §93A-12.



## **N.C.G.S. §93A-12 - Disputed Monies**

If a buyer and seller cannot agree on who should receive an EMD that is being held by an escrow agent (broker or attorney), this law enables the escrow agent to deposit funds with a Clerk of Court, rather than continue holding the disputed funds in the escrow account.

The procedure is:

1. Escrow agent notifies both parties in writing of plans to deposit funds with Clerk of Court. The notice must:
  - be sent to the parties at least 90 days prior to deposit, and
  - either be delivered to the person or sent "... by first class mail, postpaid, properly addressed to the person at the person's last known address."
2. After 90 days, if there still is no agreement between the parties, the escrow agent may deposit the funds with the Clerk of Superior Court of the county where the property is located. To do so, the escrow agent should write a check for the full amount of the EMD to the Clerk of Court and submit it with the appropriate form (AOC-SP-260) that may be obtained from the Clerk.

Note: If either party files a special proceeding with the Clerk of Court within one year of the funds' deposit, the clerk will hear the case and determine rightful ownership. If neither party files a special proceeding within one year, the money will escheat to the State.

## Delivery of EMDs and DDFs made payable to Third Parties



On Tuesday afternoon, a Buyer's Agent submits a written offer to a Listing Agent (on the Standard Form 2T) on behalf of a Buyer. The Listing Agent presents the offer to her seller-client on Wednesday morning, and the seller-client accepts the offer without making changes. The Seller signs all pages of the contract, and the Listing Agent notifies the Buyer's Agent that the contract has been signed on Wednesday morning.

Thus, the Buyer and Seller are under contract as of Wednesday morning.

Terms of the contract include a \$2000 "Initial" EMD to be paid to the Escrow Agent, an attorney, and \$1000 DDF to be paid directly to the Seller. The Buyer writes both checks on Wednesday and hands them to the Buyer's Agent. The Buyer's Agent hand-delivers both checks to the Listing Agent on Wednesday afternoon.

On Thursday morning, the Buyer calls her Buyer's Agent and says she has cold feet and wants all of her money back. She asks her Buyer's Agent to attempt to get her checks back before they are delivered. The Buyer's Agent suggests that the Buyer consult an attorney as the Buyer may be in breach of contract, but the Buyer is adamant. The Buyer instructs the Buyer's Agent to call the Listing Agent and ask for the checks to be returned.

The Buyer's Agent calls the Listing Agent and asks whether or not he has delivered the checks to the attorney and to the seller. The Listing Agent says that he has not yet delivered the checks but was planning to do so later in the day. The Buyer's Agent tells the Listing Agent that her Buyer wants the checks to be returned.

Should the Listing Agent return both checks to the Buyer? Why or why not? \_\_\_\_\_

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Historically, escrow agents were generally real estate brokerage firms, most often the listing firms, so EMD checks were commonly made payable to a listing firm's trust account. Commission rules require that whenever a real estate broker is acting as the escrow agent, the broker must deposit the buyer's EMD money into a properly identified trust or escrow account. Consequently, once a broker is given a check made payable to the firm's trust account, the broker must ensure it is deposited in the trust account within the required three-day period.

Today, however, many brokerage firms are choosing not to have trust accounts. Instead, attorneys and other companies are being named as escrow agents in sales contracts. As a result, brokers are often given EMD checks made payable to others (such as attorneys). In addition, brokers are given DDF checks made payable to sellers.



***Are brokers permitted to deliver EMD and DDF checks made payable to third parties?***

**Answer:** Yes, with certain conditions. Commission Rule 58A .0116(b)(4) states:

*A broker may accept custody of a check or other negotiable instrument made payable to the seller of real property as payment for an option or due diligence fee, or to the designated escrow agent in a sales transaction, but only for the purpose of delivering the instrument to the seller or designated escrow agent. While the instrument is in the custody of the broker, the broker shall, according to the instructions of the buyer, either deliver it to the named payee or return it to the buyer. The broker shall safeguard the instrument and be responsible to the parties on the instrument for its safe delivery as required by this Rule. A broker shall not retain an instrument for more than three business days after the acceptance of the option or other sales contract.*

**The rule attempts to remove brokers from the middle of disputes.** As long as the check/instrument for an option fee, due diligence fee, or earnest money deposit payable to an escrow agent other than the broker/company holding the check is in the possession of a broker, that broker must follow the buyer's directive to:

**EITHER:**

1) deliver the instrument to the seller/escrow agent

**OR**

2) return it to the buyer.

This is true even after the parties have entered into a legally binding contract.

**IMPORTANT NOTES:**

- The rule requires brokers to deliver the EMD and DDF checks made payable to third parties **within three business days of receipt.**
- Only EMD checks made payable to a third party escrow agent or DDF checks made payable to sellers may be delivered by brokers (without being deposited into the firm's trust/escrow account).



***May a broker who engages in property management deliver rent or tenant security deposits checks to the owner - or deposit these types of payments directly into an owner's account?***

**Answer:** No. The delivery exemption applies **ONLY** to EMDs and DDFs. If a broker is given a check for any other type of trust money, such as rent or a tenant security deposit, the broker must deposit the funds into the broker's/firm's trust account.

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## ANSWERS TO DISCUSSION QUESTIONS

### For Discussion on page 37

*NOTE: This example and article were originally published in the February 2013-Vol 43-3 edition of the Commission's Bulletin.*

A listing agent, having received and presented an offer to the sellers, sends an email to the buyer agent stating, "My clients have reviewed your buyers' offer and they are unable to accept it. However, they would accept an offer of \$225,000 with the same terms in your clients' original offer."

A few hours later the buyer agent sends an email back stating, "I spoke with my buyers and they will pay the \$225,000 your clients are looking for; we have a deal. I will have the amended paperwork to you first thing tomorrow."

The buyer agent tells the clients that they "have a deal" and the next morning emails the amended offer signed by the buyers to the listing agent. Later that day, another email arrives from the listing agent: "My sellers have received a second offer, so we are now in a multiple-offer situation. My clients are asking the buyers to submit their highest-and-best offer."

The buyer agent emails the listing agent stating the belief the buyers are "under contract" (they are not) and the buyers expect the sellers to honor the deal. The listing agent advises the sellers that they are free to consider another offer (which they are) and the sellers subsequently accept the offer of the second buyer.

May the seller consider all offers or is the seller under contract with the first buyer?

*Answer: Yes, the sellers may consider another offer. Here the buyer agent mistakenly believes that because the necessary terms for a contract were in writing between the brokers, a binding contract was formed.*

#### *Know When Contract is Binding*

*Buyers and sellers rely upon brokers to guide them through offers and counter-offers of price and terms, to know the difference between potentially binding and non-binding proposals, and to inform them when a contractual relationship has been established.*

## *Clear Communication*

*It is important to understand that “negotiations” between the brokers, even those in writing, will generally not bind their clients to a contract since brokers do not generally possess the necessary power or authority. (This may not be the case when the buyer and seller negotiate in writing, as a binding contract can then be formed).*

*Also, clarity in both oral and written communications is vitally important for a broker. When a broker proposes possible terms on the client’s behalf, the broker must use language to signal that it is a non-binding proposal: “The seller will consider an offer of \$225,000 upon the same terms,” or simply “This is a non-binding proposal.”*

*Although emails between brokers regarding contract terms should never be interpreted as a binding agreement between the principals, avoiding ambiguity is in everyone’s best interest. Brokers should always advise clients that contracts are not binding unless accepted and signed by all the parties, with any changes initialed and approved by all parties.*

## *Notice of Acceptance*

*This is the final step in forming a binding contract, and can be made orally or in writing. It is the notice given to the offeror that the offeree has signed and accepted the offer, and a binding contract has been formed. It does not mean that a broker is accepting on their client’s behalf.*

*When a broker gives notice of acceptance, he or she is communicating that the seller has signed and accepted the buyer’s last offer as written (without any changes to the terms) and the parties are under contract. A broker simply stating “we have a deal” does not, by itself, create a contract. The broker giving notice of acceptance should always be clear as to whether or not the contract in the possession of the seller is signed and the broker receiving notice of acceptance should always ask.*

*Brokers often raise the issue of whether it is ethical for a seller (or buyer) to consider other offers when they have made a “commitment” to a buyer (or seller). Until a binding, written contract is formed, the parties are free to consider other options.*

## Case Outcome - The Highest Offer is...

### Errors identified during the Commission's Investigation

- Listing Agent disclosed confidential terms of a Buyer's offer terms to competing buyers without the Buyer's permission.

### Law & Rule Violations identified during the Commission's Investigation

- N.C.G.S. § 93A-6(a)(8) - Being unworthy or incompetent to act as a real estate broker in a manner as to endanger the interest of the public.
- N.C.G.S. § 93A-6(a)(10) - Any other conduct which constitutes improper, fraudulent or dishonest dealing.
- N.C.G.S. § 93A-6(a)(15) - Violating any rule adopted by the Commission.
- Commission Rule 58A .0115 - Disclosure of Offers Prohibited
- Commission Rule 58A .0601(e) - Complaints/Inquiries/Motions/Other Pleadings

### Sanctions Imposed by Commission

Listing Agent and Listing Firm: 12-month active Suspension - reduced to 12-months *stayed* Suspension because QB/BIC completed the Commission's *Issues and Answers* course.

## Case Outcome - The Mini Storage Facility

### Possible errors made by the Broker

When the Listing Agent called the buyer to relay the seller's response to the emailed offer, the Listing Agent's comments suggested that the buyer and seller were under contract. The Listing Agent should have been more specific about the status of the offer, i. e, that there would be no contract until both parties signed the agreement and it was properly communicated.

### Law & Rule Violations identified during the Commission's Investigation

None identified.

### Sanctions Imposed by Commission: Close with no action as to broker and firm.

NCREC Comments: Respondent included all required documents requested. The evidence tends to indicate that there was no written contract between Buyer and Seller. It also indicates that there was another buyer who made a higher offer which was accepted by the Seller.

## For Discussion on pages 46

On Tuesday afternoon, a Buyer's Agent submits a written offer (on the Standard Form 2T) on behalf of a Buyer to a Listing Agent. The Listing Agent presents the offer to her seller-client on Wednesday morning, and the seller-client accepts the offer without making changes. The Seller signs all pages of the contract, and the Listing Agent notifies the Buyer's Agent that the contract has been signed on Wednesday morning.

Thus, the Buyer and Seller are under contract as of Wednesday morning.

Terms of the contract include a \$2000 "Initial" EMD to be paid to the Escrow Agent, an attorney, and \$1000 DDF to be paid directly to the Seller. The Buyer writes both checks on Wednesday and hands them to the Buyer's Agent. The Buyer's Agent hand-delivers both checks to the Listing Agent on Wednesday afternoon.

On Thursday morning, the Buyer calls her Buyer's Agent and says she has cold feet and wants all of her money back. She asks her Buyer's Agent to attempt to get her checks back before they are delivered. The Buyer's Agent explains that the Buyer may be in breach of contract, but the Buyer is adamant. The Buyer instructs the Buyer's Agent to call the Listing Agent and ask for the checks to be returned.

The Buyer's Agent calls the Listing Agent and asks whether or not he has delivered the checks to the attorney and to the seller. The Listing Agent says that No, he has not yet delivered the checks, but was planning to do so later in the day. The Buyer's Agent tells the Listing Agent that her Buyer wants the checks to be returned.

Should the Listing Agent return both checks to the Buyer? Why or why not?

*Answer: Yes. Because the Listing Agent (LA) has not yet delivered the checks to the attorney and to the Seller, the LA must return both checks to the Buyer. If the LA had already delivered the checks, they could not be retrieved at this point without permission of the Seller.*

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*Notes*