

## What is the “Seller Multiple Counter Offer”?

by Richard P. Green



In a real estate market where existing inventory is sparse and buyers are numerous, such as Florida, the situation where a seller of real estate will receive multiple offers is not uncommon. Generally, when a seller receives multiple offers, the seller has complete control and a variety of options over how to handle those offers. The four most common options for a seller are: (1) to accept whichever offer best meets the seller’s desires; (2) essentially reject all the offers and invite the buyers to resubmit new offers<sup>1</sup>; (3) institute a bidding war which has similarities to an auction<sup>2</sup>; and (4) counter only one of the offers that is closest to the terms the seller is seeking.

However, there is another option that appears to be catching on in Florida which is known as the “Seller Multiple Counter Offer” (“SMCO”). This option allows the seller who received multiple offers to submit a counter offer to each prospective buyer containing specific terms the seller desires. The assertion is if any or all of the prospective buyers accept the counter offer, it does not create a binding contract but rather the counter offers are resubmitted to the seller who has the ultimate decision to choose which counter offer to move forward with.

This SMCO does not understand the basic contract principles in Florida. SMCO’s confuse the meaning of an offer, rejection, counter-offer, and acceptance. In order to have an enforceable contract for the sale of real estate, there must be an offer and an acceptance. The acceptance of an offer must be absolute and unconditional, identical with the terms of the offer and in the mode, at the place and within the time expressly or impliedly required by the offer.<sup>3</sup> The contract must contain a description of the property, the names of the buyer(s) and seller(s), a price term and whether there are any financing contingencies, and signed by the parties.<sup>45</sup>

If a seller responds to an offer from a buyer with a counteroffer, the counteroffer acts to reject the initial offer from the buyer.<sup>6</sup> If the counteroffer is rejected by the buyer, the seller cannot accept the original offer. Likewise, if the buyer does not accept the seller’s counteroffer as submitted, but changes the offer in any manner, then the buyer has rejected the counteroffer and submitted his/her own counteroffer. This process continues until there is an explicit offer with defined terms and an acceptance which mirrors the offer.<sup>7</sup>

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<sup>1</sup> This usually takes the form of “submit your best and final offer”. Buyers are now aware that multiple offers are in play and can resubmit an offer but will not know the content of the competing offers.

<sup>2</sup> Here, a seller receives multiple offers. The seller informs the lower bidder(s) that another higher offer has been received and invites the low bidder(s) to submit a new offer. Should the seller receive a higher offer from the low bidder(s) then the seller communicates that to the other offeror allowing that offeror to increase their offer. The process continues until the seller is left with the last highest offer.

<sup>3</sup> *Sullivan v. Economic Research Properties*, 455 So. 2d 630, 631 (Fla. 5th DCA 1984).

<sup>4</sup> Section 725.01, Fla. Stat. (2018).

<sup>5</sup> *See de Vaux v. Westwood Baptist Church*, 953 So. 2d 677 (Fla. 1st DCA 2007).

<sup>6</sup> *Pena v. Fox*, 198 So. 3d 61, 63 (Fla. 2d DCA 2015).

<sup>7</sup> *Id.*

In the situation of the SMCOs the glaring issue is what is the effect of the seller's "counteroffer"? A counteroffer is not an "offer" if it cannot be accepted.<sup>8</sup> Accordingly, when a seller counters a buyer's offer with new or different terms from the buyer's original offer, the seller is conveying a new proposal for acceptance or rejection.<sup>9</sup>

Therefore, if a seller responds to multiple offers by changing terms and submitting a "counteroffer", or a new proposal, to multiple potential buyers, the seller has effectively conveyed multiple proposals for acceptance or rejection. However, the seller only has one property sell. Accordingly, if more than one prospective buyer accepts the seller's proposals, then the seller has availed themselves to more than one duty to sell without the ability to perform.

This could result in litigation where multiple potential buyers sue to have the court determine who is entitled to the property. Property is unique and therefore money damages are generally not an adequate remedy.<sup>10</sup> Each of the buyers would be seeking specific performance of their contract. The litigation would be costly, acting to deprive the seller of potential profits from the sale of their property.

The potential damages could be determined by the purchase prices of the various contracts. If the successful buyer has a higher contract price, then the judgment amounts owed to the other buyers involved could be the difference between the affected party's contract price and the successful buyer's contract price. The seller could be on the hook for attorney's fees and costs of the litigation as well as reimbursement of monies used to secure the contract.

#### *Best Practice Tips*

There are a few common sense steps that a seller can take in order to avoid the potential disaster of the SMCO. The first thing to understand is that when a seller makes an offer, the seller can dictate how acceptance is to be accomplished. For example, acceptance of the seller's offer is dependent upon an executed contract being delivered and the earnest money check clearing deposit. This way, even if multiple buyers submit signed contracts, the contract is not fully executed until the seller deposits the earnest money check. This allows the seller to choose which contract they wish to move forward with.

Another option is the seller can conspicuously indicate on their "counter-offer" that their proposal is "NOT AN OFFER" but rather a list of terms the seller is willing to accept. This notifies the prospective buyer of the terms the seller is looking for. If these terms are acceptable to the buyer then the buyer can submit a new offer with those terms. Again, the seller retains the power to decide which contract they wish to move forward with.

#### *Conclusion*

The SMCO situation has danger written all over it. It is understandable that sellers want to get the best deal they can, but risky situations should be avoided when possible. If you are a potential seller in need an experienced Real Estate advocate to assist you through the process, contact my office. I am able to provide a full range of services to help you maximize your investment.

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<sup>8</sup> *Frissell v. Nichols*, 114 So. 431 (Fla. 1927).

<sup>9</sup> *Id.*

<sup>10</sup> *Bermont Lakes, LLC v. Rooney*, 980 So. 2d 580, 586 (Fla. 2d DCA 2008).

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