**BUYER CREATIVITY IN A HOT REAL ESTATE MARKET**

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The Southwest Florida real estate market has been on fire for over a year. Sellers are happy, but often have to sort through multiple offers and decide what price and terms to accept. Sellers also have to guess which buyer will actually close on purchase.

Buyers have a different problem in a hot market. They have to compete with other buyers on both price and terms. They want their offer to be as attractive as possible and many create unforeseen problems as part of that effort.

Some buyers make a cash offer even though they will use mortgage financing to purchase. They think a cash offer is more attractive to a seller, so they do not include a financing contingency.

Financing contingencies protect a buyer. If properly worded, the financing contingency provides that if the buyer is unable to timely obtain a loan on terms acceptable to the buyer, the buyer can terminate the contract and get back any deposit. The buyer still has to pay any inspection, loan application and other expenses, but the buyer’s deposit is safe.

Most form real estate contracts include a liquidated damages clause. That clause states it is difficult to determine damage to a seller if the buyer defaults, so the parties agree if the buyer defaults the seller gets the deposit. Most of those same forms also provide that closing date must be met and there is no right to change unless the parties agree. If a buyer fails to close under a typical form contract that does not have a financing contingency, the buyer loses the deposit.

Believe it or not, things go wrong with loan applications. Even buyers with stellar credit can find financing delayed. If mortgage funds are not available on the closing date, a buyer who made a cash offer can lose the deposit while the seller happily enters contract with a new buyer. In a hot market, chance of a seller being happy when a buyer fails to close increases because market values are escalating and many sellers think they sold too cheap to start.

Another way some buyers try to make their offer attractive is to offer to purchase “as is.” That means, the buyer accepts the property without any obligation on the seller to repair defective items. These buyers hope that signals a inspections will not be a problem and that the closing will happen “for sure.”

Buyers making an “as is” offer run the risk that there may be problems with a property and that those problems could be significant. For that reason, most of the form contracts used for “as is” purchase in Southwest Florida include time for the buyer to inspect. They also provide that if the buyer decides not to purchase, the buyer can terminate the contract and get back any deposit. The forms do not have any criteria that a buyer must meet to show the property is defective but give a set time (usually 15 days) within which a buyer can terminate. Those forms are usually titled something like “As Is -Right to Inspect.”

To a seller, a contract titled “As Is-Right to Inspect” may sound like an “as is” sale. Those sellers may be very unhappy to hear a few days later that the buyer has terminated under contract right, even though the buyer did not inspect anything. Sellers may also hear that the buyer has inspected, and wants the seller to repair or give a credit and if the seller refuses the buyer will terminate by end of the buyer’s inspection period. That can create a lot of friction with a seller who thought the sale was “as is.” Even if the seller agrees to repair, the buyer might find the seller sticking to the letter of the contract thereafter and that might “stick it” to the buyer if the buyer later needs an extension or some other accommodation.

Since the “As Is-Right to Inspect” contract is really an option contract, some buyers are even more devious. They make offers on multiple properties and if more than one is accepted, terminate all but their preferred choice. Although that practice is frowned upon in the real estate community, it is not prohibited.

Most sellers start (and many end) contract review with price. Sellers want as much as they can get and the highest offer is usually given a lot of consideration. Sellers can then look to other terms and contingencies, but they rarely vary from making price the number one factor in their decision-making process.

Buyers know that sellers want as much as they can get, but buyers have a different focus. They want to pay as little as they can. Buyers do not want to bid against themselves. So how can a buyer offer more than someone else but possibly less than the buyer’s top dollar? Some use an escalation clause.

An escalation clause provides a buyer’s offer will increase by a small amount above any competing offer. Most include a maximum price where the escalation stops. These can make it difficult for a seller to compare offers that are not on identical forms as other contract terms can vary what the seller nets. They can also appear complicated to a seller. As a result, these clauses can backfire when a seller refuses to consider an escalation clause. In some cases, a seller will simply counter at the cap amount in the escalation clause, even with no competing offer. Nevertheless, these clauses are used by some in the hope of winning a contract but not at their top dollar.

Despite the best efforts of a buyer, in a hot market many offers fail. With low inventory and many shoppers, a rejected buyer may not find any other property acceptable. For those buyers, all is not lost as they can still offer a backup contract.

A backup contract becomes primary when the first contract falls through. The first contract could fall through because of financing, inspection or some other contingency. Chance of a backup contract becoming primary is usually slim, but it offers some hope when a buyer is set on a particular property and was unsuccessful in original offer. The backup can also be used when a buyer learns of a property the buyer really likes that is already under contract. A buyer usually includes a deadline for the first contract to fall through so the buyer is not “stuck” forever. The backup contract can be a good way to get a second bite at a property.

Perhaps the biggest problem with buyer efforts to dress offers in attractive clothes is poor drafting. All of the techniques discussed in this column are complex. Slapping together a few sentences that sound okay can be a recipe for a lawsuit. Even using pre-printed forms can create problems when the forms are not properly used or the signer does not understand what the form does. To make matters worse, many preprinted forms create problems on their own. Some are downright awful.

A hot real estate market encourages creativity. Creativity adds complexity. When creativity is employed, both buyer and seller should make sure they completely understand what they are being asked to sign.

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