

BACK OFFERS – WHEN DO THEY LAPSE EXACTLY?

A seller accepts 2 offers. Both are subject to suspensive conditions.

The second one is accepted subject to cancellation of the first offer. Offer #1's conditions are met in time, so cancellation will not happen unless there is a breach in the contract by one of the parties.

The question that arose last week, was "May the seller still insist that offer #2 obtain bond approval, just in case offer #1 might be cancelled later?" In other words, is offer #2 still binding, given that offer #1 has become final? Can it be a "safety net" should offer #1, for whatever reason, not work?

In our view, the answer is simply this: offer #2 is subject to cancellation of offer #1, and the moment offer #1 becomes final, offer #2 falls by the wayside. The intention here, by saying that offer #2 was subject to cancellation of the first offer, was clearly to enable buyer #2 a chance to also try and get a bond. If buyer #2 manages to secure his bond first, then buyer #1 can be given 72 hours' notice.

Only if offer #1 was then cancelled (for that reason), would offer #2 proceed. The intention could never have been to make it subject to cancellation of offer #1, "just in case offer #1 becomes cancelled at some future date", because then offer #2 can be kept to the agreement indefinitely.

To ensure this does not become an issue, it might be a solution to make any back up offer "subject to cancellation of the first offer, by a certain date". If offer #1 is not cancelled by a certain date, then #2 definitely falls away.