What First Right of Refusal Means for Contingent Offers

A contingent offer is often the answer to buying and selling at the same time. Making an offer to buy a home when your own home is not yet sold is a dilemma for many home buyers. Regardless of whether it's a buyer's market or a seller's market, sellers aren't too eager to accept an offer that is contingent upon the sale of a buyer's home, either. But especially in buyer's markets, you will see an increase in offers with a contingency to sell the buyer's home.

Basic Types of Contingent Sale Offers

Although there are many variations of a contingent offer, most adhere to one of two formats:

Seller will keep the property on the market but accept a contingent offer, providing buyers with a 72-hour (negotiable) first-right-of-refusal notice to perform in the event seller receives a better offer.
Seller will take the property off the market and wait for the buyer to sell the buyer's existing home.
The likelihood is the seller will choose option one but buyers would prefer option two. The reason a seller would accept option two is if there are not likely to be any other buyers making an offer to purchase. Most sellers will not wait forever and will stipulate a date for the transaction to close. If the buyer's home has not sold by that date, the transaction can cancel.

What is a 72-Hour Notice to Perform for a Contingent Offer?

The notice to perform can be of any negotiated duration: 24 hours, 48 hours or any number of days.

The time period is whatever the buyer and seller can agree upon. First, the seller sends the 72-hour notice to perform to the buyer, informing the buyer that another offer has been received and the buyer now has 72 hours to remove the contingency to sell the buyer's existing home. If the buyer does not remove the contingency to sell, usually the seller has the right to demand a cancellation of a contract and refund the earnest money deposit to the buyer.

Options for Removing Sale Contingency Under First Right of Refusal

By accepting a contingent offer for a particular period of time, the seller is granting the buyer first right of refusal. If another buyer wants to purchase the home and the buyer has not yet sold her home, the seller may ask the buyer to remove the contingency.

Obtain a bridge loan. It is best to get pre-approved for a bridge loan before receiving the 72-hour notice to perform. This way, you won't be scrambling around trying to line up financing over an impossible 3-day period. Bridge loans are an expensive option because you will pay loan fees.
Tap a home equity line of credit. Most lenders will not give you a home equity loan once

your home is on the market, and a seller is not likely to accept a contingent offer unless your home is on the market. But it's not a Catch-22. If you set up a home equity line of credit before you put your home on the market, you can simply transfer funds or write a check.

Change your mortgage to a higher loan-to-value. If you were planning on putting down, say, 20% to buy your new home, put down less and get a higher mortgage amount. Then, when your home eventually sells, you can use the proceeds to pay down the mortgage. Be aware that many higher loan-to-value ratios carry higher interest rates.

Borrow the down payment from a relative. Some home buyers tap the bank of Mom and Dad when an emergency arises. I don't know if buying a new home constitutes an emergency in your family, but in some families, it does. Perhaps Uncle Joe will give you that inheritance early? Might not hurt to inquire.

Remove your sale contingency and hope for the best. I know what you might be thinking right now: "Is she smoking crack?" But if you are confident your home will eventually sell, some buyers choose this option.

Bottom-Line Risk for Removing Sale Contingency

Before you remove a sale contingency, review your purchase contract with a lawyer and obtain legal advice to determine your rights under the contract. California purchase contracts, for example, clearly state your earnest money deposit is at stake if you default on the contract.

Evidence of Funds to Close

When a contingency is removed, sellers often ask for evidence of funds to close. This prevents buyers from arbitrarily removing a contingency without an actual intention to close (not that you were thinking that). If a relative has the funds, typically a gift letter from the relative and copy of bank statements or stock accounts is enough to satisfy your lender and the seller.