



# WASHINGTON REALTORS®

## Legal Hotline Q&A of the Week

From Get the Facts | August 27, 2024

### Question:

If buyer broker does not fill in 17a on pg 1 of Form 21, should listing broker fill that in before seller's signs the offer? If they do, is that considered a counter? If buyer broker does not fill in 17b: is it a disservice to your seller to call buyer broker and ask them if buyer intended to have seller pay buyer broker commission when seller is offering compensation before presenting offer to seller? What if seller elects to still pay buyer broker even if they missed 17b. If we fill that in before seller signs is that a counter to the buyer? If seller elects not to pay do we fill in 0 and is that a counter to the buyer?

### Answer:

With respect to 17(a), it is buyer broker's state law obligation to disclose to buyer, the amount of compensation, if any, that seller offered. This disclosure must be made, based on Washington law, BEFORE buyer signs an offer to purchase seller's property. If paragraph 17(a) was not completed by buyer broker when drafting buyer's offer, there is no reason for listing broker to complete the blank after buyer's offer is presented. Listing broker should leave the provision blank rather than risk a later argument that seller's completion of the blank constitutes a counteroffer.

If buyer broker leaves paragraph 17(b) blank, then listing broker and seller should assume that was intentional and that buyer is paying buyer broker's compensation directly. This is no different than a buyer choosing not to include a contingency that most listing brokers would consider common or typical to a buyer's offer. If a particular buyer decides not to include a financing contingency, for example, then seller and listing broker assume that means that buyer is paying cash or is otherwise not seeking the protection of a financing contingency. In other words, sellers and listing brokers assume that buyers and their brokers are acting competently when drafting offers to purchase seller's property. Listing brokers do not, and should not, recommend to seller that seller counter a buyer's offer to include terms that are "adverse or detrimental to seller's interests in the transaction".

The reality of what will happen at closing, in a situation where buyer broker fails to include compensation in paragraph 17(b) that buyer broker intends for seller to pay, is that the transaction should close but buyer broker will not be compensated. All of the terms of a binding contract will be present between buyer and seller. Buyer will have no contractual excuse for failing to close based on the fact that seller is not compensating buyer broker because seller will have no contractual obligation to compensate buyer broker. Buyer will have an obligation to perform the terms of agreement by paying the purchase price and seller will have an obligation to surrender title to the property. Seller will not, however, have an obligation to pay BB which means that seller's proceeds will include whatever amount seller saved by not paying BB. After closing, buyer will likely still owe buyer broker the compensation buyer owed based on the BBSA, Form 41 (unless buyer was willing and able to pay buyer broker directly, at closing).





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### Answer Continued...

All of this is important to consider when determining the advice listing broker should give seller when reviewing the offer buyer presents. If buyer broker seemingly made an error by failing to include compensation in 17(b) that seller offered to buyer broker, but seller signs buyer's offer as drafted, will buyer broker's error increase the likelihood of a sale fail? This is a question that listing broker's have to consider often when reviewing an offer that includes presumed errors. For example, if a buyer's lender will likely include a requirement that buyer inspected the home but buyer broker does not include an inspection contingency, does it make more sense for a seller to accept buyer's offer as written or f intention?

If seller chooses not to correct the buyer broker's error of failing to include buyer broker's compensation, will that impact the likelihood of a successful closing? It could. It could be that the buyer has another contingency, such as a financing or inspection contingency, that buyer is able to use to terminate the transaction if seller does not ultimately agree to pay the compensation seller originally offered and buyer intended for seller to pay. However, if seller does not agree to pay compensation that buyer broker failed to include in the PSA that buyer broker drafts, there is no direct contractual excuse for buyer to avoid closing. It is a different scenario than the one where a buyer has a financing contingency but failed to include an inspection contingency. In that scenario, buyer's effort to obtain financing may actually fail because buyer did not inspect the property. However, if buyer broker's failure is a failure to obligate seller to pay buyer broker's compensation, it is less likely that error will prevent buyer's lender from funding the loan. Rather, the qualified buyer will likely be able to perform the terms of the purchase agreement and the terms of that agreement will not obligate seller to compensate buyer broker.

If all of that plays out, that buyer closes the transaction and buyer broker is not compensated at closing by seller or buyer, then after closing, how will buyer broker's firm collect compensation owed by the buyer? Will buyer broker's firm sue buyer for compensation? If so, the buyer broker's firm will have to explain to the court that buyer broker's firm was not paid at closing because buyer broker failed to properly draft buyer's offer. That may not be a winning argument in a lawsuit where buyer broker is suing to collect compensation.





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### Answer Continued...:

The revision to the statewide forms that mandates negotiation and documentation on the face of the purchase agreement for seller's payment of buyer broker compensation is a huge change to the way broker's do business. There will certainly be a transition time within the industry as industry members learn to use the revised form. There will likely be buyer brokers who err in completing a buyer's offer with the result that buyer broker's firm is never compensated for work in that transaction. There is no right or wrong answer as to whether listing brokers should recommend to a seller that seller counter a buyer's offer to include compensation. It would be a counteroffer if buyer does not request seller's payment of buyer broker's compensation but seller responds by completing paragraph 17(b) to include compensation. As is true every time a listing broker consults with a seller about the terms of a buyer's offer, listing broker should recommend counteroffer terms that are in the best interests of the seller. Seller's best interests may require a counteroffer to include seller's payment of buyer broker compensation if that is the surest way to gain a successful closing. But, a counteroffer obligating seller to pay compensation may not be in seller's best interests if buyer seems likely to close the transaction with seller saving the cost of buyer broker's compensation. All of buyer's offer terms along with buyer's ability to close the transaction must be evaluated when seller and listing broker consider seller's response to buyer's offer. Listing broker's job is to protect seller's interests in the transaction and not to protect the buyer broker's ability to collect compensation. It is the job of buyer brokers to understand the operation of the forms so that buyer can competently draft buyer's offer to include seller's payment of buyer broker's compensation, if that is buyer's intention.

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