

NZ Certificate in Real Estate (Salesperson) (Level 4)

MODULE 2 – UNIT STANDARD 26150 (V5)

**Demonstrate knowledge of methods of
sale of Real Estate in New Zealand**

(Level 4, Credits 4)

Learner Guide 26150



TRAINING AND FURTHER EDUCATION



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METHODS OF SALE IN GENERAL

Discussing methods of sale with clients

When discussions about listing a property, business or space first begin with a prospective client, one of the important matters to be decided is the method of sale to be used.

It is important that a real estate licensee has a thorough understanding and knowledge of each of the following methods of sale and any variations of these methods that the industry uses.

Their vendor/client will rely on their understanding and knowledge in advising them in this decision, outlining the associated advantages and disadvantages of each method.

Options include the following:

- Marketing with an advertised price or price range.
- Marketing without an advertised price or price range.
- Marketing with a deadline date.
- Marketing without a deadline date.

Marketing with an advertised price or price range without a deadline date is the traditional, straightforward method of selling under a private treaty sale.

Methods of sale without a price include the following:

- Sale by negotiation.
- Deadline private treaty sale.
- Sale by auction.
- Sale by tender.

Multiple offer situations and mortgagee sales involve other processes in relation to a licensee's legal and professional obligations.

Meeting legislative and professional requirements in all methods of sale

Licensees must meet their legislative and professional obligations in relation to all real estate agency work for all methods of sale.

It is important to remember that breaches of the Real Estate Agents Act 2008 and the Code of Conduct can result in a complaint being raised, and a finding of misconduct or unsatisfactory conduct being made against the licensee and/or agent. This can result in fines and other disciplinary consequences.

Breaches of other consumer legislation may lead to court proceedings and consequences as laid out in the relevant legislation.

Key sections of consumer legislation that licensees must meet the requirements of generally, and in all transactions, include the following:

- Section 9 (misleading and deceptive conduct) Fair Trading Act 1986.
- Section 14 (false representations) Fair Trading Act 1986.
- Section 12A (unsubstantiated representations) Fair Trading Act 1986.
- Section 17 (unfair practices) Fair Trading Act 1986.
- Sections 36K to 36S (uninvited direct sales) Fair Trading Act 1986.
- Sections 35 Damages for misrepresentation Contract and Commercial Law Act 2017.
- Sections 37 The Parties may cancel the contract if induced to enter into it by a misrepresentation (Section 35) Contract and Commercial Law Act 2017.

Agency Agreements

Licensees must not market or advertise any land or business, including website advertising or signage unless authorised by a client through a written agency agreement. This includes removal of all marketing information when an agency agreement ends.

Rule 9.6 of the Code of Conduct says

Rule 9.6 Unless authorised by a client, through an agency agreement, a licensee must not offer or market any land or business, including by putting details on any website or by placing a sign on the property.

Agency agreements are required and must be in writing.

Section 126(1) of the Real Estate Acts 2008 confirms that an agent is **not entitled to claim commission or expenses** from a real estate transaction unless a **written agency agreement is signed** and in place.

Section 126(1) also confirms that the agency agreement must be in accordance with the Real Estate Agents Regulations 2009 and that a copy of it must be given to the client within 48 hours of signing it.

Real Estate Agents Act 2008

126 No entitlement to commission or expenses without agency agreement

- (1) An agent is not entitled to any commission or expenses from a client for or in connection with any real estate agency work carried out by the agent for the client unless—
 - (a) the work is performed under a written agency agreement signed by or on behalf of
 - i. the client and
 - ii. the agent
 - (b) the agency agreement complies with any applicable requirements of any regulations made under section 156; and
 - (b) a copy of the agency agreement signed by or on behalf of the agent was given by or on behalf of the agent to the client within 48 hours after the agreement was signed by.
- (2) A court before which proceedings are taken by an agent for the recovery of any commission or expenses from a client may order that the commission or expenses concerned are wholly or partly recoverable despite a failure by the agent to give a copy of the relevant agency agreement to the client within 48 hours after it was signed by or on behalf of the client.
- (3) A court may not make an order described in subsection (2) unless satisfied that_
 - (a) the failure to give a copy of the agreement within the required time was occasioned by inadvertence or other cause beyond the control of the agent; and
 - (b) the commission or expenses that will be recoverable if the order is made are fair and reasonable in all the circumstances; and
 - (c) failure to make the order would be unjust.
- (4) This section overrides subpart 5 of Part 2 of the Contract and Commercial Law Act 2017

Sole Agency versus General Agency

There are two main types of agencies available when selling a property.

Sole agency / listing exclusively

A sole agency agreement gives one agency the exclusive right to market and sell your property. The real estate company will be named on the agreement and can start real estate agency work to market and sell the property identified in the agreement. This type of agreement encourages the agency to work harder on the clients' behalf.

If the client signs a sole agency agreement, they should not sign up to another agent, as they may have to pay commission to both agencies. **Rule 9.10** outlines the licensee's obligation to explain the risks of double commission to a client before they sign an agency agreement.

General agency

A general agency allows several real estate companies to do real estate work for the same property, at the same time. Each agency will have an agreement with the client, and you would only have to pay commission to the agency which succeeds in selling your property.

With this type of agreement, every agent has the listing, but nobody has responsibility of selling the property.

Under a General Agency the client can retain the right to sell privately. This type of agency arrangement can also apply to leasing and business sales.

Meeting Code of Conduct requirements

In this material we will often refer to the Code of Conduct. The full legal name of these requirements is the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

There are specific rules and requirements that relate to:

- Approved Guides
- Appraisals
- Methods of Sale - private treaty sales, tenders, and auctions
- Multiple offer situations
- Mortgagee sales
- Disclosure obligations

Obligations prior to signing the agency agreement.

The Approved Guide

Before the agency agreement is signed, the licensee must give the client a copy of the New Zealand Residential Property Agency Agreement Guide published by the REA and get a signed acknowledgement that it was received.

Click the link:

[Section 127 - Approved Guide to be provided before agency agreement for residential property signed](#)

Appraisals

In accordance with the Code of Conduct, it is also important to note that a written appraisal that realistically reflects market conditions must be provided to the client and be supported by comparable information on sales (as available) (Rule 10.2).

Rule 10.2 An appraisal of land or a business must—

- (a) be provided in writing to a client by a licensee; and
- (b) realistically reflect current market conditions; and
- (c) be supported by comparable information on sales of similar land in similar locations or businesses

Where no direct comparable or semi-comparable sales data exists, this must be explained to the client in writing in the appraisal (Rule 10.3).

Rule 10.3 Where no direct comparable or semi-comparable sales data exists, this must be explained to the client in writing.

Estimated commission must be calculated based on the appraisal (Rule 10.6(a)) and be explained to the client before they sign an agency agreement. These rules apply regardless of whether the property, business or space is to be marketed with, or without a price.

Marketing and Commission

Rule 9.10 confirms that licensees have a positive obligation to explain the risks of double commission to a client before they sign an agency agreement.

Rule 9.10 A licensee must explain to a prospective client that if he or she enters into or has already entered into other agency agreements, he or she could be liable to pay full commission to more than 1 agent in the event that a transaction is concluded.

Rule 10.5 of the Code of Conduct requires a licensee to explain to the client how their chosen method of sale could impact on the benefits that the licensee may receive.

This is about how the commission is split in relation to the selling method and what a licensee stands to gain.

Points to consider:

- Does the listing party get more if the property is selling by Auction?
- Is this why you have recommended Auction to your client?
- Does the client have a right to know this?

The client has a right to know if the proposed method of sale is in their best interest rather than in the licensee's best interest.

Rule 10.5 Before a prospective client signs an agency agreement, the licensee must explain to the prospective client how choices that the prospective client may make about how to sell or otherwise dispose of his or her land or business could impact on the individual benefits that the licensee may receive.

For example, some companies pay a higher share of the commission to the licensees when the property is listed as an Auction as opposed to listed with a price.

Rule 10.6(a) requires a licensee to explain to the prospective client about the conditions under which commission must be paid, how the commission is calculated, including the estimated cost of commission the client would need to pay (as an actual dollar amount) based on the appraisal provided.

Rules 10.6(c) requires a licensee to give a written marketing plan including advertising and costs to the client.

Rule 10.6(d) requires a licensee to explain and confirm in writing that the client is not obligated to agree to paying for marketing and advertising if they do not want to.

- Rule 10.6** Before a prospective client signs an agency agreement, a licensee must explain to the prospective client and set out in writing—
- (a) the conditions under which commission must be paid and how commission is calculated, including an estimated cost (actual \$ amount) of commission payable by the client, based on the appraisal provided under rule 10.2:
 - (b) when the agency agreement ends.
 - (c) how the land or business will be marketed and advertised, including any additional expenses that such advertising and marketing will incur:
 - (d) that the client is not obliged to agree to the additional expenses referred to in rule 10.6(c): that further information on agency agreements and contractual documents is available from the Authority and how to access this information.

Under Rule 10.9, all promotional activities must be in accordance with client instructions and authorisation. For example, a licensee must not advertise that a property is for sale by auction unless the client has authorised this method of sale in writing.

Rule 10.9 A licensee must not advertise land or business on terms that are different from those authorised by the client.

Marketing campaigns for Auctions need to be well-planned and aggressively target potential purchasers. To have a successful Auction you need a potential purchasers pool – where there is more than one qualified purchaser for the type of property you are marketing.

Seeking advice and information

An agency agreement/lease document is a legally binding document. Before signing, a licensee must recommend the client seek legal and/or technical advice, especially if they are unsure about the implications of entering into the contract.

Rule 9.7 requires licensees to inform clients of their rights in relation to independent legal and technical advice. It also requires licensees to give the client sufficient time to seek independent advice if they choose to.

- Rule 9.7** Before a prospective client, client, or customer sign an agency agreement, a sale and purchase agreement, or another contractual document, a licensee must—
- (a) recommend that the person seek legal advice; and
 - (b) ensure that the person is aware that he or she can, and may need to, seek technical or other advice and information; and
 - (c) allow that person a reasonable opportunity to obtain the advice referred to in paragraphs (a) and (b).

Price Expectation

An advertised price or price range must be in accordance with that authorised by the client and must be in line with their realistic expectations.

Customers must not be given misleading information about the price expectations of the client.

These requirements are reflected in rules 9.4 and 10.4 which build on the principle of Rule 10.9.

Rule 9.4 A licensee must not mislead customers as to the price expectations of the client.

Rule 10.4 An advertised price must clearly reflect the pricing expectations agreed with the client.

Submitting offers and keeping records

All written offers must be submitted to the client, and licensees in turn must supply a copy of every written offer they submit to the agent. Agents must retain a copy of every written offer submitted for a period of 12 months. These requirements are clarified in Rules 10.10, 10.11 and 10.12 of the Code of Conduct.

Agreements for Selling Real Estate

There are three prescribed residential sale and purchase agreements, or forms, currently in use. These agreements have been drafted by the Real Estate Institute of New Zealand (REINZ) and the Auckland District Law Society (ADLS).

- Particulars and Conditions of Sale of Real Estate by Auction - used solely when marketing and selling under auction.
- Particulars and Conditions of Sale of Real Estate by Tender - used solely when marketing and selling a property under tender.
- Agreement for Sale and Purchase of Real Estate - used for all other methods of sale.

Legislation Related To The Sale of Real Estate

- Auctioneers Act 2013
- Fair Trading Act 1986
- Real Estate Agents Act 2008

The Legal provisions, processes, and requirements which regulate the tender, auction, and sale process in accordance with industry requirements with respect to the Fair-Trading Act 1986 and the Real Estate Agents Act 2008

Note: auctions and tenders are used for sale of land and buildings but are not commonly used for leases or sale of businesses.

AUCTIONS

Buying and selling by auction

An auction is an open sales process where potential purchasers (bidders) bid against one another to buy a property.

The Fair-Trading Act 1986 Section 36X defines an auction as:

'a process in which property of any kind (including goods, services, and interests in land) is offered for sale by an auctioneer on behalf of a vendor, and—

- (a) bids for the property are placed with the auctioneer in real time, whether in person, by telephone, via the internet, or by any other means; and
- (b) the property is sold when the auctioneer so indicates.'

Potential purchasers bid against one another to buy a property being offered for sale by a client. The bidders know the amount of each other's bids and can bid up according to their budget. Bids are made in real time either in person, by phone, online or another means of communication.

Note: Online auctions like 'Trade Me' or 'eBay' generally fall outside this definition, as property is usually sold directly by a private client to a winning bidder and not through an auctioneer (who is 'in trade'). Such sites are usually just portals for members to buy and sell property.

The Auction method of sale

A real estate auction is an effective method of selling real estate. It is an intense, accelerated real estate marketing process that involves the public sale of any property through open competitive bidding. This method of sell of real estate is where a property is marketed without a price and for a limited time.

Auctions are often used to market mortgagee sales and unusual, desirable, or more expensive residential properties.

The Real Estate Agents Authority publication 'Auctions Information Sheet' defines an auction as:

"An auction is an open process at which purchasers bid against each other to purchase a property. Once the reserve price is reached, the highest bidder becomes the successful purchasers."

An auction is defined in the Fair-Trading Act 1986 as follows:

36X Definitions

- (1) In this subpart, unless the context otherwise requires, auction means a process in which property of any kind (including goods, services, and interests in land) is offered for sale by an auctioneer on behalf of a client, and—
 - (a) bids for the property are placed with the auctioneer in real time, whether in person, by telephone, via the Internet, or by any other means; and
 - (b) the property is sold when the auctioneer so indicates.
 registered auctioneer means an auctioneer registered as an auctioneer under the Auctioneers Act 2013
 client means the person whose property is offered for sale at an auction by an auctioneer.
- (2) To avoid doubt, a process of selling property is not necessarily an auction for the purpose of this subpart just because it is described as an auction. For example, a process described as an Internet auction, but that provides that any contract of sale resulting from the process is a contract directly between the winner of the bidding and the client of the property, is not an auction for the purpose of this subpart.

General Guidance

When working on an auction sale, licensees must meet all the professional standards and legal requirements that generally apply when performing real estate agency work.

It is also recommended real estate agents comply with the REINZ Best Practice Guide – Auction when offering a property for sale by auction.

A full and complete copy of the REINZ document can be found in Appendix 2 of this study guide. It is important when considering the REINZ Best Practice Guide: Auction to note the REINZ Disclaimer:

The information contained in [the REINZ guide] is not intended to form professional legal advice or legal opinion on any particular matter.

Requirements to sell by auction.

As well as the usual listing procedures, there is an additional industry requirement in terms of signing the Agency Agreement when the sale is to be by auction.

These are that a client who decides to sell by auction:

- Will usually be required to have a sole agency agreement in place with the real estate agent they have engaged.
- Must sign the Auction Authority contained in the Agency Agreement. Sample below.

4. ADDITIONAL AUTHORITIES – SALE METHOD

If the Client does not complete these Additional Authorities then these Additional Authorities do not apply to this agreement.

4.1 Auction Authority:

The Client appoints the Agent to offer the Property for sale by public auction on the Auction Date (/ /). If the Property for sale by auction is subject to a reserve price, this must be notified to the Agent in writing prior to the auction. If the Property is sold by public auction the Client authorises the Agent to sign on its behalf the agreement that forms part of the particulars and conditions of sale used by the Agent for conducting the sale by auction.

LEGISLATION SPECIFIC TO AUCTIONS

Real Estate Agents Act 2008

Licensed real estate agents do not have to register as auctioneers to sell land at auction. This is outlined in Section 48(2) of the Real Estate Agents Act 2008.

Section 48 - Agent's licence

- (1) An agent's licence authorises the licensee to carry out real estate agency work on his or her own account, whether in partnership or otherwise.
- (2) An agent's licence authorises the licensee to sell or offer to sell land by auction, and operates as an exemption from the requirement in the Auctioneers Act 2013 to be registered as an Auctioneer.
- (3) However, every licensee who conducts an auction of land must comply with the rules about the conduct of auctions set out in sections 36Y to 36ZE (but not the rule in section 36ZF) of the Fair Trading Act 1986.

Section 49 - Branch manager's or salesperson's licence

Section 49 similarly allows those with a branch manager's or salesperson's licence to sell land at auction, on behalf of a licenced agent.

- (1) A branch manager's licence or a salesperson's licence authorises the licensee to carry out real estate agency work for or on behalf of an agent.
- (2) The licence also authorises the licensee to sell or to offer to sell on behalf of the agent, any land by auction without having to be registered as an auctioneer under the Auctioneers Act 2013.

Section 49 similarly allows those with a branch manager's or salesperson's licence to sell land at auction, on behalf of a licenced agent and operate as an exemption from the requirement in the Auctioneers Act 2013 to be registered as an auctioneer.

- (3) However, every licensee who conducts an auction of land must comply with the rules about the conduct of auctions set out in sections 36Y to 36ZE (but not the rule in section 36ZF) of the Fair Trading Act 1986

Authority to carry out an auction.

Authority for a person to carry out an auction is clarified by the Auctioneers Act and the Real Estate Agents Act.

The Real Estate Agents Act 2008 says:

Section 8 Exemption for licensed auctioneers

A person who is registered as an auctioneer under the [Auctioneers Act 2013](#) may sell or offer to sell any land by auction.

Auctioneers do not have to be licensed under the Real Estate Agents Act 2008 if they are selling land by auction.

The Auctioneers Act 2013:

Section 5 Registration of person carrying on business as auctioneer

- (1) A person must not carry on business as an auctioneer unless the person is registered under this Act as a registered auctioneer.
- (2) Subsection (1) is subject to the exceptions provided in—
 - (a) [sections 48](#) and [49](#) of the Real Estate Agents Act 2008; and
 - (b) [section 141](#) of the Motor Vehicle Sales Act 2003; and
 - (c) any other enactment.
- (3) A person carries on business as an auctioneer if the person, in trade, charges a fee or commission for, or requires the payment of any part of the proceeds of, a sale by auction, other than as an employee or agent of a registered auctioneer.

The key points to note from the legislation are:

Auctions must be conducted by an auctioneer (who is 'in trade') and registered under the Auctioneers Act 2013.

However, real estate agent licensees are exempt from needing this registration and can conduct real estate auctions if they hold a current real estate agent's licence. Licensed branch managers and salespeople may carry out real estate auction work on behalf of the agent.

All licensees who conduct real estate auctions must comply with the rules about the conduct of auctions set out in sections 36Y to 36ZE (but not the rule in section 36ZF) of the Fair-Trading Act 1986. We will look at those requirements later in this guide.

Section 24 of the Auctioneers Act outlines some of the fines if an Auctioneer or someone conducting an Auction committing an Offence.

The Auctioneers Act 2013:

24 Offences

- (1) A person who fraudulently retains the proceeds of property sold at auction, or fraudulently fails to pay the correct balance to the vendor, or, with intent to defraud the vendor, gives a false account of the sale, commits an offence and is liable on conviction to,—
 - (a) in the case of an individual, a term of imprisonment not exceeding 2 years; or
 - (b) in any other case, a fine not exceeding \$200,000.
- (2) A person who does any of the following commits an offence and is liable on conviction to a fine not exceeding \$10,000 (if an individual) or \$30,000 (in any other case):
 - (a) carries on business as an auctioneer, contrary to [section 5](#), while not being a registered auctioneer:
 - (b) holds out as being a registered auctioneer while not being a registered auctioneer:
 - (c) engages a person to conduct an auction on his or her behalf, knowing that the person is disqualified from registration:
 - (d) gives or makes any statement that is false in a material particular to the Registrar in connection with an application for registration or confirmation of registration:
 - (e) fails to comply with any of the obligations in [section 16](#) (which relate to notifying the Registrar):
 - (f) fails to comply with the requirements of [sections 17](#) and [18](#) (which relate to record-keeping).

The REINZ Best Practice Guide for Auctions outline some of the responsibilities of the auctioneer and other licensees involved in an auction sale.

Analysise the market, the property and seller situation before suggesting auction as the best marketing strategy

A good auction market situation is one where there is

- a dull market - too much product, but buyer interest is being expressed
- not enough of this property type, like beach front or home and income
- a seller's market suits known high demand properties.

A good auction seller situation is one where the seller

- needs immediate cash (the seller may have financial problems or purchased a house already)
- has a marriage or partnership breakup
- is retiring or wants to move to a new location or out of a city. (Auckland)
- wants to liquidate an estate
- is an auction-minded seller - knows the auction will bring a fair market price
- has a listing that is about to expire
- has high carrying costs on the property

A good auction property situation is one that:

- is unique - there is enough buyer/market interest to encourage competition (unique properties are difficult to appraise).
- has a lot of high carrying costs for the owner
- is vacant -- vacant properties may encourage vandalism
- is difficult to appraise

Advantages and Disadvantages of the Auction process

A licensee should be able to discuss these with the client so that any decisions made are in the best interest of the client.

Advantages of the auction process

- Marketing is for a set time period. The auction day deadline can create a sense of urgency among potential purchasers.
- Open homes are usually the main form of exposure of a residential property to the market – the client has set days/times for preparing their home during the marketing period.
- An auction creates an environment for customer competition on the day of the auction which can lead to a premium sale price. Potential purchasers see others bidding, which endorses their belief of value in the property.
- Bids must be unconditional, so this removes uncertainty if a sale is achieved on the day of the auction. There are no complicated conditions or extended timeframes.
- The client can set the reserve price and possession date, so terms of sale are under their control.
- If procedures for pre-auction offers are included in the terms and conditions, the client can consider any offers before auction day.
- Interest can be monitored through prospective purchasers being asked to register their interest during the marketing period. Registered parties can be contacted and be asked to make a pre-auction offer if the situation arises.
- Auctions can attract a wider range of potential purchasers as no low or high-end purchase price restricts possible interest.

Disadvantages of the auction process

- Most properties are saleable by auction. All types of real estate, including residential property (such as townhouses, apartments, and single-family homes), commercial and industrial property, vacant land and even car parks are sold at auction. Not all property, however, is suited for auction. If a property will only appeal to a narrow market, auction may not be the most effective marketing method.
- An auction relies on more than one potential purchaser actively bidding. If there is only one bidder, the auctioneer will have a greater challenge to create competition (through vendor bidding) and the property is unlikely to sell 'under the hammer'. Note that some agencies do not provide vendor bidding at all.
- When there is only one bidder, they see that there is no other interest in the property so will likely negotiate harder with the client.
- The successful purchasers need to only bid slightly higher than any under-bidder.
- Selling by auction can be an expensive because of the marketing campaign required.
- Selling by auction can be stressful as the client may worry about the auction. For example, Will the property sell? How much will it sell for? What should the reserve be set at? Will bidding pass the reserve? Will there be any bids at all? How many bidders will turn up? Will anyone turn up?

Key points about the auction process

- A vendor choosing to sell by auction needs to have a sole agency agreement with an agent and needs to agree a marketing plan with the licensee.
- The licensee will also need to establish a reserve price with the vendor in advance of the auction - the lowest price they are willing to accept for the property.
- Properties offered through auction can be sold before the advertised auction date if the auction terms and conditions allow it. If this is the case, all marketing material should make it clear that offers will be considered before the auction.
- Potential purchasers can then register an interest and ask to be informed if an offer is made so they can also make an offer if they want to.
- Bidding usually starts below the reserve price. If bids reach or exceed the reserve, then the highest bidder will win the auction and be immediately legally committed to buying the property once the auction is closed.
- If bidding does not reach the reserve price, the auctioneer will pause the auction and ask the vendor for further instructions.
- If the vendor does not wish to sell below their reserve price, the auctioneer will conclude the auction without the property being sold.
- If the vendor wishes the auction to continue and bidding stops close to the reserve price, and the vendor agrees to accept the last bid, the auctioneer may say the property is now 'on the market'. This means the reserve price no longer applies.
- The auctioneer will continue from that point and accept the highest bid that is made when the auction resumes, even if the reserve price is not reached.
- An auction agreement is an unconditional sale to the highest bidder.
- 'The Particulars of Sale of Real Estate by Auction' is the agreement to be completed in an auction sale.
- The successful bidder needs to sign the agreement and pay the deposit immediately (usually 10% of purchase price).
- Where a sale is not concluded, the vendor may ask the licensee to approach the highest bidder after the auction to negotiate a sale.

- Procedures for receipt and holding of the deposit must be in accordance with sections 122 and 123 of the Real Estate Agents Act 2008.

Factors that can impact on the success of an auction sale.

- Client expectations – need to be realistic.
- Desirability of the property – including location and condition Presentation of the property – is it presented to its maximum potential?

Variations to the Auction Document

Sometimes a purchaser will request a variation to the Auction conditions.

This would usually be if:

- The settlement date does not suit, or
- The deposit they want to pay is different from the 10% stated in the Auction Agreement

If this happens there must be a Variation form completed and presented to the Vendor prior to the Auction starting. They will need to sign that they accept this variation. These variations may or may not be offered to all other bidders.

The Licensee will need to amend the Memorandum of Contract and all parties will need to initial the variation.

Marketing and Advertising

Once the vendor/client signs a sole agency agreement to sell through auction, the property is promoted heavily over a set marketing period (usually four weeks), through advertising in selected media and open homes.

The duration of the marketing campaign is important. If it lasts for more than four weeks those potential customers introduced to the property at the beginning may lose interest, and if the campaign is shorter than four weeks there will be insufficient marketing time to attract a suitable number of bidders, and allow time for customers to seek any independent expert advice about the property, or to arrange finance in order to bid at the auction.

The marketing material will notify potential purchasers of the auction venue, date and time.

On that day, the property is offered up for sale, facilitated by a licensed auctioneer, or a Real Estate Licensee where interested parties (purchasers) bid against each other in an open forum.

Pre-Auction Offers

A property that is advertised as “**Unless Sold Prior**” means that customers can make a pre-auction offer for the property before the day of the auction. The offer will be written on the auction sale and purchase agreement and will be unconditional. If the client is willing to accept the offer, the auction may be brought forward from the advertised date, or it may be cancelled if a sale and purchase agreement is signed.

If the auction is held earlier than advertised, the pre-auction offer becomes the first bid at auction. The property can sell any time after that first bid.

The client may withdraw a property from sale before the auction and may choose to accept an offer before auction day. The conditions of sale should indicate this, and advertising should use the term ‘For sale by auction, unless sold prior’ or similar wording.

A register of interested parties should be kept so that if a pre-auction offer is made, other parties can be invited to make an offer. Management of a transparent multiple offer process would be necessary. Alternatively, the date of the auction may be brought forward, and the offer made used as the opening bid. Real estate agents will have policies and procedures in place to manage this situation.

REINZ Best Practice Guide for Auctions

Clause 2.7 - Licensees must make every effort to inform all interested parties if a property is to be withdrawn from Auction or is to be sold prior to Auction.

Setting a reserve price

The vendor/client will usually decide on the minimum price the property is to be sold for by setting a reserve price.

The reserve price is usually ascertained through -

- the current market appraisal (CMA) presented in writing by the licensee to the vendor
- prior to the signing of the agency agreement.
- feedback obtained from potential purchasers during the marketing campaign.
- the vendor's own thoughts.

Clients who set a reserve price must submit in writing to the Auctioneer prior to the start of Auction and if there is no reserve then the Auctioneer shall announce that the client has not set reserve and no bid shall be made by or on behalf of the client at Auction.

BIDDING AT AUCTION

If bidding reaches the reserve price, the property is deemed to be 'on the market' and the auctioneer will announce this and advise that the property will be sold to the highest bidder.

As with any type of auction, all bids made are 'cash', 'unconditional' and legally binding. This means that the purchaser is declaring they have arranged their finance, undertaken any inspections, valuations or reports they required, and agree with all the terms and conditions of the sale, including acceptance of the title. There is no 10 day period for the purchaser to search and approve the title as there is with a normal sale.

Shill bids

Shill bids (also known as dummy bids, or phantom bids) are made by people who act as though they are genuine bidders but are in fact being made on behalf of the vendor to persuade genuine bidders to raise their bid. People making shill bids never intend to purchase the property at auction. This type of bidding has never been allowed and remains illegal.

Vendor bids

A vendor bid means a bid made by the vendor, or any person (including an auctioneer) acting on behalf of the vendor. A vendor bid has been traditionally used by the auctioneer to:

- Start the bidding.
- Keep the bids moving.
- To persuade bidders to raise their bids so they are closer to the reserve price.

However, in some cases vendor bidding has caused confusion for genuine bidders who did not understand that a vendor bid was in place or what its purpose was.

Under the Fair-Trading Act 1986 Section 36ZD auctioneers cannot accept vendor bids unless the following requirements are met:

- The terms of the auction specify that vendor bids are permitted.
- The auctioneer identifies each vendor bid as it is given.

If the vendor, their agent, or anyone else makes a vendor bid they must clearly identify themselves. As best practice and to avoid any confusion, the auctioneer should state 'This is a vendor bid' and avoid industry jargon such as 'The bid is with me'.

- The property is offered for sale with a reserve price and the vendor bid is less than the reserve price.

The auctioneer (or anyone else acting for the vendor) will not be able to make a vendor bid at or over the reserve price. This would be considered a false or misleading representation. (Section 14A (2) of the Fair-Trading Act 1986).

Vendor bids have also on occasion been used to artificially inflate the price that is reported if a property is passed in at auction (does not sell because it does not meet the reserve price).

Reporting a final vendor bid (rather than genuine bid) can inflate the price expectations for a future auction, despite there being no genuine bids at that price.

If the property is unsold at the end of an auction, a vendor bid cannot later be referred to as the amount at which the property was passed in. To do so would be a false or misleading representation under section 14A (4) of the Fair-Trading Act 1986.

Bidding failing to reach the reserve price.

If bidding does not reach the reserve price the property will be 'passed in'. This means that the property will not be sold at the auction. The highest bidder, however, is usually given the first right to negotiate with the vendor after the auction

- This may result in an agreement either to purchase the property at the vendor's reserve price or at a price agreeable to both parties.
- If no agreement is reached then other potential purchasers are invited to negotiate with the vendor on a case by case basis to affect a sale.
- If there is no sale then the vendor may decide to allow the property to be marketed under a different method of sale. Often this involves a 'with a price' method based on the vendor's understanding of the market gained through the auction process.

Implications Of Misrepresentations Under The Fair Trading Act 1986

Fair Trading Act 1986

14A When vendor bids are misrepresentations

- (1) This section applies where property (being goods, services, or an interest in land) is offered for sale—
 - (a) by auction (as defined in section 36X); or
 - (b) by any other bidding process in which all bids are disclosed.
- (2) The vendor of the property makes a false or misleading representation with respect to the price of the property if the vendor, or any agent acting on behalf of the vendor, makes a vendor bid for the property.
- (3) However, subsection (2) does not apply if—
 - (a) there is a reserve price for the property; and
 - (b) the bid is made before the reserve price is reached and is clearly identified as a vendor bid.
- (4) If property is unsold at the end of an auction or other bidding process referred to in subsection (1), any subsequent reference to a particular bid as being the amount at which the property was passed in is a false or misleading representation with respect to the price of the property if the bid was a vendor bid.
- (5) In this section, vendor bid means a bid made by the vendor or any person (including an auctioneer) acting as agent for the vendor

Key points to note are:

- Only vendor bids below the reserve price are allowed.
- A vendor bid made at, or over, the reserve price, would be considered a false or misleading representation under section 14A (2) of the Fair-Trading Act.
- If the property being auctioned does not sell, and a vendor bid was the last bid made, the vendor bid cannot be reported as the amount at which the property was passed in.
- Reporting a vendor bid would not truly reflect the last genuine bid that was made. It would
- inflate the price expectations that would be referred to as a basis for any future marketing.

Vendor selling goods in trade as a supplier.

In accordance with section 36ZB(2)(a) of the Fair-Trading Act 1986, a client who is 'selling goods in trade as a supplier' within the meaning of the Consumer Guarantees Act must provide notice of this in the notice of the terms of the auction.

In a real estate auction, this would have relevance only in certain circumstances.

In a private sale, the client would not be a supplier in trade, so section 36ZB(2)(a) would not apply. Section 36ZB(2)(a) would apply where a developer ('in trade') was selling a property with chattels included in the sale, for example.

Developers selling at auction need to consider the warranties under the Consumer Guarantees Act in relation to any chattels included in the sale. They may choose to include clauses into the terms of sale excluding the warranty on chattels if appropriate.

A client 'in trade' may exclude the application of the Consumer Guarantees Act if the property is purchased by a person who is also 'in trade.' However, under section 36ZC of the Fair-Trading Act, they can only do this if the notice of auction terms clearly states that this exception applies.

Under section **36ZB of the Fair-Trading Act 1986**, a vendor who is 'selling goods in trade as a supplier' within the meaning of the Consumer Guarantees Act must provide notice of this in the notice of the terms of the auction.

For example, this would apply to sales of residential real estate by a developer where chattels are included in the sale.

Section 36ZA and 36ZB of the Fair-Trading Act 1986 and the impact on the auction process

36ZA Start and end of auction.

- (1) An auction starts when the auctioneer invites the first bid from potential participants.
- (2) An auction ends when the auctioneer makes it clear that bidding is closed.
- (3) However, property that is offered for sale by auction must be treated as having been sold at auction, even if the bidding ceased without the property being sold, if—
 - (a) the auctioneer accepts a subsequent offer from a person who attended the auction; and
 - (b) that offer is accepted before the end of the first working day following the day of the auction.

The REINZ Best Practice Guide states in clauses 3.12 and 3.13 what an auctioneer's responsibilities are at the close of an auction.

3. At the auction

- 3.12 The auctioneer will always clearly announce if the property is about to be sold under the hammer.
- 3.13 Subject to the reserve price being reached, the highest bidder should be the purchasers.

The key points to note are as follows:

- The auctioneer will confirm when bidding is closed (by the fall of the hammer, or in some other customary manner).
- If a reserve price has been set, and has been met, the highest bidder is the purchasers.
- After the auction closes, if an auction attendee makes a subsequent offer and that offer is accepted before the end of the first working day following the day of the auction, the property must be treated as if it were sold by auction.

Implications for purchasers / bidders

Auction sales and purchases are unconditional. A bidder cannot attach conditions to an auction purchase. If their bid is accepted and once the auctioneer has closed the auction, the sale is unconditional, and the successful bidder is legally committed to buying the property. The agreement used in auction sales is 'The Particulars of Sale of Real Estate by Auction'.

Note: If a side variation is signed prior to the auction, e.g., in relation to deposit or settlement date, best practice would be for the licensee to make this option available to all bidders.

- The successful bidder will be required to immediately pay the deposit (usually 10%).
- Since a bid accepted on the day is unconditional, for their own security, potential purchasers will need to get a title search, builders report and Land Information Memorandum (LIM) report before auction day and at their own expense (though sometimes some of this information, e.g., LIM will be provided by the real estate agency).
- They will also need to arrange any mortgage and finance in advance, consult appropriate parties for legal / technical advice as required before the day of the auction.
- Often auctions are used to market higher value real estate. Conversely, mortgagee sale auctions deal with properties where, due to financial hardship of the mortgagor, the holder of the mortgage on a property may require a quick sale and the bidders may go along in the hope of securing a bargain purchase.

Under Section 36ZB it is the auctioneer's responsibility to:

- Display the terms of the auction and make all terms readily available to view by all participants attending in person.
- Ensure that the terms of the auction have been available to view both before and during the auction on a readily accessible website.

The notice of terms required by Section 36ZB must include the following information:

- Whether there is a reserve price
- Whether vendor bids are permitted
- Whether the vendor of the goods is selling the goods in trade as a supplier (within the meaning of the Consumer Guarantees Act 1993) if the auction involves 'goods of a kind ordinarily acquired for personal, domestic, or household use or consumption'

CONDITIONS OF SALE OF REAL ESTATE BY AUCTION

The complete version of the **Particulars of Sale of Real Estate by Auction form** is in the Portal.

The Licensee must recommend to all parties that they seek technical and legal advice to ensure clarity of the terms of the agreement in preparation for the Auction. This is especially important for all potential purchasers.

Key Items that are included in the Particulars of Sale of Real Estate Auction form

- Auction Details and vendor's name and date of Auction
- Property Details - – includes address, type of estate and legal description
- Chattels
- Tenancies
- General terms of Sale
- Further Terms of Sale
- Conduct of Auction
- Conditions of Sale – includes GST Status, late settlement, and settlement date
- Amount of Deposit (memorandum will need to be altered if not 10%)
- Schedule 1 completed if applicable
- Sale price
- GST Details if applicable
- Memorandum of Contract completed
- Acknowledgement that the Approved Guide for the Sale and Purchase of Real Estate was received

Some of these are standard inclusions of the **Particulars of Sale of Real Estate Auction form** and others will be completed by the Agency before the auction, so the potential purchasers know what it is they are buying and under what terms/conditions.

All parties involved in the auction, i.e., the vendor, potential purchasers, and the licensee/agent, need to ensure that all details entered into the agreement, including the settlement date, are correct and they understand all 'Conditions of Sale' including the Conduct of Auction and any Further Terms.

Completion of the auction

On completion of the auction is indicated when the auctioneer (by the fall of the hammer, or in some other customary manner) announces its completion.

- Both the vendor and the purchaser are required to sign the Memorandum of Contract. The auctioneer may sign on behalf of either or both, if required.
- The purchaser is required to pay a 10% deposit, unless otherwise agreed.
- Both parties are required to complete their GST information in Schedule.1.

Section 133 of the Real Estate Agents Act 2008 requires the licensee to provide an approved guide to a person before they sign a contractual document for the sale of residential property. Signed acknowledgement of receipt of the approved guide is required from the person.

When the purchaser signs the Memorandum of Contract they are acknowledging that they have been given the approved guide; and a pre-contract disclosure statement under section 146 of the Unit Titles Act 2010 if the sale relates to a unit title property.

The text under the title 'Acknowledgements' states this.

1.0 Conditions of Sale

- 1.1 The property and the chattels included in the sale are sold on these particulars and Conditions of Sale, the General Terms of Sale, and any Further Terms of Sale
- 1.2 GST will be payable in accordance with the statement of the purchase price in the Memorandum of Contract.
- 1.3 The GST date is (subclause 14.0)
- 1.4 The Settlement date is:
- 1.5 The interest rate for late settlement is %

2.0 Conduct of Auction.

A summary of some key points regarding the Conduct of Auction clauses:

Clause 2.1 (explained regarding the reserve price and how the purchasers is determined)

- The property is offered for sale by auction subject to a reserve price, and
- The purchaser is the highest bidder whose bid is accepted by the auctioneer once this reserve price is met.

Clause 2.2 (explained regarding the amount by which bids are raised)

- This clause says that the auctioneer is permitted to nominate the amount by which the bidding can be raised.

As an example, an opening bid placed might be \$300,000. The auctioneer may then confirm that further bids need to be raised in \$10,000 increments. The next person's bid will be, \$310,000, and so forth.

Clause 2.3 (explained regarding refusal of bids)

- This clause states that the auctioneer is permitted to refuse any bids.

Clause 2.4 (explained regarding bidding on behalf of another person)

- The auctioneer or the real estate agent acting for the client in respect of the sale may submit a bid on behalf of any person.
- The auctioneer must identify this person (who is submitting bids on behalf of another person) before bidding starts.

Clause 2.5 (explained regarding vendor bids)

- The client may place a bid themselves, through a representative, or through the auctioneer as long as the bid is less than the reserve price. (This type of bid is called a 'vendor bid'.)
- The auctioneer must announce each vendor bid as it is made.

Clause 2.6 (explained regarding withdrawing the property from sale during the auction)

- This clause says that the client may withdraw the property from sale at any time before the property is sold, and without disclosing the reserve price.

Clause 2.7 (explained regarding how disputes are dealt with)

- This clause says that if a dispute arises regarding any bid, the auctioneer can determine the dispute, or re-offer the property at the last undisputed bid.

Clause 2.8 (explained regarding what the client is required to do after the auction)

- As soon as the auction is completed the purchasers must sign the Memorandum of Contract.
- Pay 10% of the purchase price as deposit (or as otherwise agreed) to the client's licensed real estate agent.
- Complete the GST information in Schedule 1 if this applies.

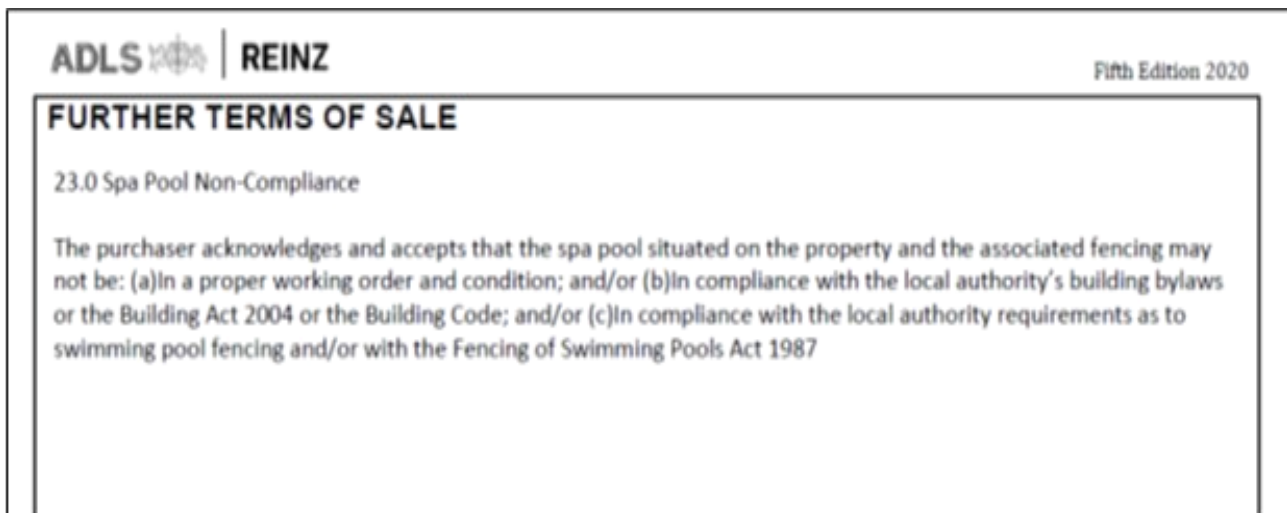
Note that If either the purchasers or the client is not available to sign the memorandum of contract the auctioneer can sign on behalf of either or both.

Further terms of sale

Following on from the 'General Terms of Sale' there is a page that allows for any 'Further Terms of Sale'. It is here that any further terms should be included.

It is important for parties to understand that any inserted clause that contradicts an associated clause under the 'General Terms of Sale' takes precedence (e.g., clause 3.4(3)).

Further Terms of Sale in an auction agreement will usually be inserted by the client as auction agreements are otherwise unconditional.



Schedule 1 (GST information)

It is important that a licensee has knowledge of the consequences if the GST option within the 'Particulars and Conditions of Sale of Real Estate by Auction' is not correctly identified.

Most transactions of residential property in New Zealand will not attract goods and services tax (GST), but some will. The sale of residential sections by persons during a taxable activity may well be liable to GST. The sale of a section by a vendor who is in the business of developing land, or the sale of a section following a subdivision, are examples of sales of residential land that might attract GST.

Transactions of commercial property are more likely to attract GST because they will usually be sales made during business, but there can be exceptions to this.

A real estate licensee should be able to identify when a transaction could possibly be liable for GST and recommend that the parties seek independent advice. This is important when acting for the vendor, because under the Goods and Services Tax Act 1985 the vendor is liable to the Commissioner of Inland Revenue for payment of any GST that is due. The vendor would usually want to make sure the agreement was drafted so that the purchaser paid the purchase price plus the GST due on the purchase price.

Failure to draft the agreement in this way would mean that the purchase price would be deemed to be GST inclusive, and the vendor would have to pay the Inland Revenue Department the GST on the purchase price and would be unable to recover it from the purchaser.

Identifying when a transaction will attract GST is also important for a purchaser. Purchasers need to check carefully to see whether GST is included in the purchase and whether the sale attracts GST. Otherwise, there is a danger that a purchaser will have to find an extra 15% of the purchase price.

ADLS REINZ		Fifth Edition 2020
SCHEDULE 1		
(GST Information – see clause 15.0)		
This Schedule must be completed if the vendor has stated on the front page that the vendor is registered under the GST Act in respect of the transaction evidenced by this agreement and/or will be so registered at settlement. Otherwise there is no need to complete it.		
Section 1 Vendor		
1(a)	The vendor's registration number (if already registered):	
1(b)	(i) Part of the property is being used as a principal place of residence at the date of this agreement.	Yes/No
	(ii) That part is: (e.g. "the main farmhouse" or "the apartment above the shop")	Yes/No
	(iii) The supply of that part will be a taxable supply.	Yes/No
Section 2 Purchaser		
2(a)	The purchaser is registered under the GST Act and/or will be so registered at settlement.	Yes/No
2(b)	The purchaser intends at settlement to use the property for making taxable supplies.	Yes/No
If the answer to either or both of questions 2(a) and 2(b) is "No", go to question 2(e)		
2(c)	The purchaser's details are as follows:	
	(i) Full name:	

Recording of GST details on the Auction form

The client, purchasers and licensee all have obligations relating to the recording of GST details on the Auction form.

- Both the client(s) and purchasers(s) must ensure their recorded GST details/status on the form is correct
- The licensee needs to ensure that the client(s) and purchasers(s)
 - understand their respective GST status.
 - are aware they can and may need to seek technical (e.g., taxation) advice or other advice and information.
 - are allowed a reasonable opportunity to obtain this advice. Note: Any technical advice would need to be obtained prior to the auction.

Chattels:

These chattels are printed on the form: stove, fixed floor coverings, blinds, curtains, light fittings. Items on the printed list are to be struck out if not included in the sale. If there are chattels that are not listed, these should be written in.

ADLS REINZ		Fifth Edition 2020	
SCHEDULE 2 List all chattels included in the sale (strike out or add as applicable)			
Stove	Rangehood	Wall oven	Cooktop
Dishwasher	Kitchen waste disposal	Light fittings	Smoke detector(s)
Burglar alarm	Heated towel rail(s)	Heat pump(s)	Garage door remote control(s)
Blinds	Curtains	Fixed floor coverings	
SCHEDULE 3 Residential Tenancies			
Name of Tenant(s):			
Rent:	Term:	Bond:	
Commercial/Industrial Tenancies (If necessary, complete on a separate schedule)			
July 2020			
1. Name of Tenant(s):			
Rent:	Term:	Right of Renewal:	Other:
2. Name of Tenant(s):			
Rent:	Term:	Right of Renewal:	Other:

Memorandum of Contract

The vendor, purchasers, and the licensee all need to ensure that the details on the Sale and Purchase Agreement are completed correct.

- Check that the correct purchase price has been entered.
- The GST status is identified, and the purchase price reflects this i.e., 'Plus GST (if any)' OR 'inclusive of GST (if any)' has been deleted.
- The purchaser needs to have their deposit ready before the auction
- The licensee needs to make sure that all the authorised people have signed the necessary places.

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MEMORANDUM OF CONTRACT

Date of Memorandum:
At the auction of the property, or prior to, or subsequent to, the auction (delete as applicable).

PURCHASER'S NAME: _____ and/or nominee ("the purchaser")

became the purchaser of the property by being the highest bidder, or by agreeing with the vendor to purchase the property.

The vendor agrees to sell and the purchaser agrees to purchase the property and the chattels included in the sale for the purchase price stated below in accordance with these Particulars and Conditions of Sale, General Terms of Sale and Further Terms of Sale (if any).

Purchase price: \$ _____ Plus GST (if any) OR Inclusive of GST (if any).
If neither is deleted, the purchase price includes GST (if any).

Deposit: \$ _____

Acknowledgements
Where this agreement relates to the sale of a residential property and this agreement was provided to the parties by a licensed real estate agent, or by a licensee on behalf of the agent, the parties acknowledge that they have been given the guide about the sale of residential property approved by the Real Estate Agents Authority.
Where this agreement relates to the sale of a unit title property, the purchaser acknowledges that the purchaser has been provided with a pre-contract disclosure statement under section 174 of the Unit Titles Act.

Signature of purchaser(s) or auctioneer:

Director / Trustee / Authorised Signatory / Agent / Attorney*
Delete the options that do not apply.
If no option is deleted, the signatory is signing in their personal capacity.

Signature of vendor(s) or auctioneer:

Director / Trustee / Authorised Signatory / Agent / Attorney*
Delete the options that do not apply.
If no option is deleted, the signatory is signing in their personal capacity.

* If this agreement is signed under:
(i) a Power of Attorney – please attach a Certificate of non-revocation (available from ADLS: 4098WFP or REINZ); or
(ii) an Enduring Power of Attorney – please attach a Certificate of non-revocation and non-suspension of the enduring power of attorney (available from ADLS: 4997WFP or REINZ); or
(iii) where the attorney signs for a trustee, a Certificate in the relevant form in Schedule 4 to the Trustee Act 1956.

Also insert the following wording for the Attorney's Signature above:
Signed by [full name of the donor] by his or her Attorney [attorney's signature].

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The buyers' details are entered here.

The purchase price and deposit offered are entered here.

Acknowledgements:
This states that the person signing below (buyer and seller) has been provided with the approved guides. If the property is a unit title property, this states that the person or people signing as buyer(s) have been provided with a pre-contract disclosure statement.

The purchaser and vendor are required to sign here.

If either the buyer or the seller is not available to sign the Memorandum of Contract the auctioneer can sign on behalf of either or both.

The final page

The final page provides some guidance that the bidder(s) are recommended to follow before bidding at the auction

<p>ADLS  REINZ</p>	<p>Fifth Edition 2020</p>
<p>BEFORE BIDDING AT THE AUCTION</p>	<p>PARTICULARS AND CONDITIONS OF SALE OF REAL ESTATE BY AUCTION</p>
<p>If you are the successful bidder or you sign this agreement before or after the auction this sale will be legally binding on you. If you are the successful bidder, the auctioneer may sign the Memorandum of Contract on your behalf if you should fail or refuse to do so.</p>	<p>© The copyright to the form is owned by the Real Estate Institute of New Zealand Incorporated and Auckland District Law Society Incorporated</p>
<p>• It is recommended you seek professional advice before bidding or, if you sign this agreement before or after the auction, before signing. This is especially so if:</p> <ul style="list-style-type: none"> ○ there are any doubts. ○ the purchaser is not a New Zealand citizen. There are strict controls on the purchase of property in New Zealand by persons who are not New Zealand citizens. ○ property such as a hotel or a farm is being sold. The agreement is designed primarily for the sale of residential and commercial property. ○ the property is vacant land in the process of being subdivided or there is a new unit title or cross-lease to be issued. ○ there is any doubt as to the position of the boundaries. ○ you wish to check the weathertightness and soundness of construction of any dwellings or other buildings on the land. <p>• Both parties may need to have customer due diligence performed on them</p>	<p>DATE:</p> <p>Address of Property:</p> <p>..</p> <p>VENDOR:</p> <p>Contact Details:</p>

The final page also provides some guidance for both bidders and the seller to read before signing the agreement.

General Terms Of Sale

Clause 4.2

If the deposit is not paid, the vendor may cancel this agreement by serving notice of cancellation on the purchaser.

Clause 7.2

Under this clause, if the property is destroyed or damaged, and the damage is sufficient to render the property untenable, the purchaser may cancel the contract or settle at a lower price with the vendor's insurance making up the difference. In the case of a rural property the value must have diminished by 20% or more for the property to be considered 'untenable'.

Clause 9

This clause includes a list of warranties and undertakings that the vendor makes. If the vendor defaults on any of these the purchaser must still settle unless the purchaser has validly cancelled the agreement under section 7 of the Contractual Remedies Act 1979. A breach of any warranty or undertaking, however, can be pursued by the purchaser at law or in equity. This means the purchaser can take legal action against the vendor in order to obtain fulfillment of a warranty or undertaking.

Clause 12.5 (2)

This clause states that if the vendor refuses to settle after a settlement notice has been served by the purchaser, the purchaser has the right to 'cancel this agreement by notice'. The purchaser also has the right to require repayment of the deposit, together with interest calculated at the interest rate for late settlement stated on the front page of the agreement.

Clause 15

The 'Zero-rating' clause has been included in the 'Particulars and Conditions of Sale of Real Estate by Auction' in response to a GST legislation change to prevent double-handling of GST by parties and the Inland Revenue Department (IRD).

For land transactions, a GST-registered person must zero-rate a supply, if the supply wholly or partly includes land, and:

- is made to another person; and
- the recipient acquires the goods with the intention of using them for making taxable supplies; and
- it is not intended to be used as a principal place of residence by the recipient and any person associated with them.

To be a zero-rated supply, all the above conditions for zero-rating must be satisfied at the time of settlement of the transaction. If any of these conditions are not satisfied at the time of settlement, the supply must be taxed at 15%.

(Reference, <http://www.ird.govt.nz/gst/additional-calcs/calc-spec-supplies/calc-zero/#landtrans>).

The sale of a tenanted commercial building, for example, would usually be zero-rated for GST.

The licensee needs to make sure the contracting parties understand their respective GST status and advise them to obtain accounting or tax advice.

REINZ Best Practice Guide: Auction

General

When conducting the sale of a property by auction, members should not engage in any conduct which is misleading or deceptive or is likely to mislead or deceive. This principle applies to conduct prior to, at and after the auction.

Nothing in this Guide limits or diminishes members' obligations to report suspected misconduct or unsatisfactory conduct of a licensee to the Real Estate Agents Authority as required under the Real Estate Agents Act 2008 and/or its regulations.

Before the Auction

Members should not advertise a property as being for sale by auction unless there is intended to be an auction and unless a written auction authority form has been duly executed by or on behalf of the client.

- 1.1 Members should provide a copy of this Best Practice Guide to prospective clients prior to having them sign the auction authority.
- 1.2 Clients should sign an acknowledgment of acceptance of the terms of this Guide, which should form part of the auction authority.
- 1.3 Prior to the auction, the member should make available for inspection the terms and conditions under which the sale of the property by auction will be undertaken.
- 1.4 If applicable, the member should specify in such terms and conditions of sale that the client reserves the right to bid either personally or through an agent. (If vendor bids are being allowed.)
- 1.5 The member should make this Guide available for inspection prior to the auction.
- 1.6 Members should make reasonable endeavours to inform all interested parties if a property is to be withdrawn from auction or is to be sold prior to auction.

2. At the auction

- 2.1 The auctioneer should conduct the auction at all times with integrity and in compliance with the law of New Zealand and this Guide.
- 2.2 The terms and conditions of sale should be on display and available for inspection, together with this Guide, at the auction. Any portion of the terms and conditions of sale relating to the description of the property will be read aloud by the auctioneer at the commencement of the auction of that property.
- 3.8 The auctioneer should ensure that the amount of any bid is clearly stated.
- 3.9 The auctioneer may refuse any bid.
- 3.10 The auctioneer should resolve any disputed bid in accordance with the terms and conditions of sale governing the auction.

If such terms and conditions do not specify how disputed bids are to be resolved, then the auctioneer should resolve any disputed bid in accordance with the Particulars and Conditions of Sale by Auction 4th Edition (or any document approved by the REINZ in substitution thereof).

REINZ Best Practice Guide: Auction full version found in Portal

The Real Estate Agents Act And The Code Of Conduct In Relation To Tender And Auctions Sales

Licencees have obligations that apply to their conduct when dealing with all types of real estate transactions and methods of sale:

- professional conduct and competence standards.
- duties and obligations in terms of client and customer care.
- requirements of the Real Estate Agents Act and other legislation.

Payment of auction proceeds

Although Section 36ZF of the Fair-Trading Act 1986 prescribes the procedures that must be followed when making payment to auction vendors, it must be noted that 36ZF confirms that in the case of real estate auctions, the provisions of the Real Estate Agents Act 2008 apply instead.

Sections 122 and 123 of the Real Estate Agents Act 2008 outline the duty the Agent must follow relating to receipting and holding of money in all real estate transactions regardless of method of sale.

Duty of agent under the Real Estate Agents Act 2008

122 Duty of agent with respect to money received in course of business.

- (1) All money received by an agent in respect of any transaction in his or her capacity as an agent must be paid to the person lawfully entitled to that money or in accordance with that person's directions.
- (2) Despite subsection (1), if an agent is in doubt on reasonable grounds as to the person who is lawfully entitled to the money, he or she must take all reasonable steps to ascertain as soon as practicable the person who is entitled and may retain the money in his or her trust account until that person has been ascertained.
- (3) Pending the payment of any such money, the money must be paid by the agent into a general or separate trust account at any bank carrying on business in New Zealand under the authority of any Act and may not be drawn upon except for the purpose of paying it to the person entitled or as that person may in writing direct.
- (4) No money to which this section applies is available for payment of the agent's debts, nor may it be attached or taken in execution under the order or process of any court at the instance of any of the agent's creditors.
- (5) Nothing in this section takes away or affects any just lien or claim that an agent who holds money to which this section applies has against the money.

123 Money to be held by agent for 10 working days.

- (1) When an agent receives any money in respect of any transaction in his or her capacity as an agent, he or she must not pay that money to any person for a period of 10 working days after the date on which he or she received it.
- (2) Despite subsection (1), a court order or an authority signed by all the parties to the transaction may require the agent to pay the money before the expiry of the period specified in that subsection.
- (3) If at any time while holding any money on behalf of any party to the transaction, the agent receives written notice of any requisitions or objections in respect of the title to any land affected by the transaction, the agent must not at any time pay that money to any person except in accordance with a court order or an authority signed by all the parties to the transaction.

Because clients rely on the advice of licensees, it is important that clients can evaluate the information they are given and understand how the licensee will benefit from the decisions they make about the property transaction.

Key points about payment of auction proceeds.

- Sections 122 and 123 of the Real Estate Agents Act 2008 relating to receipt and holding of money must be followed in all real estate transactions for all methods of sale.
- Payment must be made into a 'trust account' and the 'stakeholder' of that money must hold it for 10 working days unless a court order or an authority signed by all the parties to the transaction requires otherwise.
- If at any time, while holding any money on behalf of any party to the transaction, the agent receives written notice of any requisitions or objections relating to the property title, the agent must not pay that money to any person except in accordance with a court order or an authority signed by all the parties to the transaction.

TENDERS

Buying and selling by tender

When a property is being sold by tender, prospective purchasers (the tenderers) submit confidential written offers for a property to the agent before a deadline.

Unlike an auction, where prospective purchasers can hear other people's offers, tenderers do not know what other people are offering in advance of the tender.

A tender is where the prospective purchasers submit a written confidential offer for the property on a legally binding agreement 'Particulars and Conditions of Sale of Real Estate by Tender'.

In a sale by tender, prospective purchasers are called 'tenderers'.

The Real Estate Agents Authority defines a tender as follows:

'A tender is when prospective purchasers prepare and submit confidential written offers for a property, to the agent, for the client's consideration. There is no reserve price (the lowest price the client is willing to accept) but there may be a price guide. Purchasers can offer less than this.'

In a sale by tender, all offers are submitted to the client by the licensee at the same time, after the tender closing date and time. The tenderers are given no information about the quantity or content of the competing offers.

Each tenderer must also provide a deposit as stipulated in the Tender document (usually 10% of the purchase price). A deposit lodged by an unsuccessful tenderer will be returned to the tenderer no later than two working days after the Tender Acceptance Date. No interest shall be payable on any deposit.

A client can ask to have a provision included that a property for sale by tender can be sold before the tender closing date and time. However, industry best practice discourages this.

Each tenderer must have these key points of the Tender process explained to them:

- They make a confidential written offer which they submit to the real estate agency managing the tender process before the closing date and time deadline set down in the terms and conditions of the tender.
- They must be informed that they need to submit their best offer as they may not get the opportunity to improve upon it at a later date.
- Their tender is submitted in a sealed envelope and the offers are only opened by the licensee, (or their nominated authorised person) after the tender has closed and in front of the client.
- There will be a closing date and time for all tenders to be submitted.
- Selling by tender allows details about the sale to stay confidential and also allows all potential purchasers the same opportunity to make an offer, at the same time.
- Each tenderer submits their tender in a sealed envelope (actual tender submitted being unknown to the licensee), and tenders are only opened after the tender has closed and in front of the client or the client's lawyer.
- Written offers made under the tender process may also have any terms and conditions required by the tenderer incorporated into the offer.

Key points about the tender process

- A property offered through tender can be sold prior to the tender date if the marketing material and tender documents clearly state 'for sale by tender (unless sold prior)'. (This practice is discouraged in the REINZ Best Practice Guide for Tenders).
- If a property is offered for sale prior to tender, potential purchasers can register their interest and ask to be informed if someone else makes an offer.
- All potential purchasers wishing to submit a tender need to request a copy of the tender documents from the real estate agency.
- Tenderers will be asked to fill in a legally binding agreement: 'The Particulars of Sale of Real Estate by Tender' which includes the tendered price, deposit amount, settlement dates and any conditions attached to the offer. The vendor may also have added conditions and / or deleted standard clauses in the sale and purchase document.
- The Vendor, potential purchasers and the licensee all need to ensure that the details entered this section are correct and the correct GST option has been identified.
- Tenderers must provide a deposit as stipulated in the Tender document once they have been notified . This is usually 10% of the purchase price but can be negotiated. This will be returned to the tenderer if their tender is not successful.
- After the tender deadline, the licensee provides the tender offer(s) to the vendor. The vendor will consider the offer(s) and decide which, if any, they wish to accept (based on price offered and any conditions).
- All tendered offers must be kept by the agent for a period of 12 months (Rule 10.12)
- If a tender is accepted, the successful tenderer is then in contract with the vendor and the process of working through any conditions towards settlement begins.
- If a tender is rejected, then that tenderer is under no legal obligation and is free to pursue other purchase options. Their tender offer should be returned to them.
- If none of the tenders reflect the price the vendor is willing to accept or conditions that are unacceptable to them, then they can reject all tenders and all deposits will be returned.
- Via the licensee, the vendor may choose to negotiate further with any tenderer to the exclusion of any others after the opening of tenders.

Tender is not suitable for all properties or in some circumstances

The tender method of sale should not be used if the client wants to consider offers before the tender date.

NOTE: REINZ Best Practice Guide for Tenders – the full version can be found in Portal

Advantages and disadvantages of the tender process

Here are some advantages and disadvantages of the tender process that should be discussed with clients.

Advantages of a tender process

- Client's price is unknown and if known kept confidential.
- The client sets the settlement date, so it is known.
- Marketing of the property is for a set time period, so it can create a sense of urgency for interested parties.
- Open homes are usually the main form of exposure of a residential property to the market – the client has set days/times for preparing their property during the marketing period.
- Purchasers are encouraged to make their best offer, which can reduce stressful negotiation and can encourage a higher sale price.
- Purchasers can submit an offer, with conditions or without conditions and with terms and to suit them as required.
- Regular feedback from the licensee
- The client has the right to accept or reject the tenders or choose to negotiate with any tenderer - they are in control and do not need to sell for less than they want to.
- The client can view all offers at once and make an informed decision or negotiate with any of the parties.

Disadvantages of a tender process

- The tender process relies on potential customers being comfortable with the tender process.
- Potential customers need to be open to making an offer against unknown competition.
- Potential customers generally like to have an indication of what might be an acceptable offer and can be resistant to 'marketing without a price' methods. Those who are unsure of themselves are less likely to make an offer under a tender programme.
- Selling by tender often requires a higher-end marketing budget commitment from the client as the marketing campaign can be expensive.
- Selling by tender can be a stressful method of sale – there can be significant stress with the anticipation of receiving any tenders.
- Remember, offers may be conditional, so even if the client accepts a conditional offer, it may not result in a successful transaction.
- The tender method is not appropriate for all properties in all market conditions. Different properties, with different prospective purchasers, suit different marketing techniques.

Sale by tender is commonly used to sell commercial property and rural real estate (including farms) but is also used for residential property.

An important difference between a tender process and a deadline private treaty process is that the ADLS/REINZ 'Particulars and Conditions of Sale of Real Estate by Tender' is the sale and purchase document commonly used for sales by tender, whereas in a deadline private treaty they would use the Agreement for Sale and Purchase of Real Estate.

The Tender Method

A real estate tender is an effective method of selling real estate. It is an intense, accelerated, real estate marketing process that involves the sale of any property through confidential, written, competitive offers.

There is:

- no information given about the quality of the competing offers.
- It is marketed without a price.
- It is for a limited time.

The Real Estate Agents Authority defines a tender as follows:

'A tender is when prospective purchasers prepare and submit confidential written offers for a property, to the agent, for the client's consideration. There is no reserve price (the lowest price the client is willing to accept) but there may be a price guide. Purchasers can offer less than this.'

The Tender Process

Marketing and Advertising

Once the vendor/client signs a sole agency agreement to sell through tender the property is promoted heavily over a set marketing period (usually four to six weeks), through advertising in selected media and open homes.

The advertising will clearly indicate a time and date the tender will close. If the client wants to accept offers before the closing date, they should be encouraged to use an appropriate method of sale such as 'no price' marketing or deadline sale (offers considered prior).

If the vendor reserves the right to sell by any other method prior to the closing of the tender, then the advertising must clearly reflect this with statements such as 'unless sold prior by any other means' incorporated into the text.

If the client insists on reserving the right to sell the property prior to, during or after the opening of tenders, you should consult with your supervising agent or branch manager.

Tenders may involve significant due diligence by the purchasers, and it is unfair practice to alter the timeframe set and advertised at the beginning of the tender process. Prospective purchasers need the certainty of time to carry out their due diligence. There is also a positive duty on the agency to contact and inform all other potential purchasers that the closing date has been brought forward. (Code of Conduct, Rule 6.4)

There would be obligations on the agency if this were to happen. All advertising and marketing must clarify this. An appropriate term to use would be 'tender unless sold by private treaty' or 'for sale by tender (unless sold prior)'.

Sometimes when a property has no Tenders, or the client does not accept any of the Tender offers they can:

- Re-advertise for tenders.
- Negotiate with any parties
- Attempt to sell by another method.
- Withdraw the property from the market.

Submitting offers by tender

Each prospective purchaser is to be encouraged to make his or her best offer. Unlike an auction, offers made by tender may have any terms and conditions, required by the potential purchaser, incorporated into the offer. Offers do not have to be 'cash, unconditional'.

Offers must be submitted to the real estate agent, on the prescribed tender form, in a sealed envelope prior to the close of tender, accompanied by a 10% deposit, and placed in a secure locked tender box provided by the real estate licensee.

The Contract and Commercial Law Act 2017 sets out the legal requirements for submitting contracts.

The Contract and Commercial Law Act 2017

222 Legal requirement that information be in writing

A legal requirement that information be in writing is met by information that is in electronic form if the information is readily accessible so as to be usable for subsequent reference.

All offers are confidential and can be submitted by:

- Personal delivery
- Posting by ordinary mail
- Email (electronically)

If the offer is submitted electronically then it is the responsibility of the licensee conducting the tender to ensure that these offers are kept confidential from all other parties.

Offers received in this manner should be put into a sealed envelope and placed into the secure locked tender box.

See Particulars and Conditions of Sale of Real Estate by Tender - Clause **3.4 - Notices**

After the tender closes

After the tender closes the licensee (agent, branch manager and/or salesperson) will meet with the vendor, at which time the tender box will be opened, and the tenders viewed.

After the submitted tenders have been opened and viewed, the vendor may accept any tender reject any tender, even if it the highest in terms of price, negotiate with any tenderers to the exclusion of any others.

The REINZ Best Practice Guide: Tender provides guidance about the tender process for REINZ members. [Click here for the link.](#)

Particulars and Conditions of Sale of Real Estate by Tender

The ADLS/REINZ sale and purchase agreement which is commonly used for tender sales is the 'Particulars and Conditions of Sale of Real Estate by Tender.'

Front page of Particulars and Conditions of Sale of Real Estate by Tender

All parties involved in the tender, i.e., the client, potential purchasers, and the licensee / agent, need to ensure that all details entered onto the front cover are correct and they understand the 'Conditions of Sale' fully. This includes the settlement date, and the Conduct of Tender.

The front page includes the following details:

ADLS | REINZ Fifth Edition 2020

PARTICULARS AND CONDITIONS OF SALE OF REAL ESTATE BY TENDER

This form is approved by the Real Estate Institute of New Zealand Incorporated and by Auckland District Law Society Incorporated.

TENDER DETAILS

Closing Date and Time:

Delivery Address for Tenders:

Licensed Real Estate Agent acting for Vendor:

Salesperson(s):

Vendor:

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The vendor is registered under the GST Act in respect of the transaction evidenced by this agreement and/or will be so registered at settlement. **Yes/No**

PROPERTY

Address:

Estate: **FREEHOLD** **STRATUM IN LEASEHOLD** **LEASEHOLD CROSS-LEASE (FREEHOLD)** **STRATUM IN FREEHOLD CROSS-LEASE (LEASEHOLD)**

If none of the above are deleted, the estate being sold is the first option of freehold.

Legal Description:

Area (more or less): Lot/Flat/Unit: DP: Record of Title (unique identifier):

TENANCIES **Yes/No**

Name of Tenant(s):

Particulars of any tenancies are set out in Schedule 3 or another schedule attached to this agreement by the parties.

Release date: 4 August 2020
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Tender details: closing date and time, delivery address for tenders, real estate agent acting for client, client details.

GST: Yes/No confirmation of whether the client is registered under the GST Act in respect of the transaction and/or will be registered by settlement.

Particulars of property: address, type of estate (e.g., fee simple, leasehold etc), legal description – area (more or less), lot/flat/unit number, DP (deposited plan) reference, unique

Tenancies (if any): If the property is being sold with a tenant in place, details of the name of tenant, bond, rent, term of tenancy and right of renewal need to be included.

Conditions of sale and conduct of tender.

Conditions of sale and conduct of tender are on the second page of the document.

1.0 Conditions of sale

- | | | |
|------|---|--------|
| 1.1. | The property and the chattels included in the sale are sold on these Particulars and Conditions of Sale, the General Terms of Sale and any Further Terms of Sale. | |
| 1.2. | GST will be payable in accordance with the statement of the purchase price in the Memorandum of Contract. | |
| 1.3. | The GST date is (subclause 15.0): | |
| 1.4. | Land Act consent required (subclause 11.1): | Yes/No |
| 1.5. | Land Act date (subclause 11.2): | |
| 1.6. | The settlement date is: | |
| 1.7. | The interest rate for late settlement is: | % p.a. |

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2.0 Conduct of tender

- 2.1 A tender must be submitted in this form in duplicate in a sealed envelope marked "Tender [address of property]" and must be received at the Delivery Address for Tenders by the Closing Date and Time (time being of the essence).
- 2.2 A tender offer must state the purchase price as an exact dollar amount without reference to any calculation or variation or to the purchase price contained in any other tender.
- 2.3 A tender must be accompanied by payment of the deposit, equivalent to 10% of the purchase price.
- 2.4 A tender must be executed as follows:
- (1) Where it is signed by an agent, there must be attached an authority signed by the principal.
 - (2) In the case of a partnership, it must be signed by all partners or, if all partners have not signed, by a duly authorised partner whose signature must follow the name of the partnership, followed by the word "Partner".
 - (3) In the case of a company, it must be signed by an officer of the company authorised to sign or, where at least two directors are required to execute a document, two or more of such officers, and there must be attached evidence of that authority.
 - (4) Where it is signed by an attorney, there must be attached a copy of the power of attorney, together with a declaration or certificate of non-revocation.
- 2.5 A tender will not be opened before the Closing Date and Time.
- 2.6 All tenders, including the identity of the tenderer, will be kept confidential and will not be divulged to any other tenderer or third party, save that statistical data relating to successful tenders may be provided to the Real Estate Institute of New Zealand Incorporated.
- 2.7 The offer contained in each tender cannot be withdrawn until after the Tender Acceptance Date, being the fifth working day after the Closing Date and Time.
- 2.8 A tender is deemed to be accepted on signing by the vendor of the Acceptance of Tender. Acceptance will be communicated to the successful tenderer and/or the tenderer's lawyer as soon as reasonably practicable.
- 2.9 The vendor may:
- (1) sell the property in such manner as the vendor sees fit at any time, whether before or after the opening of tenders;
 - (2) reject any tender even if it is the highest;
 - (3) negotiate with any tenderer to the exclusion of any others after the opening of tenders;
 - (4) re-advertise for tenders;
 - (5) ignore any irregularities in the tender process; and
 - (6) at any time before the Closing Date and Time, extend the Closing Date and Time by a maximum of twenty working days, in which case each of the dates mentioned in clauses 1.3, 1.5 and 1.6 of the Conditions of Sale shall be deemed to have been extended by an equivalent period.
- 2.10 A deposit lodged by an unsuccessful tenderer will be returned to the tenderer no later than two working days after the Tender Acceptance Date. No interest shall be payable on any deposit.
- 2.11 The tenderer must complete its GST information in Schedule 1 before submitting a tender, if applicable.

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1.0 CONDITIONS OF SALE

- 1.1 The property and the chattels included in the sale are sold on these particulars and Conditions of Sale, the General Terms of Sale, and any Further Terms of Sale
- 1.2 GST will be payable in accordance with the statement of the purchase price in the Memorandum of Contract.
- 1.3 The GST date is (subclause 15.0)
- 1.4 Land Act consent required (subclause 11.1): Yes / No
- 1.5 Land Act date (subclause 11.2):
- 1.6 The settlement date is:
- 1.7 The interest rate for late settlement is %

2.0 CONDUCT OF TENDER

- 2.1 A tender must be submitted in this form in duplicate in a sealed envelope marked "Tender [address of property]" and must be received at the Delivery Address for Tenders by the Closing Date and Time (time being of the essence).
- 2.2 A tender offer must state the purchase price as an exact dollar amount without reference to any calculation or variation or to the purchase price contained in any other tender.
- 2.3 The deposit, equivalent to 10% of the purchase price, must be paid to the vendor or vendors agent in accordance with Clause 4.1 or at such other time as is specified in this Agreement.
- 2.4 A tender must be executed as follows:
 - (1) Where it is signed by an agent, there must be attached an authority signed by the principal.
 - (2) In the case of a partnership, it must be signed by all partners or, if all partners have not signed, by a duly authorised partner whose signature must follow the name of the partnership, followed by the word "Partner".
 - (3) In the case of a company, it must be signed by an officer of the company authorised to sign and there must be attached evidence of that authority.
 - (4) Where it is signed by an attorney, there must be attached a copy of the power of attorney, together with a declaration or certificate of non-revocation.
- 2.5 A tender will not be opened before the Closing Date and Time.
- 2.6 All tenders, including the identity of the tenderer, will be kept confidential and will not be divulged to any other tenderer or third party, save that statistical data relating to successful tenders may be provided to the Real Estate Institute of New Zealand Incorporated.
- 2.7 The offer contained in each tender cannot be withdrawn until after the Tender Acceptance Date, being the fifth working day after the Closing Date and Time.
- 2.8 A tender is deemed to be accepted on signing by the vendor of the Acceptance of Tender. Acceptance will be communicated to the successful tenderer and/or the tenderer's lawyer as soon as reasonably practicable.
- 2.9 The vendor may:
 - (1) sell the property in such manner as the vendor sees fit at any time, whether before or after the opening of tenders.
 - (2) reject any tender even if it is the highest.
 - (3) negotiate with any tenderer to the exclusion of any others after the opening of tenders.
 - (4) re-advertise for tenders.
 - (5) ignore any irregularities in the tender process; and
 - (6) at any time before the Closing Date and Time, extend the Closing Date and Time by a maximum of twenty working days, in which case each of the dates mentioned in clauses 1.3 to 1.5 of the Conditions of Sale shall be deemed to have been extended by an equivalent period.
- 2.10 The tenderer must complete its GST information in Schedule 1 before submitting a tender, if applicable.

Conduct of Tender Clauses *(further explained in brief)*

Clause 2.5 (regarding when a tender can be opened)

This clause states that the tender will not be opened before the Closing Date and Time. Only tenders received by this date and time will be opened and considered. When the real estate agent receives the tenders, they will be placed unopened in a locked tender box.

No-one may open the sealed envelopes to look inside until after the closing date and time. After the closure of tenders, the agent and/or salesperson licensee will meet with the client, at which time the tender box will be opened, and tenders viewed in the presence of the client.

If a licensee is found to have breached this requirement, and the confidentiality requirements under the Code of Conduct, a complaint could be laid with the Real Estate Authority and the licensee could be found guilty of unsatisfactory conduct or misconduct. They could be fined, have their license suspended or lose their license.

Clause 2.6 (regarding confidentiality of tenders)

This clause states that both the contents of the tender, and the identity of the tenderer, must be kept confidential, and cannot be disclosed to any other tenderer or third party. Information on the tenders or tenderers must also be kept confidential.

There is an exception in that statistical data related to successful tenders can be released to REINZ.

Clause 2.7 (regarding when a tenderer can withdraw their offer)

The potential customer (tenderer) cannot withdraw their Tender until after the Tender Acceptance Date. The Tender Acceptance date is the fifth working day after the Closing Date and Time.

Clause 2.8 (regarding when and how a tender is deemed accepted)

Once the tender has been viewed by the client (after the Closing Date and Time), if the client accepts one of the tenders submitted and signs the tender document, this is called 'Acceptance of Tender.' This means there is now a legally binding contract for the sale of the property between the client and the purchaser(s) who submitted the tender.

Clause 2.9 (regarding what actions the client can take during the tender process)

This clause outlines what actions the client can take during the tender process.

Note that:

- The client does not have to accept the highest offer (clause 2.9(2)).
- The client can choose to negotiate with one tenderer and exclude the others. (clause 2.9(3)).
- The tenderer the client chooses to negotiate with does not have to be the one with the highest offer.
- The client can, at any time before the Closing Date and Time, extend the Closing Date and Time by a maximum of twenty (20) working days (clause 2.9(6)).

Note: If the Closing Date and Time were extended the GST date, Land Act consent required and the Land Act date under the Conditions of Sale would be extended by an equivalent time period to the extension time sought.

Clause 2.10

The tenderer must complete the GST information in Schedule 1 before submitting a tender, if applicable.

Conditions of Sale of Real Estate by Tender

General Terms of Sale *(explained in brief)*

Clause 4.1

The purchaser shall pay the deposit to the vendor (or vendors agent) immediately upon the vendor giving notice to the purchaser that the tender is accepted or at such time as is specified in this agreement.

Clause 4.2

If the deposit is not paid on the due date for payment the vendor may at any time thereafter serve notice on the purchaser requiring payment. If the purchaser fails to pay the deposit on or before the third working day after the notice was served, then the vendor may cancel this agreement by serving notice of cancellation on the purchaser.

Clause 7.2

Under this clause if the property is destroyed or damaged, and the damage is sufficient to render the property untenable, the purchaser may cancel the contract or settle at a lower price with the vendor's insurance making up the difference. In the case of a rural property the value must have diminished by 20% or more for the property to be considered 'untenable'.

Clause 9

This clause includes a list of warranties and undertakings that the vendor makes. If the vendor defaults on any of these the purchaser must still settle unless the purchaser has validly cancelled the agreement under section 37 (1) of the Contract and Commercial Law Act 1979. A breach of any warranty or undertaking, however, can be pursued by the purchaser at law or in equity. This means the purchaser can take legal action against the vendor in order to obtain fulfilment of a warranty or undertaking.

Clause 13.5

This clause states that if the vendor refuses to settle after a settlement notice has been served by the purchaser, the purchaser has the right to 'cancel this agreement by notice'.

The purchaser also has the right to require repayment of the deposit together with interest. calculated at the interest rate for late settlement stated on the front page of the agreement.

Clause 17

The 'Zero-rating' clause has been included in the 'Particulars and Conditions of Sale of Real Estate by Tender' in response to a GST legislation change to prevent double-handling of GST by parties and the Inland Revenue Department (IRD).

For land transactions, a GST-registered person must zero-rate a supply, if the supply wholly or partly includes land, and:

- is made to another person; and
- the recipient acquires the goods with the intention of using them for making taxable supplies; and
- it is not intended to be used as a principal place of residence by the recipient and any person associated with them.

To be a zero-rated supply, all the above conditions for zero-rating must be satisfied at the time of settlement of the transaction. If any of these conditions are not satisfied at the time of settlement, the supply must be taxed at 15%.

Reference, <http://www.ird.govt.nz/gst/additional-calcs/calc-spec-supplies/calc-zero/#landtrans>). The sale of a tenanted commercial building, for example, would usually be zero-rated for GST.

The licensee needs to make sure the contracting parties understand their respective GST status and advise them to obtain accounting or tax advice.

General terms of sale

The ADLS/REINZ Particulars and Conditions of Sale of Real Estate by Tender also have a section called the General Terms of Sale.

It is important for licensees and parties to the contract to understand the implications of all the clauses contained in the agreement. Under the Code of Conduct, parties should be advised to seek legal and/or technical advice before they enter into a contract.


Further terms of sale

Following on from the 'General Terms of Sale' there is a page that allows for any 'Further Terms of Sale.' These are the special conditions that a purchaser, or a client, may wish to insert for their benefit. Any further terms of sale should be included on this page.

It is important for parties to understand that any further term of sale that contradicts an associated 'General Terms of Sale' takes precedence (clause 1.4(3)). If an additional clause is required that supersedes an existing clause, best practice is to first insert a clause that clearly states a deletion of the printed clause.

As the agreement already includes clauses 1 to 22 in the general terms, the next clause inserted as a Further Term of Sale will be numbered 23, and so on.

For example: 23.0 Spa Pool Non-Compliance

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FURTHER TERMS OF SALE	
<p>23.0 Spa Pool Non-Compliance</p> <p>The purchaser acknowledges and accepts that the spa pool situated on the property and the associated fencing may not be: (a)In a proper working order and condition; and/or (b)In compliance with the local authority's building bylaws or the Building Act 2004 or the Building Code; and/or (c)In compliance with the local authority requirements as to swimming pool fencing and/or with the Fencing of Swimming Pools Act 1987.</p>	

Chattels:

The following chattels are printed on the form: stove, fixed floor coverings, blinds, curtains, light fittings. Items on the printed list are to be struck out if not included in the sale. If there are chattels that are not listed, these should be written in.

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SCHEDULE 2
List all chattels included in the sale
(strike out or add as applicable)

Stove	Rangehood	Wall oven	Cooktop
Dishwasher	Kitchen waste disposal	Light fittings	Smoke detector(s)
Burglar alarm	Heated towel rail(s)	Heat pump(s)	Garage door remote control(s)
Blinds	Curtains	Fixed floor coverings	

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SCHEDULE 3
Residential Tenancies

Name of Tenant(s):

Rent: Term: Bond:

Commercial/Industrial Tenancies
(If necessary, complete on a separate schedule)

Name of Tenant(s):

Rent: Term: Right of Renewal: Other:


Name of Tenant(s):

Rent: Term: Right of Renewal: Other:

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Schedule 1

Schedule 1 follows the Further Terms of Sale.

ADLS  REINZ	Fifth Edition 2020						
SCHEDULE 1							
(GST Information – see clause 16.0)							
This Schedule must be completed if the vendor has stated on the front page that the vendor is registered under the GST Act in respect of the transaction evidenced by this agreement and/or will be so registered at settlement. Otherwise there is no need to complete it.							
Section 1 Vendor							
1(a) The vendor's registration number (if already registered):							
1(b)	<table border="1"> <tr> <td>(i) Part of the property is being used as a principal place of residence at the date of this agreement.</td> <td>Yes/No</td> </tr> <tr> <td>(ii) That part is: (e.g. "the main farmhouse" or "the apartment above the shop")</td> <td>Yes/No</td> </tr> <tr> <td>(iii) The supply of that part will be a taxable supply.</td> <td>Yes/No</td> </tr> </table>	(i) Part of the property is being used as a principal place of residence at the date of this agreement.	Yes/No	(ii) That part is: (e.g. "the main farmhouse" or "the apartment above the shop")	Yes/No	(iii) The supply of that part will be a taxable supply.	Yes/No
(i) Part of the property is being used as a principal place of residence at the date of this agreement.	Yes/No						
(ii) That part is: (e.g. "the main farmhouse" or "the apartment above the shop")	Yes/No						
(iii) The supply of that part will be a taxable supply.	Yes/No						

It relates to GST and zero-rating as covered by clause 15.0.

This schedule must be completed if the client has stated on the front page of the 'Particulars and Conditions of Sale of Real Estate by Tender' that they are registered for GST in relation to the transaction and/or will be registered at settlement.

If these circumstances do not apply, Schedule 1 does not need be completed.

It is important that a licensee has knowledge of the consequences if the GST option within the 'Particulars and Conditions of Sale of Real Estate by Tender' is not correctly identified.

Memorandum of contract

The Memorandum of Contract is where the tenderer records their offer and the client records acceptance by signing. The client, potential purchasers and the licensee all need to ensure that the details entered this section are correct and the correct GST option has been identified. The licensee needs to ensure that all signatories to the document are correct.

The Memorandum of contract

- Confirms their offer (in an exact \$ amount).
- By signing the memorandum of contract page, the tenderer also acknowledges that they have received a copy of the REA Approved Guide (if a residential sale, and that they have been provided with a pre-contact disclosure statement (if a unit title property).
- If the client accepts the offer, they will also need to sign and date the memorandum of contract page.
- The licensee will need to ensure the correct parties are identified and have signed the memorandum of contract page.

MEMORANDUM OF CONTRACT

WARNING *(This warning does not form part of this agreement)*

This is a binding contract. Read the information set out on the back page before signing.

Acknowledgements

Where this agreement relates to the sale of a residential property and this agreement was provided to the parties by a licensed real estate agent, or by a licensee on behalf of the agent, the parties acknowledge that they have been given the guide about the sale of residential property approved by the Real Estate Agents Authority.

Where this agreement relates to the sale of a unit title property, the purchaser acknowledges that the purchaser has been provided with a pre-contract disclosure statement under section 146 of the Unit Titles Act.

PURCHASER'S NAME:**OFFER BY TENDER TO PURCHASE**

and/or nominee ("the purchaser")

offers by tender to purchase the property and the chattels included in the sale on the Particulars and Conditions of Sale, General Terms of Sale and Further Terms of Sale (if any) set out above for a purchase price of:

Purchase price: \$

Plus GST (if any) OR Inclusive of GST (if any)
if neither is deleted, the purchase price includes GST (if any)

[The tender offer must state the purchase price as an exact dollar amount and without reference to any calculation or variation or to the purchase price stated in any other tender]

Signature of purchaser(s):

Director / Trustee / Authorised Signatory / Agent / Attorney*

Delete the options that do not apply

If no option is deleted, the signatory is signing in their personal capacity

Director / Trustee / Authorised Signatory / Agent / Attorney*

Delete the options that do not apply

If no option is deleted, the signatory is signing in their personal capacity

ACCEPTANCE OF TENDER

The vendor accepts the offer by tender of the purchaser.

Signature of vendor(s):

Director / Trustee / Authorised Signatory / Agent / Attorney*

Delete the options that do not apply

If no option is deleted, the signatory is signing in their personal capacity

Director / Trustee / Authorised Signatory / Agent / Attorney*

Delete the options that do not apply

If no option is deleted, the signatory is signing in their personal capacity

Date:

*If this agreement is signed under:

- (i) a Power of Attorney – please attach a Certificate of non-revocation (available from ADLS: 4095WFP or REINZ); or
- (ii) an Enduring Power of Attorney – please attach a Certificate of non-revocation and non-suspension of the enduring power of attorney (available from ADLS: 4997WFP or REINZ); or
- (iii) where the attorney signs for a trustee, a Certificate in the relevant form in Schedule 4 to the Trustee Act 1956.

Also insert the following wording for the Attorney's Signature above:

Signed for [full name of the donor] by his or her Attorney [attorney's signature].

The back page also provides some guidance for both tenderers and clients and must be read before signing the agreement.

<p>ADLS  REINZ</p> <p style="text-align: right;">Fifth Edition 2020</p> <p style="text-align: center;">BEFORE SIGNING A TENDER</p> <ul style="list-style-type: none"> • It is recommended you seek professional advice before signing and lodging this tender. This is especially so if: <ul style="list-style-type: none"> ○ there are any doubts. On acceptance this will be a binding contract with only restricted rights of termination. ○ the purchaser is not a New Zealand citizen. There are strict controls on the purchase of property in New Zealand by persons who are not New Zealand citizens. ○ property such as a hotel or a farm is being sold. The agreement is designed primarily for the sale of residential and commercial property. ○ the property is vacant land in the process of being subdivided or there is a new unit title or cross-lease to be issued. In these cases additional clauses may need to be inserted. ○ there is any doubt as to the position of the boundaries. ○ you wish to check the weather tightness and soundness of construction of any dwellings or other buildings on the land. 	<p style="text-align: center;">SALE OF REAL ESTATE BY TENDER</p> <p>© The copyright to the form is owned by the Real Estate Institute of New Zealand Incorporated and Auckland District Law Society Incorporated</p> <div style="border: 1px solid black; padding: 5px;"> <p>Address of Property: --</p> <p>Closing Date & Time:</p> <p>Delivery Address for Tenders:</p> </div> <div style="border: 1px solid black; padding: 5px; margin-top: 5px;"> <p>VENDOR:</p> </div>
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References to Unit Title properties

If the property is a unit title, the vendor must provide the customer with

- A certificate of insurance for all insurances effected by the body corporate under the
- Unit Titles Act 2010 (Tender form, clause 11.2 (2)(a); Unit Titles Act 2010, Section 135)
- A pre-settlement disclosure statement from the vendor, certified correct by the body corporate (Tender form clause 11.2 (2)(b); Unit Titles Act 2010, Section 147)

REINZ Best Practice Guide for Tenders – the full version can be found in Portal

OTHER COMMON METHODS OF SALE OF REAL ESTATE

There are number of other methods of sale commonly used in the marketing and sale of real estate in New Zealand. Regardless of the method of sale, generally they fall under the following key criteria.

- With or without a price.
- Limited marketing period or open-ended marketing period.

With a Price Examples	Without a Price Examples
Set Price (\$850,000)	Auction
Negotiable Over \$....	Tender
Asking \$.....	Price by Negotiation
Expressions of Interest Over \$...	Deadline Sale
Buyer Enquiry Over \$.....	Make an Offer
Buyers Over \$.....	Price on Application
Offers Over \$.....	Sale Date

‘Without a price’ method

The primary marketing perspective with ‘no price’ marketing is to look to the market to find a willing purchasers and establish a fair sale price mutually agreeable to both parties. Utilising these methods means you, on behalf of the vendor, are inviting offers from prospective purchasers and are willing to negotiate, in consultation with the vendor, an agreeable price based on the ‘willing client – willing purchasers’ concept.

With some of these methods the licensee can combine the attributes of ‘no price’ marketing with the advantages of a limited marketing period, under a ‘sole agency’ agreement. Potential purchasers are invited to make an offer within a specified advertised time period. Advertising often incorporates the term ‘unless sold prior’ which means that if a client wishes to accept any offer made before the end of the advertised marketing period they are entitled to sell before that specified end date. e.g. “Expressions of Interest close on the 31 March 2014, unless sold prior.”

If a property is to be advertised with a price, there is a requirement that the price meets the expectations of the Client as outlined in the CODE.

A Licensee must not mislead customers about the price expectation by marketing it *below* what they know the client will accept. (Rule 9.4)

Rule 9.4 – A Licensee must not mislead customers as to the price expectations of the client.

When marketing a property with a price it must be set at a minimum figure that the client has agreed they will accept and not below the minimum. (Rule 10.4)

Rule 10.4 - An advertised price must clearly reflect the pricing expectations agreed with the client.

Advantages of ‘no price’ marketing methods

Those who advocate ‘no price’ marketing methods usually hold a strong belief in allowing purchasers to decide ‘fair market value’ of a property. In other words, rather than telling the potential purchasers how much they must pay, the purchasers are required to establish how much they believe the property is worth to them. This ‘price’ will usually be based on an assessment by the potential purchasers of other comparable properties currently on the market and the prices achieved for comparable sold properties.

‘No price’ marketing has the potential to create competition amongst potential purchasers and therefore has the potential ability to push up the price of a property as potential purchasers compete to out-price each other.

It is worth remembering at this point that the agency agreement is between the agent and the vendor, and the agent has a duty of care to obtain the best possible price achievable for the property in the current market. Agents / licensees are working for the vendor, not the purchaser.

Disadvantages of ‘no price’ marketing methods

When a property is marketed without a price, purchasers face the prospect of having to spend time researching the property market to establish what they believe to be a ‘fair market value’ for the property. There will, therefore, always be a segment of purchasers who will immediately disregard any properties marketed without a price.

‘With a price’ method

This method of sale provides no time restriction for customers to purchase. The property will be available to the market for the period of the agency agreement, either by ‘general agency’ or ‘sole agency’

Advantages of marketing with a price

One of the most significant advantages of marketing a property with a price is that it sets a clear level of expectation for the purchaser. The advertised price must reflect the client’s price expectations, so the purchaser who has stringent financial limits will not waste time looking at a property that is clearly outside their purchasing power.

This method of sale provides no time restriction for customers to purchase. The property will be available to the market for the period of the agency agreement, either by ‘general agency’ or ‘sole agency’

Disadvantages of marketing with a price

Probably the main disadvantage of marketing with a price is that once advertised, the market price is 'capped' at that price. In other words, once the market has been informed of the clients expected price it is difficult to affect a sale for that amount or more. Once purchasers see the advertised price, they usually immediately think they will pay less.

Sale by private treaty

A private treaty sale is where the client offers the property to the market and invites offers from interested purchasers. In a private treaty sale, a property, business, or space is usually offered for a fixed price or price range without a deadline date for offers.

A private treaty sale may become a multiple offer process if more than one offer is generated at the same time. Information about the multiple offer process follows later in this guide.

The Auckland District Law Society (ADLS) and the Real Estate Institute of New Zealand (REINZ) are joint owners of the standard sale and purchase agreements. The ADLS/REINZ standard sale and purchase agreement 'Agreement for Sale and Purchase of Real Estate' is commonly used for private treaty sales.

In a regular private treaty sale, the real estate licensee negotiates individually with potential purchasers. The price may be adjusted throughout the marketing process, based on qualified purchaser feedback and local market conditions.

Potential purchasers can choose to offer more or less than the advertised price, and seek to negotiate the sale, including any conditions they wish to insert, for example, conditional on obtaining finance, a satisfactory LIM report or a building report.

Price by negotiation (PBN)

'Price by negotiation' is a term that is used when a client chooses to sell by private treaty but without an advertised price or price range. In these situations, advertising would state 'sale by negotiation', PBN, or similar.

'By negotiation' is a 'no-price' marketing method of sale. The client is looking to the market to establish 'fair market value' and is inviting prospective purchasers to come and make an offer. In doing so, they are inviting offers from a prospective purchaser, and are willing to negotiate an agreeable price based on a 'willing client-willing purchasers' concept.

In a 'sale by negotiation' transaction there is usually no deadline date for offers.

Sale by negotiation may be the chosen method of sale when it is difficult to gauge the market price of a property, perhaps because it is a very unusual property or in uncertain market conditions.

Price on application (POA)

'Price on application' (POA) is another term that is sometimes used when a client has chosen to sell by private treaty but without a publicly advertised price or price range. However, the licensee will be required to provide a price guide to a potential customer when they 'apply' POA should not be used if the client does not wish a price or range to be disclosed under that circumstance as this could be construed as misleading the customer.

Deadline private treaty sale

A deadline private treaty sale is sometimes called a 'deadline sale' or 'private treaty by deadline.' This method can be used to market with or without an advertised price or price range, usually through a three to four-week advertising campaign.

In a deadline private treaty sale, the client sets a date by which all offers must be submitted.

Deadline sales can create a 'call to action.' In other words, they can create a sense of urgency as there is a closing date by which interested parties must make their offer or risk missing out.

Key Points of a Deadline Sale.

- The vendor sets a date and buyers can make an offer at any time before that date. The vendor may indicate a price, and buyers can offer more or less than that price and see if the vendor is open to negotiation.
- The Vendor is not obliged to accept any of the offers.
- **Buyers** can attach conditions so their offer maybe conditional on:
 - An expiry date, a LIM, Building report, a valuation, finance or selling another property.
- **Vendors** can also attach terms and conditions to the sale, for example, the settlement date and which chattels will be included.
- Vendors can also decide to include a provision where prior offers can be accepted.
- A deposit is paid either on acceptance of the agreement by the vendor or on the agreement becoming unconditional (depending on the terms of the offer).
- The balance of the purchase price is due on settlement day.
- If you can't meet the conditions or need an extension, you need to talk to your lawyer or conveyancer and the real estate agent as soon as possible.
- If there is more than one offer, the sale may become a multi-offer process.

NOTE: A Deadline private treaty sale is a variation on the tender method that is more commonly used for commercial or rural sales.

This method may be used in less buoyant markets, to try to address the issue of properties staying on the market for extended periods while potential purchasers wait to see if a better option comes along, or to see if the asking price comes down.

Offers are kept confidential (sometimes in sealed envelopes) and managed in accordance with the agent's policies and procedures for this method of sale.

If more than one prior offer is generated the benefits and potential pitfalls of bringing the deadline forward should be discussed with the client. If the client then decides that the deadline date should be brought forward, the process followed to manage this should be a transparent multiple offer process.

Key Points of a Without a Deadline Sale.

- This method of sale has no reference to an end date, the property will stay on the market until sold or withdrawn.
- The property can be advertised with a price or without a price.
- This method of sale provides no time restriction for customers to purchase. The property will be available to the market for the period of the agency agreement, either by 'general agency' or 'sole agency'

THE MULTI OFFER PROCESS

Multiple offers

A multiple offer (multi-offer) situation occurs when more than one purchaser / lessee makes an offer for **the same property / space / business by private treaty, at the same time.**

In accordance with best practice, every real estate agency should have a written policy to cover multiple offers that is transparent, fair to all parties and ensures all interest is conveyed to the vendor / lessor.

Once a multi-offer process has been invoked, each potential customer is entitled to be given the same opportunity to make a written offer within a reasonable time frame.

Multiple offer situations may arise:

- When more than one potential purchaser or lessee makes an offer for the same property, business, or space at the same time during a private treaty sale with a sole agency in place.
- After an unsuccessful tender when more than one tenderer wants to make another offer and the client wants to negotiate with more than one party.
- After an unsuccessful auction.
- When consideration of prior offers is allowed prior to a deadline regardless of the method of sale.

A multiple offer situation can arise in all sectors of real estate (residential, rural, business, commercial and industrial).

In a multiple offer situation, the standard ADLS/REINZ Agreement for Sale and Purchase of Real Estate is commonly used to present written offers, but all potential purchasers/lessees will also be asked to complete a multiple offer acknowledgement form.

Where there is more than one party interested in making an offer, a client or lessor will typically want to view all offers to choose the most favourable one. Clients are usually open to waiting until all offers can be presented together.

The client can decide the timeframes for a multiple offer situation. The timeframe must be reasonable and in writing. If the timeframe is too long, the client risks losing the offers as the customer can withdraw an offer at any time before it is accepted. If the time frame is too short, the client may not have the same number of options.

The REINZ Information Sheet: *Multiple offers* was developed to help licensees handle multiple offer situation fairly and in a way that is compliant with the Real Estate Agents Act and Code of Conduct. It provides information regarding important requirements for a robust multiple offer process.

It is important to note the REINZ disclaimer regarding the REINZ Information Sheet: Multiple offers:

The material and information contained [in the REINZ information sheet] is for general information purposes only and is not intended to form professional legal advice.

REINZ does not accept liability for any claim or other action that may arise directly or indirectly from the use of or reliance on the material and information provided [in the REINZ information sheet]. REINZ recommends you seek independent legal advice if you are unsure of your legal position.

The REINZ Information Sheet: Multiple offers, can be found in the Portal.

Important considerations in the multiple offer process

Firstly, ensure that all parties understand that they are participating in a multiple offer.

- The multi-offer process needs to be explained clearly to all potential purchasers.
- In a multiple offer process, the offeror needs to understand they may only have one opportunity to make an offer, so their offer should be their 'best and highest'. This means 'best' in terms of the conditions they chose to include and 'highest' in terms of the price they decide to offer. Of course, the client/lessor is more likely to favour an offer at a higher price and/or that has more favourable conditions; for example, no finance condition, an earlier settlement date etc.
- Potential purchasers / lessees need to be made aware:
 - That the vendor / lessor may choose to negotiate to the exclusion of others or negotiate with all interested parties.
 - And assured that no other party will be made aware of the nature or extent of their offer.
- In situations where a client vendor / lessor instructs the licensee to try to obtain a better price than those offered on closing date, a suggested solution is for the licensee to go back to each proposed purchaser / lessee on the basis that the vendor / lessor has instructed the licensee that none of the current offers have reached their expectations; and ask if they are prepared to increase their offer at this time.
- It is also important to ask the potential purchasers / lessees not to withdraw their offer until the vendor / lessor has had more time to consider the situation.
- Potential purchasers / lessees can withdraw their offer or counteroffer at any time prior to acceptance if the notice of withdrawal is communicated prior to the notice of acceptance. All parties should be advised of their rights about this.
- In these cases, a timeframe should be imposed by the licensee (any purchaser / lessee may require an answer within a stated timeframe). This is important to give certainty as to final close-off time for acceptance or otherwise.
- All offers should be in a sealed envelope and should be presented by the listing licensee to the vendor / lessor at the same time.
- Licensees can only present offers that contain an actual price. It is important to make this clear to parties. For example, a licensee may be told by a prospective purchaser "I'll offer 10% more than the best price anyone else offers". This is not a valid offer that can be presented.
- Each offeror will need to sign a multiple offer acknowledgement form.
- The offerors should be guaranteed that the details of their offer will not be disclosed to other competing offerors.
- Where the listing licensee is associated with one, or more, of the offers then all offers should be presented by the supervising agent, the branch manager or independent nominee.
- In the event of many multiple offers, one option may be for the process to become a public auction, but this would need consultation with all parties and auction conditions being prepared and presented at short notice.
- While a certain level of urgency comes into play in a multiple offer situation, licensees cannot put any party under undue pressure.

Administration of the Multi Offer Process

REINZ recommends that the following steps be used as a means of keeping a secure paper trail in respect of all multiple offer situations:

- Open a register of all parties wishing to participate in multiple offers.
- Keep details (names, addresses, numbers, and email addresses of all interested parties).
- Each offer should have a separate file with file notes of all communications, phone calls and hard copies of all email communications.
- Keep signed copies of the multiple offer acknowledgement forms of each party in their respective file and provide a copy of the forms to the vendor / lessor.
- Confidentiality is critical and absolutely no discussion as to the level of offers should be disclosed to other salespeople until all offers are finally dealt with.
- If the vendor / lessor requires the salesperson to go back to the proposed purchaser / lessee, ensure the correct wording is used.
- Time limits should be agreed upon with referral to the vendor / lessor and purchasers / lessees.
- If the transaction is a residential property sale, at the time of getting all multiple offer acknowledgement forms signed, licensees must ensure that all parties are provided with the approved guide relating to sale of residential property.

Agency policy and procedures

The REINZ Information Sheet: Multiple Offers strongly recommends that agencies have a multiple offer process in place which is fair to all parties, and ensures all interest is conveyed to the client in a timely, confidential manner.

The legal obligations in a multiple offer situation are governed by the obligations imposed by the Real Estate Agents Act 2008 and the Code of Conduct.

These 4 rules set out the standards of professional conduct of licensees:

- **Rule 6.1** - A licensee must comply with the fiduciary duties with respect to clients.
- **Rule 6.2** - A licensee must act in good faith and deal fairly with all parties engaged in a transaction.
- **Rule 6.3** - A licensee must not engage in any conduct likely to bring the industry into disrepute.
- **Rule 6.4** - A licensee must not mislead a customer or client, nor provide false information, nor withhold information that should by law or in fairness be provided to a customer or client.

These 3 rules set out a licensee's obligation under client and customer care.

- **Rule 10.10** - requires licensees to submit to a client vendor / lessor all offers concerning the sale, purchase or other disposal of any land or business provided that such offers are in writing.
- **Rule 9.2** - a licensee must not engage in any conduct that would put a client, prospective client, or customer under undue or unfair pressure.
- **Rule 9.3** - requires licensees to communicate regularly, and in a timely manner with the client and to keep them well informed of all matters relevant to the client's interest (unless instructed otherwise).

The Privacy Act, which strictly prevents disclosure of any information of a vendor / lessor or potential purchasers / lessees to any other person, except with express consent of the parties concerned, also has particular significance in a multiple offer situation.

Issues surrounding the multiple offer process.

Complaints are often made to agencies REA and REINZ about multiple offer situations. These are usually made by purchasers and prospective purchasers who feel agents and licensees have managed the situation unfairly.

Licensees need to exercise skill, competence, and a duty of care in all real estate agency work. However, it is important to take particular care in multiple offer situations, as these situations can arise quickly, can be fast-paced, high pressure, and involve parties who do not understand the process and its implications.

- Lack of communication from the licensee about when a multiple offer situation arises.
- Lack of clarity about the process.
- Failure by the licensee to advise that there is interest in the subject property from other parties.
- Failure by the licensee to advise that there may not be another chance to submit a higher offer.
- Delays in the licensee presenting an offer.
- Licensees disclosing information about competing offers, and a feeling that information about the complainant's own offer is also being disclosed to other parties interested in the property.
- Uncertainty about how to negotiate in a multiple offer situation.
- Licensees applying undue pressure on parties involved in the multiple offer process to submit an unconditional offer.
- Conflicts of interest arising when competing offers are being presented by different licensees from the same agency. A feeling from complainants that the listing licensee may be biased towards their own customer so that they can obtain a higher commission share rather than share commission with another licensee (if that licensee's customer purchases the property).

Important Note

Ultimately the decision as to whether to participate in a multi-offer process rests with the vendor

Multiple Offer Presentation Proposed Purchaser Acknowledgement

To: (XYZ Realty) (Licensee – Name)

I/We acknowledge that you have provided to me/us the following advice, consistent with the vendor’s instructions:

- a) That there is more than one prospective purchaser interested in purchasing the property described below and/or one or more offers have or may be received in respect of the property.
- b) That you have advised me/us to put my/our highest and best offer in writing for presentation by you to the vendor. That the vendor has the right to accept or reject any offer.
- c) That the vendor has the right to counter offer and/or negotiate with one prospective purchaser to the exclusion of other purchasers.
- d) That I/we might not have any further opportunity to submit a higher or better offer to the vendor.
- e) That the terms and conditions of my/our offer will remain confidential to me/us, the licensee drafting the offer, and management. The offer will be placed in a sealed envelope and will only be opened in the presence of the vendor, unless otherwise instructed by the vendor.
- f) That my/our offer and any other offers will be presented at the same time to the vendor by the licensee, branch manager or independent nominee or otherwise in accordance with the protocols of XYZ Realty.

Address of property:

.....

.....

I/We have been recommended to obtain independent legal advice before signing this document.

NB: It is not compulsory to participate in the multiple offer process and therefore signing this form is not mandatory. Offers presented outside this multi-offer process will be handled according to the vendor’s instructions.

Purchaser(s) signature(s):

Purchaser(s) signature(s):

Date:/...../.....

Back Up Offers & Escape Clause

When a vendor/lessor accepts and signs a sale and purchase agreement / lease agreement, **this first accepted offer becomes the primary contract.**

From that point on, any other offer made on that property/space/business is referred to as a backup offer.

An Escape clause will allow a vendor to give notice to the purchaser, who has a conditional offer on the property, that they need to confirm the contract as unconditional before the end of the notice period otherwise the contract will be at an end.

A Backup offer will allow a potential purchaser to make an offer on a property that is already under contract. A back up offer can be made whether or not there is an escape clause in the original agreement.

Back up offers can sometimes result from a client who missed out on a Multi-Offer, an auction, tender or where a property is already under contract but has not become unconditional.

Backup Offers can be Conditional or Unconditional and rely on the previous contract falling over or being cancelled.

When dealing with a contract that has either an escape clause or a backup clause time is of the essence. It is important that all times and dates are strictly adhered to so no one is advantaged or disadvantaged.

Important Point

A Sale and Purchase Agreement sets out any agreed terms and conditions of the sale or purchase of a property/business. It is a legally binding contractual document that requires the parties to go ahead with the sale or purchase of a property/business once any conditions in the agreement have been met. Most **back up offers** call for the first agreement to be cancelled as soon as legally possible. This will not allow the vendor to extend any of the dates including the day the deposit was due and the unconditional date.

Agents and Licensees are “stewards of the sale transaction” and must always act in the best interest of the client.

Key Points of a Back Up Offer.

Timeframes need to be carefully adhered to. If the first offer does not confirm by the time stated in the agreed contract, the first contract may be at an end and the backup offer would then proceed.

- A competent and ethical licensee should always ensure they have the full facts as to why a primary contract failed - full disclosure in accordance with the Code of Conduct will be required, for example, in relation to known defects.
- It is the licensee’s duty to ensure all processes are explained and understood by all parties involved and that all parties are fully informed about what they are signing and the implications.
- Timeframes confirmed must be ethical (i.e. fair and realistic), and licensees must avoid putting undue pressure on parties.
- Licensees must remain impartial, i.e. they cannot ‘prefer’ the second offer - having a vested interest in the first offer falling over creates ethical issues.
- The supervising agent / branch manager, not the individual licensee, should deal with back up offers.
- A solicitor should manage the contractual process.

MORTGAGEE SALES

A mortgagee is a party, normally a bank, institution, or finance company, sometimes even an individual person, who has lent money to another party (the mortgagor)

Security is taken for the loan by registering the mortgage on the certificate of title. The mortgagor is the party who has been given the loan.

A mortgagee sale happens when, as a result of the mortgagor not meeting their obligations under the terms of the mortgage, usually in not meeting their mortgage repayments, the mortgagee exercises its power of sale. The property is sold, after completing a legal process, to recover its debt. A mortgagee sale is usually the last option open to the lender.

In the case of an Auction the mortgagee will set a reserve with the auctioneer, just prior to the auction. This reserve is kept confidential between the mortgagee and the auctioneer and is not made public. Mortgagee sales generally account for approximately 2% of all annual residential sales in New Zealand. The mortgagee sale may also be a tender.

The Property Law Act 2007 sets out the rules and process governing mortgagee sales. But there is also a duty of reasonable care to achieve the best price reasonably obtainable at the time of sale is owed to the mortgagor by the mortgagee. In practice, this means selling the property through a real estate agent.

To:

- obtain the best possible price in a distressed sale situation; and provide for mortgagees to adopt sale and purchase agreements in order to provide clear title to the purchaser (customer).

Section 119 of the Property Law Act 2007 states that notice must be given to the current mortgagor of the mortgagee's intention to exercise power to recover monies owing. These powers are defined in Section 119(2) as outlined below:

PROPERTY LAW ACT 2007

Section 119

Notice must be given to current mortgagor of mortgaged land of exercise of powers, etc

- (1) No amounts secured by a mortgage over land are payable by any person under an acceleration clause, and no mortgagee or receiver may exercise a power specified in subsection (2), by reason of a default, unless—
 - (a) a notice complying with section 120 has been served (whether by the mortgagee or receiver) on the person who, at the date of the service of the notice, is the current mortgagor; and
 - (b) on the expiry of the period specified in the notice, the default has not been remedied.
- (2) The powers are –
 - (a) The mortgagee's power to enter into possession of mortgaged land;
 - (b) The receiver's power to manage mortgaged land or demand and recover income for mortgaged land;
 - (c) The mortgagee's or receiver's power to sell mortgaged land.
- (3) Subsection (1) is subject to sections 125 and 126.
- (4) A notice required by this section may be given in the same document as a notice under section 118.

PROPERTY LAW ACT 2007

Section 120 - Form of notice under section 119

The notice required by Section 119 must be:

- is to be given in the prescribed form
- must include details of the nature and extent of the default
- specifies a period to remedy (not less than 20 working days after notice is served)
- specifies the amount secured by the mortgage
- the actions required to remedy the default (if it can be remedied).

In summary, a mortgagee sale process cannot begin unless there has been default on the mortgage by the mortgagor; the mortgagee has served a valid Property Law Act (PLA) notice; and the arrears have not paid by the mortgagor by the time the PLA notice expires.

In situations where a mortgagee sale is to go ahead:

- the mortgagee can sell 'personally' (through a real estate agency), i.e., by auction, tender or private treaty.
- the mortgagee can apply for the sale to be conducted by the Registrar of the High Court.
- the mortgagee can apply to the High Court to direct or assist in the sale process.

A mortgagee cannot purchase the property themselves if sold 'personally'. They may purchase the property if the sale is conducted by the Registrar of the High Court or by an order of the High Court.

The mortgagor is entitled to stop the auction at any time prior to the completion of the Auction (or it is withdrawn from sale) if they either pay the arrears or refinance the property; in other words, clear the debt owing to the mortgagee.

Often, an additional clause is included in the sale and purchase agreement that allows for cancellation of the contract right up to the point of settlement if arrears can be paid by the mortgagor.

Mortgagee sales are offered under different terms and conditions.

As the mortgagee is not the owner of the property, it offers the property for sale under different terms and conditions.

- Most mortgagee sales are not offered for sale with **vacant possession**.
- Most mortgage sales **do not include chattels** in the sale.
- The mortgagee generally **does not give warranties** regarding building permits, Code of Compliances, or boundaries.

Section 120 of the Property Law Act specifies the form of notice which is to be given under squatters if they are still occupying the property. As with any auction, the terms of the sale are read prior to bidding. The mortgagee will usually set a 'reserve price'. This is the minimum amount they are prepared to accept.

A mortgagee sale by auction usually requires settlement to be within 30 days from the date

Key points for Real estate licensees in mortgagee sales

It is important to note that mortgagee sales can be difficult for licensees to work on.

Given the circumstances of a forced sale, mortgagors can be expected to be highly stressed and can be actively resistant to the sale. It is important for licensees to remain professional, respectful, and considerate if faced with trying circumstances.

In a mortgagee sale there may be higher risk of damage to property by the mortgagor, and there may be the possible need for a purchaser to pursue legal avenues to remove a mortgagor who refuses to leave.

The 'as is/where is' provision is usually used in mortgagee sales. This means the usual client warranties for building permits, compliance documentation, etc. do not apply.

However, the 'as is/where is' provision does not negate a licensee's disclosure obligations under rules 10.7 and 6.4 of the Code of Conduct.

If a licensee is aware, or should be aware, of anything that may be material to a prospective purchaser, that information needs to be fully disclosed, no later than the point of inducement.

Potential purchasers need to be actively encouraged to carry out their own due diligence.

It is especially important for licensees to follow their agency processes for mortgagee sales and to do the following:

- Provide copies of all relevant documents in their possession to potential purchasers and to strongly advise them, given the higher risks involved, that it is even more crucial that they seek legal, and any other relevant specialist advice as required. This is to make sure they fully understand the implications of the conditions of sale before they place a bid at auction, submit a tender or make an offer.
- Recommend all potential purchasers research the property fully and satisfied themselves in all respects regarding the property.
- Recommend potential purchasers obtain a copy of the conditions of sale before attending the auction or submitting a tender, including the full sale conditions are contained in the auction particulars and conditions of sale or the tender documents.
- Recommend all potential purchasers carry out their own due diligence on the property.
- Recommend all potential purchasers understand they would need to arrange insurance to protect themselves against the risk of the property being damaged prior to settlement if their auction bid is successful, or their tender or offer is accepted.
- Recommend all potential purchasers consult their solicitor.
- Inform the potential purchasers the mortgagor has the right to redeem or repay their mortgage, on terms satisfactory to the mortgagee, prior to the property being sold. As such, it could be withdrawn from sale.
- Explain that most mortgagee sales are not offered for sale with vacant possession.
- Explain that most mortgage sales do not include chattels in the sale.
- Explain that a mortgagee sale generally does not give warranties regarding building permits, Code of Compliances, or boundaries.

FAIR TRADING ACT 1986

When conducting a sale of real estate within New Zealand by any method, the agency and the licensee must ensure that they comply with the legal requirements of the Fair Trading Act 1986. includes companies.

Section 9 of the Act prohibits misleading or deceptive conduct in trade by a person. 'Person' includes companies.

Fair Trading Act 1986

9 Misleading and deceptive conduct generally

No person shall, in trade, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

Because section 9 covers those in trade, it does not apply to private clients. It will, however, apply to real estate companies and their licensees because they will be acting in the course of their trade.

"Conduct" can include written and verbal statements and actions (e.g. silence).

The misleading or deceptive conduct can be accidental; it does not have to be intentional. It does not matter whether the person causing the misleading or deceptive conduct believed he or she was acting properly or not.

As well as prohibiting misleading and deceptive conduct in trade in Section 9, the Act prohibits false representations in relation to land under section 14. Again, this relates to persons in trade, so does not apply to private clients.

False representation claims often involve advertising, but can be any written or spoken statement, or even pictures. Silence can also be a false representation.

The following civil remedies are provided for in the Fair-Trading Act:

14 False representations and other misleading conduct in relation to land

- (1) No person shall, in trade, in connection with the sale or grant or possible sale or grant of an interest in land or with the promotion by any means of the sale or grant of an interest in land,
-
- (a) make a false or misleading representation that a person has any sponsorship, approval, endorsement, or affiliation; or
 - (b) make a false or misleading representation concerning the nature of the interest in the land, the price payable for the land, the location of the land, the characteristics of the land, the use to which the land is capable of being put or may lawfully be put, or the existence or availability of facilities associated with the land.

THE CONTRACT AND COMMERCIAL LAW ACT 2017

Relief in relation to legal mistakes.

If a contract is entered into as a result of a legal mistake, the court may grant relief in the following ways:

- Cancel the contract.
- Vary the contract.
- Order restitution or compensation.

Section 35(1) (a) of the Contract and Commercial Law Act 2017 allows for damages in the same manner and to the same extent as if the misrepresentation were a term of the contract. There is no entitlement to damages for deceit or negligence which means no damages will be awarded under this legislation if a customer was induced into the contract or suffered additional pain or loss. If a misrepresentation is made by the agent or licensee working on behalf of the client but the client was not at fault, the agent may be instructed by the Court to indemnify the client. This means the agent would be required to cover the cost of any court decisions made against the client.

An example would be if a spa pool were promised but not included in the chattels and was not. There on settlement day, then the compensation would only be for the cost of the spa pool to be replaced. There would be no allowance for claims of damages for negligence.

Section 37 of the Contract and Commercial Law Act 2017 covers cancellation of contracts between parties. If misrepresentation under Section 35 is established, the customer may be able to lawfully cancel the sale and purchase/lease agreement under Section 37.

Cancellation of contract in relation to misrepresentation

The Contract and Commercial Law Act 2017 covers situations where a customer may be entitled to cancel a contract because of a misrepresentation made by a party selling or leasing a property, business, or space, or by real estate licensee acting on behalf of their client.

Section 37 of the Contract and Commercial Law Act 2017 covers cancellation of contracts between parties. If misrepresentation under section 35 is established, the customer may be able to lawfully cancel the sale and purchase/lease agreement under section 37.

Section 35 of the Contract and Commercial Law Act 2017 does not allow for entitlement to damages for deceit or negligence. This means that no extra damages will be awarded under this legislation if a customer was induced into the contract or suffered additional pain or loss.

The customer is legally entitled to bring action under both the Contract and Commercial Law Act 2017 and the Fair-Trading Act 1986.

If a misrepresentation is made by the agent or licensee working on behalf of the client but the client was not at fault, the agent may be instructed by the Court to indemnify the client. This means the agent would be required to cover the cost of any court decisions made against the client

Resources

ADLS/REINZ. (2012). *Particulars and Conditions of Sale of Real Estate by Auction - 4th Edition*.

ADLS. (2012). *Particulars and Conditions of Sale of Real Estate by Tender – 4th Edition*.

New Zealand Legislation. (1986). *Fair Trading Act*.

<http://www.legislation.govt.nz/act/public/1986/0121/61.0/DLM96439.html>

New Zealand Legislation. (2007). *The Property Law Act*.

<http://www.legislation.govt.nz/act/public/2007/0091/latest/DLM968962.html>

New Zealand Legislation. (2008). *Real Estate Agents Act 2008*.

<http://www.legislation.govt.nz/act/public/2008/0066/latest/DLM1151921.html>

New Zealand Legislation. (2009). *Real Estate Agents (Duties of Licensees) Regulations 2009*.

<http://www.legislation.govt.nz/regulation/public/2009/0281/latest/whole.html>

New Zealand Legislation. (2013). *Auctioneers Act*.

<http://www.legislation.govt.nz/act/public/2013/0148/latest/DLM5788504.html>

Real Estate Authority. (2012). *Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012*.

<https://www.rea.govt.nz/assets/Uploads/Resources/Guides/Code-of-conduct.pdf>