QUESTION:
Buyer broker is writing an offer using the WA State Bond money. In the 22A, I would write FHA loan type with 3.5% down. Some say it's a zero down loan. Others say that since buyer is taking a loan (bond money) to get the money and then putting it down, buyer should say they are putting 3.5% down. I think that they are putting money down. A USDA loan or a VA loan would be zero down but bond is 3.5. Is there a rule for this?

ANSWER:

The answer to this question starts with the fact that buyer MUST disclose all contingent sources of funds on which buyer is relying to purchase seller’s property (Form 21, paragraph (a)). The WA State Bond money is a contingent source of funds and buyer must disclose buyer’s reliance on it so that seller is aware that buyer is not putting any of buyer’s money into the purchase. Buyer is reliant on borrowed money for every penny of the purchase price. That buyer necessarily has a more challenging time getting financing then a buyer who, for example, might put down 30% of the purchase price from buyer’s own resources.

Recognizing disclosure as buyer’s goal, there is more than one way buyer can handle disclosure of buyer’s reliance on contingent funds. Buyer can make buyer’s obligation to purchase the property CONTINGENT on getting the funds or buyer can simply DISCLOSE buyer’s reliance on the contingent funds. To make buyer’s obligation contingent on getting the funds, buyer would use a financing contingency addendum (Form 22A). To simply disclose buyer’s reliance on the contingent source of funds, buyer would disclose buyer’s reliance but the form used to make that disclosure would not include language giving buyer a contingency (legal excuse) for failing to close if the contingent funds are not available for closing (Form 22EF). If buyer chooses disclosure only, buyer has no legal excuse for performance of the purchase agreement if buyer is unable to timely get the funds. Rather, buyer will breach the purchase agreement if buyer has no contingency for failing to get the funds and is unable to get the funds necessary to close the loan.

To illustrate ... in a competitive market, where a buyer has good reason to believe that buyer will have no trouble getting
the loan, buyer may choose to make an offer more desirable to the seller by not including a financing contingency. Remember that buyer must disclose buyer’s reliance on the contingent source of funds and even though buyer has confidence in buyer’s ability to get the loan, the loan funds are still a contingent source of funds. Because of that, buyer would include a Form 22EF and put seller on notice of buyer’s reliance on a contingent source of funds -- but buyer is not making buyer’s obligation to purchase contingent on getting those loan funds. Instead, the message that buyer communicates to seller is that seller should accept buyer’s offer knowing that buyer has such confidence in buyer’s ability to timely obtain the loan that buyer is willing to risk breach of contract if buyer is unable to get the loan. That is exactly what Form 22EF says. Form 22EF says that if buyer fails to have the contingent funds, disclosed in Form 22EF, by closing, buyer will be in breach of the purchase agreement.

It is unlikely that the typical bond money buyer has this degree of confidence in their ability to obtain the bond money. Consequently, most bond money purchasers will want to not only disclose their reliance on the bond money but also make their obligation to purchase contingent upon getting the bond money. To do this, buyer would use a Form 22A, Financing Addendum, and disclose that they are putting zero down. Buyer would also mark the box for “FHA” (if that is the underlying loan type for which they are applying) AND mark the box for “other”. On the blank line associated with “other,” buyer broker would write “Washington State Bond Money”. With that, seller knows that buyer is relying on contingent funds for 100% of the purchase price and buyer has a legal excuse for performance if buyer is unable, after a good faith effort, to obtain either the underlying loan or the bond money.

The only alternative for this bond money buyer is to use a Form 22A to disclose the underlying loan and indicate a down payment of 3.5% and accompany that form with a Form 22EF disclosing buyer’s reliance on the bond money program to make the down payment. However, if buyer uses this approach and is then unable to timely secure the bond money, buyer will breach the purchase agreement. The financing contingency cannot save buyer from breach. Instead, buyer will be in breach of the purchase agreement BECAUSE buyer was unable to secure the bond money funds identified in Form 22EF.

Is it possible that a seller will choose against a buyer’s offer simply because buyer is relying on contingent funds for 100% of the purchase price? Absolutely. Seller takes a greater risk removing their property from the market for a zero-down buyer than for a cash buyer (or a buyer who puts any of buyer’s own funds into the purchase). That is precisely the reason that seller is entitled to know the true picture of buyer’s financial abilities. The bond money buyer who fails to make full disclosure to seller, of buyer’s reliance on contingent funds for the entire purchase price, risks breaching the contract and forfeiting earnest money or worse. The buyer broker who does not understand this issue and gives the bond money buyer bad advice risks violating broker’s duty of reasonable skill and care.

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