

1 **13-808. Acceptance; ~~[terms of the offer]~~new or different terms; counteroffer.**

2
3 ~~[A reply is not an acceptance if it adds a material qualification or requests a new~~
4 ~~condition not in the offer. If, however, you determine that _____'s reply departs~~
5 ~~from the terms of _____'s offer, that reply is still an acceptance if:~~

6 ~~[_____ agreed to the new term;] [or]~~

7 ~~[the new term is so consistent with the offer that _____'s agreement to~~
8 ~~the term could reasonably be inferred from [his] [her] [its] offer;] [or]~~

9 ~~[_____ makes it clear in the reply that [his] [her] [its] acceptance is not~~
10 ~~dependent upon _____'s agreement to the new term.]]~~

11 If _____ (name of offeree) responded to an offer by conditioning acceptance on new
12 terms that added, varied or changed any term of the offer, the response was a rejection of the
13 original offer and operated as a new offer that could be accepted or rejected by _____ (name
14 of offeror). [If the new terms were reasonably implied by the original offer, however, the
15 response operated as an acceptance of the original offer despite the additional or different terms.]

16 [If _____'s (name of offeree) response to an offer included additional or different
17 terms but did not condition acceptance on agreement to those terms, the response operated as an
18 acceptance of the original offer.]

19
20 **USE NOTES**

21 ~~[Only those bracketed exceptions to a material qualification which are relevant to the~~
22 ~~case should be given. This instruction should be given only when the contract does not involve~~

1 ~~sales of goods governed by the UCC.]~~This instruction should be given only when a purported
2 acceptance includes terms that differ from the offer. Only the bracketed portions relevant to the
3 case should be used.

4 [Adopted, effective November 1, 1991; as amended by Supreme Court Order No. 18-8300-013,
5 effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme
6 Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31,
7 2020.]

8 **Committee commentary.** — ~~[When the “acceptance” reply is qualified or adds~~
9 ~~conditions which materially vary the terms of the offer, the reply is a rejection of the offer and a~~
10 ~~counteroffer. It is not an acceptance. See *Polhamus v. Roberts*, 1946 NMSC 033, ¶ 18, 50 N.M.~~
11 ~~236, 175 P.2d 196; Restatement (Second) of Contracts §§ 39, 59 (1981).]~~An offer must be
12 accepted unconditionally and unqualifiedly by the offeree. *Pickett v. Miller*, 1966-NMSC-050, ¶
13 9, 76 N.M. 105, 412 P.2d 400. “A reply to an offer which purports to accept it but is conditional
14 on the offeror’s assent to terms additional to or different from those offered is not an acceptance
15 but is a counter-offer.” Restatement (Second) of Contracts, § 59 (1981); see also *Polhamus v.*
16 *Roberts*, 1946-NMSC-033, ¶ 18, 50 N.M. 236, 175 P.2d 196.

17 ~~[An acceptance, however, need not be an exact mirror image of the offer. If the offeree~~
18 ~~accepts the offer unconditionally but requests a change or addition, making it plain that granting~~
19 ~~the request is not a condition of the acceptance, then, assuming that the time and manner of~~
20 ~~acceptance was authorized, the offeree’s acceptance creates a contract. *Polhamus*, 1946 NMSC-~~
21 ~~033, ¶ 21; Restatement (Second) of Contracts § 61. In addition, an] An acceptance is not~~

1 inoperative because conditional, if the requirement of the condition could be implied from the
2 offer. [~~See, e.g., *Ross v. Ringsby*, 1980-NMCA-080, ¶ 8, 94 N.M. 614, 614 P.2d 26;~~] See *Pickett*
3 *v. Miller*, 1966-NMSC-050, ¶ 9, 76 N.M. 105, 109, 412 P.2d 400, 403; Restatement (Second) of
4 Contracts, § 59, Comment b. A conditional acceptance is also operative if the condition was
5 within the manifested intention of the parties. *See *Tatsch v. Hamilton-Erickson Mfg. Co.*, 1966-*
6 *NMSC-193, ¶ 11, 76 N.M. 729, 418 P.2d 187* (where a supplier’s offer to provide school desks
7 was conditional upon the project architect’s acceptance of the supplier’s brand of desk and the
8 supplier made the conditional nature of the offer clear to the contractor, the contractor was
9 empowered to accept supplier’s offer on the condition that the project architect would approve
10 the substituted product).

11 If the offeree accepts the offer unconditionally but requests a change or addition, making
12 it plain that granting the request is not a condition of the acceptance, then, assuming that the time
13 and manner of acceptance was authorized, the offeree’s acceptance creates a contract. *Polhamus,*
14 1946-NMSC-033, ¶ 21; Restatement (Second) of Contracts, § 61 (“An acceptance which
15 requests a change or addition to the terms of the offer is not thereby invalidated unless the
16 acceptance is made to depend on an assent to the changed or added terms.”); Restatement
17 (Second) of Contracts, § 59, Comment a. (“[A] definite and seasonable expression of acceptance
18 is operative despite the statement of additional or different terms if the acceptance is not made to
19 depend on assent to the additional or different terms.”).

1 [As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed
2 on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective
3 for all cases pending or filed on or after December 31, 2020.]