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

[A reply is not an acceptance if it adds a material qualification or requests a new condition not in the offer. If, however, you determine that __________________’s reply departs from the terms of __________________’s offer, that reply is still an acceptance if:

[__________________ agreed to the new term;] [or]

[the new term is so consistent with the offer that __________________’s agreement to the term could reasonably be inferred from [his] [her] [its] offer;] [or]

[__________________ makes it clear in the reply that [his] [her] [its] acceptance is not dependent upon __________________’s agreement to the new term.]

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

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

USE NOTES

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

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

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

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

[An acceptance, however, need not be an exact mirror image of the offer. If the offeree accepts the offer unconditionally but requests a change or addition, making it plain that granting the request is not a condition of the acceptance, then, assuming that the time and manner of acceptance was authorized, the offeree’s acceptance creates a contract. Polhamus, 1946-NMSC-033, ¶ 21; Restatement (Second) of Contracts § 61. In addition, an] An acceptance is not
inoperative because conditional, if the requirement of the condition could be implied from the
offer. [See, e.g., Ross v. Ringsby, 1980-NMCA-080, ¶ 8, 94 N.M. 614, 614 P.2d 26.]
See Pickett v. Miller, 1966-NMSC-050, ¶ 9, 76 N.M. 105, 109, 412 P.2d 400, 403; Restatement (Second) of
Contracts, § 59, Comment b. A conditional acceptance is also operative if the condition was
within the manifested intention of the parties. See Tatsch v. Hamilton-Erickson Mfg. Co., 1966-
NMSC-193, ¶ 11, 76 N.M. 729, 418 P.2d 187 (where a supplier’s offer to provide school desks
was conditional upon the project architect’s acceptance of the supplier’s brand of desk and the
supplier made the conditional nature of the offer clear to the contractor, the contractor was
empowered to accept supplier’s offer on the condition that the project architect would approve
the substituted product).

If the offeree accepts the offer unconditionally but requests a change or addition, making
it plain that granting the request is not a condition of the acceptance, then, assuming that the time
and manner of acceptance was authorized, the offeree’s acceptance creates a contract, Polhamus,
1946-NMSC-033, ¶ 21; Restatement (Second) of Contracts, § 61 (“An acceptance which
requests a change or addition to the terms of the offer is not thereby invalidated unless the
acceptance is made to depend on an assent to the changed or added terms.”); Restatement
(Second) of Contracts, § 59, Comment a. (“[A] definite and seasonable expression of acceptance
is operative despite the statement of additional or different terms if the acceptance is not made to
depend on assent to the additional or different terms.”).
[As amended by Supreme Court Order No. 18-8300-013, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. 20-8300-006, effective for all cases pending or filed on or after December 31, 2020.]