

1 **13-812. Acceptance; performance as acceptance; notification of the offeror; partial**
2 **performance.**

3
4 ~~[Performance by _____ would be an acceptance of the offer only if:~~
5 ~~_____ reasonably understood that _____ wanted performance~~
6 ~~rather than a return promise,~~

7 ~~and if~~

8 ~~[_____ reasonably believed _____ would learn of the~~
9 ~~performance.]~~

10 ~~{or}~~

11 ~~[_____ took reasonable steps to notify _____ of the~~
12 ~~performance.]~~

13 ~~In order to be effective as acceptance, performance must be complete.]~~

14 If _____ (name of offeror) invited acceptance of the offer through a return promise
15 or through performance, and _____ (name of offeree) began the invited performance,
16 such performance was an acceptance of the offer.

17 [Unless the offer required _____ (name of offeree) to notify _____ (name of offeror)
18 about the beginning of performance, no notification was necessary for the performance to be
19 acceptance.]

20 [If _____ (name of offeree) had reason to know that _____ (name of
21 offeror) had no adequate means of learning of the performance with reasonable promptness and
22 certainty, _____'s (name of offeror) contractual obligation[s] [was] [were] discharged unless:

1 [_____ (name of offeree) exercised reasonable diligence to notify _____ (name of
2 offeror) of the acceptance];

3 [or]

4 [_____ (name of offeror) learned of the acceptance within a reasonable time];

5 [or]

6 [the offer indicated notification of acceptance was not required].]

7

8

USE NOTES

9 ~~[This instruction should be given in conjunction with UJI 13-807 and 13-816 NMRA.~~

10 ~~One or both of the bracketed paragraphs must be given, as the evidence warrants.]~~

11 In a case which presents a jury question as to whether an offer was accepted through an
12 invited performance, this instruction should be given. The bracketed language should be
13 included to the extent the evidence in the case warrants.

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

16 **Committee commentary.** — ~~[An offer may be accepted by performance before~~
17 ~~revocation. *Keeth Gas Co. v. Jackson Creek Cattle Co.*, 1977 NMSC 087, 91 N.M. 87, 570 P.2d~~
18 ~~918; Restatement (Second) of Contracts §§ 54, 34(2) (1981); *but see* Restatement (Second) of~~
19 ~~Contracts § 53 for the qualification that the offer must invite acceptance by performance. Where~~
20 ~~an offeree who accepts by rendering a performance knows that the offeror has no adequate~~

1 ~~means of learning of the performance, the offeror's duties are discharged unless one of the~~
2 ~~following three conditions exists:~~

3 ~~(1) the offeror learns of the performance within a reasonable time;~~

4 ~~(2) the offer indicates that notification is unnecessary; or~~

5 ~~(3) the offeree exercises reasonable diligence to notify the offeror of acceptance.~~

6 ~~Restatement (Second) of Contracts § 54. Reasonable time is defined in Restatement (Second) of~~
7 ~~Contracts § 41(2).~~

8 ~~Where the offer calls for performance as consideration for the contract, partial~~
9 ~~performance which is a part of the consideration creates an option contract in which completion~~
10 ~~of the performance by the offeree invokes the duties of the offeror. *Marchiondo v. Scheek*, 1967-~~
11 ~~NMSC 222, 78 N.M. 440, 432 P.2d 405; Restatement (Second) of Contracts §§ 45, 63. What~~
12 ~~constitutes partial performance will vary from case to case since what can be done toward~~
13 ~~performance is a question of fact, depending on the circumstances in which the offer is made.~~
14 ~~*Marchiondo*, 1967 NMSC 222. Use of a subcontractor's bid in a general contractor's bid may~~
15 ~~constitute an acceptance by the contractor, binding both parties to the terms of the~~
16 ~~subcontractor's offer. *Stites v. Yelverton*, 1955 NMSC 098, 60 N.M. 190, 289 P.2d 628;~~
17 ~~Restatement (Second) of Contracts § 87. If a subcontractor's bid contains language specifically~~
18 ~~limiting the duration of the offer and the contractor does not confirm reliance upon the offer~~
19 ~~before the time limit, the subcontractor is not bound. *K. L. House Const. v. Watson*, 1973-~~
20 ~~NMSC 038, 84 N.M. 783, 508 P.2d 592.]~~

1 “Acceptance of an offer is a manifestation of assent to the terms of the offer in a manner
2 invited or required by the offer.” *Orcutt v. S & L Paint Contractors, Ltd.*, 1990-NMCA-036,
3 ¶ 13, 109 N.M. 796, 791 P.2d 71 (citing Restatement (Second) of Contracts § 50 (1981).) The
4 offeror may invite or require acceptance through performance. See Restatement (Second) of
5 Contracts § 50; see also *Long v. Allen*, 1995-NMCA-119, ¶ 6, 120 N.M. 763, 906 P.2d 754
6 (citing Restatement (Second) of Contracts § 30 (form of acceptance invited), as another source of
7 guidance on the issue). This instruction was drafted to address the first scenario in which the
8 offeror invites acceptance through performance.

9 Acceptance through performance is invited when the offer invites the offeree to choose
10 between acceptance by promise and acceptance by performance. *Long*, 1995-NMCA-119, ¶ 6
11 (citing the Restatement (Second) of Contracts § 62); see also *id.* ¶ 4 (citing Restatement (Second)
12 of Contracts § 32 for the proposition that, in case of doubt, the offeree may accept through either
13 a promise to perform or through performance). “[T]he tender or beginning of the invited
14 performance or a tender of a beginning of it is an acceptance by performance” which “operates
15 as a promise to render complete performance.” Restatement (Second) of Contracts § 62.

16 Acceptance through performance is required when the offer limits the manner of
17 acceptance to performance. See *Marchiondo v. Scheck*, 1967-NMSC-222, 78 N.M. 440, 432
18 P.2d 405; see also *Strata Prod. Co. v. Mercury Exploration Co.*, 1996-NMSC-016, ¶ 18 n.2, 121
19 N.M. 622, 916 P.2d 822 (citing *Marchiondo*, 1967-NMSC-222, and the Restatement (Second) of
20 Contracts § 45, as sources of guidance on the issue). In such a case, the tendering or beginning

1 of performance operates as an acceptance for an option contract. See Marchiondo, 1967-NMSC-
2 222, Restatement (Second) of Contracts § 45.

3 For an acceptance through performance to be effective, the offeree need not notify the
4 offeror about the performance unless certain circumstances are present. One of the circumstances
5 is when the offeror requires such notification. See Long, 1995-NMCA-119, ¶ 7 (citing
6 Restatement (Second) of Contracts § 54). Additionally, if the offeree has reason to know that the
7 offeror does not have adequate means of learning of the performance with reasonable
8 promptness and certainty, the offeror’s contractual duty is discharged unless (1) the offeree
9 exercises reasonable diligence to notify the offeror of the acceptance; (2) the offeror learns of the
10 performance within a reasonable time; or (3) the offer indicates that notification of acceptance is
11 not required. See id.

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