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

[Performance by __________________ would be an acceptance of the offer only if:
__________________ reasonably understood that __________________ wanted performance
rather than a return promise,

and if

[__________________ reasonably believed __________________ would learn of the
performance.]

[or]

[__________________ took reasonable steps to notify __________________ of the
performance.]

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

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

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

[If ___________ (name of offeree) had reason to know that ___________ (name of
offeror) had no adequate means of learning of the performance with reasonable promptness and
certainty, ________’s (name of offeror) contractual obligation[s] [was] [were] discharged unless:
[________ (name of offeree) exercised reasonable diligence to notify _______ (name of offeror) of the acceptance];

[or]

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

[or]

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

USE NOTES

[This instruction should be given in conjunction with UJI 13-807 and 13-816 NMRA. One or both of the bracketed paragraphs must be given, as the evidence warrants.]

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

[Adopted, effective November 1, 1991; 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. — [An offer may be accepted by performance before revocation. *Keeth Gas Co. v. Jackson Creek Cattle Co.*, 1977-NMSC-087, 91 N.M. 87, 570 P.2d 918; Restatement (Second) of Contracts §§ 54, 34(2) (1981); *but see* Restatement (Second) of Contracts § 53 for the qualification that the offer must invite acceptance by performance. Where an offeree who accepts by rendering a performance knows that the offeror has no adequate
means of learning of the performance, the offeror’s duties are discharged unless one of the
following three conditions exists:

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

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

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

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

Where the offer calls for performance as consideration for the contract, partial
performance which is a part of the consideration creates an option contract in which completion
of the performance by the offeree invokes the duties of the offeror. Marchiondo v. Scheck, 1967-
NMSC-222, 78 N.M. 440, 432 P.2d 405; Restatement (Second) of Contracts §§ 45, 63. What
constitutes partial performance will vary from case to case since what can be done toward
performance is a question of fact, depending on the circumstances in which the offer is made.

Marchiondo, 1967-NMSC-222. Use of a subcontractor’s bid in a general contractor’s bid may
constitute an acceptance by the contractor, binding both parties to the terms of the
subcontractor’s offer. Stites v. Yelverton, 1955-NMSC-098, 60 N.M. 190, 289 P.2d 628;
Restatement (Second) of Contracts § 87. If a subcontractor’s bid contains language specifically
limiting the duration of the offer and the contractor does not confirm reliance upon the offer
before the time limit, the subcontractor is not bound. K. L. House Const. v. Watson, 1973-
NMSC-038, 84 N.M. 783, 508 P.2d 592.]
“Acceptance of an offer is a manifestation of assent to the terms of the offer in a manner invited or required by the offer.” Orcutt v. S & L Paint Contractors, Ltd., 1990-NMCA-036, ¶ 13, 109 N.M. 796, 791 P.2d 71 (citing Restatement (Second) of Contracts § 50 (1981).) The offeror may invite or require acceptance through performance. See Restatement (Second) of Contracts § 50; see also Long v. Allen, 1995-NMCA-119, ¶ 6, 120 N.M. 763, 906 P.2d 754 (citing Restatement (Second) of Contracts § 30 (form of acceptance invited), as another source of guidance on the issue). This instruction was drafted to address the first scenario in which the offeror invites acceptance through performance.

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

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

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

[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.]