



FARM COMMONS

Building Strong, Legally Enforceable Sales Agreements for Production Services

LAST UPDATED:
July 17, 2015

FIRST PUBLISHED:
July 17 2015

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DISCLAIMER: This guide does not provide legal advice or establish an attorney client relationship between the reader and author. Always consult an attorney regarding your specific situation.

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This publication was supported by the Specialty Crop Block grant Program at the U.S. Department of Agriculture through grant 12-25-B10706. Its contents are solely the responsibility of the authors and do not necessarily represent the official views of the USDA.

This section will explain why sales agreements are important and how to use this resource.

Why Use This Toolbox?

Typically, farmers grow a product, set a price for it, and then sell it by weight, quantity, or volume. But, that’s just one option. Many farmers are coming up with unique sales relationships that reflect the needs of their buyers, emerging markets, and their specialized skills.

As these new sales structures come to be, farmers need new types of contracts that reflect these specialized relationships. The contract presented here illustrates a unique option: the production services agreement. It still involves a product – tomatoes - but the farmer isn’t selling the item itself. Instead, this farmer is selling her services in growing the tomatoes for a commercial salsa company. This isn’t common among direct-to-consumer farmers who produce locally marketed products. But, it has a long history in the vegetable commodity market. With some modifications, the basic structure of selling a service rather than a good can be very beneficial for farmers who market locally. It can allow farmers to share risk with the buyer while exploring new varieties and production methods.

“Everyone hopes these issues don’t happen, but hoping alone isn’t a prevention strategy.”

While the farmer and the buyer might greatly appreciate the flexibility of their arrangement, it often can come with complications. What happens if the buyer is not happy with the end product? Who is responsible if there is a crop failure? There are many things that can go wrong. When disputes are unresolved, legal issues can quickly follow. Buyers can file lawsuits and farmers can sue for payment. Of course, everyone hopes these issues don’t happen, but hoping alone isn’t a prevention strategy. The details need to be discussed in advance.

Farmers can mitigate the risks of entering into a production services arrangement by using clear, written communication. Communication happens at many points along the process of coming to an agreement and going forward with providing a service. Each point of contact is an opportunity for farmers to build a strong relationship that never encounters legal trouble.

A good services agreement can protect the farm over the long term if things do go wrong. With a little advance planning, farmers can create legally enforceable agreements that feel comfortable to both the farmer and the service contractor. If a

farmer needs to enforce a sale or gets sued him or herself, the process is a bit easier with good documentation. Solid agreements also boost a farmer's confidence. It's always easier to ask for what you deserve when you have records to back yourself up. Over time, clear agreed-upon procedures help set and raise standards for both farmers and buyers. The entire food and farming community has much to gain from excellent contracts!

How to Use This Toolbox

“Legal tools are are just like any other tool a farmer uses, so that’s how we present them.”

Farm Commons focuses on creating flexible, adaptable tools that empower farmers to move forward in addressing their legal matters. Farmers (and business owners of all types) are sometimes under the misimpression that legal matters can be addressed by simply using the “correct” form or language. This often isn't the case, especially when it comes to sales law. The “correct” language varies widely between farmers as it's based on each business' unique circumstances and process.

There is no single contract that is best for all farmers and all production services. To build legal resiliency, each farmer will need to follow a process of exploration, negotiation, and drafting that is unique to his or her farm.

Legal risks cannot be completely eliminated by using a good production services agreement or other contract. Enforceability depends on many factors such as the specific circumstances of the problem that arises, the farmer's specific state laws, past practices, and many other factors that can't be explored in a resource like this. This toolkit is designed primarily to help farmers build their own strategy to avoid legal problems through good communication; which is also good legal protection should a problem materialize. This toolkit IS NOT legal advice specific to any circumstance and should not be used as such.

Take a look at how we've structured this toolkit to better understand how to use it.

Our toolkit empowers farmers using a very unique approach! Legal tools are just like any other tool a farmer uses, so that's how we present them. Before you begin, take a look at how we've structured this toolkit.

Section 1: Opening the Toolbox

The first thing you'll want to do is get a basic understanding of why the tool exists and how it works. That's this section!

Section 2: See the Tools in Action

The best way to learn how to use a tool is to watch someone else use it first. Check out the fictional story of Farmer Anne and Zach, the chef who would like to hire Anne to grow some specialty tomatoes. See how Anne and Zach use this toolkit to build an excellent production services agreement.

Section 3: Read the Tool Manual

Before you use a tool yourself, you want to get a really good idea of its capabilities and design. We will discuss some of the legal basics for contracts in general.

Section 4: Adapt the Tools

The last step is to make the tools work for you. The only good sales documents are the ones that are adapted to your business, and our models illustrate the final result for how Anne and Zach adapted the products to their business needs.

Now, you'll be ready to do the same.

Our Objectives:

After reading this resource, farmers should:

1. Understand the potential of good communication to prevent legal problems
2. Be familiar with the basic considerations that should be addressed in order to build an excellent, legally resilient production services agreement
3. Know the legal role contracts play in a legal dispute
4. Have the resources to move forward with assembling their own production services agreement

This section will introduce our fictional farmer and buyer and explain how they used this toolbox to create an excellent sales agreement.

SEE THE TOOLS IN ACTION

Watching someone else use a tool is often the best way to become familiar with it ourselves. It's usually more fun and educational than starting with the manual, right? We think so!

To understand this contract and illustrate how this relationship might work, let's start by meeting our imaginary farmer and buyer, Anne and Zach.

After reading this short story, farmers will have an excellent grasp on Farm Commons' recommendations for strong, legally-resilient sales agreements for a production services scenario. We'll explore the subtleties of the choices Anne and Zach make in the next section.

Typically, farmers grow a product, set a price for it, and then sell it by weight, quantity, or volume. But, that's just one option. The contract presented here illustrates a unique option: the production services agreement. It still involves a product – tomatoes - but the farmer isn't selling the item itself. Instead, this farmer is selling her services in growing the tomatoes for a commercial salsa company. This isn't common among direct-to-consumer farmers who produce locally marketed products. But, it has a long history in the vegetable commodity market. With some modifications, the basic structure of selling a service rather than a good can be very beneficial for farmers who market locally. It can allow farmers to share risk with the buyer while exploring new varieties and production methods.

To understand this contract and illustrate how this relationship might work, let's start by meeting our imaginary farmer and buyer, Anne and Zach.



Anne Baker runs Anne Baker's Produce, a diversified vegetable farm that she's been operating for the past 10 years. She loves growing tomatoes, eggplants, and peppers, especially. Anne has developed a keen understanding of her particular sub-climate, soil types, and pest pressures which allows her to grow excellent quality crops, especially tomatoes.

Growing great crops isn't the only reason Anne is successful. Anne can move her crops, too. She knows what she's good at: meeting the needs of a few, valuable

buyers that want volume and quality at the same time. Predictability and stability are important to Anne so she stays away from restaurants and farmers' markets. The idea of having families out to her farm or having to write newsletters on her farm progress makes her nervous, so the CSA market isn't right for Anne. Specialty wholesaling is her ideal market.



Zach Smith operates Zach Smith's Salsa Company, a locally-marketed brand of specialty condiments that prides itself on contributing to a more sustainable food system. Zach has his hand in the pots of a few different food ventures; salsas are just one. Each brand captures his passion for heirloom vegetables and culturally-significant food products. Zach has farming experience himself, although not on a production scale. His enormous backyard testifies to his passion for preserving vegetable heritage.

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“Asking a farmer to accept the risks of an unknown tomato variety produced from his seed is a lot to ask.”
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Zach wants to make a new salsa out of a specialty tomato, the seeds of which he gathered many years ago on a trip south of the border. He's been carefully growing out his seed supply for years and is ready for production. Now, Zach is looking for a farmer to help grow these tomatoes.

This won't be a typical sales relationship, however. Zach has some distinct needs and resources. He doesn't want his unique tomato varietal sold on the open market. This tomato will give his brand an edge, and a great story to tell. If other farmers grow it or other people can buy it, his advantage might be lost. At the same time, this tomato hasn't been grown at scale in his local region. It's hard to predict how the varietal will respond to the area's distinct soil types and pressures at a few acres of production. Asking a farmer to accept the risks of an unknown tomato variety produced from his seed is a lot to ask.

—————●
Zach is upfront about both his goals and the potential complications of the arrangement

Zach starts asking around for a farmer who might be interested in partnering with him. One of his suppliers recommends Anne as a reliable and skilled tomato producer. Zach gives her a call. Zach knows his idea will probably be new to Anne so he takes his time explaining the unique aspects of this opportunity. First, he introduces his goal and the most significant barrier to a farmer.

1. He has a unique tomato varietal that he'd like a farmer to grow exclusively for him.
2. The varietal hasn't been grown in the region previously so there's some risk involved.

Before Anne can say, “No,” Zach rushes into explaining the basic elements of his proposed partnership with a farmer:

- Zach will provide the seed to the farmer.
- Rather than pay by the pound for harvested tomatoes, he’d like to pay a farmer for her labor and input costs, rather than for the product itself.
- The farmer will be paid for the service of growing out and harvesting the tomatoes.
- Zach will bear the primary risk of loss because he will provide the seed and will pay the farmer regardless of the total yield.
- In return, he’d like to work closely with the farmer to monitor pest and disease pressure, quality parameters, and other aspects of production.

Anne is intrigued. This might work. She is great at growing tomatoes and she likes working with buyers who need quality produce in larger quantities. Anne appreciates that Zach has considered the risks to both sides and his rough plan seems like a decent framework.

At the same time, Anne recognizes that the basic plan needs far more detail before she will be comfortable. In particular, these questions leap to her mind:

- For what input costs, exactly, does Zach envision providing a reimbursement?
- Is he paying for her labor by the hour or as a flat fee?
- What kind of quality does Zach expect? What happens to product that doesn’t meet those quality parameters?
- Does she have autonomy over her production techniques or does Zach intend to issue the orders for how she plants, cultivates and more?

Anne takes time to think through her idea scenario before talking to Zach.

Rather than ask Zach these questions right away, she takes some time to think through her ideal scenario for this type of production. Anne sketches out a few key requirements she’d need to see in writing:

1. Anne will raise the transplants so she can raise them to the exact characteristics that work best for her system.
2. The payments for labor come in installments, not at the end, and the

reimbursements for input costs are made at least monthly.

3. Anne is not responsible for any minimum yield.
4. Product not meeting pre-established quality standards is left in the fields. She needs an efficient harvest plan to minimize her costs.

With her key goals in mind, Anne sets up a meeting with Zach to start putting their ideas on paper. Neither has heard of anyone doing this before so they have to start from scratch with their agreement. Anne and Zach begin by listing out in plain language how the relationship will be structured: production issues, how payments are made, who is responsible for what, and more. Then, they plan to take their proposed terms to an attorney. The attorney will help them craft the list into a full contract.

During the meeting, Anne and Zach hit a few rough patches. For example, Zach wants extensive documentation of all Anne's input costs including time spent on the tractor, fuel used, an approximation of water used on transplants, etc. Zach's goal is in part to understand the subtleties of his tomato varietal. But for Anne, that is way too much paperwork. She can't afford to spend valuable time each day recording the number of minutes spent watering these tomatoes or the flow rate of the watering wand. Anne offers a compromise: she will cover the costs of inputs that are difficult to track if Zach will raise the fee for labor a bit. Zach accepts, and concedes that this isn't the time or place for a full accounting of his varietal's production inputs.

After they work out a list of terms, Zach takes the list to his attorney, who creates a formal agreement. Anne brings the agreement to her attorney for review, as well. Fortunately, this process goes quickly and there are no major issues or disagreements, perhaps because Anne and Zach put in the hard work to get themselves on the same page, first!

Finally, Anne and Zach sign the contract that appears at the end of this resource, in the "Adapt the Tools" section.

Read the next section - the Tool Manual - to find out the principles behind the story.

Anne and Zach start with a plain language agreement, and then take their proposed terms to an attorney for review.

Because of their excellent communication, the process of working with their lawyers goes very quickly.

This section will explore the capabilities and structure of each of the tools so that you can effectively use them.

READ THE TOOL MANUAL

Farmers might be left with more questions after reading our story about our fictional Farmer Anne and Zach and their ideal contract process in the previous section. Why didn't Zach approach Anne with a contract ready from the start? Why did they even need to consult with lawyers?

Wise farmers might also be skeptical. Isn't the story a little idealistic? Is that all it takes to come to an agreement on such a complicated arrangement? What if the farmer and the buyer don't agree? What if things go wrong?

These are excellent questions, and we will explore them now. Think of this section as the manual that comes with any new tool. You get much more out of it if you take the time to delve into the tool's full functionality. Legal tools work the same way. This manual serves as your roadmap for adapting the tools to reflect your sales contract needs. Anne and Zach's situation is unique, and the models reflect their particular situation. But, the principles they use to come to their conclusions apply to a wide range of sales situations. You could skip ahead to our models in the back, but you might not realize why we designed them that way, how to incorporate them into a full process, or how to adapt them effectively to your operation.

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“There are as many different types of buyers as there are kinds of farm operations.”
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Now that we've gotten to know Anne and Zach, let's take a step back and take a look at the general principles for developing a sales contract.

There are as many different types of buyers as there are kinds of farm operations. Every sales arrangement is unique, and contracts must be tailored to the specific needs of both parties. Luckily, there are some general guidelines that apply no matter what the situation calls for. Learning these will help you navigate all of your buyer relationships as you grow your farm business and expand to new markets.

A sales agreement is simply a set of procedures and standards that a buyer and seller agree to follow when working with each other. These procedures create predictability and accurate expectations for everyone, which goes a long way towards preventing problems. Rather than putting distance between two

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parties, a good sales agreement can merge the space between them by creating understanding where it may not exist.

In this section, we will take you through Farm Commons’ proactive process for developing a strong sales agreement:

1. Think through an ideal sales situation and any issues that may arise
2. Come to a consensus with the buyer
3. Put the plan in writing
4. Follow through on the agreement

Step 1: Think through your ideal sales situation and any issues that may arise

The first thing to do is think through exactly how you want the sale to occur.

A good place for a farmer to start is to think through exactly how she wants the sale to occur. The exact questions the farmer should think about depend on the type of sale that is occurring. Some examples might be: What day is ideal for her to harvest the crops that she is selling? When is the best time for her to make deliveries? What does she need to charge to make the relationship work for her business? What payment procedure does she prefer, and what is the payment deadline? Considerations such as these will help the farmer craft a clear vision of her ideal sale.

Then, think about potential contingencies, and come up with a strategy for how to handle them.

Next, the farmer should think about possible contingencies that might occur. For example, if the buyer’s customers aren’t happy with the product, can the buyer modify future orders? Can the buyer change the time or location of delivery?

After brainstorming potential problems, the farmer should create a strategy to minimize the impact if cancellations, changes, and other contingencies occur. Is there a time frame where cancellations are less inconvenient for the farm? Would charging a fee make it more financially feasible to make changes after the order deadline? What is the procedure if the buyer is not satisfied with the order?

One potential issue that a farmer might experience is buyer misperceptions about his or her product. As the local food movement expands, new buyers are entering the market. Many things motivate these buyers: desire to market local foods,

concern for the environment, and dedication to the best-tasting items. We can't necessarily predict the experience and knowledge of any specific buyer, so it is a good practice to assume that the buyer knows very little about your product.

For example, a buyer might not be familiar with all the different varieties of a crop. Take green beans, as an example. Farmers grow green beans of all varieties. An inexperienced buyer, however, may assume all local farmers grow haricots verts. If a farmer working with that buyer shows up with his first delivery of plump and crisp pole beans, the buyer will be sorely disappointed to not find the long, slender legumes he or she had been expecting. This is just one illustration of the kind of miscommunication that can occur.

Farmer and buyer may also have different expectations about how the product will be packaged, delivered, or prepped. Some farmers may want information about their farm and growing practices displayed at the point of sale. A buyer might expect leeks to be trimmed a certain way, or for bundles of carrots to be a specific weight. These are all details that should be discussed and agreed upon in advance of the sale.

By thinking through her ideal arrangement and then making a contingency plan based on her needs, a farmer is able to correctly identify her priorities for the sale and what she needs from her buyer in order to protect her revenue and manage the risk she is taking by entering into the sales arrangement.

What if I need to make changes?

Even if a farmer understands the importance of this stage of the process, it still might make him or her a little nervous. Growing and selling crops isn't a black and white process. Things change, and sometimes the farmer needs flexibility. What if the harvest isn't ready when the farmer expects it? What if the contingency procedures that the farmer has laid out don't feel appropriate when the time comes to put them in place? There are ways to write procedures to give the farmer flexibility. This includes using language such as:

- "I have the right to reject order changes"
- "Delivery day might vary from week to week depending on product growth rate."
- "I reserve the right to modify the price based on current market rates."

As you can see, discussion of terms does not have to mean setting the procedures in stone. It does, however, set the stage for accurate and open communication. Getting clear right from the beginning is the foundation of any strong sales relationship. Farmers will rarely go to court to enforce a sales agreement. A farmer's time is much better spent developing the communication and procedures to prevent problems from happening in the first place.

Principles in Context



Anne and Zach started off well by thinking through some of the problems that might pop up in their arrangement. Zach comes prepared with many details of his plan, but Anne remembers to consider possible contingencies and what might go askew throughout the process that Zach has laid out. We saw Anne thinking through:



- Quality considerations
- How payment will be made, and what it is based on
- What exact costs Zach will be covering
- The level of autonomy she has over each step of the growing process

Let's move along with Anne and Zach as they proceed to the next stage of the process.

Step 2: Come to a consensus with your buyer

A sales contract covers the basic issues and contingencies of all shapes and sizes. In the previous step, we identified what issues might come up and how we can address them. The next step is to talk these through with your buyer and come to a consensus on how each of those situations will be handled.

Each farm may deal with changes, cancellations, payment, delivery, and quality issues in a different manner. To increase your chances of a positive sales relationship with your buyer, you must communicate your specific details. The information in your contract reflects the agreement you have already made with your buyer about how to conduct business.

Remember to take your buyer's needs into account throughout the process.

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“Think of a sales relationship like a marriage... you have to work on the relationship first, and then back it up with the written document.”
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Get creative! This process is an opportunity to develop unique sales arrangements that work for the specific business interests of you and your buyer. Take advantage of the flexibility.

It's important to remember that your buyer has needs too! Understanding your buyers' limitations and flexibility can help you draft a contract that will work for both parties. A grocer might need for produce to be sized or graded to industry standards, or require that you label your produce with a product lookup number (PLU). Fundamentally, the contract is simply the agreement the parties make about how to conduct their business -- it should not be the first time that your buyer is learning of your policies and procedures, and vice versa.

You might be wondering, “How can we come to a consensus before I've put the terms in writing?” A helpful analogy might be to think of a sales relationship like a marriage. If you aren't committed to your partner already, a marriage certificate won't create a strong union. You have to work on the relationship first, and then back it up with the formal agreement. Certainly a contract is a commitment, but its effectiveness as a preventative strategy relies on the contract being an authentic reflection of an agreement that two folks have already created together. Focus on the style of communication that feels most comfortable to you, but make sure that you and your buyer come to a consensus on your respective needs, policies, and expectations ahead of time.

Sometimes, consensus is not possible. You might discover that your buyer needs you to compromise on terms that you are unwilling to change. If that's the case, while disappointing, you may decide not to move forward with that buyer. It can be tempting to skip this step, and just hope for the best. But, as we have been discussing, proactive communication about potential pitfalls and areas of concern prior to the sale is key in developing (and keeping) strong sales relationships that keep your business profitable, and you out of court. Recognizing an incompatibility early on can save you a lot of time, money, and mental energy down the road!

An initial disagreement on the terms does not have to mean that the sale cannot move forward. Coming to a consensus with your buyer might mean a bit of negotiation. Sales arrangements have many details and moving parts, and it is common that both the buyer and farmer might have to compromise on some issues. Both parties are weighing the risks they are taking, and thinking about how to best protect their expected revenue. By coming to the table with a clear vision of what you need in order to go through with the sale, and what you might be able to compromise on, you and your buyer can figure out how best to meet your respective needs.

Keep your cool: The two most common negotiation styles are “adversarial” and “collaborative.” Experts have shown that in contract negotiation, a collaborative style without anger or big emotional display is more likely to yield the desired results.¹

1 “Getting to Yes: Negotiating Agreement Without Giving In” by Roger Fisher, et al. Harvard University Press, 2011.]

Negotiation of Terms

There are many different ways to negotiate with your buyer and come up with an arrangement that works for you both. The first option is to present your contract

first, before your buyer has a chance to do so. If your plan is well thought through and takes into account your buyers’ goals, your buyer might decide to agree to it without further negotiation.

If that’s not an option, or if the buyer does not agree with the terms you’ve laid out, it’s time to begin thinking about what you are willing and able to compromise on, and what you are not. By getting your own priorities clear in your head, you will be able to keep your eye on the prize and not get bogged down by small details that might not mean as much to you. And, you get the added benefit of appearing very accommodating when you concede one of those less-important points!

As we mentioned earlier, it can be very helpful to also look at the situation from your buyers’ perspective to help you understand where his or her needs are. A grocer might count back stock on a specific date, or a salsa processor might need a farmer to follow certain post-harvest procedures for his tomatoes. Observe how your buyer works with supplies and what kinds of relationships already exist with other growers. Try to determine if there is another person or institution that is influencing your buyer or putting pressure on him or her to make certain decisions. Understanding your buyer’s limitations and flexibility can help you negotiate intelligently and ultimately draft a procedure that will work for both parties.

Another strategy is to break the negotiation process into parts, rather than taking an all-or-nothing approach. For example, let’s say that a buyer rejects the contract that a farmer first presents. Instead of throwing out the whole thing and starting from scratch, the farmer would be better off breaking the process into sections and going through each one. This would allow both the buyer and the seller to pinpoint exactly where they are not in alignment, and also give the general feeling that they are making progress forward in their relationship. If the seller requires that the buyer agree to all the terms he presents or it’s back to the

drawing board (or vice-versa) it could be a long and frustrating process to come to a consensus.

Rather than look at the compromising and negotiation process with dread, farmers can re-frame it as an opportunity for marketing themselves as dedicated to customer service. By working with buyers to understand their needs, farmers can show that they truly want to understand how to make the buyer happy and build a strong relationship. Of course, this requires that farmers are honestly willing to do this, and compromise if necessary!

Principles in Context

Zach and Anne meet to go over their respective goals and come to a consensus before taking anything written to an attorney. As we mentioned in “opening the toolbox,” Zach would like Anne to track all of the inputs used to grow the tomatoes. Anne’s first reaction is irritation – does Zach realize how much work that would take? Does he think that he’s Anne’s only customer? Zach doesn’t seem like he’s going to back down, and she is tempted to tell him to take his tomato seeds elsewhere.



Luckily, she remembers the negotiation tactics and takes time to think through how she might be able to make the arrangement work for her. She realizes that if Zach is willing to compensate her for the additional time it would take to track the inputs, she could provide him with the information that he wants. Would that be Zach’s first choice? No, of course he would like Anne to just do what he wants without an additional cost. However, her willingness to compromise and her ability to come up with a practical solution gives him confidence in their business relationship.



It shows him that Anne is not only a skilled grower, but a savvy business person. Anne and Zach are able to come to an agreement about the input tracking and move forward with their sales arrangement.

Step 3: Put the plan in writing

Once farmer and buyer have come to an agreement on the terms of the sale, what happens if things go awry, and what conditions will work for them both, it's time to put those details in writing.

There are a few reasons why this step is important:

1. Make certain that you are on the same page (literally!)

This is a final checkpoint to ensure that there are no misunderstandings between the two parties, and that the arrangement outlined in contract truly does meet both of their needs.

2. Preserve collective memory with accuracy.

While verbal communication and consensus-building is important in this process, without the written record, it can be difficult to remember exactly what was agreed upon. This eliminates the possibility for future disagreements and discrepancies in recollection of the agreement.

3. Build enforceability and confidence.

Having a contract is a key factor in being able to effectively defend yourself in court. A written agreement helps the judge determine what each party's obligations were in the case of the sale. The court makes its ruling based on that determination.

The ability to enforce an agreement might also make it less likely that enforcement is ever needed. This is because you've built a strong foundation of communication ahead of time. Operating from that base often allows you to prevent and resolve problems outside of a court system.

But if, despite your best efforts, you do go to court to settle a dispute, that ability to enforce the agreement can give you great confidence in defending yourself. Disagreement and lawsuits are still possible, even if you take the preventative measures suggested in this guide. If the dispute does reach a court, you can be confident in your argument knowing that it is backed up by the sales contract you were using. Without written terms, the court process could turn into a game of "he-says-she-says." If the farmer and the buyer claim to remember their agreement differently, it will be quite difficult for a court to determine what the agreement

“The ability to enforce an agreement might make it less likely that enforcement is ever needed.”

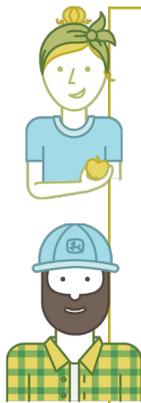
A written agreement can back up your argument in court, rather than relying on the memories of the farmer and the buyer.

“The ability to enforce an agreement might also make it less likely that enforcement is ever needed.”

was, and how to enforce it.

Even if a dispute doesn't reach the court system, having a clear contract is helpful for enforcing accountability between you and your buyer. Let's say that a buyer was to back out the sale at the last minute or fails to pay the farmer. The farmer can be confident in asking for what she is owed with the knowledge that her arguments will be backed up in court by her contract. That confidence is valuable whether or not the farmer ever decides to go forward with formal enforcement. Sometimes, just knowing that your agreement is robust enough to stand up in court is enough on its own to keep both parties accountable.

In case you are wondering – yes, a contract can also be enforced against you. But, having something in writing is still important in that situation, too! It's important to realize that you can be held accountable for your actions whether your agreement is in writing, or not. While the terms of a sale may not be as clear without a written procedure, the fact that you have agreed to sell someone your product for a price means that you have entered into a commitment. The difference is that putting it in writing helps you set achievable objectives from the start and build in flexibility for yourself. This makes the chance of “mistakes” and disputes less likely.



Principles in Context

Since their arrangement is particularly complex, Anne and Zach go to an attorney to review their written agreement. This is an excellent and highly recommended step for farmers to take, especially if the sale represents a large portion of the farmer's revenue. The review process goes quickly, mostly due to the care that Zach and Anne took in putting together their written agreement and establishing consensus prior to this step.

Step 4: Follow through on the agreement

It should go without saying that both parties need to follow through on the agreement that they have crafted together. The producer needs to make sure that she can meet her obligations in delivering the promised product, at the expected time. If not, she must be sure to follow the notification systems and deadlines she

Following through on an agreement is important for preserving ongoing relationships in addition to being legally imperative.

wrote into her contract. The same goes for the buyer.

Following through is in integral practice in maintaining good customer relationships. But, that's not the only reason for a farmer to hold up her end of the bargain. Legally, the seller has committed to doing what she says she will in the sales contract. Failing to follow through is a breach of contract, and this can have ramifications ranging from the loss of the sales relationship to a lawsuit.

If a farmer fails to follow the procedures time after time, the pattern of behavior can modify the written contract and it is as if the contract never existed. This becomes a legal liability and it erodes the predictability we are trying to create with a written agreement. Not to mention, all the time and effort put into to building the sales relationship and writing the contract goes to waste!

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“If a farmer fails to follow the procedures time after time... it is as if the agreement never existed.”
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What if things go wrong?

So far, we've discussed the steps a farmer can take to prevent problems by building a strong sales relationship and writing a contract that reflects your mutual understanding with your buyer. But, sometimes despite our best efforts, things don't go according to our well-laid plans.

Enforcement might be necessary to keep the farm in business.

If you are in a situation where a sale goes awry, you might decide to enforce your agreement. There are a few reasons why a farmer might seek outside resolution for a dispute with a buyer. If the sale is particularly large, or a substantial portion of the farmer's revenue, enforcement might be necessary to get what is due, and keep the farm in business.

Enforcing an agreement can set a precedent for future sales relationships.

A slightly less tangible reason why a farmer may choose to go through the sometimes-awkward process of enforcing a sales agreement is to set a precedent. By standing his or her ground and asking the buyer to uphold the agreement they've made, the farmer sends the message that this is not acceptable behavior, and it won't be part of their business relationship. This is both for any future dealings with that buyer as well as for other current and potential buyers. Word does travel, as we all know, and having the reputation for being a fair and honest businessperson who expects the same from your buyers will attract the kind of business relationships that will serve you well over the long run.

Seeking formal retribution for a sales dispute may provide important closure for the injured party.

Finally, seeking enforcement for an agreement may alleviate the negative impact

“Sales relationships are business, yes, but they cannot be completely unmarried from the personal components.”

that being treated unfairly can have on a business owner’s mindset. In some cases, seeking retribution could allow the farmer to continue on developing sales relationship a building a business with an open mindset, rather than operating from a fearful or resentful standpoint. Sales relationships are business, yes, but they cannot be completely unmarried from the personal components. Sometimes closure on a situation, whether that is financial or emotional, is key to move on in a fruitful and productive manner.

1. Small Claims Court

Small claims court can be an excellent option for small business owners, including farmers, with a dispute to settle. Small claims court is accessible to non-lawyers, and is a common option for lawsuits involving small business owners and folks who do not want or need the more extensive procedures of regular court. To access small claims court, the claim (the amount of money that you are requesting from the other buyer) must be under a specific amount. This varies by state, ranging from \$2,500 to \$10,000.

The website www.nolo.com is a helpful resource if you would like to learn more about small claims court and what the limits are in your state. Just click on “Small Claims Court and Lawsuits” under the “Get Informed” category on the homepage of the website.

Written agreements are still very important in court. When you enter into small claims court, the role of the judge is to uphold what the two parties had previously agreed upon. The role of the judge is not to decide what is “fair” from an objective perspective, necessarily. The judge will first try to figure out what the two parties had agreed to do for each other. A written agreement makes that task much easier and cleaner for everyone. Then, the judge will focus on whether the two parties actually met their mutual obligations. If they did not, the judge will look to the agreement of the parties first, when deciding on a resolution. The parties’ agreement is always the judge’s first source for a fair resolution.

This isn’t always an intuitive point, not just to farmers, but business owners of all types. It can be easy to assume that there are laws written down somewhere that say what exactly to do when there is a sales disagreement. In fact, the primary rules are the ones that you write into your contract. The terms “contract” can refer to other sales documents like availability sheets and invoices, as well. Without the contract, it’s up to the court to try to discern what the verbal agreement was between the buyer and producer, and how to uphold it. Wouldn’t you rather set those rules ahead of time, rather than rather than playing a game of “he-said, she-said” and hoping that the judge takes your side?

A clear written agreement helps the court make their decision. Without it, the judge may have to pull from multiple sources and fill in the blanks.

In the case where a farmer takes a buyer to court, the court will determine what the agreement was, and who breached it. If you do not have a written agreement, or if it is incomplete or unclear, a judge may have to fill in the blanks and pull from various sources to make their decision. This may include things like what the buyer and the seller have respectively done in past sales arrangements, how other farmers and buyers handle similar situations, and so forth.



Principles in Context

We are hoping that everything goes smoothly for Anne and Zach. But, let's say things aren't that easy. The tomatoes don't grow well in Anne's soil, and the first harvest is too small to make anything more than a few jars of salsa. Zach has had a few other financial issues pop up this year, and he was really counting on the income of this new product to keep his business afloat. He tells Anne that despite their agreement, he doesn't have the money to pay her for any more labor or inputs until she can provide him with a much higher volume of tomatoes.



Now, Anne has a lot on the line with this crop, and she took a big risk in entering the agreement. She explains to Zach that she needs to get paid on the schedule that they had agreed on in the contract, but he's unresponsive to her requests to try to work out the matter. Anne is desperate. She decides to take Zach to small claims court to get what she is owed.

Because Anne and Zach have been working with a contract that clearly states the terms of the sale, the court will be able to quickly discern that Zach had agreed to pay Anne for labor and inputs regardless of the size of the yield.

If Zach and Anne had only a verbal agreement, Zach might claim that he only agreed to pay Anne if the crop yielded a high volume. Anne wouldn't have much to go on to prove otherwise in that case. The court process might take a lot longer, and leave a lot more room for interpretation, than if Anne had come into the court with a written, comprehensive sales contract to show that Zach had, indeed, agreed to pay her no matter the crop yield.

2. Perishable Agricultural Commodities Act (PACA)

Perishable Agricultural Commodities Act (PACA) is a law that can protect farmers from unfair business practices. PACA generally regulates large buyers, wholesalers, and dealers, and ensures that they are following fair trade practices. If you are selling large amounts of product and haven't gotten paid for your transaction, PACA may be able to help you get the money that you are owed. But, it does not always apply.

First of all, what is a "fair trade practice"? PACA sets basic standards for things such as rejecting produce without cause, not paying the agreed upon price, dumping (throwing out) product that doesn't meet standards, or misbranding or misrepresenting product. Some states also have their own versions of PACA. Some have additional or different requirements than the federal PACA. For example, in Wisconsin, the state PACA law prohibits a wholesaler from giving the impression that produce is from Wisconsin if it actually not.

To determine whether or not the federal PACA applies to you, begin by asking the following questions:

- Do you have some form of written evidence that the buyer agreed to purchase the product at a stated price?
- Does the buyer have or should the buyer have a license?
- Are you selling fresh, frozen, or iced fruits or vegetables?
- Was the produce moved to another state or country?

If you answered yes to all of the above, PACA may apply to you. The next step would be to call the United States Department of Agriculture for guidance on next steps. Remember that there are both federal and state PACA regulations, and there are differences to when each apply. Be sure to look into both agencies' regulations.

For more information on PACA, visit the website www.flaginc.org and enter "PACA" into the search box. One particularly helpful resource is the article entitled "Federal Law Protects Farmers' Rights to be Paid for Fruit and Vegetable Crops".

To learn more information about when PACA applies, including how to determine if your buyer does or should have a license, refer to Farm Commons' flow chart on our website: "Does PACA apply."

Insurance

This section will explore the role of insurance in sales agreements.

This section will explore the role of insurance in sales agreements. Up until this point, we've been discussing the risks of sales agreements as they relate to the relationship between the farmer and the buyer. We have been reviewing two main concepts: communication to prevent problems from occurring, and steps to protect our ability to succeed if problems result in a lawsuit. There are, however, two additional risks that we would like to touch on: crop loss and food safety incidents. These risks call for a different management strategy.

For much more information on insurance, watch Farm Commons tutorial, "Effectively Manage Your Farm's Risks With Insurance" at farmcommons.org.

Insurance can play an important role in protecting your business. When you buy an insurance policy, you are essentially paying someone else to assume the burden of a risk. In the sales context, we are specifically concerned with the risks of crop loss and a food safety incident. In this guide, we are discussing a few basic options for risk management through insurance. However, to understand what policies are most appropriate for your unique situation, your insurance agent will be your best resource.

Crop damage

As a farmer, your revenue is often dependent on you supplying your buyer with a specific product during the time period you agree upon. If something happens to that product, your revenue is lost. This is where crop insurance can play a helpful role. In the case of a crop loss, crop insurance may be able to provide reimbursement for some or all of the lost revenue.

Some farmers do not carry crop insurance plans because they are under the impression that crop insurance is only available for commodity farmers in specific regions of the country. While this may have been the case in the past, there are new options for federally subsidized crop and livestock insurance that might be appropriate for diversified farmers. Many farmers report that these policy options are quite affordable.

For more information on crop insurance options, please consult Farm Commons' guide: "Managing the Sustainable Farm's Risks with Insurance: Navigating common options" available at farmcommons.org/resources.

One of the new crop insurance policy options available is the Whole Farm Revenue Protection (WRFPP) through the United States Department of Agriculture's Risk Management Agency (USDA RMA). If a farmer is interested in WRFPP, she would first need to check into whether her farm is eligible. Then, she would need to make sure she could provide evidence of the sale and the revenue she was

expecting to gain from it. Confirmed orders, distributed availability sheets, past sales records and more can be used to demonstrate a farmer's expected revenue from a sale.

Farmers interested in purchasing a WRFPP policy should contact a local agent who sells crop insurance. A list can be found at the RMA website, under the "agent locator" tab.

Food Safety Incident

There are many variables that factor into liability for a food safety incident. These include the source of the outbreak, whether the product is being sold directly to the consumer, and the details of the agreement the buyer and producer come to ahead of time, among others. Depending on how the outbreak develops and the nature of the sales relationship, a producer could be held liable for the costs of a food safety incident. This is where insurance could be an integral management tool for the farmer. The appropriate insurance policy could pay for the ramifications of a food safety incident.

Let's say that a farmer sells to a local grocery store, and numerous customers get sick and end up in the hospital. The common denominator among the group? They had all purchased and eaten produce that came from that farmer.

The personal health insurance companies of the sick customers might see an opportunity to get paid back for the costs of the medical bills that have been incurred. A lawsuit ensues determine who is at fault in this situation, and who will pay the retribution.

Negligence is defined as behaving less responsibly than the average person would under similar circumstances.

Determining whether or not the farmer is liable in this situation is complex. It depends on if the farmer's actions, in this case most likely the harvesting and packing procedures, are considered negligent under the law. Negligence can be technically defined as behaving less responsibly than the average person would behave under similar circumstances. Negligence and liability is determined through the lawsuit process. Insurance could pay for the cost of an attorney for the farmer to defend himself and his procedures. If he is found liable, insurance could also pay for the outcome of the judgment, up to policy limits.

Food safety incidents can have other financial ramifications. If there was a large amount of produce sold, there may have to be a product recall. Costs can quickly

Indemnification means that you will repay another party for loss or damage that occurs as a result of your actions.

pile up in the case of a recall. A lot of time and money can be spent tracking down product and retrieving it, not to mention the time that takes away from other revenue-driving activities. Insurance is vital for a farmer's financial stability.

Another way that a farmer could be held liable is if she agreed to indemnify the buyer in their contract. Indemnification means that you agree to pay back your buyer for any harm they suffer because of what you did. So, the farmer would be held responsible for any negative impact that the grocery store suffered because of his contaminated produce. This could range from paying the judgment of a lawsuit to compensating the store for lost business due to damaged reputation. Contract indemnification is especially likely if you are working with a buyer's pre-written contract. If you agree to indemnify your buyer in your contract, be sure to check with your insurance agent that you have the appropriate coverage. A general liability policy may or may not cover you in this situation. Many commercial insurance policies, however, do provide coverage for the indemnification that you provide to others, and may be a good investment.

Additional insurance coverage does cost money, but considering the potential consequences of an incident occurring might make the money well-spent.

Additional insurance coverage does come at a cost, and it can be tempting to ignore the risks of a food safety incident occurring. Farmers might assume that because they follow safe practices, this will not happen. Accidents can happen to anyone, though, and the effects can be both financially and emotionally devastating. A single mistake can have steep consequences. Even if you are not found to be at fault, you may still incur large costs from having to defend yourself in court. When thinking about the costs of purchasing insurance, it is important to consider what might happen in the case of an incident occurring. Would your business be able to stand the financial impact? By asking these types of questions in advance of any incidents occurring, you can make a business plan that includes the cost of the insurance you need to protect your long-term vision for your farm.

For more information on how to prevent and manage a food safety incident, download Farm Commons' "Guide to Reducing the Legal Risks of a Food Safety Incident" at farmcommons.org/resources.

To find insurance coverage for a food safety incident, the best thing to do is talk to your insurance agent about the right option for the kinds of sales that you are doing. Some key points to discuss are what is being sold, to whom it is being sold to, and what level of coverage you are comfortable with. From there, your agent will be able to present you with appropriate policy options.

“The base of a strong relationship between a farmer and a buyer is a clear understanding of exactly how they will work together before the first sale even occurs.”

Conclusion

The base of a strong relationship between a farm and a buyer is a clear understanding of exactly how they will work together before the first sale even occurs. Farmers and buyer set themselves up for success by clearly presenting product information and outlining procedures for addressing contingencies. This chapter outlines some of the issues that should be addressed and how to incorporate them into the sales process. In the next section, we will talk more about how to choose the sales structure that’s right for you. No matter which you choose, you will be able to use the 4-stage process we suggest to navigate sales relationships smoothly and build a stable, resilient farm business. Lastly, don’t forget the other risk management strategies that compliment good communication, including insurance.

Connect and Collaborate: Rachel Responds

Congratulations! If you are reading this guide, you are on the right path to developing strong sales contracts and building a stable farm business. We wanted to pause for a moment to introduce you to one of Farm Commons’ most valuable resources – our community of farm business owners.

One of the ways that our network connects is through our winter webinar series. Participants have the opportunity to ask questions and learn from each others’ challenges and experiences. Below, we’ve taken some of the questions that came up during our webinar on sales contracts, led by Farm Commons Executive Director and Attorney Rachel Armstrong. Maybe you were wondering some of these same things, or perhaps this will bring up a new perspective on contracts.

To keep the conversation going, we encourage you to post your questions in the “comments” section of this resource. We will do our best to get back to you in a timely manner so that you and the rest of the community can continue to grow and succeed in your sales relationships.

Rachel Responds: Sales Contracts

Q. I'm part of a small cooperative trying to work with stores and institutions. We are finding that they are resistant to using contracts. They say things like "Well, just bring us the extra of what you have when it's ready" or "What we can pay depends on the price at the time." I've tried to explain that we, as farmers, can't grow without some indication of what our sales will be, but the buyers don't seem to understand. What should I do if my buyers really don't want to use contracts?

A. This is a tricky and common situation. I want to tell you about a group of farmers here in Wisconsin who were in a very similar situation. They had an institution that was really interested in their product but wasn't making the kind of commitment that the farmers needed to make it worthwhile. I mean, having extra product lying around isn't a situation any farmer wants!

So, they took a bit of a marketing approach to it. They said, "Okay, you [the institution] want to benefit from our local products. You are going to tell customers that you are buying from local farmers and do marketing and outreach around that. That's all well and good, but if you want to reap those benefits you have to be able to commit to us. We can commit to growing product for you, but we'd appreciate the same in return. If we have an authentic, committed relationship, we'd be happy if you used our name in your marketing materials."

If you have that kind of leverage with a buyer, I wouldn't hesitate using it. If they are already advertising that they support local farmers, ask them to reinforce that with a commitment, expressed in a contract.

Another solution is to take a cooperative approach. A cooperative of farmers can unite as a group in an area and tell buyers that they will only be able to sell to them under certain circumstances and with certain commitment. This is more involved, but can lead to other long-term benefits.

I would encourage you, as awkward as it seems, to not necessarily just give in and agree to take whatever the going rate is or to just give them your extra product. Remember that you are different from their current supplier – if it's coming from across the country, yours is fresher. If it's from an anonymous supplier, yours has brand identity. Use that knowledge to empower you and help you make a

/////////
"Remember
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case to the buyer as to why you need clear commitment. Explain how setting out standards and procedures helps everyone provide good customer service. It's really in their interest to get things on paper, right? Let them know that!

Q. Do you have any advice for buyers who really want to support local farmers but don't have any purchasing experience?

A. Sometimes I think not having a lot of purchasing experiences is exactly the way to be! You don't have any assumptions. Assumptions are really what cause problems between farmers and buyers. So, you are in a perfect position. There's no reason why you can't sit down with this resource, come up with a procedure that works for you, and talk with some farmers to see if it works for them, too. It's designed for farmers but works for buyers too. From there, you can hammer out an agreement. And, of course, you can find even more helpful information for this process throughout our guide.

Now that we've seen exactly how Zach and Anne built their own sales process and production services contract, let's take a look at some tools farmers can use while following Farm Commons' 4-step process. It's time to put pen to paper!

ADAPT THE TOOLS

Farm Commons provides the following tools to help farmers move forward in following our 4-step process to drafting great materials.

- 1. A checklist of things to consider for inclusion in a production services contract**
- 2. Zach and Anne's model contract**

Important Instructions for Using This Model

To understand how to use and adapt this agreement, read the full contract and the annotations. The annotations explain Anne and Zach’s reasoning for writing the contract this way, and some propose alternative strategies that might work for other farmers.

Don’t expect that this agreement can be quickly adapted to your farm.

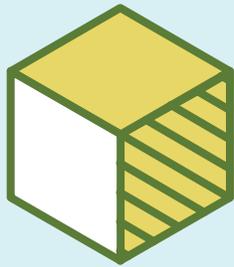
The best sales agreement is the one that is unique to a particular farmer and buyer by taking into account the two parties’ own needs, resources, and skills. Model contracts have limited utility. The best use of a model is to illuminate why and how a specific farmer and buyer created the agreement they created. **This model is meant to inspire farmers as they structure their own unique agreement with a buyer.** Farmers are encouraged to consider this agreement in the context of what they might need for their own unique circumstances.

This model is meant to inspire farmers as they structure their own unique agreements.

This model contract represents one way a farmer and buyer might arrange their relationship. The possibilities for variation are tremendous. This model is not the “best” agreement between all farmers and all salsa companies, by any means. There is no single “best” sales agreement anywhere because each business is unique.

The farmer’s attorney should review any modifications to this agreement before signing. A contract is a single cohesive document, and each clause is written with respect to each other clause. A change to one section can disrupt the flow of the entire document. It’s imperative to read everything through and check every element for consistency. Attorneys are experts at spotting seemingly small issues that might become huge problems down the road. Although contracts are very flexible, there are some contracts that a court will not enforce, perhaps because they are too unfair or they violate another law. An attorney can help a farmer determine if their modifications will render a contract unenforceable in court. Attorneys are often able to review documents drafted by farmer (especially documents that originate from a relevant, clear, detailed model) for an affordable fee.

“This model is not the ‘best’ agreement between all farmers and salsa companies, by any means. There is no single ‘best’ sales agreement anywhere because each business is unique.”



Checklist

Use this checklist to help you consider what information to include in your production services agreement.

Using This Checklist

Are you ready to start putting together a production services agreement for your unique situation? This checklist of considerations can get you there. This list details basic issues that should be addressed in a thorough and well-considered production services agreement. . Not all the questions will be relevant in every situation. For some farmers, more detailed responses will be necessary to create a truly comprehensive agreement. If you have a basic understanding of the answers to each of these questions, you might be ready for the next step – drafting. Drafting can be a challenge and may not be the best use of a farmer’s limited time. Bring your responses to these questions to a qualified attorney. He or she should be able to assemble a terrific agreement with this information. Farm Commons always urges farmers to get any self-drafted agreement reviewed by an attorney.

This checklist is designed to be used with our other resources, including the manual in the previous section.

Product

- What is being grown?
- Where is it being grown? Is the description specific enough that a person unfamiliar with the farm could identify it?
- Who provides the seed or transplants?
 - **If the buyer:** How much seed is being provided? Do the parties want a guaranteed germination rate of the seed lot? If transplants are provided, to what quality and size should the transplants conform?
 - **If the farmer:** Are there restrictions on where seeds or plants should be sourced from?
- Who is considered the owner of the growing crop?
 - **If the farmer:** Does the buyer require insurance be carried on the product? Does the buyer expect receipt of any insurance payment received for lost product?
 - **If the buyer:** Do we have assurances that no liens exist or will be created on the crop?
- Who has a right to sell the crop and who has a right to proceeds from the crop’s sale?

Production

- Are specific planting or spacing procedures required?
- What service is the farmer providing, specifically? Seeding? Growing

out transplants? Cultivation, fertilization, trellising, etc?

- ☐ Is organic certification required? Other certifications?
- ☐ Are specific products or techniques prohibited from use?
- ☐ Do farmer and buyer have to consult at any time about production or is the farmer entirely in control of the production?
- ☐ What happens if the plants are damaged or destroyed? Must they be replanted? During what timeframe? Is there a procedure for making a replanting decision?
- ☐ Is there enough water to assure production? If not, who is responsible in the event of a shortage?

Harvest and Transportation

- ☐ Is the farmer responsible for harvest and packing services?
 - **If so:** Can the buyer harvest if the farmer fails to do so?
 - **If not:** Can the buyer enter the farmer's property for harvest? Are there any specific communications or notifications that must be issued?
- ☐ When does harvest occur?
- ☐ Are all products harvested or only those that meet a specific quality standard?
 - **If quality standard:** Who determines if the quality standard is met? What happens if the product is below the quality standard?
- ☐ Are specific harvest procedures such as washing or packing methods desired?
- ☐ Where and how are the products stored after harvest?
- ☐ Who provides transportation of the product? To where does the product go? Are there any standards for the transportation such as refrigeration?
- ☐ Who pays for transportation?

Standards

- ☐ Does the farmer's production work have to adhere to a specific or general standard?

Payment

- ☐ How is the farmer being compensated?

☞ Are input costs reimbursed?

- **If so:** What exact costs are reimbursable? When will reimbursement occur? How is reimbursement initiated? Do specific documents or records need to accompany the reimbursement process?

☞ Is the farmer paid a fee for labor?

- **If so:** How is the fee determined? What is the process for receiving the payment? When is it paid? Do specific documents or records need to accompany the payment process?

Changing the Agreement

☞ Can the agreement be terminated?

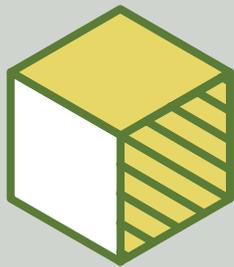
- **If so:** When and how?

☞ Do amendments to the agreement have to be in writing or can they be verbal?

☞ Can the parties transfer their responsibilities under the agreement to others?

- **If so:** Are there restrictions on that ability?

☞ Do we want a specific dispute resolution procedure such as arbitration or appointment of a committee?



Model Agreement

Use Zach and Anne's production services agreement as inspiration for your own.

Production Services Agreement

This agreement for production services, (“the Agreement”) is entered into by:

Anne Baker’s Produce

Anne Baker

123 Farm Lane

Goodsoil City, State, Zip

Here on, Anne will be referred to as the “Farmer.¹”

Zach Smith’s Salsa Company

Zach Smith

123 Processing Lane

Goodsoil City, State, Zip

Here on, Zach will be referred to as the “Buyer,” and the Farmer and Buyer, individually or collectively, may be referred to as a “Party” or the “Parties.”

Recitals²

- 1.** Farmer operates a farm, Anne Baker’s Produce, on land she owns at 123 Farm Lane in Goodsoil City. Farmer has experience growing tomatoes for specialty markets and processors.
- 2.** Buyer operates a salsa processing business, Zach Smith’s Salsa Company, at 123 Processing Lane in Goodsoil City. Buyer is in the general business of manufacturing condiments for sale to the general public, under a brand that prioritizes sourcing from local farmers.
- 3.** Buyer has bred a specialty tomato variety for his salsa company.
- 4.** Buyer wishes for Farmer to grow tomatoes from his seed for his use in his salsa production.

1 We could use the shorthand of “Anne,” too. It’s possible Anne could transfer her responsibilities under this contract to a new owner of her farm. Referring to her obligations as the farmer would make that transition a bit more intuitive.

2 Contracts often begin with a section called “Recitals.” This section contains information that isn’t necessarily part of the binding agreement. Rather, the statements here might inform and illuminate the contract if it is enforced in court. In this situation, I would like a court to know that the buyer is a salsa manufacturer and the farmer specializes in tomatoes, as it helps explain the structure of the contract.

Section A: Planting Specifics

1. Buyer will provide Farmer with tomato seed on or before February 1st, in a quantity sufficient to plant the acreage stated below. The quantity provided will account for Farmer's standard tomato loss rate between seeding and transplanting.
2. Farmer shall seed the tomatoes and raise the transplants in her greenhouse.
3. Farmer shall transplant the tomatoes into the 3 acres in the far northeast portion of Farmer's property.³ The tomatoes shall be transplanted at a 24-foot spacing with rows no closer than 3 feet apart.⁴ Farmer shall use her preferred weed and fungal control techniques, which may include plastic mulch.⁵
4. Farmer shall provide cultivation, fertilization, and pest control as necessary. At all times, the production standards shall adhere to Farmer's organic plan.

Section B: Harvest Specifics

1. Farmer shall contact Buyer by phone in the week before the plants reach 45 days from transplanting. After Farmer notifies Buyer, the two shall work together to monitor tomato maturity on regular basis, by mutual agreement.
2. Buyer and Farmer shall set a 5-day harvest and delivery window⁶ at a mutually agreed upon time, during which Farmer shall arrange for or conduct the tomato harvest, packing, and delivery at her own cost.⁷
3. Farmer shall arrange for or conduct operations to clean, pack in tomato boxes,

3 Zach might like to specify the acreage on which the tomatoes will be planted as different locations will influence total yield. If the location of the acreage isn't easily identifiable in writing, Zach and Anne should create and attach a map to the contract. If Zach didn't specify where he would like the tomatoes grown, he might consider stating the soil characteristics that should be present at the planting location: specific soil type, pH value range, composition, drainage, etc.

4 For many farmers and crop varieties, this information may not be necessary. Since Zach bred his own seed, he might have unique specifications.

5 Zach may want to specify techniques that will maximize yield. In other produce contract scenarios, farmers are paid by the pound for product. So, the farmer has incentive to use the best possible techniques. Anne has her reputation and pride to motivate excellent production, but to allay Zach's concerns, she may want to offer to commit to specific practices.

6 This might not work for an indeterminate tomato variety. Whatever the specifics of their agreement, Anne and Zach will want to arrive at a plan for determining and setting harvest for the tomatoes that accommodates all concerns: Anne's concerns for flexibility and Zach's desire for maximum yield. This clause attempts to balance those concerns by allowing Anne to choose the exact day of harvest within a agreed-upon window.

7 This is a significant provision because harvest is a large cost. Anne is responsible to make sure the tomatoes come out of the field.

and store the tomatoes at above 55 degrees and 85-90% humidity.⁸

4. Farmer shall transport the tomatoes to Buyer in a temperature-controlled vehicle.
5. Farmer shall deliver the tomatoes to Buyer's facility or to his agent, as determined by mutual agreement. If the delivery location exceeds 50 miles from Farmer's farm, the parties shall split transportation costs equally.⁹
6. If, due to the negligence of Farmer, tomatoes meeting the quality standards under Section 3(5) (or if no standard has been set: typical processing quality standards) are unharvested due to negligence of Farmer, Buyer may conduct or arrange for harvest of the tomatoes in his sole discretion. Buyer may reduce fee payments made to Farmer under Section 4(b) by the value of Buyer's costs incurred to harvest the product.¹⁰
7. Farmer shall allow Buyer and his agents access to Farmer's property for the purposes of harvesting product under Section 2(6)¹¹.

Section 3: Production Specifics

1. Farmer agrees to grow the tomatoes in a good farmlike manner and in accordance with the best organic agricultural standards and practices prevailing in the region. Farmer has an affirmative obligation to exert her best efforts to produce a good crop¹².

8 As stated above, this level of detail may not be necessary. In this case, Zach is paying for the seed, the inputs, and Anne's labor. He is motivated to protect the product quality because Anne doesn't necessarily have the same stake in the product's long-term quality.

9 Zach may not be able to process the tomatoes immediately. But, Anne might still need or want to deliver them within the 5-day window. So, Zach may want her to bring them to a storage facility instead. The mile limitation makes sure Anne isn't vulnerable to outsized shipping costs.

10 In a usual contract where the farmer is paid by the pound for harvested product, this provision might not be important. Here, the buyer has paid input costs and depends on this exact product. So, we give him the ability to harvest the product himself if Anne doesn't harvest it. Now, there are some requirements. Anne has to be negligent in her failure to harvest. That means Anne has to behave in an unreasonable manner - a manner that most farmers in her situation would not behave in. It can be a tricky determination to make, but some form of standard is necessary. Otherwise, Zach could simply go in to harvest if he found cheaper labor than the fee he pays to Anne. That wouldn't be very fair.

11 When someone is allowed to harvest on another's property, this is an important addition. If Anne negligently fails to harvest, we need to allow Zach to do it without having the cops called on him for trespassing.

12 This might be expected even if we didn't write it into the contract. But, it's good to state the standard clearly. Some farmers might prefer to avoid saying "best efforts," because it's hard to know exactly what that means. "Reasonable efforts" might also work.

2. Farmer agrees to maintain organic certification, as currently present on the acreage, at all times while this Agreement is in effect.
3. Farmer will replace a destroyed or damaged crop if practical and mutually agreed upon.¹³
4. Buyer and Farmer shall consult from time to time about pest or weed control, cultivation, irrigation, or fertilization. Farmer shall have exclusive responsibility for formulation and carrying out of growing obligations¹⁴.
5. Buyer and Farmer shall consult about product quality at the same time as they set the harvest window in Section B(1). Buyer shall set product quality standards for ripeness and defects at that time. Farmer shall harvest product meeting the quality standards set by Buyer and shall not deliver product below the standard¹⁵.
6. Buyer may reject substandard produce at the time of delivery¹⁶.
7. Farmer warrants that there is a suitable and adequate supply of water available to irrigate the acreage identified in Section A(3) as necessary to produce tomatoes at a typical level of quality and yield as is typical on irrigated tomato farmland in the region¹⁷.

13 This is a significant provision. Anne gets paid a flat price for her labor. If she has to repeat the process of seeding, raising transplants, and transplanting, she will make less per hour. But at the same time, if the crop is damaged, Zach still wants to get his tomatoes. Allowing replacement only if practical and agreed upon gives Anne an "out." Perhaps she can negotiate with Zach for extra labor fees in exchange for replanting. They would discuss details like those when laying out their mutual agreement for replanting. Zach is motivated to provide Anne with what she needs to replant because he knows she has a right to simply not replant/replace, if they can't come to an agreement.

14 Zach wants to make sure that the crop is well cared for, so he might want to require occasional consultation. But, if he has the ability to tell Anne what to do, bigger problems arise. The ability to tell someone exactly what to do and when is one of the characteristics of an employee. Anne and Zach have agreed that Anne is an independent contractor. If Zach wants to preserve that, he has to be careful not to overstep his bounds. Zach should be contracting with reliable farmers whom he trusts, anyway.

15 Quality standards play a more important role when the buyer is purchasing product by the pound. In that case, we would want a more precise quality standard and for it to be established ahead of time so the farmer can plan to maximize acceptable yield. The motivation to maximize yield is a bit less dominant in this more experimental production scenario. Still, a quality standard is useful - it allows Anne to save time by not harvesting product Zach doesn't want, while sparing Zach from having to dispose of unwanted product.

16 If Zach really doesn't want the sub-par tomatoes, he can reject those and send them back for Anne to dispose of them. (Anne can't sell them, however.)

17 Because Zach is bearing much of the risk in this relationship, he wants to be sure a crop is grown. By expecting Anne to warrant that she has irrigation and water enough to grow the tomatoes, he protects himself. If Anne's irrigation or water supply failed and she didn't fix it as necessary, she would be in breach of this provision.

Section 4: Payments

1. Buyer shall reimburse Farmer for her input costs in producing the crop including the proportionate share of any fertilizers, pest or disease control inputs, potting mix, and greenhouse supplies used in producing tomatoes identified to this Agreement. Farmer shall invoice Buyer monthly for reimbursement of costs incurred. Farmer shall substantiate the request for payment with records, including but not limited to, receipts or greenhouse logs. Farmer agrees to keep such receipts and logs in a manner that can be separated from the Farmer's other business activities.¹⁸
2. As a fee for the services performed by the Farmer under this Agreement, and for all the charges and costs incurred by the Farmer for labor, equipment, materials and other items necessary to fulfill this Agreement but not directly reimbursed in Section 4(1), Buyer will pay the Farmer a fee of \$2,000. The fee shall be paid in two equal installments. The first installment shall be due on or before July 1. The second installment shall be due on or before October 1.¹⁹

Section 5: Ownership of Crop

1. Legal and beneficial title to the tomatoes identified to this Agreement transfers to Buyer as soon as the plants are growing or can be identified.²⁰
2. Buyer has an exclusive right to sell the crop at his sole discretion and is

18 Anne isn't being paid by the pound, she's being reimbursed for input costs here (and paid an hourly fee for her labor in the next section.) First, Anne and Zach need to agree on exactly which input costs are shared. For example, this list doesn't include tractor time or fuel. Folks might want to include that and other additional costs. Whatever costs are agreed upon, we need to be sure those costs can be substantiated with actual records- receipts, logs, or whatever is appropriate to the input costs being reimbursed. Requiring records can prevent any issues with billing down the road. Then, it's only fair that Anne is expected to keep those records separate from her normal business operations. Otherwise, it might be difficult for Anne and Zach to determine which went to this contract's tomato production. Farmers and buyers might also consider requiring the farmer to submit a budget ahead of time for the buyer's approval. This would be especially important if the buyer is unfamiliar with the input costs of production or the farmer has an unusual or resource-intensive system of production.

19 This flat-fee arrangement may be unusual to many farmers and buyers. An hourly fee for labor seems more intuitive but comes with potential problems. For example, a farmer might be motivated (or appear to be) to take a long time on tomato tasks to earn extra money under this contract. A flat fee incentivizes efficiency. The fee for this make-believe scenario was set at random. Don't rely on it as a typical fee for such an arrangement.

20 The seed is Zach's, he is reimbursing Anne for the input costs, he's paying Anne a fee for her labor, and the tomatoes are exclusively his - Anne cannot sell them. The plants are technically his as well. Why is this important? It may become important if Anne experiences financial trouble and creditors pursue her assets. This makes it clear that the tomatoes are not Anne's. They won't be available to Anne's creditors. Anne and Zach may have other reasons for wanting to assign ownership, such as securing an insurance policy on the crop.

exclusively entitled to the proceeds from any such sale.²¹

3. Farmer warrants that no security interests, liens, or encumbrances have been created concerning the crop and none will be created without the express written approval of Buyer.²²
4. Farmer shall not sell, deliver, or dispose of tomatoes from acreage covered by this Agreement except to Buyer or as specified in this Agreement.²³
5. No other acreage of tomatoes of the same variety as described in this Agreement shall be grown on the premises. If additional acreage of the same variety is grown, it becomes subject to this Agreement.²⁴

Section 6: Indemnification and Risk of Loss

1. Farmer bears risk of loss to her own equipment and structures while conducting her business operations, including those operations to fulfill the obligations of this agreement. Buyer may bear risk of loss if the loss was caused by negligence of Buyer, Buyer's agents, or Buyer's employees.²⁵
2. Farmer bears all risk of loss due to the negligent or intentional acts of Farmer, her employees, agents, or contractors.²⁶

21 It's possible Zach might have too many tomatoes. This makes it clear that he can sell them; Anne cannot.

22 This clause achieves a similar purpose to Section 5(1). Farmers are sometimes in a situation where creditors place a lien on their crops. This usually happens after a farmer does not meet his or her financial obligations. The Buyer here, because he stands to own the crop, wants to make sure no one else already has a lien on the crop. If someone has a lien already, that could limit his ability to take the tomatoes himself.

23 Because Zach is growing his own special tomatoes to give his salsa a competitive edge, he doesn't want Anne to give these tomatoes to anyone else. With this, Anne would be prohibited from allowing anyone else to come into her fields and harvest/use the tomatoes that didn't meet Zach's quality standards.

24 This means Anne couldn't take extra seed or produce stock from the tomato seeds or plants owned by Zach and use them for her own purposes. This clause goes ahead and says that if Anne does that, those plants are automatically owned by Zach anyway, even though they are not planted on the acreage listed in this agreement.

25 Let's say Anne breaks the plastic mulch laying implement for her tractor while preparing beds for Zach's tomatoes. She could be tempted to claim that it's Zach's responsibility to fix the implement. This clause invalidates that argument, unless there was something irresponsible Zach had done to cause the breakage.

26 Let's say one of Anne's employees is upset with her and to get back at her, the employee intentionally leaves Zach's tomatoes in the sun for 8 hours and shelf life degrades seriously. This is a vulnerability for Zach, who has paid for the inputs and owes Anne for her production labor. This clause protects Zach in that situation. He could go to Anne and say, "You are responsible for this loss. I'd like you to pay me back for the additional tomatoes I had to buy elsewhere because these rotted quickly." This could also protect Zach if Anne failed to do something essential like apply an organic control to a known fungal risk that Anne and Zach discussed and Anne didn't have a valid reason for failing to do it. Zach could say, "Hey Anne, that was negligent. My yield really dropped because of it. You are responsible and should pay me back for my losses." Anne and Zach would come to an agreement about how Anne should compensate Zach (ideally themselves but if not, through the dispute resolution procedures or through the court system). Folks could come up with more detailed plans for how damages would be calculated and when

3. Neither Party shall be liable for injury or damage to persons or property caused by the other, its agents, employees, or contractors and each Party agrees to protect, defend, and hold the other Party free and harmless from any claim, demand, or liability arising from any injury or damage.²⁷

Section 7: Termination or Default

1. This Agreement is terminated immediately if Farmer allows or causes a lapse in organic certification on the acreage identified to this Agreement, as required in Section 3(2).
2. In case of fire, strikes, or other labor disturbances, lack of transportation facilities, shortage of supplies, floods, earthquakes, action of the elements, invasion, war, riots, insurrection or rebellion, interference by civil or military authorities or passage of laws, or any unavoidable casualty or cause beyond the control of buyer or farmer, which affects the Party's performance under this Agreement, the Party is excused from performance under this Agreement during the period of inability to perform.²⁸

Section 8: Nature of Relationship

1. Farmer and Buyer operate independent businesses. The Parties are not in, nor intend to create, a partnership. Neither Party has any rights to the profit or interests of the other Party. Each Party enters into this Agreement as an independent contractor. Neither Party shall be responsible for the actions or agreements of the other.²⁹

damages would be due, rather than trust their ability to work it out after the negligence occurs. That may be a very wise choice.

- 27 This is what's commonly called a "hold harmless" clause. It works like this: Let's say that while Zach is on Anne's property for a meeting, he backs his truck into a vehicle owned by Anne's irrigation repairwoman, Sue. Sue asks Anne to pay her back for the damage to her vehicle. This clause means Anne can go right to Zach and say, "Hey you caused this damage and you need to take care of it fully with Sue." If Zach doesn't, Anne could use this clause to demand that Zach make it right (or pay Anne back if she already paid Sue herself).
- 28 Potentially, all kinds of things could happen that would make it impossible for Anne to grow the tomatoes or for Zach to fulfill his duties, including taking delivery of the tomatoes. This clause excuses each party if they can't perform their duties because of causes completely outside their control, such as an earthquake.
- 29 Legally speaking, this is a very important clause. This relationship could potentially be viewed as a partnership, which has important tax and liability consequences. Here, our parties don't want those consequences and so they need to specifically state in their agreement that they are not a partnership, they are not conducting business together, they don't share profits, and they can't commit each other. They affirmatively state that they are independent contractors. These clauses aren't necessarily helpful if Zach and Anne aren't actually behaving this way, of course. Putting it on paper doesn't make it so. But, the structure of this agreement shouldn't create a legal risk of a partnership.

2. Buyer shall have no right to direct or control any of Farmer's employees.³⁰

Section 9: Miscellaneous

1. Buyer may assign his responsibilities under this Agreement to another Party. Farmer may only assign her responsibilities under this Agreement by mutual agreement of Farmer and Buyer.³¹
2. If the acreage or any portion of it is condemned or taken by any authority possessing the power of eminent domain, any payment received as compensation for loss of the tomatoes identified to this Agreement shall become the property of Buyer and this Agreement shall terminate as of the date title vests in the condemnor.³²
3. This Agreement may be executed in counterparts, each of which shall be considered an original and all of which shall constitute one and the same agreement.³³
4. If any part of this Agreement is invalid or unenforceable, the remainder of the Agreement shall remain effective.
5. Any amendment to this Agreement is ineffective unless in writing and signed by both Parties.³⁴
6. Prior to taking any action in a court of law, the Parties to this Agreement agree to appoint a dispute resolution committee to evaluate the dispute and make recommendations for its resolution. The Dispute Resolution Committee shall consist of three persons: 1) One adult appointed by Buyer who is not a member, partner, director or employee of Buyer's business or an immediate family member of Buyer; 2) One adult appointed by Farmer who is not a member, owner, partners, director or employee of Farmer or an immediate family member of the same; and 3) a neutral individual to be agreed upon by both Parties. The Dispute Resolution Committee shall review written submissions and supporting evidence submitted by both Parties within 30 days of the committee's creation. The Dispute Resolution Committee shall make findings of fact and propose a resolution for the dispute within 60 days of the

30 We allow Zach to enter Anne's property if he needs to harvest and Anne isn't doing it. So, we should make clear that he can't instruct Anne's crew to do it. Allowing Zach to control Anne's employees could have legal implications for creating a partnership, among other risks.

31 When a person "assigns" an agreement to someone else, they put someone else in their place as the Buyer or Farmer.

32 Zach would be disappointed if he pays for inputs and Anne's labor, only to have the crop lost to eminent domain. This clause at least allows Zach to receive the compensation for the loss.

33 This means Anne and Zach don't have to sign the same exact paper copy. They can each sign their own copy of the agreement.

34 This means that any change to this lease needs to be in writing or it's not enforceable. A writing is as good as scratching phrases out of this agreement and writing new words in the margins. As long as it's clear and agreed upon, nothing fancy is needed.

Committee's creation. The Parties may accept the resolution if they wish. If the Parties do not accept the Dispute Resolution Committee's proposed resolution, the Parties agree and acknowledge that the Dispute Resolution Committee's findings of fact shall be presumptively valid in a court of law. Buyer and Farmer agree to each assume 50% of the costs of the Dispute Resolution Committee, as they are incurred.³⁵

35 This is a nice way to resolve the many issues that may come up. For example, if we have damaged tomatoes and we can't agree on whether it was caused by negligence or natural causes, Farmer and Buyer could use this process to appoint people to review the situation and suggest a resolution. Ideally, the committee is not emotionally invested and will be able to suggest a resolution that works for everyone.

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