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Organic Contract Basics

CHAPTER QUICK TIPS

Writing Requirement

Oral agreements (such as handshake agreements) are generally unenforceable in court. Contracts worth $500 or more must be in writing or they are not enforceable in court. Any changes to contracts must also be in writing to be enforceable.

Special Rules for Merchant Farmers

You are probably a merchant farmer and special contract rules apply to merchants. Contract law generally holds merchants to a higher standard than non-merchants, loosening some of the formal contract requirements and assuming that merchants will be able to protect their own interests in a contract relationship.

ORGANIC CONTRACT BASICS

The purpose of this chapter is to educate farmers about the basic legal concepts most likely to be important for farmers entering into organic contracts.

The chapter will cover: (1) basic legal principles involved in contracting; (2) how to form enforceable contracts; (3) how to successfully change contract terms; (4) practical tips for creating enforceable contracts with fair terms; and (5) the truth about common contract myths.

IMPORTANT NOTE:

This guide is not a substitute for an attorney who can analyze the facts of your particular contract or legal situation. If you are a farmer negotiating an organic contract or involved in an organic contract dispute, please make sure to consult an attorney licensed to practice law in your state.

See Chapter 12, page 12-4, for tips on hiring an attorney.

BASIC TERMINOLOGY AND CONCEPTS

Organic Contracts

When this guide refers to "organic contracts" or "written organic contracts," we mean written contracts governing the sale of any organic crop or commodity.

Contract Formation

Creating or "forming" a contract requires three steps: (1) an offer; (2) acceptance; and (3) consideration (exchange of value). An offer is an indication of intent to be contractually bound upon acceptance by another party. This means one party's offer gives the other party the power to form a contract by accepting the offer.[1]

Consideration simply means that when you make a contract promise, you must be getting a promise in return. There must be some exchange of value between the parties. For example, your promise to deliver organic products to a buyer is consideration for the buyer's promise to pay you the organic market price for the products, and the buyer's promise to pay you is consideration for your promise to deliver.

In addition, a written contract should identify: (1) the parties to the contract; (2) the price to be paid for the goods and/or services to be exchanged; and (3) the quantity of goods to be delivered and/or scope of services to be provided. Any writing (or combination of writings) with these three pieces of information has the potential to create a binding contract (so long as there is also offer, acceptance, and consideration). This can be true even if the writing is not a formal document.

A binding contract can be formed with any type of writing, including a purchase order, an email, notes on a napkin, a ticket, or a letter.[2]

Proper contract formation is very important, but the most common problems with contract formation generally aren't noticed until later in the relationship when one party challenges the very existence of a contract.[3] This may result from a genuine dispute over whether an agreement was reached, or it may be an excuse to get out of a contract that has become unfavorable or inconvenient.

Looking back to the three steps of contract formation, as discussed above, in order to challenge whether a contract was properly formed, a party

could argue that the offer or the acceptance was invalid, or both, and/or that the consideration given by one or both parties was insufficient. Putting an agreement to sell organic crops or livestock in writing can go a long way toward proving the existence of a properly formed contract.

Even if you have a formal written contract, defending or challenging the formation of a contract often involves very technical legal questions. If you find yourself in a dispute with a buyer over contract formation, consult an attorney licensed to practice law in your state.

The Parties to an Organic Contract

The two parties involved in an organic contract are: (1) you, the farmer; and (2) the buyer.

You, the farmer. This guide is meant for farmers who produce organic crops, dairy products or livestock in accordance with the National Organic Program (NOP) regulations. This includes all farmers who produce U.S. Department of Agriculture (USDA) certified organic commodities (including farmers who may be exempt from USDA certification because they market less than $5,000 worth of organic farm products per year).[4]

The buyer. The term "buyer," as used in this guide, means the broad group of individuals and businesses that purchase organic commodities from farmers. Buyers of organic commodities are most likely to be companies that are certified to handle organic products. As of 2007, there were 3,225 certified organic handlers in the United States.[5] These buyers generally purchase organic commodities from farmers and then turn around and sell them further down the organic supply chain, to distributors, retailers (for example, grocery stores), and manufacturers.[6]

Although certified organic handlers (mostly processors, distributors, and manufacturers) make up the largest percentage of buyers, the term "buyer" also includes retailers, co-ops, restaurants, universities and schools, and individuals, such as a neighbor who contracts for organic grain to feed her organic dairy cows. Basically, a "buyer" can be anyone or any company buying the organic commodities you produce.

Buyers of organic commodities are significantly involved in many aspects of on-farm production. In 2007, the most recent year for which data is available, 38 percent of certified organic handlers provided transport for organic commodities, 28 percent provided technical advice on organic requirements, 24 percent provided on-farm production advice, 16 percent provided inputs, 11 percent provided assistance or incentives for organic transition, 9 percent provided labor, and 9 percent provided assistance with organic certification.[7]

Sources of Contract Law

The law of contracts arises from a combination of sources, and is somewhat different in every state. The main sources of contract law are:

- The specific words of your particular contract.
- The common law (case law, or judge-made law) of the state.
- State and federal statutes and regulations. State statutes will usually include a version of the Uniform Commercial Code (U.C.C.). Article 2 of the U.C.C. governs contracts for the sale of goods worth $500 or more.[8]
- The United Nations Convention on Contracts for the International Sale of Goods (CISG), which governs many transactions for the sale of goods between parties with places of business in different countries.

See Chapter 12 for more detailed information about the federal and state laws that apply to contracts.

Oral Agreements (Handshake Agreements)

Many farmers wonder whether an oral agreement "counts" as a contract. The answer is: "Sometimes." Although parties are always free to carry out otherwise lawful oral agreements, difficulties can arise when one party wants to force the other to keep contract promises. It is difficult to prove the existence and terms of an oral agreement. If you end up in front of a judge, you will need some type of evidence to prove price, quantity, and other essential terms of the contract. Your chances of success in any legal dispute increase significantly when you can rely on more than just your word against the buyer's.

Additionally, some agreements (including contracts for products worth $500 or more) must be written down in some form in order to be binding and enforceable in court (see pages 1–8 and 1–9, next section).

Key Concept: *Enforceability*

An enforceable contract is a contract that meets all of the requirements of applicable state law and would be recognized as legally binding by a state or federal court. Only enforceable contracts give farmers legal rights against buyers.

Generally, handshake agreements (oral contracts) are not enforceable in court.

Informal contracts are enforceable in court, however, and can potentially include almost anything in writing that has price, quantity, and quality information—such as a purchase order, invoice, email, or handwritten notes.

Types of Contracts for Sale of Agricultural Products

Although there are many types of contracts that any farmer will enter into as part of the farming operation, this guide will focus mainly on marketing contracts for organic farm products.

A marketing contract sets a price, price range, or price formula for sale of a specified amount of a commodity. This can happen before, at, or after planting; or before removal of crops, milk, or livestock from the farm. Farmers who enter into marketing contracts: (1) generally own the commodity until it is delivered to the buyer; (2) generally retain the right to make most management and production decisions; and (3) generally bear the risk of loss.

As a general rule, marketing contracts provide farmers more independence than another type of contract common in agriculture: the production contract (discussed below). However, farmers do give up some managerial independence when they agree to sell organic commodities, which must be produced in compliance with the NOP regulations and under organic certification. Additionally, buyers can limit farmers' independence by including burdensome provisions within organic marketing contracts and by becoming more involved in on-farm production.

NOTE:

Some farmers refer to certain types of marketing contracts as "full production" contracts, meaning that the farmer has agreed to sell to the buyer the entire production from a defined area (for example, everything produced on 100 acres) rather than a set amount of production. Despite its name, a "full production" contract is still a marketing contract, not a production contract, because the farmer owns the crop until it is delivered to the buyer.

Under production contracts, in contrast to marketing contracts, farmers do not own the crop or livestock product they have agreed to produce. Instead, the owner of the product (often a large company, such as a processor) agrees to pay the farmer for the services required to produce the agricultural product. Production contracts typically allow the owner of the product (the buyer) to make significant management and production decisions. Additionally, production contracts for certain commodities often require the farmer to invest large sums of money in infrastructure (for example, poultry barns) designed or required by the owner/buyer.

Although production contracts have become extremely common (and extremely problematic) in conventional livestock and poultry production, they have yet to be extensively used in organic production. Still, because many organic poultry and livestock handlers are subsidiaries of large conventional agribusinesses (for example, Tyson Foods, Perdue), it is certainly possible that more organic poultry and livestock farmers will be offered production contracts in the future.

Focus of the Guide

This guide will focus primarily on marketing contracts. However, FLAG has written extensively about production contracts and other organic marketing activities. FLAG's farmer-friendly publications can be downloaded for free from FLAG's website (www.flaginc.org), or be purchased in printed form.

FLAG's farmer-friendly publications of interest to organic farmers include:

Dairy Contracts

- Tools for Dairy Farmers in Tough Economic Times (2010)
- When Your Processor Requires More than Organic Certification: Additional Requirements in Organic Milk Contracts (2008)
- Hushed Up: Confidentiality Clauses in Organic Milk Contracts (2008)

Livestock and Poultry Production Contracts

- Contract Poultry Growers Have Rights Under Federal Law (2006)
- Questions to Ask Before You Sign a Poultry Contract (2005)
- Livestock Production Contracts: Risks for Family Farmers (2003)

Disaster

- Disaster Readiness and Recovery: Legal Considerations for Organic Farmers (2007)

Marketing

- Selling Directly to Schools: Tips for Farmers (2010)
- Federal Law Protects Farmers' Rights to Be Paid for Fruit and Vegetable Crops (2007)
- Understanding Farmers' Market Rules (2006)

GMOs

- Farmers' Guide to GMOs (2nd Edition) (2009)
- If Your Farm Is Organic, Must It Be GMO-Free? Organic Farmers, Genetically Modified Organisms, and the Law (2007)

All FLAG publications are available for free download at www.flaginc.org.

CREATING ENFORCEABLE CONTRACTS

As mentioned earlier, a contract may be lawful without being enforceable. Lawfulness is determined by the acts or goods that the contract involves. That is, a contract to commit a crime is unlawful no matter how carefully the parties may document their agreement. Enforceability, on the other hand, assumes that the contract is lawful and instead considers whether the agreement can be enforced by law. If a contract is enforceable and a dispute arises, either party can sue the other and seek money damages or a court order forcing the other party to fulfill its obligations.

Enforceability of otherwise lawful contracts is only important if there is a problem. If everything goes smoothly and the contract is carried out to both parties' satisfaction, it doesn't matter whether it would have been enforceable in court. However, because it is impossible to perfectly predict in advance whether problems will arise, enforceability is a very important consideration.

Because contract enforceability often involves very complicated legal questions, you should consult an attorney licensed to practice law in your state if you want to challenge or defend the enforceability of a contract.

Contracts Must Generally Be in Writing to Be Enforceable

Many types of contracts must be in writing in order to be enforceable in court. The laws that require these contracts to be put in writing are generally called "statutes of frauds." This name is somewhat misleading, because statutes of frauds are not laws about frauds; statutes of frauds are intended to prevent fraud by requiring written agreements.[9]

Each state has its own statute of frauds, and the specifics may differ from state to state. However, in almost all states, a contract to sell goods for a price of $500 or more must be in writing.[10] Crops and livestock, including growing crops and unborn livestock, qualify as "goods."[11] Therefore, since most farmers are contracting to sell organic farm products (goods) worth $500 or more, organic contracts must generally be written down in some form in order to be enforceable in court.

Oral Agreements Are Generally Unenforceable

If you have an oral contract (like a handshake agreement) for a sale of agricultural products worth $500 or more, that oral contract will generally be unenforceable in court.

Farmers and buyers are free to perform otherwise legal oral agreements to sell goods worth $500 or more. But if an agreement falls through, the courts generally cannot enforce a contract unless it is in writing.

Bottom line: If you don't have something in writing—even something very informal, as discussed below—you probably can't enforce your contract against the buyer, and the buyer probably can't enforce the contract against you. However, even if your contract is unenforceable, if you have given the buyer something of value (like crops or livestock) and the buyer won't pay you for it, a court would likely order the buyer to pay you.

The Required "Writing" May Be Very Informal

Although organic contracts must generally be in writing, the "writing" can be extremely informal. All that is required is some writing sufficient to indicate that a contract for sale has been made between the parties. As stated above, the writing can be an email, notes on a napkin, a ticket, or a letter.[12] The contract terms can even be "written in lead pencil on a scratch pad."[13]

An exception to the writing requirement, for contracts created by the action of the parties, is discussed below.

NOTE:

This guide uses the words "terms," "provisions," and "language" interchangeably when discussing words, clauses, or portions of text in organic contracts. Thus, the phrases "contract terms," "contract provisions," and "contract language" have the same meaning.

Special Contract Rules for "Merchant" Farmers Apply to Many Farmers

Special contract rules apply when both parties to the contract are "merchants."[14] A merchant is defined as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction."[15] Farmers who regularly sell crops, dairy, or livestock are very often considered merchants,[16] and buyers will almost always be merchants. Merchants are assumed to be knowledgeable businesspeople, and contract law generally holds merchants to a higher standard, loosening some of the formal contract requirements and assuming that the merchants will be able to protect their own interests in a contract relationship.

Forming a Contract Between Merchants: The "Written Confirmation + No Objection Within 10 Days" Rule

If one merchant sends written confirmation of an oral contract to another merchant, and if the merchant receiving the confirmation has reason to know what the confirmation says, both merchants will be bound by the contract unless the receiving party sends a written objection within 10 days of receiving the written confirmation.[17]

Here's how the rule works:

Example: Written Confirmation + No Objection Within 10 Days Rule

If a merchant buyer:

(1) Sends you (a merchant farmer) written confirmation of an oral agreement, AND

(2) You read the written confirmation or have reason to know what the confirmation says, AND

(3) You do not send a written objection to the buyer within 10 days of receiving the confirmation…

… a contract was formed that binds both you and the buyer.

Farmers Can Use the "Written Confirmation + No Objection Within 10 Days" Rule to Create an Enforceable Contract

Parties who are regularly involved in buying and selling a given type of product are considered "merchants." Both farmers and buyers are often considered merchants. Between merchants, an enforceable written contract can be created if:

(1) you send to the buyer written confirmation of an oral agreement you have reached,

(2) the buyer reads it or has reason to know what the confirmation says, and

(3) the buyer fails to send you a written objection within 10 days of receiving the confirmation.

This is a convenient way to create an enforceable contract if you feel uncomfortable asking the buyer for a formal written contract and the buyer does not object.

Merchants can also create a contract by action, as described on pages 1–14 through 1–16 of this chapter, even if the informal written documents do not form an enforceable contract.

Forming Enforceable Contracts With Mismatched Writings

Under traditional contract law, courts required contract offers and acceptances to "mirror" each other. This is called the mirror-image rule. The party who received the offer had to accept the offer "as-is"; if any language was deleted or added, no contract was formed. Instead, the attempted acceptance was considered a rejection and counteroffer.

The "Modern Rule" Replaces the "Mirror-Image Rule"

Modern business practices—such as the routine use of standard-form purchase orders and invoices—have made the mirror-image rule unworkable for the sale of goods. Consequently, the mirror-image rule has

been abandoned for contracts involving the sale of goods worth $500 or more, which includes most contracts for the sale of organic farm products.[18]

The so-called "modern rule" was developed to deal with the common situation in which parties intend to form a contract through the exchange of informal writings that do not match exactly (mismatched forms). For example, a buyer might have a standard purchase order form, and your farm might have a standard acceptance form, or invoice form. It is unlikely that the buyer's purchase order form and your standard invoice form will use exactly the same language. Still, under the modern rule, an exchange of these mismatched forms can create a contract between you and the buyer.

Contract Acceptance Can State Additional and/or Different Terms

For contracts to sell goods worth $500 or more, a definite and timely acceptance is valid even if it states terms additional to or different from those offered.

If a Contract Is Formed With Mismatched Forms, What Are the Terms?

If a contract is formed with an offer (such as a buyer's faxed purchase order) and an acceptance (such as an email response to the purchase order) that do not match exactly, an important question is: "What are the terms of the contract?" The answer depends on whether the parties are merchants.

If at least one party is a non-merchant, the terms of the contract will be only those provisions that are in both the offer and the acceptance.

If both parties are merchants, the terms of the contract will be the provisions in both the offer and acceptance, plus any additional provisions that:

(1) do not significantly alter the contract; and

(2) were not objected to before contract formation or within a reasonable time after contract formation.

If any provisions in the offer and acceptance conflict with each other, it is generally presumed that the parties object, and those provisions will not become part of the contract.[19]

Example: Determining the Terms of a Contract Created by Mismatched Forms

Buyer offers a purchase order with terms A, B, and C.

You send back an acceptance form with terms A, B, the opposite of C, and D.

What are the terms?

If at least one party is a non-merchant, the terms are:

A and B.

If both you and the buyer are merchants, the terms are A, B, and possibly D. D would be part of the contract only if:

(1) D does not significantly change the contract;

(2) The buyer has not already objected to D; and

(3) The buyer does not object to D within a reasonable time after receiving your confirmation.

In most situations, neither C nor the opposite of C would be part of the contract because they are in conflict.

Exception to the Modern Rule That Mismatched Forms Create a Contract — "As-Is Only" Offer Is Explicitly Limited to Terms

There is a narrow exception to the modern rule that mismatched forms can create a contract. The exception is for "as-is only" offers that are explicitly limited to their own terms. For example, a buyer might send you a purchase order stating that the offer terms must be accepted "as-is." In this case, if you send back an acceptance with even slightly different language, no contract is formed by the exchange of the purchase order and your acceptance. To form a contract, you would have to send back an acceptance with language identical to the purchase order, or a statement to the effect that you accept the exact terms of the purchase order. If you send back something even slightly different, no contract is formed.

Farmers can make an "as-is" only offer by explicitly stating that the offer is limited to the terms of the offer, or stating that the offer is extended on an "as-is only" basis. If you make an as-is only offer, though, be aware that the acceptance must exactly mirror your offer. If the acceptance is not identical, no contract has been formed.

Exception to the Writing Requirement — Creating a Contract by Action

There is an exception to the rule that contracts for the sale of goods worth $500 or more must be in writing in order to be enforceable. The exception is for contracts formed by "action." Under this exception, even if the parties fail to create an enforceable written contract where a writing is typically required (maybe they made an oral agreement to sell goods worth $500 or more), an enforceable contract can be formed if the parties act as if a contract exists. This is sometimes called an "implied contract."

A contract by action is formed and a written agreement is not required if any of the following actions take place:

- the buyer accepts and pays for the goods,

  or

- the farmer (seller) accepts payment for the goods,

  or

- the buyer admits there was an agreement (usually this must be done under oath).[20]

Example: Contract Formed by Action

A farmer and buyer enter into an oral agreement for sale of 1,000 pounds of organic apples. But the farmer does not follow up with a written confirmation, and neither does the buyer. No enforceable contract was formed.

Nevertheless, the parties act as if a contract exists. The farmer delivers the apples, and the buyer accepts them and pays the farmer for them.

An enforceable contract was formed by the buyer's action of accepting and paying for the goods.

If a Contract Is Created by Action, What Are the Terms?

If a contract is created by action, it may not be obvious what terms are contained in the contract.

- *Terms of Contract by Action After Oral Agreement*

  In the example above, where the farmer and buyer entered into an oral agreement but failed to later form an enforceable written contract, the terms of the contract created by action would be the terms the parties orally agreed upon, with any important gaps filled in by state law (see next page).

- *Terms of Contract by Action After Exchange of Mismatched Forms*

  An exchange of mismatched forms might fail to create a contract. For example, if one party's form is "as-is only," and the other party tries to accept with a form that has deletions or additions, no enforceable contract is formed.

  If a contract is formed by the actions of the parties after an exchange of mismatched forms, the terms of the contract consist only of the provisions that are the same in each party's form.

Example: Contract Created by Action After Exchange of Mismatched Forms

Buyer offers a purchase order with terms A, B, and C. The purchase order states that the offer is limited to the exact terms of the purchase order.

You respond with an acceptance form including terms A, C, and D.

No contract is formed, because the offer was explicitly limited to its terms, and your acceptance was not identical to the offer.

However, after the exchange of forms, you and the buyer act as if there is a contract. You grow crops for the buyer, and the buyer receives and pays you for the crops. Your actions and the buyer's actions create a contract.

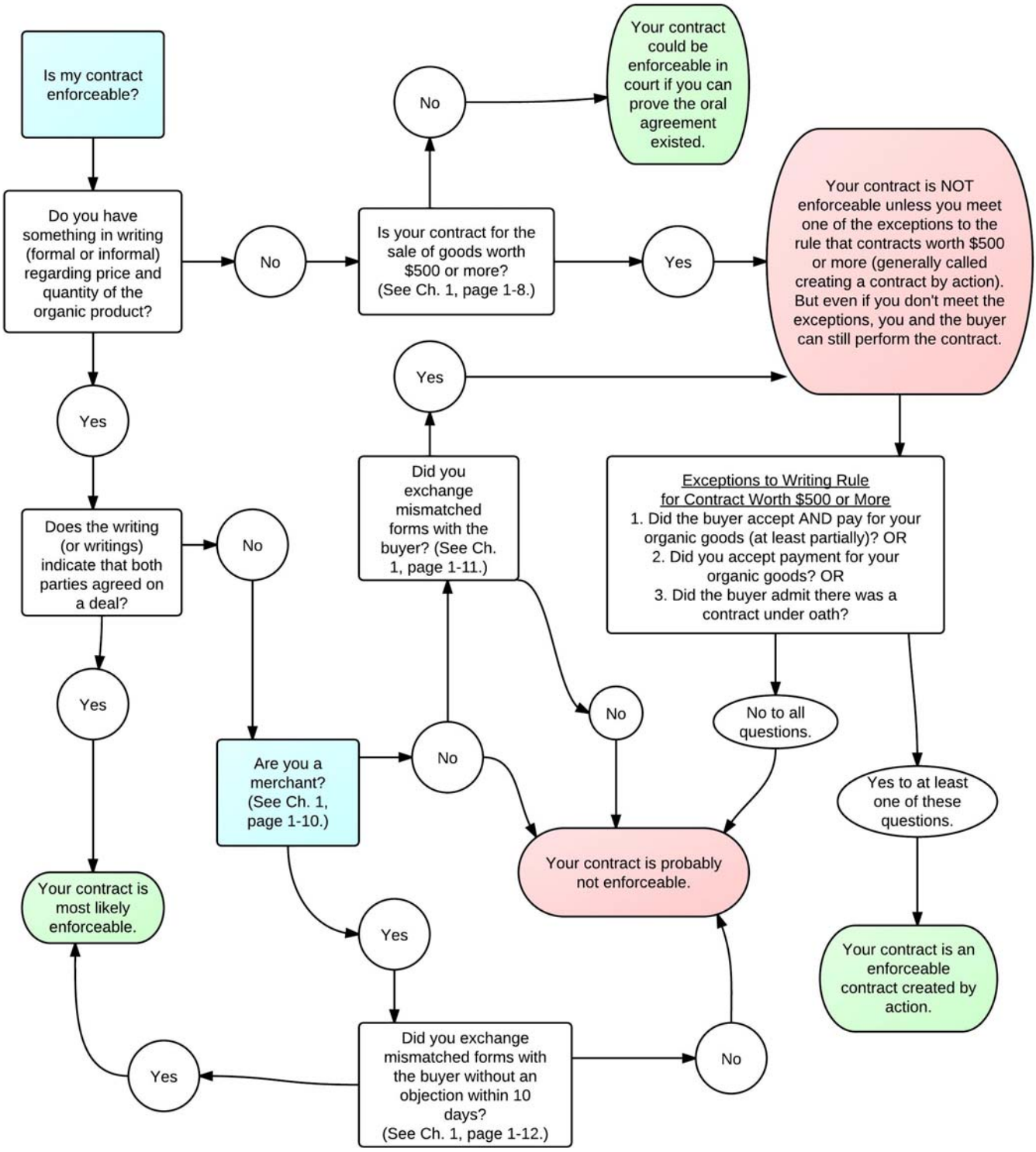
What are the terms of the contract?

The terms of the contract are A and C. This is true because the written documents (the purchase order and the acceptance form) agree upon A and C. Neither B nor D are included in the contract because the documents do not agree on B and D—each term is in only one document, not both documents.

Filling in the Gaps

If important gaps remain in the contract after the agreed-to terms have been established, state law generally provides standard terms that fill in the negotiated contract terms.[21] These supplementary terms might come from your state's version of the Uniform Commercial Code, from other contract law statutes, or from judicial interpretation (case law).

FLOW CHART: DO I HAVE AN ENFORCEABLE CONTRACT?



CHANGING CONTRACT TERMS

The terms of a contract are set at the time the contract is formed. However, the terms can later be changed if both parties agree in writing.

Many unexpected things can happen in between contract formation and the final delivery of the contracted goods. It is not uncommon for farmers and buyers to want to change the precise terms of their agreement at some point in the production cycle. Often, this change is discussed during a phone call or in-person conversation between the farmer and the buyer. Much less often, however, does the farmer or the buyer take the crucial step of confirming the agreed-upon change in writing. Failing to confirm in writing an oral agreement making changes to a contract (for example, by sending a written letter to the buyer) is very risky.

Get All Contract Changes in Writing!

It's best to think about contract changes in the same way that you should think about contract formation: Get it in writing! Oral modifications to organic contracts are generally without legal effect.[22]

As with oral contracts in general, farmers and buyers are free to carry out otherwise lawful oral agreements, including oral agreements making changes to an existing contract. However, if a problem arises, it will be the written contract that will control the outcome rather than a later oral agreement. Without a written document establishing the change to the existing contract terms, the change will generally not be enforceable.

PRACTICAL TIPS

Tip #1: If you and the buyer reach an oral agreement, write to the buyer confirming the terms of the agreement.

If you and the buyer have reached an oral agreement, and you don't feel comfortable asking the buyer for a formal written contract, send the buyer a letter, fax, or email confirming the terms of your oral agreement. If the buyer does not object to the terms set forth in your message within 10 days, you have likely formed an enforceable contract. The contract terms will be those in your written confirmation.

If the buyer responds to your confirmation with a writing of its own that sets out contract terms in addition to or different from the terms in your confirmation, you may still have an enforceable contract unless you respond with an objection within 10 days. If you do not object, the terms of the contract will be the terms your written confirmation and the buyer's written response agree upon, plus any of the buyer's terms that do not significantly change the contract. Any terms that conflict between the writings will not be part of the contract.

Note that you and the buyer could negotiate back and forth within the 10-day window indefinitely. If you write back to the buyer within 10 days of receiving a written confirmation stating you no longer wish to make a deal, no contract will be formed.

Note also that the "Written Confirmation + No Objection Within 10 Days" rule (discussed in detail on pages 1–10 and 1–11 of this chapter) is a two-way street. If you receive a written confirmation of an oral agreement from a buyer, you will likely be bound to the agreement unless you write back and object within 10 days.

Tip # 2: If the buyer sends you a contract, but you don't like some of the terms, you can delete and/or add terms and send it back to the buyer.

If the buyer sends you a written contract, and you do not like some of the terms, you can cross out the terms you don't like and/or write in new terms and send it back to the buyer. If the buyer did not send you the contract on an explicitly "as-is" basis (discussed on page 1–13 of this chapter), and if the buyer does not object to the deleted and/or added terms within 10 days of receiving the marked-up contract, you have likely

created an enforceable contract. The terms are the contract language with your changes.

If the contract was presented to you on an "as-is" basis, meaning the buyer communicated to you that the contract was an all-or-nothing offer, you can still cross out and/or add terms and send it back. However, no contract will be created unless the buyer responds to your marked-up version and accepts it. There is no specific time limit for acceptance. But, even if the buyer does not respond with an acceptance and no contract is created at the outset, if you and the buyer act as though there is a contract (you deliver goods, and the buyer accepts and pays for goods), then a contract has likely been created by your actions. The terms of this contract by action are the terms from the buyer's original offer that you did not cross out or otherwise clearly reject. The terms you crossed out are not in the contract by action, and if you added terms to the original offer, those terms are also not part of the contract by action. For example, in an original offer with terms A, B, and C, if you crossed out C and added D, the terms of the contract by action would only be A and B.

Note that, at any time, you and the buyer could decide to create a formal contract instead of relying upon the exchange of informal writings or forms. If a formal contract is created, the terms of the formal contract will most likely supersede anything written or orally agreed upon prior to the creation of the formal contract.

DEBUNKING CONTRACT MYTHS

Contract Myth #1: The buyer won't enforce the contract against me, so I needn't bother to negotiate terms with the buyer before signing.

Truth: Buyers will enforce contracts against farmers if doing so is in their best interest. Don't assume that the buyer won't enforce the terms of the contract. Negotiate up front and be prepared to comply with all of the provisions of the contract that you sign, or be prepared for the possibility that you may be sued.

Contract Myth #2: If I sign a contract while telling the buyer that I don't like some of the terms, or that I won't comply with the terms, the buyer cannot enforce those terms against me in court.

Truth: The buyer can hold you to anything written in the contract, even if you tell the buyer before signing that you don't like the language or won't comply with it. Ignoring contract terms doesn't work. In court, only the terms of the written contract matter.

Contract Myth #3: If I sign an unfair contract under pressure because I absolutely need the money to keep my farm running, I don't have to abide by the contract terms. The buyer won't let me negotiate, and I have to sign, so I'm not really bound by the terms.

Truth: Even if the economic reality is that you absolutely must sign an unfair contract or risk financial ruin, you generally have to comply with the terms of the unfair contract no matter what. Economic duress is generally a losing defense against a breach of contract claim in court.

CHAPTER 1 — ENDNOTES

[1] See, for example, Restatement (Second) of Contracts § 1 (1979); see also U.C.C. § 1-201 (1977).

[2] See, for example, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (ticket); see, for example, Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954) (back of a receipt).

[3] See, for example, ConAgra, Inc. v. Nierenberg, 7 P.3d 369 (Mont. 2000) (wheat farmer challenges existence of contract formed by written confirmation of oral agreement).

[4] See 7 C.F.R. § 205.101(a)(1) (2012).

[5] Carolyn Dimitri, Lydia Oberholtzer, and Michelle Wittenberger, *The Role of Contracts in the Organic Supply Chain: 2004 and 2007*, EIB-69 at 6, U.S. Department of Agriculture, Economic Research Service (December 2010). The 2007 data are the most recent figures reported by USDA, from the first USDA census of organic agriculture. The 2012 Census of Agriculture was ongoing at the time this guide was written.

[6] Carolyn Dimitri, Lydia Oberholtzer, and Michelle Wittenberger, *The Role of Contracts in the Organic Supply Chain: 2004 and 2007*, EIB-69 at 8, U.S. Department of Agriculture, Economic Research Service (December 2010).

[7] Carolyn Dimitri, Lydia Oberholtzer, and Michelle Wittenberger, *The Role of Contracts in the Organic Supply Chain: 2004 and 2007*, EIB-69 at 11, U.S. Department of Agriculture, Economic Research Service (December 2010).

[8] Louisiana is the only state that has not adopted Article 2 of the U.C.C.

[9] See, for example, C.R. Klewin, Inc. v. Flagship Properties, Inc., 600 A.2d 772 (Conn. 1991).

[10] See U.C.C. § 2-201 (2000).

[11] U.C.C. § 2-105(1) (1977).

[12] See, for example, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991) (ticket); see, for example, Lucy v. Zehmer, 84 S.E.2d 516 (Va. 1954) (back of a receipt).

[13] See U.C.C. § 2-201 comment 1 (1977) ("The required writing need not contain all of the material terms of the contract and such material terms as are stated need not be precisely stated. All that is required is that the writing afford a basis for believing that the offered oral evidence rests on a real transaction. It may be written in lead pencil on a scratch pad. It need not indicate which party is the buyer and which the seller. The only term which must appear is the quantity term which need not be accurately stated but recovery is limited to the amount stated. The price, time and place of payment or delivery, the general quality of the goods, or any particular warranties may all be omitted.")

[14] U.C.C. § 2-201(2) (1977).

[15] U.C.C. § 2-104(1) (1977).

[16] See 10 Williston on Contracts § 29:25 (4th ed.), at footnote 9 (May 2012) ("[T]he issue of whether a particular farmer may also be classified as "merchant" within the meaning of U.C.C. § 2-104(1) must be determined on a

case by case basis. The court in each case must determine, on the basis of the evidence presented, whether an individual who is considered a farmer also possesses expertise in the area of marketing … sufficient enough to classify him as a "merchant" within the purview of the Uniform Commercial Code."); see, for example, In re Montagne, 431 B.R. 94, 113 (Bankr. D. Vt. 2010) (determining a dairy farmer is a merchant in all aspects of his mercantile capacity, that is, with respect to goods for dairy farming operations, but not for every purchase of goods).

[17] See U.C.C. § 2-201(2) (1977); see, for example, ConAgra, Inc. v. Nierenberg, 7 P.3d 369 (Mont. 2000) (discussing the merchant exception in Montana's version of the U.C.C.).

[18] See, for example, Gardner Zemke Co. v. Dunham Bush, Inc., 850 P.2d 319 (N.M. 1993).

[19] U.C.C. § 2-207 (1977); see also comment 6.

[20] U.C.C. § 2-201(3) (1977). Additionally, a written agreement may not be required if the goods were specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of business.

[21] See, for example, U.C.C. § 2-207 (1977); Restatement (Second) of Contracts § 204 (1979).

[22] See, for example, Brookside Farms v. Mama Rizzo's, Inc., 873 F. Supp. 1029 (S.D. Tex. 1995).