9

Beyond Organic

CHAPTER QUICK TIP

Incorporated Buyer Policies Have the Same Force as Contract Provisions

Generally speaking, any policies or documents the contract refers to as "incorporated" into the agreement are part of the contract and have the same force and effect as any other contract provision. Breach of any part of an incorporated policy is the same as breach of the contract. Thus, if you agree to an incorporated policy, you are also promising to follow the requirements of that policy.

DOES THE CONTRACT REQUIRE YOU TO GO BEYOND THE NOP REGULATIONS?

All of the topics covered in this chapter are related to contract requirements that go above and beyond the requirements necessary for organic certification. If the contract agreement is simply for "certified organic" products, it should be clear that the farmer is only required to comply with the National Organic Program (NOP) regulations.

Example: Products Will Be Organic

All products covered under this contract will be produced in compliance with NOP regulations.

However, if you agree to provide products that are not only certified organic but also go beyond organic (by, for example, taking additional steps in the production process), it is important for the contract to clearly define any requirements that are in addition to NOP regulation requirements. This is necessary for you to be sure that you understand what the buyer is expecting. When complying with your Organic System Plan (OSP) might not be enough to keep you in compliance with the contract, you will need the contract itself to set out what else is required.

For example, the contract might require compliance with international organic standards (such as Japan's), you could be required to provide minimum square feet of space per chicken indoors and outdoors, you might agree not to use certain inputs that are allowed under NOP regulations (such as sodium nitrate), or you might agree not to use oxytocin even for emergency purposes. Each of these requirements would go beyond what is required for organic certification.

Beware of Mistaken Buyer Beliefs About "Certified Organic"

As part of making sure that requirements beyond those for organic certification are clearly set out in the contract, you should talk with the buyer about what "certified organic" actually means for your operation and farm products. Some buyers may mistakenly believe "certified organic" means more than it actually means, and so may not consider their expectations to be "beyond" organic. As discussed in Chapter 8, certified organic does not mean 100 percent GMO-free; it does not mean grass-finished, it does not mean free-range, it does not mean 100 percent pesticide-free, and it does not even mean synthetic-free. Certified organic simply means produced in compliance with the federal organic standards established by the NOP.[1] Not all buyers will understand the limited meaning of "certified organic," and may contract for your organic commodities under the mistaken belief that organic means something different. This misunderstanding could be dangerous.

For example, a buyer expecting 100 percent pesticide-free wheat might reject your delivery as not satisfying the contract if testing shows some pesticide residues, even if the residues are less than the tolerance permitted by the organic rules. You could argue that the buyer should accept your wheat under the contract because it meets the organic standards; but if the buyer refuses, your only remedies might be expensive litigation or arbitration.

Avoid surprise buyer rejections by: (1) clearly communicating with the buyer about the meaning of "certified organic"; and (2) clearly setting out in the contract what additional measures you will have to take, if any, to simultaneously comply with federal organic regulations and the contract obligations.

MARKETING CLAIMS

Does the contract require you to produce organic farm products that satisfy marketing claims in addition to "certified organic"?

Buyers may wish to market their products with claims in addition to organic, such as grass-fed, grass-finished, free range, biodynamic, humanely raised, open-pollinated, GMO-free, fair trade, or locally grown. If the contract requires you to produce an organic product that also satisfies one or more of these additional marketing claims, you will want to make sure that both you and the buyer are working from the same definition. Consider including the definition of the marketing claim in the contract. This can be harder than it sounds, because although some of these claims have at least some legal definition, some mean entirely different things to different people.

Also, do any of these required marketing claims require additional certification? If so, you should know the certification process, paperwork, and costs before signing the contract.

Some buyers contract for organic farm products that are in compliance with both federal organic standards and additional social justice certification programs. Examples include fair trade goods (domestic and international) and goods produced in compliance with Agricultural Justice Project standards (www.agriculturaljusticeproject.org).

Complying with Additional Marketing Claims

If the contract requires you to comply with additional marketing claims and/or social justice standards, be sure that you:

- Fully understand how your production methods must change or expand in order to comply with both organic requirements and requirements that go beyond organic.
- Obtain a copy of any additional standards required by the contract.
- Read the standards closely and determine what new requirements you must satisfy.

- Consider contacting representatives from an applicable marketing or social justice standards organization for help with compliance.
- Make sure to communicate with your organic certifier to ensure your new obligations do not interfere with your organic certification.
- Try to estimate the cost of compliance with the additional requirements and factor that cost into your consideration of whether the contract will be profitable.

VAGUE AND SUBJECTIVE CONTRACT REQUIREMENTS

Organic contract requirements that go beyond what is required for organic certification often include somewhat fuzzy language about how farms should be operated and even what farms should look like. These types of requirements can be problematic both because they are unclear and because whether they are satisfied is often a matter of taste or opinion.

Does the contract require your farm to look "pleasing"?

The organic contract may address your farm's visual appearance. For example, the contract might state that your farm must be "kept in an aesthetically pleasing condition." If you are offered a contract with such a provision, you may wish to ask the buyer whether it is really necessary; you may be able to delete it.

Subjective Provisions Increase Risk

Provisions related to visual appearance, which may seem reasonable at first glance, can be risky because they are frequently vague and subjective. What might be "aesthetically pleasing" to one person may not be pleasing to another. Thus, because it is impossible to know exactly what your farm must look like in order to satisfy the requirement, it is easy to breach this kind of provision without realizing it.

Contract promises that are easy to breach are especially dangerous when they appear in a contract under which even minor breaches are grounds for cancellation (see Chapter 5, pages 5–4 through 5–7, for a discussion of blanket breach provisions). In this way, vague provisions about appearance provide an "easy out" for a buyer who decides it does not want to honor the organic contract. Consequently, you may wish to negotiate the deletion of this type of provision.

Possible Compromise — Specific Obligations

If it is not possible to eliminate the appearance provision completely, you may be able to work out a compromise that gives specific, objective standards for you to meet. Ask the buyer why it is concerned with the farm's appearance and then determine what actions would need to be

taken to maintain that desired appearance. This means you could agree to more specific obligations regarding farm upkeep, such as contract language promising that "trash will be promptly removed from the front yard of the farmhouse," or "consistent with organic production practices, the farm will be kept reasonably free of weeds." Agreeing to more specific obligations makes it more difficult for the buyer to claim that you breached the contract, but it also means that you will have to undertake these specific tasks or risk breach.

Does the contract require unspecified "best management practices"?

As with requirements related to the farm appearance, vague and subjective language about "best management practices" can be dangerous, leaving the farmer vulnerable to an unexpected objection from the buyer or even contract termination. What does it mean to use best management practices on your farm? Two organic farmers could easily come up with two different answers. Does it simply mean adhering to the letter of the organic regulations? Does it mean compliance with a certain organic group's idea of the spirit of organic? It is impossible to tell from the phrase "best management practices" alone.

Because a contract requiring you to use unspecified "best management practices" leaves a wide opening for the buyer to claim that you are in breach, it is wiser not to agree to such a provision. Instead, you could agree to specific management practices desired by the buyer, such as certain recordkeeping practices, integrated pest management (IPM), or annual audits. Alternatively, you could agree to practice "good organic management practices in compliance with NOP regulations," or to operate in accordance with a published standards document specific to organic crops or livestock, such as the University of Minnesota's Organic Risk Management Guide.[2]

INSPECTION

Does the contract allow the buyer to inspect the farm?

If the contract allows the buyer to inspect the farm, the buyer's right of access should be limited to some degree. It is understandable that a buyer would wish to see the farm, especially during the growing season, but unlimited access to farm property is probably unnecessary.

Suggested Limitations on the Buyer's Right of Inspection Include:

- *Require prior notice of inspection.*

  Allowing an inspection "at any time" gives the buyer the right to inspect the farm even at inconvenient times, such as during the evening, on holidays, or when the farmer is absent. Requiring that the buyer give advance notice of an inspection is a reasonable limitation that you may wish to negotiate. The notice required could be a specific length of time, such as 36 hours prior to inspection, or a less predictable but still somewhat limited "reasonable notice" standard.

  The contract could further state that notice has to be given in a certain way (by phone, by mail, by email, etc.). If the buyer is particularly concerned about seeing the farming operation without the changes and preparations that might come from advance notice, and the farmer is comfortable with the idea, a compromise could be to agree to a small number of "surprise" inspections.

- *Create reasonable inspection timeframes.*

  You may be uncomfortable with a contract that allows the buyer to show up in the middle of the night or on the 4th of July (for example, language stating the buyer "may inspect at any time"). Consider limiting inspections to business or daylight hours, non-holidays, or days of the week you are usually working on the farm.

- *Limit the scope of the inspection.*

  You may also be uncomfortable with a contract allowing the buyer access to parts of your farm unrelated to your organic farming

operation and contracted crop acres. A contract stating that the buyer shall have "unlimited access to the organic farm for purposes of inspection" would arguably allow the buyer to inspect any part of the farm, including personal living spaces. If the contract allows unlimited access and you block the buyer from inspecting some part of your farm – even a personal living area – you could be in violation of the contract. Thus, you may wish to negotiate language stating that inspections are limited to those buildings and areas closely related to the organic farming operation and contracted crop acres.

- *Accompany the buyer.*

  You may wish to negotiate for the right to accompany the buyer on the inspection of your farm. It could be risky for the buyer to come onto your land unsupervised and perhaps even take samples without your knowledge. An unaccompanied buyer inspecting your farm could disturb growing crops or livestock, interfere (even unintentionally) with on-going projects, or even be injured. In addition, without farmers' supervision and guidance, buyers could misunderstand what they see on your farm and how it relates to the product they have contracted for. For example, a buyer might mistake a buffer area for an organically managed crop; if the buyer happened to sample the buffer area, it could mistakenly believe your crop has been contaminated and try to cancel the contract.

  Some organic contracts might actually require farmers to accompany buyers during inspections. If so, it is even more important to require advance notice of inspection and a reasonable time frame for inspection (such as during business hours) so farmers are sure to be available and able to satisfy this requirement.

- *Limit the frequency of inspections.*

  If a contract allows a buyer to inspect the farm at will, the buyer could theoretically conduct an inspection multiple times a day, every day of the year—or at least often enough to be disruptive. Consider limiting inspections to a certain number or a certain number per unit of time (once a month, once per season, etc.).

INCORPORATED BUYER POLICIES AND LAWS

Does the contract incorporate separate buyer-created policies?

Generally speaking, any policies or documents that the contract refers to as "incorporated" into the agreement are part of the contract and have the same force and effect as any other contract provision. Therefore, it is very important to read and understand any buyer-created policies that may be incorporated into your organic contract.

Buyer policies can become part of a contract if they are completely restated in the body of the contract, or if they are "incorporated by reference," which means that contract language simply mentions the separate policy and states the intent for the policy to be a binding part of the contract. There is no requirement that the separate policy be presented to you prior to signing the contract for an incorporation by reference to be binding. Note that an incorporated policy could easily be longer and more complicated than the contract itself.

Example: Incorporation of Additional Policies

Attachment A (Premium/Discount Table), Attachment B (Buyer's Quality Standards), and Attachment C (Buyer's Production Policy) attached to this Agreement are hereby incorporated into and made a part of this Agreement.

Or:

Producer agrees to produce, harvest, and store the contracted organic crop in compliance with the most up-to-date standards accepted and promulgated by Buyer.

If the contract incorporates a policy created by the buyer, you may wish to take some or all of the following steps to protect yourself from potentially burdensome and unexpected legal obligations:

- Obtain a full, current copy of any buyer-created policy, standard, or other document incorporated into the contract. Don't sign the contract until you have obtained and read the policy.
- Read the policy before signing the contract and apply the same scrutiny to the policy as you did to the main contract. That means you should ask all of the same questions about the policy as you would have asked if the policy language were actually written in the contract. Consider whether you want to negotiate contract language that cancels out some parts of the policy. Take as much time as you need to review the policy; if you sign the contract, you are also promising to carry out the policy requirements—which could be costly and difficult.
- Identify any areas of conflict or inconsistency between the contract and the policy. For example, the contract might include a 30-day delivery window but make no mention of a penalty for late delivery. The policy, in contrast, might state that the buyer receives a one percent discount for every day the delivery is late. If you find inconsistencies like this, discuss the situation with the buyer and request that the conflict be resolved in the contract before signing.

Suggestion for Resolving Conflicts Between Contract and Incorporated Policies

As a potential solution in case of conflict between the contract and an incorporated policy, consider adding language to the contract stating "if the policy conflicts with the contract, the contract language controls."

Note that just stating that the contract language controls policy requirements might not protect you in all cases. For example, in cases where the policy adds requirements that do not conflict with the contract, but are in addition to the contract (like the one percent discount penalty example on the previous page), there is an interpretation where the contract and the policy could co-exist and be in effect without conflict.

So, if the policy adds obligations that you are uncomfortable with or believe are unclear, consider negotiating alternative policy language or contract language that clearly sets out your understanding of the particular obligation. You could also ask the buyer to clarify the situation by putting the policy and the contract into a single document instead of incorporating the policy by reference. When everything is in one document, obligations can become clearer, inconsistencies may be uncovered more easily, and it might be easier to negotiate changes.

- Watch out for language in an incorporated policy stating that the policy "supersedes" or "controls" in case of conflict with the contract. (In general, you will want the contract to supersede the policy, not the policy to supersede the contract.) If the policy supersedes, you must consider the text of the policy to be your main agreement with the buyer. If this makes you uncomfortable, consider asking for deletion of the "superseding" language.
- Be especially careful if the contract allows termination for even minor contract breach (blanket breach) (see Chapter 5, pages 5–4 through 5–7). Breach of any part of an incorporated policy is the same as breach of the contract, so vague and subjective terms in an incorporated policy are just as dangerous as vague and subjective terms in the contract.

Does the contract incorporate specific federal, state, or local laws?

Buyers sometimes include contract language stating that farmers will comply with specific statutes or regulations or even "all applicable laws." Since most farmers are presumably intending to comply with the laws of the nation, state, and locality—whether or not those laws are incorporated into the contract—such a provision may not seem very important. However, this type of provision can create significant risks for farmers, particularly if the contract has a provision allowing the buyer to cancel the contract for any breach by the farmer, no matter how insignificant (blanket breach, discussed in Chapter 5, pages 5–4 through 5–7).

Because statutes and regulations are constantly changing, even a farmer who is making an effort to be in full compliance may not be up-to-date on current requirements. Also, laws are often unclear, and their meaning can be open to dispute and further interpretation by the courts. Thus, a buyer might say that a farmer is in violation of a specific incorporated law and therefore in violation of the contract based on the buyer's understanding of what is required, but that might not be the only, or even the most common, interpretation. A farmer in that situation might have to hire an attorney and dispute the buyer's interpretation in court or in private arbitration.

Additionally, the many statutes and regulations applicable to a typical farm represent hundreds if not thousands of possible violations of a contract that incorporates a requirement that a farmer comply with applicable law. Even if the law incorporated into the contract is limited to a specific statute or regulatory program, there will likely be many very minor requirements of which violation could be considered a breach of the contract. In many cases, particularly for laws governing farms, the punishment for violation of a law is simply that farmers make up the defect and pay a fine to the government. Enforcement agencies recognize that it would be significant overkill to shut down an operation for minor violations; but contract language making any legal violation a breach of the contract could threaten just that.

If the contract you are offered incorporates specific laws or states a requirement to apply with all applicable law, consider asking the buyer to delete the language, since you intend to follow the law anyway. Alternatively, instead of incorporating an entire law into the contract, you could suggest a provision stating that "major violations" of "relevant laws" could be grounds for contract cancellation. If the final contract language does incorporate laws, before signing ask the buyer for a copy of the laws mentioned in the contract.

FOOD SAFETY AND NANOTECHNOLOGY

Does the contract address food safety practices?

As food safety has become a hot national issue, buyers are increasingly addressing food safety practices in organic contracts. As with all contract obligations, you should be sure that you are prepared to meet any food safety requirements, that you can comply and still make an acceptable profit from the contract, and that the buyer's food safety requirements are not in conflict with the NOP regulations.

Food Safety Obligations That May Appear in Organic Contracts Include:

- *Traceback*

  The organic contract could include obligations that are intended to ease "traceback," or the ability to track food items back to their source. Traceback can be useful in preventing the spread of foodborne illnesses, as the source of the outbreak can sometimes be identified and contained. Traceback can also protect farmers by enabling them to prove that their farm was not the cause of an outbreak. Additionally, traceback can be used as a marketing mechanism. Consumers may be more interested in purchasing a particular food item if they know which farm produced the raw materials for that item.

  Farmer obligations related to traceback may require practices such as livestock ID tags, shipment affidavits, stickers, bar codes, and product lot numbers, all of which are standard practice to maintain organic certification.

- *Recall*

  Large-scale food recalls have, unfortunately, become relatively commonplace in recent years. These recalls are often quite damaging to the reputations of companies whose products are recalled. As a result, some buyers are including provisions related to recall procedures in organic contracts.

  As a farmer, you may be concerned about the scope of the buyer's control over the recall process. For example, if the contract gives the buyer the right to control everything about the recall,

including any public statements to be made on the matter, your voice could be entirely silenced. That means if the buyer is inclined to blame your farm for the food safety issue, you will have contracted away your right to publicly dispute the buyer's claims. And if you decide to make a public statement in spite of the contract (in order to protect your farm's reputation), the buyer could sue you for the harm your statements might cause.

Additionally, the contract may require you to take all steps ordered by the buyer in case of a recall. These steps could be costly, or even unnecessary in your view, but if you agree to follow the buyer's orders in a recall situation, you will have agreed to take on whatever duties the buyer wants. Your idea of what should be done and a larger company's idea of what should be done may differ considerably.

That said, if the buyer insists on including language related to recall procedures in the organic contract, consider negotiating language such as, "In case of recall, Buyer and Seller agree to make best efforts to create a mutually acceptable recall strategy." This kind of broad language gives you more flexibility in case you and the buyer end up on opposing sides during a recall.

- *Good Agricultural Practices (GAPs)*

  The major institutionalized food safety certification program for farmers is the Good Agricultural Practices (GAP) audit program. The GAP program focuses on best agricultural practices to verify that farms selling fruits and vegetables are producing them in a safe manner. The program's goal is to minimize the risks of microbial food safety hazards by addressing the following categories: water, manure and municipal biosolids, worker health and hygiene, sanitary facilities, field sanitation, packing facility sanitation, transportation, and traceback. If the contract requires you to participate in the GAP program, be sure to obtain a copy of the program requirements and understand your obligations before signing the contract.

- *Compliance with state and local food safety laws*

  Organic contracts might require compliance with state and local food safety laws and regulations, including licensing requirements. Make sure you understand these requirements, and see pages 9–9 through 9–12 of this chapter for a discussion of the risks of contracts that incorporate laws.

- *Compliance with marketing agreements on food safety*

  Marketing agreements among buyers related to food safety have been implemented in at least two states. Moreover, the U.S. Department of Agriculture (USDA) has also proposed a national food safety-related marketing agreement, to be called the National Leafy Greens Marketing Agreement, which has not yet been put in place. Organizations that promote organic and sustainable farming are concerned that marketing agreements like these create a bias toward chemically intensive, environmentally damaging, mono-cultural farming practices and thus, in the name of food safety, promote conventional farming practices and penalize organic farmers.[3]

  USDA's national proposal is modeled after the California Leafy Greens Marketing Agreement. The California agreement was established in 2007 by a group of California leafy greens handlers in response to the September 2006 *E. coli* outbreak attributed to California spinach greens. The agreement promotes chemical fertilizers and makes it more difficult to use the non-synthetic, natural nutrient sources common in organic production. Additionally, the California agreement also provides a strong incentive for farmers to remove wildlife habitat bordering growing areas, in stark contrast to the federal organic standards, which require organic growers to promote biodiversity. The wildlife habitat destruction also impedes organic farmers' ability to provide habitat for the beneficial insects that are commonly a part of many organic farms' non-chemical pest management strategies.

  Although the current California agreement and the proposed USDA agreement are implemented at the buyer level and are not technically required for farmers, in practice farmers may find that the requirements work their way down the line to them through contract obligations. When farmers are unable to find a buyer who does not require through contract that the farmer satisfy the marketing agreement standards, those standards have essentially become farmer requirements.

  Still, farmers should be very hesitant to sign a contract with a buyer that is a party to the California Leafy Greens Marketing Agreement or any similar agreement in another state. The requirements of the marketing agreement are very likely to conflict with the farmer's OSP, potentially placing the farmer's organic certification in jeopardy.

- *Product liability insurance*

  As discussed in Chapter 4, pages 4–17 and 4–18, organic contracts may require farmers to obtain insurance. In the food safety context, the important type of insurance is product liability insurance. Even if you already have farm-related commercial liability insurance, check to see whether it includes product liability coverage. If not, talk with your insurer about whether you can tailor your policy to include product liability coverage or obtain a separate product liability policy. Be aware that a contract provision requiring product liability coverage probably will not be waived if you find that coverage is unexpectedly expensive or unavailable from your preferred insurance provider.

Does the contract address nanotechnology?

Nanotechnology is the process of manipulating matter on an atomic and molecular scale and deals with developing materials sized in the range of 1 to 100 nanometers. As one nanometer equals one one-billionth of a meter, these nanomaterials are obviously extremely small. Nanomaterials, which exist in computers and other electronics, textiles, cosmetics, chemicals, and food, are increasingly present in commercial materials. However, due to a lack of regulation in this area, it is nearly impossible to tell whether a particular item contains engineered nanomaterials.

Currently, there are no organic regulations governing the presence of nanomaterials in organic food or processing. In late 2010, however, the National Organic Standards Board (NOSB) recommended that the NOP create regulations prohibiting nanomaterials from organic production.[4] Concerns related to nanomaterial contamination of organic production involve all stages of production of an organic product, including growing, processing, and packaging. The most significant concern with respect to organic production is contamination from primary packaging and food contact surfaces. Although nanomaterials may be difficult to regulate, it is likely that the NOP will create regulations related to nanotechnology in the not-too-distant future.

Advisable to Delete Contract Language on Nanomaterials

Despite the absence of current regulation and the difficulties with detection of and protection against nanomaterials, it is possible that the organic contract could include language related to nanomaterials. If so, remember that simply following the NOP regulations will not be enough to ensure that your organic commodities remain nanotech-free. Nanotechnology can be found in fertilizer, pesticides, packaging, water, feed, and many other agricultural inputs. Most will not even be labeled as

containing nanomaterials. Consider how you would go about ensuring that the materials you use in organic production would not become contaminated with nanomaterials, and whether it would be cost-effective to do so. For the present, due to the difficulty of determining whether a particular material contains nanotechnology, it is advisable to delete any contract language requiring your organic farm products to remain free of nanomaterials. Alternatively, you could agree to use "best efforts" to avoid nanomaterials or agree to "not knowingly use" nanomaterials. Or, you could agree to comply with the NOP regulations as they relate to nanotechnology.

CHAPTER 9 — ENDNOTES

[1] 7 C.F.R § 205.2, "Organic" (2012).

[2] See generally, Mary P. Brakke, *et al*., *Organic Risk Management Guide* (Kristine M. Moncada and Craig C. Sheaffer, eds., Regents of the University of Minnesota, 2010), available at http://www.organicriskmanagement.umn.edu.

[3] National Organic Coalition, Media Release, *National Organic Coalition Disappointed Over USDA Decision to Move Forward With Leafy Greens Marketing Agreement*, April 26, 2011; see also, Shermain D. Hardesty and Yoko Kusunose, *Growers' Compliance Costs for the Leafy Greens Marketing Agreement and Other Food Safety Programs*, UC Small Farm Program Research Brief (University of California, September 2009), available at http://sfp.ucdavis.edu/files/143911.pdf.

[4] National Organic Standards Board, Formal Recommendation by the National Organic Standards Board (NOSB) to the National Organic Program (NOP), *Guidance Document -- Engineered Nanomaterials in Organic Production, Processing, and Packaging* (October 28, 2010), available at http://www.ams.usda.gov/AMSv1.0/getfile?dDocName=STELPRDC5087795.