

REDUCING YOUR BUSINESS
RISK

▶
**CONTRACTS
AND
AGREEMENTS**

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Any society that needs disclaimers has too many lawyers – Erik Pepke

- Information is provided for instructional and discussion purposes only and does not constitute legal advice
- Develop your own support team for your specific needs – an attorney, an accountant, your insurance agent

What liabilities?



Drafting a contract

Merry Christmas from your lawyer...

(But without any
assumption of liability
on our part)

Wishing you[^]

reasonably

a Merry Christmas
(and/or festive period)

and a happy ~~new year~~

for the avoidance
of any doubt

12 (Twelve)
months from
the date hereof.

Found at thefunniestpictures.com



Basic rules of contracting

- Whoever writes the contract benefits most
- Everything is negotiable
- Nothing is “usual” and one size does not fit all
- Do your due diligence before you sign anything
- Spot the red flags and trust your gut
- Run the “what if” scenarios

Contracts that must be in writing to be enforceable – the Statute of Frauds

- Lease of real property for over 1 year
- Contract affecting real property
- Rental of equipment if payments over \$1000
- Sale of goods over \$500

▶ If not required, then why a written contract?

- Contracting party amnesia
- Contracting party's creative rendition
- Enforceable terms
- In a dispute, what will the Judge or Jury do?

What is a bad contract?

- Little detail (you don't need a book, but everyone needs to understand the terms and conditions)
- Delays in payment (such as pay when paid, pay if paid)
- Lack of clear language as to how and when payment is expected
- Overly restrictive confidentiality provisions
- Give little authority to you to make decisions
- Shifting of risks to you (risks beyond your control, attorney fees and costs)
- Make it hard to seek relief (mandatory, binding arbitration in Glasgow by 3 arbiters chosen by some organization you have never heard of under rules no one knows, with no appeal)
- Confusing and conflicting provisions, poorly written, refers to attachments you don't have
- Signers without clear authority – multiple layers

When you outline your “what ifs”

- You will generally be required to fulfill the terms before you are paid
- Never assume breaking a contract will be excused even if by weather, drought, flood, fire, etc.
- Never assume you are released from obligations because of the actions of the other party

Critical issues in a contract

- The contract term – any early termination?
- Payment amounts are clear; timeliness of payment is clear
- Your obligations are spelled out
- Are there express or implied warranties? Maybe quality or quantity – what happens if not met?
- You are excused from timely delivery in the event of circumstances outside of your control
- Opportunity to cure
- What is the cost of substitute performance (cover)
- What happens if a breach?
- What exactly is your liability?

Biggest problem for producers is getting paid

- Due diligence before you sign – what is the financial condition of the person to be paying you? Bankruptcies, lawsuits, liens, reputation
- Contract includes payment penalties – late fees, interest, bad check, costs of collection including attorney fees
- When do you impose “cash on the barrel head”
- Build into contract ability to cease performance if payment becomes an issue

Second biggest problem is dispute over performance

- Are performance expectations clear? If certain size, color, quality, quantity, time of delivery, etc. is required, specify it
- If your product is rejected, how soon must that rejection be made and can you sell it elsewhere?



Make your record

- Stay in touch with the other party – keep record of communications
- Production records, delivery records
- Step up the degree of formality of communications

Resources

- **USDA General Contracting Brochure**
https://www.gipsa.usda.gov/psp/publication/AMS_contracting/contracting.pdf
- **Contracting in Agriculture, Making the Right Decision**
<http://sustainableagriculture.net/wp-content/uploads/2017/03/2016-Drake-FSA-NSAC-Production-Contracts-Guide.pdf>
- **National Agricultural Law Center**
<http://nationalaglawcenter.org/research-by-topic/production-contracts/>