

Chapter ATCP 101

VEGETABLE PROCUREMENT PRACTICES

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Note: Chapter Ag 101 was renumbered chapter ATCP 101 under s. 13.93 (2m) (b) 1., Stats., Register, April, 1993, No. 448.

Note: This chapter is adopted under authority of s. 100.20 (2), Stats., and is administered by the Wisconsin department of agriculture, trade and consumer protection. Violations of this chapter may be prosecuted under s. 100.20 (6), 100.26 (3) or (6), Stats. A person who suffers a monetary loss because of a violation of this chapter may sue the violator directly under s. 100.20 (5), Stats., and may recover twice the amount of the loss, together with costs and reasonable attorneys' fees.

ATCP 101.01 Definitions. In this chapter:

(1) "Abandoned acreage" means vegetable acreage, grown under a vegetable procurement contract, which the contractor declares to be abandoned under s. ATCP 101.04.

(2) "Contractor" means a person who buys or offers to buy vegetables in this state from a producer, or who contracts or offers to contract with a producer to grow vegetables in this state, regardless of whether the contractor is located in this state or is engaged in food processing. "Contractor" does not include any of the following:

(a) A person who procures vegetables primarily for unprocessed fresh market use and is licensed under the federal perishable agricultural commodities act, 7 USC 499.

(b) A restaurant or retail food establishment that procures vegetables solely for retail sale at the restaurant or retail food establishment.

(3) "Pool acreage" means vegetable acreage assigned to an unharvested acreage pool under s. ATCP 101.05.

(4) "Pool contributor" means any of the following:

(a) A producer who contributes, either directly or by means of a deduction or reduced compensation under a vegetable procurement contract, to an unharvested acreage pool.

(b) A contractor who contributes to an unharvested acreage pool as a producer under s. ATCP 101.05 (8).

(c) A contractor who makes a matching contribution to an unharvested acreage pool under s. ATCP 101.05 (7).

(5) "Pool contribution" or "contribution" means an amount of money contributed to an unharvested acreage pool by a pool contributor. A producer's "contribution" to an unharvested acreage pool includes any contribution in the form of a deduction or reduced compensation under a vegetable procurement contract.

(6) "Pool funds" means all contributions made by pool contributors as part of an unharvested acreage pool.

(7) "Pool participant" means a producer assigned to an unharvested acreage pool under s. ATCP 101.05. "Pool participant" includes a contractor who participates in an unharvested acreage pool as a producer under s. ATCP 101.05 (8).

(8) "Producer" means a person who produces and sells vegetables, or who grows vegetables under contract.

(9) "Suitable acreage" means all vegetable acreage grown under a vegetable procurement contract, other than acreage which the contractor declares to be abandoned under s. ATCP 101.04.

(10) "Unharvested acreage" means both of the following:

(a) Vegetable acreage which a contractor leaves unharvested for any reason, regardless of whether the vegetable crop is suitable or abandoned.

(b) Acreage used to produce a vegetable crop which is rejected by the contractor for any reason, regardless of whether the crop is suitable or abandoned.

(11) "Unharvested acreage pool" or "pool" means a contractual arrangement under s. ATCP 101.05 between a contractor and producers, under which producers make contributions in order to help finance a contractor's payments to other producers under s. ATCP 101.05 (4) (a) or (b).

(12) "Vegetable" means sweet corn, snap beans or peas that are grown or sold for use in food processing, whether or not they are actually processed as food.

(13) "Vegetable procurement contract" means an agreement between a contractor and a producer, under which the contractor buys vegetables from the producer or contracts with the producer to grow vegetables in this state.

History: Cr. Register, December, 1992, No. 444, eff. 1-1-93.

ATCP 101.02 Vegetable procurement contracts.

(1) **CONTRACT IN WRITING; COPY TO PRODUCER.** Every vegetable procurement contract shall be in writing, and shall include the name, address and telephone number of the contractor. The contractor shall provide a copy of the signed contract to the producer after the producer signs the contract.

(2) **PRODUCER'S RIGHT TO CANCEL.** A producer may cancel a vegetable procurement contract by mailing a written cancellation notice to the contractor within 72 hours after the producer receives a copy of the signed contract, or before a later cancellation deadline if a later deadline is specified in the contract. The producer's right to cancel, the method by which the producer may cancel, and the deadline for canceling the contract shall be clearly disclosed in every vegetable procurement contract.

(3) **CLEAR DISCLOSURE OF TERMS.** (a) Every vegetable procurement contract shall clearly and conspicuously disclose both of the following:

1. The amount which the contractor agrees to pay the producer for suitable acreage, including unharvested suitable acreage under s. ATCP 101.03.

2. The amount, if any, which the contractor agrees to pay the producer for abandoned acreage under s. ATCP 101.04. If the contractor offers no payment for abandoned acreage, that fact shall be clearly disclosed in the contract.

(b) If the amounts under par. (a) are variable, depending on crop yield, grade or other factors to be determined at the time of harvest, the contract shall clearly disclose the formula or method by which the amounts will be determined.

(c) The contract shall clearly disclose every charge or deduction which may affect the net amount paid to the producer under the contract.

Note: Sections ATCP 101.03 (2) (b), 101.04 (1) (b) and (c), (3) (b) 2., and 101.05 (1) (5) and (6) also include contract disclosure requirements.

(4) **UNHARVESTED ACREAGE POOL.** (a) If a vegetable procurement contract requires a producer to participate in an unharvested acreage pool, the contract shall clearly specify the terms and conditions of the pool, pursuant to s. ATCP 101.05.

(b) Except for pool contributions under ss. ATCP 101.03 (2), 101.04 (3) and 101.05, no vegetable procurement contract may

provide for any deduction or reduced payment to a producer because of a contractor's obligations to other producers.

(5) HARVEST RESPONSIBILITIES. Every vegetable procurement contract shall clearly specify whether the contractor or the producer is responsible for harvesting the vegetable crop. If the producer is responsible for harvest, the contract shall not state or imply that the contractor will provide harvest equipment or services unless the contractor is equipped to meet the reasonably foreseeable demand for harvest equipment and services on a timely basis.

(6) ARBITRATION OF DISPUTES. Under every vegetable procurement contract, the contractor shall agree to submit contract disputes to impartial arbitration at the request of the producer.

History: Cr. Register, December, 1992, No. 444, eff. 1-1-93.

ATCP 101.03 Unharvested suitable acreage.

(1) FULL PAYMENT REQUIRED. (a) *General.* If a contractor declines to harvest or accept delivery of suitable acreage grown under a vegetable procurement contract, the contractor shall pay the producer the full contract amount for the suitable acreage, as if the acreage had been harvested or accepted on a timely basis.

(b) *Suitable acreage left unharvested because of adverse field conditions.* If, because of adverse field conditions during the scheduled harvest period, a contractor is not able to harvest acreage which is otherwise suitable, the contractor shall pay for the unharvested acreage as suitable acreage under this section.

(2) CONTRIBUTION TO UNHARVESTED ACREAGE POOL. Subsection (1) does not prohibit the contractor from deducting the producer's contribution to an unharvested acreage pool under s. ATCP 101.05, provided that all of the following apply:

(a) *Equivalent contributions from all producers.* The producer's pool contribution, expressed as a percentage deduction from the gross amount due the producer for the unharvested suitable acreage, equals the percentage contribution on harvested acreage made by every producer of harvested acreage.

(b) *Contribution clearly disclosed.* The pool contribution requirement is clearly disclosed in the vegetable procurement contract, pursuant to s. ATCP 101.05.

(c) *Maximum contribution.* The pool contribution does not exceed the maximum contribution specified in the vegetable procurement contract under s. ATCP 101.05 (6).

(3) SERVICE CHARGES. When paying for unharvested suitable acreage under sub. (1), the contractor may deduct charges for seed, harvest, hauling, grading or similar supplies or services that would have been assessed against the producer had the producer's acreage been harvested. A contractor may not receive any pool funds for these services.

(4) ESTIMATING YIELD AND GRADE OF UNHARVESTED SUITABLE ACREAGE. (a) *General.* Except as provided under par. (b) or (c), if payment for suitable acreage is based on yield or grade, the contractor shall estimate the yield and grade of unharvested suitable acreage by means of field sampling under sub. (5).

(b) *Equivalent field sampling procedures.* Rather than estimating yield or grade according to the field sampling procedures under sub. (5), a contractor may estimate yield or grade according to equivalent field sampling procedures which are clearly specified in writing in the procurement contract.

(c) *Agreement on yield and grade.* If, because of adverse field conditions or because field harvest is impractical during the scheduled harvest period, a contractor is not able to harvest acreage which is otherwise suitable, the contractor and the producer may agree on the yield and grade of the unharvested acreage without field sampling under sub. (5), provided that all of the following apply:

1. The agreement is made in writing and signed by the parties during the scheduled harvest period, and a copy is provided to the producer.

2. The agreement clearly describes the field conditions deemed adverse or the reason why field harvest was deemed impractical.

3. Before the agreement is made, the contractor discloses to the producer in writing that the producer has a right to have the field sampled for yield and grade in compliance with this subsection. If a producer requests field sampling, the contractor shall sample the field in compliance with par. (a) or (b).

(5) FIELD SAMPLING PROCEDURE. (a) *General.* If a contractor is required to estimate the yield or grade of unharvested acreage under sub. (4) (a), the contractor shall estimate the yield or grade using the field sampling procedure under this subsection. Field samples used to estimate yield or grade shall be collected when the unharvested vegetables are at maturity, and shall be collected from areas which are reasonably representative of the field.

(b) *Number of samples.* Except as provided under par. (c), the number of samples collected under par. (a) shall be based on the size of the field as follows:

1. At least 3 samples from different areas shall be taken from a field which is less than 40 acres.

2. At least 5 samples from different areas shall be taken from a field which is 40 to 100 acres.

3. At least 7 samples from different areas shall be taken from a field which is larger than 100 acres.

(c) *Different crop or soil conditions within field; subdivision of field.* If significant differences of crop or soil conditions exist within a field, the field shall be divided so that crop and soil conditions are reasonably uniform within each subdivision. Each subdivision shall be treated as a separate field under par. (b).

(d) *Selecting sampling areas.* The samples collected under par. (b) or (c) shall be collected from sampling areas alternately selected by the contractor and the producer. After the contractor and the producer have each selected an equal number of sample areas, the contractor and the producer shall jointly select the last sample area.

(e) *Sample areas defined.* Each area sample under par. (d) shall consist of one of the following:

1. If the vegetable is a row crop such as sweet corn or snap beans, each sample area shall be not less than 15 linear feet of a row.

2. If vegetables, such as peas, are planted by either the drill or broadcast method, each sample area shall be a plot of not less than 25 square feet having dimensions of not less than 5 feet in length and width.

(f) *Sample weights.* Each sample collected under this subsection shall be individually weighed. The weights of the individual samples shall be added together to obtain a combined sample weight for the field, which shall be divided by the number of samples to determine an average sample weight. Vegetable samples shall be weighed according to the following procedures for the respective commodity:

1. Sweet corn shall be weighed after the ears are completely husked, and the stem and any excess tip are removed.

2. Snap beans shall be weighed after all beans in the sample are removed from the vines.

3. Sweet peas shall be weighed after all peas in the sample are removed from the pods.

(g) *Calculating yield per acre.* The yield per acre of unharvested vegetables shall be calculated by performing the following sequential operations:

1. Calculate the square footage of each sample area. For row crops, multiply the length of the row by the space between rows, measured in feet to 2 decimal places.

2. Determine the average square footage of all the sample areas.

3. Divide the square footage of one acre (43,560 sq. ft.) by the average square footage of the sample areas to determine the number of sampling units per acre.

4. Multiply the number of sampling units per acre by the average sample weight under par. (f) to determine the yield in pounds per acre.

5. Calculate the estimated yield for the unharvested field by multiplying the yield per acre by the number of acres in the field.

(h) *Documenting the yield estimate.* Every yield estimate under this section shall be documented in writing, and a copy shall be provided to the producer. The documentation shall include:

1. The name and address of the contractor.
2. The identity of the producer and the location of the field.
3. The date and time when the field was sampled and the yield estimate was made.
4. The size of the field, the number of samples collected, and the calculations used to estimate the yield. If sampling methods or yield estimation methods differ from those prescribed under this section, the documentation shall specify the methods used.
5. The signatures of the contractor and the producer, or their agents.

(i) *Grading samples.* If payment for unharvested vegetables is based on the quality or condition of the vegetables, the samples collected under this subsection shall be graded in compliance with ch. ATCP 155.

History: Cr. Register, December, 1992, No. 444, eff. 1-1-93.

ATCP 101.04 Abandoned acreage. (1) **DECLARATION THAT ACREAGE IS ABANDONED.** For payment purposes under s. ATCP 101.03, contracted vegetable acreage is considered suitable unless the contractor declares that the acreage is abandoned under this section. A contractor may declare that acreage is abandoned if any of the following apply:

(a) The vegetable crop is destroyed, or rendered clearly unsuitable for processing, by drought, flood, wind, hail, frost or other natural peril.

(b) The crop yield or grade, determined according to the procedure specified for unharvested suitable acreage under s. ATCP 101.03 (4), fails to meet the contractor's reasonable minimum standard for harvest as specified in the vegetable procurement contract.

(c) The crop is not suitable for processing because it contains illegal pesticide residues, or pesticide residues which exceed limits specified in the vegetable procurement contract.

Note: Pesticide residues are illegal if, for example, they exceed legal tolerances on the vegetable crop, or if they resulted from the use of a pesticide which is not registered or labeled for use on that vegetable crop.

(2) **FORM OF DECLARATION.** If a contractor declares that acreage is abandoned under sub. (1), the contractor shall make that declaration in writing to the producer. The contractor shall specify the basis for the declaration under sub. (1).

(3) **CONTRIBUTION TO UNHARVESTED ACREAGE POOL.** (a) Subject to par. (b), a contractor may require a producer of abandoned acreage to contribute to an unharvested acreage pool under s. ATCP 101.05, and may deduct the producer's contribution from the amount paid to the producer for the abandoned acreage.

(b) A contractor may not require a producer of abandoned acreage to contribute to an unharvested acreage pool unless all of the following apply:

1. The producer's pool contribution, expressed as a percentage deduction from the gross amount due the producer for the abandoned acreage, equals the percentage contribution made by every other producer of abandoned acreage.

2. The pool contribution requirement is clearly disclosed in the vegetable procurement contract, pursuant to s. ATCP 101.05.

3. The pool contribution does not exceed the maximum contribution specified in the vegetable procurement contract under s. ATCP 101.05 (6).

4. The pool contribution does not result in any net payment from the producer to the contractor.

(4) **NO NET CHARGE TO PRODUCER.** (a) If a contractor declares that acreage is abandoned under this section, the contractor may not require the producer to pay any supply or service charges, or make any pool contribution, which would result in a net payment from the producer to the contractor.

(b) Paragraph (a) does not limit charges for supplies and services which the producer was free to obtain from sources other than the contractor.

(5) **CONTRACTOR FAULT.** This section does not relieve a contractor from any contract claim which a producer may have against a contractor because of the contractor's failure to perform the contractor's obligations under the contract.

History: Cr. Register, December, 1992, No. 444, eff. 1-1-93.

ATCP 101.05 Unharvested acreage pool. A contractor may establish an unharvested acreage pool under this section. The unharvested acreage pool shall comply with all of the following requirements:

(1) **TERMS SPECIFIED IN CONTRACT.** In each vegetable procurement contract with a pool participant, the contractor shall clearly specify the terms and conditions of the pool, including terms related to producer contributions, contractor contributions, and the use of pool funds. The same terms and conditions shall apply to every producer who participates in the pool.

(2) **POOL COVERAGE.** Pool funds may be used only to pay for vegetable acreage contracted with pool participants. No pool may apply to more than one contract year. If a pool applies to more than one vegetable crop, the vegetable procurement contract shall clearly identify the crops included in the pool.

(3) **PRODUCERS AND ACREAGE ASSIGNED TO POOL.** (a) Pool participants and pool acreage shall be assigned to a specific pool when those participants sign vegetable procurement contracts for that acreage. Pool participants and pool acreage, once assigned to a pool, may not be reassigned to a different pool.

(b) If any pool participants are located outside this state, the vegetable procurement contract shall identify all of the states in which pool participants are located.

(4) **USE OF POOL FUNDS; GENERAL.** (a) A contractor may use pool funds to pay for unharvested suitable acreage or abandoned acreage.

(b) If, because of low crop yield or grade, a producer is entitled to a smaller contract payment for harvested acreage than if that harvested acreage had been abandoned, a contractor may use pool funds to pay the producer the difference between the harvested acreage payment and the higher contract guarantee for abandoned acreage.

(c) A contractor may not use pool funds for any purpose other than those specified under par. (a) or (b). Payments under pars. (a) and (b) are subject to the terms of the vegetable procurement contract.

(5) **PRODUCER CONTRIBUTIONS.** In every vegetable procurement contract with a pool participant, the contractor shall clearly specify both of the following:

(a) The circumstances under which the participant will be required to contribute to the pool, and the method by which contributions will be assessed.

(b) The amount of the participant's contribution to the pool, or the formula by which that contribution will be determined, subject to the maximum specified under sub. (6).

(6) **MAXIMUM PRODUCER CONTRIBUTION.** (a) In every vegetable procurement contract with a pool participant, the contractor

shall specify the participant's maximum potential contribution to the pool.

(b) The maximum contribution under par. (a) shall be stated as a maximum percentage deduction from the gross amount due the producer under the vegetable procurement contract. Producers of abandoned acreage may be subject to a different maximum contribution than producers of suitable acreage, provided that the different maximum contribution is clearly specified in the contract.

(c) No contractor may require a pool participant to contribute more than the applicable maximum amount specified under this subsection.

(7) CONTRACTOR TO MATCH PRODUCER CONTRIBUTIONS. The contractor shall contribute to the pool an amount which is not less than the total of all producer contributions to the pool.

(8) CONTRACTOR ACREAGE INCLUDED. (a) If, in any geographic area covered by a pool, a contractor grows the same vegetable crop on acreage owned or leased by the contractor, the contractor shall participate in the pool on the same basis as every other participating producer.

(b) If the contractor participates as a producer under par. (a), the contractor's pool contribution shall be treated as a producer contribution which the contractor shall also match with a separate contribution under sub. (7).

(c) If a contractor participates as a producer under par. (a), the contractor is eligible for payments from the pool on the same basis as every other participating producer.

(9) REFUNDS TO POOL CONTRIBUTORS. If the contractor collects more pool contributions than the contractor distributes to pool participants under sub. (4), the contractor shall refund all unused pool funds to pool contributors on a pro rata basis, based on the amount of each contributor's pool contribution. If the contractor refunds pool funds to producers under this subsection, the contractor shall include each producer's pro rata refund with the contractor's final payment to the producer under the vegetable procurement contract.

(10) INFORMATION TO PRODUCERS. When the contractor makes final payment to a pool participant under a vegetable procurement contract, the contractor shall provide all of the following information to the pool participant:

(a) The total amount that pool participants contributed to the pool. If the contractor participates as a producer under sub. (8), the contractor's total contribution as a producer shall be stated separately.

(b) The contractor's total contribution to the pool as a contractor under sub. (7).

(c) The total amount of pool funds paid to pool participants under sub. (4). If the contractor received pool funds as a producer under sub. (8) (c), the amount paid to the contractor shall be stated separately.

(d) The total number of suitable pool acres left unharvested, the number of pool participants who produced that unharvested suitable acreage, and the total amount of pool funds paid for unharvested suitable acreage. Instead of reporting the number of suitable pool acres left unharvested, the contractor may report that number as a percentage of total pool acres.

(e) The total number of pool acres that were abandoned, the number of pool participants who produced that abandoned acreage, and the total amount of pool funds paid for abandoned acreage. If some of the abandoned acres were not eligible for pool payments, the contractor shall also report the total number of eligible acres and producers. Instead of reporting the number of pool acres that were abandoned, or the number of abandoned acres that were eligible for pool payments, the contractor may report those numbers as percentages of total pool acres.

(f) The total number of harvested pool acres that were eligible for pool payments under sub. (4) (b), the number of pool partici-

pants who produced that eligible harvested acreage, and the total amount of pool funds paid under sub. (4) (b) for that eligible harvested acreage. Instead of reporting the number of pool acres that were eligible for pool payments under sub. (4) (b), the contractor may report that number as a percentage of total pool acres.

(g) The total amount of pool funds, if any, that the contractor refunded to pool contributors under sub. (9). If the contractor contributed as a producer under sub. (8), the amount refunded to the contractor shall be stated separately.

(11) RECORDS. (a) For each unharvested acreage pool, the contractor shall keep complete and accurate records related to each of the items under sub. (10).

(b) For each pool participant, the contractor shall keep accurate records of all of the following:

1. The participant's name and address.
2. The amount of each participant's pool acreage.
3. The participant's pool contribution, if any.
4. The amount of unharvested suitable acreage for which the participant received pool payments, and the amount of those payments.
5. The amount of abandoned acreage for which the participant received pool payments, and the amount of those payments.
6. The amount of acreage for which the participant received pool payments under sub. (4) (b), and the amount of those payments.

(c) If a contractor estimates the yield or grade of unharvested suitable acreage under s. ATCP 101.03 (4), the contractor shall keep complete and accurate records showing how the yield or grade was estimated in compliance with that subsection.

(12) RECORDS RETAINED; INSPECTION AND COPYING. A contractor shall retain the records under sub. (11) for at least 3 years, and shall make those records available to the department for inspection and copying upon request.

History: Cr. Register, December, 1992, No. 444, eff. 1-1-93.

ATCP 101.06 Prohibited contract provisions. No vegetable procurement contract may do any of the following:

(1) Require any producer to purchase seed, pesticide applications, harvest services, hauling services, or other supplies or services from the contractor if the charges for the supplies or services exceed the reasonable market value of those supplies or services.

(2) Relieve, or purport to relieve a contractor from liability for property damage or personal injury caused by the negligent acts or omissions of the contractor.

(3) Impose, or purport to impose liability on a producer for personal injury or property damage caused by the contractor.

History: Cr. Register, December, 1992, No. 444, eff. 1-1-93.

ATCP 101.07 Prohibited practices. No contractor may do any of the following:

(1) Fail to pay a producer according to the terms of a vegetable procurement contract.

(2) Knowingly misrepresent the terms of a vegetable procurement contract, the procedures used under the contract, or the services provided by the contractor under the contract, in order to induce a producer to sign a vegetable procurement contract.

(3) Conspire with other contractors to fix prices or restrain trade in the procurement of vegetables from producers.

(4) Fail or refuse to offer a vegetable procurement contract to a producer because the producer has done any of the following:

(a) Filed a complaint with the contractor or a government agency.

(b) Requested arbitration of a contract dispute.

(c) Filed suit alleging a violation of this chapter or ch. ATCP 155.

(d) Joined an association of producers, advised or attempted to organize producers, or participated in any discussion, meeting or action related to vegetable procurement or vegetable industry issues.

(e) Negotiated or attempted to enforce the terms of any vegetable procurement contract, or represented producer interests in any matter related to vegetable procurement or vegetable industry issues.

(f) Sought government action related to vegetable procurement, or testified or participated in any way in the development or implementation of laws related to vegetable procurement or

vegetable industry issues.

(5) Charge a producer for defective seed planted under a vegetable procurement contract if the seed supplier reimburses the contractor for the cost of that seed.

History: Cr. Register, December, 1992, No. 444, eff. 1-1-93.

ATCP 101.08 Rule review. Three years after the effective date of this chapter, the department shall submit a report to the board of agriculture, trade and consumer protection evaluating the rules under this chapter and the need for changes to those rules.

History: Cr. Register, December, 1992, No. 444, eff. 1-1-93.