

Chapter ATCP 98

FRUIT AND VEGETABLE CONTRACTORS; SECURITY REQUIREMENTS

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Note: This chapter is adopted under authority of s. 100.03 (17), Stats. A person who violates this chapter, or any order issued under this chapter, is subject to the penalties provided under s. 100.03 (22), Stats.

Subchapter I —
Definitions; Contractor Registration

ATCP 98.01 Definitions. In this chapter:

(1) "Affiliate" means any of the following persons or business entities that procures farm products for use by an operator:

(a) An officer, director, partner, major stockholder, employe or agent of the operator.

(b) A corporation or business entity which is owned, controlled or operated by any of the persons specified under sub. (a).

(2) "Asset" means anything of value owned, except as provided under s. ATCP 98.14.

(3) "Audited financial statement" means a financial statement on which an independent certified public accountant, or an independent public accountant holding a certificate of authority under ch. 442, Stats., has done both of the following:

(a) Expressed an opinion according to generally accepted accounting principles.

(b) Conducted an audit according to generally accepted auditing standards.

(4) "Balance sheet" means a statement of assets, liabilities and equity on a specific date.

(5) "Cash payment" means payment in the form of currency, certified check, money order or barter, or in the form of an advance money transfer arrangement with a bank that is evidenced in writing.

(6) "Compiled financial statement" means a financial statement that is compiled according to generally accepted accounting principles by an independent certified public accountant, or by a public accountant who holds a certificate of authority under ch. 442, Stats., but that is not reviewed or audited by the accountant.

(7) "Contractor" means a person who buys fruits or vegetables grown in this state from a producer, or who contracts with a producer to grow fruits or 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 fruits or 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 fruits or vegetables solely for retail sale at the restaurant or retail food establishment.

(8) "Cooperative pooling" means a cooperative marketing method under which a producer-owned cooperative or organization pays its producer-owners a prorated share of sales proceeds for the marketing year after a final accounting and deduction of marketing expenses.

(9) "Current assets" means cash and assets, including trade and investment items, that can be readily converted into cash in the ordinary course of business within one year from the date of the balance sheet, except as provided under s. ATCP 98.14.

(10) "Current liabilities" means those liabilities that are due and payable within one year from the date of the balance sheet.

(11) "Department" means the state of Wisconsin department of agriculture, trade and consumer protection.

(12) "Equity" means the excess of total assets over total liabilities.

(13) "Equity statement" means a report of change in equity from the beginning to the end of the accounting period applicable to the report.

(14) "Financial statement" means a financial statement that complies with s. ATCP 98.12.

(15) "Food processing" has the meaning specified under s. 97.29 (1) (g), Stats.

(16) "Food processing plant" has the meaning specified under s. 97.29 (1) (h), Stats.

(17) "Fruit or vegetable" means any fruit or vegetable that is grown or sold for use in food processing, whether or not the fruit or vegetable is actually processed as food. "Fruit or vegetable" includes sweet corn but does not include grain.

(18) "Income statement" means a report of the financial results of operations for the accounting period covered by the report.

(19) "Interim statement" means a financial statement prepared as of a date other than the end of a fiscal year.

(20) "Liability" means an obligation to pay money or other assets or to render a service to another person immediately or in the future.

(21) "Long-term liability" means debts due or payable more than one year from the date of the balance sheet.

(22) "Maximum liability to producers" means the largest aggregate amount of producer obligations owed by a contractor at any time during a registration year.

(23) "Operator" means a person licensed or required to be licensed under s. 97.29, Stats., to operate a food processing plant.

(24) "Payment on delivery" means a contractor's cash payment of producer obligations at the time specified under s. ATCP 98.10 (3).

(25) "Person" means a natural person, corporation, partnership, cooperative, or any other business association or entity.

(26) "Procurement contract" means an oral or written agreement between a contractor and a producer, under which the contractor buys fruits or vegetables grown in this state from the producer or contracts with the producer to grow fruits or vegetables in this state.

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

(28) "Producer claim" means a claim filed by a producer under s. ATCP 98.24 (1) seeking payment of a producer obligation.

(29) "Producer obligation" means a payment which a contractor owes to a producer under a procurement contract.

(30) "Registration certificate" means a registration certificate issued under s. 100.03 (2), Stats., and s. ATCP 98.02.

(31) "Registration year" means the period to which a registration certificate applies.

(32) "Reviewed financial statement" means a financial statement that is reviewed according to generally accepted accounting principles by an independent certified public accountant, or by a public accountant who holds a certificate of authority under ch. 442, Stats., but that is not audited by the accountant.

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(33) "Secretary" means the secretary of the department or the secretary's designee.

(34) "Statement of cash flows" means a report of cash receipts and cash payments from operating, investing, and financing activities, including an explanation of changes in cash and cash equivalents for the accounting period covered by the report.

(35) "Subsidiary" means a corporation or business entity that is owned, controlled or operated by an operator, and that procures fruits or vegetables for use by the operator.

(36) "Unharvested acreage" means fruit or vegetable acreage, subject to a procurement contract, which a contractor leaves unharvested for any reason.

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ATCP 98.02 Registration certificate; application and fees.

(1) REGISTRATION CERTIFICATE REQUIRED. (a) No person may operate as a contractor unless that person holds an annual registration certificate from the department. A registration certificate expires on March 31 annually and is not transferable.

Note: See s. 100.03, Stats. If the operator of a food processing plant procures fruits or vegetables from producers, the operator must obtain both a food processing plant license under s. 97.29, Stats., (see ch. ATCP 70) and a registration certificate under s. 100.03, Stats. (see this chapter).

(2) APPLICATION. An applicant for an annual registration certificate under sub. (1) shall submit an application in writing, on a form provided by the department. The application shall include any information reasonably required by the department for registration purposes, and shall include all of the following:

(a) The contractor's correct legal name and any trade name used by the contractor. If the contractor is a corporation or cooperative, the statement shall identify each officer of the corporation or cooperative. If the contractor is a partnership, the statement shall identify each partner.

(b) The contractor's mailing address and the name of a responsible person who may be contacted at that address.

(c) All of the fees required under sub. (3).

(d) The sworn and notarized statement required under sub. (4).

(e) If the contractor is applying for an initial registration certificate, either a year-end financial statement or, if the contractor has not previously engaged in business, an opening balance sheet. This paragraph does not apply if the contractor is exempt from filing financial statements under s. ATCP 98.12 (2).

(3) FEES. (a) *Registration fees.* A contractor who applies for an annual registration certificate under sub. (2) shall pay all of the following:

1. A basic fee of \$50.

2. A fee of one cent for each \$100 in total producer obligations reported under sub. (4) (a). The fee under this subdivision is not required if all graded fruits and vegetables which the contractor procures from producers are graded by the department under contract with the contractor.

3. A fee of 3 cents for each \$100 in total producer obligations reported under sub. (4) (a).

(b) *Surcharge for operating without a registration certificate.* 1. An applicant under sub. (2) shall pay a surcharge of \$500 if the department determines that, within 365 days prior to submitting the application, the applicant procured fruits or vegetables from producers without a registration certificate in violation of sub. (1).

2. An applicant required to pay a surcharge under subd. 1 shall also pay all fees, set forth in a statement from the department, that are still due for any registration year in which, according to the department, the applicant violated sub. (1).

3. Payment of the license fee surcharge and past fees under subds. 1 and 2 does not relieve the applicant of any other civil or criminal liability that results from the violation of sub. (1), but does not constitute evidence of any law violation.

(c) *Registration contingent on fee payment.* The department shall not grant an application under sub. (2) unless the applicant has paid all fees and surcharges, set forth in a statement from the department, that are due and payable by the applicant under this subsection. The department shall refund a fee paid under protest if, upon review, the department determines that the fee or surcharge is not due and payable under this subsection.

(4) **SWORN AND NOTARIZED STATEMENT.** An application under sub. (2) shall include a sworn and notarized statement, signed by the contractor or an officer of the contractor, which states all of the following:

(a) The contractor's total producer obligations, whether paid or unpaid, that accrued during the registration year immediately preceding the registration year for which application is made.

(b) The contractor's maximum liability to producers during the registration year immediately preceding the registration year for which application is made.

(c) The contractor's anticipated maximum liability to producers during the registration year for which application is made. If the contractor's anticipated maximum liability is zero because the contractor plans to make cash payment on delivery under every procurement contract or the contractor plans to procure all farm products from another contractor, the contractor shall so state. A contractor shall immediately notify the department in writing if, at any time during the registration year, the contractor has reason to believe that the contractor's maximum liability to producers will exceed the maximum liability previously anticipated and reported to the department.

(d) Whether, on the date of application, the contractor has paid all producer obligations that became due before that date.

(e) Whether the contractor and the contractor's affiliates and subsidiaries will collectively grow more than 10% of the acreage of any vegetable species grown or procured by the contractor during the registration year for which application is made.

Note: See s. 100.235 (3), Stats.

(f) Whether the contractor is a producer-owned cooperative or organization doing business on a cooperative pooling basis with its producer-owners and, if so, and whether the producer-owned cooperative or organization procures any fruits or vegetables from producers who are not its producer-owners.

(5) **ACTION GRANTING OR DENYING APPLICATION.** The department shall grant or deny an application under sub. (2) within 40 days after the department receives a complete application.

Note: See ss. ATCP 98.02 (3) (c) and 98.06 (1).

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

ATCP 98.04 Registration certificate; suspension or revocation. (1) **GENERAL.** The secretary may suspend or revoke a contractor's registration certificate for cause, including any violation of this chapter.

Note: See ch. ATCP 1 for procedure in suspension or revocation proceedings.

(2) **SUMMARY SUSPENSION.** The secretary may issue a summary order suspending a contractor's registration certificate without prior notice or hearing if the secretary determines that summary action is necessary to prevent clear and imminent harm to producers. A summary order under this subsection shall set forth the specific basis for the order.

Note: A person adversely affected by a summary suspension is entitled to a prompt informal hearing and a full evidentiary hearing upon request, as provided under s. ATCP 1.03 (3).

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

Subchapter II — Contractor Payments to Producers

ATCP 98.06 Timely payment required. (1) **GENERAL.** No contractor may fail to pay a producer obligation when due. Except as provided under sub. (2) or (3), the department shall not grant an application under s. ATCP 98.02 (2) unless, according to the contractor's sworn statement under s. ATCP 98.02 (4) (d), the contractor has paid all producer obligations that became due before the application date.

(2) **DISPUTED PRODUCER OBLIGATION.** If a contractor is unable to comply with sub. (1) solely because a producer obligation is disputed, the department may issue an annual registration certificate to the contractor if the contractor deposits the disputed amount in escrow with the department or a court, pending resolution of the dispute.

(3) **COOPERATIVE POOLING ORGANIZATIONS EXEMPT.** This section does not apply to a producer-owned cooperative or organization when doing business on a cooperative pooling basis with its producer-owners.

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ATCP 98.08 Payment deadlines. (1) **PAYMENT DATE IF NOT SPECIFIED IN WRITTEN CONTRACT.** Except as provided under s. ATCP 98.10, if a procurement contract does not specify a payment date in writing, the contractor shall pay the producer as follows:

(a) If a contractor harvests or accepts delivery of fruits or vegetables grown or delivered under the contract, the

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contractor shall pay the producer the full amount owed for those fruits or vegetables on or before the 15th day of the month immediately following the month in which the contractor harvests or accepts delivery of those fruits or vegetables, or by an earlier date agreed upon between the parties.

(b) If a contractor rejects fruits or vegetables tendered under the contract, or declines for any reason to harvest fruits or vegetables grown under the contract, the contractor shall pay the producer the full amount, if any, which the contractor owes under the contract for the rejected fruits or vegetables or the unharvested acreage. Unless the parties agree on an earlier payment date, the contractor shall pay the producer by the 15th day of the month immediately following the month in which the producer tenders the fruits or vegetables, or in which the contractor notifies the producer that the acreage will not be harvested.

Note: See ch. ATCP 101 related to unharvested vegetable acreage.

(2) **PAYMENT DATE SPECIFIED IN WRITTEN CONTRACT.** Except as provided under s. ATCP 98.10, if a procurement contract specifies a payment date in writing, the contractor shall pay the producer by that specified date. No contract may specify a payment date that violates sub. (3).

(3) **ANNUAL PAYMENT DEADLINE.** (a) Except as provided under par. (b) or (c), a contractor shall pay all producer obligations by January 31 of each registration year.

(b) A written procurement contract may specify a payment date after January 31 for fruits or vegetables delivered on or before December 31 if, before the contract is offered to producers, it is approved by a vote of producers who had procurement contracts with the contractor for the same type of fruit or vegetable in the preceding registration year. To obtain advance approval of a contract under this paragraph, a contractor shall give written notice to all producers who had procurement contracts with the contractor for the same type of fruit or vegetable in the preceding registration year. The notice shall include a copy of the proposed contract and shall announce a meeting at which producers will be asked to vote on the proposed contract. The notice shall also include a mail ballot by which a producer may cast his or her vote without attending the meeting. Voting shall be by secret ballot. The proposed contract shall be approved by a majority of the producers who vote on the proposed contract. Before offering the approved contract to producers, the contractor shall file a sworn statement with the department, on a form provided by the department, certifying the results of the balloting.

(c) If a producer tenders or delivers fruits or vegetables to a contractor after December 31 of any registration year, the contractor shall pay the producer the full amount owed for those fruits or vegetables by the 15th day of the month following the month in which the fruits or vegetables were tendered or delivered, or within 30 days after tender or delivery, whichever occurs later.

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

ATCP 98.10 Payment on delivery. (1) **GENERAL REQUIREMENT.** A contractor shall make payment on delivery to all producers, as provided under sub. (3), if any of the following applies:

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(a) The contractor does not meet the minimum financial standards under s. ATCP 98.16, and has not filed security with the department under s. ATCP 98.18.

(b) The secretary orders the contractor to make payment on delivery, pursuant to sub. (2).

(c) The contractor stated, in the sworn and notarized statement under s. ATCP 98.02 (4) (c), that the contractor would make payment on delivery to all producers.

(2) **FAILURE TO FILE SECURITY; SUMMARY ORDER REQUIRING PAYMENT ON DELIVERY.** If a contractor fails to file the full amount of security required by the department under s. ATCP 98.18 (5) by the deadline date which the department specifies, the secretary may, without prior notice or hearing, issue a summary order requiring the contractor to make payment on delivery under every procurement contract. The summary order shall set forth the specific basis for the order.

Note: A person adversely affected by a summary order under sub. (2) is entitled to a prompt informal hearing and a full evidentiary hearing upon request, as provided under s. ATCP 1.03 (3).

(3) **PAYMENT ON DELIVERY; WHAT CONSTITUTES.** If a contractor is required to make payment on delivery under sub. (1), the contractor shall pay producers as follows:

(a) If the contractor harvests or accepts delivery of fruits or vegetables grown or delivered under a procurement contract, and the fruits or vegetables will not be graded, the contractor shall make full cash payment for those fruits and vegetables when the contractor harvests or accepts delivery of those fruits or vegetables.

(b) If the contractor harvests or accepts delivery of fruits or vegetables grown or delivered under a procurement contract, and the fruits or vegetables will be graded, the contractor shall make full cash payment for those fruits and vegetables within 72 hours after the contractor harvests or accepts delivery of those fruits or vegetables.

(c) If the contractor rejects delivery of fruits or vegetables which the producer tenders under the contract, or notifies the producer that contract acreage will not be harvested for any reason, the contractor shall pay the producer the full amount, if any, which the contractor owes the producer under the contract for the rejected fruits or vegetables or the unharvested acreage. If payment is owed, the contractor shall make full cash payment when the producer tenders the fruits or vegetables or the contractor notifies the producer that the acreage will not be harvested.

Note: See ch. ATCP 101 related to unharvested vegetable acreage. If a contractor is required to make payment "on delivery" under this section, that contractor may not use any unharvested acreage pool that provides for delayed pool accounting, payment or refunds to pool contributors.

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

Subchapter III — Financial Standards and Security

ATCP 98.12 Financial statements. (1) **YEAR-END FINANCIAL STATEMENT.** (a) Except as provided under sub. (2), every contractor shall file a year-end financial statement with the department for each of the contractor's fiscal years. A year-end financial statement shall be filed, for

each fiscal year, by the 15th day of the fourth month following the close of that fiscal year.

(b) A year-end financial statement under par. (a) shall be an audited financial statement, except that if a contractor purchases less than \$250,000 of fruits and vegetables from producers each year, the contractor may file a compiled or reviewed financial statement. A compiled or reviewed financial statement shall contain a notarized statement, signed and sworn by the contractor or an officer of the contractor, stating that the financial statement is correct.

(2) **EXEMPTIONS.** Subsection (1) does not apply to any of the following:

(a) A contractor who makes payment on delivery under all procurement contracts, and who submits a sworn and notarized statement to that effect under s. ATCP 98.02 (4) (c).

(b) A contractor who files security with the department under s. ATCP 98.18.

(c) A producer-owned cooperative or organization that procures fruits and vegetables solely on a cooperative pooling basis from its producer-owners, and that submits a sworn and notarized statement to that effect under s. ATCP 98.02 (4) (f).

(3) **SUPPLEMENTARY AND INTERIM FINANCIAL STATEMENTS.** The department may, at any time, require a contractor to file supplementary or interim financial statements containing information the department specifies. A supplementary or interim financial statement shall contain a notarized statement, signed and sworn by the contractor or an officer of the contractor, stating that the financial statement is correct. A supplementary or interim financial statement need not be a compiled, reviewed or audited financial statement, except as required by the department.

(4) **FINANCIAL STATEMENTS; ACCOUNTING PRINCIPLES.** Every compiled, reviewed or audited financial statement shall be prepared according to generally accepted accounting principles and this chapter.

(5) **FINANCIAL STATEMENT CONTENTS; GENERAL.** (a) Except as provided under par. (b), every year-end financial statement under sub. (1) shall consist of a balance sheet, income statement, equity statement, statement of cash flows, notes to those statements, and any other information required by the department.

(b) A contractor not previously engaged in business may file an initial financial statement consisting of an opening balance sheet and notes to the balance sheet. Thereafter, the contractor's year-end financial statements shall comply with par. (a).

(6) **BALANCE SHEET; CLASSIFICATION OF ASSETS.** In a contractor's balance sheet, assets shall be classified in the following categories, or in other categories specifically described in the balance sheet:

(a) Current assets including cash, marketable securities identified in the balance sheet, notes and accounts receivable, inventories, prepaid items and other current assets specifically identified in the balance sheet. The balance sheet shall identify receivables and inventories according

to subs. (8) and (9). Marketable securities and other short-term investments shall be valued at cost or market value, whichever is lower.

(b) Long-term investments.

(c) Fixed assets, including property, plant and equipment, identified according to sub. (11).

(d) Intangible assets.

(e) Other assets specifically described in the balance sheet.

(7) **BALANCE SHEET; CLASSIFICATION OF LIABILITIES.** In a contractor's balance sheet, liabilities shall be classified in the following categories:

(a) Current liabilities, including producer obligations and other current liabilities, identified according to sub. (12).

(b) Long-term liabilities, identified according to sub. (14).

(8) **NOTES AND ACCOUNTS RECEIVABLE.** (a) In a contractor's financial statement, notes and accounts receivable arising in the ordinary course of trade shall be identified separately from notes and receivables which do not arise in the ordinary course of trade. A financial statement shall describe any note or account receivable representing 15% or more of all notes or accounts receivable, respectively. The description of that note or account receivable shall indicate the name of the person from whom payment is receivable and the amount receivable.

(b) A contractor's financial statement shall specifically identify and explain the following notes and accounts receivable:

1. Notes and accounts receivable from officers, directors, partners, employees or stockholders, or from members of their families, other than trade accounts arising in the ordinary course of trade.

2. Notes and accounts receivable from parent organizations, subsidiaries or affiliates, including trade accounts arising in the ordinary course of trade.

(c) A contractor's financial statement shall include an aging summary of all notes and accounts receivable.

(d) A contractor shall maintain reasonable allowances for doubtful or uncollectible items and shall identify those allowances in the contractor's financial statements.

(9) **INVENTORY.** A contractor's financial statement shall identify inventories of farm products manufactured and held for sale separately from other classes of inventory, such as materials and supplies. Inventories not in marketable or salable condition are not current assets. Financial statements shall describe the basis on which inventory values are determined.

(10) **FIXED ASSETS.** A contractor's financial statement shall identify fixed assets, including property, plant and equipment, according to each major class of property included. The contractor shall report all property, plant and equipment at cost less depreciation. A year-end financial statement shall identify changes in fixed asset values resulting from the acquisition, disposal or depreciation of fixed assets.

(11) **PERSONAL ASSETS NOT INCLUDED.** In a contractor's financial statement, the contractor may not claim as assets any personal assets that are exempt from execution or attachment by creditors.

(12) **CURRENT LIABILITIES.** (a) A contractor's financial statement shall show current liabilities separately from long-term liabilities. Current liabilities shall include the current portion of all long-term obligations as well as any other items of a current nature. The financial statement shall set forth current liabilities, including all notes and accounts payable, deferred income and accrued expenses, in sufficient detail that the specific nature of the liability and the amount owed can be readily determined.

(b) A contractor's financial statement shall show fruit and vegetable accounts separate from other trade accounts and shall identify amounts payable to producers and their assignees.

(c) A contractor's financial statement shall detail each trade account representing 15% or more of all trade accounts, showing for each of those accounts the name of each trade creditor and the amount owed.

(d) A contractor's financial statement shall specifically identify the current portion of all notes and mortgages payable. The financial statement shall separately identify notes and mortgages payable to officers, directors, employees or stockholders, or to members of their families, as well as to parent, subsidiary or affiliated organizations.

(13) **LONG-TERM LIABILITIES.** A contractor's financial statement shall fully describe all notes, mortgages or other long-term liabilities, including the nature of the liability, the amount owed, and the terms of payment.

(14) **GENERAL NOTES TO FINANCIAL STATEMENTS.** A contractor's financial statement shall include the following information, if material:

(a) The amount and a brief description of any assets mortgaged, pledged or subject to lien.

(b) Defaults in payment of any obligations.

(c) A brief statement as to contingent liabilities.

(d) A statement of judgments, suits, liens or claims pending against the contractor.

(e) A statement indicating whether the contractor has acted as surety, bondsman or accommodation party on notes or obligations of another.

(f) A description of any changes in accounting principles used that would affect comparability of the contractor's financial statement with prior financial statements.

(g) A statement as to whether the contractor's books and records are adequate for purposes of providing dependable financial statements.

(h) Disclosure of any deceptive manipulation of accounts, including temporary funding of current liabilities to effect "window dressing."

(i) Any other facts or circumstances that may affect the reliability of the financial statement, the financial liquid-

ity of the contractor, or the contractor's ability to pay producers.

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ATCP 98.14 Assets excluded from financial standard calculations. The department shall exclude the following assets when it calculates whether a contractor complies with the minimum financial standards under s. ATCP 98.16:

(1) Nontrade notes and accounts receivable from officers, directors, employees, partners or stockholders, or from members of their families.

(2) Notes and accounts receivable from parent organizations, subsidiaries or affiliates unless the department finds that the current financial position of the organization, subsidiary or affiliate justifies the inclusion of these assets.

(3) Notes receivable that are more than one year in arrears, and accounts receivable outstanding for more than one year, unless the contractor has established an offsetting reserve for uncollectible notes and accounts receivable.

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

ATCP 98.16 Minimum financial standards. (1) REQUIREMENT. Except as provided under sub. (3), a contractor shall meet both the following financial standards:

(a) The contractor's ratio of current assets to current liabilities shall be at least 1.20 to 1.00.

(b) The contractor's total assets shall exceed total liabilities.

Note: These minimum financial standards are required by s. 100.03, Stats.

(2) **NOTIFICATION OF CHANGES.** A contractor required to meet the financial standards under sub. (1) shall immediately notify the department if the contractor knows or has reason to know that any of the financial standards under sub. (1) is no longer being met.

(3) **EXEMPTIONS.** A contractor is not required to meet the financial standards under sub. (1) if any of the following applies:

(a) The contractor files security with the department under s. ATCP 98.18.

(b) The contractor makes payment on delivery under all procurement contracts, and submits a sworn and notarized statement to that effect under s. ATCP 98.02 (4) (c).

(c) The contractor is a producer-owner cooperative or organization doing business solely on a cooperative pooling basis with its producer owners, and submits a sworn and notarized statement to that effect under s. ATCP 98.02 (4) (f).

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

ATCP 98.18 Security. (1) REQUIREMENT. A contractor shall file security with the department under this section, or enter into a food processing plant trusteeship under s. ATCP 98.20, unless one or more of the following apply:

(a) The contractor meets the minimum financial standards under s. ATCP 98.16.

(b) The contractor makes payment on delivery under all procurement contracts, and submits a sworn and notarized statement to that effect under s. ATCP 98.02 (4) (c).

(c) The contractor is a producer-owned cooperative or organization doing business solely on a cooperative pooling basis with its producer owners, and submits a sworn and notarized statement to that effect under s. ATCP 98.02 (4) (f).

(2) FORM OF SECURITY. Security filed with the department under this section is subject to approval by the department. Except as provided under s. ATCP 98.20, security shall be in one or more of the following forms:

(a) A continuous surety bond that is all of the following:

1. Made payable to the department for the benefit of producers.
2. Endorsed by a surety company authorized to do business in this state.
3. In a form approved by the department containing all of the terms and conditions required by the department.
4. Continuing, and not subject to cancellation until after the date specified for payment of producer obligations under s. ATCP 98.08.

(b) Cash or negotiable securities.

(c) Stocks, bonds or other marketable securities at current market value.

(d) Irrevocable bank letters of credit that are all of the following:

1. Issued for a term extending at least six months beyond the date on which the contractor is required to have paid all producer obligations in full. The department may, at the request of a contractor, release a letter of credit before the end of its term if the department is satisfied that the contractor has paid all of the producer obligations in full.

2. Made payable to the department for the benefit of producers.

3. In a form approved by the department, written on bank letterhead and containing all the terms and conditions required by the department.

4. Continuing, and subject to nonrenewal by the issuing bank only upon 90 days prior written notice to the department served in person or by certified mail. If a contractor does not file satisfactory security to replace a letter of credit at least 31 days before that letter of credit expires, the department shall issue a summary order under s. ATCP 98.04 (2) suspending the contractor's registration certificate.

(e) Personal surety bonds or other third party guarantees that are supported by security under par. (b) or (c).

(3) DEPARTMENT CUSTODY OF SECURITY. Except as provided under s. ATCP 98.20, the department or the department's agent shall maintain custody of all security filed by a contractor under this section. Security shall be payable to and held by the department for the benefit of producers.

(4) AMOUNT OF SECURITY. Except as provided under s. ATCP 98.20, security under this section shall be in an amount equal to at least 75% of the contractor's maximum liability to producers as stated by the contractor under s. ATCP 98.02 (4) (c).

(5) DEMANDS FOR SECURITY. (a) The department may require a contractor to provide security at any time if any of the following occurs:

1. The contractor no longer meets the minimum financial standards under s. ATCP 98.16.

2. The department receives notice of cancellation of a surety bond under sub. (2) (a), or the nonrenewal of a letter of credit under sub. (2) (d).

3. Security currently filed by the contractor falls below the amount required under sub. (4) for any reason, including a depreciation in the value of the security or an increase in the contractor's maximum liability to producers.

4. The contractor fails to provide relevant information requested by the department or required by this chapter.

(b) If the department requires a contractor to provide security under par. (a), it shall issue a notice to the contractor indicating why security is required, the amount of security required, and the deadline for filing security. The security filing deadline shall not be more than 30 days after the date on which the department issues the demand for security. The department may extend the security filing deadline for up to 30 more days for cause. If the department extends the deadline, it may require the contractor to file an alternative form of security, other than a form of security specified under sub. (2), in the interim. The department may reject alternative forms of security it finds unacceptable.

(c) If a contractor fails to file security by the final deadline date specified by the department under par. (b), the contractor shall, within 5 days after the deadline date, notify all producers with whom the contractor has a procurement contract that the contractor has failed to file security in response to the department's demand. If the department finds that the contractor has failed to notify all producers under this paragraph, or has notified producers incorrectly, the department shall promptly notify all known producers of the operator's failure to file security.

(6) RELEASE OF SECURITY. The department may, upon request, release security filed under this section only if one of the following occurs:

(a) The contractor achieves and maintains for 2 consecutive registration years the minimum financial standards under s. ATCP 98.16.

(b) The contractor demonstrates to the department's satisfaction that the amount of security on file exceeds the amount required under sub. (4) because of a substantial reduction in maximum liability to producers, a substantial appreciation in the value of the security, or other reasons.

(c) The contractor files alternative security of equivalent value.

(d) The contractor is no longer in business and certifies, to the department's satisfaction, that the contractor has paid all producer obligations in full.

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

ATCP 98.20 Food processing plant trusteeship. (1) **ALTERNATIVE TO FILING SECURITY.** Instead of filing security in a form specified under s. ATCP 98.18 (2), a contractor who operates a food processing plant licensed under s. 97.29, Stats., may establish a food processing plant trusteeship under this section. Under the trusteeship, the contractor shall set aside, in trust for producers, processed fruits or vegetables constituting the equivalent of not less than 30% of the raw fruits and vegetables received by the contractor under procurement contracts in each registration year. The processed fruits and vegetables set aside by the contractor, and all proceeds and accounts receivable from the sale or disposition of those fruits or vegetables, shall be held in trust for the payment of the contractor's producer obligations.

(2) **TRUST AGREEMENT.** A trusteeship under sub. (1) shall be created by a written trust agreement filed with the department. The trust agreement shall be prepared in a form prescribed by the department, and shall be signed by the contractor and an independent trustee approved by the department under sub. (3). The trust agreement shall specify all of the following:

(a) The identity and amount of processed fruits and vegetables set aside in trust for producers under sub. (1), the locations at which those processed fruits and vegetables are kept, and other terms and conditions of the trusteeship under sub. (1).

(b) That a field warehouse keeper licensed under ch. 99, Stats., shall exercise custody over the fruits and vegetables set aside in trust for producers under sub. (1). The field warehouse keeper shall be identified in the trust agreement and shall sign the agreement.

(bm) That none of the processed fruits and vegetables set aside in trust for producers may be sold or distributed by the contractor unless the trustee specifically authorizes the sale or distribution in writing.

(c) That the trustee may not authorize the sale or distribution of any processed fruits or vegetables held in trust unless the contractor first pays producers an amount equivalent to the value of those processed fruits and vegetables. The contractor may pay the producers directly, or may pay the trustee for the benefit of producers. Payments shall be allocated among all producers on a pro rata basis, based on the amount of the contractor's obligation to each producer.

(d) That the contractor agrees to pay all expenses of the trust.

(e) That the trustee is granted a first priority security interest in the processed fruits and vegetables set aside in trust, and in the proceeds and accounts receivable from the sale or disposition of those processed fruits and vegetables. The trustee shall perfect the security interest by filing according to ch. 409, Stats.

(3) **TRUSTEE.** A trust agreement under sub. (2) shall designate an independent trustee, approved by the department, who is responsible for administering the trust.

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teeship on behalf of producers. The trustee shall meet all of the following requirements:

(a) The trustee shall not be an employe, director, officer or agent of the contractor, or of any subsidiary or affiliate of the contractor.

(b) The trustee shall secure and file with the department a performance bond which secures the trustee's faithful performance of his or her obligations under the trust agreement. The bond shall be written by an insurer authorized to operate a surety business in this state, and shall be payable to the department for the benefit of producers. The bond shall be issued in a form prescribed by the department, in an amount not less than 75% of the contractor's maximum liability to producers.

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

ATCP 98.22 Notice to producer; financial information. (1) **NOTICE TO ACCOMPANY PROCUREMENT CONTRACT.** Except as provided under sub. (3), whenever a contractor offers a producer a procurement contract, the contractor shall notify the producer of the basis on which the contractor is registered with the department under this chapter. The contractor shall give the notice in writing as part of the procurement contract, or in a separate notice attached to the procurement contract. The notice shall be clear and conspicuous, and shall comply with sub. (2). The contractor shall file a copy of the notice with the department before issuing the notice to producers.

(2) **CONTENTS OF NOTICE.** The notice under sub. (1) shall bear the conspicuous title "NOTICE TO PRODUCERS." The notice shall include the following information as applicable:

(a) Every notice under sub. (1) shall contain the following verbatim statement conspicuously printed under the title:

"Under Wisconsin law, if a contractor procures fruits or vegetables from producers for use in processing, the contractor must be registered with the Wisconsin Department of Agriculture, Trade and Consumer Protection, and must demonstrate a reasonable degree of financial responsibility. The law does not guarantee that contractors will pay producers for their fruits or vegetables. Every producer has some responsibility for determining the credit worthiness of the contractor for whom the producer grows fruits or vegetables. To qualify for registration, a contractor must do at least one of the following: (1) pay cash on delivery for all fruits and vegetables; (2) file financial statements with the department showing that the contractor meets certain minimum financial standards; (3) file security with the department equal to at least 75% of the contractor's anticipated maximum liability to producers; or (4) set aside part of the contractor's processed inventory in trust for producers."

(b) If a contractor is required, under s. ATCP 98.10 (1), to pay cash on delivery for all fruits and vegetables, the notice under sub. (1) shall contain the following statement in addition to the statement under par. (a):

"(Name of contractor) is currently required, as a condition of registration, to pay cash on delivery for

all fruits or vegetables which we procure from producers. This also applies to any amounts owed for unharvested contract acreage. (See s. ATCP 98.10, Wis. Adm. Code.)"

(c) If a contractor is licensed on the basis of the contractor's financial statement, the notice under sub. (1) shall contain the following statement in addition to the statement under par. (a):

"(Name of contractor) is currently registered on the basis of its financial statement. Our most recent year-end financial statement meets the following minimum financial standards: (1) a current ratio of at least 1.20 to 1.00; and (2) total assets in excess of total liabilities."

(d) If a contractor has filed security with the department under s. ATCP 98.18 because the contractor has not filed a financial statement under s. ATCP 98.12, the notice under sub. (1) shall contain the following statement in addition to the statement under par. (a):

"(Name of contractor) has filed security with the department to secure payments to its producers instead of filing financial statements with the department. The amount of security is equal to at least 75% of the amount which we expect to owe producers at any time during the coming year."

(e) If a contractor has filed security with the department under s. ATCP 98.18 because the contractor's financial statement does not meet the minimum financial standards under s. ATCP 98.16, the notice under sub. (1) shall contain the following statement in addition to the statement under par. (a):

"(Name of contractor) has filed security with the department to secure payments to its producers because our financial statement does not meet minimum standards. The amount of the security is equal to at least 75% of the maximum amount which we expect to owe producers at any time during the coming year."

(f) If a contractor is covered by a food processing plant trusteeship under s. ATCP 98.20, the notice under sub. (1) shall contain the following statement in addition to the statement under par. (a):

"(Name of contractor) is currently covered by a food processing plant trusteeship under s. ATCP 98.20, Wis. Adm. Code. Under a trust agreement filed with the department, processed fruits and vegetables representing at least 30% of the raw fruits and vegetables packed are set aside for the benefit of producers. None of these processed fruits or vegetables may be sold without authorization by an independent trustee. The trustee may authorize sales only after we have paid producers an amount equal to the value of the processed fruits or vegetables released for sale."

(3) **EXEMPTION.** This section does not apply to a producer-owned cooperative or organization when that cooperative or organization procures fruits and vegetables on a cooperative pooling basis from its producer-owners.

History: Cr. Register, June, 1991, No. 462, eff. 7-1-91.

Subchapter IV --- Collecting Producer Claims

ATCP 98.24 Producer claims; default proceedings. (1) FILING CLAIMS. If a producer claims that a contractor has failed to pay a producer obligation when due, the producer may file a written claim with the department. Upon receipt of a producer claim, or other evidence of default on the part of a contractor, the department may initiate a default proceeding under this section. Before initiating a default proceeding, the department may inspect the contractor's records under s. ATCP 98.30, and may conduct a preliminary investigation under s. 93.16, Stats.

(2) **INITIATING DEFAULT PROCEEDINGS.** To initiate a default proceeding, the department shall issue an order requiring all interested producers to file verified proofs of claim with the department before a specified date or be barred from participating in any recovery obtained by the department. Notice of the order shall be published as follows:

(a) By posting a copy of the order in a prominent location at each place of business in this state operated by the contractor.

(b) By mailing a copy of the order to the contractor and to the trustee or surety, if any.

(c) By publishing the contents of the order as a class 3 notice under ch. 985, Stats. The date of the last insertion of the class 3 notice under ch. 985, Stats., shall be not less than 30 days before the deadline date for filing claims.

(d) If, based on the contractor's records or other information, the department obtains the names and addresses of other producers who appear to have an unpaid claim against the contractor, by mailing a copy of the order or equivalent notice to each of those producers. In its notice, the department may indicate the amount of the producer's apparent claim and ask the producer to verify or correct the claim on or before the claim filing deadline.

(e) By any additional method which the department considers necessary.

Note: See also s. ATCP 1.08.

(3) **AUDIT; PROPOSED ORDER.** If the department initiates a default proceeding, the department shall audit producer claims filed with the department and shall issue a proposed order allowing or disallowing claims. The proposed order shall be based on proposed finding of facts and conclusions of law which shall accompany the proposed order. The department shall mail a copy of the proposed order to the contractor, to the trustee or surety, if any, and to every producer who filed a timely producer claim in the proceeding.

(4) **UNTIMELY CLAIMS DISALLOWED.** (a) The department shall disallow a producer claim filed after the claim filing deadline specified under sub. (2) unless the department waives the claim filing deadline for good cause shown.

(b) The department shall disallow a claim for any payment that was due the producer more than 60 days before the date on which the department received the first written default notice under sub. (1).

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(5) **NOTICE AND HEARING.** The department shall hold a public hearing on its proposed order under sub. (3). A notice of hearing shall be issued to each person who is required to receive a copy of the proposed order under sub. (3). The notice of hearing shall comply with s. 227.44, Stats. The notice may require affected parties to file objections to the proposed order, if any, in writing before the date of hearing. The hearing examiner may hold a prehearing conference before the hearing and may reschedule or continue the hearing as necessary. The hearing and related proceedings shall be conducted under ch. 227, Stats., and ch. ATCP 1.

(6) **FINAL ORDER AFTER HEARING.** Before issuing the final decision and order, the department shall follow the procedures prescribed under s. 227.46, Stats., except that if after the hearing under sub. (5) there are no objections to the proposed order, the department may adopt the proposed order as a final decision and order of the department, without further notice or hearing.

(7) **INTEREST ON CLAIMS.** (a) If the department's proposed or final order allows a producer claim, the order shall require the contractor to pay interest on the claim. The interest rate shall be the rate awarded by Wisconsin courts for interest on verdicts, as provided under s. 814.04 (4), Stats.

(b) A contractor shall pay interest on the full principal amount of an allowed claim, at the rate specified under par. (a), for the period beginning with the contractor's failure to pay the producer obligation when first due and ending with the contractor's full payment of the allowed claim. If a contractor does not pay the full allowed claim including interest within the time period specified in the department's final order allowing producer claims, interest shall continue to accrue on the balance of the unpaid claim.

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

ATCP 98.26 Payment of secured claims. If the department issues a final order allowing producer claims under s. ATCP 98.24, the department may convert any security it holds under s. ATCP 98.18 and apply the proceeds of that security to pay the allowed claims. The department shall distribute available funds to the producer claimants according to the final order allowing claims, on a proportionate basis, according to the amount of each producer's allowed claim. If funds exceed allowed claims, the excess shall be returned to the person who filed the security with the department.

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

ATCP 98.28 Collecting producer claims. (1) The department may, on behalf of producers, demand and receive payment of claims allowed under s. ATCP 98.24 or commence an action in court to recover allowed claims. Any amounts recovered by the department shall be distributed to represented producer claimants on a proportionate basis, according to the amount of each producer's allowed claim.

(2) The department may settle any producer claim with consent of the producer and may decline to represent a producer who does not agree to settlement recommended by the department.

Note: This subsection does not prohibit any producer from proceeding independently under s. 100.03 (12) or (20), Stats., to recover an unpaid claim.

(3) The department or any producer may demand payment of an allowed claim under s. 100.03 (12), Stats.

Note: If a contractor fails to pay an allowed claim within 30 days after the department or any producer files a demand for payment under s. 100.03 (12), Stats., the department or producer may file a copy of the department's final order allowing claims with the clerk of circuit court in any county of this state. The clerk must then docket the department's order as a judgment, and the docketed order becomes a judgment lien against the contractor's real property in that county.

(4) A producer who sustains a monetary loss because of a violation of s. 100.03, Stats., including a contractor's failure to pay a producer obligation when due, may bring a court action under s. 100.03 (20) Stats., to recover the amount of the producer's proven damages, together with costs and reasonable attorney fees.

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

Subchapter V —

Contractor Records; Prohibited Practices

ATCP 98.30 Records; inspection by department. A contractor shall keep copies of all written procurement contracts and a current record of all producer obligations and payments to producers. Records and contracts under this section shall be retained for a period of three years and shall be available for inspection and copying by the department upon request.

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.

ATCP 98.32 Prohibited practices. No contractor may do any of the following:

(1) Fail to provide relevant information required by the department under this chapter, or falsify any information provided to the department.

(2) Fail to file the full amount of security required by the department under s. ATCP 98.18 (5), if any, by the date which the department specifies.

(3) Fail to make cash payment on delivery if required under s. ATCP 98.10 (1).

(4) If the contractor is a producer-owned cooperative, procure fruits or vegetables from producers contrary to the contractor's statement under s. ATCP 98.02 (4) (f).

(5) Violate any provision of this chapter, or any order issued under this chapter.

(6) Violate any provision of s. 100.03, Stats.

History: Cr. Register, June, 1994, No. 462, eff. 7-1-94.