OREGON DEPARTMENT OF AGRICULTURE
Advisory Document on Grass Seed Contracts, with Specific Information Pertaining to Grass Seed Price Negotiations

Preface: The Oregon Department of Agriculture encourages grass seed dealers to develop contracts with growers that are clear and concise as to pricing, delivery, and other terms of agreement.

The information provided in this document is advisory, but where stated, carries the enforcement of law by the Oregon Department of Agriculture.

HB 3811, passed by the 2001 Legislature, and amended in 2005 by HB 3461, authorizes the State Department of Agriculture to actively supervised price negotiations between grass seed bargaining associations and dealers (ORS 62.848). This process provides anti-trust immunity to the parties to agree to price terms and recommend this agreement to the Director of Agriculture for review and establishment of the price to which the parties will be bound.

State law (ORS 646.525) and federal law provide growers with the right to join together to collective bargain over prices for which members of a grower bargaining association will sell their products. Dealers cannot purposefully discriminate in pricing against growers of a bargaining association simply for reason of their membership in such an association, so as to entice or discourage growers from joining or not joining with pricing incentives or disincentives. (ORS 646.535, Unlawful Trade Practices)

The specific terms of a contract between growers who are not members of the bargaining association and the dealers who they grow for will largely determine the latitude these parties have to price differentially from members who do belong to the bargaining association.

In the following context, "*Bargaining Council*" refers to the group of dealers and grower representatives of the bargaining association who come together under the auspices of the Oregon Department of Agriculture to participate in state-supervised price negotiations for proprietary grass seed produced under contract.

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Q. 1. What parties are bound by the price that is established by the Oregon Department of Agriculture for grass seed priced under these supervised negotiations?

A. If the Bargaining Council reaches a recommended price agreement and the Oregon Department of Agriculture certifies an established price for a specific grass classification (perennial, tall fescue, etc.), all grower members of the bargaining association and Oregon licensed seed dealers who have seed production contracts (agreements) with those growers are bound by this price. All dealers who have contract agreements with grower members of a bargaining association are invited to participate in the Bargaining Council to have input on the development of the negotiated price that is recommended to the Oregon Department of Agriculture.

Suggested contract language for pricing with members of a bargaining association: "For grower members of the Oregon Grass Seed Bargaining Association, the price is to be negotiated by the Bargaining Council and established by the Oregon Department of Agriculture."

This language makes clear that the price is based on an agreement (if reached) of the Bargaining Council, which in turn is recommended to the Oregon Department of Agriculture for certification as the grower price for grass seed produced by members of bargaining association.

Dealers who have contracts or agreements with non-member growers are not prohibited from using the price negotiated by the Bargaining Council and approved by the Department as their contract price. Some dealers are already doing this. If this is the price specified in the contract and agreed to by a dealer and non-member grower, it is binding on the parties to that contract.

Q. 2. Are growers who are not members of the bargaining association bound by the price negotiated by the Bargaining Council and certified by the Oregon Department of Agriculture if it is not referenced in the contract?

A. The answer is complex. In short, no. These growers were not party to the negotiations and did not agree to the terms of Bargaining Council process. However – the contract the grower has signed with the dealer has influence on the situation.

If the contract is a fixed-price seed production agreement or a fixed pricing formula seed production agreement, this is an enforceable contract on both the grower and the dealer. This is the case whether the grower is a non-member or a member grower who signed such a contract prior to joining the bargaining association. These contracts must be honored, (unless modified by agreement of the parties).

Appropriate contract language for fixed-price agreements or formula priced agreements with growers who are not members of a bargaining association: "Price to be $xx.xx per cwt." Or "Price to grower will be 80% of the wholesale market price at which the dealer sells the seed…" Or "Price to grower will be the non-contract spot market price for (seed variety) as determined on (date) based on average ticket sales between xx parties (or some other measure or benchmark). The more specific the language that designates how the price will be determined, the less the likelihood of confusion and that it could be challenged as price discrimination by a bargaining association.

Q. 3. What if the contract does not specify terms of price, or stipulates that the price will be "settled" or "determine by mutual agreement" during the production year?

A. These are vague terms and provide no benchmark or guidelines for what the price will be. ORS 72.3050 addresses open price term contracts. This section of Oregon law indicates that parties can conclude a contract for sale even though the price is not settled. In such a case the price *"is a reasonable price at the time for delivery*."

Hence, one option for the resolution of this situation is the determination of a "reasonable price" that is established through "good faith" agreement of the parties to the contract. This still leaves substantial room for dispute about what constitutes a reasonable price.

Further, Section 3 of ORS 72.3050 provides that if the price was left to be fixed by some means other than agreement of the parties, such as the prevalent market price (if this is specifically stipulated in clear terms in the contract as the open-market non-contract price), and it is not implemented or "fixed" as agreed, then "**there is no contract**." Parties should carefully evaluate the implications of this remedy and the need to clarify terms and come to agreement.

Q. 4. If a dealer has an "open market" contract or agreement with a grower who is not a member of a bargaining association, and they agree to a price higher than that established by ODA as the Bargaining Council price, can the bargaining association challenge the dealer with price discrimination?

A. State and Federal law prohibit unfair trade practices. Dealers cannot influence growers to join or not join a bargaining association by offering some inducement or incentive. For instance, if a dealer offered a non-member grower 10 cents/lb. above the ODA established price with no empirical market, quality, or varietal justification, this may give rise to an unfair trade practice claim. It is unclear in a situation where market conditions and contract language provide the incentive for price differentials whether such a situation is, in fact, price discrimination as defined in the law.

Q. 5. What about contracts that state the price "will be determined by the dealer"?

A. ORS 72.3050(2) allows an open price contract to specify that the price may be "fixed by the seller or by the buyer." In such a case, the price is to be fixed "in good faith." If the designated party to fix the price (usually the dealer) specifies a price that represents a *reasonable price* it would generally be deemed to meet the requirement of the contract, and the grower, by virtue of signing the contract, has consented to allow the dealer to choose the reasonable price. The question becomes, "what is a reasonable price?"

A reasonable price could be the price established through the Bargaining Council and certified by ODA, or it may be some other benchmark that represents "commercial judgment or under usage of trade (a price) that would serve as a reasonable substitute (ORS 72.7230(2))… or as reported in official publications or trade journals or newspapers or periodicals of general circulation published as the reports of such markets." There are none of these in the grass seed industry in Oregon.

Again, better to have contract language that is more concise as to how the dealer or parties will determine the price. This can help avoid any dispute and deliberation about what is a reasonable price, how is it established, and what is the benchmark for the determination. Hence, a "preventive" remedy is to establish a fix priced agreement, a formula pricing agreement, or an agreement that clearly states the benchmark, whether this is "the spot market price for

Buccaneer perennial ryegrass seed on September 1 of each crop," or "the price negotiated by the Bargaining Council and certified by ODA," or some other mechanism.

If there is a dispute about a reasonable price, the parties may choose to have a legal determination by the courts. Additionally, the Oregon Department of Agriculture has a Farm Mediation Program that provides private, professional mediators to assist disputing parties reach agreements. The cost is $35/hour for each party in the dispute.

Q. 6. Can the contract for seed production require the producer to waive his right to a lien on a seed crop that is produced under a service or "bailment" contract?

A. Some contracts state that the grower "shall have no title therein or lien thereon" for the crop. While it is clear that the title for the seed remains with the dealer on production contracts, the lien protection is a matter of State law. ORS 87.750-87.755(7) and Section 26 of HB 2051 (2001) provide that an agricultural producer who grows grains (including grass seeds) for delivery or transfer to others owning or holding title to the grain or seed retains a lien interest in that crop for the value of their "labor, delivery of materials or provision of services in the growing and harvesting of crops…" The law further states "an agreement by an agricultural producer purporting to waive the right to file notice under ORS 87.762 of a lien created [by this section] is void as contrary to public policy."

Seed production contracts or agreements cannot include language that asks a grower to waive the right to file notice of a statutory lien. This is a legislative clarification that was made in the aftermath of the ABT bankruptcy to clearly note in law that growers maintain their lien rights on grain and seed production even though they may not hold title to the crop.

Q. 7. How soon must payments be made to growers, and is this to be included in contract language?

A. HB 3964, passed by the 2001 Legislature, requires that seed production or purchase contracts contain language that specifies payment to the seed grower <u>within 30 days after seed delivery</u>. If the grower agrees to an extension of this payment period, this is allowable. But if the grower has not agreed to such an extension, payment must be made within 30 days of delivery.

With respect to final payment, if the contract language does not otherwise specify a date, final payment on all delivered seed must be made by May 1 of the year following production and harvesting.

Failure to follow these conditions may lead to interest penalties and/or suspension of a dealer's license.

Q. 8. What other terms and conditions must be in a seed production or purchase contract?

A. "Seed production or purchase contract" means a written agreement that must include:
(a) The estimated date for seed delivery;
(b) The terms and estimated dates for the wholesale seed dealer to pay the seed grower;
(c) The number of acres of grass or clover seed to be grown; and
(d) The species, cultivars and quality standards of the grass or clover seed to be produced or purchased.
ORS 576.725(3)

"Terms of payment" should be specific to avoid confusion about the pricing and how it will be determined.

Q. 9. In some instances growers are not presented with a contract until several months after a crop has been planted. Is this legal?

A. Growers who willingly enter these arrangements do so at their own risk. It appears to be standard industry practice for some dealers and growers to enter into verbal agreements to plant a grass seed crop and at a later date sign a contract with the terms for payment and delivery. The Department encourages dealers and growers to determine and finalize contract terms **prior** to planting a crop so there is no ambiguity about these issues.

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In summary, contract language and integrity is critical to many of the issues facing the industry. The Department encourages more concise language in contracts, and for dealers to include terms that are required by law and to avoid including clauses that exempt lien rights.

For growers who are not members of a bargaining association, and who choose to avoid having the Bargaining Council price impact the price they receive (for better or worse), these options are available:

1) planting non-contracted VNS seed and sell on the open market;

2) obtaining their own varieties (paying royalties) and marketing their own seed;

3) if growing under contract, specifying the price in a fixed-price or formula priced arrangement based on a clearly stated benchmark, or referencing the non-contract spot market as the benchmark for the price and be specific as to date and other factors that will establish the price.