Co-Packers: Helping Navigate the Food and Beverage Landscape

Connor Lovejoy
Assistant Editor, Informa Markets

Adrienne Smith
Senior Food Business Reporter, New Hope Network, Informa Markets

Daniel La Faver
Senior Consultant for Product Development and Supply-Chain/Co-Manufacturing, Whole Brain Consulting

Gregory Miller
Partner, Rivkin Radler LLP

Glenn Steiner
Sr. Vice President, Supply Chain, Fresca Foods

Markets
Aligning Incentives When Vetting a New Co-Packer
WHAT ARE WE GOING TO DISCUSS?

There are multiple factors to consider when looking for a new co-packer, the following of which are the most critical:

**QA/QC**
- Can they handle your product and your requirements?

**Supply Chain**
- Do you want to consider “turn key” or carry your raw materials on your books?
- What are the Pros and Cons to each option?

**Contract**
- You need to know what to watch out for when negotiating your contract. For example, your IP, SKU and UPC all need to be protected.
FIRST UP – QA/QC

Can they handle your product and your requirements? To answer this question, you need to:

• Know your product’s processing requirements.
• Know your specific finished goods requirements requirements.
• How did your "strike zone" develop? Is it sustainable?
• Have you done what was necessary to guide your manufacturing partners?
• Who will be responsible for the certifications/call-outs on your packaging? **THIS IS A CRITICAL FACTOR TO CONSIDER!!!!!**

Ultimately, find your balance: What are deal breakers for you? Where can you bend a little?
QA/QC CRITICAL FACTORS TO REVIEW

Review multiple years food safety audits, non-conformance reports and corrective action reports. Look for the following:

• Have they received any FDA form 483? (Public Record)
• Have they had any recalls? (Public Record)
• If it’s USDA, do they have laundry list of NRs? Have you reviewed them?
• For specific certifications critical for your product: seek 2 years reports with non-conformances.
• What does their approved supplier program have with respect to reviews of vendors and maintenance of certifications of those suppliers?
• Are they GFSI or GMP: SQF, BRC, GMP, etc.? Why is this important?
UP SECOND: SUPPLY CHAIN

Is integrating your supply chain with your co-packer needed or necessary? Examine the Pros and Cons

• Much like certifications, there are benefits to allowing them to do the RM ordering for you; however, this makes transitioning difficult in tough times.
• You may receive economies of scale earlier than buying on your own.
• Foreign Supplier Verification and the QA/QC headaches that go along with maintaining your own supply chain are shifted to the co-packer.
• If the relationship sours, your costs become extremely variable making moving more difficult.
• Raw materials can become a costly negotiating point; specifically, the handling, storage and movement of those materials.
• Changing to new vendors becomes extremely difficult and will become your specific problem if not part of the co-packer’s current supply chain partner network.
SUPPLY CHAIN ESSENTIALS

When assessing potential processing partners, you must audit the co-packers supply chain. Why? Because your certifications are at risk if they do not do their job correctly.

Other considerations:

• Are COAs required (Yes), and what should you consider when developing them?
  • You will never micro-test your way to food safety!

• Minimum order quantities (MOQs), and Minimum Runs work for your sales forecast.

• Process scalability v. run rate review
LAST BUT NOT LEAST: CONTRACTS

When negotiating a deal, shoot for a "fair" deal that’s equitable to both parties. If the whole negotiation is predicated on "Winning v Losing," everyone will lose in the end.

The following are things to look out for and “Red Flags” to consider when bringing on a new partner:

- Are their R&D Fees reasonable?: they ask for day rates, labor split, etc.
- Non-Negotiable contracts = RED FLAG
- NO CONTRACT = RED FLAG
- No recall provision = RED FLAG
- Surrender of your SKU, IP, formula, UPC or Item Numbers = RED FLAG (THIS IS BECOMING MORE AND MORE COMMON AND CAN CRUSH YOUR BUSINESS)
REVIEW

• Why are these factors important to consider?
• How do you work with potential partners?
• Know when to walk away — review non-starters
• How do you find potential new processing partners? Answer = NOT Google.
QUESTIONS / SHAMELESS PLUG

If you have any questions we can't/didn't get to, please don’t hesitate to reach out:

brandon@whole-brain-consulting.com
www.whole-brain-consulting.com

Whole Brain Consulting Capabilities:
- QA/QC
- Supply Chain
- Co-man Source and Selection/Contract Negotiations
- Operations Management
- Logistics
- R&D
THANK YOU FOR YOUR TIME!

Certified minority owned business by the Mountain Plains Supplier Development Council
Food & Beverage Contract Negotiation

Gregory D. Miller
Rivkin Radler LLP
How does an F&B brand ensure that its deal has good terms and that it can retain bargaining power?
General Contract Negotiation

► Clarity is key
► Define the terms of the agreement, and be transparent about what you want upfront prior to signing the contract
  ► Terms should be clear and concise with no room for interpretation
► A contract should include the specific responsibilities and requirements for both parties
Scope of the Agreement

- Off the shelf or custom products?
- Single or multiple products?
Structure of Agreement

- Self-contained agreement.
- Master agreement and short form purchase orders.
Exclusivity

- If private-labeled:
  - Manufacturer may seek to be the buyer’s exclusive source for the goods;
  - Buyer may seek to restrict the manufacturer from making and selling the goods to others.

- If custom-made:
  - Buyer may seek to protect its designs, formulas, or recipes by restricting the manufacturer from producing the products for others.

- Off-the-shelf:
  - Neither manufacturer or buyer is likely to obtain exclusivity.
Quality Control

- Determine whether the buyer has the right to mandate preferred or required suppliers of raw materials for the goods, and whether the manufacturer can take advantage of any price discounts the buyer has arranged with its preferred or required suppliers.

- Determine whether the buyer has the right to visit and inspect the manufacturer’s manufacturing facilities, and if so, under what conditions.
Acceptance and Rejection of Purchase Orders

- Specify the means by which the manufacturer accepts a purchase order and whether it must do so within a stated period of time.
- Decide whether the manufacturer has the discretion to reject purchase orders issued by the buyer.
- Consider whether the manufacturer must maintain necessary capacity and levels of finished goods and raw materials inventory to meet the buyer’s purchasing needs.
- Alternatively, consider whether the manufacturer (in a private-label or off-the-shelf agreement) may:
  - discontinue its supply of goods during the term; or
  - allocate its inventory of goods (and under what conditions).
Cancellation and Modification of Purchase Orders

- Specify the circumstances under which either party may cancel accepted purchase orders.
- Determine the procedure for cancellation and whether it must be made within a stated period of time.
- Determine if the buyer may reschedule delivery under accepted purchase orders.
Minimum Purchase Commitments

- Determine if the buyer has a minimum purchase commitment and how it is measured.
- Describe the manufacturer’s remedies for the buyer’s failure to meet its minimum purchase commitment.
Inspection and Acceptance of Goods

- Specify the amount of time that the buyer has to complete its inspection of delivered goods and notify the manufacturer of any rejected goods.
- List the circumstances under which the buyer is permitted to reject delivered goods.
- Identify the buyer’s remedies for rejected goods.
- Determine which party has the right to choose between alternative remedies for rejected goods, and whether the buyer’s remedy is exclusive.

Returning Accepted Goods

- Decide whether the buyer has the right to return excess or unwanted goods that it previously accepted.
Pricing

Specify whether per-unit prices include:

- shipping costs;
- costs of insurance; and
- sales taxes.

Determine which party is responsible for payment of costs not included in the price and whether the manufacturer is obligated to try to minimize shipping and insurance costs.

Decide whether the buyer is entitled to most favored customer protection.
Term and Termination

- Determine whether either or both parties have the right to renew the agreement.
  - Conditions to renewal; advance notice prior to the term’s expiration.
- Decide whether either or both parties have the right to terminate for convenience.
- State the conditions under which either party can terminate the agreement for cause.
Product Warranties

▶ Decide whether to include an express product warranty limited to the language stated in the contract. If so, expressly disclaim all other express and implied warranties.

▶ Determine whether the warranty beneficiary is limited to the buyer or extends to any third-party beneficiaries (such as the buyer’s customers and end users).

▶ Specify any exceptions to the product warranty (for example, if the goods have been misused or neglected).

▶ Identify the length of the warranty period if it is shorter than the applicable statute of limitations.
Product Warranties (Con’t)

- Consider whether to specify the buyer’s remedies for breach of any product warranties.
- Identify any conditions precedent to the buyer’s entitlement to any remedies.
- Consider whether to include any provisions regarding compliance with the buyer’s quality standards.
Decide which party owns the intellectual property used to create the goods.

If the manufacturer is packaging or distributing the buyer’s products that it manufactures, include an appropriate license of the buyer’s trademarks and brand materials.
Confidentiality and Trade Secrets

- Non-Disclosure Agreement
- Determine what confidential information each party will be disclosing to the other in the deal.
- Determine if any of the confidential information provided by each party constitutes trade secrets. This may include:
  - the buyer’s formulas, recipes, or designs of its products; and
  - the manufacturer’s manufacturing processes.
Inspection and Audit Rights

- To audit compliance under the agreement, determine whether either or both parties must provide the other party:
  - access to its books and records; and
  - the right to inspect its facilities and warehouses.
- Consider including appropriate limitations on these rights (such as restricting their frequency and requiring prior notice of audit or inspection).
Insurance

- Decide whether either party must obtain and retain insurance during the term of the agreement. If so:
  - Specify the types of insurance and the minimum limits.
  - Address whether and to what extent the parties may self-insure.
- Describe whether and on what terms the insured party must add the other party as an additional insured or provide the other party with evidence of insurance.
Indemnification

- Scope of Indemnification
  - Third Party Claims
  - Negligence, gross negligence and/or reckless conduct
  - Monetary limitations
- Control of defense of claims
Sourcing with Co-Packers
GUESS WHO'S EXCITED
FOR VEGAS

SUPER HAPPY
TO BE HERE
Today’s Discussion

• Company Overview

• Sourcing with Copackers
Company Overview
500 Employees and growing!

Boulder, CO

500 Employees and growing!

20+ production lines

employee led self-financed management owned

employee led self-financed management owned

employee led self-financed management owned

employee led self-financed management owned

employee led self-financed management owned

employee led self-financed management owned

employee led self-financed management owned

employee led self-financed management owned

employee led self-financed management owned
Partner to large scale entrepreneur led brands

Innovator for global CPG giants

Fresca Foods

Manufacturer of iconic brands

We Build Systems Around Platforms
Sourcing with Co-Packers

- What sourcing model is appropriate for your business
- What you can offer co-packers in terms of specs
- Considerations for choosing suppliers
- Where you can have an impact on sourcing
Which Sourcing Model is Appropriate?

Who Finds the Supply Source?
- Customer
- Co-Packer
- Hybrid

Who Pays for the Material?
- Customer
- Co-Packer
- Hybrid

Control, Reporting & Reconciling
- Customer Owned
- Co-Packer owned
How Do You Pick?
Who Sources? It Depends…

- Scale/Purchasing Power
- Resource Availability/Time
- Contacts to find what is being looked for
Who Owns/Pays for Material? It Depends…

- Inventory Carrying Costs
- Cash Flow
- Administration Costs
**Control, Reporting, & Reconciling**

**If Copacker Owned**
- Contracted min/max inventory levels based on future forecast
- Periodic pricing reviews

**If Customer Owned**
- Contracted min/max inventory levels based on future forecast
- Inventory Reporting
- Periodic Inventory Reconciliation with aligned waste factor
Sourcing with Co-Packers

• What sourcing model is appropriate for your business
• What you can offer co-packers in terms of specs
• Considerations for choosing suppliers
• Where you can have an impact on sourcing
Considerations & Flexibility

Certifications Desired
- Gluten Free
- Organic
- Non-GMO
- Kosher
- Paleo
- Whole Grain Council
- Etc.

Allergens
- Peanut
- Tree Nut
- Wheat
- Milk
- Egg
- Soy
- Fish
- Shellfish

Sustainability
- Renewable Source?
- How far is source from plant?
- Recyclable Material?
- Fair Trade
- Non-Conflict Area
- Etc.
BLAME IT ON PURCHASING.

IT'S ALWAYS THEIR FAULT!
Sourcing with Co-Packers

• What sourcing model is appropriate for your business
• What you can offer co-packers in terms of specs
• Considerations for choosing suppliers
• Where you can have an impact on sourcing
ONE DOES NOT SIMPLY...

CHOOSE THE CHEAPEST VENDOR EVERY TIME
Considerations when Selecting a Supplier

Pricing
- Price
- Payment Terms
- Freight

Performance
- Quality
- Pack Size
- MOQ
- Production Frequency
- Lead Time

Capabilities
- Flexibility
- Scalability
- Responsiveness
- Innovation
**Certifying Suppliers and Ingredients**

**Fresca Requires 19 Documents from each supplier**
- Collected by Procurement team
- Analyzed and Certified by FSQA team

Certification claims require additional documents

**Consider**
- Do you use the Co-packer’s certifying process, or do you require your own internal certification?
- On-site visit required or paperwork only?
- What timeline are you trying to get this done in?

**Clear Requirements up Front**
# Ways to Find Suppliers

<table>
<thead>
<tr>
<th>Past Experience/Industry Contacts</th>
<th>Internet</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="handshake.png" alt="Past Experience" /></td>
<td><img src="chrome.png" alt="Internet" /></td>
</tr>
<tr>
<td><img src="phone.png" alt="Industry Contacts" /></td>
<td><img src="internet-explorer.png" alt="Internet" /></td>
</tr>
<tr>
<td><img src="brain.png" alt="Ask the Expert" /></td>
<td></td>
</tr>
</tbody>
</table>

*Information Classification: General*
Are You Google?

Because You Have Everything I’m Searching For.
## Ways to Find Suppliers

<table>
<thead>
<tr>
<th>Past Experience/Industry Contacts</th>
<th>Internet</th>
</tr>
</thead>
<tbody>
<tr>
<td><img src="image" alt="Handshake" /></td>
<td><img src="image" alt="Internet Explorer" /></td>
</tr>
<tr>
<td><img src="image" alt="Business Card" /></td>
<td><img src="image" alt="Chrome" /></td>
</tr>
<tr>
<td><img src="image" alt="Expert" /></td>
<td><img src="image" alt="Safari" /></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Brokers/Distributors</th>
<th>3rd Party Resources</th>
</tr>
</thead>
<tbody>
<tr>
<td>JM SWANK</td>
<td>TRACEGAINS</td>
</tr>
<tr>
<td>You Can Bank on Swank</td>
<td>PROSPECTOR®</td>
</tr>
<tr>
<td>Dawn</td>
<td></td>
</tr>
<tr>
<td>Rocky Mountain Ingredients</td>
<td></td>
</tr>
<tr>
<td>BATORY FOODS®</td>
<td></td>
</tr>
<tr>
<td>ROCKY MOUNTAIN SPICE COMPANY</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Industry Events</th>
</tr>
</thead>
<tbody>
<tr>
<td>SupplySide WEST</td>
</tr>
<tr>
<td>Food Ingredients North America</td>
</tr>
<tr>
<td>Sweets &amp; Snacks Expo</td>
</tr>
<tr>
<td>IFT</td>
</tr>
<tr>
<td>IFT EXPO EAST</td>
</tr>
</tbody>
</table>
Sourcing with Co-Packers

- What sourcing model is appropriate for your business
- What you can offer co-packers in terms of specs
- Considerations for choosing suppliers
- Where you can have an impact on sourcing
AND I HELPED!
What You Can Do To Impact Sourcing

- Align on Sourcing Model
- Clear Claims Requirements
- Clear Certifying Requirements
- Remember Price isn’t Everything
THANK YOU
STAY CLASSY