

**STATE OF NEW MEXICO
NEW MEXICO DEPARTMENT OF HEALTH
Public Health Division**

**SPECIAL SUPPLEMENTAL NUTRITION PROGRAM
FOR WOMEN, INFANTS AND CHILDREN (WIC)**

WIC Program Soy-Based Infant Formula Rebate Contract

This contract is entered into between the New Mexico Department Of Health (DEPARTMENT) and _____(CONTRACTOR).

ARTICLE 1. SCOPE OF WORK

The CONTRACTOR shall:

- A. Provide soy-based contract brand infant formulas specified herein, through vendors authorized by the New Mexico Women, Infants and Children Program, in sufficient supply to service 100% of the WIC caseload; and remit to the DEPARTMENT a rebate for each unit of the CONTRACTOR's soy-based contract brand infant formula as specified herein.
- B. Rebate to the DEPARTMENT a price per unit of soy-based contract brand infant formula as specified in Attachment 1. Attachment 1 may be amended as necessary by written agreement of the parties at any time during the term of this contract.

The rebate amount per unit for the primary soy-based contract brand infant formula is the amount specified by the CONTRACTOR on the WIC Soy-Based Infant Formula Rebate Initiative Quote Sheet on April 6, 2009, identified as Attachment II to the DEPARTMENT's WIC Soy-Based Infant Formula Rebate Initiative Request for Proposals, issued February 10, 2009, in conjunction with the North Carolina Department of Health and the Arkansas Department of Health (Request for Proposals) incorporated as part of this contract. The rebate amounts per unit for the other soy-based contract brand infant formulas specified herein are calculated in accordance with Section III.A.7. of the Request for Proposals.

- C. Contact all wholesalers and authorized WIC retail outlets to assure that wholesalers and WIC-authorized vendors have sufficient knowledge to provide a ready supply of the Contractor's soy-based contract brand infant formula after the Contract is awarded. Inform all WIC-authorized retail outlets that the Contractor's soy-based contract brand infant formula will be designated the single authorized brand of WIC soy-based infant formula as of the date the contract is executed by signature of both parties.

D. Payment

The three states' WIC Programs presently receives infant formula rebates of about \$102,353,594 annually. In order to comply with the requirements of (U.S.) Treasury Circular 1075 and the Cash Management Improvement Act, as amended, the three states WIC Programs desire to receive rebate payments in installments. The Contractor shall remit payments as described below for each calendar month by the due dates indicated.

Each month the due date of the first installment will be the fifth day of the month immediately following the month in which the rebate pertains and shall be no less than 75% of the total payment for the proceeding month. The DEPARTMENT will bill the CONTRACTOR for each month's remaining rebate balance on a final invoice after receipt of data on infant formula redemptions. The balance of installment rebate payments due for that month will be paid on the 25th of the month to which the rebate pertains. In the event that any due date occurs on a Saturday, Sunday, or legal holiday, the rebate payment will be due on the last business day preceding the due date.

Payments will be made to the DEPARTMENT by EFT or ACH wire transfer.

The CONTRACTOR shall make advance payment, if requested by the DEPARTMENT. The requested advance payment may not exceed the number of units issued, by brand, physical form and size, less the number of units issued but not redeemed, for the most recent closed-out month for which the data is available. The DEPARTMENT may request a partial advance payment.

The CONTRACTOR agrees to pay interest penalties to the DEPARTMENT in the amount of 1 percent per month or any portion thereof calculated on the installment amount due or invoice total for any properly delivered invoice for which funds have not been transferred to the DEPARTMENT by the CONTRACTOR by the close of business on the due date for the payment. Late interest penalties will not be applicable by the DEPARTMENT or the DEPARTMENT's bank or data processing center that have been identified and validated prior to the due date of the invoice payment.

Automatically increase rebates on a cent-for-cent basis for any one or all of the soy-based contract brand infant formulas listed herein that are subject to any price level increases in the CONTRACTOR's lowest national wholesale price per unit for a full truckload. The price per unit rebate will increase effective the first day of the month in which the wholesale price per unit increased. The CONTRACTOR shall notify the DEPARTMENT in writing no less than 30 calendar days prior to any changes in wholesale prices. The notification shall include both the date and amount of the increase.

Automatically decrease rebates on a cent-for-cent basis for any one or all of the soy-based contract brand infant formulas listed herein, that are subject to any price level decreases in the CONTRACTOR's lowest national wholesale price per unit for a full truckload. The price per unit rebate will decrease effective the first day of the month in which the wholesale price per unit decreased. The CONTRACTOR shall notify the DEPARTMENT in writing no less

than 30 calendar days prior to any changes in wholesale prices. The notification shall include both the date and amount of the decrease.

Notwithstanding any other provisions of this contract, the CONTRACTOR shall pay a rebate yielding the same net price per reconstituted fluid ounce as the primary soy-based contract brand infant formula or any other soy-based contract brand infant formula, specified herein, if any of these formulas are replaced during the term of the contract, including, but not limited to, replacement by change in formulation or unit size.

Agree that if a new soy-based contract brand infant formula introduced into the CONTRACTOR's product line is approved for issuance by the DEPARTMENT or the DEPARTMENT decides to add more soy-based contract brand infant formulas to its approved list, the CONTRACTOR shall pay a rebate amount per unit for the additional soy-based infant formula calculated in accordance with Section III.A.7.c. of the Request for Proposals. The DEPARTMENT will notify the affected parties in the WIC community and bill the CONTRACTOR accordingly if and when that soy-based infant formula is issued.

Agree that in the event of a natural disaster, the DEPARTMENT may issue a soy-based contract brand infant formula that is currently not approved for issuance by the DEPARTMENT or a soy-based non-contract brand infant formula, except exempt infant formula. The CONTRACTOR shall pay a rebate amount per unit calculated in accordance with Section III.A.7.b. of the Request for Proposals, except that the lowest national wholesale price per unit for a full truckload at the time the soy-based infant formula is issued by the DEPARTMENT will be used to calculate the rebate.

Agree to pay rebates to the DEPARTMENT on any unit of soy-based contract brand infant formula approved for issuance by the DEPARTMENT, for which a food instrument was issued during the term of this contract and subsequently redeemed even though the contract may have expired or otherwise terminated at the time the food instrument is redeemed and payment of the rebate is due.

Agree not to withhold any rebate payments due the DEPARTMENT under any circumstances. Any adjustments owed the CONTRACTOR by the DEPARTMENT shall be made by the DEPARTMENT in subsequent invoices.

Accept reconciliation invoices from the DEPARTMENT every six (6) months during the contractual period and within ninety (90) days of the termination of the Contract to include unreported claims. Payment from the CONTRACTOR is due upon receipt of the invoice, and becomes delinquent after thirty (30) calendar days of receipt of the DEPARTMENT's invoice. A late payment charge of 1 percent per month shall be assessed on past due amounts at the time the subsequent invoice is calculated.

Agree to timely notify the DEPARTMENT of any known or suspected deterioration, alteration, adulteration, damage, falsification, or tainting to any of the soy-based contract brand infant formulas provided through vendors authorized by the New Mexico Women, Infants and Children Program, as specified herein, if harmful to life or health, hazardous or do not comply with the regulations on manufacturing.

E. Payment Disputes

1. Notify the DEPARTMENT of any dispute or error in any rebate invoice within sixty (60) calendar days of the receipt of the invoice. The CONTRACTOR waives its right to challenge any invoice or request the return of any funds after sixty (60) calendar days of the CONTRACTOR's receipt of the invoice for the funds in question.
2. Agree that late penalties will accrue against the CONTRACTOR during the period of time any invoiced amounts are in dispute and will accrue at a rate of 1.5% per month accrued on a daily basis (18% annual percentage rate). In the event such dispute is settled in favor of the CONTRACTOR, such penalties will not be owed. All disputes will be settled within twenty (20) calendar days from the date written notice of a dispute is received by the DEPARTMENT, or by closeout of the federal fiscal year in which the dispute has occurred, whichever is earlier. Any payment or late penalties due to the DEPARTMENT shall be received within ten calendar days from the date of resolution.
3. Agree that disputes regarding invoiced amounts shall be limited to the accuracy of the invoice. Policy issues, such as the DEPARTMENT's eligibility criteria, shall not be subject to challenge or dispute. Supporting documentation provided by the DEPARTMENT in the event of a dispute shall be limited to the food instrument number, EBT transaction number, its issue date, redemption date, unit count, brand name and size. No client identifying information will be provided.

Agree that the DEPARTMENT shall make adjustments in invoiced amounts only when an actual error in any disputed invoice is found. Statistical inference or sampling shall not be the basis for any dispute by the CONTRACTOR or any adjustment in an invoice by the DEPARTMENT. Supporting documentation provided by the DEPARTMENT in the event of a dispute shall be limited to the documentation identified in Article 1.H of this contract.

F. Audits and Records

1. Maintain books, records and documents in accordance with New Mexico laws and regulations and generally accepted accounting procedures and practices.
2. Assure that these records created solely for this contract shall be subject at all times to inspection, review or audit by state or federal personnel and others authorized by the DEPARTMENT, as well as by the federal personnel. Routine inspections, review or audits will be performed upon reasonable notice and during normal business hours.

3. Maintain and file progress, fiscal, inventory and other reports with the DEPARTMENT as required.
4. Retain all financial records, supporting documents, statistical records and all other documents created for this contract for a period of three (3) years after termination of the contract, or if an audit has been initiated and audit findings have not been resolved at the end of the three (3) years, the records shall be retained until resolution of the audit findings. Any routine audits of such records or documents shall be upon reasonable notice and during normal business hours.
5. Provide authorized representatives of the DEPARTMENT and federal auditors pursuant to 45 CFR, Part 74, 24 (a), (b) and (d) to full access to records and documents and permit the right to examine any of those records and documents during the retention period. Such access shall occur during normal business hours.
6. Monitoring
 - a. Provide access to information necessary to monitor this contract.
 - b. Permit the DEPARTMENT to monitor the contract according to applicable regulations of the state and federal governments.

The DEPARTMENT shall:

- G. Provide the CONTRACTOR with a monthly invoice specifying the number of units of each contract brand, form and size of soy-based infant formula redeemed during the preceding calendar month. The rebate due shall be calculated by the DEPARTMENT based on these figures.
- H. Provide the calculations and the supporting documentation upon request. The supporting documentation is limited to the food instrument number, EBT transaction number, redeemed amount, redemption date, issue date, can count, brand name, physical form and size. No identifiable participant information will be provided. Should vendor information be requested, no identifiable vendor information can be provided other than vendor number and authorization status.
- I. Allow the purchase of any non-contract brand formula or any soy-based contract brand infant formula that does not meet the requirements of 7 C.F.R. 246.10 (C) (1) (i) only with medical documentation, as that term is defined in 7 C.F.R. 246.10 (C) (1) (v) except as provided in 7 C.F.R. 246.10 (C) (1) (iv), and Articles 12.B and 16.B of this contract. Pre-printed medical documentation or medical documentation to cover more than one infant will not be allowed. The CONTRACTOR will not be required to pay rebates on soy-based non-contract brand infant formula, except in situations where the CONTRACTOR's soy-based contract brand infant formula is not available through WIC authorized vendors for 72 hours or more, as provided in Article 12.B or Article 16.B of this contract.

ARTICLE 2. TERM

This contract shall be effective on October 1, 2009 and shall terminate on September 30, 2012. No commitment of public funds is permitted prior to contract approval.

ARTICLE 3. INDEMNIFICATION

- A. The CONTRACTOR shall defend, indemnify and hold harmless the DEPARTMENT, its officers, agents and employees from all claims, actions, demands, costs, damages, attorney fees and all other liabilities and expenses of any kind from any source arising out of any act or omission of the CONTRACTOR, its agents and employees in performance of this contract as well as from all claims accruing and resulting from personal injury allegedly caused by a defect in the product furnished pursuant to this contract. Claims, losses or suites arising from any negligence to the DEPARTMENT, its officers, agents, employees, contractors or subcontractors are subject in all cases to the New Mexico Tort Claims Act. The DEPARTMENT shall provide the CONTRACTOR written notice of each such claim or suit and the right and opportunity to conduct the CONTRACTOR's own defense thereof.

- B. Notwithstanding any indemnification clause, the DEPARTMENT shall have full authority to conduct is own defense, negotiations, and settlements without affecting the CONTRACTOR's indemnification herein.

ARTICLE 4. FEDERAL LAW

- A. The CONTRACTOR shall abide by all applicable federal laws and regulations.

- B. In the event that a state law conflicts with federal law, federal law shall supersede state law.

ARTICLE 5. COMPLIANCE

The DEPARTMENT shall monitor WIC authorized retailers for compliance with New Mexico WIC Program rules, regulations, policies, and procedures. The DEPARTMENT shall employ sanctions, as necessary to enforce compliance, as outlined in state and federal regulations.

ARTICLE 6. CONTACT AND NOTICE

The name and address of the DEPARTMENT's administrator for this contract is

Deanna Torres, MPA
WIC Program Director
Family Health Bureau
2040 S. Pacheco, Suite 152

Santa Fe, New Mexico 87505

The representative of the CONTRACTOR responsible for the administration of services under this contract is:

Any notice which is required or permitted to be given under this contract shall be given by personal delivery or certified U.S. mail/return receipt requested and directed to the respective party at the address shown below:

For the DEPARTMENT:

Deanna Torres, MPA
WIC Program Director
Family Health Bureau
2040 S. Pacheco, Suite 152
Santa Fe, New Mexico 87505

For the CONTRACTOR:

In the event that either party designates a different representative after execution of this contract, notice of the name and address of the new representative written notice of the change shall be provided to the other party and attached to originals of this contract.

ARTICLE 7. CONTRACT MONITORING

The DEPARTMENT and the CONTRACTOR agree to meet on annually to review the parties' performance of the contract and to address all concerns regarding invoice procedures, subject at all times to the terms of the contract. During these meetings any concerns regarding billing procedures must be addressed.

ARTICLE 8. AMENDMENT

This contract shall not be altered, changed or amended except by instrument in writing executed by the parties hereto. The parties agree to amend this contract to comply with all revisions of applicable state and federal laws or regulations.

ARTICLE 9. GOVERNING LAW

This contract shall be governed in accordance with the laws and regulations of the State of New Mexico.

ARTICLE 10. CONFIDENTIALITY

In no event shall confidential participant information be made available to the CONTRACTOR. The use of any participant information that may be inadvertently provided to the CONTRACTOR is prohibited by state and federal law. It is the responsibility of the CONTRACTOR to protect the identity of any client receiving services through this contract in the event of inadvertent disclosure.

ARTICLE 11. ASSIGNMENT

The CONTRACTOR shall not assign, sublicense or otherwise transfer its rights, duties and/or obligations under this contract. The DEPARTMENT shall at all times be entitled to assign or transfer its rights, duties and/or obligations under this contract to another governmental agency in the State of New Mexico without the CONTRACTOR's consent.

ARTICLE 12. FORCE MAJEURE

- A. The CONTRACTOR shall not be liable for delay, failure of performance, loss or damage due to fire, earthquake, volcanic action, flood, war, civil or military authority, acts of God or other causes beyond its reasonable control.
- B. Notwithstanding the preceding paragraph, the CONTRACTOR shall pay rebates to the DEPARTMENT for soy-based non-contract brand infant formulas, except exempt infant formulas, when the CONTRACTOR's product is not available in any area in the State for 72 hours or more. The DEPARTMENT shall have the right to substitute soy-based non-contract brand infant formulas and to invoice the CONTRACTOR for the units issued during the period when the CONTRACTOR's formula was not available, notwithstanding that food instruments issued during a shortage may be redeemed after a shortage is remedied. The rebate paid for the soy-based non-contract brand infant formula must yield the same net price per reconstituted fluid ounce as the rebate for the soy-based contract brand infant formula that is substituted with the non-contract brand. The lowest national wholesale price per unit at the time of issuance for a full truckload of the soy-based non-contract brand infant formula will be used to calculate the rebate amount. At any time after the CONTRACTOR's product is not available for 72 hours or more, the DEPARTMENT may declare the CONTRACTOR in breach and may terminate the contract for cause pursuant to ARTICLE 15.A, Termination for Cause.

ARTICLE 13. DISASTER RELIEF

In the event of a natural disaster the DEPARTMENT may issue a soy-based contract brand infant formula that is currently not approved for issuance by the DEPARTMENT. The CONTRACTOR shall pay a rebate amount per unit calculated in accordance with Section III.A.7.b. of the Request for Proposals, except that the lowest national wholesale price per unit for a full truckload at the time the soy-based infant formula is issued by the DEPARTMENT will be used to calculate the rebate.

ARTICLE 14. FORMULAS

The CONTRACTOR shall give the DEPARTMENT no less than 90 calendar days advance written notice prior to the following, except for item number (1) which requires no advance notice:

1. The introduction of any new contract brand soy-based infant formula into the CONTRACTOR's product line;
2. A change in the label of the primary soy-based contract brand infant formula or any other soy-based contract brand infant formula approved for issuance by the DEPARTMENT;
3. The replacement of the primary soy-based contract brand infant formula or any other soy-based contract brand infant formula approved for issuance by the DEPARTMENT, including, but not limited to, replacement by change in formulation and/or unit size; and
4. A change in the name of the primary soy-based contract brand infant formula or any other soy-based contract brand infant formula approved for issuance by the DEPARTMENT.

ARTICLE 15. TERMINATION

Termination shall not nullify or otherwise excuse any obligation owed by the CONTRACTOR to the DEPARTMENT prior to the effective date of the termination or as provided otherwise herein.

A. Termination for Cause

Unless the CONTRACTOR's material breach of any provision of this contract is waived by the DEPARTMENT in writing, the DEPARTMENT may, by written notice to the CONTRACTOR specifying CONTRACTOR's failure, terminate this contract upon no less than twenty-four (24) hours notice unless the CONTRACTOR has cured the breach within time frames agreed upon by both parties. Said notice shall be delivered by certified mail, receipt requested, or in person with proof of delivery. If applicable, the DEPARTMENT may employ the default provision of the New Mexico Procurement Code.

1. Waiver of breach of any provision of the contract shall not be deemed to be a waiver of any other breach and shall not be construed to be modification of the terms of this contract. The provisions herein do not limit the DEPARTMENT's right to remedies at law or to damages.
2. The DEPARTMENT may terminate this contract for cause upon the filing of a bankruptcy action or insolvency by or against the CONTRACTOR.

3. If the contract is terminated pursuant to this provision, the CONTRACTOR shall provide to the DEPARTMENT the same rebate payment for formula that would have been paid until a new contract is executed.

B. Termination Without Cause

1. Either party may terminate this contract with a minimum of 150 calendar days written notice delivered to the contract representatives specified herein.
2. In the event of termination of the contract by either party pursuant to this provision, any payment or obligation incurred during the 150 calendar days between issuance of notice and termination will be made or satisfied within 30 calendar days of the receipt of the invoice.
3. If the contract is terminated pursuant to this provision, the contractor shall continue to pay rebates from the date notice is given until the end of the notice period or until a new contract is executed, whichever occurs first.

ARTICLE 16. ENTIRE AGREEMENT

- A. This contract and its attachment contain all the terms and conditions agreed upon by the parties and contain the entire understanding of the parties with respect to the subject matter hereof, and supersedes all prior oral or written agreements.
- B. All terms and conditions of the DEPARTMENT's WIC Soy-based infant formula Rebate Initiative Request for Proposals and State's Answers to Prebid Questions and the Contractor's accepted response to the RFP are hereby incorporated, and are a part of the contract. Also incorporated in the contract are the New Mexico Formulas Approved for Issuance (Attachment 1), the CONTRACTOR's Certification, (Attachment 2) the New Mexico WIC Program General Description - Soy-based infant formula Rebate System (Attachment 3), the New Mexico Formula Short Purchase Calculation Methodology Redemptions (Attachment 4) and the New Mexico Campaign Contribution Disclosure Form (Attachment 5).

ARTICLE 17. SEVERABILITY

If any provision of this contract is found to be unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision. The remaining terms and provisions of this contract shall remain in full force and effect in the same manner as if the invalid or illegal provisions had not been contained herein.

ARTICLE 18. APPROPRIATION

The DEPARTMENT's obligation under this contract is subject to the condition precedent that sufficient funds are appropriated, authorized and allotted by the Legislature of the State of New

Mexico and/or by the Federal government, specifically the United States Department of Agriculture.

ARTICLE 19. COMPUTATION OF TIME

In computing any period of time stated in this contract, the day from which the period of time begins to run shall not be included. The last calendar day of the time period shall be included in the computation unless it is a Saturday, Sunday or a day on which a legal holiday is observed. In such a case, the period of time runs to the close of business on the next regular workday.

ARTICLE 20. USE OF WIC ACRONYM AND LOGO

Use of the acronym “WIC” and the WIC logo, including close facsimiles thereof, in total or in part, is reserved for the official use of the WIC Program as set forth in FNS Instruction 800-2, June 2, 1992 and clarified in USDA WIC Policy Memorandum #2009-1.

IN WITNESS WHEREOF the parties have executed this Contract at Santa Fe, New Mexico.
The effective date is the date as executed by signature of both parties.

**STATE OF NEW MEXICO
NEW MEXICO DEPARTMENT OF HEALTH:**

By: _____
Alfredo Vigil, M.D., Secretary

Date: _____

By: _____
Jack Callaghan, Ph.D., Director
Public Health Division

Date: _____

CONTRACTOR:

By: _____

Title: _____

Date: _____

CERTIFIED FOR LEGAL SUFFICIENCY:

By: _____
Department of Health
Assistant General Counsel

Date: _____

TAXATION AND REVENUE:

The CONTRACTOR is registered for the payment of gross receipts taxes to the State of New Mexico.

N.M. Tax Identification #:

By: _____
Taxation and Revenue Department

Date: _____

ATTACHMENT 1

NEW MEXICO CONTRACT FORMULAS APPROVED FOR ISSUANCE

ATTACHMENT 2

**NEW MEXICO DEPARTMENT OF HEALTH (NMDOH),
ARKANSAS DEPARTMENT OF HEALTH AND HUMAN SERVICES (ADHHS)
AND NORTH CAROLINA DEPARTMENT OF
HEALTH AND HUMAN SERVICES (NCDHHS)**

**SPECIAL SUPPLEMENTAL NUTRITION PROGRAM FOR WOMEN,
INFANTS AND CHILDREN (WIC)
WIC SOY-BASED INFANT FORMULA REBATE INITIATIVE
CONTRACTOR CERTIFICATION**

CONTRACTOR _____

The undersigned authorized official of the above listed soy-based infant formula manufacturer (contractor) certifies:

1. That the contractor has read and understands all requirements and specifications of the Request for Proposals.
2. That the contractor agrees to all requirements, specifications, terms and conditions of the Request for Proposals.
3. That the contractor, its principals, officers and employees have not been debarred or otherwise sanctioned by any governmental entity (federal, state, territory, tribal, county or municipality) for misconduct, breach of contract, tortious acts or omissions or criminal acts or omissions relating to the production, sale or distribution of soy-based infant formula or WIC rebate contractual compliance in the past 10 years. (The facts, circumstances and agreements or findings relating to any sanction or debarment must be provided for the States' consideration).
4. That the contractor shall provide soy-based infant formula and rebates to the States pursuant to the terms specified in the Request for Proposals and its attachments.
5. That the contractor is registered with the Secretary of Health and Human Services under the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321 *et seq.*) and that the products shall comply with all applicable regulations relevant to soy-based infant formulas, including 7 CFR Section 246.10 (f), as well as the provisions of the Federal Food, Drug and Cosmetic Act.
6. That the contractor will give the States, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and shall establish a proper accounting system in accordance with generally accepted accounting standards.
7. That the contractor will comply with the provisions of the Federal Certification Regarding Lobbying.

8. That the contractor will comply with the Civil Rights Act of 1964 (42 U.S.C. 2000d, et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. 1681, et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 6101, et seq.), the Americans With Disabilities Act (42 U.S.C. 12150 et seq.) the Age Discrimination Act of 1975 (42 U.S.C. 6101, et seq.) and all other applicable federal and state laws and regulations. These laws and regulations prohibit discrimination on the grounds of race, color, national origin, sex, age, religion, sexual preference, medical condition, handicap or disability.

9. That the contractor will comply with the provisions of the Federal Certification Regarding Debarment and Suspension.

10. That the contractor will comply with the provisions of the Federal Certification Regarding Drug-Free Workplace Requirements.

11. That the contractor will comply with the Energy Policy and Conservation Act (Public Law 94-163), the Commodity Distribution Reform Act and the WIC Amendment of 1987 (Public Law 100-237).

12. That the contractor will obey all applicable federal regulations in the performance of its duties, including applicable standards, orders or requirements issued under the Clean Air Act (42 U.S.C 1857), the Clean Water Act (33 U.S.C. 1368), Executive Order 11738 and Environmental Protection Agency regulations (40 CFR Part 15), which prohibit the use under non-exempt federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities. Violations shall be reported to the States and the EPA Assistant Administrator for Enforcement.

13. That the contractor will carry adequate public liability insurance and other appropriate forms of insurance as well as pay all taxes incident hereto.

Signature of Authorized Certifying Official Date

Printed Name of Certifying Official Title

ATTACHMENT 3

NEW MEXICO WIC SOY-BASED INFANT FORMULA REBATE CONTRACT

General Description – Soy-based infant formula Rebate System

1. New Mexico WIC Program participants receive food instruments and/or EBT smart cards redeemable at approved retailers. Soy-based infant formula may be issues to participants via food instruments and/or EBT smart cards.
2. Soy-based infant formula food instruments state on the face of the food instrument or in the aggregated family food package on the EBT smartcard, the name, size, quantity and type of formula to be purchased.
3. New Mexico WIC Program participants redeem their valid food instruments at approved retailers, purchasing their allowable items of choice, including the Contractor's approved soy-based infant formula.
4. When a physician orders a non-rebate brand of formula rather than the Contractor's brand of soy-based infant formula, the substitute formula will be specified on the WIC food instrument or EBT smartcard and will be redeemed through an approved retailer.
5. Approved retailers submit redeemed food instruments to the authorized New Mexico Bank agent for payment. A series of edits will be performed on each food instrument prior to payment. Approved retailers submit redeemed food transactions from EBT smart cards to the State of New Mexico WIC Program for financial settlement; the WIC Program issues a daily ACH file to its authorized bank agent for payment.
6. The New Mexico WIC Program data system calculates soy-based infant formula redeemed by name, size, quantity and type of Contractor's formula purchased.
7. The Department produces a monthly report entitled "Soy-based infant formula Report." This report specifies the number of cans of concentrate formula, powdered formula and ready-to-feed formula purchased from approved retailers.
8. The Department will provide the Contractor a monthly invoice of the number of cans of the Contractor's soy-based infant formula purchased by the New Mexico WIC Program during the referenced month, adjusted for short purchases.
9. The Contractor shall remit to the Department the total amount invoiced based on these calculations within 30 calendar days of the invoice date or pay an additional penalty payment to the Department as described in the Contract.
10. Every six (6) months during the contractual period and within 90 calendar days of the termination of the Contract, the Department may provide reconciliation invoices to include unreported claims against the Contractor. Payment from the Contractor is due within 30 calendar days. A late payment charge of 1.5% per month accrued on a daily basis (18% annual percentage rate) shall be assessed on past-due amounts at the time the subsequent invoice is calculated.

ATTACHMENT 4

**Formula Short Purchase Calculation
Methodology**

***New Mexico Department of Health
Women, Infants and Children Program***

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Introduction

The State of New Mexico WIC Program and the manufacturers of soy-based infant formula wish to determine if FI's (checks for formula purchase) were used to purchase fewer than the amount specified on the FI. This document describes the methodology used by the State, and the methods finally chosen to calculate the "formula short purchase" amounts.

New Mexico's Methodology

The average retail price for each of the rebated formula types and sizes is calculated by vendor. For each vendor: "The **total redeemed amount** on the check is divided by the **average retail price** to determine the estimated number of cans actually purchased with that food instrument. The result is **rounded down** to whole cans."

Testing and Determination of Methodology

In the following examples, amounts are calculated to four decimal places for improved accuracy.

The State tested the calculation of cans actually purchased and found that **rounding down** resulted in losses to New Mexico of rebate amounts to which the State would be entitled.

Example: 15 cans were prescribed with the issue of FI No. 1151004637. When the total of \$47.83 is divided by the average retail price for that vendor of \$3.1987, the result is 14.9529 cans. The average price renders the number of cans purchased to less than 5% short of 15 cans (the number prescribed). However, by **rounding down**, New Mexico would only be rebated for 14 cans.

The State also tested **true rounding**, whereby a decimal of .5 or greater would be rounded up to the nearest whole number and anything less than .5 would be rounded down to the nearest whole number. This also created problems.

Example: 15 cans were prescribed with the issue of FI No. 11510046379. When the total of \$52.20 is divided by the average retail price for that vendor of \$3.2566, the result is 16.0290 cans. The average price renders the number of cans purchased to nearly 103% greater than the number prescribed (15 cans). However, by rounding, New Mexico would report that they should be rebated for 16 cans, even though only 15 were prescribed and only 15 could be sold by the vendor to the client.

The State then experimented with other methods of **statistical analysis**, specifically standard deviation and variance. **Standard deviation** was found to address the problems found above. Standard deviation measures the degree to which the values of fields or expressions involving fields differ from the average of all the values. The smaller the standard deviation, the less the values vary from the average. Standard deviation is normally expressed by the formula:

Figure 1 – Standard Deviation Formula

$$\sigma = \sqrt{\frac{\sum x^2 - \frac{(\sum x)^2}{N}}{N - 1}}$$

Implemented Methodology

The state uses standard deviation in the calculation of the number of units of formula purchased on every FI. The process is:

- 1) Retrieve food detail information for every FI whose bank processing date falls within the month being analyzed.
- 2) For all FI's, subtract the cost, as determined from the vendor food price table, of all non-rebatable formula and other foods from the redeemed amount.
- 3) Calculate the average price (AVG) and standard deviation (STD) per unit of each vendor/formula type combination.
- 4) From this data, determine the acceptable high and low limit range of the unit price.
 - $\text{Low-limit} = \text{AVG} - (2 * \text{STD})^1$
 - $\text{High-limit} = \text{AVG} + (2 * \text{STD})$
- 5) For each FI, test for success:
 - If the number of prescribed units is one, then assume that the rebate count is one.
 - If the calculated amount (redeemed amount \div prescribed units) is between the low and high limits, then the rebate count is equal to the prescribed units.
 - If the calculated amount (redeemed amount \div prescribed units) is greater than the high limit, then the vendor has possibly sold the client too many units and the rebate count is adjusted to equal the prescribed units.
 - If the calculated amount (redeemed amount \div prescribed units) is less than the low limit, then the vendor has probably sold less than the prescribed amount. Determine the unit count that would cause the calculated amount to result in an acceptable unit price value as shown in the drawing below. Apply the calculated unit count as the rebate count.

The following diagram graphically illustrates the calculations used.

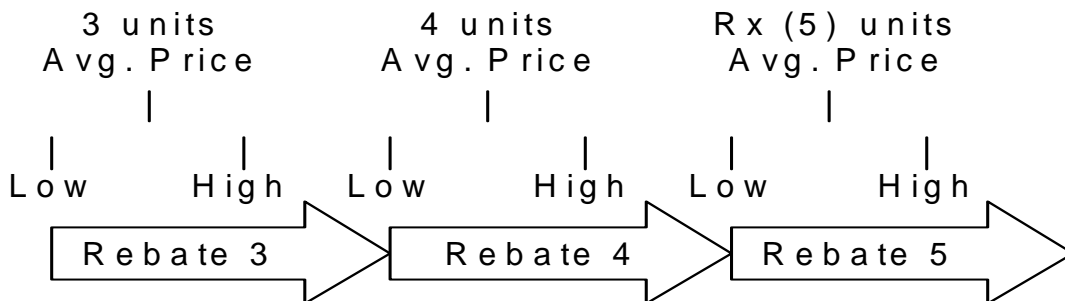


Figure 2 - Rebate Calculation Diagram

Note that the implemented methodology favors the manufacturer in cases where the redeemed value falls outside of the range determined by 2x the standard deviation.

Example: As mentioned above, 15 cans were prescribed with the issue of FI No. 11510046379. When the total of \$52.20 is divided by the average retail price for that vendor of \$3.2566, the result is 16.0290 cans, which exceeds the prescribed quantity and would be an illegal purchase. However, the unit charge of \$3.48 for this FI falls within a low of \$2.5292 and a high of \$3.9840 (the **range of standard deviation** for this vendor's pricing). The prescribed quantity of 15 cans would, therefore, be recognized as the quantity for which New Mexico is entitled to a rebate.

Summary

No single solution seems appropriate for every situation. The recommended methodology is similar to the one suggested by the State but is more accurate and much fairer to the State, while still favoring the manufacturer in doubtful situations. On a sample run for September 2000, the recommended method results in 334 out of 17,034 FI's with rebates favoring the Manufacturer (i.e., outside of the low/high range suggested by 2x standard deviation), with a total of 404 records that have a formula reduction of one or more units, representing approximately 2.37% of the FI's analyzed. 4 of the records resulted in 0 rebates, presumably caused by the client not purchasing any formula. The expected range of FI's having short purchase was 1%-3%.

Initial FI count	17,034	
Rebate reduced	404	2.37%

Using the data from September 2000, the total rebate calculated was:

Initial calculation	\$595,452.84	
Rebate reduction	\$4,419.14	
Final rebate amount	\$591,033.70	0.7421%

Even with the bias in favor of the Manufacturer, this represents a reduction of only 0.7% of the total rebate.

ATTACHMENT 5

NEW MEXICO CAMPAIGN CONTRIBUTION DISCLOSURE FORM