

ARKANSAS DEPARTMENT OF HEALTH WIC PROGRAM
WIC Soy-Based Infant Formula Rebate Contract

This contract (hereinafter referred to as Contract) is entered into between the Arkansas Department of Health (ADH) WIC Program, hereinafter referred to as the PROGRAM, and _____, hereinafter referred to as the CONTRACTOR.

I. THE PARTIES AGREE:

A. THE CONTRACTOR'S DUTIES

The CONTRACTOR shall provide the soy-based contract brand infant formulas specified herein through wholesalers and authorized WIC vendors and shall remit to the PROGRAM a rebate for each unit of the CONTRACTOR'S soy-based contract brand infant formulas as specified herein.

B. CONTRACT AMOUNT

The CONTRACTOR shall rebate to the PROGRAM a price per unit for each soy-based contract brand infant formula listed on Attachment 1 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 Infant Formula Rebate Initiative Soy-Based Quote Sheet (hereinafter "Quote Sheet") on April 6, 2009. It is identified as Attachment 2. to the PROGRAM'S Soy-based Infant Formula Rebate Initiative Request for Proposals, issued in conjunction with the New Mexico Department of Health and the North Carolina Department of Health and Human Services, hereinafter referred to as the REQUEST FOR PROPOSALS and 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. PAYMENT

1. Each month the due date of the initial payment will be the fifth day of the month. The payment shall be no less than 75% of the total payment for the most recent closed out month for which data is available. The balance of the payment is due the 25th of the month. The PROGRAM will submit an invoice to the CONTRACTOR for the remaining rebate balance which will be based on the total number of units of soy-based contract brand, physical form and size of infant formula redeemed for that billing month. 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.

2. The PROGRAM will apply the methodology described in Attachment 3 to this Contract

for determining partial redemptions prior to billing the CONTRACTOR for rebates. The CONTRACTOR agrees that all payments shall be made to the PROGRAM by EFT or ACH wire transfer. Such files must be ready for output by the printer.

3. The CONTRACTOR agrees to pay interest penalties to the PROGRAM in the amount of one (1.0) percent per month or any portion thereof calculated on the payment amount due or invoice total for any properly delivered invoice for which funds have not been transferred to the PROGRAM by the CONTRACTOR by the close of business on the due date for the payment.
4. The CONTRACTOR shall make advance payment if requested by the PROGRAM. 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 month for which data is available for the PROGRAM.
 - a. Advance payment is due upon receipt of the request and becomes delinquent after twenty (20) calendar days. A late payment charge of $\frac{1}{2}$ of 1% per month, accrued on a daily basis (6% annual percentage rate) shall be assessed on any advance payment request that has not been paid within twenty (20) calendar days of its receipt. Late payment penalties will begin on the twenty-first day.
 - b. The CONTRACTOR shall be entitled to a non-refundable discount of one-half of one percent for each month, accrued on a daily basis (6% annual percentage rate), that payment is in advance of its original due date, with such discount applied against the actual amount of advance payment made. Any amount in excess of actual rebates due to the PROGRAM shall be deducted from the next payment due to the PROGRAM.
5. Price increases or decreases in the CONTRACTOR'S lowest national wholesale price per unit for a full truckload, of any one or all of the soy-based contract brand infant formulas listed herein will result in an automatic rebate increase or decrease on a cent-for-cent basis for those formulas. The price per unit rebate will increase or decrease effective the first day of the month in which the wholesale price per unit increased or decreased. The CONTRACTOR shall notify the PROGRAM in writing no less than thirty (30) calendar days prior to any changes in wholesale prices. The notification shall include both the date and amount of the increase or decrease.
6. 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.
7. The CONTRACTOR agrees that if a new soy-based contract brand infant formula

introduced into the CONTRACTOR'S product line is approved for issuance by the PROGRAM or the PROGRAM 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 PROGRAM will notify the affected parties in the WIC community and bill the CONTRACTOR accordingly, if and when that infant formula is issued.

8. The CONTRACTOR agrees that, in the event of a natural disaster, the PROGRAM may issue a soy-based contract brand infant formula that is currently not approved for issuance by the PROGRAM 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 infant formula is issued by the PROGRAM, will be used to calculate the rebate.
9. The CONTRACTOR agrees to pay rebates to the PROGRAM on any unit of soy-based contract brand infant formula approved for issuance by the PROGRAM for which a food instrument was issued during the term of this Contract and subsequently redeemed, even though the Contract may have expired at the time the food instrument is redeemed and payment of the rebate is due.
10. The CONTRACTOR cannot withhold any rebate payments due the PROGRAM under any circumstances. Any adjustments owed the CONTRACTOR by the PROGRAM will be made by the PROGRAM in subsequent invoices.

D. PAYMENT DISPUTES

1. The CONTRACTOR must notify the PROGRAM of any dispute or error in the rebate invoice within sixty (60) calendar days of 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 following the CONTRACTOR'S receipt of the invoice for the funds in question.
2. Adjustments in invoice amounts shall be made by the PROGRAM 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 PROGRAM. Supporting documentation provided by the PROGRAM in the event of a dispute shall be limited to the documentation identified in provision II. A. of this Contract.

E. CONFLICT OF INTEREST

The CONTRACTOR warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required under this Contract. The CONTRACTOR shall comply with the provision of Arkansas Code Annotated Sections 19-11-701 et seq., the Ethics in Public Contracting Law, which requires disclosure to the Director of the Arkansas Department of Finance and Administration of amounts received under Contract when such provisions are applicable. In addition, the CONTRACTOR must comply with all federal laws and regulations on conflict of interest.

F. MISCELLANEOUS

1. The CONTRACTOR acknowledges that the WIC Acronym and the WIC logo are service marks owned by the United States Department of Agriculture (USDA), and that all rights therein and goodwill pertaining thereto belong exclusively to USDA.
 - a. The CONTRACTOR shall not use these service marks in any manner on its goods or their containers or packaging or on tags of labels affixed thereto. The CONTRACTOR also shall not use the WIC logo in advertising or other promotional materials (collectively: “advertising”).
 - b. The CONTRACTOR shall not use the WIC Acronym in advertising in any manner that is likely to cause confusion, mistake, or deception as to the affiliation, connection, or association of the CONTRACTOR with the WIC Program, or as to the sponsorship or approval of the CONTRACTOR’S goods, services, advertising, or commercial activities, including nutrition message(s), by the WIC Program and USDA.
 - c. The CONTRACTOR shall include the following statement with any use of the WIC Acronym in advertising: “WIC is a registered service mark of the U.S. Department of Agriculture for USDA’s Special Supplemental Nutrition Program for Women, Infants, and Children.”
2. The CONTRACTOR shall keep confidential and not divulge or make available to any individual or organization without the prior written approval of the PROGRAM any information, data, documents or reports provided by the PROGRAM to the CONTRACTOR under this Contract.
3. The CONTRACTOR shall not use the award of contract as part of any news release for commercial advertising.
4. The CONTRACTOR shall give the PROGRAM no fewer than ninety (90) calendar days

advance written notice prior to any of the actions listed below in provision I.D.4.a. through d. of this Contract. The ninety (90) calendar days advance written notice shall not begin prior to the date of any required Food and Drug Administration (FDA) approval for the action.

- a. 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 PROGRAM.
- b. 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 PROGRAM, including, but not limited to, replacement by change in formulation and/or unit size.
- c. 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 PROGRAM.
- d. the introduction of any new soy-based contract brand infant formula into its product line.

G. COVENANT AGAINST CONTINGENT FEES

1. The CONTRACTOR warrants that no commissions, percentages, brokerage, gratuities, kickbacks or contingency fees were paid in connection with the Contract, nor exchanged for consideration by the CONTRACTOR for the purpose of securing this Contract.
2. Arkansas Code Annotated, Section 19-11-714 imposes both criminal and civil penalties for violation of its provisions. Arkansas statutes impose criminal penalties where bribes, gratuities or kickbacks have been solicited, given or received in contracts involving public money.

H. AUDITS AND RECORDS

1. The CONTRACTOR shall maintain books, records, and documents in accordance with generally accepted accounting procedures and practices.
2. The CONTRACTOR assures that these records created solely for this Contract shall be subject to inspection, reviews or audit by state personnel and other personnel duly authorized by the PROGRAM, as well as by authorized federal personnel. Routine inspections, review or audits shall be upon reasonable notice and during normal business hours.

3. The CONTRACTOR shall maintain and file with the PROGRAM such progress, fiscal, inventory and other reports as the PROGRAM may require within the period of this Contract.
4. The CONTRACTOR shall allow public access during normal business hours to all documents, papers, letters or other material subject to the provisions of Arkansas Code Annotated, Sections 25-19-101, et seq., The Arkansas Freedom of Information Act, and made or received by the CONTRACTOR in conjunction with this Contract. It is expressly understood that receipt of substantial evidence of the CONTRACTOR'S refusal to comply with this provision shall constitute a breach of the Contract.

I. RETENTION OF RECORDS

1. The CONTRACTOR shall retain all financial records, supporting documents, statistical records and any other documents created solely for this Contract for a period of five (5) years after termination of the Contract. If an audit has been initiated and audit findings have not been resolved at the end of five (5) 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.
2. Persons duly authorized by the PROGRAM and federal auditors pursuant to 45 C.F.R. Section 74.26 (a), (b), and (d), shall have full access to and the right to examine any of said records and documents during said retention period. Such access shall occur during normal business hours.

J. MONITORING

1. The CONTRACTOR shall provide access to, or shall furnish whatever information is necessary for the monitoring of this Contract.
2. The CONTRACTOR shall permit the PROGRAM to monitor the aforementioned Contract according to applicable regulations of the state and federal governments.

K. HOLD HARMLESS/INDEMNIFICATION

1. The CONTRACTOR agrees to indemnify and hold harmless the STATE as well as officers, agents, and employees of the PROGRAM from all claims, losses, or suits accruing and/or resulting from personal injury allegedly caused by a defect in the product furnished pursuant to this Contract, except claims, losses, or suits arising from any negligence by the PROGRAM, its officers, agents, employees, CONTRACTORS or SUBCONTRACTORS. The PROGRAM shall give the CONTRACTOR written notice of each such claim or suit and full right and opportunity to conduct the CONTRACTOR'S own defense thereof, together with all reasonable cooperation. Any

such claim shall be settled by the Arkansas Claims Commission.

2. Notwithstanding any indemnification clause, the PROGRAM shall have full authority to conduct its own defense, negotiation, and settlements, but the CONTRACTOR'S indemnification nevertheless remains in full force and effect. Any settlement shall only be reimbursable by CONTRACTOR if the CONTRACTOR approves such settlement in advance, and any liability upon successful defense shall only be reimbursable by the CONTRACTOR if CONTRACTOR has full opportunity to participate equally in the defense of the action.

L. COMPLIANCE WITH LAWS

1. The CONTRACTOR shall abide by all applicable federal laws and regulations.
2. If any state law conflicts with a federal law, the federal law shall supersede.

II. PROGRAM AGREES:

A. INVOICE REPORTS

The PROGRAM shall provide the CONTRACTOR a monthly invoice report specifying the number of units of each soy-based contract brand, physical form and size of infant formula approved for issuance by the PROGRAM and paid for during the preceding month. Based on these figures, the rebate due to the PROGRAM shall be calculated. The PROGRAM shall provide these calculations and the supporting documentation with each invoice. The PROGRAM will make adjustments for partial purchases bases on Attachment 3: Arkansas Methodology for Determining Partial Redemptions.

The supporting documentation is limited to the food instrument number, food instrument redeemed amount, redemption date, issue date, unit 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 name, address, and authorization status.

B. PURCHASES REQUIRING MEDICAL DOCUMENTATION

The purchase of any non-contract brand infant formula or any contract brand infant formula that does not meet the requirements of 7 C.F.R. § 246.10(c)(1)(i) will be allowed 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 provisions III.A. and III.J. of this Contract. In addition, the purchase of brands of formula other than the Contract brands will be allowed only with a written prescription from an authorized competent health care professional requesting the exception. 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 non-contract brand infant formula, except as provided in provisions III.J. and III.L.A2. of this Contract.

C. COMPLIANCE

The PROGRAM shall monitor WIC vendors for compliance with Arkansas WIC Program rules, regulations, policies, and procedures, and employ sanctions as necessary to enforce compliance as outlined in WIC federal regulations.

III. THE CONTRACTOR AND THE PROGRAM MUTUALLY AGREE:

A. TERM

This Contract shall be effective on October 1, 2009 through September 30, 2012. The Contract will not be extended past that period. No commitment of public funds is permitted prior to Contract approval.

B. NOTICE AND CONTACT

The name and address of the PROGRAM'S administrator for this Contract is Marcell Jones, WIC Director, Arkansas Department of Health (ADH) WIC Program, 5800 West 10th Street, Suite 810, Little Rock, AR 72204-1703. The representative of the CONTRACTOR responsible for administering the services under this Contract is _____. In the event that different representatives are designated by either party after execution of this Contract, notice of the name and address of the new representative will be rendered in writing to the other party and said notification attached to originals of this Contract.

C. PERFORMANCE OF CONTRACT

The PROGRAM and the CONTRACTOR agree to meet at least annually to review the progress and performance of the Contract. During these meetings any concerns regarding billing procedures must be addressed.

D. MODIFICATION OF CONTRACT

Modification of provisions of this Contract shall only be valid when reduced to writing and duly signed by both parties to the Contract. The parties agree to amend this Contract if federal and/or state revisions of any applicable laws or regulations make changes in the Contract necessary.

E. SEVERABILITY

In the event any provision of this Contract shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

F. GOVERNING LAW

This Contract shall be deemed to have been executed and entered into in the State of Arkansas, the County of Pulaski, and shall be construed, performed and enforced in all respects in accordance with the laws and rules of the State of Arkansas. It is agreed between the parties hereto that the place of this Contract, its situs and forum, shall be Pulaski County, Arkansas. Each party shall perform its obligations hereunder in accordance with the terms and conditions of this Contract.

G. HEADINGS NOT CONTROLLING

Headings used in this Contract are for reference purposes only and shall not be considered to be a substantive part of this Contract.

H. AVAILABILITY OF FUNDS

It is understood and agreed between the CONTRACTOR and the PROGRAM that Arkansas Code Annotated §19-11-238 (c) requires that the payment of any amounts specified in this Contract, or its continuation, is contingent upon and subject to the allocation of funds to the PROGRAM for the purposes set forth in this Contract.

I. NON-ASSIGNMENT

Neither party shall assign, sublicense, subcontract or otherwise transfer its rights, duties and/or obligations under this Contract. Any sublicense, subcontract, assignment or transfer otherwise occurring shall be null and void; provided, however, that the PROGRAM 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 Arkansas upon giving prior written notice to the CONTRACTOR.

J. FORCE MAJEURE

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.

Notwithstanding the preceding paragraph, the CONTRACTOR shall pay rebates to the PROGRAM for soy-based non-contract brand infant formulas, except exempt infant formulas, when the CONTRACTOR's product is not available for 72 hours or more. The PROGRAM shall have the right to substitute soy-based non-contract brand infant formulas and to invoice the CONTRACTOR for the units issued during the periods 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 PROGRAM may declare the CONTRACTOR in breach and may terminate the Contract for cause pursuant to Section L, A. "Termination for Cause".

K. PROGRAM'S RIGHT TO APPROVE NEW OR ADDITIONAL CONTRACT BRAND INFANT FORMULAS FOR ISSUANCE

The CONTRACTOR agrees that the PROGRAM has the right to approve for issuance additional contract brand infant formulas that are not currently listed in Attachment 1. , of this Contract and new contract brand infant formulas introduced into the CONTRACTOR'S product line during the term of this Contract. The PROGRAM is not obligated to add new or additional contract brand infant formulas to the PROGRAM'S WIC-approved food list.

L. TERMINATION

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

Termination for Cause

1. Unless the CONTRACTOR's material breach of any provision of this contract is waived by the PROGRAM in writing, the PROGRAM 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.

2. 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 PROGRAM's right to remedies at law or to damages.
3. The PROGRAM may terminate this contract for cause upon the filing of a bankruptcy action or insolvency by or against the CONTRACTOR.
4. If the contract is terminated pursuant to this provision, the CONTRACTOR shall provide to the PROGRAM the same rebate payment for soy-based infant formula that would have been paid until a new contract is executed.

Termination Without Cause

1. Either party may terminate this contract with a minimum of one hundred and fifty (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 one hundred and fifty (150) calendar days between issuance of notice and termination will be made or satisfied within thirty (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.
4. Notwithstanding termination, the Contractor shall comply with paragraph I A. 9. regarding payment of rebates on units of soy-based contract infant formula for which food instruments were issued during the term of the Contract and redeemed subsequent to the Contract termination.

M. RECONCILIATION INVOICES

Every six (6) months during the contractual period and within one hundred and twenty (120) calendar days of the termination of the Contract, the PROGRAM may provide reconciliation invoices to include unreported claims against the CONTRACTOR. Payment from the CONTRACTOR is due within thirty (30) calendar days of receipt of the PROGRAM'S invoice. A late payment charge of 1.0 percent per month accrued on a daily basis (12% annual percentage rate) shall be assessed on past-due amounts at the time the subsequent invoice is calculated.

N. **ALL TERMS AND CONDITIONS INCLUDED**

The Contract and its attachments contain all the terms and conditions agreed upon by the parties.

All terms and conditions of the ARKANSAS/NORTH CAROLINA/NEW MEXICO WIC SOY-BASED INFANT FORMULA REBATE INITIATIVE REQUEST FOR PROPOSALS (issued February 10, 2009), STATES ANSWERS TO PRE-BID QUESTIONS (issued March 19, 2009) and the CONTRACTOR'S accepted response to the Request for Proposals, are hereby incorporated, and are a part of the Contract. Also incorporated in the Contract are the QUOTE SHEET (Attachment 1), the CONTRACTOR CERTIFICATION (Attachment 2), the ARKANSAS METHODOLOGY FOR DETERMINING PARTIAL REDEMPTIONS (Attachment 3), and the PRICE PER UNIT QUOTE SHEET (Attachment 4).

IN WITNESS THEREOF, the CONTRACTOR and the PROGRAM have executed this agreement in duplicate originals, one of which is retained by each of the parties, the day and year first written below.

CONTRACTOR

ARKANSAS DEPARTMENT OF HEALTH

BY _____
Contractor's Signature/Date
**President/Vice President
or designee**

Paul K. Halverson, DrPH
Director

WITNESS:

Signature/Date
CORPORATE SECRETARY

Date