

VI. FOOD FUNDS MANAGEMENT

(Please indicate) State Agency: AR for FY 2015

Food funds management involves monitoring cost containment measures and procedures related to infant formula and other authorized food items, the monitoring and management of State agency funding sources, and the accurate reporting of participation figures.

A. *Cost Containment Measures - 246.4(a)(14)(x)*: describe the policies and procedures used to implement cost containment measures as they relate to infant formula contracts, their approval and the processing of infant formula and/or other rebates, and food package cost containment practices.

B. *Funds Monitoring/798 Reporting - 246.4(a)(12)and (a) (14)*: describe the State agency's funding sources, how food obligations are calculated to allow for inflation, rebate cash management, and monthly closeout monitoring activities.

C. *Participation Reporting - 246.4(a)(11)(i)*: describe the methods used to accurately document and monitor participation at the State and local level, and methods for monitoring changes in participation by priority.

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A. Cost Containment Measures

1. The State agency seeks FNS approval related to infant formula cost containment measures (check one):

- for a waiver of the requirement for a single-supplier competitive system. State agency must complete a cost comparison projecting food cost savings in the single-supplier competitive system based on the lowest monthly net price or highest monthly rebate (as required in Section 246.16a(d)(2)(i) through (d)(2)(iii) and savings under an alternative cost containment system, Section 246.16a(d)(2)(B)
- to issue an infant formula bid solicitation that evaluates bids by highest rebate. A State agency must demonstrate to FNS' satisfaction that the weighted average retail prices for different brands of infant formula in the State vary by 5% or less, Section 246.16a(c)(5)(iii)
- not applicable

Please attach in the Appendix supporting documentation for requests for FNS approval.

ADDITIONAL DETAIL: Food Funds Management Appendix and/or Procedure Manual citation:

2. Cost Containment Contracts for Infant Formula

a. The State agency has a rebate contract/agreement for infant formula.

- | | |
|---|---|
| <input checked="" type="checkbox"/> Yes | <input type="checkbox"/> No |
| If yes, attach contract in Appendix | If no, check which applies:
<input type="checkbox"/> granted waiver
<input type="checkbox"/> ITO with participation under 1,000 as of April |

b. The State agency acquires infant formula through (check all that apply):

- home food delivery system
- direct distribution food delivery system
- retail food delivery system
- other (specify): _____

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A. Cost Containment Measures

- c. **The duration of the contract or rebate agreement(s) in effect is:**
For a single-supplier system or multi-supplier: Date contract/agreement:

Manufacturer	Began	Expires	Extensions
Nestle Gerber	10/1/2012	09/30/2015	

- d. **Current fiscal year rebates and current net price per can paid (note the price should reflect current prices rather than original contract prices and rebate amounts):**

Primary Contract Infant Formula				
Product	Manufacturer	Rebate/Unit	Net price/Unit	% Discount
Liquid Concentrate (specify unit size)	See Nestle/Gerber Rebates FFM Appendix I			
Milk-Based				
Soy-based*				
Powder (specify unit size)				
Milk-based				
Soy-based*				
Ready to Feed (specify unit size)				
Milk-based				
Soy-based*				
Exempt Formula If applicable				

***If uncoupled/separate contracts for milk- and soy-based infant formula.**

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A. Cost Containment Measures

e. Infant Formula Issuance.

Does the State agency issue the Primary Contract Infant Formula as the first choice of issuance (by physical form), with all other infant formula infant formulas issued as an alternative? (Section 246.16a(c)(8) & 246.10(e)(1)(iii))

Yes No

The percent of infants receiving each type of formula is estimated at:

Contract	<u>92%</u>
Non-contract	
Exempt infant formula	<u>8%</u>
Non-exempt infant formula	<u>N/A</u>

ADDITIONAL DETAIL: Food Funds Management Appendix and/or Procedure Manual (citation):

3. The State agency's infant formula rebate solicitation/contract contains the following provisions (check all that apply):

- Does not apply (granted waiver or ITO with participation under 1000)
- Establishes the contractor's responsibility to provide sufficient quantities of products covered by contract to all authorized WIC vendors in the State.
- Requires contractor to provide a rebate on all infant formulas it produces that the State agency chooses to issue, except exempt infant formulas. (Section 246.16a(c)(2)(i) & (ii))
- Specifies that the rebate reflects the same percentage discount on the manufacturer's lowest national wholesale cost as the corresponding physical form (i.e., liquid concentrate) of the Primary Contract Infant Formula for which bids were received. (Section 246.16a(c)(7)(i & ii))
- Requires manufacturer to adjust for price changes subsequent to the bid opening. The provision requires a cent-for-cent increase and decrease in the rebate amounts whenever there is any change in the lowest national wholesale price for a full truckload of a particular infant formula. (Section 246.16a(c)(7)(iv))
- Specifies that the contractor shall pay the rebate in effect on the day the participant actually transacts the food instrument (regardless of the food instruments' issuance date).

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A. Cost Containment Measures

- Requires payment of rebates on all infant formula purchased while contract is in effect, even though the contract may be void at the time payment is due.
- Stipulates sanctions for unfulfilled contract obligations (e.g., if payment is not made within 30 days of the invoice date, the contractor will pay the State agency with interest, at a rate specified in the contract, on the unpaid balance until such time as payment is made over and above the amount due from infant formula rebate.)
- Includes an extension option for a specified length of time. Terms and conditions of extension person(s) are specified in the request for bids and contract.
- Addresses billing discrepancies. Prohibits contractor from withholding rebate payments due under any circumstances. All disputes must be settled by closeout of the fiscal year in which the dispute occurred.

4. For all authorized food, including infant formula, rebate solicitations the following applies:

- The State agency provides a minimum of 30 days between the publication of the rebate solicitation and the date on which the bids are due, unless exempted by the Secretary. (Section 246.16a(c)(1)(i))
- The State agency publicly opens and reads all bids aloud on the day the bids are due. (Section 246.16a(c)(1)(ii))
- The rebate solicitation must identify the composition of State alliances for the purpose of a cost containment measure, and verify that no additional States shall be added between the date of the bid solicitation and the end of the contract. (Section 246.16a(c)(3))

If single solicitation, State agency serves a monthly average of less than 100,000 infants during preceding 12-month period. (Section 246.16a(c)(2)(ii))

Yes No

If no, requested separate bids for milk- and soy-based formulas or other foods.

Yes No

Is solicitation for a State alliance? Yes No

If yes, the size of alliance must be no more than 100,000 infants as of October 1, 2003, unless (Section 246.16a(c)(3)):

- Alliance existed prior to July 1, 2004 and has not added additional State agencies,
- Alliance expanded to include an ITO, or
- Alliance expanded to include a State agency(ies) that serves less than 5,000.

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A. Cost Containment Measures

**ADDITIONAL DETAIL: Food Funds Management Appendix
and/or Procedure Manual (citation):**

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A. Cost Containment Measures

5. Cost Containment for Other Foods

a. Rebates are also obtained on other WIC foods.

- Yes (specify foods and attach contract in Appendix): _____
 No

b. The State agency intends to pursue rebates on other authorized foods.

- Yes (specify): _____
 No

c. To contain food costs, the State agency has limited authorized foods/container sizes/types, etc.

- Yes (If yes, note such limitations on the following table)
 No

ADDITIONAL DETAIL: Food Funds Management Appendix and/or Procedure Manual (citation):

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A. Cost Containment Measures

	Specific brands are designated/ Disallowed	Only certain container sizes are allowed	Allowable types are limited	Other
Exempt formula for women, infants & children	X	X	X	
Infant cereal	X	X	X	
Infant Fruit/Veg/Meat	X	X		
Whole fresh fluid milk				Least Expensive at time of purchase
Lowfat fresh fluid milk				Least Expensive at time of purchase
Skim fresh fluid milk				Least Expensive at time of purchase
Fresh milks (e.g., Lactaid, cultured buttermilk, goat milk) (specify):				Least Expensive at time of purchase
Shelf-stable milk (e.g., evaporated milk, UHT, whole/low fat/nonfat dry milk)		X		Least Expensive at time of purchase
Cheese		X	X	Least Expensive at time of purchase
Soy-based beverage	X			
Tofu	N/A			
Fresh eggs	X	X	X	Least Expensive at time of purchase

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A. Cost Containment Measures

Dried egg mix	N/A			
Hot cereal	X		X	
Cold cereal	X		X	
Single strength fruit/ vegetable juice	X	X		Least Expensive at time of purchase
Concentrated fruit/ vegetable juice	X	X	X	Least Expensive at time of purchase
Whole wheat bread	X	X	X	
Other whole grains	X	X	X	
Peanut butter		X		
Dry beans/peas		X		
Canned Fish			X	
Canned beans/peas		X	X	Least Expensive at time of purchase

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B. Funds Monitoring/798 Reporting

1. **The State agency has procedures to assure that the requirements are met regarding the nonprocurement of food in bulk lots, supplies, equipment and other services from entities that have been debarred or suspended.**

Yes No

ADDITIONAL DETAIL: Food Funds Management Appendix and/or Procedure Manual (citation):

2. Food Cost Obligations

- a. **The State agency calculates food obligations based on the following data (check one):**

- number of expected participants and average food cost per participant
 number of expected participants by category (e.g., pregnant woman, infant, etc.) and average food cost per participant category
 number of expected redemptions by food instrument type and cash-value voucher type and average value per food instrument type and cash-value voucher type
 other (specify): _____

- b. **The State agency estimates the impact of inflation on food costs through the use of the following inflation escalators:**

- Inflation factor used in Federal funding formula
 State-generated estimates of inflation based on State market basket of foods
 Best guess by food item based on economic reports or other sources
 Other (specify): _____

- c. **The State agency ADP system automatically produces a monthly obligation amount**

- Yes
 No, data are pulled from various sources and an estimated amount is calculated manually or with a PC spreadsheet
 Other (specify): _____

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B. Funds Monitoring/798 Reporting

- d. **The State agency system (in-house or contracted) provides the following data on food instrument and cash-value voucher redemptions at specific (daily, weekly, monthly, as needed) frequencies (check all that apply and provide frequency):**

<u>Frequency</u>	<u>Data</u>
<u>Monthly</u>	<input type="checkbox"/> food instruments and cash-value vouchers paid for issue month
<u>Monthly</u>	<input type="checkbox"/> food instruments and cash-value vouchers outstanding for issue month
<u>Monthly</u>	<input type="checkbox"/> food instruments and cash-value vouchers that have expired
<u>Monthly</u>	<input type="checkbox"/> food instruments and cash-value vouchers that are void/unclaimed

ADDITIONAL DETAIL: Food Funds Management Appendix and/or Procedure Manual (citation):

3. Rebate Cash Management

- a. The State agency has a billing system in place that ensures rebate invoices for all authorized food, including infant formula, under competitive bidding, provide a reasonable estimate, or actual count of the number of units purchased by participants during WIC transactions (Section 246.16a(k)).

- Actual count of units purchased
 Estimate of units purchased (attach methodology)
 State reduces the invoice by an "error rate". The error rate is _____%.

ADDITIONAL DETAIL: Food Funds Management Appendix and/or Procedure Manual (citation):

- b. **The State agency uses a food instrument that enables it to identify the type and brand of infant formula redeemed.**

- Yes, for all formula types, brands, and physical forms
 Yes, for exempt infant formulas
 No

- c. **The invoice to the formula manufacturer is issued by:**

- the WIC unit
 the State agency fiscal unit
 other (specify): _____

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B. Funds Monitoring/798 Reporting

d. Monthly invoices are submitted with supporting data.

Yes No

e. Rebates received are reported on the FNS-798 in the _____ month in which the rebate is received rather than the month in which it was earned.

Yes No

ADDITIONAL DETAIL: Food Funds Management Appendix and/or Procedure Manual (citation):

4. Closeout of Report Month Outlays

a. The State agency allows the food vendor (and farmer if any) the following number of days to submit food instruments and cash-value vouchers for payment (provide the number of days):

60 days from the participant's first valid date

b. The State agency is generally able to close out a report month completely within:

90 days
 120 days
 other (specify number of days): _____

ADDITIONAL DETAIL: Food Funds Management Appendix and/or Procedure Manual (citation):

5. Indicate the method used to reimburse vendors (and farmers if any) for redeemed food instruments and cash-value vouchers or other services and specify the entity responsible for making payment:

State WIC	State FM	Other (Specify)	
<input type="checkbox"/>	<input type="checkbox"/>	_____	by check directly to vendor or farmer
<input type="checkbox"/>	<input type="checkbox"/>	_____	by check directly to vendor's or farmer's bank
<input type="checkbox"/>	<input type="checkbox"/>	<u>Solutran</u>	by electronic transfer to vendor's or farmer's bank
<input type="checkbox"/>	<input type="checkbox"/>	_____	other (specify): _____

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B. Funds Monitoring/798 Reporting

**ADDITIONAL DETAIL: Food Funds Management Appendix
and/or Procedure Manual (citation):**

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C. Participation Reporting

1. Participation Counting

- a. **The State agency counts an enrollee who received at least one food instrument/food package (or who received no food instrument/food package, but was either a fully-breastfed infant of a participating breastfeeding woman or a woman partially breastfeeding a participating 6 to 12 month old infant) as a participant during:**

- the calendar month
 the computer system cycle month
 other (specify): _____

- b. **The State agency receives participation counts from:**

- the State agency computer system based on the number of persons issued food or food instruments (manual and automated food instruments), the number of fully-breastfed infants who receive no food or food instruments, but are breastfed by participating breastfeeding women, and the number of women who receive no food or food instruments, but are partially breastfeeding a participating 6 to 12 month old infant.
 counts reported from local agencies based on issuance records
 other (specify): _____

- c. **If State funds are present, the State agency differentiates between Federal-supported and State-supported participants by:**

- special code on food instrument
 special areas of State designated as State-supported areas
 pro rata allocation based on proportion of Federal to State funds spent
 other (specify): N/A

- d. **When local agencies are chronically late in furnishing food instrument and/or certification data needed for participation counts, the State agency:**

- sends warnings
 applies financial sanctions
 requires manual reporting
 other (specify): N/A

ADDITIONAL DETAIL: Food Funds Management Appendix and/or Procedure Manual (citation):

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C. Participation Reporting

2. Participation by Priority

a. Priority level is a critical data field in the State agency's computer system.

Yes No

b. The State computer system automatically assigns priority level based on the enrollee's nutritional risk condition.

Yes No

c. The State agency's computer system revises the priority level determination when a participant changes category (e.g., infant becomes child and receives a child's food package).

Yes No

d. The State agency has an "unknown" priority category for VOC transfers where priority is unknown.

Yes No

3. Participation by Local Agency

The State agency's computer system supports its requirement to report participation data by local agency to measure breastfeeding performance.

Yes No

ADDITIONAL DETAIL: Food Funds Management Appendix and/or Procedure Manual (citation):

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 20, 2012. It is identified as Attachment 1 to the WIC 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. The first of the month the CONTRACTOR will receive an invoice by electronic mail for payment for the most recent closed out month for which data is available. The PROGRAM will submit an invoice to the CONTRACTOR which will be based on the total number of units of soy-based infant formula by brand, physical form and size, redeemed for that billing month. Payment by the CONTRACTOR is due within (30) calendar days of receipt of the PROGRAM'S invoice. 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 State 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 increases or decreases. 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. The lowest national wholesale price per unit for a full truckload of the replacement soy-based

infant formula at the time the replacement formula is approved for issuance by the PROGRAM will be used to calculate the rebate.

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 CONTRACTOR ninety (90) days, or less if mutually agreed upon, prior to the approval of the new or additional formula for issuance. 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 substitute 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 redeemed units of primary soy-based contract brand infant formula and other soy-based contract brand infant formulas approved for issuance by the PROGRAM that are issued with a food instrument having a "first date to use" on or between October 1, 2012 and September 30, 2015. Rebate payment shall be made 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. Late penalties shall be assessed against the CONTRACTOR during the time any amounts are in dispute and will accrue at a rate of 1.5% per month prorated 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 thirty (30) calendar days, or by closeout of the federal fiscal year in which the dispute occurred, whichever is earlier. Any payments or late penalties due to the PROGRAM shall be received with ten (10) calendar days from the date of resolution.

3. 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 one hundred and twenty (120) 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 one hundred and twenty (120) 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. The introduction of any new soy-based contract brand infant formula into its product line and when it will become available in the PROGRAM's market;
 - b. 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;
 - c. 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 or unit size; and
 - d. 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.
 - e. A change in size of the product which impacts the amount of yield and the amount of product issued per month. Due to the impact on an EBT system, products that change both size and yield must change the UPC or the contractor must work with the PROGRAM to reset the authorized WIC vendors' shelves and the wholesalers' inventory.

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 state and 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 infant formula by brand, physical form and size, 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 based 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, first date to use, 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, authorization status, web address, email address, and store type.

B. 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, 2012 through September 30, 2015. 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 Susan Handford, Director, WIC/Nutrition Branch, 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 Susan Eberhart, Sr. Regulatory Specialist, [Nestlé](#) Nutrition, 12 Vreeland Road, 2nd Floor, Florham Park, NJ 07932. 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

This Contract may not be amended orally or by performance. 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, when the CONTRACTOR's product is not available in the State for 72 hours or more, the PROGRAM shall have the right to substitute soy-based contract brand infant formulas currently not approved for issuance or soy-based non-contract brand infant formulas currently not approved for issuance, except exempt infant formulas. The PROGRAM shall invoice, and the CONTRACTOR shall pay, rebates 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 the shortage is remedied. The lowest national wholesale price per unit at the time of issuance for a full truckload of the substitute formula shall be used to calculate the rebate amount. The rebate paid for the substitute formula shall yield the same net price per reconstituted fluid ounce as the rebate for the formula for which it is being substituted. 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 terminate the Contract for cause pursuant to Section III L, 1. "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.

1. Termination for Cause

- a. 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.

- b. 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.
- c. The PROGRAM may terminate this contract for cause upon the filing of a bankruptcy action or insolvency by or against the CONTRACTOR.
- d. 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.

2. Termination Without Cause

- a. Either party may terminate this contract with a minimum of one hundred and eighty (180) calendar days written notice delivered to the contract representatives specified herein.
- b. 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 eighty (180) calendar days between issuance of notice and termination will be made or satisfied within thirty (30) calendar days of the receipt of the invoice.
- c. 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.
- d. Notwithstanding termination, the Contractor shall comply with paragraph IC, 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 January 20, 2012), STATES ANSWERS TO PRE-BID QUESTIONS (issued March 19, 2012) 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).

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

ARKANSAS DEPARTMENT OF HEALTH WIC PROGRAM
WIC Milk-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 milk-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 milk-based contract brand infant formulas as specified herein.

B. CONTRACT AMOUNT

The CONTRACTOR shall rebate to the PROGRAM a price per unit for each milk-based contract brand infant formula listed on Attachment 1 of this Contract. The rebate amount per unit for the primary milk-based contract brand infant formula is the amount specified by the CONTRACTOR on the Infant Formula Rebate Initiative Milk-Based Quote Sheet (hereinafter "Quote Sheet") on April 20, 2012. It is identified as Attachment 1 to the WIC PROGRAM'S Milk-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 milk-based contract brand infant formulas specified herein are calculated in accordance with Section III.A.7. of the Request for Proposals.

C. PAYMENT

1. The first of the month the CONTRACTOR will receive an invoice by electronic mail for payment for the most recent closed out month for which data is available. The PROGRAM will submit an invoice to the CONTRACTOR which will be based on the total number of units of milk-based infant formula by brand, physical form and size, redeemed for that billing month. Payment by the CONTRACTOR is due within (30) calendar days of receipt of the PROGRAM'S invoice. 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 State 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 milk-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 increases or decreases. 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 milk-based contract brand infant formula or any other milk-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. The lowest national wholesale price per unit for a full truckload of the replacement

milk-based infant formula at the time the replacement formula is approved for issuance by the PROGRAM will be used to calculate the rebate.

7. The CONTRACTOR agrees that if a new milk-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 milk-based contract brand infant formulas to its approved list, the CONTRACTOR shall pay a rebate amount per unit for the additional milk-based infant formula calculated in accordance with Section III.A.7.c. of the Request for Proposals. The PROGRAM will notify the CONTRACTOR ninety (90) days, or less if mutually agreed upon, prior to the approval of the new or additional formula for issuance. 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 substitute a milk-based contract brand infant formula that is currently not approved for issuance by the PROGRAM or a milk-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 redeemed units of primary milk-based contract brand infant formula and other milk-based contract brand infant formulas approved for issuance by the PROGRAM that are issued with a food instrument having a "first date to use" on or between October 1, 2012 and September 30, 2015. Rebate payment shall be made 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. Late penalties shall be assessed against the CONTRACTOR during the time any amounts are in dispute and will accrue at a rate of 1.5% per month prorated 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 thirty (30) calendar days, or by closeout of the federal fiscal year in which the dispute occurred, whichever is earlier. Any payments or late penalties due to the PROGRAM shall be received with ten (10) calendar days from the date of resolution.

3. 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 one hundred and twenty (120) 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 one hundred and twenty (120) 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. The introduction of any new milk-based contract brand infant formula into its product line and when it will become available in the PROGRAM's market;
 - b. A change in the label of the primary milk-based contract brand infant formula or any other milk-based contract brand infant formula approved for issuance by the PROGRAM;
 - c. The replacement of the primary milk-based contract brand infant formula or any other milk-based contract brand infant formula approved for issuance by the PROGRAM, including, but not limited to, replacement by change in formulation or unit size; and
 - d. A change in the name of the primary milk-based contract brand infant formula or any other milk-based contract brand infant formula approved for issuance by the PROGRAM.
 - e. A change in size of the product which impacts the amount of yield and the amount of product issued per month. Due to the impact on an EBT system, products that change both size and yield must change the UPC or the contractor must work with the PROGRAM to reset the authorized WIC vendors' shelves and the wholesalers' inventory.

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 state and 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 milk-based infant formula by brand, physical form and size, 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 based 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, first date to use, 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, authorization status, web address, email address, and store type.

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A. TERM

This Contract shall be effective on October 1, 2012 through September 30, 2015. The Contract will not be extended past that period. No commitment of public funds is permitted prior to Contract approval.

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The name and address of the PROGRAM'S administrator for this Contract is Susan Handford, Director, WIC/Nutrition Branch, 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 Susan Eberhart, Sr. Regulatory Specialist, Nestlé Nutrition, 12 Vreeland Road, 2nd floor, Florham Park, NJ 07932. 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

This Contract may not be amended orally or by performance. 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.

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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.

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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.

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- b. 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.
- c. The PROGRAM may terminate this contract for cause upon the filing of a bankruptcy action or insolvency by or against the CONTRACTOR.
- d. If the contract is terminated pursuant to this provision, the CONTRACTOR shall provide to the PROGRAM the same rebate payment for milk-based infant formula that would have been paid until a new contract is executed.

2. Termination Without Cause

- a. Either party may terminate this contract with a minimum of one hundred and eighty (180) calendar days written notice delivered to the contract representatives specified herein.
- b. 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 eighty (180) calendar days between issuance of notice and termination will be made or satisfied within thirty (30) calendar days of the receipt of the invoice.
- c. 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.
- d. Notwithstanding termination, the Contractor shall comply with paragraph IC, 9. regarding payment of rebates on units of milk-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.

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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 MILK-BASED INFANT FORMULA REBATE INITIATIVE REQUEST FOR PROPOSALS (issued January 20, 2012), STATES ANSWERS TO PRE-BID QUESTIONS (issued March 19, 2012) 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).

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

Appendix II -Nestle Gerber Rebates

Product/Size/Form	Rebate Per Can	Price Per Can	% Discount
Gerber Good Start Gentle 12.7 oz Powder	\$ 14.560	\$ 14.800	98.378%
Gerber Good Start Gentle 12.1 fl oz Concentrate	\$ 4.380	\$ 4.430	98.871%
Gerber Good Start Gentle 33.8 fl oz Ready to Feed	\$ 2.480	\$ 6.230	39.807%
Gerber Good Start Protect 12.4 oz Powder	\$ 14.560	\$ 14.800	98.378%
Gerber Good Start Gentle Supplementing 2.4 oz Powder	\$ 14.560	\$ 14.800	98.378%
Gerber Good Start Soothe 12.4 oz Powder	\$ 14.860	\$ 15.100	96.411%
Gerber Good Start Soy 12.9 oz Powder	\$ 13.779	\$ 15.100	91.252%
Gerber Good Start Soy 12.1 fl oz Concentrate	\$ 4.097	\$ 4.430	92.483%
Gerber Good Start Soy 33.8 fl oz Ready to Feed	\$ 2.935	\$ 6.230	38.443%
Gerber Graduates Gentle 22oz Powder	\$ 18.930	\$ 19.290	98.180%
Gerber Graduates Protect 22oz Powder	\$ 18.930	\$ 19.290	98.180%
Gerber Graduates Soy 24oz Powder	\$ 18.930	\$ 19.290	98.180%
Gerber Graduates Soothe 22oz Powder	\$ 18.959	\$ 19.290	98.286%