



Reply to
Attn. of:

APR 06 1995

Subject: WIC Final Policy Memorandum #95-14
Infant Formula Rebate Contracts
Provisions Restricting Competition

To: Regional Directors
Supplemental Food Programs
All Regions

In the course of reviewing Invitations for Bids (IFB) for infant formula rebate contracts, the Food and Consumer Service has noticed that certain provisions may preclude some infant formula manufacturers from bidding. One example is provisions requiring multiple manufacturing facilities which are intended to insure continued delivery of formula in the event of plant shut-downs, natural disasters or other unpredictable occurrences. Although such provisions are intended to achieve legitimate State agency purposes, they are often too broad and may result in restricting competition by precluding bidding by otherwise qualified manufacturers.

Such provisions violate the spirit of Section 246.16(Q)(2) of the WIC Program regulations, therefore restricting competition. The regulations state that "State agencies shall not issue invitations for bids or enter into contracts which...exclude from consideration in the bidding evaluation any infant formula manufacturer in compliance with the Federal Food, Drug and Cosmetic Act." Therefore, the Department will not approve future IFBs or contracts that include provisions that erroneously restrict competition for WIC infant formula rebates.

If the goal is to prevent interruptions in supply, this can be accomplished by an "insufficient quantities provision," requiring a contractor who is unable to supply the contracted quantity of formula to pay a rebate for non-contracted formula (and any resulting increased costs to the State agency) until the contracted formula can be supplied again. In lieu of a requirement that a contractor have multiple manufacturing plants, such a provision would adequately protect the State agency's interest without precluding bidding by an otherwise qualified manufacturer.

The contents of this guidance document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

Regional Directors

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Please inform your respective State agencies of this policy.
If you have any questions, please contact us.

for *Barbara Hallman*

STANLEY C. GARNETT
Director

Supplemental Food Programs Division

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