DW

MAY 10 1994

SF-220

WIC Policy Memorandum 94 -6
Extension of Infant Formula Rebate Contracts

Regional Directors
Supplemental Food Programs
All Regions

The Food and Nutrition Service, in consultation with the Office of the General Counsel, has determined that State agencies may not exercise any options to renew, extend, or otherwise continue any infant formula cost containment contract at amounts not specified in the original contract. We have determined that to do so would be inconsistent with section 17(h)(8)(B)(i) of the Child Nutrition Act of 1966 (CNA) and section 246.16(m) of the WIC Program regulations, and is contrary to Program policy. In addition, State agencies may not extend, renew, or otherwise continue any infant formula cost containment contract beyond the time period specified in the contract, including any options to renew or extend. This memorandum sets forth our position on this issue.

State agencies often send us various invitations for bids and infant formula cost containment contracts for our review. These documents frequently include clauses allowing the State agency and the infant formula manufacturer to agree to extend the contract for a specified number of months after the expiration of the contract's initial term. We have informally "approved" these option clauses and State agencies' implementation of them as an administrative convenience to State agencies, some of which are prohibited by State law from entering into multi-year contracts. To balance the competing interests of (1) promoting competition as required by the law and the regulations and (2) not requiring State agencies to relet the contracts annually, we have typically limited the allowable number of options to extend which a State agency may exercise by limiting the total contract period to three years, including the original contract period plus any extensions.

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.

Although the execution of options to renew or extend is not prohibited under the regulations, we did not envision that the exercise of these options would be for amounts not specified in the original contract. Both the law and the regulations require State agencies that provide for the purchase of Program foods at retail grocery stores to use competitive bidding in the procurement of infant formula. Specifically, section 17(h)(8)(B)(i) of the CNA requires that those State agencies use either (1) a competitive bidding system, or (2) any other cost containment measure that yields savings equal to or greater than savings generated by a competitive bidding system when such savings are determined by comparing the amounts of savings that would be provided over the full term of contracts offered in response to a single invitation to submit both competitive bids and bids for other cost containment systems for the sale of infant formula. In order to be consistent with this requirement that savings be measured against the benchmark of a competitively-bid single supplier contract, the exercise of options to renew, extend, or otherwise continue an infant formula cost containment contract under terms which are not specified in the original contract is not permitted. Similarly, allowing renegotiation of a contract's terms during the term of the contract or after all options to renew or extend have been exercised would contravene this requirement.

Therefore, State agencies may not exercise options to renew, extend, or otherwise continue infant formula cost containment contracts if the terms for the amount of rebates during the additional period are not specified in the original contract. The fact that the proffered rebates for any extended period are higher than those under the original contract is not sufficient to meet the competition requirement if the terms were not specified in the original contract. Further, State agencies may not renegotiate or otherwise extend contracts beyond the term of the contract after all options to renew or extend have been exercised.

There are certain exceptions under which an option to renew, extend, or renegotiate a contract may be acceptable. For example, the regulations at section 246.16(o) state certain circumstances under which a State agency would be permitted to renew, extend, or otherwise continue its contract. A State agency may request a postponement of the deadlines established in section 246.(o)(5) for implementing an infant formula cost containment system when the State agency has taken timely and responsible action to implement a cost containment system within established deadlines but has been unable to do so due to procurement delays, disputes with FNS concerning cost containment issues during the State Plan approval process, or

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.

other circumstances beyond its control. The postponement period shall be no longer than 120 days. If a postponement is granted, the State agency may extend, renew or otherwise continue an existing system during the period of the postponement.

We would also like to remind State agencies that they are already required to comply with the following requirements. First, both the invitation for bids and the contract must specify whether options to renew, extend, or otherwise continue the contract are permitted. Second, both the invitation for bids and the contract must express the rebate amounts that are bid or the method by which the rebate amounts will be calculated (e.g., by using the Consumer Price Index) for the entire term of the contract, including any options to renew or extend. A constant rebate amount throughout the contract period is not required. Third, if options to renew or extend are permitted, the invitation for bids must indicate that they are a basis for evaluation of the bids.

Please inform the State agencies in your region of this policy. Feel free to contact this office if you have any questions.

STANLEY C. GARNETT
Director
Supplemental Food Programs Division

cc: Maxine McMillian
Debbie Whitford, Policy Section
Infant Formula Manufacturers
Carnation
Gerber
Wyeth
Ross
Mead-Johnson
Nutricia-Foods

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.