



OCT 14 1990

Food and
Consumer
Service

SUBJECT: Final Policy Memorandum #99-3
Evaluation Criteria for Infant Formula Rebate Contracts

TO: Regional Directors
Supplemental Food Programs
All Regions

The purpose of this policy memorandum is to clarify Federal statutory and regulatory limitations on the use of technical evaluation requirements for invitations for bid (IFB) for infant formula rebate contracts. Specifically, this memorandum addresses: (1) the statutory requirement that an infant formula rebate contract be awarded to the manufacturer "offering the lowest price" (42 U.S.C. § 1786(b)(17)); and (2) that State agencies are prohibited by Federal regulation from issuing IFBs or entering into contracts excluding "from consideration in the bidding evaluation any infant formula manufacturer in compliance with the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 321 *et seq.*)" (7 C.F.R. § 246.16(o)(2)).

BACKGROUND

It has come to our attention that some State agencies included in their IFBs technical requirements that violate the Child Nutrition Act's (CNA) lowest price requirement. Specifically, the technical requirements used a subjective point evaluation system and/or a weight system that allowed scores for both the technical evaluation and cost evaluation. For example, the technical requirements under this subjective point evaluation standard included provisions such as rating marketing practices or organization size and structure, and/or requiring information on total shelf presence in a State or plant production capability. These types of technical requirements violate 42 U.S.C. § 1786(b)(17) because they create the possibility of awarding an infant formula rebate contract to a manufacturer who has not offered the lowest price.

FEDERAL REQUIREMENTS

Several State agencies have indicated to us they are concerned about contract performance problems and believe evaluating technical requirements allows them to select a bidder that is the most able to provide benefits to the State. However, we must emphasize Federal law explicitly requires State agencies to award infant formula rebate contracts to the bidder offering the lowest price to the State. This lowest price requirement appears in the CNA and is stated in unconditional terms; therefore, it is not subject to modification by the use of technical requirements such as those discussed above. This prohibition against using technical requirements to exclude lowest price bidders is buttressed by WIC regulations. As we have already stated, 7

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C.F.R. § 246.16(o)(2) requires that “State agencies shall not issue invitations for bid 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.” This regulatory language recognizes that compliance with the Federal Food Drug and Cosmetic Act demonstrates that a manufacturer satisfies all, subjectively evaluated, technical requirements relevant to whether the manufacturer is capable of providing infant formula for the WIC Program.

FNS is not suggesting a State agency must totally exclude technical information from its IFB. A State agency may choose to require bidders to submit information of a technical nature in order to determine if a bidder is responsible and responsive. To be responsive, a bidder must submit a bid that conforms to the solicitation. To be responsible, the bidder must meet the eligibility requirements under the applicable statute and regulations, and be able to meet the requirements set forth in the IFB. For example, if a bidder meets applicable statutory and regulatory requirements, such as the requirement to register under the Food, Drug and Cosmetic Act, it should be deemed responsible.

However, if information is required, such information must be evaluated objectively. A State agency can only ascribe a pass or fail determination based solely on whether the bidder has submitted the required information and that the required information is relevant to the bidder’s capability to provide infant formula products to the State agencies authorized retail vendors. In other words, technical information shall demonstrate factors which are either present or absent, and evaluation of the factors may not allow any subjective assessment.

Contract Provisions

Regarding State agency concerns about possible performance failure, we believe there are ways to provide the State agency with assurances via contractual provisions. To protect a State agency in the event the successful bidder cannot fulfill the terms of the contract, we suggest a clause in the contract that requires the successful bidder to continue to pay a rebate on another brand of similar infant formula issued to WIC participants in the event the contract manufacturer’s formula is unavailable in grocery stores. Granted, this is not an easy solution; however, it does put bidders on notice that a rebate is required and it is in their best interest to have their infant formula readily available to WIC retailers. Also, contracts should contain provisions that allow the State agency to cancel the contract for non-performance issues such as failure to supply infant formula and hold the company liable for damages.

State agencies must also plan well in advance of the effective date of the contract to alert WIC retailers of an infant formula change to allow ample time to order an

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adequate supply of the new contract brand of infant formula. This will help ensure a smooth transition period, a critical time of the contract for infant formula supply. FNS strongly encourages that WIC State agencies also apply this memorandum, as appropriate, to IFBs for rebates on products other than infant formula.

Please advise your State agencies of this policy.

for 
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