

STATE OF MICHIGAN  
 DEPARTMENT OF MANAGEMENT AND BUDGET  
 PURCHASING OPERATIONS  
 P.O. BOX 30026, LANSING, MI 48909  
 OR  
 530 W. ALLEGAN, LANSING, MI 48933

May 17, 2006

**NOTICE  
 OF  
 CONTRACT NO. 071B720001  
 between  
 THE STATE OF MICHIGAN  
 and**

NAME & ADDRESS OF VENDOR  <b>Mead Johnson &amp; Company          2400 West Lloyd Expressway          Evansville, IN 47721</b>	TELEPHONE: Kathy Decker <b>(812) 429-8758</b> Fax: <b>(812) 429-8610</b>
	VENDOR NUMBER/MAIL CODE
	BUYER/CA (517) 373-7374 <b>Joan Bosheff</b>
Contract Compliance Inspector: Alethia Carr <b>WIC Rebate Program – Department of Community Health</b>	
CONTRACT PERIOD: From: <b>November 1, 2006</b> To: <b>November 1, 2011</b>	
TERMS <p style="text-align: center;"><b>N/A</b></p>	SHIPMENT <p style="text-align: center;"><b>N/A</b></p>
F.O.B. <p style="text-align: center;"><b>N/A</b></p>	SHIPPED FROM <p style="text-align: center;"><b>N/A</b></p>
MINIMUM DELIVERY REQUIREMENTS <p style="text-align: center;"><b>N/A</b></p>	

The terms and conditions of this Contract are those of **ITB #071I6200132** this Contract Agreement and the vendor's quote dated **March 30, 2006**. In the event of any conflicts between the specifications, terms and conditions indicated by the State and those indicated by the vendor, those of the State take precedence.

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MISCELLANEOUS INFORMATION: <b>The terms and conditions of this Contract are those of <a href="#">ITB #07116200132</a> this Contract Agreement and the vendor's quote dated <a href="#">March 30, 2006</a>. In the event of any conflicts between the specifications, terms and conditions indicated by the State and those indicated by the vendor, those of the State take precedence.</b>	

**THIS IS NOT AN ORDER:** This Contract Agreement is awarded on the basis of our inquiry bearing the [ITB No.07116200132](#). Orders for delivery of equipment will be issued directly by the [Department of Community Health](#) through the issuance of a Purchase Order Form.

All terms and conditions of the invitation to bid are made a part hereof.

<p><b>FOR THE VENDOR:</b></p> <hr/> <p style="text-align: center;"><b>Mead Johnson &amp; Company</b></p> <p style="text-align: center;">Firm Name</p> <hr/> <p style="text-align: center;">Authorized Agent Signature</p> <hr/> <p style="text-align: center;">Authorized Agent (Print or Type)</p> <hr/> <p style="text-align: center;">Date</p>	<p><b>FOR THE STATE:</b></p> <hr/> <p style="text-align: center;">Signature</p> <p style="text-align: center;"><b>Joan Bosheff, Buyer Specialist</b></p> <hr/> <p style="text-align: center;">Name/Title</p> <p style="text-align: center;"><b>Purchasing Operations</b></p> <hr/> <p style="text-align: center;">Division</p> <hr/> <p style="text-align: center;">Date</p>
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**STATE OF MICHIGAN**  
**Department of Management and Budget**  
**Acquisition Services**

Contract #071B720001  
WIC Infant Rebate Program

Buyer Name: Joan Bosheff  
Telephone Number: (517) 373-7374  
E-Mail Address: bosheffj@michigan.gov

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**ATTACHMENT A -- Rebate Pricing Sheet**  
**ATTACHMENT B -- Sample Invoices**  
**ATTACHMENT C -- Contractor Information**



## ARTICLE 1 -- STATEMENT OF WORK (SOW)

### **1.0 Project Identification-WIC Infant Formula Rebate**

#### **PROJECT**

This Contract establishes a rebate program for infant formula purchased by the Michigan WIC Program through the WIC retail food delivery system, which includes rebates paid by the contractor to the State of Michigan on a per can basis. The Contractor shall provide milk-based iron-fortified infant formula that is suitable for routine issuance to the majority of healthy, full-term infants. The same percentage discounts applied to the wholesale truckload prices of the milk-based iron-fortified infant formula as bid by the Contractor will apply to all other authorized types, forms or sizes of non-exempt (concentrate, powdered, or ready-to-feed), Michigan WIC Program authorized infant formulas.

As stated in Federal Register (246.16a(c)(3)) "State agency must award the contract(s) to the responsive and responsible bidder(s) offering the lowest total monthly net price for infant formula or the highest monthly rebate for a standardized number of units of infant formula. The state agency must calculate the lowest net price using the lowest national wholesale cost per unit for a full truckload of the infant formula on the date of the bid opening."

All infant formula included in the rebate must comply with FDA requirements and the Infant Formula Act of 1980 as amended, 94 Stat 1190 et seq; 21 USCA 301 note et seq. Over the course of the 60-month contract period, the Michigan WIC Program is expected to purchase a minimum of 38,416,667 units of infant formula.

#### **BACKGROUND**

In accordance with the "Child Nutrition Act of 1966, as Amended through P.L. 109-85, Oct. 4, 2005, the State of Michigan, Department of Community Health, (herein referred to as "The Department"), Special Supplemental Nutrition Program for Women, Infants, and Children (herein referred to as the "Michigan WIC Program"), is seeking infant formula cost-containment systems which will produce the maximum savings and thus allow for the greatest number of participants to benefit from Michigan WIC Program services.

The Michigan WIC Program is administered federally by the U. S. Department of Agriculture (USDA). The Department is the recipient of federal funds and is responsible for administering the Michigan WIC Program in Michigan through a network of 49 local agencies, 230 local clinics and approximately 2100 WIC authorized retail food stores and pharmacies (vendors) throughout the State.

Eligible WIC participants receive WIC food instruments, which may be redeemed at any of the 2,100 WIC authorized retail food vendors throughout the State. Currently WIC food instruments are issued as either food coupons or EBT benefits. Once a vendor accepts a WIC food instrument, it is then redeemed by the vendor via submission to the Department for payment processing.

On a pilot basis in Jackson County, and possibly later statewide during the course of the Contract, the Department provides WIC food instruments via Electronic Benefit Transfer (EBT) at authorized retail food vendors and pharmacies. The required food items are being specified in the EBT system in the same manner as is currently done with the food coupons by providing a food list for the EBT participants with similar language to what is used on the food coupons.

WIC food instruments are issued at clinic sites throughout the State to certified eligible pregnant, non-breastfeeding postpartum women and breastfeeding women, and parents/guardians of certified eligible infants and children. These food instruments are specific in quantity and type of nutritious foods, which may be purchased at an authorized WIC food vendor or pharmacy. A series of prepayment edits are



performed on each food instrument to ensure that specific redemption requirements are met. The edits for each food instrument which will prevent payment to the vendor at redemption include the following: 1) The WIC food instrument is redeemed before the "starting date" or after the "expiration date" printed on each food instrument. 2) The dollar amount exceeds the maximum expected value for that food instrument. 3) The authorized signature is missing from the coupon (this is for the coupon system only, there is no signature required with the EBT system). 4) The WIC food instrument is altered in any way except for price field corrections (this is also for the coupon system only). 5) The coupon is not received for payment by the Department within 60 days of the "starting date" (this also refers to the coupon system only as in the EBT system non-payment will not be an issue).

Vendors accepting WIC food instruments are under a contractual agreement with the Michigan WIC Program to accept WIC food instruments in accordance with the federal requirements set forth in 7:CFR, Part 246.12(f).

The average monthly Michigan WIC Program participation for Federal Fiscal Year 2005 was 226,601, including 53,846 infants, 53,982 women, and 118,773 children. Of these infants, 3,528 were totally breastfed, 2,348 used exempt infant formulas, and 47,970 infants used contract infant formulas. A modest savings in the cost of infant formula allows the Department to provide services to a significant number of additional eligible participants.

Upon selection of a Contractor, the Michigan WIC Program will provide requisite notices of the contracted brands to appropriate parties participating in the infant formula selection and delivery process. The Contractor should be prepared to assist the Department in serving notice upon affected parties including, but not limited to, wholesalers, retail food vendors, hospitals, physicians, participants, and local agencies, contracted to provide WIC services to eligible women, infants and children.

### **1.1 Scope of Work and Deliverables**

#### **IN SCOPE**

##### **General:**

The Department intends to contract with one manufacturer whose iron-fortified milk based 13-ounce liquid concentrate, 12 – 16 ounce powder, and 32-ounce ready-to-feed iron fortified infant formula is suitable for routine issuance to the majority of generally healthy full-term infants will be the basis for determining the lowest net cost. The Contractor shall rebate to the Department a fixed amount per container of any infant formula in the manufacturer's product line that meets the definition described in the Definitions Section of an "infant formula", such as soy-based, milk-based, lactose free, low iron or rice starch (cereal) added infant formula authorized by and purchased through the Michigan WIC Program. The same discount percentage bid for each authorized form of infant formula (concentrate, powder, and ready-to-feed) will be applied to all authorized can sizes of contract formula. Future rebates on all other infant formula including new formula and changed can sizes will be based on the same percentage as the corresponding physical form of the primary contract formula.

As stated in federal register (246.16a(c)(5)(i-iii) "All bids must specify the rebates offered by each bidder for the primary contract brand infant formula(s). After the contract is awarded, the State agency must calculate the percentage discount for all other contract brand infant formulas (i.e., all other infant formulas produced by the bidder other than exempt infant formulas) approved for issuance by the State agency. The State agency must use the following method in calculating the rebates: (i) Rebates for contract brand infant formulas, other than the primary contract brand infant formula(s) for which bids were received, must be calculated by first determining the percentage discount for each physical form (e.g., ready-to-feed) of the primary contract brand infant formula(s). The percentage discount must be calculated by dividing the rebate for the primary contract brand infant formula by the manufacturer's lowest national wholesale price per unit, as of the date of the bid opening, for a full truckload of the primary contract infant formula. The percentage discounts must be used to determine the rebate for all other contract brand infant formulas



approved for issuance by the State agency. (ii) The rebate for each type and form of all other contract brand infant formulas must be calculated by multiplying the percentage discount by the manufacturer’s lowest national wholesale price per unit, as of the date of the bid opening, for a full truckload of the other contract brand infant formula. The percentage discount used for each of the other contract brand infant formula depends on the physical form of the infant formula. For example, if the percentage discount provided for the primary contract brand powdered infant formula is 80 percent of its wholesale price; the same percentage discount must be applied to all other contract brand powdered infant formulas. The rebate for any types or forms of contract brand infant formulas that are introduced during the contract period must be calculated using the wholesale prices of these new contract brand infant formulas at the time the infant formulas are approved for issuance by the State agency. (iii) The rebates resulting from the application of the percentage discount must remain the same throughout the contract period except for the inflation adjustments required in paragraph (c)(5)(iv) of this section.”

It is anticipated that a minimum of 13,000,000 units of 13-ounce iron-fortified liquid concentrate, 10,000,000 units of 12 – 16 ounce powder formula, and 40,000 units of ready-to-feed liquid formula will be purchased by the State of Michigan during the 36-month Contract period. The infant formula will be approximately 70% milk base and 30% soy base. In addition, 10,000 units of low iron, rice starch, and lactose-reduced infant formulas will be purchased if produced by the manufacturer. Except for the issuance of the primary infant formula as formula of first choice, the Department provides no guarantee of the quantity, type, or physical forms that will be used under a new contract.

As stated in Federal Register (246.16a(c) (2)). “The bid solicitation must require bidders to specify a rebate for each of the types and physical forms of infant formulas specified in the following chart. These rebates apply proportionally to other infant formulas produced by the winning bidder(s).

For purposes of this section, the infant formula on which bids are solicited is the primary contract brand infant formula.

Type of Infant Formula	Physical Forms of Infant Formula	Infant Formula Requirements
A single milk-based infant formula (primary contract brand infant formula); bidders must specify the brand name of the milk-based infant formula for which the rebate is being specified.	Concentrated liquid, powdered, and ready-to-feed.	Meets requirements under 246.10(c)(1)(i) and suitable for routine issuance to the majority of generally healthy, full-term infants.”

The Michigan WIC Program reserves the right to issue non-contract and exempt infant formula with medical justification according to federal register, (246.10 (c) (l) (iii).

The Contractor must be registered with the Food and Drug Administration (FDA) and certify to the Department that the infant formulas manufactured and bid fully comply with FDA requirements and are in compliance with the Infant Formula Act of 1980 as amended, 94 State 1190 *et seq*; 21 USCA 301 *note et seq*. The Contractor must be qualified to do business in Michigan and must have the contract infant formulas authorized by the Michigan WIC Program. In addition, the Contractor must be able to demonstrate that they have a retail network in the State of Michigan, which is comprehensive enough to make adequate amounts of the contract formula in all forms and sizes available to our Michigan WIC Program participants.

According to Section 17 (f)(CNA) “Infant Formula Benefits – A state agency may round up to the next whole can of infant formula to allow all participants under the program to receive the full-authorized nutritional benefit specified by regulation.” The Michigan WIC Program will not allow rounding up to the



next whole can of infant formula for standard contract formulas. The primary contract infant formula will be the formula of first choice for issuance to infants with all other formula issued as an alternative to the primary contract infant formula.

### **OUT OF SCOPE**

Exempt infant formulas issued by the Michigan WIC Program will not be subject to rebate billings. The Michigan WIC Program reserves the right to not issue formulas produced by the manufacturer other than contract formula after bidding process has been completed.

### **WORK AND DELIVERABLE**

The Contractor shall provide deliverable/services and staff, and otherwise do all things necessary for/or incidental to the performance of work, as set forth below:

1. The Contractor must make available for redemption supplies of the Contractor's iron-fortified milk and soy based liquid concentrate, powder, and ready-to-feed infant formula in sufficient supply to serve the Michigan WIC Program caseload and to remit to the Department a rebate per container.
2. A minimum of one iron-fortified milk based type infant formula and one soy based type infant formula in liquid concentrate, powder and ready-to-feed must be available.
3. Infant formulas shall be complete, not requiring the addition of any ingredients other than water prior to being served in a liquid state.
4. The iron-fortified milk-based infant formulas shall contain at least 10 milligrams of iron per liter of infant formula at standard dilution which supplies 67 kilocalories per 100 milliliters; e.g., approximately 20 kilocalories per fluid ounce of infant formula at standard dilution.
5. If unable to produce a soy-based infant formula, the Contractor shall be required to subcontract with another manufacturer to supply a soy-based infant formula under the Contract.
6. The contractor shall pay the Department a rebate on the soy-based infant formula supplied by the subcontractor. The rebate must yield the same percentage discount on wholesale cost as the same physical form of the iron-fortified milk-based infant formula when used as a substitute.
7. The Contractor agrees to supply any infant formula in the Contractor's product line that the Department chooses to issue, including any new infant formula products introduced during the Contract term that meet the FDA definition of an "infant formula", as defined in the Infant Formula Act of 1980, including but not limited to soy-based, low iron, lactose free, rice starch (cereal) added, or toddler formula in sufficient supply to serve the Michigan WIC Program caseload at a rebate that yields the same percentage discount on wholesale cost as the iron-fortified milk based infant formula, when used as a substitute when milk-based iron-fortified infant formula is not tolerated.
8. Contractor will provide the national wholesale price list effective the day of bid opening and rebate amount for each item being bid.
9. Wholesale prices and rebates must be submitted with 3 decimals.
10. The spreadsheet will calculate the percentage discount of each item bid. These percentages will be used for determining the rebate on all other products covered under this solicitation.



11. Prior to the start date of the Contract, the Contractor must contact all wholesalers in Michigan to assure adequate knowledge and notice of the change in brands of infant formula for WIC participants.
14. The Department shall have printed infant formula food instruments (coupons and EBT) that designate only the brands of infant formulas provided by the Contractor. Payment due to the Department shall be based on the number of infant formula units on food instruments printed and issued to participants (quantity adjusted as necessary, see below), with the sole manufacturer's brands that were redeemed at WIC Authorized vendors and submitted to the Department for payment.

The number of units reported for billing purposes shall be determined as follows: Each food instrument identifies a specific product physical form (concentrate, ready-to-feed, powder), container size, and quantity to be purchased. The Michigan WIC payment system calculates weekly, an estimated average price for each food instrument type by Contractor peer group, using one month of redeemed food instruments. For rebate calculations on an ongoing basis for each container size and form, the food instrument type estimated average price by vendor peer group is divided into the redeemed food instruments price submitted by the vendor. The resulting quantity, with fractions rounded to the next whole number, not to exceed the quantity printed on the food instrument, shall be reported for rebate billings. The number of formula units billed in areas using EBT will equal the number of formula units redeemed.

15. During the term of the Contract including all extensions, the Contractor shall provide to the Department, for any manufacturer increase or decrease in wholesale truckload prices, a cent-for-cent increase or decrease in the rebate amount on the first day of the month in which the increase or decrease has occurred. The increase or decrease shall apply to all of the food instruments printed with the Contractor's brands that are redeemed in the month of increase or decrease.

Therefore the net wholesale price for each form may not be higher than the initial net wholesale price per container quoted in the Contractor's bid sheet.

Price level increases and decreases in the Contractor's wholesale truckload prices will result in an automatic rebate increase or decrease on a cent-for-cent basis over the life of the Contract. The rebate amount per can will increase or decrease effective the first day of the Contract.

The Contractor shall notify the Department in writing of any price increase or decrease at the same time retailers and other customers are notified of a price increase or decrease. In addition, the Department requests notification of at least 30 days in advance of the effective date of the price increase or decrease.

16. The Department reserves the right to approve or reject for issuance any new and improved infant formula introduced by the Contractor subsequent to the signing of this Contract or any substitution for a similar existing product. If the Contractor desires to substitute the new infant formula product for the products on the accepted brands list, the Contractor shall pay a rebate that yields the same percentage discount on wholesale cost as the same physical form of the iron-fortified milk-based infant formula when used as a substitute. In the event that the primary contract infant formula described in the Contract is eliminated, the Department may terminate the Contract without further liability and solicit new bids, and may hold the Contractor responsible for any excess costs occasioned thereby. In addition, the Contractor shall be responsible for all food instruments issued with the Contractor's brands indicated which are issued to WIC participants up to and including the date of termination.
17. Any written communication from the Contractor to WIC Local Agencies or authorized WIC vendors regarding WIC Program policy will require prior approval by the Department.



18. Contractor will provide Michigan WIC Program with advance notification of any changes in label, unit size, and reformulations of infant formula. If new formulas or forms of formulas are introduced after the initiation of the contract, the rebate will be calculated using the wholesale price of the formula at the time that the formula is approved for issuance by the Department. Contractor must notify the Department in advance for any changes that would affect WIC policy.
19. The Michigan WIC Program reserves the right to issue non-contract and exempt infant formulas with medical justification according to federal register (246.10 (c) (l) (iii)).
20. By November 1, 2006, the Contractor must be able to adequately provide the complete variety of Infant Formulas bid to supply approximately 52,000 infants and over 2,100 authorized WIC vendors in 83 counties statewide.

## **PRICE**

All prices/rates are firm for the duration of the Contract, except as noted. During the term of the Contract, the Contractor shall provide to the Department for any manufacturer increase or decrease in the manufacturer's lowest national truck load price per unit for a full truck load, a cent-for-cent increase or decrease in the rebate on the first day of the month in which the increase or decrease has occurred. The increase or decrease shall apply to all of the food instruments printed with the Contractor's brands that are redeemed in the month of increase or decrease. Therefore, the net wholesale price for each type of infant formula may not be higher or lower than the initial net wholesale price per can quoted in the Contractor's bid sheet.

## **PROJECT CONTROL AND REPORTS**

1. The Contractor will carry out this project under the direction and control of the ***Michigan Department of Community Health, WIC Division.***
2. Although there will be continuous liaison with the Contractor team, the client agency's project director may meet annually at a minimum, with the Contractor's project manager for the purpose of reviewing progress and providing necessary guidance to the Contractor in solving problems which arise.

### **1.2 Roles and Responsibilities**

#### **STATE STAFF, ROLES, AND RESPONSIBILITIES**

Alethia Carr, WIC Director  
Role: Contract Manager for MDCH

Rosemary Gabe, MDCH Contracts and Grants  
Role: Submit invoices to Contractor

#### **OTHER ROLES AND RESPONSIBILITIES**

Department of Information Technology

- Production of rebate reports
- File transfers
- System food table maintenance

WIC Division

- Policy revisions
- Authorize formulas
- Food package authorization
- Technical assistance to Local Agencies



Review and submit reports to Contracts and Grants

### **1.3 Project Plan**

#### **PROJECT PLAN MANAGEMENT**

##### **CONTRACT INVOICING AND PAYMENT**

Within sixty (60) days of the end of the first calendar month, MDCH will produce a report specifying the number of units of Infant Formula identified on redeemed food instruments issued by MDCH during the Contract period for which it has paid various retailers under the Michigan WIC Program account. MDCH shall report the number of units of Infant Formula indicated in the report to the Contractor.

The Contractor shall make payment in full to the Department within 30 days of the postmarked date of the invoice.

##### **REPORTING AND BILLING PROCEDURES**

1. The number of infant formula units reported for rebate billing purposes is determined by: dividing the estimated average food instrument type price by vendor peer group into the redeemed food instrument price submitted by the vendor to the Department for payment. The calculated quantity, rounded to the nearest whole number, not to exceed the issued quantity printed on the coupon, shall be reported for billing purposes.

These calculations will take place on an ongoing basis, using the current vendor peer group price averaging process utilized in the Michigan WIC Vendor Payment System, which is updated weekly. EBT infant formula units will not be reduced or modified.

2. The resultant number of units for each brand and form of the Contractors' Infant Formula shall then be multiplied by the then current rebate reimbursement to "determine" the total amount due to MDCH.
3. Thereafter and for each month of the Contract, MDCH will produce a report identifying the quantity of the specific type of infant formula purchased with food instruments (coupons or EBT) issued during the Contract period and redeemed according to State and Federal guidelines for infant formula manufactured by the Contractor. Food Instruments issued during the last month of the Contract period and redeemed in the subsequent two months shall be reimbursed based on the rebate in effect during the last month of the Contract.

Any errors in calculation by the Department shall be rectified as expediently as possible by submitting an adjusted bill to the Contractor no later than thirty (30) days from the date of discovery of the error.

4. MDCH will provide to the Contractor monthly invoices, supporting documentation consisting of an electronic file to be transmitted via FTP on a monthly basis. This file will contain information associated with formula coupons redeemed during the billing month. Each record will contain at a minimum, coupon number, issuing agency/clinic, issue date, redeemed date (received for payment), redeemed amount, coupon type, food item, and number of units authorized to purchase (issued or recalculated).
5. A separate electronic file will be transmitted via FTP for EBT food instruments and will consist of similar record information.

**BILLING PROBLEM RESOLUTION:**

1. The Contractor may be entitled to recoupments of funds paid due to an over billing error, after demonstration that the billing error has been verified by the Department.
2. The Contractor may also be entitled to recoupment of funds for infant formula billed that was not identified on redeemed food instruments after demonstrating that over billing has occurred if the Department was notified of the error in writing. The Contractor may only recoup funds in the instances stated above. Any corrections to billing must be made within the same fiscal year of the original invoice.
3. All disputes must be settled by closeout of the fiscal year in which the dispute occurred. If the Department has over billed the contractor, funds will be reimbursed within 30 days of the final resolution of the dispute.
4. Any review of WIC redemption data by the Contractor shall be for the sole purpose of recoupment in resolving discrepancies of over billing or for validating infant formula identified on redeemed coupons only.
5. The Contractor shall not withhold any rebate payment due the Department under any circumstances.
6. The Contractor shall make advance payment if requested by the Department. Such request may be made no sooner than thirty (30) days prior to the date for which the advance payment is requested. The advance payment request may not exceed the rebate payment calculated under 1.301.A.1. for the most recent redemption month for which data is available for the Department. Any amounts in excess of actual rebates due the Department shall be deducted from the next payment due the Department. The Department may make such request one time during a federal fiscal year. The Contractor may deduct from the prepayment up to one percent (1%) of the total prepayment invoice, or the discount can be applied to the next rebate invoice.”

**CONFIDENTIALITY**

The Contractor may not have access to any records identifying Michigan WIC Program participants by name or address. Nor may the Contractor have vendor information other than vendor's name, address and authorization status.

**REPORTS**

No formal reports are required by the nature of this agreement; however, the Contractor shall report any changes in pricing, packaging, nutrient content, or any other significant change in the nature of their product to the Michigan WIC Program at the same time or before these anticipated changes are reported to the customers and prior to delivery to wholesalers, clinics, participants, and other health providers. The Contractor shall also provide marketing materials such as posters, flyers, slides, etc. as are necessary to implement the change.

**1.4 Project Management**  
**ISSUE MANAGEMENT**

The State Contract Manager and Contractor shall maintain immediate communication regarding issues of infant formula production, distribution, quality control issues, or recalls.



## RISK MANAGEMENT

The State Contract Manager and Contractor shall maintain immediate communication regarding issues of infant formula production, distribution, quality control issues, or recalls. The selected vendor must have a risk mitigation plan that assures a high quality product, and consistent availability of formula.

## CHANGE MANAGEMENT

1. The Department reserves the right to approve or reject for issuance any new and improved infant formula introduced by the Contractor subsequent to the signing of this Contract or any substitution for a similar existing product. If the Contractor desires to substitute the new infant formula product for the products on the accepted brands list, the Contractor shall pay a rebate that yields the same percentage discount on wholesale cost as the same physical form of the iron-fortified milk-based infant formula when used as a substitute. In the event that the primary infant formula described in the Contract are no longer available, the Department may terminate the Contract without further liability and solicit new bids, and may hold the Contractor responsible for any excess costs occasioned thereby. In addition, the Contractor shall be responsible for all food instruments issued with the Contractor's brands indicated which are issued to WIC participants up to and including the date of termination.

2. If the Contractor desires to artistically change the appearance of the Contract infant formula units or labels during the Contract period (changes refer to but are not limited to label, color, shape, UPC Code, material) these anticipated changes shall be reported to the Department at the same time as reported to other customers and prior to delivery to wholesalers, clinic, participants, and other health providers and shall provide such marketing materials as posters, flyers, slides, etc. as are necessary to implement the change and to inform those persons affected by the change.

If a proposed contract change is approved by the Contract Compliance Inspector, the Contract Compliance Inspector will submit a request for change to the Department of Management and Budget, Acquisition Services Buyer, who will make recommendations to the Director of Acquisition Services regarding ultimate approval/disapproval of change request. If the DMB Acquisition Services Director agrees with the proposed modification, and all required approvals are obtained (including State Administrative Board), the Acquisition Services Buyer will issue an addendum to the Contract, via a Contract Change Notice. **Vendors who provide products or services prior to the issuance of a Contract Change Notice by the DMB Office of Acquisition Services, risk non-payment for the out-of-scope/pricing products and/or services.**



**1.5 Acceptance**  
**CRITERIA**

The Contractor has agreed to meet all of the following requirements:

- 1) Contractor has the capacity to supply WIC authorized retail grocery stores with sufficient quantities of the formulas included in the bid before the agreement start date of November 1, 2006.
- 2) Contractor has the capacity to assist the Department in notifying affected parties of the contract formula brand change, including wholesalers, retail food vendors, hospitals, physicians.
- 3) Contractor will assist WIC authorized stores to change their stocking patterns for infant formula if a new brand is selected.
- 4) Contractor will provide Michigan WIC Program with advance notification of any changes in label, unit size, and reformulations of infant formula. If new formulas or forms of formulas are introduced after the initiation of the contract, the rebate will be calculated using the wholesale price of the formula at the time that the formula is approved for issuance by the Department. Contractor must receive prior approval by the Department for any changes that would affect WIC policy.
- 5) Contractor must be registered with the Food and Drug Administration (FDA) and certify to MDCH that the infant formulas manufactured and bid fully comply with FDA requirements and are in compliance with the Infant Formula Act of 1980 as amended.
- 8) The Contractor must be qualified to do business in Michigan.
- 9) The Contractor must have a risk mitigation plan that assures a high quality product and consistent availability of formula.

**1.6 Compensation and Payment**  
**COMPENSATION AND PAYMENT**

See Attachment B for three examples of rebate billing invoices. Invoices will be paid to the State of Michigan within 30 days of the post marked date of the invoice.



**1.7 Additional Terms and Conditions Specific to this SOW**  
**ADDITIONAL TERMS AND CONDITIONS SPECIFIC TO THIS SOW**

The Department reserves the right to approve or reject for issuance any new and improved infant formula introduced by the Contractor subsequent to the signing of this Contract or any substitution for a similar existing product. If the Contractor desires to substitute the new infant formula product for the products on the accepted brands list, the Contractor shall pay a rebate that yields the same percentage discount on wholesale cost as the same physical form of the iron-fortified milk-based infant formula when used as a substitute. In the event that the primary contract formula described in the Contract is no longer available, the Department may terminate the Contract without further liability and solicit new bids, and may hold the Contractor responsible for any excess costs occasioned thereby. In addition, the Contractor shall be responsible for all food instruments issued with the Contractor's brands indicated which are issued to WIC participants up to and including the date of termination.

The Michigan WIC Program reserves the right to issue non-contract and exempt infant formulas with medical justification according to federal register (246.10 © (l) (iii)).



## ARTICLE 2—GENERAL TERMS AND CONDITIONS

### 2.0 Purpose PURPOSE

This Contract establishes a rebate program for infant formula purchased by the Michigan WIC Program through the WIC retail food delivery system, which includes rebates paid by the contractor to the State of Michigan on a per can basis. The Contractor shall provide milk-based iron-fortified infant formula that is suitable for routine issuance to the majority of healthy, full-term infants. The same percentage discounts applied to the wholesale truckload prices of the milk-based iron-fortified infant formula as bid by the Contractor will apply to all other authorized types, forms or sizes of non-exempt (concentrate, powdered, or ready-to-feed), Michigan WIC Program authorized infant formulas.

### DEFINITIONS

Capitalized terms used in this Contract shall have the meanings given below, unless the context requires otherwise:

TERMS	DEFINITIONS
Days	Means calendar days unless otherwise specified.
24x7x365	Means 24 hours a day, seven days a week, and 365 days a year (including the 366 <sup>th</sup> day in a leap year).
Additional Service	Means any Services/Deliverables within the scope of the Contract, but not specifically provided under any Statement of Work, that once added will result in the need to provide the Contractor with additional consideration. "Additional Service" does not include New Work.
Business Day	Whether capitalized or not, shall mean any day other than a Saturday, Sunday or State-recognized legal holiday (as identified in the Collective Bargaining Agreement for State employees) from 8:00am EST through 5:00pm EST unless otherwise stated.
Incident	Means any interruption in Services.
Business Critical	Means any function identified in any Statement of Work as Business Critical.
Deliverable	Means physical goods and/or commodities as required or identified by a Statement of Work
Services	Means any function performed for the benefit of the Department.
State Location	Means any physical location where the Department performs work. State Location may include state-owned, leased, or rented space.
Subcontractor	Means a company Contractor delegates to perform the manufacturing of infant formula only.
Contract	A binding agreement entered into by the state of Michigan resulting from a bidder's proposal; see also "blanket purchase order."
Contractor	The successful bidder who is awarded a contract.
DMB	Michigan Department Of Management And Budget
Successful Bidder	The bidder(s) awarded a contract as a result of a solicitation.
State	The State Of Michigan. For purposes of indemnification as set forth in section I-J, state means the state of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees and agents.
Blanket Purchase Order	Alternate term for "contract" used in the Department's computer system (Michigan Automated Information Network [main])



Expiration	Except where specifically provided for in the contract, the ending and termination of the contractual duties and obligations of the parties to the contract pursuant to a mutually agreed upon date.
Cancellation	Ending all rights and obligations of the Department and Contractor, except for any rights and obligations that are due and owing.
Infant Formula	Infant formula is defined as any infant formula in the manufacturer's product line that: 1) complies with the infant formula act of 1980 as amended which defines "infant formula" as "a food which purports to be or is represented for special dietary use solely as a food for infants by reason of it's simulation of human milk or its suitability as a complete or partial substitute for human milk"; and 2) complies with the definition and requirements for "infant formula" under the federal food, drug and cosmetic act including [sections 201(z) and 412 of act, 21 u.s. c. 321 (z) and 350a respectively], excluding "exempt infant formulas, [section 412(h) of the act 21 u.s. c. 350a(h)], and with all applicable Food and Drug Administration (FDA), Department of Health and Human Services regulations pursuant to the Act, and the regulation at 21 U.S.C. part 106 and 107.
Retail Purchase Food Delivery System	The Michigan WIC Program operates a "Retail Purchase Food Delivery System." This enables WIC participants to go to an authorized store of their choice and shop to obtain supplemental WIC foods in exchange for food instruments (food instruments are WIC coupons or WIC EBT transactions) at the cash counter and complete the transaction in accordance with the terms of a WIC authorized vendor contract,
Primary Contract Infant Formulas	The term "primary contract infant formula" means the specific infant formula for which manufacturers submit a bid to a state agency in response to a rebate solicitation under this section and for which a contract is awarded by the State agency as a result of that bid. (17(h)(8)(a)(©)) The primary contract infant formula is the formula of first choice the State agency will use when issuing infant formula.
The Department	The Michigan Department of Community Health – A department that is part of the Michigan State Government.
Local Agencies	Agencies which contract with the Michigan Department of Community Health, "The Department," to provide direct services to recipients of the WIC Program.
Exempt Infant Formulas	An exempt infant formula is an infant formula intended for commercial or charitable distribution that is represented and labeled for use by infants who have inborn errors of metabolism or low birth weight or who otherwise have unusual medical or dietary problems (21 CFR 107.3) Infant formulas are classified as exempt infant formulas by the Food and Drug Administration.
Authorized WIC Vendor	Any vendor contractually authorized to accept WIC food instruments from WIC participants for reimbursement by the State of Michigan. Michigan currently authorizes approximately 2100 vendors.
Manufacturer	As used in this RFP, means a bidder that possesses the manufacturing and marketing capabilities necessary to fulfill all requirements specified in the ITB.
Full Truckload of Infant Formula	Lowest net price is based on the manufacturers lowest national wholesale price per unit for a full truckload on the date of bid opening.

**ISSUING OFFICE**

This Contract is issued by the Department of Management and Budget, Office of Acquisition Services (“OAS”) and MDCH WIC Division (collectively, including all other relevant State of Michigan departments and agencies, the “State”). OAS is the sole point of contact in the Department with regard to all procurement and contractual matters relating to the Contract. **OAS is the only State office authorized to change, modify, amend, alter or clarify the prices, specifications, terms and conditions of this Contract.** The Contractor Administrator within the Office of Acquisition Services for this Contract is:

Joan Bosheff, Buyer Specialist  
Office of Acquisition Services  
Department of Management and Budget  
Mason Bldg, 2<sup>nd</sup> Floor  
PO Box 30026  
Lansing, MI 48909  
Phone: (517) 373-7374  
Email: [bosheffj@michigan.gov](mailto:bosheffj@michigan.gov)

**NOTICE**

Any notice given to a party under this Contract must be written and shall be deemed effective, if addressed to such party as addressed below upon (i) delivery, if hand delivered; (ii) receipt of a confirmed transmission by facsimile if a copy of the notice is sent by another means specified in this section; (iii) the third (3<sup>rd</sup>) Business Day after being sent by U.S. mail, postage pre-paid, return receipt requested; or (iv) the next Business Day after being sent by a nationally recognized overnight express courier with a reliable tracking system.

**CONTRACT TERM**

The term of this Contract will be for five (5) years. This will be November 1, 2006, through November 1, 2011.

All infant formula included in the rebate must comply with FDA requirements and the Infant Formula Act of 1980 as amended, 94 Stat 1190 et seq; 21 USCA 301 note et seq. Over the course of the 60-month contract period, the Michigan WIC Program is expected to purchase a minimum of 38,416,667 units of infant formula.

**GOVERNING LAW**

The Contract shall in all respects be governed by, and construed in accordance with, the laws of the State of Michigan. By signing this agreement, vendor consents to personal jurisdiction in the state of Michigan. Any dispute arising herein shall be resolved in the State of Michigan.

**APPLICABLE STATUTES**

The following statutes, rules, and laws are applicable to the performance of this contract; some statutes are reflected in the clauses of this contract. This list is NOT exhaustive.

MI Uniform Commercial Code (MIUCC) MCL 440. (All sections unless otherwise altered by agreement)  
MI OSHA MCL §§ 408.1001 – 408.1094  
Freedom of Information Act (FIOA) MCL §§ 15.231, et seq.  
Natural Resources and Environmental Protection Act MCL §§ 324.101, et seq.  
MI Consumer Protection Act MCL §§ 445.901 – 445.922  
Laws relating to wages, payments of wages, and fringe benefits on state projects MCL §§ 408.551 – 408.558, 408.471 – 408.490, 1965 PA 390.  
Department of Civil Service Rules and regulations  
Elliot Larsen Civil Rights Act MCL §§ 37.2201, et seq.



Persons with disabilities Civil Rights Act MCL §§ 37.1101, et seq.  
MCL §§ 423.321, et seq.  
MCL § 18.1264 (law regarding debarment)  
Davis-Bacon Act (DBA) 40 USCU §§ 276(a), et seq.  
Contract Work Hours and Safety Standards Act (CWHSSA) 40 USCS § 327, et seq.  
Business Opportunity Act for Persons with Disabilities MCL §§ 450.791 – 450.795  
Rules and regulations of the Environmental Protection Agency  
Internal Revenue Code  
Rules and regulations of the Equal Employment Opportunity Commission (EEOC)  
The Civil Rights Act of 1964, USCS Chapter 42  
Title VII, 42 USCS §§ 2000e et seq.  
The Americans with Disabilities Act (ADA), 42 USCS §§ 12101 et seq.  
The Age Discrimination in Employment Act of 1967 (ADEA), 29 USCS §§ 621, 623 et seq.  
The Old Workers Benefit and Protection Act of 1990 (OWBPA), 29 USCS §§ 626, et seq.  
The Family Medical Leave Act of 1993 (FMLA), 29 USC §§ 651 et seq.  
The Fair Labor Standards Act (FLSA), 29 USC §§ 201 et seq.  
Pollution Prevention Act of 1990 (PPA) 42 U.S.C. §13106  
Sherman Act, 15 U.S.C.S. § 1 et seq.  
Robinson-Patman Act, 15 U.S.C.S. § 13 et. Seq.  
Clayton Act, 15 U.S.C.S. § 14 et seq.

#### **RELATIONSHIP OF THE PARTIES**

The relationship between the State and the Contractor is that of client and independent Contractor. No agent, employee, or servant of the Contractor or any of its subcontractors shall be or shall be deemed to be an employee, agent, or servant of the State for any reason. The Contractor will be solely and entirely responsible for its acts and the acts of its agents, employees, servants and subcontractors during the performance of this Contract.

#### **HEADINGS**

Captions and headings used in the Contract are for information and organization purposes. Captions and headings, including inaccurate references, do not, in any way, define or limit the requirements or terms and conditions of this Contract.

#### **MERGER**

This document constitutes the complete, final, and exclusive agreement between the parties. All other prior writings and negotiations are ineffective.

#### **SEVERABILITY**

Each provision of the Contract shall be deemed to be severable from all other provisions of the Contract and, if one or more of the provisions of the Contract shall be declared invalid, the remaining provisions of the Contract shall remain in full force and effect.

#### **SURVIVORSHIP**

Any provisions of the Contract that impose continuing obligations on the parties including, but not limited to the Contractor's indemnity and other obligations shall survive the expiration or cancellation of the Contract for any reason.

#### **NO WAIVER OF DEFAULT**

The failure of a party to insist upon strict adherence to any term of the Contract shall not be considered a waiver or deprive the party of the right thereafter to insist upon strict adherence to that term or any other term of the Contract.



## **2.1 Vendor/Contractor Obligations**

### **ACCOUNTING RECORDS**

The Contractor and all subcontractors shall maintain all pertinent financial and accounting records and evidence pertaining to the Contract in accordance with generally accepted principles of accounting and other procedures specified by the State of Michigan. Financial and accounting records shall be made available, upon request, to the State of Michigan, its designees, or the Michigan Auditor General at any time during the Contract period and any extension thereof, and for three years from expiration date and final payment on the Contract or extension thereof.

### **NOTIFICATION OF OWNERSHIP**

The Contractor shall make the following notifications in writing:

When the Contractor becomes aware that a change in its ownership or officers has occurred, or is certain to occur, that could result in changes in the valuation of its capitalized assets in the accounting records, the Contractor shall notify Acquisition Services within 30 days.

The Contractor shall also notify the Acquisition Services within 30 days whenever changes to asset valuations or any other cost changes have occurred or are certain to occur as a result of a change in ownership or officers.

The Contractor shall:

Maintain current, accurate, and complete inventory records of assets and their costs;

Provide Acquisition Services or designated representative ready access to the records upon request;

Ensure that all individual and grouped assets, their capitalized values, accumulated depreciation or amortization, and remaining useful lives are identified accurately before and after each of the Contractor's ownership or officer changes; and

Retain and continue to maintain depreciation and amortization schedules based on the asset records maintained before each Contractor ownership or officer change.

## **2.2 Contract Performance**

### **TIME IS OF THE ESSENCE**

The Contractor is on notice that time is of the essence in the performance of this contract. Late performance will be considered a material breach of this contract, giving the State a right to invoke all remedies available to it under this contract.

## **2.3 Contract Rights and Obligations**

### **INCURRING COSTS**

The State of Michigan is not liable for any cost incurred by the Contractor prior to signing of the Contract. The State fiscal year is October 1<sup>st</sup> through September 30<sup>th</sup>. The Contractor should realize that payments in any given fiscal year are contingent upon enactment of legislative appropriations. Total liability of the State is limited to terms and conditions of the Contract.

### **CONTRACTOR RESPONSIBILITIES**

The Contractor will be required to assume responsibility for all contractual activities, whether or not that Contractor performs them. Further, the State will consider the Contractor to be the sole point of contact with regard to contractual matters, including payment of any and all charges resulting from the anticipated Contract. If any part of the work is to be subcontracted, the Contract must include a list of subcontractors, including firm name and address, contact person and a complete description of work to be subcontracted. The State reserves the right to approve subcontractors and to require the Contractor to replace



subcontractors found to be unacceptable. The Contractor is totally responsible for adherence by the subcontractor to all provisions of the Contract. Any change in subcontractors must be approved by the State, in writing, prior to such change.

### **ASSIGNMENT AND DELEGATION**

The Contractor shall not have the right to assign this Contract, to assign its rights under this contract, or delegate any of its duties or obligations under the Contract to any other party (whether by operation of law or otherwise), without the prior written consent of the State. Any purported assignment in violation of this Section shall be null and void. Further, the Contractor may not assign the right to receive money due under the Contract without the prior written consent of the Director of Acquisition Services.

The Contractor shall not delegate any duties or obligations under the Contract to a subcontractor other than a subcontractor named and approved in the bid unless the Director of Acquisition Services has given written consent to the delegation.

**The Contractor shall agree to notify the Director of Acquisition Services before using a place of performance that is different from the address that the Contractor provided in the bid.**

### **TAXES**

Sales Tax: For purchases made directly by the State of Michigan, the State is exempt from State and Local Sales Tax. Prices shall not include such taxes. Exemption Certificates for State Sales Tax will be furnished upon request.

Federal Excise Tax: The State of Michigan may be exempt for Federal Excise Tax, or such taxes may be reimbursable, if articles purchased under this Contract are used for the State's exclusive use. Certificates exclusive use for the purposes of substantiating a tax-free or tax-reimbursable sale will be sent to the Contractor upon request. If a sale is tax exempt or tax reimbursable under the Internal Revenue Code, prices shall not include the Federal Excise Tax.

The State's Tax Exempt Certification is available for vendor viewing upon request to the Contract Administrator.

### **INDEMNIFICATION**

#### General Indemnification

To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold harmless the State, its departments, divisions, agencies, sections, commissions, officers, employees and agents, from and against all losses, liabilities, penalties, fines, damages and claims (including taxes), and all related costs and expenses (including reasonable attorneys' fees and disbursements and costs of investigation, litigation, settlement, judgments, interest and penalties), arising from or in connection with any of the following:

1. Any claim, demand, action, citation or legal proceeding against the State, its employees and agents arising out of or resulting from (1) the product provided or (2) performance of the work, duties, responsibilities, actions or omissions of the Contractor or any of its subcontractors under this Contract.
2. Any claim, demand, action, citation or legal proceeding against the State, its employees and agents arising out of or resulting from a breach by the Contractor of any representation or warranty made by the Contractor in the Contract;
3. Any claim, demand, action, citation or legal proceeding against the State, its employees and agents arising out of or related to occurrences that the Contractor is required to insure against as provided for in this Contract;



4. Any claim, demand, action, citation or legal proceeding against the State, its employees and agents arising out of or resulting from the death or bodily injury of any person, or the damage, loss or destruction of any real or tangible personal property, in connection with the performance of services by the Contractor, by any of its subcontractors, by anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable; provided, however, that this indemnification obligation shall not apply to the extent, if any, that such death, bodily injury or property damage is caused solely by the negligence or reckless or intentional wrongful conduct of the State;

5. Any claim, demand, action, citation or legal proceeding against the State, its employees and agents which results from an act or omission of the Contractor or any of its subcontractors in its or their capacity as an employer of a person.

#### Patent/Copyright Infringement Indemnification

To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold harmless the State, its employees and agents from and against all losses, liabilities, damages (including taxes), and all related costs and expenses (including reasonable attorneys' fees and disbursements and costs of investigation, litigation, settlement, judgments, interest and penalties) incurred in connection with any action or proceeding threatened or brought against the State to the extent that such action or proceeding is based on a claim that any piece of equipment, software, commodity or service supplied by the Contractor or its subcontractors, or the operation of such equipment, software, commodity or service, or the use or reproduction of any documentation provided with such equipment, software, commodity or service infringes any United States or foreign patent, copyright, trade secret or other proprietary right of any person or entity, which right is enforceable under the laws of the United States. In addition, should the equipment, software, commodity, or service, or the operation thereof, become or in the Contractor's opinion be likely to become the subject of a claim of infringement, the Contractor shall at the Contractor's sole expense (i) procure for the State the right to continue using the equipment, software, commodity or service or, if such option is not reasonably available to the Contractor, (ii) replace or modify the same with equipment, software, commodity or service of equivalent function and performance so that it becomes non-infringing, or, if such option is not reasonably available to Contractor, (iii) accept its return by the State with appropriate credits to the State against the Contractor's charges and reimburse the State for any losses or costs incurred as a consequence of the State ceasing its use and returning it.

#### Code Indemnification

To the extent permitted by law, the Contractor shall indemnify, defend and hold harmless the State from any claim, loss, or expense arising from Contractor's breach of the No Surreptitious Code Warranty.

#### Indemnification Obligation Not Limited

In any and all claims against the State of Michigan, or any of its agents or employees, by any employee of the Contractor or any of its subcontractors, the indemnification obligation under the Contract shall not be limited in any way by the amount or type of damages, compensation or benefits payable by or for the Contractor or any of its subcontractors under worker's disability compensation acts, disability benefits acts, or other employee benefits acts. This indemnification clause is intended to be comprehensive. Any overlap in sub clauses, or the fact that greater specificity is provided as to some categories of risk, is not intended to limit the scope of indemnification under any other sub clause.



### Continuation of Indemnification Obligation

The duty to indemnify will continue in full force and affect notwithstanding the expiration or early termination of the Contract with respect to any claims based on facts or conditions, which occurred prior to termination.

### Indemnification Procedures

The procedures set forth below shall apply to all indemnity obligations under this Contract.

1. After receipt by the State of notice of the action or proceeding involving a claim in respect of which it will seek indemnification, the State shall promptly notify Contractor of such claim in writing and take or assist Contractor in taking, as the case may be, any reasonable action to avoid the imposition of a default judgment against Contractor. No failure to so notify Contractor shall relieve Contractor of its indemnification obligations except to the extent that Contractor can demonstrate damages attributable to such failure. Within ten (10) days following receipt of written notice from the State relating to any claim, Contractor shall notify the State in writing whether Contractor agrees to assume control of the defense and settlement of that claim (a "Notice of Election"). After notifying Contractor of a claim and prior to the State receiving Contractor's Notice of Election, the State shall be entitled to defend against the claim, at Contractor's expense, and Contractor will be responsible for any reasonable costs incurred by the State in defending against the claim during such period.
2. If Contractor delivers a Notice of Election relating to any claim: (i) the State shall be entitled to participate in the defense of such claim and to employ counsel at its own expense to assist in the handling of such claim and to monitor and advise the State about the status and progress of the Defense; (ii) Contractor shall, at the request of the State, demonstrate to the reasonable satisfaction of the State, Contractor's financial ability to carry out its defense and indemnity obligations under this Contract; (iii) Contractor shall periodically advise the State about the status and progress of the defense and shall obtain the prior written approval of the State before entering into any settlement of such claim or ceasing to defend against such claim and (iv) to the extent that any principles of Michigan governmental or public law may be involved or challenged, the State shall have the right, at its own expense, to control the defense of that portion of such claim involving the principles of Michigan governmental or public law. Notwithstanding the foregoing, the State may retain control of the defense and settlement of a claim by written notice to Contractor given within ten (10) days after the State's receipt of Contractor's information requested by the State pursuant to clause (ii) of this paragraph if the State determines that Contractor has failed to demonstrate to the reasonable satisfaction of the State Contractor's financial ability to carry out its defense and indemnity obligations under this Section. Any litigation activity on behalf of the State of Michigan, or any of its subdivisions pursuant to this Section, must be coordinated with the Department of Attorney General. In the event the insurer's attorney represents the State pursuant to this Section, the insurer's attorney may be required to be designated as a Special Assistant Attorney General by the Attorney General of the State of Michigan.
3. If Contractor does not deliver a Notice of Election relating to any claim of which it is notified by the State as provided above, the State shall have the right to defend the claim in such manner as it may deem appropriate, at the cost and expense of Contractor. If it is determined that the claim was one against which Contractor was required to indemnify the State, upon request of the State, Contractor shall promptly reimburse the State for all such reasonable costs and expenses.

**LIMITATION OF LIABILITY**

Except as set forth herein, neither the Contractor nor the State shall be liable to the other party for indirect or consequential damages, even if such party has been advised of the possibility of such damages. Such limitation as to indirect or consequential damages shall not apply to claims for infringement of United States patent, copyright, trademarks or trade secrets; to claims for personal injury or damage to property caused by the gross negligence or willful misconduct of the Contractor; to claims covered by other specific provisions of this Contract calling for liquidated damages; to Contractor's indemnification obligations (2.305); or to court costs or attorney's fees awarded by a court in addition to damages after litigation based on this Contract.

The State's liability for damages to the Contractor shall be limited to the value of the Contract.

**CONTRACT DISTRIBUTION**

Acquisition Services shall retain the sole right of Contract distribution to the Department of Community Health, WIC Division, unless other arrangements are authorized by Acquisition Services.

**ASSIGNMENT OF ANTITRUST CAUSE OF ACTION**

For and in consideration of the opportunity to submit a quotation and other good and valuable consideration, the Contractor hereby assigns, sells and transfers to the State of Michigan all rights, title and interest in and to all causes of action it may have under the antitrust laws of the United States or this State for price fixing, which causes of action have accrued prior to the date of payment and which relate solely to the particular goods, commodities, or services purchased or procured by this State pursuant to this transaction.

**TRANSITION ASSISTANCE**

If this Contract is not renewed at the end of this term, or is canceled prior to its expiration, for any reason, the Contractor shall provide for up to 30 days after the expiration or cancellation of this Contract, all reasonable transition assistance requested by the State, to allow for the expired or canceled portion of the Services to continue without interruption or adverse effect, and to facilitate the orderly transfer of such services to the State or its designees. Such transition assistance will be deemed by the parties to be governed by the terms and conditions of this Contract (notwithstanding this expiration or cancellation) except for those Contract terms or conditions that do not reasonably apply to such transition assistance. The State shall pay the Contractor for any resources utilized in performing such transition assistance at the most current rates provided by the Contract for Contract performance.

**WEBSITE INCORPORATION**

The State expressly states that it will not be bound by any content on the Contractor's website, even if the Contractor's documentation specifically referenced that content and attempts to incorporate it into any other communication, unless the State has actual knowledge of such content and has expressly agreed to be bound by it in a writing that has been manually signed by an authorized representation of the State.

**WORKPLACE DISCRIMINATION**

The Contractor represents and warrants that in performing services for the State pursuant to this Contract, the Contractor agrees not to discriminate against any employee or applicant for employment, with respect to their hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment, because of race, color, religion, national origin, ancestry, age, sex, height, weight, marital status, physical or mental handicap or disability. The Contractor further agrees that every subcontract entered into for the performance of any Contract or purchase order resulting here from will contain a provision requiring non-discrimination in employment, as herein specified, binding upon each subcontractor. This covenant is required pursuant to the Elliot Larsen Civil Rights Act, 1976 Public Act 453, as amended, MCL 37.2201, et seq., and the Persons With Disabilities Civil Rights Act, 1976 Public Act 220, as amended, MCL 37.1101, et seq., and any breach thereof may be regarded as a material breach of the Contract or purchase order.



The Contractor hereby represents that in performing this contract it will not violate The Civil Rights Act of 1964, USCS Chapter 42, including, but not limited to, Title VII, 42 USCS §§ 2000e et seq.; the Americans with Disabilities Act (ADA), 42 USCS §§ 12101 et seq.; or The Age Discrimination in Employment Act of 1967 (ADEA), 29 USCS §§ 621, 623 et seq.; the Old Workers Benefit and Protection Act of 1990 (OWBPA), 29 USCS §§ 626 et seq.; the Family Medical Leave Act of 1993 (FMLA), 29 USC §§ 651 et seq.; or the Fair Labor Standards Act (FLSA), 29 USC §§ 201 et seq.

## **LABOR RELATIONS**

Pursuant to 1980 Public Act 278, as amended, MCL 423.231, et seq., the State shall not award a Contract or subcontract to an employer whose name appears in the current register of employers failing to correct an **unfair labor practice** compiled pursuant to Section 2 of the Act. A Contractor of the State, in relation to the Contract, shall not enter into a Contract with a subcontractor, manufacturer, or supplier whose name appears in this register. Pursuant to Section 4 of 1980 Public Act 278, MCL 423.324, the State may void any Contract if, subsequent to award of the Contract, the name of the Contractor as an employer, or the name of the subcontractor, manufacturer or supplier of the Contractor appears in the register. The Contractor represents and warrants that the company does not appear in the current register of employers failing to correct an unfair labor practice.

### **2.4 Contract Review and Evaluation**

#### **CONTRACT COMPLIANCE INSPECTOR**

Upon receipt at Acquisition Services of the properly executed Contract Agreement(s), the person named below will be allowed to oversee the Contract performance on a day-to-day basis during the term of the Contract. However, overseeing the Contract implies **no authority to negotiate, change, modify, clarify, amend, or otherwise alter the terms, conditions, and specifications of such Contract(s). That authority is retained by Acquisition Services.** The Contract Compliance Inspector for this project is:

Alethia Carr, Director,  
Department of Community Health-WIC Division  
Lewis Cass Building,  
6<sup>th</sup> Floor  
320 S. Walnut Street  
Lansing, MI 48913  
Phone: (517) 335-9299  
Fax: (517) 335-8835  
Email: [CarrA@michigan.gov](mailto:CarrA@michigan.gov)

## **PERFORMANCE REVIEWS**

The State may review with the Contractor their performance under the Contract. Performance reviews shall be conducted quarterly, semi-annually or annually depending on Contractor's past performance with the State. Performance reviews shall include, but not limited to, quality of products/services being delivered and provided, timeliness of delivery, percentage of completion of orders, the amount of back orders, status of such orders, accuracy of billings, customer service, completion and submission of required paperwork, the number of substitutions and the reasons for substitutions, and other requirements of the Contract.

Upon a finding of poor performance, which has been documented by Acquisition Services, the Contractor shall be given an opportunity to respond and take corrective action. If corrective action is not taken in a reasonable amount of time as determined by Acquisition Services, the Contract may be canceled for default. Delivery by the Contractor of unsafe and/or adulterated or off-condition products to any State agency is considered a material breach of Contract subject to the cancellation provisions contained herein.

**AUDIT OF CONTRACT COMPLIANCE/ RECORDS AND INSPECTIONS**

The Contractor agrees that the State may, upon five (5) business days notice, perform an audit at Contractor 's location(s) to determine if the Contractor is complying with the requirements of the Contract. The Contractor agrees to cooperate with the State during the audit and produce all records and documentation that verifies compliance with the Contract requirements.

**2.5 Quality and Warranties****PROHIBITED PRODUCTS**

The State will not accept salvage, distressed, outdated or discontinued merchandise. Shipping of such merchandise to any State agency, as a result of an order placed against the Contract, shall be considered default by the Contractor of the terms and conditions of the Contract and may result in cancellation of the Contract by the State. The brand and product number offered for all items shall remain consistent for the term of the Contract, unless Acquisition Services has approved a change.

**INSPECTION**

All goods are subject to inspection and testing. In the event goods are defective in material or workmanship, or otherwise fail to meet the requirements of the Contract, the State shall have the right to reject the goods or retain the goods and correct the defects. The Contractor shall pay the State for expenses incurred in correcting defects. Rejected goods will be held for 45 days after delivery. The Contractor must arrange for the return of said goods, including paying for handling, packing, and transportation costs. The State has the authority to dispose of the goods without further liability to the State in the event the Contractor fails to make arrangements within the specified time period.

**GENERAL WARRANTIES (goods)**

*Warranty of Merchantability* – Goods provided by vendor under this agreement shall be merchantable. All goods provided under this contract shall be of good quality within the description given by the State, shall be fit for their ordinary purpose, shall be adequately contained and packaged within the description given by the State, shall conform to the agreed upon specifications, and shall conform to the affirmations of fact made by the vendor or on the container or label.

*Warranty of fitness for a particular purpose* – When vendor has reason to know or knows any particular purpose for which the goods are required, and the State is relying on the vendor's skill or judgment to select or furnish suitable goods, there is a warranty that the goods are fit for such purpose.

*Warranty of title* – Vendor shall, in providing goods to the State, convey good title in those goods, whose transfer is right and lawful. All goods provided by vendor shall be delivered free from any security interest, lien, or encumbrance of which the State, at the time of contracting, has no knowledge. Goods provided by vendor, under this agreement, shall be delivered free of any rightful claim of any third person by of infringement or the like.

**CONTRACTOR WARRANTIES**

The Contract will contain customary representations and warranties by the Contractor, including, without limitation, the following:

The Contractor will use its best efforts to use efficiently any resources or services necessary to provide the products that are separately chargeable to the State;

The Contractor will provide the products in a manner that does not infringe the proprietary rights of any third party;

The Contractor will provide the products in a manner that complies with all applicable laws and regulations;



The Contractor has duly authorized the execution, delivery and performance of the Contract;

The Contractor is capable in all respects of fulfilling and shall fulfill all of its obligations under this contract.

The contract appendices, attachments, and exhibits identify all equipment and software services necessary for the deliverable(s) to perform and operate in compliance with the contract's requirements.

The contract signatory has the power and authority, including any necessary corporate authorizations, necessary to enter this contract, on behalf of Contractor.

The Contractor is qualified and registered to transact business in all locations where required.

Neither the Contractor nor any Affiliates, nor any employee of either, has, shall have, or shall acquire, any contractual, financial, business, or other interest, direct or indirect, that would conflict in any manner or degree with Contractor's performance of its duties and responsibilities to the State under this Contract or otherwise create an appearance of impropriety with respect to the award or performance of this Agreement. Contractor shall notify the State within two (2) days of any such interest that may be incompatible with the interests of the State.

All financial statements, reports, and other information furnished by Contractor to the State as part of its response to RFP or otherwise in connection with the award of this Contract fairly and accurately represent the business, properties, financial condition, and results of operations of Contractor as of the respective dates, or for the respective periods, covered by such financial statements, reports, other information. Since the respective dates or periods covered by such financial statements, reports, or other information, there have been no material adverse changes in the business, properties, financial condition, or results of operations of Contractor. All written information furnished to the State by or behalf of Contractor in connection with this Contract, including its bid, is true, accurate, and complete, and contains no untrue statement of material fact or omits any material fact necessary to make such information not misleading.

## **2.6 Breach of Contract**

### **BREACH DEFINED**

Failure to comply with articles, sections, or subsections of this agreement, or making any false statement in this agreement will be considered a material breach of this agreement giving the state authority to invoke any and all remedies available to it under this agreement.

In addition to any remedies available in law and by the terms of this Contract, if the Contractor breaches, such a breach may be considered as a default in the performance of a material obligation of this Contract.

### **NOTICE AND THE RIGHT TO CURE**

In the event of a curable breach by the Contractor, the State shall provide the Contractor written notice of the breach and a time period of 30 days to cure said breach described in the notice. This section requiring notice and an opportunity to cure shall not be applicable in the event of successive or repeated breaches of the same nature or if the State determines in its sole discretion that the breach poses a serious and imminent threat to the health or safety of any person or the imminent loss, damage or destruction of any real or tangible personal property.

### **EXCUSABLE FAILURE**

1. Neither party shall be liable for any default or delay in the performance of its obligations under the Contract if and to the extent such default or delay is caused, directly or indirectly, by: fire, flood, earthquake, elements of nature or acts of God; riots, civil disorders, rebellions or revolutions in any country; the failure of the other party to perform its material responsibilities under the Contract (either itself or through another Contractor); injunctions (provided the injunction was not issued as a result of any fault or negligence of the party seeking to have its default or delay excused); or any other cause



beyond the reasonable control of such party; provided the non-performing party and its sub-Contractors are without fault in causing such default or delay, and such default or delay could not have been prevented by reasonable precautions and cannot reasonably be circumvented by the non-performing party through the use of alternate sources, workaround plans or other means, including disaster recovery plans. In such event, the non-performing party will be excused from any further performance or observance of the obligation(s) so affected for as long as such circumstances prevail and such party continues to use its best efforts to recommence performance or observance whenever and to whatever extent possible without delay provided such party promptly notifies the other party in writing of the inception of the excusable failure occurrence, and also of its abatement or cessation.

2. If any of the above enumerated circumstances substantially prevent, hinder, or delay performance of the services necessary for the performance of the State's functions for more than 14 consecutive days, and the State determines that performance is not likely to be resumed within a period of time that is satisfactory to the State in its reasonable discretion, then at the State's option: (a) the State may procure the affected services from an alternate source, and the State shall not be liable for payments for the unperformed services under the Contract for so long as the delay in performance shall continue; (b) the State may cancel any portions of the Contract so affected and the charges payable hereunder shall be equitably adjusted to reflect those services canceled; or (c) the Contract will be canceled without liability of the State to the Contractor as of the date specified by the State in a written notice of cancellation to the Contractor. The Contractor will not have the right to any additional payments from the State as a result of any excusable failure occurrence or to payments for services not rendered as a result of the excusable failure condition. Defaults or delays in performance by the Contractor which are caused by acts or omissions of its sub-Contractors will not relieve the Contractor of its obligations under the Contract except to the extent that a sub-Contractor is itself subject to any excusable failure condition described above and the Contractor cannot reasonably circumvent the effect of the sub-Contractor's default or delay in performance through the use of alternate sources, workaround plans or other means.

## **2.7 Remedies**

### **CANCELLATION**

The State may cancel this Contract without further liability or penalty to the State, its departments, divisions, agencies, offices, commissions, officers, agents, and employees for any of the following reasons:

1. Material Breach by the Contractor. In the event that the Contractor breaches any of its material duties or obligations under the Contract, which are either not capable of or subject to being cured, or are not cured within the time period specified in the written notice of breach provided by the State, or pose a serious and imminent threat to the health and safety of any person, or the imminent loss, damage or destruction of any real or tangible personal property, the State may, having provided written notice of cancellation to the Contractor, cancel this Contract in whole or in part, for cause, as of the date specified in the notice of cancellation.

In the event that this Contract is cancelled for cause, in addition to any legal remedies otherwise available to the State by law or equity, the Contractor shall be responsible for all costs incurred by the State in canceling the Contract, including but not limited to, State administrative costs, attorneys fees and court costs, and any additional costs the State may incur to procure the services required by this Contract from other sources. All excess re-procurement costs and damages shall not be considered by the parties to be consequential, indirect or incidental, and shall not be excluded by any other terms otherwise included in the Contract.

In the event the State chooses to partially cancel this Contract for cause charges payable under this Contract will be equitably adjusted to reflect those services that are cancelled.



In the event this Contract is cancelled for cause pursuant to this section, and it is therefore determined, for any reason, that the Contractor was not in breach of Contract pursuant to the provisions of this section, that cancellation for cause shall be deemed to have been a cancellation for convenience, effective as of the same date, and the rights and obligations of the parties shall be limited to that otherwise provided in the Contract for a cancellation for convenience.

2. Cancellation for Convenience by the State. The State may cancel this Contract for its convenience, in whole or part, if the State determines that such a cancellation is in the State's best interest. Reasons for such cancellation shall be left to the sole discretion of the State and may include, but not limited to (a) the State no longer needs the services or products specified in the Contract, (b) relocation of office, program changes, changes in laws, rules, or regulations make implementation of the Contract services no longer practical or feasible, and (c) unacceptable prices for additional services requested by the State. The State may cancel the Contract for its convenience, in whole or in part, by giving the Contractor written notice 30 days prior to the date of cancellation. If the State chooses to cancel this Contract in part, the charges payable under this Contract shall be equitably adjusted to reflect those services that are cancelled.

3. Non-Appropriation. In the event that funds to enable the State to effect continued payment under this Contract are not appropriated or otherwise made available. The Contractor acknowledges that, if this Contract extends for several fiscal years, continuation of this Contract is subject to appropriation or availability of funds for this project. If funds are not appropriated or otherwise made available, the State shall have the right to cancel this Contract at the end of the last period for which funds have been appropriated or otherwise made available by giving written notice of cancellation to the Contractor. The State shall give the Contractor written notice of such non-appropriation or unavailability within 30 days after it receives notice of such non-appropriation or unavailability.

4. Criminal Conviction. In the event the Contractor, an officer of the Contractor, or an owner of a 25% or greater share of the Contractor, is convicted of a criminal offense incident to the application for or performance of a State, public or private Contract or sub-Contract; or convicted of a criminal offense including but not limited to any of the following: embezzlement, theft, forgery, bribery, falsification or destruction of records, receiving stolen property, attempting to influence a public employee to breach the ethical conduct standards for State of Michigan employees; convicted under State or federal antitrust statutes; or convicted of any other criminal offense which in the sole discretion of the State, reflects upon the Contractor's business integrity.

5. Approvals Rescinded. The State may terminate this Contract without further liability or penalty in the event any final administrative or judicial decision or adjudication disapproves a previously approved request for purchase of personal services pursuant to Constitution 1963, Article 11, section 5, and Civil Service Rule 7. Termination may be in whole or in part and may be immediate as of the date of the written notice to Contractor or may be effective as of the date stated in such written notice.

## **RIGHTS UPON CANCELLATION**

**Termination Assistance.** If this Contract is terminated for any reason prior to completion, Contractor agrees to provide for up to six (6) months after the termination all reasonable termination assistance requested by the State to facilitate the orderly transfer of such Services to the State or its designees in a manner designed to minimize interruption and adverse effect. Such termination assistance will be deemed by the parties to be governed by the terms and conditions of this Contract (notwithstanding its termination) other than any terms or conditions that do not reasonably apply to such termination assistance. Such termination assistance shall be at no additional charge to the State if the termination is for Contractor's Default; otherwise the State shall compensate Contractor for such termination assistance on a time and materials basis in accordance with the Amendment Labor Rates identified within this Contract agreement.



## SUSPENSION OF WORK

The Contract Administrator may order the Contractor, in writing, to suspend, delay, or interrupt all or any part of the work of this Contract for the period of time that the Contract Administrator determines appropriate for the convenience of the State.

If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contract Administrator in the administration of this Contract, or (2) by the Contract Administrator's failure to act within the time specified in this Contract (or within a reasonable time if not specified), an adjustment shall be made for any increase in the cost of performance of this Contract (excluding profit) necessarily caused by the unreasonable suspension, delay, or interruption, and the Contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the Contractor, or for which an equitable adjustment is provided for or excluded under any other term or condition of this Contract.

A claim under this clause shall not be allowed:

1. For any costs incurred more than 20 days before the Contractor shall have notified the Contract Administrator in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order); and
2. Unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of the suspension, delay, or interruption, but not later than the date of final payment under the Contract.

## 2.8 Changes, Modifications, and Amendments

### APPROVALS

The Contract may not be modified, amended, extended, or augmented except by a writing executed by the parties hereto, and any breach or default by a party shall not be waived or released other than in writing signed by the other party.

### TIME EXTENSIONS

Time extensions for Contract changes will depend upon the extent, if any, by which the changes cause delay in the completion of the various elements of performance as described in the statement of work. The change order granting the time extension may provide that the Contract completion date will be extended only for those specific elements related to the changed work and that the remaining Contract completion dates for all other portions of the work will not be altered. The change order also may provide an equitable readjustment of liquidated damages under the new completion schedule.

### MODIFICATION

Acquisition Services reserves the right to modify this Contract at any time during the Contract term. Such modification may include changing the locations to be serviced, additional locations to be serviced, method or manner of performance of the work, number of days service is to be performed, addition or deletion of tasks to be performed, addition or deletion of items, and/or any other modifications deemed necessary. Any changes in pricing proposed by the Contractor resulting from the proposed changes are subject to acceptance by the State. Changes may be increases or decreases. **IN THE EVENT PRICES ARE NOT ACCEPTABLE TO THE STATE, THE CONTRACT SHALL BE SUBJECT TO COMPETITIVE BIDDING BASED UPON THE NEW SPECIFICATION.**

**The State reserves the right to add an item(s) that is not described on the item listing and is available from the Contractor.** The item(s) may be included on the Contract, only if prior written approval has been granted by Acquisition Services.

**AUDIT AND RECORDS UPON MODIFICATION**

DEFINITION: records includes books, documents, accounting procedures and practices, and other data, regardless of whether such items are in written form, electronic form, or in any other form

Contractor shall be required to submit cost or pricing data with the pricing of any modification of this contract to the Contract Administrator in Acquisition Services. Data may include accounting records, payroll records, employee time sheets, and other information the state deems necessary to perform a fair evaluation of the modification proposal. Contract Administrator or authorized representative of the state shall have the right to examine and audit all of the contractor's records, including computations and projections, related to:

The proposal for modification;  
The discussions conducted on the proposal, including those related to negotiation;  
Pricing of the modification; or  
Performance of the modification.

Contractor shall make available at its office at all reasonable times the materials described in the paragraphs above.

If this contract is completely or partially terminated, the records relating to the work terminated shall be made available for 3 years after any resulting final termination settlement.

The State of Michigan, upon request, shall have access to any and all records pertaining to State accounts compiled during the term of the Contract.

**CHANGES**

A. The Contract Administrator may, at any time, without notice to the sureties, if any, by written order designated or indicated to be a change order, make changes in the work within the general scope of the contract, including changes:

- 1) In the specifications (including drawings and designs);
- 2) In the method or manner of performance of the work;
- 3) In the State-furnished facilities, equipment, materials, services, or site; or
- 4) Directing acceleration in the performance of the work.

B. Any other written or oral order (which, as used in this paragraph (b), includes direction, instruction, interpretation, or determination) from the Contract Administrator that causes a change shall be treated as a change order under this clause; Provided, that the Contractor gives the Contract Administrator written notice stating:

- 1) The date, circumstances, and source of the order; and
- 2) That the Contractor regards the order as a change order.

Except as provided in this clause, no order, statement, or conduct of the Contract Administrator shall be treated as a change under this clause or entitle the Contractor to an equitable adjustment.

**LIABILITY INSURANCE****A. Insurance**

The Contractor is required to provide proof of the minimum levels of insurance coverage as indicated below. The purpose of this coverage shall be to protect the State from claims which may arise out of or result from the Contractor's performance of services under the terms of this Contract, whether such services are performed by the Contractor, or by any subcontractor, or by anyone directly or indirectly employed by any of them, or by anyone for whose acts they may be liable.



The Contractor waives all rights against the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees and agents for recovery of damages to the extent these damages are covered by the insurance policies the Contractor is required to maintain pursuant to this Contract.

All insurance coverage provided relative to this Contract/Purchase Order is PRIMARY and NON-CONTRIBUTING to any comparable liability insurance (including self-insurances) carried by the State.

The insurance shall be written for not less than any minimum coverage specified in this Contract or required by law, whichever is greater.

The insurers selected by Contractor shall have an A.M. Best rating of A or better, or as otherwise approved in writing by the State, or if such ratings are no longer available, with a comparable rating from a recognized insurance rating agency. Companies that have been approved to do business in the State shall issue all policies of insurance required in this Contract.

See [www.michigan.gov/cis](http://www.michigan.gov/cis)

Where specific limits are shown, they are the minimum acceptable limits. If Contractor's policy contains higher limits, the State shall be entitled to coverage to the extent of such higher limits.

Before both parties sign the Contract or before the purchase order is issued by the State, the Contractor must furnish to the Director of DMB, certificate(s) of insurance verifying insurance coverage ("Certificates"). The Certificate must be on the standard "accord" form or equivalent. **THE CONTRACT OR PURCHASE ORDER NO. MUST BE SHOWN ON THE CERTIFICATE OF INSURANCE TO ASSURE CORRECT FILING.** All Certificate(s) are to be prepared and submitted by the Insurance Provider. All Certificate(s) shall contain a provision indicating that coverage afforded under the policies WILL NOT BE CANCELLED, MATERIALLY CHANGED, OR NOT RENEWED without THIRTY (30) days prior written notice, except for ten (10) days for non-payment of premium, having been given to the Director of DMB. The notice must include the Contract or Purchase Order number affected and be mailed to: Director, Department of Management and Budget, P.O. Box 30026, Lansing, Michigan 48909. Failure to provide evidence of coverage, may, at the State's sole option, result in this Contract's termination.

The Contractor is required to pay for and provide the type and amount of insurance listed **below**:

1. Commercial General Liability with the following minimum coverage:
 

\$2,000,000	General Aggregate Limit other than Products/Completed Operations
\$2,000,000	Products/Completed Operations Aggregate Limit
\$1,000,000	Personal & Advertising Injury Limit
\$1,000,000	Each Occurrence Limit
\$500,000	Fire Damage Limit (any one fire)

The Contractor must list the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees and agents as ADDITIONAL INSURED(S) on the Commercial General Liability certificate. The Contractor also agrees to provide evidence that insurance policies contain a waiver of subrogation by the insurance company.

2. If a motor vehicle is used to provide services or products under this Contract, the Contractor must have vehicle liability insurance on any auto including owned, hired and non-owned vehicles used in Contractor's business for bodily injury and property damage as required by law.



The Contractor must list the State of Michigan, its departments, divisions, agencies, offices, commissions, officers, employees and agents as ADDITIONAL INSUREDS on the vehicle liability certificate. The Contractor also agrees to provide evidence that insurance policies contain a waiver of subrogation by the insurance company.

3. Workers' compensation coverage must be provided in accordance with applicable laws governing the employees and employers work activities in the state of the Contractor's domicile. If a self-insurer provides the applicable coverage, proof must be provided of approved self-insured authority by the jurisdiction of domicile. For employees working outside of the state of qualification, Contractor must provide appropriate certificates of insurance proving mandated coverage levels for the jurisdictions where the employees' activities occur.

Any certificates of insurance received must also provide a list of states where the coverage is applicable.

The Contractor also agrees to provide evidence that insurance policies contain a waiver of subrogation by the insurance company. This provision shall not be applicable where prohibited or limited by the laws of the jurisdiction in which the work is to be performed.

4. Employers liability insurance with the following minimum limits:

\$100,000	each accident
\$100,000	each employee by disease
\$500,000	aggregate disease

5. Employee Fidelity, including Computer Crimes, insurance naming the State as a loss payee, providing coverage for direct loss to the State and any legal liability of the State arising out of or related to fraudulent or dishonest acts committed by the employees of Contractor or its Subcontractors, acting alone or in collusion with others, in a minimum amount of one million dollars (\$1,000,000.00) with a maximum deductible of fifty thousand dollars (\$50,000.00).

6. Umbrella or Excess Liability Insurance in a minimum amount of ten million dollars (\$10,000,000.00), which shall apply, at a minimum, to the insurance required in Subsection 1 (Commercial General Liability) above.

7. Professional Liability (Errors and Omissions) Insurance with the following minimum coverage: three million dollars (\$3,000,000.00) each occurrence and three million dollars (\$3,000,000.00) annual aggregate.

8. Fire and Personal Property Insurance covering against any loss or damage to the office space used by Contractor for any reason under this Contract, and the equipment, software and other contents of such office space, including without limitation, those contents used by Contractor to provide the Services to the State, up to the replacement value thereof, where such office space and its contents are under the care, custody and control of Contractor. Such policy shall cover all risks of direct physical loss or damage, including without limitation, flood and earthquake coverage and coverage for computer hardware and software. The State shall be endorsed on the policy as a loss payee as its interests appear.

## **B. Subcontractors**

Except where the State has approved in writing a Contractor subcontract with other insurance provisions, Contractor shall require all of its Subcontractors under this Contract to purchase and maintain the insurance coverage as described in this Section for the Contractor in connection with the performance of work by those Subcontractors. Alternatively, Contractor may include any Subcontractors under Contractor's insurance on the coverage required in this Section. Subcontractor(s) shall fully comply with the insurance coverage required in this Section. Failure of Subcontractor(s) to comply with insurance requirements does not limit Contractor's liability or responsibility.



### **C. Certificates of Insurance and Other Requirements**

Contractor shall furnish to the Office of DMB certificate(s) of insurance verifying insurance coverage or providing satisfactory evidence of self-insurance as required in this Section (the "Certificates"). Before the Contract is signed, and not less than 20 days before the insurance expiration date every year thereafter, the Contractor shall provide evidence that the State and its agents, officers and employees are listed as additional insured, but only to the extent of liabilities assumed by Contractor as set forth in Indemnification Section of this Contract, under each commercial general liability and commercial automobile liability policy. In the event the State approves the representation of the State by the insurer's attorney, the attorney may be required to be designated as a Special Assistant Attorney General by the Attorney General of the State of Michigan.

Contractor shall maintain all required insurance coverage throughout the term of the Contract and any extensions thereto and, in the case of claims-made Commercial General Liability policies, shall secure tail coverage for at least three (3) years following the expiration or termination for any reason of this Contract. The minimum limits of coverage specified above are not intended, and shall not be construed, to limit any liability or indemnity of Contractor under this Contract to any indemnified party or other persons. Contractor shall be responsible for all deductibles with regard to such insurance. If Contractor fails to pay any premium for required insurance as specified in this Contract, or if any insurer cancels or significantly reduces any required insurance as specified in this Contract without the State's written consent, at the State's election (but without any obligation to do so) after the State has given Contractor at least thirty (30) days written notice, the State may pay such premium or procure similar insurance coverage from another company or companies; and at the State's election, the State may deduct the entire cost (or part thereof) from any payment due Contractor, or Contractor shall pay the entire cost (or any part thereof) upon demand by the State.

#### **LIQUIDATED DAMAGES**

The parties acknowledge that widespread unavailability of contract infant formula exceeding 7 calendar days and affecting 5% or more of WIC participating infants will interfere with the timely and proper completion of the Contract, to the loss and damage of the Department, and that it would be impracticable and extremely difficult to fix the actual damage sustained by the Department as a result of any such delay. Therefore, Contractor and the Department agree that in the case of any such unavailability in respect of which the Department does not elect to exercise its rights under **INDEMNIFICATION**, the Department may assess liquidated damages against Contractor as specified in this Section.

If widespread unavailability of contract infant formula exceeding 7 calendar days and affecting 5% or more of WIC participating infants occurs, then the Department shall be entitled to collect liquidated damages in the amount of \$1,000.00 per day for each day Contractor fails to remedy the unavailability plus any owed rebate amount.

The parties acknowledge that non-payment of infant formula rebate on a monthly basis will interfere with the timely and proper completion of the Contract, to the loss and damage of the Department, and that it would be impracticable and extremely difficult to fix the actual damage sustained by the Department as a result of any such delay. Therefore, Contractor and the Department agree that in the case of any such non-payment of non-formula rebate in respect of which the Department does not elect to exercise its rights under **INDEMNIFICATION**, the Department may assess liquidated damages against Contractor as specified in this Section.

If non-payment of infant formula rebate on a monthly basis occurs, then the Department shall be entitled to collect liquidated damages in the amount of \$5,000.00 and a figure representative of the number of infants un-served multiplied times the retail price of alternative infant formula per day for each day Contractor fails to remedy the unavailability.

**Article 1, Attachment 1**  
**Rebate Pricing Sheet**

**Manufacturer: Mead Johnson & Company**

**Formula Name: Enfamil LIPIL with Iron**

	<b>A</b>	<b>B</b>	<b>C</b>	<b>D</b>	<b>E</b>	<b>F</b>	<b>G</b>	<b>H</b>
<b>Infant Formula Type, Size, Form</b>	<b>Max. Issuance per infant (oz).</b>	<b>Avg. Monthly infant participation by form*</b>	<b>Total oz. for bid</b>	<b>Standardized number of units per month</b>	<b>Wholesale Price Per Can</b>	<b>Rebate Bid Per Can</b>	<b>Net Wholesale Cost per Can</b>	<b>Net Cost</b>
			<b>(A * B)</b>	<b>(C / no. of oz. per container)</b>	<b>(lowest national wholesale cost per unit for a full truckload)</b>		<b>(E - F)</b>	<b>(G * D)</b>
Liquid Conc. 13 oz.	403	12,952	5,219,656	401,512	<b>\$ 3.720</b>	<b>\$3.300</b>	<b>\$0.420</b>	<b>\$168,635.040</b>
Powder 12.9 oz.	128	34,970	4,476,160	346,989	<b>\$11.610</b>	<b>\$9.451</b>	<b>\$2.159</b>	<b>\$749,149.251</b>
RTF 32 oz.	806	48	38,688	1,209	<b>\$ 5.470</b>	<b>\$3.665</b>	<b>\$1.805</b>	<b>\$ 2,182.245</b>
<b>Total Monthly Cost</b>								<b>\$919,966.536</b>

**\*Excludes only infants exclusively breastfed and issued nonexempt infant formula**

**\*\* Column E equals Column D divided by number of ounces per can of powder**

**Average infant participation is calculated from closeout reports from the period 3/05 through 8/05.**

**Article 1 – Attachment B**  
**Sample Invoices**

**Formula Rebate Billing Worksheet**

**FORMULA REBATE BILLING WORKSHEET**

Invoice No. 1

PRODUCT	TYPE & DISCOUNT	SIZE/WT.	WHOLE-SALE PRICE AS OF 11/01/03	% DISCOUNT APPLIED	REBATE PER CAN	NO. OF CANS TO BE BILLED	AMOUNT TO BE BILLED
Similac w/ Iron	Concentrate	13 oz.	\$3.32	97.29%	\$3.230	247,876	\$800,639.48
Similac Low Iron	Concentrate	13 oz.	\$3.35	97.29%	\$3.259	0	\$0.00
Similac Lactose-Free	Concentrate	13 oz.	\$3.92	97.29%	\$3.814	11,439	\$43,628.35
Isomil	Concentrate	13 oz.	\$3.63	97.29%	\$3.531	83,209	\$293,810.98
Similac w/iron	Powder	12.9 oz.	\$10.56	92.89%	\$9.809	229,230	\$2,248,517.07
Similac Low Iron	Powder	12.9 oz.	\$10.66	92.89%	\$9.9020	45	\$445.59
Similac Lactose-Free	Powder	12.9 oz.	\$12.02	92.89%	\$11.166	11,184	\$124,880.54
Isomil	Powder	12.9 oz.	\$11.08	92.89%	\$10.292	69,084	\$711,012.53
Similac w/iron	RTF	8 oz.	\$1.71	34.09%	\$0.629	0	\$0.00
Similac Low Iron	RTF	8 oz.	\$1.71	34.09%	\$0.583	0	\$0.00
Isomil	RTF	8 oz.	\$1.86	34.09%	\$0.680	0	\$0.00
Similac w/iron	RTF	32 oz.	\$4.40	34.09%	\$1.500	885	\$1,327.50
Similac Low Iron	RTF	32 oz.	\$4.66	34.09%	\$1.589	7	\$11.12
Similac Lactose-Free	RTF	32 oz.	\$4.83	34.09%	\$1.647	0	\$0.00
Isomil	RTF	32 oz.	\$4.83	34.09%	\$1.647	768	\$1,264.90
						Amount to be billed	\$4,225,538.06

Infant Enrollment      OCTOBER 2005      59,552

**Calculation of Discount:**

Concentrate:  $3.230/3.320=97.29\%$

Powder:  $9.809/10.56=92.89\%$

RTF:  $0.583/1.71=34.09\%$

Sample Invoice 2

FORMULA REBATE BILLING WORKSHEET

Invoice No. 47

PRODUCT	TYPE & DISCOUNT	SIZE/WT.	WHOLE-SALE PRICE AS OF 11/01/03	% DISCOUNT APPLIED	REBATE PER CAN	NO. OF CANS TO BE BILLED	AMOUNT TO BE BILLED
Similac w/ Iron	Concentrate	13 oz.	\$3.32	97.29%	\$3.230	248,737	\$803,420.51
Similac Low Iron	Concentrate	13 oz.	\$3.35	97.29%	\$3.259	0	\$0.00
Similac Lactose-Free	Concentrate	13 oz.	\$3.92	97.29%	\$3.814	11,169	\$42,598.57
Isomil	Concentrate	13 oz.	\$3.63	97.29%	\$3.531	86,159	\$304,227.43
Similac w/Iron	Powder	12.9 oz.	\$10.56	92.89%	\$9.809	232,464	\$2,280,239.38
Similac Low Iron	Powder	12.9 oz.	\$10.66	92.89%	\$9.9020	33	\$326.77
Similac Lactose-Free	Powder	12.9 oz.	\$12.02	92.89%	\$11.166	10,764	\$120,190.82
Isomil	Powder	12.9 oz.	\$11.08	92.89%	\$10.292	71,129	\$732,059.67
Similac w/Iron	RTF	8 oz.	\$1.71	34.09%	\$0.629	0	\$0.00
Similac Low Iron	RTF	8 oz.	\$1.71	34.09%	\$0.583	0	\$0.00
Isomil Advance	RTF	8 oz.	\$2.05	34.05%	\$0.698	0	\$0.00
Similac w/Iron	RTF	32 oz.	\$4.40	34.09%	\$1.500	940	\$1,410.00
Similac Low Iron	RTF	32 oz.	\$4.66	34.09%	\$1.589	0	\$0.00
Similac Lactose-Free	RTF	32 oz.	\$4.83	34.09%	\$1.647	0	\$0.00
Isomil Advance	RTF	32 oz.	\$4.83	34.09%	\$1.647	649	\$1,068.90
Amount to be billed							\$4,285,542.05

Infant Enrollment      SEPTEMBER 2005      60283

Calculation of Discount:  
 Concentrate:  $3.230/3.320=97.29\%$   
 Powder:  $9.809/10.56=92.89\%$   
 RTF:  $0.583/1.71=34.09\%$

Sample Invoice 3

FORMULA REBATE BILLING WORKSHEET

Invoice No. 46

PRODUCT	TYPE & DISCOUNT	SIZE/WT.	WHOLE-SALE PRICE AS OF 11/01/03	% DISCOUNT APPLIED	REBATE PER CAN	NO. OF CANS TO BE BILLED	AMOUNT TO BE BILLED
Similac w/ Iron	Concentrate	13 oz.	\$3.32	97.29%	\$3.230	244,883	\$790,972.09
Similac Low Iron	Concentrate	13 oz.	\$3.35	97.29%	\$3.259	0	\$0.00
Similac Lactose-Free	Concentrate	13 oz.	\$3.92	97.29%	\$3.814	10,068	\$38,399.35
Isomil	Concentrate	13 oz.	\$3.63	97.29%	\$3.531	86,513	\$305,477.40
Similac w/Iron	Powder	12.9 oz.	\$10.56	92.89%	\$9.809	222,050	\$2,178,088.45
Similac Low Iron	Powder	12.9 oz.	\$10.66	92.89%	\$9.9020	45	\$445.59
Similac Lactose-Free	Powder	12.9 oz.	\$12.02	92.89%	\$11.166	9,858	\$110,074.43
Isomil	Powder	12.9 oz.	\$11.08	92.89%	\$10.292	69,485	\$715,139.62
Similac w/Iron	RTF	8 oz.	\$1.71	34.09%	\$0.629	0	\$0.00
Similac Low Iron	RTF	8 oz.	\$1.71	34.09%	\$0.583	0	\$0.00
Isomil Advance	RTF	8 oz.	\$2.05	34.05%	\$0.698	0	\$0.00
Similac w/Iron	RTF	32 oz.	\$4.40	34.09%	\$1.500	950	\$1,425.00
Similac Low Iron	RTF	32 oz.	\$4.66	34.09%	\$1.589	0	\$0.00
Similac Lactose-Free	RTF	32 oz.	\$4.83	34.09%	\$1.647	0	\$0.00
Isomil Advance	RTF	32 oz.	\$4.83	34.09%	\$1.647	704	\$1,159.49
						Amount to be billed	\$4,141,181.42

Infant Enrollment      AUGUST 2005      59670

Calculation of Discount:  
 Concentrate:  $3.230/3.320=97.29\%$   
 Powder:  $9.809/10.56=92.89\%$   
 RTF:  $0.583/1.71=34.09\%$

**Attachment C**  
**Contractor Information**

**1B.101 VENDOR NAME AND ADDRESS**

<b>Name:</b>	<u>Mead Johnson &amp; Company</u>
<b>Address:</b>	<u>2400 West Lloyd Expressway</u>
<b>City, State, Zip:</b>	<u>Evansville, IN 47721</u>
<b>Phone:</b>	<u>(812) 429-5000</u>
<b>Web Page:</b>	<u>www.meadjohnson.com</u>

**1B.102 LOCATION ADDRESS**

<b>Address:</b>	<u>2400 West Lloyd Expressway</u>
<b>City, State, Zip:</b>	<u>Evansville, IN 47721</u>

**1B.103 ORGANIZATION AND YEAR**

<b>Status:</b>	<u>Corporation established in 1967</u>
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**1B.104 CONTACT**

<b>Name:</b>	<u>Kathy J. Decker</u>
<b>Address:</b>	<u>2400 West Lloyd Expressway</u>
<b>City, State, Zip</b>	<u>Evansville, IN 47721</u>
<b>Phone:</b>	<u>(812) 429-8758</u>
<b>Fax:</b>	<u>(812) 429-8610</u>
<b>E-Mail</b>	<u>Kathy.decker@bms.com</u>