

Public Law 102-512
102d Congress

An Act

To amend the National School Lunch Act and the Child Nutrition Act of 1966 to better assist children in homeless shelters, to enhance competition among infant formula manufacturers and to reduce the per unit costs of infant formula for the special supplemental food program for women, infants, and children (WIC), and for other purposes.

Oct. 24, 1992

[S. 2875]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Children’s Nutrition Assistance Act of 1992”.

Children’s
Nutrition
Assistance Act
of 1992.
42 USC 1771
note.

**TITLE I—HOMELESS CHILDREN’S
ASSISTANCE**

Homeless
Children’s
Assistance Act
of 1992.

SEC. 101. SHORT TITLE.

This title may be cited as the “Homeless Children’s Assistance Act of 1992”.

42 USC 1771
note.

SEC. 102. EXPENDITURE OF FUNDS FOR ADMINISTRATIVE EXPENSES.

Section 18(c)(2)(B)(i) of the National School Lunch Act (42 U.S.C. 1769(c)(2)(B)(i)) is amended by striking “Each such organization” and inserting “Each private nonprofit organization”.

SEC. 103. ALLOCATION OF RETURNED FUNDS.

Section 7(a)(5)(B)(i) of the Child Nutrition Act of 1966 (42 U.S.C. 1776(a)(5)(B)(i)) is amended—

(1) by striking “, the Secretary shall—” and inserting a colon;

(2) by striking subclause (I) and inserting the following new clause:

“(I) The Secretary shall allocate, for the purpose of providing grants on an annual basis to public entities and private nonprofit organizations participating in projects under section 18(c) of the National School Lunch Act (42 U.S.C. 1769(c)), not more than \$4,000,000 in each of fiscal years 1993 and 1994. Subject to the maximum allocation for the projects for each fiscal year, at the beginning of each of fiscal years 1993 and 1994, the Secretary shall allocate, from funds available under this section that have not been otherwise allocated to the States, an amount equal to the estimates by the Secretary of funds to be returned under this clause, but not less than \$1,000,000 in each fiscal year. To the extent that amounts returned to the Secretary are less than estimated or are insufficient to meet the needs of the projects, the Secretary may, subject to the maximum allocations established in this subclause, allocate amounts to meet the needs of the projects

from funds available under this section that have not been otherwise allocated to States.”; and

(3) in subclause (II), by striking “then allocate,” and inserting “After making the allocations under subclause (I), the Secretary shall allocate.”

42 USC 1769
note.

SEC. 104. EFFECTIVE DATE.

This title and the amendments made by this title shall become effective on September 30, 1992.

WIC Infant
Formula
Procurement
Act of 1992.

TITLE II—WIC INFANT FORMULA PROCUREMENT

42 USC 1771
note.

SEC. 201. SHORT TITLE.

This title may be cited as the “WIC Infant Formula Procurement Act of 1992”.

42 USC 1786
note.

SEC. 202. WIC INFANT FORMULA PROTECTION.

(a) FINDINGS.—

(1) the domestic infant formula industry is one of the most concentrated manufacturing industries in the United States;

(2) only three pharmaceutical firms are responsible for almost all domestic infant formula production;

(3) coordination of pricing and marketing strategies is a potential danger where only a very few companies compete regarding a given product;

(4) improved competition among suppliers of infant formula to the special supplemental food program for women, infants, and children (WIC) can save substantial additional sums to be used to put thousands of additional eligible women, infants, and children on the WIC program; and

(5) barriers exist in the infant formula industry that inhibit the entry of new firms and thus limit competition.

(b) **PURPOSES.**—It is the purpose of this title to enhance competition among infant formula manufacturers and to reduce the per unit costs of infant formula for the special supplemental food program for women, infants, and children (WIC).

SEC. 203. DEFINITIONS.

Section 17(b) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(b)) is amended by striking paragraph (17) and inserting the following new paragraphs:

“(17) ‘Competitive bidding’ means a procurement process under which the Secretary or a State agency selects a single source (a single infant formula manufacturer) offering the lowest price, as determined by the submission of sealed bids, for a product for which bids are sought for use in the program authorized by this section.

“(18) ‘Rebate’ means the amount of money refunded under cost containment procedures to any State agency from the manufacturer or other supplier of the particular food product as the result of the purchase of the supplemental food with a voucher or other purchase instrument by a participant in each such agency’s program established under this section.

"(19) 'Discount' means, with respect to a State agency that provides program foods to participants without the use of retail grocery stores (such as a State that provides for the home delivery or direct distribution of supplemental food), the amount of the price reduction or other price concession provided to any State agency by the manufacturer or other supplier of the particular food product as the result of the purchase of program food by each such State agency, or its representative, from the supplier.

"(20) 'Net price' means the difference between the manufacturer's wholesale price for infant formula and the rebate level or the discount offered or provided by the manufacturer under a cost containment contract entered into with the pertinent State agency."

SEC. 204. PROCUREMENT OF INFANT FORMULA FOR WIC.

Section 17(h)(8) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(h)(8)) is amended by striking subparagraph (G) and inserting the following new subparagraphs:

"(G)(i) The Secretary shall offer to solicit bids on behalf of State agencies regarding cost-containment contracts to be entered into by infant formula manufacturers and State agencies. The Secretary shall make the offer to State agencies once every 12 months. Each such bid solicitation shall only take place if two or more State agencies request the Secretary to perform the solicitation. For such State agencies, the Secretary shall solicit bids and select the winning bidder for a cost containment contract to be entered into by State agencies and infant formula manufacturers or suppliers.

Contracts.
Inter-
governmental
relations.

"(ii) If the Secretary determines that the number of State agencies making the election in clause (i) so warrants, the Secretary may, in consultation with such State agencies, divide such State agencies into more than one group of such agencies and solicit bids for a contract for each such group. In determining the size of the groups of agencies, the Secretary shall, to the extent practicable, take into account the need to maximize the number of potential bidders so as to increase competition among infant formula manufacturers.

"(iii) State agencies that elect to authorize the Secretary to perform the bid solicitation and selection process on their behalf and enter into the resulting containment contract shall obtain the rebates or discounts from the manufacturers or suppliers participating in the contract.

"(iv) In soliciting bids and determining the winning bidder under clause (i), the Secretary shall comply with the requirements of subparagraphs (B) and (F).

"(v)(I) Except as provided in subclause (II), the term of the contract for which bids are to be solicited under this paragraph shall be announced by the Secretary in consultation with the affected State agencies and shall be not less than 2 years.

"(II) If the law of a State regarding the duration of contracts is inconsistent with subclause (I), the Secretary shall permit a 1-year contract, with the option provided to the State to extend the contract for additional years.

"(vi) In prescribing specifications for the bids, the Secretary shall ensure that the contracts to be entered into by the State agencies and the infant formula manufacturers or suppliers provide

for a constant net price for infant formula products for the full term of the contracts and provide for rebates or discounts for all units of infant formula sold through the program that are produced by the manufacturer awarded the contract and that are for a type of formula product covered under the contract. The contracts shall cover all types of infant formula products normally covered under cost containment contracts entered into by State agencies.

“(vii) The Secretary shall also develop procedures for—

“(I) rejecting all bids for any joint contract and announcing a resolicitation of infant formula bids where necessary;

“(II) permitting a State agency that has authorized the Secretary to undertake bid solicitation on its behalf under this subparagraph to decline to enter into the joint contract to be negotiated and awarded pursuant to the solicitation if the agency promptly determines after the bids are opened that participation would not be in the best interest of its program; and

“(III) assuring infant formula manufacturers submitting a bid under this subparagraph that a contract awarded pursuant to the bid will cover State agencies serving no fewer than a number of infants to be specified in the bid solicitation.

“(viii) The bid solicitation and selection process on behalf of the State agencies shall be conducted in accordance with any procedures the Secretary deems necessary for the effective and efficient administration of the bid solicitation and selection process and consistent with the requirements of this subparagraph. The procedures established by the Secretary shall ensure that—

“(I) the bid solicitation and selection process is conducted in a manner providing full and open competition; and

“(II) the bid solicitation and selection process is free of any real or apparent conflict of interest.”

“(H) In soliciting bids for contracts for infant formula for the program authorized by this section, the Secretary shall solicit bids from infant formula manufacturers under procedures in which bids for rebates or discounts are solicited for milk-based and soy-based infant formula, separately, except where the Secretary determines that such solicitation procedures are not in the best interest of the program.

“(I) To reduce the costs of any supplemental foods, the Secretary—

“(i) shall promote, but not require, the joint purchase of infant formula among State agencies electing not to participate under the procedures set forth in subparagraph (G);

“(ii) shall encourage and promote (but not require) the purchase of supplemental foods other than infant formula under cost containment procedures;

“(iii) shall inform State agencies of the benefits of cost containment and provide assistance and technical advice at State agency request regarding the State agency's use of cost containment procedures;

“(iv) shall encourage (but not require) the joint purchase of supplemental foods other than infant formula under procedures specified in subparagraph (B), if the Secretary determines that—

“(I) the anticipated savings are expected to be significant;

"(II) the administrative expenses involved in purchasing the food item through competitive bidding procedures, whether under a rebate or discount system, will not exceed the savings anticipated to be generated by the procedures; and

"(III) the procedures would be consistent with the purposes of the program; and

"(v) may make available additional funds to State agencies out of the funds otherwise available under paragraph (1)(A) for nutrition services and administration in an amount not exceeding one half of 1 percent of the amounts to help defray reasonable anticipated expenses associated with innovations in cost containment or associated with procedures that tend to enhance competition.

"(J)(i) Any person, company, corporation, or other legal entity that submits a bid to supply infant formula to carry out the program authorized by this section and announces or otherwise discloses the amount of the bid, or the rebate or discount practices of such entities, in advance of the time the bids are opened by the Secretary or the State agency, or any person, company, corporation, or other legal entity that makes a statement (prior to the opening of bids) relating to levels of rebates or discounts, for the purpose of influencing a bid submitted by any other person, shall be ineligible to submit bids to supply infant formula to the program for the bidding in progress for up to 2 years from the date the bids are opened and shall be subject to a civil penalty of up to \$100,000,000, as determined by the Secretary to provide restitution to the program for harm done to the program. The Secretary shall issue regulations providing such person, company, corporation, or other legal entity appropriate notice, and an opportunity to be heard and to respond to charges.

Regulations.

"(ii) The Secretary shall determine the length of the disqualification, and the amount of the civil penalty referred to in clause (i) based on such factors as the Secretary by regulation determines appropriate.

"(iii) Any person, company, corporation, or other legal entity disqualified under clause (i) shall remain obligated to perform any requirements under any contract to supply infant formula existing at the time of the disqualification and until each such contract expires by its terms.

"(K) Not later than the expiration of the 180-day period beginning on the date of enactment of this subparagraph, the Secretary shall prescribe regulations to carry out this paragraph."

Regulations.

SEC. 205. PROCEDURES TO REDUCE PURCHASES OF LOW-IRON INFANT FORMULA.

Section 17(f) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(f)) is amended by adding at the end the following new paragraph:

"(22) In the State plan submitted to the Secretary for fiscal year 1994, each State agency shall advise the Secretary regarding the procedures to be used by the State agency to reduce the purchase of low-iron infant formula for infants on the program for whom such formula has not been prescribed by a physician or other appropriate health professional, as determined by regulations issued by the Secretary."

Regulations.

SEC. 206. ASSISTANCE TO ENCOURAGE ADDITIONAL COST CONTAINMENT EFFORTS.

The second sentence of section 17(h)(2)(A) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(h)(2)(A)) is amended—

- (1) by striking “formula shall—” and inserting “formula—”;
- (2) by inserting “shall” after the clause designations of each of clauses (i), (ii), and (iii);
- (3) by striking “and” at the end of clause (ii);
- (4) by striking the period at the end of clause (iii) and inserting “; and”; and
- (5) by adding at the end the following new clause:
“(iv) may provide funds, to the extent funds are not already provided under subparagraph (I)(v) for the same purpose, to help defray reasonable anticipated expenses associated with innovations in cost containment or associated with procedures that tend to enhance competition.”.

SEC. 207. TECHNICAL ASSISTANCE.

Section 17(h)(8)(E)(ii) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(h)(8)(E)(ii)) is amended by striking “that do not have large caseloads and”.

SEC. 208. STUDY.

Not later than April 1, 1994, the Secretary of Agriculture shall report to the Committee on Education and Labor of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate on—

- (1) State agencies that request the Secretary of Agriculture to conduct bid solicitations for infant formula under section 17(h)(8)(G)(i) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(h)(8)(G)(i)) (as amended by section 204 of this Act);
- (2) cost reductions achieved by the solicitations; and
- (3) other matters the Secretary determines to be appropriate regarding this title and the amendments made by this title.

42 USC 1786
note.
Reports.

SEC. 209. TERMINATION.43 USC 1786
note.

The authority provided by this title and the amendments made by this title shall terminate on September 30, 1994, except with regard to section 17(h)(8)(J) of the Child Nutrition Act of 1966 (42 U.S.C. 1786(h)(8)(J)) (as amended by section 204 of this Act).

Approved October 24, 1992.

LEGISLATIVE HISTORY—S. 2875:

CONGRESSIONAL RECORD, Vol. 138 (1992):

Oct. 5, considered and passed Senate and House.