Question #1: We often see guaranteed returns in contracts between Child and Adult Care Food Program (CACFP) Day Care Home (DCH) Sponsors and their subcontractors and would like to know what they are.

Answer: When dealing with procurement contracts involving the Sponsor there are two basic variations of guaranteed returns. One involves the subcontractor guaranteeing a return to the nonprofit food service account at the end of the program year if certain agreed upon conditions in the contract are met. For example, if conditions x, y, and z are met the FSMC agrees at the end of the year to increase the nonprofit food service account by an amount specified in the contract.

A second type of guaranteed return involves an agreement between the subcontractor and the Sponsor. If the predetermined return amount is not met at the end of the program year, the subcontractor will cover the amount by reducing its management fee, up to the amount of the fee. As with all terms and conditions, the guaranteed return provision must be specified in both the solicitation and contract documents.

Question #2: What if the management fee doesn’t cover the predetermined return amount? This is a possibility if at the end of the program year the loss exceeds the agreed upon predetermined return amount.

Answer: This is a potential problem, which is why the Sponsor should review the guaranteed return provision carefully. If the guaranteed return provision requires the subcontractor to provide a guarantee that they will repay an amount up to the agreed upon management fee, but not to exceed the fee if the terms and conditions of the agreement are not met, then the Sponsor is essentially agreeing to limit the subcontractor’s liability. Sponsors should consider that any agreement to limit the subcontractor’s liability places the nonprofit food service account at great risk should a substantial to catastrophic loss be experienced that program year.

Question #3: If the Sponsor enters into a contract containing such a guaranteed return, does this mean they do not have to pay the subcontractor for any losses incurred in the prior year?

Answer: No. It simply means they cannot pay for them out of the nonprofit food service account. If the Sponsor entered into a contract that included a guaranteed return provision requiring that any losses incurred by the contractor in one year would have to be paid by the Sponsor in the subsequent year, then the Sponsor would have to pay with funds other than the nonprofit food service account funds.
**Question #4:** When can a Sponsor pay bonuses?

**Answer:** Generally, bonuses paid to employees are allowable costs and nonprofit food service account funds may be used to pay the costs of bonuses for efficient performance or as a result of a suggestion or safety improvement. However, the bonuses can be paid to employees only as long as the overall compensation is determined to be reasonable and such costs are paid or accrued pursuant to a formally established labor agreement. Thus, this generally requires that such payments be a standard personnel practice.

**Question #5:** A subcontractor is telling a Sponsor that they have to cover the costs of bonuses the subcontractor pays to its own employees. Can the Sponsor pay the bonuses for these employees?

**Answer:** Generally, no. Bonuses go to the Sponsor’s employees and not to their subcontractor’s. Neither the subcontractor nor its employees are employees of the sponsor. One exception might entail a Sponsor paying for such bonuses if in its bid documents the Sponsor had explicitly included as a cost a subcontractor’s total compensation package for its employees that included bonuses (i.e., total compensation includes rate plus incentives). Sponsor should be aware that if language does not exist in the Request for Proposal and in subsequent contracts to allow for such costs to be paid, then the Sponsor does not have to cover these costs. Sponsors should be aware that the payment of such costs should be consistent with standard personnel practices. Also, such a provision should be considered very carefully as the incentive for a subcontractor to perform well should be inherent in the awarding of the contract and not based on bonuses at the end of the contract period.

**Question #6:** In light of the disaster stemming from Hurricanes Katrina and Rita, what would be an appropriate length of time available to conduct an emergency procurement?

**Answer:** During a disaster situation noncompetitive contracts may be awarded only when a public exigency or emergency exists that will not permit a delay in contracting that would result from a competitive solicitation. The Sponsor should contact Special Nutrition Programs (SNP) on what constitutes an emergency situation and whether the provision discusses timeframes. Clearly these would qualify as emergency situations but not all disasters are clear. SNP has to make the determination as to whether the emergency condition exists in the entire State or certain locales. The Sponsor must also check with SNP to determine the length of the emergency situation so that any noncompetitive contracts comply with the timeframes associated with the designated emergency situation.

**Question #7:** Does SNP have a provision in place that allows a Sponsor to use a noncompetitive contract due to an emergency situation such as the situations created by the hurricanes?

**Answer:** Yes, as long as a Sponsor has received approval from SNP regarding emergency designation.