

Other stadium and athletic events are expected to be a minimum of 52% of gross sales. The RFP also states, "in addition, the proposals should indicate the percentage of gross sales that are to be retained as a management fee. The department will review all financial proposals submitted and alternatives to the management fee will not be deemed non-responsive." (Record p. 34).

Volume Services (Volume) proposed a minimum guarantee of \$354,000.00 or a minimum of 47.0% of gross sales for year one's six home game schedule; a minimum guarantee of \$366,000.00 or a minimum of 42.0% of gross sales for years two through five's six home game schedule; and \$420,000.00 or a minimum of 42.0% of gross sales for years two through five's seven home game schedule. Marriott Management Services (Marriott) proposed a minimum guarantee of \$400,000.00 in six game years and \$475,000.00 in seven game years. Marriott's proposal states "profits earned by Marriott will be split 50\50". Testimony reveals that the evaluation committee called Marriott to ask if the statement in its proposal was a proposed 50% of gross sales. Marriott confirmed that it proposes a minimum guarantee of 50% of gross sales.

The RFP lists the evaluation criteria in order of importance, as follows:

1. Financial guarantee and profit participation for the Athletic Department.
2. Total sports advertising including all purveyors in marketing and signage opportunities and participation in coaches radio and TV shows sports marketing, signage and participation in coaches radio and TV shows Host Communications will provide a menu of opportunities at the April 15 conference.
3. A financial commitment to upgrade the existing concession facilities and equipment at Williams-Brice stadium to coincide with the opening of the 1995 football season.

4. References, financial history, and history of success in large Division I (50,000+ seating) venues.
5. Quality of product, menu, service and willingness to work within departmental guidelines.

(Record p. 30)

The first award criteria was evaluated by one member of USC's evaluation team, Venis Manigo, who compiled and compared the minimum guarantee and profit participation data from the proposals. The first criteria was then objectively assigned points. Marriott was assigned the full 30 points, and Volume received a proportional amount of the 30 points, 27.65 points. The USC evaluation committee members subjectively evaluated the proposals based on the remaining award criteria. The total scores were as follows:

For Evaluation Criteria 2-5:

Volume Services	299
Marriott Management Services	323

With Criteria 1 (Minimum Guarantee):

Volume Services	433.35
Marriott Management Services	473

(Record p. 365)

On April 15, 1994, USC held a site visit and proposer's conference, which was attended by Marriott and Volume. April 15, 1994, was also the deadline for offerors to submit questions regarding the RFP. On April 22, 1994, USC issued Amendment # 001 with attached answers to questions raised during the proposer's conference. Volume asked several questions, but did not ask about the evaluation criteria.

On May 2, 1994, USC opened the two proposals received, which were from Volume and Marriott. On May 13, 1994, USC issued an intent to award to Marriott.

MOTION TO DISMISS

At the beginning of the hearing USC made a motion to dismiss Volume's protest on the grounds that Volume's appeal letter to the Panel did not comply with S. C. Code Ann. Section 11-35-4210(6), which requires the protestant to include in its letter to the Panel the reasons it disagrees with the CPO. The Panel notes that Volume's lack of representation by an attorney does not relieve it of its duty to know the law under which it is proceeding. Ignorance of the law is not a legal excuse for failure to comply with the law.

The Panel finds that the failure to include reasons for disagreeing with the CPO is not dispositive to a protestant's appeal. The Panel interprets this subsection of the statute in light of the entire section. S.C. Code Ann. Section 11-35-4210 provides the right to protest. Subsections (1) and (2) require a protestant to state its grounds for protest in writing to the CPO within a time limit. Thus, the issues in the case are established in the protest letter. The letter appealing to the Panel cannot add issues. If new issues were allowed to be included in the appeal letter to the Panel, no effect would be given to the requirements of subsection (1) and (2). Although, the Panel hearing is a *de novo* hearing under Code Section 11-35-4410(1), it is only new as to evidence. The Panel may allow new evidence to be admitted, but only evidence concerning the established issues. Because the protestant has a new hearing before the Panel, on the issues established in the protest letter, the reasons the protestant disagrees with the CPO are superfluous or beyond what is essential to the protest process. Because the requirement of subsection (6) to state reasons for disagreeing with the CPO decision is not essential or dispositive, the protestant may cure this omission at the Panel hearing. However, the Panel emphasizes that the details of subsection (6) are requirements of the Code and protestants should be diligent in meeting exact Code requirements.

CONCLUSIONS OF LAW

Volume protests on the grounds that the proposals were not properly evaluated under the RFP criteria. Volume believes the USC evaluators did not follow the award criteria and did not properly evaluate the proposals. S. C. Code Section 11-35-2410 provides that "the determinations required" by certain sections, including sections 11-35-1530(9) and (10), "shall be final and conclusive unless they are clearly erroneous, arbitrary, capricious, or contrary to law." Volume has the burden to prove, by a preponderance of the evidence, that its allegation concerning the evaluation makes USC's determination clearly erroneous, arbitrary, capricious, or contrary to law. The Panel will not substitute its judgment for the judgment of the evaluators. The Panel will not disturb the evaluators findings "so long as the evaluators follow the requirements of the Procurement Code and the RFP, fairly consider all proposals, and are not actually biased." See In re: Protest of Coastal Rapid Public Transit Authority, Case no. 1992-16.

The first and most important evaluation criteria is the "financial guarantee and profit participation for the Athletic Department". The evaluation process normally separates the cost criteria, which in this RFP is the first award criteria, from the other criteria to be evaluated. The cost criteria is not given to the evaluation committee to be evaluated, but is determined by a mathematical formula, and added to the scores given by the evaluators for the other criteria. Ms. Manigo testified that she evaluated the first criteria herself, and added the scores to the scores for the other evaluation criteria to provide the total scores for the proposals. No evidence was provided to prove this evaluation process was not done correctly under the requirements of the Code.

Ms. Manigo also testified that the evaluation committee, prior to scoring the proposals, met to discuss any need for clarification of the proposals. S. C.

Code Section 11-35-1530(8) allows for discussion with responsive offerors "for the purpose of clarification". The evaluation committee found the need to clarify Marriott's proposal. The committee phoned Marriott to clarify that the "50/50 split" language in Marriott's proposal applied, as it appeared to, the profit participation. Mr. Wertz's testimony corroborates Ms. Manigo's concerning the committee's actions. The Panel does not agree with Volume that USC negotiated with Marriott. No evidence was presented to show that anything other than clarification of the language used by Marriott in its proposal was discussed. The Panel cautions offerors to carefully and accurately respond to the RFP so that clarification may be avoided, as a fine line exists between the need for clarification and being nonresponsive. The Panel also cautions purchasing agencies to carefully handle the need for clarification.

Volume also states its belief that the "importance of the management fee was taken with less merit than it should". (Record p. 13). Volume proposed a management fee of 5%, and Marriott proposed a management fee of 6%. The RFP states "proposals should indicate the percentage of gross sales that are to be retained as a management fee. The department will review all financial proposals submitted and alternatives to the management fee will not be deemed non-responsive." The management fee was asked for as "an additional item" and it is not specifically stated as a criteria. During the time open for asking questions, Volume asked two questions about the "Management Fee Proposal", and therefore had the opportunity to ask about the value of the management fee as a criteria for evaluation if it felt it was not given enough weight in the RFP. (Record p. 21). Under Code Section 11-35-4210(1), an issue of protest concerning the specifications of the RFP, including the criteria for evaluation, is timely filed "within fifteen days of the date of issuance" of the RFP. Volume is not timely in protesting the criteria and specifications of the RFP.

Volume's protest can be summarized as Volume's belief it did not receive adequate consideration of its financial information. Clearly, Marriott offered a greater minimum guarantee and profit participation, and so received more points for the first and most important criteria. Even before adding the first criteria, Marriott was scored higher. The total points for the criteria evaluated subjectively, which does not include the first criteria, was 323 points for Marriott and 299 points for Volume. However, Volume proposed a capital investment of \$240,000.00 in comparison to Marriott's proposed investment of \$200,000.00. Volume received more points from each evaluator for the third award criteria. The "financial commitment to upgrade the existing concession facilities and equipment" was the third most important criteria out of five criteria. Marriott proposed both a better minimum guarantee as well as a better profit participation, which was the first, and most important, criteria of the five. The RFP clearly states the areas of evaluation that are important to USC and will be used to make the award. Volume knew the relative importance placed on each of the stated evaluation criteria, and had the opportunity to tailor its response appropriately, as did Marriott. The USC evaluators found Marriott's proposal superior to Volume's proposal and assigned points accordingly. The Panel will not disturb their findings without a preponderance of the evidence showing the evaluation was clearly erroneous, arbitrary, capricious, or contrary to law.

The evidence reflects that each proposal was properly evaluated and assigned a score for each award criteria, and no evidence was presented that the evaluations or scores are arbitrary, capricious, or contrary to law. In fact, the evidence reveals that USC followed standard procedures which comply with the requirements of the Procurement Code. The Panel finds that Volume has not met its burden of proof.

CONCLUSION

For the foregoing reasons, the Panel denies USC's Motion to Dismiss, upholds the decision of the CPO, as far as it is consistent with this opinion, and denies the protest of Volume Services.

IT IS SO ORDERED.

SOUTH CAROLINA PROCUREMENT
REVIEW PANEL



Gus J. Roberts, Chairman

Columbia, S.C.

August 31, 1994.