UNITED STATES OF AMERICA
DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of:	
Albert Gonzales, Gonzales Consulting Services, Inc. (WV), Gonzales Consulting Services, Inc. (CO), Wall Street Discoveries, LLC, GCS Corporate Services, LLC, and GCS Holdings, LLC, Respondents.	HUDALJ 00-9165-DB 00-9166-DB 00-9167-DB 00-9168-DB 00-9169-DB 00-9170-DB Decided: January 22, 2002

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For the Respondents

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For the Government

Before: Thomas C. Heinz
Administrative Law Judge

HEARING OFFICER'S FINDINGS OF FACT

Background

In 1998 the United States Department of Housing and Urban Development ("HUD") unveiled a new program to manage and market single-family homes that come into the Government's inventory through programs administered by HUD. (TR. 17-19)[1] In August

[1]The following abbreviations are used in these findings: "TR." refers to the hearing transcript;

1998 HUD solicited bids for 16 management and marketing contracts ("M&M contracts") covering different sections of the United States. (TR.19, 401) In October 1998 Intown Management Group ("IMG"), a limited liability company registered in Nevada, submitted bids on 10 of the 16 contracts. (TR. 20, 33-34, 395-96, 897; GX. 72) IMG was formed for the purpose of bidding on the M&M contracts and was owned by three companies: Intown Properties, Inc., Larry Latham Auctioneers, Inc., and Respondent Gonzales Consulting Services, Inc. ("Respondent GCS"). (TR. 32-33, 399, 400, 465, 846, 858, 886, 893; GX. 21 at 04397) These companies were each solely owned by, respectively, Mr. Melton Harrell, Mr. Larry Latham, and Respondent Albert Gonzales ("Respondent Gonzales"). (TR. 884-85; GX. 21) Mr. Harrell, the majority owner of IMG, invited Respondent Gonzales to become part of IMG. Mr. Harrell believed that Respondent Gonzales would enhance IMG's chances of winning M&M contracts because he was a member of a minority group and the owner of a small business. (TR. 400, 1056, 1314-15)

Under the guidance of a new contracts administrator,[2] in mid-January 1999 HUD announced an award to IMG of seven M&M contracts involving tens of thousands of properties worth billions of dollars scattered over more than half of the United States. At that time, IMG had no assets of its own, a tiny fraction of the employees needed to perform the contracts, and no financial, accounting, subcontracting, personnel, information-management, or service-delivery systems in place. (TR. 414, 468, 685, 751, 778-79, 902, 1109, 1143) The contracts required performance to begin within 60 days of award. (TR. 217) Respondent Gonzales expected that IMG would be awarded one or two, not seven, of the M&M contracts. (TR. 1060, 1108) Within days of receiving news that the contracts would be awarded to IMG, the owners, who had never worked together before to perform a contract, were quarreling among themselves. (TR. 465, 486, 1098-99) Within weeks, the company was in serious trouble with HUD. (TR. 420-23) Within eight months of the award, HUD had withdrawn all of the contracts on grounds of default.(TR. 699-700) Shortly thereafter, HUD took steps through its debarring official to debar all three owners of IMG from engaging in business with the federal government for 10 years. Mr. Harrell and Mr. Latham eventually entered into settlement agreements with HUD, but Respondent Gonzales contested the action. (TR. 1018-19)

"GX." and "RX." refer, respectively, to the Government's and Respondents' exhibits.

[2]In March 1998 HUD's new M&M contract program became the responsibility of a new procurements administrator, Vincent Stephen Carberry, who began his employment with HUD after 34 years with the U.S. Navy working on procurement contracts. Before he left the Navy, Mr. Carberry was in charge of buying the airplanes, missiles, and helicopters used by the Navy and the Marines. (TR. 684-85)

After an "informal" hearing conducted on January 20, 2000, by the debarring official's designee, the debarring official decided on March 3, 2000, to debar Respondent Gonzales and his affiliated companies (all of the other Respondents in this proceeding) for 10 years. Upon appeal to the United States District Court for the District of Colorado, that decision was vacated and remanded for further administrative proceedings because the court concluded that HUD had not followed its regulations in the course of deciding that Respondents must be debarred. *Gonzales, et al. v. United States Department of Housing and Urban Development, et al.,* 2000 U.S. Dist. Lexis 18935 (D. Colo. 2000).

Based on a narrow interpretation of the remand order, HUD decided to refer the following limited questions to a hearing officer for additional proceedings and preparation of findings of fact pursuant to 24 C.F.R. §24.314(b)(2):

> 1. Whether Respondent[3] was an officer, principal or participant in the IMG ventures and
>
> 2. Whether Respondent had an ability to influence, control or otherwise participate in the management of IMG. [Second Superseding Referral Order, filed June 25, 2001][4]

[3]Based on context, I interpret the word "Respondent" in the referral to mean Respondent Gonzales, the individual. Accordingly, these findings focus on Respondent Gonzales, with exceptions as noted.

[4]The original referral order of January 22, 2001, used the word "mismanagement" rather than "management."

Although 24 C.F.R. §24.314(b)(2)(i) authorizes the debarring official to refer "disputed material facts and issues of law to a hearing officer for findings of fact and conclusions of law," and although Respondents have disputed numerous issues of material fact and law in addition to those contained in the referral, HUD has decided to refer only the quoted questions to an independent hearing officer for findings. The referral, in effect, asks whether Respondent Gonzales is subject to HUD's debarment regulations, but it does not ask whether Respondent Gonzales has given cause for debarment, whether his conduct was sufficiently serious to merit debarment, whether mitigating factors argue against debarment, whether Respondent Gonzales is "presently responsible," or whether debarment of him and his affiliates is necessary to protect the public interest. *See* 24 C.F.R. §§24.115(a) and (b), 24.300, and 24.305. All of these questions must be considered before a person may be debarred from doing business with the government. However, I make no independent conclusions regarding anything other than the two questions in the referral.

By agreement of the parties, oral hearings were held more than 45 days after the original referral of the case by the debarring official on January 22, 2001. *See* 24 C.F.R.§24.314(b)(2)(ii). Hearings were held on July 10, 11, 12, 13, 16, and 17, 2001, and August 23, 2001, in Denver, Colorado. At the close of the hearings, the parties were directed to file briefs. The last brief was received on October 24, 2001. These findings have not been issued within the period contemplated by 24 C.F.R. §24.314(b)(2)(ii) for several reasons: because the record is relatively large; because after the close of the hearings the parties filed several novel motions requiring considerable time for disposition; because the parties' citations to the record proved inaccurate or misleading in many instances; and because of interruptions caused by holidays and illness.

Findings of Fact[5]

Question Number 1. Whether Respondent was an officer, principal, or participant in the IMG ventures.[6]

Whether Respondent was an officer of IMG is a question subsumed within the larger question whether Respondent Gonzales was a principal of IMG, as shown below.

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[5]The referral requires the hearing officer to prepare "findings of fact" only. However, question number 1 of the referral includes terms of art defined by law. The referral therefore necessarily requires preparation of conclusions of law as well as findings of fact.

[6]"Ventures" is not defined or explained in the regulations, the referral, or the District Court's opinion, but context leads me to interpret the term as referring to IMG's operations pursuant to M&M contracts.

WAS RESPONDENT GONZALES A PRINCIPAL IN THE IMG VENTURES?

Section 24.105 of the regulations (24 C.F.R. §24.105) defines *principal* as follows:

> Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are: [The definition then goes on to list 22 categories of persons by title or status.]

1. Focusing on that part of the definition of "principal" that precedes the semicolon, the question whether a person is a "principal" has two components: (1) What title or status does the person have?; and (2) What was the person's conduct within the participant? The phrase that describes conduct--"with primary management or supervisory responsibilities"--modifies not only the word "person," which is not a title, but also the list of persons with titles: "Officer, director, owner, partner, key employee." Therefore, the conduct component is paramount. A person can be a principal without having one of the listed titles (that is, without being an officer, director, owner, partner, or key employee) if one is a "person . . . with primary management or supervisory responsibilities."

2. However, one cannot be a principal without having primary management or supervisory responsibilities, according to the first part of the definition of "principal." For example, a person is an owner of General Motors, Inc., if he owns one share of the company's common stock, but owning one share of General Motors stock clearly does not give the owner power to exercise primary management or supervisory responsibilities over any part of General Motors business. In other words, owning a share of General Motors stock does not make one a "principal" under this provision. Similarly, a person can be an investing "silent" partner in a partnership venture and have no power to manage the business. Such a person is not a "principal" of the venture within the meaning of the first part of the definition of "principal." Under this provision, a person's conduct determines the issue, not his title or status.

3. Focusing on that part of the definition that follows the semicolon, the question whether a person is a "principal" has only one component: Does the person have a title or status that places him or her within the 22 categories of persons listed in the definition? The regulation does not say that the 22 categories of persons are examples of persons with critical influence or substantive control, nor does the regulation provide that a person listed within the 22 categories may be deemed a principal *if* he or she is also found to have in fact exercised critical influence or substantive control. Rather, the regulation specifically defines the entire universe of persons who have "critical influence on or substantive control

over a covered transaction." Therefore, if a person is found to have a title or status that places him or her within that universe, the inquiry is at an end. That person is a "principal." The regulation does not permit any inquiry as to whether such a person in fact has had critical influence on or substantive control over a covered transaction. He or she is deemed to have had it as a matter of law.

4. Respondents cite *Novicki v. Cook*, 946 F.2d 938, 940 (D.C. Cir. 1991) and *Caiola v. Carroll*, 851 F.2d 395 (D.C. Cir. 1988) in support of their argument that the questions referred to me for findings of fact may not be answered based on the presumed status of Respondent Gonzales. In *Novicki* the government attempted to debar the former president and chief executive officer of a debarred electronics firm on the ground that he had "reason to know" that the company was falsifying test reports to the government. The government argued that his status as president and CEO "put him in a position to discover the misconduct, report it to the Government, and take corrective action." *Novicki*, 946 F.2d at 941. The D.C. Circuit Court of Appeals, however, ruled that the government could not debar on that ground because the "reason to know" standard was "related to status rather than knowledge." *Novicki*, 946 F.2d at 941-42.

5. Similarly, in *Caiola*, the D.C. Circuit held that the misconduct of the contractor could not be imputed to the company's president or its secretary in part because neither exercised control over the corporation. The court rejected the government's argument that the status of the president and the secretary as officers and directors gave them "reason to know of the criminal conduct although [they] did not have actual knowledge of the conduct." *Caiola*, 851 F.2d at 397.

6. Both of these cases stand for the proposition that a person cannot be debarred unless he is shown to have actual knowledge of misconduct and the power to prevent or correct it. But neither case holds that, as a threshold matter, a person cannot be found to be a "principal" based on status. My mandate is to decide whether Respondent Gonzales is subject to the debarment regulations--that is, whether he is a "principal" or "participant" as defined by the regulations. I do not have the power to decide whether Respondents must be debarred. Therefore, *Novicki* and *Caiola* are inapposite to the issues I must decide.[7]

[7]This is not to say, however, that I see no conflict between HUD's regulations and the cited cases. For example, the regulations identify 22 categories of persons who by definition are deemed to have critical influence on or substantive control over a covered transaction. The 22nd category is: "Employees or agents of any of the [persons in the other 21 categories]." Therefore, a janitor employed by an attorney who is in a business relationship with a participant (category 13) is also a "principal" by virtue of his status as an employee of the attorney, even though the janitor, in fact, exercises no critical influence on or substantive control over the legal services provided to the participant. The janitor is merely a member of the support staff of the attorney. Compare this illustration with the comments accompanying publication in the Federal Register of the final common rule regarding nonprocurement debarment and suspension and the interim final rule for federal agencies:

> By introducing the concept of "principals," the rule now covers only those persons who participate in a covered transaction and who are working for a participant in a capacity of primary management, or who have a critical influence on or substantive control over a covered transaction (e.g., not support staff). . . . [53 F.R. 19161, May 26, 1988]

Although the intent of the common rule as shown by these comments and the rulings in the cases cited by Respondents conflict with HUD's regulations, administrative law judges do not have the power to declare an agency's regulations unlawful; I am constrained to apply them as written.

As explained above, the answer to the question whether Respondent Gonzales was a principal of IMG depends on his title or status and whether he exercised primary management or supervisory responsibilities at IMG. The following findings of fact demonstrate that the evidence in the record on this issue is mixed.

A. Was Respondent Gonzales an officer of IMG?

1. In the fall of 1998 IMG submitted 10 bid proposals to HUD for M&M contracts. (TR. 22-23, 401). Each proposal contained a chart of IMG's organizational structure identifying Respondent Gonzales as a vice-president of IMG. (GX. 4 at 26) The text of the proposals also referred to Respondent Gonzales as a vice-president of IMG. (GX. 4 at 21)

2. Mr. Harrell, one-time president of IMG, testified that Respondent Gonzales was given a copy of the proposals identifying him as a vice-president of IMG before the proposals were submitted to HUD. (TR. 407)

3. Mr. Harrell testified that before the proposals were submitted to HUD, he and Respondent Gonzales jointly decided that Respondent Gonzales would have the title of vice-president of IMG. (TR. 407-08, 458)

4. In contrast to Mr. Harrell's testimony, Respondent Gonzales testified that he did not know that he had been designated a vice-president of IMG in the bid proposals when they were submitted to HUD because he did not read them before they were submitted. (TR. 1072, 1076, 1079) Respondent Gonzales also testified as follows:

> I never performed the role of an officer. I never considered myself an officer. I never referred to myself as an officer in any fashion. Any correspondence that I wrote to Melton Harrell was as president of Gonzales Consulting Services. Any meeting that I had with HUD I referred to myself as president of Gonzales Consulting Services. Never did I ever use the title of vice president or officer of [IMG]. [TR. 1080]

5. Respondent Gonzales never informed HUD that he was not a vice-president of IMG during the operating life of the company. (TR. 75, 1221)

6. Respondent Gonzales was never formally elected as a vice-president of IMG. (TR. 481, 1079)

7. IMG's amended operating agreement of March 6, 1999, does not identify Respondent Gonzales as an officer of IMG. (GX. 21, Art. IV, at 04393)

8. Because Respondent Gonzales did not hold himself out as an officer of IMG, and because he was not officially made an officer of IMG by the company, I conclude that Respondent Gonzales was not an officer of IMG.

B. Was Respondent Gonzales a director of IMG?

1. As a member of the Board of Managers ("Board") of IMG, Respondent Gonzales considered his responsibilities to be similar to those of a director. (TR. 926)

2. Counsel for Respondents admitted that Respondent Gonzales was a director of IMG. (TR. 708)

3. Respondent Gonzales was a director of IMG.

C. Was Respondent Gonzales an owner of IMG?

1. Respondent GCS owned 15 percent of IMG. (TR. 408, 886; GX. 21 at 04397)

2. Respondent GCS was solely owned by Respondent Gonzales. (TR. 884-85)

3. Counsel for Respondents admitted that Respondent Gonzales was a minority owner of IMG. (TR. 708)

4. Respondent Gonzales was an owner of IMG.

D. Was Respondent Gonzales a partner in the IMG ventures?

1. The record contains no evidence of a partnership agreement between Respondent Gonzales and the other owners of IMG.

2. IMG was not a partnership. (GX. 4, at 00000128)

3. Respondent Gonzales was not a partner in the IMG ventures.

E. Was Respondent Gonzales a key employee of IMG?

1. The record contains no evidence that Respondent Gonzales was hired by IMG to perform services for the company in return for wages or a salary.

2. Respondent Gonzales' positions as a member of the IMG Board of Managers and an owner of IMG did not make him an employee of the company.

3. Respondent Gonzales was not an employee of IMG, let alone a "key" employee of the company.

F. Was Respondent Gonzales a person with primary management or supervisory responsibilities in the IMG ventures?

1. IMG was a limited liability company owned by three members. IMG's operating agreement dated June 1, 1998, provided that a quorum would consist of members holding a majority in interest of the company and that "a vote of 51% of the majority in interests present at the meeting is necessary and sufficient to conduct business." (GX. 21, Art. 2.3). These provisions allowed Mr. Harrell to conduct all of the company's business without consulting the other owners because he owned 65 percent of the company. (TR. 1056-57)

2. IMG's operating agreement of June 1, 1998, established a Board of Managers charged with the responsibility of managing the company. (GX. 18) At the outset of operations, the Board consisted of the three owners of IMG. (TR. 980-981)

3. As soon as HUD announced that seven of the M&M contracts would be awarded to IMG, Mr. Harrell took complete charge of the company. (TR. 1097, 1336-37, 1350) He made decisions unilaterally without consulting Respondent Gonzales or Mr. Latham. (TR. 905-06, 1097, 1104-05, 1337, 1344) The Board of Managers had only one perfunctory meeting during this period. (TR. 980)

4. Respondent Gonzales' attempts to influence the decision-making process were rebuffed by Mr. Harrell. (TR. 1098-99) When Respondent Gonzales found that he could not influence Mr. Harrell, he contacted Mr. Latham in mid-February 1999 and discovered that he, too, was having the same experience with Mr. Harrell. (TR. 1099-1100; 1337) Mr. Latham testified that "[w]ith Mr. Harrell, it was very unilateral: He made the decisions, and he told people what his decisions were." (TR. 1337)

5. Mr. Latham also testified that:

> I mean my feeling was Melton was totally ignoring [Respondent Gonzales]. Melton was giving him no input of what was going on. Melton wasn't asking for his decisions on anything. Melton wasn't asking him, Albert, for anything at all. Melton was doing everything there was to do. [TR. 1423]

6. By mid-February 1999, before contract performance began, Respondent Gonzales' experiences with Mr. Harrell led him to formulate several specific goals: (l) Amend IMG's operating agreement so that Mr. Harrell could not make decisions unilaterally; (2) Hold conference calls at least once if not twice a week to allow all of the owners to discuss the issues; (3) Hold face-to-face meetings of the owners every two weeks

through the initial stages of startup; (4) Establish a process for making decisions and for distinguishing policy decisions from operational decisions; (5) Create an orderly process to document all decisions; (6) Determine with specificity what capital contributions would be required of each owner and how profits would be divided; (7) Establish a financial system adequate to cope with the huge demands of the M&M contracts; (8) Use Mr. Latham's company to auction properties; and (9) Establish a system to reimburse each owner for time spent by his employees on IMG business. (TR. 902-03; RX. 18) The record demonstrates only partial accomplishment of the first two goals. The remaining goals were never realized.

7. When the contract proposals were submitted to HUD, Respondent Gonzales and Mr. Latham had been led to believe that Mr. Harrell had arranged sufficient financing to cover IMG's cash needs until payments were received from HUD. (TR. 1271-73, 1333-34) Respondent Gonzales did not expect that he or his company would be called upon to make any capital contributions to IMG. (TR. 1106, 1271-72) Respondent Gonzales first realized that he would be called upon for cash after the contracts were awarded. (TR. 1106-07, 1272-73; GX. 123-30, 132-36)

8. On or about February 26, 1999, before the start of contract performance, Mr. Harrell demanded a capital contribution from Respondent Gonzales. (TR. 1109) Because Mr. Harrell refused to tell him how the money would be spent, Respondent Gonzales refused to provide the money demanded. (TR. 906) That refusal prompted Mr. Harrell to remove Respondent Gonzales from the Board. (TR. 981-82, 1347; RX. 19)

9. The removal of Respondent Gonzales occurred during a Board of Managers conference call, described by Mr. Latham as follows:

> That's one incident I'll recall for a long time, as long as I live. I was at home, and I was in my living room. And Melton called, and we had a board conference call at that point. And Albert was online, I was online and Melton was online, and Melton said, Albert you're off the board; You don't have anything to do with us any more.
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> And I said, Melton, that's not right, and I don't think it's legal because, if you look at the operating agreement, you can't do that. And he said, Yes, I can do that, and I will do that; And if you don't want to take my word for it, my attorney is sitting right here. And he asked his attorney. And his attorney said, Melton, you have the right to do it.
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> And I said, I disagree; You do not have the right to do it on the circumstances – those type of circumstances; The operating agreement doesn't give you that right; Besides that, whether you have the right to do it or not, I think it's unethical; It's close to immoral the way you're going about doing this, and I won't have any part of it; I'm

> not going to vote to do that.
>
> And Melton said, You don't have to; I own the majority of this company, and I can do what I want to do; So, Albert, you're out, and we don't need any further discussion. [TR. 1345-46]

10. On March 4 or 5, 1999, HUD's Chief Procurement Officer, Mr. Carberry, learned that Mr. Harrell had removed Respondent Gonzales from the Board and that Mr. Latham was in danger of being removed from the Board as well. (TR. 81, 688-89, 787, 730, 1346-47, 1420-21) Furthermore, Respondent Gonzales was threatening to put IMG into receivership. (TR. 422) In response, Mr. Carberry threatened all three owners with termination of the M&M contracts and debarment if IMG's operations did not involve all three owners. (TR. 903-04) Mr. Carberry felt that HUD was in danger of becoming the victim of a "bait and switch" game: IMG's bid proposals promised that the government would receive the benefits of the efforts and expertise of all three owners, but it appeared that only Mr. Harrell actually would be executing the contracts. (TR. 688-89, 785) According to Mr. Latham:

> Carberry told us that if the partners – if he heard any rumbling that the partners weren't getting along at all, he would pull this contract and debar every one of us, and that he would go after us for all the damages of soliciting a new contract and whatever else. [TR. 1364]

11. On March 9, 1999, the three IMG owners met with HUD officials to assure the government that the M&M contracts would be performed as promised. The owners also signed a letter dated March 9, 1999, and addressed to Mr. Carberry, pledging, among other things, that Respondent Gonzales would be "overseeing the financial and subcontractor outreach, all duties being consistent with the proposal submitted to HUD." (GX. 22)

12. As a result of Mr. Carberry's threats to withdraw the contracts and debar the owners, Respondent Gonzales was reinstated as a member of the Board of Managers of IMG, and in an attempt to resolve their differences, the three IMG owners met with a retired judge acting as mediator. (TR. 903-05, 908) Although Mr. Harrell objected to changing IMG's operating agreement, as a result of negotiations aided by the mediator, he reluctantly agreed to various changes, including the following: (1) The number of managers on IMG's Board of Managers was increased from three to five; (2) A provision was added to the agreement requiring submission of a dispute among the members relating to the operating agreement to mediation by the American Arbitration Association; and (3) The amended operating agreement provided that IMG's financial and information systems would be reviewed by a "big-five consultant." If the consultant found existing systems inadequate, Respondent GCS would have the right to propose a solution that would meet the

requirements outlined by the consultant. (TR. 529, 1353-54, 1368; GX. 21)

13. The number of authorized managers on the Board of Managers was increased in the amended operating agreement because Mr. Harrell insisted on having one of his employees added to the Board and Respondent Gonzales insisted on having an outside person added to the Board to avoid stalemates. (TR. 1119-21, 1133) Without a fifth manager, Respondent Gonzales feared Board votes would continually split two-two, leaving Mr. Harrell in complete control of the company. (TR. 1119-21) A fifth manager was never added to the Board because no candidate for the position was acceptable to all three owners. (TR. 1134-35) Control of IMG therefore remained in Mr. Harrell's hands throughout the life of the company. (TR. 982-84, 1119-21, 1377, 1383, 1449-50, 1452-53)

14. Mr. Latham requested inclusion of the dispute resolution provision in the amended operating agreement to provide an alternative to court proceedings in the event of a dispute among the owners over distribution of profits. (TR. 1356-58) The dispute resolution provision was not included for the purpose of resolving operational disputes that might arise among the owners. (TR. 1359) The arbitration process was too cumbersome and time-consuming for that purpose. (TR. 1359)

15. The provision in the amended operating agreement concerning review of IMG's financial and information systems stemmed from Respondent Gonzales' deep concern that the capacity of those systems was inadequate to manage the M&M contracts. (TR. 1125) Mr. Harrell felt that the existing systems were satisfactory and resisted attempts to change them, as shown below.

16. In April 1999, Mr. Harrell unilaterally replaced the consultant that had been selected by Mr. Latham's company to examine IMG's financial and information management system. (TR. 1368-69) When Respondent Gonzales reviewed the new consultant's work, he discovered that the consultant had been given only a small portion of the systems to review. Consequently, Respondent Gonzales determined that the consultant's conclusions did not satisfy the requirements of the amended operating agreement. (TR. 1231-32, 1368-70; RX. 61) When Respondent Gonzales set up a Board of Managers meeting to discuss the matter, Mr. Harrell unilaterally cancelled it and thereafter refused to address the issue. (RX. 60) In Mr. Harrell's view, the requirements of the operating agreement had been satisfied. (TR. 1148-49)

17. Mr. Harrell obstructed Respondent Gonzales' attempts to change IMG's financial and information management systems because he believed that Respondent Gonzales was improperly attempting to profit at the expense of the other IMG owners by installing a system that he owned. (TR. 492-93) However, the record does not support Mr. Harrell's

beliefs on this point. Mr. Latham supported Respondent Gonzales' efforts to install adequate systems, and Mr. Harrell remained opposed to changing the systems even after Respondent Gonzales offered to install and operate his system at cost. (TR. 1126-28) IMG later acknowledged to HUD that IMG's systems were inadequate to the task. (RX. 128 at 007034)

18. Mr. Harrell testified that Respondent Gonzales committed Respondent GCS to setting up the Denver office of IMG but failed to do so. According to Mr. Harrell, this commitment included hiring staff and setting up sub-offices in the field. (TR. 477-79) However, neither the proposal nor the contract shows that Respondent Gonzales was charged with that responsibility, and Mr. Harrell did not indicate when this alleged commitment was made. (TR. 311; GX. 4, 15) Although one of Respondent Gonzales' employees, Mr. Marc Trost, was initially slated to manage the Denver regional office of IMG, he never assumed that responsibility. (TR. 476-77) The job instead went to Mr. Fred Schotte, a newly hired IMG employee, who remained the manager until the contract was cancelled by HUD. (TR. 539-40, 580-81, 597-98)

19. In late April 1999, Respondent Gonzales telephoned Tony Karpowicz, a contracting officer from HUD, and requested a meeting concerning the operations of IMG's Denver Contract. (TR. 951-52) Respondent Gonzales was prompted to contact HUD based on news that HUD was planning to cancel the Denver contract. He wanted to talk to Mr. Karpowicz to see if anything could be done to save the contract. (TR. 952-53)

20. The requested meeting with Mr. Karpowicz occurred on May 3, 1999. (TR. 951; RX. 83) During the meeting Respondent Gonzales said that he and Mr. Latham had decided "to make a concerted effort to take charge of [the Denver and Santa Ana] contracts." Respondent Gonzales testified that the thrust of what he was trying to communicate at this meeting was that he would take a more active role in IMG's Denver contract. (TR. 955)

21. Respondent Gonzales also visited IMG's Denver office on May 3, 1999, where Mr. Schotte briefed him on the status of the contract. (TR. 545-46, 655, 958) Respondent Gonzales asked Mr. Schotte to prepare information relating to the status of HUD properties in IMG's Denver inventory so that a presentation could be made to HUD. (TR. 546-48) Mr. Schotte prepared a number of documents pursuant to Respondent Gonzales' request. (TR. 547-48, 551-52, 658; GX. 35, 36) Mr. Schotte discussed Respondent Gonzales' visit with Mr. Harrell, who told Mr. Schotte to cooperate with Respondent Gonzales. (TR. 548, 614)

22. On May 4, 1999, Respondent Gonzales wrote to the President of IMG, Susan

Mohr, to report that he had been informed by the Denver HUD office that the Denver IMG office was in "mission failure." (RX. 83, 122) HUD considered the Denver M&M contract to be in default. To remedy the situation, Respondent Gonzales proposed that Respondent GCS "be given oversight authority and the ability to devote staff resources to oversee the Denver [IMG] office." (RX. 122) However, Respondent Gonzales' proposal was rejected; Respondent GCS was not given authority to oversee the Denver IMG office. (TR. 977) At about the same time that Respondent Gonzales made his proposal to Susan Mohr, Mr. Latham proposed to Mr. Harrell that Respondent Gonzales run the Denver IMG operation and that he, Mr. Latham, run the IMG operation headquartered in Santa Ana, California. Mr. Harrell summarily rejected the proposal, saying that "his people were in place and they could do the job and they were doing a fine job and he didn't need us involved." (TR. 1374-75)

23. Ms. Susan Mohr confirmed during her deposition that Respondent Gonzales was not given authority to oversee the Denver operation. (GX. 43 at 57-58) Ms. Mohr also testified that although control of the Denver IMG office did not change hands, Respondent Gonzales "took a very effective leadership role in that branch and helped it overcome its initial slow start." (GX. 43 at 58) That testimony is incredible in light of the fact that a couple of weeks later, in approximately mid-May, 1999, HUD cancelled the Denver M&M contract. (TR. 597-98, 978-79). The remaining six M&M contracts with IMG were cancelled on September 21, 1999. (TR. 699-700)

24. The M&M contract bid proposals that IMG submitted to HUD in October 1998 described the responsibilities of Mr. Harrell and Respondent Gonzales as follows:

> **President, Melton Harrell**
> Directs and oversees all corporate activities including corporate support functions, sales and marketing, and asset management. Provides guidance to management team in implementing and executing corporate activities.
>
> **Vice President, Albert Gonzales**
> Directs the small business subcontracting efforts, outreach programs, IMG advantage training seminars, and other small, woman-owned, and disadvantaged business preference programs. Establishes corporate policies and procedures for working with municipalities and government organizations in revitalization areas. [GX. 4 at 00000021]

25. When the M&M contracts were awarded to IMG, Respondent Gonzales anticipated that he would have what he called "oversight" responsibilities at IMG but no operational responsibilities. (TR.1076-77, 1256) "Oversight" is a synonym for

"supervision."[8]

26. When the M&M contract bid proposals were made to HUD, Respondent Gonzales anticipated directing the efforts of IMG employees regarding small business subcontracts. (TR. 1275) However, he never did so. (TR. 1276) He did not anticipate establishing corporate policies and procedures regarding municipalities and government organizations because he had no expertise in this area. (TR. 1280-81) He did not know why he was designated to perform these duties in the proposal but speculated that Mr. Harrell must have been responsible for the designation. (TR. 1280-82)

27. Both Mr. Latham and Respondent Gonzales testified that Respondent Gonzales did not have anything to do with the management of subcontracts on behalf of IMG.

[8] *Webster's New World Dictionary, 3rd College Edition,*1988, defines "oversight" as "a superintendence; supervision, esp. when careful or vigilant."

(TR. 1081, 1471, 1473-74) Two of HUD's witnesses, Mr. McCloskey and Ms. McCurry, testified that Denise Reed of Intown Properties, Inc.--not Respondent Gonzales--was responsible for "formalizing contracts with subcontractors." (TR. 146-47, 865-67) Further, according to the job description for the IMG Directors for REO Services, the director in each region had operational responsibility for subcontracts. (RX. 210) Before the contracts were awarded, HUD asked who was going to manage and monitor IMG's subcontractors. IMG answered that the "directors and deputy directors for each corporate office have direct oversight for every aspect of the contract, direct the daily operations of IMG staff, manage the subcontractors, and ensure that the contracts meet the performance objective identified by HUD." (GX. 15)

28. A chart of the organizational structure submitted in IMG's proposals to HUD does not indicate that anyone within the organization was expected to report to Respondent Gonzales. (GX. 4, at 00000026) The same chart does not indicate what, if any, operational responsibilities Respondent Gonzales was expected to assume; that is, the organization chart does not show that he had a portfolio. No one at IMG in fact reported to Respondent Gonzales. (TR. 145-46)

29. Throughout the operating life of IMG, Mr. Harrell had complete access to and control of all information because IMG's base of operations, financial records, and corporate headquarters were located at the offices of Mr. Harrell's company, Intown Properties, Inc., in Atlanta, Georgia. (TR. 1119-21; GX. 21 at 04393)

30. Respondent Gonzales received little financial information from IMG and received only superficial telephonic updates on IMG's contract performance. These updates later turned out to conflict with information received from HUD. (TR. 943-45, 1157-58, 1177-78, 1340-41, 1371-72, 1438-39) Despite repeated requests, Respondent Gonzales never received timely, accurate information from IMG. (TR. 976-77, 1157, 1160, 1167, 1173-74, 1177-78, 1193-95; GX. 106; RX. 65, 83, 87) As of April 20, 1999, HUD acknowledged that the minority shareholders "appear to not know what is going on and that [IMG] is not performing their contractual duties." (RX. 87)[9] Between the time the M&M

[9]RX. 87 appears to be a memorandum to file prepared by Michael J. Mee, a contract specialist for HUD who testified at hearing. However, Mr. Mee was not asked to identify RX. 87 while he was testifying. The document was proffered through another witness after Mr. Mee was excused and departed. Citing Fed. R. Evid. 803(6), the Government argues that because a proper foundation was not laid for the introduction of RX. 87, it should not be admitted into evidence.

Section 26.23(a) of the rules of practice governing this proceeding provides in part:

> Unless otherwise provided for in this part, the Federal Rules of Evidence shall provide guidance for the conduct of proceedings under this part. Parties may object to clearly irrelevant material, but technical objections to testimony as used in a court of law will not be sustained.

contracts were awarded to IMG and July 20, 1999, HUD did not address or copy any business correspondence concerning IMG to Respondent Gonzales. (TR. 800-804, 1181-84, 1187-88; Gov.'s Answers to Respondents' Request for Admission, Request nos. 8 and 9)

31. From March 15, 1999, through July 15, 1999, Respondent GCS contributed at least $870,000 to the operations of IMG, of which $75,000 was a capital contribution and the remainder in the form of loans. (TR. 888-90; GX. 123-130, 132-136)

32. According to Mr. Harrell, "Mr. Gonzales was supposed to put 15 percent of the effort in and get 15 percent of the [rewards] out, and his decision was to put zero percent of the effort in and get more than 15 percent out." (TR. 526) Mr. Harrell believed that Respondent did no IMG business but attend Board of Managers meetings. He testified that as of July 30, 1999, Respondent Gonzales "had not done any work for the company in many months. He was a member of the board of managers and attended those meetings, but he had not been to an office or spoken to an employee." (TR. 484)

33. Mr. Harrell was not a very credible witness. For example, his claims that the Board of Managers took many votes, which were always unanimous, and that the Board never had an unresolved issue are completely incredible in light of the testimony from numerous witnesses regarding conflicts among the owners of IMG and conflicts the company had with HUD. (TR. 375-76, 496-97, 500-01) Furthermore, his testimony on many occasions was evasive, argumentative, or incomprehensible. (*See, e.g.*, TR. 492-95)

34. If Respondent Gonzales had performed the duties listed in the bid proposals (Finding of Fact F. 24 above), he would have exercised primary management or supervisory responsibilities for IMG. However, the record does not show that Respondent Gonzales in

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The Government's objection to RX. 87 is the sort of technical objection that would be lodged in a court of law, but it is not persuasive in this forum, absent some reason to doubt the authenticity of the evidence objected to.

RX. 87 appears to have been prepared according to Mr. Mee's standard operating procedure, which he described with reference to GX. 25 and 26. The signature on RX. 87 appears the same as Mr. Mee's signatures on GX. 25 and 26. "[T]he principal precondition to admission of documents as business records pursuant to F.R.E. 803(6) is that the records have sufficient indicia of trustworthiness to be considered reliable." *Yankee Bank for Finance & Savings, FSB v. Task Assoc. Inc., et al.*, 139 B.R. 71, 79 (N.D.N.Y. 1992) (citing *Saks International, Inc., v. M/V Export Champion*, 817 F.2d 1011, 1013 (2^{d} Cir. 1987). There is nothing in the record to suggest that RX. 87 is not an authentic copy of a government document created in the ordinary course of business. RX. 87 is therefore admitted because it appears to be trustworthy and reliable.

fact performed those duties.

35. In sum, when Respondent Gonzales became involved with IMG, he expected to exercise supervisory responsibilities, what he called "oversight." He attempted from the outset of the enterprise to influence IMG managerial decisions, but he was rebuffed. During the first few months of IMG's operations, he attempted to exert some management control over IMG's financial and information systems, and shortly before the Denver M&M contract was cancelled he sought authority to supervise the Denver IMG office, but he was unsuccessful in both efforts. Whereas Mr. Harrell contended that Respondent Gonzales chose not to perform his duties as promised, Respondent Gonzales contended that he was prevented from fulfilling his expectations and exercising influence because of the structure of IMG and because Mr. Harrell would not allow him to do so. Although they disagree as to the reasons for Respondent Gonzales' inaction and lack of influence, both agree that Respondent Gonzales did not in fact exercise "primary management or supervisory responsibilities" with regard to the operation of IMG.

36. Respondent Gonzales was not a person who exercised primary management or supervisory responsibilities in the IMG ventures. (TR. 1256)

G. Is Respondent Gonzales a person deemed by regulation to have a critical influence on or substantive control over the IMG ventures?

1. The definition of "principal" includes in category 13 the following list of persons who are deemed to have a critical influence on or substantive control over a covered transaction:

> Accountants, consultants, investment bankers, architects, engineers, attorneys and others in a business relationship with participants in connection with a covered transaction under a HUD program; [24 C.F.R.§24.105]

2. The Government argues that Respondent GCS is a principal because Respondent GCS was a consultant in a business relationship with IMG and because Respondent GCS's loans to IMG placed it in a lender-borrower business relationship with IMG. (*See* Finding of Fact F. 31 above.) This argument is partly correct.

3. The phrase "others in a business relationship with participants" in the definition is so broad that it swallows up the rest of category 13 and much of the rest of the definition of "principal" as well. In addition to the specific titles listed, the phrase encompasses (among others) officers, directors, owners, partners, customers, suppliers, agents, and employees, since they all can be shown to have a "business relationship" with a participant in connection

with a covered transaction. In other words, the phrase "others in a business relationship with participants" turns much of the definition of "principal" into surplusage.

4. Nevertheless, there are limits to the scope of the definition. That Respondent GCS is a consulting firm does not make it a "principal." Respondent GCS did not provide consulting services to IMG. (TR. 1274-75) The business relationship between Respondent GCS and IMG was based not on consulting services but on Respondent GCS's part ownership of IMG and Respondent GCS's loans to IMG, a participant engaged in covered transactions.[10] Because of the ownership and lending relationships between IMG and Respondent GCS, Respondent GCS was in a business relationship with a participant in connection with a covered transaction under a HUD program. Accordingly, Respondent GCS must be deemed to have had critical influence on or substantive control over a covered transaction.

5. Given Respondent Gonzales' sole ownership and control of Respondent GCS and his role as representative of Respondent GCS on IMG's Board of Managers, it necessarily follows that he also was in a business relationship with a participant in connection with a covered transaction under a HUD program. (TR. 949) Accordingly, Respondent Gonzales must be deemed to have had critical influence on or substantive control over a covered transaction.

Conclusion

Because Respondent Gonzales is deemed by regulation to have had critical influence on or substantive control over a covered transaction, he was a "principal" in the IMG ventures, within the meaning of the regulations.

WAS RESPONDENT GONZALES A PARTICIPANT IN THE IMG VENTURES?

Section 24.105 of the regulations (24 C.F.R. §24.105) defines *participant* as follows:

> Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of

[10]The parties apparently agree that IMG was a "participant" and that the M&M contracts were "covered transactions" within the meaning of the regulations.

another participant.

A. Did Respondent Gonzales submit a proposal for a covered transaction?

1. Ms. Denise Reed, one of Mr. Harrell's employees at Intown Properties, Inc., Mr. Harrell, and the staff at Intown Properties, Inc., prepared and submitted IMG's M&M contract proposals to HUD, using materials gathered from all of the owners. (TR. 861, 1064, 1066-67, 1071-72, 1320, 1389)

2. Ms. Reed sent the format of the proposals to those employees at Respondent GCS, Larry Latham Auctioneers, Inc., and Intown Properties, Inc., who worked on the proposals. Ms. Reed then compiled the requested information received in return from those employees, used it to prepare drafts of the proposals, and sent copies of the drafts to each company. (TR. 404-05**,** 465-68, 627-28, 868-69)

3. Respondent Gonzales participated in the preparation of IMG's initial M&M contract proposals**.** He participated in a meeting in which the proposals were discussed, made recommendations about the proposals, suggested changes and corrections to drafts of the proposals, provided input to Mr. Harrell regarding pricing issues, provided information about Respondent GCS, provided resumes on himself and key members of his staff, and provided financial information on Respondent GCS. (TR. 350, 402-03, 988, 1064-65)

4. After drafts of IMG's proposals were sent to Respondent Gonzales, he and Mr. Harrell had several conversations about them. (TR. 342, 403-05)

5. Staff members of the three companies had many conversations about changes and improvements in the drafts. (TR. 373, 406)

6. At the direction of Respondent Gonzales, Mr. Marc Trost participated in the preparation of IMG's initial proposals on the M&M contracts. (TR. 351, 402, 466, 618, 626, 628-29, 847-48, 894) Mr. Trost was the Director of Asset Management at Respondent GCS from January 1998 to September 1999 and reported directly to Respondent Gonzales. (TR. 617, 1239)

7. Ms. Veronica Holt participated in the preparation of IMG's initial proposals on the M&M contracts. (TR. 350-51, 392, 466-67, 628, 894) Ms. Holt was the manager of proposals for Respondent GCS from January 1998 to September 1999. (TR. 619, 628, 892)

8. Respondent Gonzales directed his staff to gather certain information for the

proposals. (TR. 895, 989)

9. At HUD's request, representatives of IMG appeared before a Technical Evaluation Panel at HUD for a post-bid conference on November 18, 1998, to discuss the IMG proposals. (TR. 21, 42, 76, 408-09, 411)

10. Respondent Gonzales reviewed IMG's proposals before the post-bid conference. (TR. 1221) Nothing therein gave him pause or was inconsistent with his view of how the organization would take shape; and he, in effect, adopted them. (TR. 1222, 1279)

11. To prepare for the post-bid conference, representatives of IMG, including Respondent Gonzales, practiced their presentations at a meeting held on November 17, 1998. (TR. 411-12, 639-40, 850-51; GX. 43 at 13-16) At that meeting, Respondent Gonzales gave other participants directions regarding their presentations and discussed strategy with Mr. Harrell and Mr. Latham. (TR. 412, 640, 851; GX. 43 at 16)

12. On November 18, 1998, Respondent Gonzales and other IMG representatives attended the post-bid conference. (TR. 58, 68, 409, 412, 640, 896; GX. 43 at 19)

13. From the perspective of the IMG representatives, the purpose of the post-bid conference was to convince HUD to award M&M contracts to IMG. (TR. 125, 852, 895-97)

14. At the post-bid conference, Respondent Gonzales assumed major responsibility for selling IMG's case to HUD. (TR. 1071-72) He made the opening and the closing presentations on behalf of IMG. (TR. 412, 851, 896) Mr. McCloskey, a HUD representative who attended the conference, testified that Respondent Gonzales spoke about the role that he would play in IMG "coordinating subcontracting activities and . . . supporting financial information systems." (TR. 62-63, 896) During the conference, Respondent Gonzales assured HUD that he was committed to delivering services under the contract no matter what it took. (TR. 150-51) Respondent Gonzales also assured HUD that IMG was capable of executing multiple M&M contracts. (TR. 896-97, 1226-27)

15. Neither Mr. Latham nor Respondent Gonzales saw the final proposals before they were submitted to HUD. (TR. 1072, 1389, 1391)

16. Respondent Gonzales did not sign and did not have authority to sign IMG's offers or the resulting contracts. (TR. 1072, 1324-25; GX. 21, Art. 3.1)

17. Viewing the record as a whole, it must be concluded that Respondent Gonzales submitted a proposal for a covered transaction. He was not merely a member of the support staff who put these proposals together, nor was he a disinterested spectator watching the

project unfold. He participated in the preparation of the proposals, provided information regarding Respondent GCS and himself that was incorporated into the proposals, supervised employees who worked on the proposals, discussed pricing of the proposals with Mr. Harrell, helped IMG representatives prepare their presentations to HUD, personally represented to HUD that he would have an oversight role at IMG, and took the lead in selling the proposals to HUD. It is immaterial that he did not know all of the exact details of the proposals when they were made and did not sign the proposals in the official capacity of an offeror. He (along with Mr. Latham and Mr. Harrell) submitted M&M contract proposals to HUD on behalf of IMG.

B. Did Respondent Gonzales enter into a covered transaction?

The M&M contracts that IMG and HUD signed were not submitted into evidence at hearing. Nevertheless, the record shows that Respondent Gonzales did not sign the contracts on behalf of IMG, himself, or Respondent GCS, and IMG's proposals were not merged into the contracts. (TR. 757, 1072, 1324-25; GX. 21) Without examining the contracts, it is impossible to determine whether they created legal rights that either Respondent Gonzales or Respondent GCS could enforce or that HUD could enforce against him or his company. Therefore, it is impossible to determine whether Respondent Gonzales entered into a covered transaction by virtue of his involvement in the IMG ventures.

C. Is Respondent Gonzales a person who reasonably may be expected to enter into a covered transaction?

Almost 90 percent of Respondent GCS's current business involves covered transactions. (TR. 884-85, 1271) It is therefore reasonable to expect that Respondent GCS will enter into a covered transaction in the future. Because Respondent GCS is solely owned and controlled by Respondent Gonzales, we must pierce the corporate veil and conclude that Respondent Gonzales is a person who reasonably may be expected to enter into a covered transaction in the future as well.

D. Is Respondent Gonzales a person who has acted on behalf of or has been authorized to commit a participant in a covered transaction as an agent or representative of another participant?

Respondent Gonzales acted as a representative of Respondent GCS on IMG's Board of Managers. (TR. 949) Respondent GCS is a participant because it has entered into covered transactions other than the IMG transactions. (TR. 884-85, 1271) Therefore, Respondent Gonzales has acted on behalf of another participant.

Conclusion

Because he submitted proposals on behalf of IMG for covered transactions, because he may reasonably be expected to enter into a covered transaction in the future, and because he acted on behalf of another participant, Respondent Gonzales was a "participant" in the IMG ventures, within the meaning of the regulations.[11]

Question Number 2. Whether Respondent had an ability to influence, control, or otherwise participate in the management of IMG.[12]

1. Those Findings of Fact set out above supporting the conclusion that Respondent Gonzales submitted proposals for a covered transaction also demonstrate that Respondent Gonzales had an ability to influence, control, or otherwise participate in the management of IMG during the period preceding the award of M&M contracts to IMG.

2. As shown above, after HUD announced that IMG would be awarded seven M&M contracts, Mr. Harrell assumed complete control of the company. He managed IMG until it collapsed. Therefore, the answer to the question whether Respondent Gonzales had an ability to influence, control, or otherwise participate in the management of IMG after the award of the contracts largely depends upon whether Respondent Gonzales had an ability to influence or control Mr. Harrell and other persons under Mr. Harrell's control.

3. Respondent Gonzales placed items on the agenda for discussion by IMG's Board of Managers, which included Mr. Harrell. (TR. 438, 927-30, 1213, 1434) If an issue was important to Respondent Gonzales, he would raise it at a Board of Managers meeting. (TR. 987)

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[11]It seems counterintuitive that a person may be judged to have been a "participant" in the past based on what he may do in the future, but that is a conclusion compelled by the language of the regulations.

[12]The purpose and relevance of this question are unclear. Proof that a person has the "ability to influence, control or otherwise participate in management" will not support a finding that such a person is subject to the debarment regulations. This language appears nowhere in the regulations and hence does not define either the conduct or the status of persons subject to the debarment regulations. The following hypothetical illustrates why this language is not determinative: When management implements a suggestion found in a suggestion box, the employee or customer who made the suggestion has exhibited an "ability to influence" management. But there is no authority for the proposition that an employee or customer risks government debarment by putting a suggestion in a suggestion box maintained by a business engaged in a covered transaction.

4. The Government argues that Respondent Gonzales demonstrated his ability to influence the Board of Managers in proposals he raised before the Board. On July 28, 1999, Respondent Gonzales proposed: (1) the resignation of Mr. Harrell as Chairman of the Board of Managers, to be replaced by Mr. Latham; (2) the formation of an independent audit committee composed of Mr. Harrell and Mr. Latham to deploy specialists from Homebid.com and Respondent GCS to audit IMG's operations; and (3) the break-up of IMG into three geographical areas, each under the separate control and oversight of Mr. Harrell, Mr. Latham, and Respondent Gonzales. (TR. 449, 931; GX. 43 at 60, 116) None of these proposals was adopted because they were rejected by Mr. Harrell. (TR. 450, 934, 1200-01, 1386) It is nonsense to argue that these failed proposals show an ability to influence. That the proposals failed proves just the opposite: Respondent Gonzales did not have an ability to influence management regarding these proposals.

5. Ms. Susan Mohr, who reported to Mr. Harrell, testified during her deposition that she sought Respondent Gonzales' advice and counsel on numerous occasions and that she generally took his advice, but she could not recall a single instance when she followed it. (TR. 153-55; GX. 43 at 6-8)

6. In early May 1999, Respondent Gonzales influenced Mr. Schotte, an employee who reported to Mr. Harrell, to gather information concerning IMG's Denver contract and to accompany him at meetings with HUD representatives. (TR. 544-51, 958-60) Mr. Schotte acted pursuant to Mr. Harrell's instruction to cooperate with Respondent Gonzales. (TR. 548, 614)

7. With difficulty, Respondent Gonzales persuaded Mr. Harrell that the owners should submit their Amended and Restated Operating Agreement of March 6, 1999, to HUD during their meeting with HUD representatives on March 9, 1999. (TR. 920; GX. 21) Respondent Gonzales also influenced Mr. Harrell to insert an additional word in the letter that the owners submitted to HUD during the same meeting. The letter was drafted by Mr. Harrell. (TR. 921; GX. 22)

8. On April 8, 1999, Mr. Latham and Respondent GCS, through its representative, Respondent Gonzales, called a special meeting of the owners for April 12, 1999. The purpose of the meeting was to discuss the following items:

l. Review of operations since the start of the contract
2. Status of Financial Systems review
3. Status of identifying fifth board member
4. Execution of note to evidence advances
5. Status of auctions
6. Establishment of weekly Board of Managers conference calls
7. Establishment of spending limits and controls [GX. 86]

The meeting was held as scheduled, and Mr. Harrell addressed the agenda. (TR. 441-43, 950; GX. 21, 43 at p. 53)

9. Several of the changes made to IMG's operating agreement in March 1999 were made at Respondent Gonzales' urging. The provision regarding the Board of Managers was revised to add two more members; the definition of a quorum was changed so that Mr. Harrell could not act unilaterally; Mr. Latham's company was authorized to perform auctions; and a provision was added providing for review of the financial and information systems by a "big-five consultant." (TR. 901-03, GX. 21) The last provision could have resulted in Respondent Gonzales' enjoying greater profits from IMG's operation. (TR. 915-917) All of these changes were made in the face of opposition from Mr. Harrell. (TR. 429, 518)

10. Respondent Gonzales had the right to submit any dispute relating to the Amended and Restated Operating Agreement of March 6, 1999, to mediation by the American Arbitration Association. (GX. 21 at 04399)

11. On one occasion when Mr. Harrell came to Denver, Respondent Gonzales refused to meet with him and went to lunch. (TR. 341-42, 364, 523) He instructed his secretary, Ms. Julia Powell, to be pleasant to Mr. Harrell but to get him out of the office quickly. (TR. 341) Mr. Harrell and Ms. Powell also testified that there was a time when Respondent Gonzales would not take Mr. Harrell's calls or would wait several days to return them. (TR. 363, 522)

12. Respondent Gonzales, Mr. Latham, and Mr. Harrell participated in conference calls with HUD representatives concerning the M&M contracts. (TR. 89, 93-94, 451, 694, 696-97, 946-48, 978-79)

13. Employees of Respondent GCS under Respondent Gonzales' supervision (1) ran a classified advertisement to recruit IMG staff, (2) interviewed potential IMG staff and made job offers contingent upon approval by Mr. Harrell's staff, (3) examined office space in Denver and Minneapolis for use by IMG, (4) attended training at HUD related to IMG, (5) telephoned subcontractors for IMG's Denver contract requesting recommendations for other subcontractors, and (6) discussed transition issues with Mr. Schotte, manager of IMG's Denver office, after the Denver contract was cancelled. (TR. 477, 619-24, 898; GX. 43 at pp. 32-33, 46, 50, 69)

14. Respondent Gonzales had the right to place IMG in receivership but did not do so. (TR. 907, 1253)

Conclusion

By reason of the facts found above, Respondent Gonzales demonstrated an ability to influence, control, or otherwise participate in the management of IMG.

The above Findings of Fact are based on the preponderance of evidence in the record.

/s/

THOMAS C. HEINZ
Administrative Law Judge

Dated: January 22, 2002