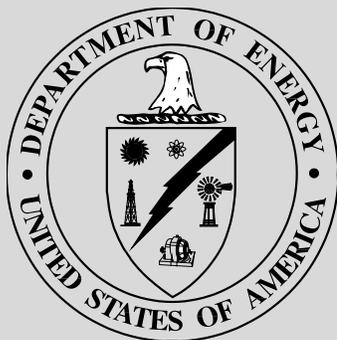


# INQUIRY REPORT

Review of Alleged Conflicts of  
Interest Involving a Legal Services  
Contract for the  
Yucca Mountain Project



U.S. DEPARTMENT OF ENERGY  
OFFICE OF INSPECTOR GENERAL  
No. I011G001

NOVEMBER 2001

November 13, 2001

MEMORANDUM FOR THE SECRETARY

FROM: Gregory H. Friedman (Signed)  
Inspector General

SUBJECT: Review of Alleged Conflicts of Interest Involving a Legal  
Services Contract for the Yucca Mountain Project

Introduction

In September 1999, the Department of Energy awarded a contract to the law firm of Winston & Strawn in connection with the Yucca Mountain Project (the Yucca legal contract). Specifically, Winston & Strawn was to assist the Department with a potential license application to be submitted to the U.S. Nuclear Regulatory Commission in the event Yucca Mountain is approved as the site for a repository for the nation's high-level radioactive waste.

The Office of Inspector General initiated a fact-finding inquiry into allegations that Winston & Strawn had contemporaneously served as a registered lobbyist for the Nuclear Energy Institute while serving under the Yucca legal contract, and that Winston & Strawn did not disclose these activities when bidding on the Yucca legal contract. The Nuclear Energy Institute is a nuclear energy industry trade group and its members include commercial utilities with spent nuclear fuel that would be destined for Yucca Mountain in the event the site is recommended and approved for the repository.

Findings

In summary, the Office of Inspector General inquiry disclosed that:

- The Organizational Conflict of Interest (OCI) provisions of the Yucca legal contract sought the disclosure of information regarding other contractor relationships that could have caused the contractor to be "unable or potentially unable to render impartial assistance or advice to the Government" or that could impair the contractor's objectivity. Winston & Strawn's OCI disclosure, submitted when bidding on the Yucca legal contract in June 1999, made no mention of the law firm's work for the Nuclear Energy Institute, which included both lobbying and non-lobbying activities. At the time of bidding, the applicable OCI provisions sought information about covered activities and relationships dating back to June 1998;

- Winston & Strawn had been a registered lobbyist for the Nuclear Energy Institute from January 1995 to July 2001, but the law firm acknowledged to the Office of Inspector General that it did not discuss these activities with the Department until July 2001, when it terminated the registration. According to lobbying reports, Winston & Strawn was also engaged in lobbying activities for the Nuclear Energy Institute concerning nuclear waste legislation relevant to the Yucca Mountain Project in 1996 and 1997, while serving under a subcontract with TRW Environmental Safety Systems, Inc., the Department's then-Yucca Mountain management and operating contractor;
- Department officials stated that had the Department been told of the reported lobbying activities prior to award of the Yucca legal contract, a range of options were available. The Department could have: (1) disqualified Winston & Strawn; (2) insisted upon implementation of specific conflict avoidance measures; or, (3) made a determination that there was no conflict or potential conflict requiring such measures;
- An internal Winston & Strawn memo, dated June 17, 1999, recognized the potential for conflicts relating to Yucca Mountain and nuclear waste. This memo: (1) asserted that a number of steps had been taken to avoid "any hint of a conflict"; (2) stated that the law firm must "continue to remain on the DOE/Yucca Mountain side of this wall"; and, (3) indicated that Winston & Strawn avoided participating in certain Nuclear Energy Institute meetings concerning Yucca Mountain for these reasons;
- Winston & Strawn's activities concerning the Nuclear Energy Institute appeared inconsistent with the June 17, 1999, memo. For example, according to public lobbying reports filed by Winston & Strawn, it engaged in lobbying activities for the Nuclear Energy Institute that some Department officials characterized as, at a minimum, creating a potential appearance of a conflict of interest. Moreover, Winston & Strawn acknowledged to the Department and the Office of Inspector General that no firewalls were used on the Yucca legal contract or on any matters concerning the Nuclear Energy Institute. According to the law firm itself, 14 Winston & Strawn personnel who billed for work on the Yucca legal contract also worked on a variety of Nuclear Energy Institute matters during the period covered by the OCI provisions;
- When asked to reconcile the June 17, 1999, memo with Winston & Strawn's activities, including the non-disclosure of its lobbying activities to the Department, the memo's author, a senior Winston & Strawn attorney, advised the OIG that the memo's primary purpose was to help ensure that Winston & Strawn avoided inappropriate contacts with Department officials during the pendency of the contract bidding. The memo's author further explained that the memo also addressed how the law firm had avoided participating in industry efforts to sue the Department over its alleged failures to begin accepting commercially-generated spent nuclear fuel by a 1998 deadline to do so. The memo's author stated that the law firm wanted to avoid even the appearance that it was participating in these activities;

- Winston & Strawn stated that there was no conflict of interest, and that Winston & Strawn had not compromised the contract work or the Yucca Mountain Project. Department officials responsible for administering the Yucca legal contract advised that they have reached no conclusions concerning whether Winston & Strawn's lobbying activities or other representations of the Nuclear Energy Institute constituted actual or potential conflicts of interest or somehow violated attorney ethics. Department officials identified no examples to the OIG of actual compromise of the contract work or the Yucca Mountain Project. Department officials and Winston & Strawn identified examples of how Winston & Strawn had urged more thoroughness concerning the Yucca Mountain Project. Department officials expressed general satisfaction with Winston & Strawn's work;
- Winston & Strawn stated that it had retained an expert to advise whether Winston & Strawn needed to file amended lobbying reports, because a number of the reports already filed may list activities that never took place; and,
- In addition to the matters relating to Winston & Strawn and the Nuclear Energy Institute, the Office of Inspector General identified certain other matters warranting Department management attention, including apparent lobbying activities by an affiliate of the former Yucca Mountain management and operating contractor.

### Observations

In conducting this inquiry, we found that: (1) as a condition of contract award, Winston & Strawn was required to have specific nuclear experience; and, (2) this experience was obtained by representing numerous nuclear industry clients, including utilities that had generated spent nuclear fuel. In this context, it was to be expected that the law firm's prior or current associations could intersect, and perhaps conflict, with its representation of the Department. At the heart of our inquiry was how, if at all, those intersections and potential conflicts were identified, disclosed, addressed, and resolved by the law firm and the Department. In our judgment, the Department was not entirely successful in managing these issues. In large measure, this was attributable to Winston & Strawn's lack of disclosure, about which Department officials expressed dissatisfaction.

Department officials' own efforts to evaluate these matters were impacted by assertions by Winston & Strawn that it could not answer certain questions about its lobbying and other activities for the Nuclear Energy Institute on the grounds of attorney-client privilege invoked by the Nuclear Energy Institute. Winston & Strawn also declined to answer some questions posed by the Office of Inspector General for the same reason.

It is our view that it is imperative that the contracting officer, in conjunction with other responsible Department officials, promptly evaluate the facts disclosed by the Office of Inspector General inquiry, and determine whether Winston & Strawn has in fact violated the terms of the Yucca legal contract or otherwise acted in a manner not in keeping with

its professional ethical obligations to the Department. If so, the Department should pursue remedies to ensure the integrity of the Yucca Mountain Project. Our findings are detailed in the report, which includes recommendations for management action.

I would be pleased to discuss our findings with you at your convenience.

cc: Deputy Secretary  
Under Secretary for Energy, Science and Environment  
Chief of Staff  
General Counsel  
Acting Director, Office of Civilian Radioactive Waste Management  
Director, Office of Procurement and Assistance Management

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## **I. BACKGROUND**

### **Introduction**

In September 1999, the Department of Energy (Department) awarded a contract to the law firm of Winston & Strawn in connection with the Yucca Mountain Project (the Yucca legal contract). Specifically, Winston & Strawn has been assisting the Department with a potential license application to be submitted to the U.S. Nuclear Regulatory Commission (NRC) in the event Yucca Mountain is approved as the site for a repository for the nation's high-level radioactive waste. Winston & Strawn previously performed legal work while serving as a subcontractor for the Department's then-Yucca Mountain management and operating (M&O) contractor, TRW Environmental Safety Systems (TRW), from 1992 to 1999. Although a site recommendation concerning Yucca Mountain has not yet been made, the Department's Office of General Counsel has explained that Winston & Strawn's role has been "to review matters to make sure that we are not prejudicing the prospects for a license in anything we are doing in connection with the site recommendation, and to give other advice relating to what would be necessary to get a license should a favorable recommendation be made."

The objective of our inquiry was to review allegations that Winston & Strawn was contemporaneously a registered lobbyist for the Nuclear Energy Institute (NEI) while serving under the Yucca legal contract. The allegations also included concerns that Winston & Strawn did not disclose these activities to the Department when bidding on the contract in June 1999. NEI is a nuclear energy industry trade group. NEI's members include commercial utilities. These utilities have generated spent nuclear fuel that would be destined for Yucca Mountain in the event Yucca Mountain ever becomes the approved site for the nation's high-level nuclear waste repository.

The Office of Inspector General (OIG) initiated this fact-finding inquiry following a review of these allegations, including information provided by U.S. Senators Harry Reid and John Ensign of Nevada in a letter to the Inspector General dated August 1, 2001. Related concerns of a similar nature were also expressed, at various times, by Congresswoman Shelley Berkley, Congressman Jim Gibbons, and Governor Kenny Guinn, all of the State of Nevada.

The OIG inquiry sought to identify facts to assist a Department evaluation and resolution of whether Winston & Strawn's dual representation of NEI and the Department resulted in an organizational conflict of interest (OCI) under the contract or somehow violated Winston & Strawn's ethical obligations owed to the Department. The OIG inquiry also endeavored to determine whether there were any indicators that Winston and Strawn's activities for, or relationships with, NEI caused it to compromise the contract work or the Yucca Mountain Project, by "taking short cuts" or "pulling punches" in its legal advice provided to the Department.

## Overview

### *Yucca Mountain*

Under the Nuclear Waste Policy Act of 1982, the Federal Government assumed responsibility for providing for the permanent disposal of the Nation's civilian spent nuclear fuel and high-level radioactive waste. This statute adopted geologic disposal as the Nation's long-term strategy for managing radioactive wastes. It also created the Office of Civilian Radioactive Waste Management (OCRWM) within the Department and charged the Secretary of Energy with the siting, construction and operation of potential repositories for the disposal of this waste. In 1987 the statute was amended, and the Department was directed to focus on Yucca Mountain to determine its suitability as the sole candidate for a repository.

### *Winston & Strawn and Requirements to be Eligible for the Award of the Yucca Legal Contract*

According to Winston & Strawn, it is one of the nation's oldest and largest law firms, and its practice encompasses a range of diverse interests and activities, both commercial and in the public arena. These interests and activities include those of the nuclear industry, and comprise a substantial portion of Winston & Strawn's energy practice. In order to be deemed qualified and eligible to perform under the Yucca legal contract, Winston & Strawn, along with other bidders, was required to demonstrate previous experience with legal issues associated with high-level radioactive waste and spent nuclear fuel, as well as prior practice before the NRC.

### *The Nuclear Energy Institute*

According to its web site, NEI's objective is to "ensure the formation of policies that promote the beneficial uses of nuclear energy and technologies in the United States and around the world." NEI, with member participation, develops policy on key legislative and regulatory issues affecting the nuclear industry. NEI then serves as a unified industry voice before the Congress, the Executive Branch agencies and federal regulators, as well as international organizations and venues. In addition, NEI provides a forum to resolve technical and business issues for the industry.

NEI has over 260 corporate members in 15 countries. Membership includes individuals from companies that operate nuclear power plants, design engineering firms, fuel suppliers and service companies, companies involved in nuclear medicine and nuclear industrial applications, radionuclide and radiopharmaceutical companies, universities and research laboratories, and labor unions. Winston & Strawn was listed as a member of NEI. NEI's public policy goals include "Attaining an integrated used fuel disposal program . . ." NEI maintains a staff of in-house lobbyists, and also employs a number of outside law firms to engage in lobbying on its behalf.

## **Organizational Conflict of Interest Disclosure Requirements**

In response to the Department's Yucca legal contract solicitation, Winston & Strawn was required to make certain OCI disclosures. OCI was defined as:

...because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

Specifically, the successful bidder was required to submit the following:

A statement of any past (within the past twelve months), present, or currently planned financial, contractual, organizational, or other interests relating to the performance of the statement of work. For contractual interests, such statement must include the name, address, telephone number of the client or client(s), a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client, if, in the 12 months preceding the date of the statement, services were rendered to the Government or any other client (including a foreign government or person) respecting the same subject matter . . . The agency and contract number under which the services were rendered must also be included, if applicable. For financial interests, the statement must include the nature and extent of the interest and any entity or entities involved in the financial relationship. For these and any other interests enough such information must be provided to allow a meaningful evaluation of the potential effect of the interest on the performance of the statement of work; and

A statement that no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory and assistance services to be provided in connection with the instant contract or that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated as part of the [required disclosure statements].

The Yucca legal contract also contained the following additional OCI provision:

A contractor will be deemed to have an organizational conflicts (sic) of interest if the firm has represented in the last five years, or is currently representing a party or parties in litigation, either administrative or judicial, against the Department of Energy involving the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste (10 CFR Part 961).

On this point, Department officials asserted that Winston & Strawn remained eligible for the award of the Yucca legal contract because, although the law firm had clients who

were suing the Department over this issue, other law firms were representing them in the litigation.

The Department's contract solicitation, as well as the certifications signed by Winston & Strawn in submitting the required OCI statement, provided:

Failure of the offeror to provide the required statement may result in the offeror being determined ineligible for award. Misrepresentation or failure to report any fact may result in the assessment of penalties associated with false statements or such other provisions provided for by law or regulation.

Winston & Strawn was also subject to continuing OCI disclosure requirements during contract performance, including:

Disclosure after award . . . The contractor agrees that, if changes, including additions, to the facts disclosed by it prior to award of this contract, occur during the performance of this contract, it shall make an immediate and full disclosure of such changes in writing to the contracting officer. Such disclosure may include a description of any action that the contractor has taken or proposes to take to avoid, neutralize, or mitigate any resulting conflict of interest.

The continuing OCI disclosure requirements also provided:

Remedies. For breach of any of the above restrictions or for nondisclosure or misrepresentation of any facts required to be disclosed concerning this contract, including the existence of an actual or potential organizational conflict of interest at the time of or after award, the Government may terminate the contract for default, disqualify the contractor from subsequent related contractual efforts, and pursue such other remedies as may be permitted by law or this contract.

#### **Winston & Strawn's June 28, 1999, Organizational Conflict of Interest Disclosure**

Pursuant to the Yucca legal contract's OCI provisions, Winston & Strawn disclosed its work under its subcontract with TRW. Winston & Strawn did not disclose any past or ongoing relationships with NEI. Winston & Strawn stated:

Winston & Strawn has reviewed the OCI disclosure requirements in accordance with the Request for Proposal, as amended, and has determined that it has no conflicts of interest as defined in the solicitation.

Winston & Strawn also stated:

No actual or potential conflict of interest or unfair competitive advantage exists under the TRW Subcontract, or under any other Firm contract, with respect to the advisory and assistance services to be provided in connection with the instant contract as described in RFP No. DE-RP01-99GC30789.

Pursuant to these OCI disclosure provisions, Winston & Strawn also stated:

Winston & Strawn does not represent and has not represented, in the past 5 years, any party or parties in any litigation, either administrative or judicial, against DOE under the Standard Contract for Disposal of Spent Nuclear Fuel and/or High Level Radioactive Waste (10 C.F.R. Part 961) ("Standard Contract"), including the entering of any appearances on behalf of any party or parties in any such litigation.

### **The Nuclear Waste Policy Act and Department Administrative Directions**

The Yucca legal contract is for the provision of services relating to the Yucca Mountain Project. As such, it is governed in part by the Nuclear Waste Policy Act. On April 23, 2001, in response to a previous inquiry by the OIG concerning the Yucca Mountain Project, the Secretary of Energy reiterated that the process to assess Yucca Mountain must be objective, unbiased, and based on sound science.

### **Winston & Strawn's Duties to the Department as Lawyers**

The Yucca legal contract is for the provision of legal services. Consequently, according to the Department's Office of General Counsel (OGC), Winston & Strawn has professional ethical responsibilities to the Department as lawyers to their client. According to an OGC official, these obligations overlap but are different from the Yucca legal contract's OCI disclosure requirements. They include an attorney's specific duties with respect to disclosure of potential or actual conflicts of interest. They also include a general duty to not intentionally prejudice or damage the client during the course of the professional relationship.

In a June 29, 2001, letter to Winston & Strawn, which predated the Department's knowledge of Winston & Strawn's lobbying activities for NEI, a Department contracting official stated:

...[A]s a general matter, the Department expects the firm to honor its duty of loyalty by refraining from representing another client in any litigation or other matter where the firm might be advocating a position adverse or otherwise inconsistent with the position of the Department in such a matter.

## **II. FINDINGS**

The OIG inquiry disclosed facts that will assist the Department in its determination whether Winston & Strawn has violated the terms of the Yucca legal contract or has otherwise acted in a manner inconsistent with its professional ethical obligations to the Department.

### **Contemporaneous Work for the Department and the Nuclear Energy Institute**

Fourteen Winston & Strawn personnel who billed for work on the Yucca legal contract also were reported, by the law firm itself, to have worked on a variety of NEI matters during the period covered by the Yucca legal contract's OCI provisions. Winston & Strawn advised the Department that although it had used firewalls on occasion, it could not recall having used any firewalls on matters under the Yucca legal contract or any matters concerning NEI. Winston & Strawn confirmed this directly to the OIG. Winston & Strawn also advised the OIG that its internal conflicts "check" system did not flag NEI work as a potential OCI under the Yucca legal contract or under the subcontract with TRW. Winston & Strawn further advised the OIG that in light of events, Winston & Strawn would be reviewing their conflicts check system.

### **Winston & Strawn's Lobbying Activities for the Nuclear Energy Institute**

According to public records (lobbying records) filed with the Congress pursuant to the Lobbying Disclosure Act of 1995 or its predecessor, Winston & Strawn reported that it contacted the Department, NRC, the Environmental Protection Agency (EPA), and both houses of the Congress on behalf of NEI. As reported, a number of these contacts: (1) occurred during Winston & Strawn's performance of the Yucca legal contract; or (2) occurred during Winston & Strawn's performance of the subcontract with TRW. As reported, Winston & Strawn was a registered lobbyist for NEI from January 10, 1995, through July 12, 2001, when Winston & Strawn filed the first of two termination reports.<sup>1</sup>

#### *"Interim Storage" Legislation*

In the lobbying records, Winston & Strawn reported that it engaged in lobbying activities for NEI concerning legislation that included "interim storage" legislation. As reported, this included the following proposed amendments to the Nuclear Waste Policy Act in the following years: 1996--S. 1271, S. 1936, and H.R. 1020; and 1997--S. 104 and H.R. 1270. This legislation was never enacted. If enacted, some versions of this legislation could have mandated that spent nuclear fuel be stored in Nevada.

With respect to the first year of its reported lobbying activities, 1995, when interviewed by the OIG on October 5, 2001, Winston & Strawn advised that a reported contact with

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<sup>1</sup> Winston & Strawn filed two separate reports with the Congress, on July 12, 2001, (a "mid-year" report) and July 13, 2001, (a "year-end" report). Both reports identified July 11, 2001, as the date of termination of Winston & Strawn's lobbying registration concerning NEI.

EPA concerning "EPA regulation of radiological materials," identified in Winston & Strawn's 1995 lobbying records, did not relate to Yucca Mountain, although Winston & Strawn further stated to the OIG that the regulations could have applied to all NRC licensed facilities. Winston & Strawn also stated that it did not engage in lobbying activities concerning interim storage legislation (H.R. 1020) during 1995. According to lobbying records, from 1998 to 2001, Winston & Strawn reported only that it had engaged in contacts for NEI concerning "Nuclear Issues." In other words, Winston & Strawn did not identify the specific legislation, if any, on which they had engaged in lobbying activities for NEI during these years.

#### *Altering the Permanent Site-Suitability Evaluation Process*

The legislation identified above, on which Winston & Strawn was reported to have engaged in lobbying activities for NEI, also included provisions, if enacted, that would have altered the criteria for determining Yucca Mountain's permanent site suitability.

#### *Attorney-Client Privilege Invoked by the Nuclear Energy Institute*

When asked to clarify its activities for NEI, Winston & Strawn acknowledged that the Department needed to be assured that Winston & Strawn had exhibited no bias nor "pulled any punches" under the Yucca legal contract. Winston & Strawn, however, declined to answer some questions posed by the OIG on September 24, 2001, on the grounds of attorney-client privilege invoked by NEI.

During the OIG inquiry, an attorney in the Department's OGC met with NEI on October 3, 2001, and accepted NEI's invitation to travel to NEI's offices and review certain documents concerning Winston & Strawn's lobbying activities during the Yucca legal contract's OCI period. An apparent condition for this review was that the OGC attorney would be permitted to take notes, but could not make copies of the documents reviewed. The OIG declined an offer to participate in this review, because the conditions imposed were deemed unacceptable for purposes of the OIG inquiry. As a result of these additional disclosures authorized by NEI, Winston & Strawn was able to answer additional questions posed in subsequent interviews by the OIG. Nevertheless, Winston & Strawn stated on October 5, 2001, that it was not authorized by NEI to discuss further its non-lobbying activities for NEI during the OCI period of the Yucca legal contract, or any activities for NEI prior to the OCI period. The extent to which Winston & Strawn discussed its lobbying activities for NEI during the Yucca legal contract's OCI period is set forth in the following section.

## Department Actions and Winston & Strawn's Responses

### *The Department's July 31, 2001, Letter*

Upon first learning of Winston & Strawn's reported lobbying activities for NEI through press inquiries in July 2001, a Department official sent a July 31, 2001, letter to Winston & Strawn and requested certain additional information concerning "...the firm's representation of ...NEI... [in order] to better inform [the Department's] review of any potential Organizational Conflict of Interest [OCI]." The Department's letter requested the following information only for the period "Starting the time period between 12 months before Winston & Strawn submitted its legal services proposal in May 1999 through the present"<sup>2</sup>:

- The names of all individuals in [Winston & Strawn] assigned to any NEI matters;
- The matters and respective number of hours billed by each individual by name in the firm assigned to any NEI matters;
- The names of all individuals in the firm assigned to the Department's [Yucca] legal services contract;
- The steps Winston & Strawn has taken or will take to avoid the potential for an appearance of a conflict of interest in representing NEI and any potential appearances of conflicts with similar clients in the future, e.g., creating a firewall for personnel used under the Department's contract; and
- Any other information related to the NEI representation or representation of other Winston & Strawn clients that the firm should provide to the Department to enable an informed review of this subject.

### *Winston & Strawn's Responses to the Department's Letter*

By letter dated August 3, 2001, Winston & Strawn responded to the Department's July 31, 2001, letter. Winston & Strawn identified the personnel that had worked on the Yucca legal contract and the personnel that had worked on matters concerning NEI. Winston & Strawn also provided some limited description of work performed for NEI (not limited to lobbying activities), and made other assertions.

Department officials did not consider the August 3, 2001, letter from Winston & Strawn entirely responsive to the Department official's questions. Department officials advised the OIG that they were asking a number of follow up questions of Winston & Strawn. In its August 3, 2001, letter, Winston & Strawn stated:

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<sup>2</sup> This was intended to address the period covered by the Yucca legal contract's OCI disclosure provisions, although Winston & Strawn actually submitted its contract bid in June 1999.

During the past several days, Winston & Strawn has conducted an intensive review of files and records of the firm in an effort to reply promptly to [the Department]. As a result of that review, the record shows that Winston & Strawn's efforts on behalf of NEI germane to these allegations during the period in question were exclusively devoted to questions of legislative and parliamentary procedure (such as congressional disposition of presidential vetoes) related to nuclear waste legislation.

In a footnote to the August 3, 2001, letter, immediately following the paragraph quoted above, Winston & Strawn stated:

These activities involved two telephone calls to the Senate Parliamentarian's Staff (not any committee with relevant jurisdiction) in April-May 2000 relating exclusively to Senate procedures in the consideration of presidentially-vetoed legislation, and two phone conferences to Senate Leadership Staff regarding scheduling of the legislation. These telephone calls in the aggregate totaled 30 minutes. At no time during these conversations did the Winston & Strawn attorney advocate or attempt to persuade anyone on any aspect of high-level waste legislation and Yucca Mountain site suitability for permanent disposition. The balance of the total hours spent on legislative matters for NEI (36.25 hours in total over the relevant period) was devoted to in-house analysis of the legislative process.

S. 1287 was nuclear waste legislation pending in early 2000 that if enacted, would have amended the Nuclear Waste Policy Act and, among other relevant provisions, changed current law with respect to the timing of a recommendation and/or the approval of the Yucca Mountain site. S. 1287 was vetoed by the President in April 2000 and the last action in Congress concerning this legislation occurred in May 2000.

In OIG interviews on October 5, 2001, Winston & Strawn identified the attorney who had made the phone calls. Specifically, a Winston & Strawn attorney interviewed by the OIG acknowledged that he had made the phone calls. This attorney identified an official in the Office of the Secretary of the Senate as the "Senate Leadership Staff" with whom he spoke. This Winston & Strawn attorney could not recall with whom he spoke in the offices of the Senate Parliamentarian, but acknowledged making the calls for the reasons stated in the footnote. This attorney denied ever contacting the Department, EPA, or NRC on behalf of NEI.

Winston & Strawn further stated in its August 3, 2001, letter:

Nothing in [the nuclear waste legislation pending in April-May 2000] nor in our representation of NEI predetermined the suitability of the Yucca Mountain site for permanent disposal of nuclear waste. During this period, no individual at Winston & Strawn advocated or attempted to persuade anyone regarding any provision of the legislation. Further, Winston & Strawn had no responsibility for drafting or analyzing

legislative provisions related to Yucca Mountain. Most important, nothing was advocated by Winston & Strawn to – using a phrase from a recent news story – "assure the [Yucca Mountain site] was approved." [Emphasis in original]

Winston & Strawn further stated in its August 3, 2001, letter:

From June 1998 to the present, a total of 36.25 hours were billed on these [NEI legislative] tasks. No work has been performed since May, 2000. While Winston & Strawn continued to file disclosure forms as lobbyists for NEI through July 13, 2001, the date of its formal termination of that status for NEI, said status was retained after May, 2000 for convenience—a fairly common practice. This provided the opportunity for NEI to assign Winston & Strawn a new task while at the same time obviating the need to go through the time and expense of filing a new registration in order to perform such a new assignment. As a result of the concerns raised last month, the firm terminated this registration.

In its August 3, 2001, letter, to the Department, Winston & Strawn asserted that there was no past<sup>3</sup> or present OCI concerning its representation of NEI and Winston & Strawn's work under the Department's Yucca legal contract, and further stated:

The OCI provisions of the contract require disclosure of any facts that alter the circumstances for Winston & Strawn's performance under it. Applying that standard to the circumstances here, nothing the firm did for NEI was related to the scope of work that defines Winston & Strawn's legal services on behalf of DOE, viz., acting as licensing counsel pursuant to Section C.2, paragraph 2.0 et seq. of the contract.

Regarding the reasons for not including its work for NEI in the OCI disclosure dated June 28, 1999, when interviewed by the OIG on September 24, 2001, Winston & Strawn stated that they "didn't think of it [the NEI work]." Winston & Strawn further advised the OIG that they had since retained outside counsel who advised that there was no legal requirement to disclose NEI work. Winston & Strawn reiterated to the OIG that they did nothing for NEI relating to the Yucca legal contract's scope of work. Winston & Strawn also advised the OIG that in light of events, it would have been better to disclose the work. Winston & Strawn also acknowledged that upon learning of these activities in July 2001, Department officials had expressed dissatisfaction to Winston & Strawn about the lack of disclosure.

As set forth later in this report, an internal Winston & Strawn memo dated June 17, 1999, provided to the OIG on October 5, 2001, in response to a previous OIG request, recognized the potential for conflicts with respect to Yucca Mountain and nuclear waste, and stated that the law firm had avoided certain NEI meetings as a consequence.

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<sup>3</sup> Winston & Strawn made this assertion with respect to the "12 month period preceding the firm's submission of its legal services proposal to DOE in June 1999."

In its August 3, 2001, letter to the Department, Winston & Strawn also stated:

Because of the questions giving rise to this letter, Winston & Strawn thinks it appropriate to have a more formal understanding with DOE and a process through which the firm can continue to assure that OCI requirements are met and through which DOE and the firm can discuss issues associated with Winston & Strawn's representations of its other clients. In this regard, Winston & Strawn envisions and has been discussing with DOE updating the existing agreement it has with DOE, as set forth in a letter dated October 22, 1997,<sup>4</sup> to create categories for services the firm contemplates performing for its other clients. This would permit ready distinction between clearly permissible activities and those which require prompt dialogue with DOE and thereby provide DOE and Winston & Strawn opportunity to acknowledge and to account for the firm's representation of a wide variety of energy clients on matters unrelated to Yucca Mountain and the legal services contract. This, together with aggressive use of firewalls, as suggested in the [Department's] July 31, 2001 letter, should resolve any potential conflict issues that might arise.

In a footnote to its August 3, 2001, letter, Winston & Strawn stated:

As has been publicly known for a long time and equally well known to DOE, Winston & Strawn represents many energy clients involved in the commercial development and use of nuclear energy, some of whose issues are within DOE's purview. The firm represents investor-owned and public utilities before the NRC, the Congress, the courts, and state regulatory agencies. Further, as we noted in the letter of October 22, 1997, the firm also represents and has represented a number of clients in matters related to, inter alia, tritium production, Price-Anderson enforcement issues, and the decontamination and decommissioning special assessment imposed by the Energy Policy Act of 1992. The firm also represents fuel cycle companies on various regulatory policy issues, including in the legislative arena, on issues affecting the domestic uranium industry.

On September 21, 2001, Winston & Strawn faxed the Department's OGC a one page document, captioned, "Winston & Strawn Legislative Work for NEI June 28, 1998 - November 13, 2000." This document listed six items:

- Procedural issues relating to Senate disposition of the Texas Low-Level Radioactive Waste Disposal Compact (2.75 hours)

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<sup>4</sup> Department officials advised the OIG that there is no "agreement" between Winston & Strawn and the Department pursuant to Winston & Strawn's October 22, 1997, letter. The October 22, 1997, letter was sent to the Department in connection with Winston & Strawn's contract to provide legal services in connection with the Waste Isolation Pilot Plant (WIPP). When interviewed by the OIG, Winston & Strawn advised that it considered the October 22, 1997, letter, an agreement with DOE concerning conflict waivers obtained by Winston & Strawn from other clients and approved in connection with the law firm contract relating to WIPP. The October 22, 1997, letter made no mention of Winston & Strawn's lobbying activities for, or other representations of NEI.

- Reviewing proposed changes to legislation regarding the procedure for the adjustment to the millage fee and providing an alternative (12.25 hours)
- Research regarding review of precedents regarding triggers to the blue slip rule (11.5 hours)
- General discussions with NEI with no specific assignments either discussed or requested (0.5 hours)
- Research and memorandum regarding Congressional disposition of presidential veto related to nuclear waste legislation, with a description of the practice of Congressional pairing (6.25 hours)
- Discussions regarding NEI's staffing needs (3 hours)

When asked by the OIG, on September 24, 2001, to clarify any or all of the matters listed on this fax, or to provide further detail, Winston & Strawn declined to do so. Winston & Strawn, as well as law firm counsel, explained that no further information would be provided, other than as stated in the fax, based on attorney-client privilege invoked by NEI.

In subsequent interviews on October 5, 2001, and in light of NEI authorizing further disclosure, Winston & Strawn identified the attorneys who had participated in this work. These attorneys stated that none of these activities resulted in a conflict with their work under the Yucca legal contract.

### **Department Conclusions**

When interviewed by the OIG, Department officials responsible for administering the Yucca legal contract advised that they have reached no conclusions concerning whether Winston & Strawn's lobbying activities or other representations of NEI constituted actual or potential conflicts of interest under the Yucca legal contract or somehow violated attorney ethics. Some stated that these activities raised, at a minimum, a potential appearance of a conflict of interest. Department officials further advised that they had been in the process of requesting and evaluating additional information from Winston & Strawn in order to make an assessment. A number of these steps were underway during the course of the OIG inquiry.

When interviewed by the OIG, a Department contracting official stated that had Winston & Strawn advised of its lobbying activities prior to contract award, the Department could have considered a broad range of options. These options could have included disqualifying Winston & Strawn from contract award, insisting upon implementation of specific conflict avoidance measures, or perhaps concluding that there was no conflict or potential conflict requiring such measures.

Department officials' own efforts to evaluate these matters were impacted by assertions by Winston & Strawn that it could not provide more detailed information concerning its activities for NEI in response to Department questions. Two Department officials, who had each attended at least one of two meetings with Winston & Strawn and the Department's OGC (held on August 13 and September 6, 2001), both advised the OIG that Winston & Strawn declined to answer certain Department questions seeking clarification of these matters, because of attorney-client obligations owed to NEI.

### **Winston & Strawn's Assertion of No Compromise**

When interviewed by the OIG, Winston & Strawn asserted that it had not compromised the Yucca Mountain Project or the work under the Yucca legal contract. In response to an allegation, received by the OIG, that Winston & Strawn may have shared non-public information with NEI, Winston & Strawn asserted that no law firm personnel had done so. Department officials did not identify to the OIG any evidence of compromise. Department officials, as well as Winston & Strawn, stated that Winston & Strawn had urged the Department to be more thorough than it had been concerning the Yucca Mountain Project. For example, Winston & Strawn asserted, and Department officials acknowledged, that Winston & Strawn had pointed out to the Department that certain "key technical issues" required further attention, and that Winston & Strawn had assisted in efforts to correct the perceived deficiencies. Department officials expressed satisfaction with Winston & Strawn's technical legal abilities and their performance in that regard under the Yucca legal contract.

### **Winston & Strawn's Termination of Nuclear Energy Institute Lobbying Registrations**

Winston & Strawn filed papers with the Congress in July 2001 terminating its lobbying registration concerning NEI. When asked by the OIG for its reasons for doing so, Winston & Strawn advised that it would have been "damned if it did" terminate, and "damned if it did not" terminate the registration in light of the current controversies concerning its activities for NEI and its work under the contract.

In the meeting between Winston & Strawn and the OGC on September 6, 2001, Winston & Strawn advised the Department that it might be filing amended lobbying reports. On September 24, 2001, Winston & Strawn advised the OIG that it had not yet reached a decision whether to do so, but had retained an outside expert to advise it accordingly. For example, public reports filed in August 2000 and February 2001 identified contacts with the Department by Winston & Strawn on behalf of NEI, whereas Winston & Strawn advised the OIG that no such contacts may have actually occurred. Winston & Strawn characterized this as a potential instance of "over-reporting" to the Congress pursuant to the lobbying disclosure statute. During interviews of law firm attorneys by the OIG on October 5, 2001, counsel for Winston & Strawn advised that there may be amendments filed, but again, could not confirm whether or when Winston & Strawn would actually file amendments.

**Department's Knowledge About Winston & Strawn and the  
Nuclear Energy Institute**

*No Knowledge by the Technical Evaluation Committee of Winston & Strawn "Interim Storage" Lobbying*

During the inquiry, the OIG interviewed Department officials responsible for competing, awarding, and administering the contract with Winston and Strawn. Among the questions asked was whether and when these officials had any knowledge of Winston & Strawn's relationships with NEI. The Technical Evaluation Committee (TEC) members advised the OIG that they were not aware of Winston & Strawn's lobbying activities for NEI until after the Department received press inquiries in July 2001. Had it been known, Department officials stated that they might have asked questions about this from an OCI perspective.

*The Nuclear Energy Institute Lawyers Committee Tour of Yucca Mountain*

During the inquiry, it was disclosed that two Department officials helped escort a tour of the Yucca Mountain site for representatives of NEI's "Lawyers Committee" on September 22, 1999. This was 2 days before the Yucca legal contract was signed by the Department, but according to one of the Department officials, after it had been determined by the Department to award the Yucca legal contract to Winston & Strawn. NEI's delegation included two attorneys from Winston & Strawn, and the Department officials recognized the Winston & Strawn attorneys who were present. A sign-in sheet for the tour identified the two law firm attorneys. These two law firm attorneys had also attended Winston & Strawn's oral presentation on August 3, 1999, when bidding on the Yucca legal contract. The two Department officials also attended the oral presentation. When interviewed by the OIG, one of these Department officials stated that the fact that the Winston & Strawn attorneys attended the NEI tour did not raise any conflict concerns in her mind at the time.

**Winston & Strawn's June 17, 1999, Internal Memorandum**

As previously noted, in response to a request from the OIG, counsel for Winston & Strawn produced a copy of an internal law firm memorandum addressed to attorneys in Winston & Strawn's "Energy Group," dated June 17, 1999.<sup>5</sup> This memorandum, subject "NEI Lawyers Committee Meeting in Las Vegas," stated:

The NEI Lawyers Committee has scheduled a meeting for September 21-22, 1999 in Las Vegas. The purpose for having the meeting in Las Vegas is to include a tour of the Yucca Mountain site. Several [Winston & Strawn] nuclear attorneys have asked to attend this meeting.

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<sup>5</sup> As we have noted, Winston & Strawn's OCI disclosure statement under the Yucca legal contract is dated June 28, 1999.

The [law firm's] Energy Group is now in the process of responding to a DOE RFP in connection with providing legal services to DOE for the licensing and operation of the Yucca Mountain H[igh] L[evel] W[aste] repository. Our response to the RFP will be submitted later this month. DOE's selection of the law firm to serve as its counsel on these matters will be announced later this year.

Because we have served as counsel to TRW at Yucca Mountain for several years, we have been scrupulous in our efforts to avoid any conflict of interest or appearance of any conflict of interest in connection with H[igh] L[evel] W[aste]. For example, we have declined to represent clients in connection with lawsuits involving the January 1998 deadline for DOE to begin taking H[igh] L[evel] W[aste]. We have also avoided participating in industry meetings, including NEI meetings, involving Yucca Mountain and DOE's obligation to take H[igh] L[evel] W[aste] in accordance with the Nuclear Waste Policy Act. The care which we have taken to avoid any hint of a conflict has served us well. A criterion in the DOE RFP addresses this very issue, and we are in an excellent position to distinguish the Firm from our prime competitors on this basis.

We must continue to remain on the DOE/Yucca Mountain side of this wall. To cross it could jeopardize our efforts to avoid conflicts or the appearance of conflicts. Accordingly, we have determined that no Winston & Strawn attorney should participate in the Yucca Mountain tour. In light of that result, it would make little sense for any of us to travel to Las Vegas just for an NEI Lawyers Committee meeting. This includes not only those attorneys who have asked to attend, but also those attorneys who typically do attend the NEI Lawyers Committee Meetings. If and as we are selected by DOE to serve as its counsel on Yucca Mountain going forward, there will be ample opportunities for many of us to visit Yucca Mountain.

When interviewed by the OIG on October 16, 2001, and asked to reconcile Winston & Strawn's memo with Winston & Strawn's activities for NEI, including reported lobbying activities and the non-disclosure of these activities pursuant to the Yucca legal contract's OCI provisions, the memo's author, a senior law firm attorney, advised the OIG that the memo's purpose was to help ensure that Winston & Strawn avoided inappropriate contacts with Department officials during the pendency of the Yucca legal contract bidding. This law firm attorney also stated that Winston & Strawn wanted to avoid even the appearance that it was participating in efforts to sue the Department over the alleged failure to begin accepting spent nuclear fuel by the 1998 deadline. The memo's author later reconsidered his previous instructions. When asked by the OIG who was on the other side of the "wall" from "DOE/Yucca Mountain," the memo's author replied, "utilities." This law firm attorney clarified that he meant the utilities that would be suing the Department. When asked if the "wall" referenced in the memo was intended to be a "firewall," the memo's author replied, "I think so."

### **Invoices Submitted by Winston & Strawn to the Department**

During the inquiry, the OIG reviewed Winston & Strawn invoices submitted to the Department under the Yucca legal contract in part to determine whether there were any indicators of potential conflicts of interest relative to NEI. This review disclosed three entries which warranted further review. Two of these involved telephone calls by a Winston & Strawn attorney to two different representatives of NEI about Yucca legal contract matters. When interviewed by the OIG, this Winston & Strawn attorney stated that he did not share any non-public information with NEI and was seeking NEI's views on the matters discussed. Department officials disallowed the charges associated with these telephone calls, not because of any conflict concern, but because the Department had not authorized Winston & Strawn to make these contacts on behalf of the Department. Department officials did not know at the time they reviewed these charges that Winston & Strawn was listed in lobbying records as engaged in lobbying activities on behalf of NEI.

The OIG inquiry also disclosed a billing entry associated with a meeting a Winston & Strawn attorney had with a high-level official of the NRC. When interviewed by the OIG, the Winston & Strawn attorney asserted that he had been at NRC on another matter for another client (not NEI and not in any way involving Yucca Mountain), and the high-level NRC official had asked him to convey the official's views to the Department about certain EPA procedures relating to the Yucca Mountain Project. A Department official stated that this charge was not disallowed but may yet be disallowed because Winston & Strawn had not been authorized to bill for such a meeting.

### **Other Lobbying by Winston & Strawn for Nuclear Groups**

The OIG inquiry disclosed other reported lobbying activity by Winston & Strawn that warranted further review by the OIG in light of the objective of the inquiry.

#### *Nuclear Utility Backfitting and Reform Group*

According to lobbying records, Winston & Strawn was also a registered lobbyist for the Nuclear Utility Backfitting and Reform Group (NUBARG) at the same time law firm attorneys were performing work under the Yucca legal contract, or under the previous related subcontract. According to lobbying records, NUBARG is a "[c]onsortium of 15 nuclear utilities that exchange information on backfitting issues and regulatory reform." Winston & Strawn's lobbying registration concerning NUBARG was first filed on July 20, 1998, and was terminated on August 14, 2000. These lobbying activities for NUBARG included "nuclear waste disposal issues" and "high-level waste." When interviewed by the OIG, Winston & Strawn asserted there was no conflict of interest between these activities and law firm work concerning the Yucca Mountain Project. A senior Department nuclear waste official stated that he had never heard of NUBARG and NUBARG did not have anything to do with the Yucca Mountain Project.

### *Washington Public Power Supply System*

According to lobbying records, Winston & Strawn was also a registered lobbyist for the Washington Public Power Supply System (WPPSS) at the same time law firm attorneys were performing work under the previous related subcontract. According to lobbying records, WPPSS is "[a] municipal corp. and joint operating agency of the State of Washington that is empowered to finance, acquire, construct and operate facilities for the generation/transmission of electric power." Winston & Strawn's lobbying registration concerning WPPSS was first filed on February 14, 1996, and was terminated on August 13, 1999. These lobbying activities concerned the disposition of excess weapons plutonium. These activities included contacts with the Department. When interviewed by the OIG, Winston & Strawn asserted that there was no conflict of interest between these activities and law firm work concerning the Yucca Mountain Project. A senior Department nuclear waste official stated that he did not think this lobbying was in conflict with the Yucca Mountain Project, although he had not been aware of it.

### *Health Physics Society*

According to lobbying records, Winston & Strawn was a registered lobbyist for the Health Physics Society (HPS). According to lobbying records, HPS is a "[p]rofessional, scientific organization dedicated to radiation safety." Winston & Strawn's registration was first filed on November 4, 1997, and was terminated on August 13, 1998. As reported, this lobbying activity for HPS included S. 104 and H.R. 1270. As noted previously and as reported, Winston & Strawn also engaged in lobbying activities for NEI concerning S. 104 and H.R. 1270. When interviewed by the OIG, Winston & Strawn asserted that there was no conflict of interest between these activities and law firm work concerning the Yucca Mountain Project, and stated the work was unrelated to the Yucca Mountain Project. A senior Department nuclear waste official stated that he did not believe HPS was connected to Yucca Mountain, but focused on nuclear safety generally.

### **Other Conflict of Interest Concerns by the Department**

Winston & Strawn's reported lobbying activities for NEI was not the only example Department officials identified to the OIG of a potential conflict of interest concern that arose under the Yucca legal contract and required evaluation and action by the Department. It was also not the first or only time in which Department officials asserted they learned of, and were required to address, a potential conflict concern which was brought to their attention by means other than disclosure by Winston & Strawn. A previous instance arose relating to Winston & Strawn's representation of NAC, a nuclear waste cask manufacturer.

### *NAC International*

According to a number of Department officials, the Department became aware, in late 2000, by means other than disclosure by Winston & Strawn, that Winston & Strawn was representing NAC International (NAC). Winston & Strawn was representing NAC in regulatory proceedings before NRC to which the Department was not a party. Department officials advised that they requested additional information from Winston & Strawn, expressed some measure of dismay to Winston & Strawn for learning of the issue elsewhere, and ultimately, requested that Winston & Strawn terminate its representation of the cask manufacturer. The OIG was advised that the basis for this request stemmed in part from Department concerns that the firm's representation of the cask manufacturer could result in actual or potential conflict concerns for the Department. Winston & Strawn subsequently advised the Department that it had terminated its representation of the cask manufacturer in the proceedings before NRC. It appeared unresolved to some Department officials whether Winston & Strawn continued to represent the cask manufacturer in other matters. Winston & Strawn advised the OIG that it had, in fact, terminated its representation of the cask manufacturer on all matters. According to Winston & Strawn, the Department apparently felt that the cask could be used as a multi-purpose cask somehow in relation to the Yucca Mountain Project, and that a conflict could arise because in that event, Winston & Strawn might defend the cask "to the death."

In a June 29, 2001, letter, to Winston & Strawn unrelated to NEI but in part addressing the Department's concerns over the NAC representation, a Department contracting official stated:

Also, in regards to potential conflicts of interest, the events of the past year highlight the need for [Winston & Strawn] to remain vigilant in meeting its contractual obligation to avoid any situation that constitutes or could be perceived to constitute a legal or organizational conflict of interest.

### *Pending Related Litigation*

There is litigation pending in the United States District Court for the District of Columbia concerning the Yucca legal contract. In that action, brought by an unsuccessful bidder and challenging the Yucca legal contract's award to Winston & Strawn, it was alleged that the work previously performed by Winston & Strawn under the previous related subcontract for the Department's Yucca Mountain M&O contractor created a conflict of interest with the work performed under the Yucca legal contract. The unsuccessful bidder alleged that the Department's contract required Winston & Strawn to review Winston & Strawn's own previous work. Department officials and Winston & Strawn disagreed, and asserted that there was no conflict. Department officials maintained that the work is the same, and that the decision to compete and administer the Yucca legal contract directly by the Department stemmed from a general policy decision by the Department's OGC to have direct control of contract legal services work. The Department prevailed in previous bid protest proceedings before the U.S. General

Accounting Office, which had been initiated by the unsuccessful bidder. According to Winston & Strawn, the conflict issues raised in this litigation may be resolved, ultimately, by the federal judiciary.

#### *Fluor*

In the litigation pending in the United States District Court for the District of Columbia concerning the Department's contract with Winston & Strawn, the unsuccessful bidder alleged also that work performed by Winston & Strawn for Fluor Daniel, Inc., constituted a conflict of interest with the work to be performed under the Yucca legal contract. Winston & Strawn represented Fluor Daniel in some tentative enforcement actions then being pursued by officials of the Department's Office of Environment, Safety, and Health, and relating to Fluor Daniel work under contract at the Department's Hanford site. Department officials learned of the alleged conflict of interest involving Fluor Daniel and Winston & Strawn as a result of allegations made during the course of the pending litigation, and not through any disclosure by Winston & Strawn. Department officials and Winston & Strawn have asserted that there was no conflict of interest. This issue may be resolved, ultimately, by the federal judiciary in the pending litigation.

#### *Others*

Winston & Strawn has brought a number of potential representations to the Department's attention, in order to discuss their implications for Winston & Strawn's work under the Yucca legal contract. A number of these have resulted in the Department requesting that Winston & Strawn not undertake the representation and/or Winston & Strawn not undertaking the representation for a variety of reasons. These have included proposals by Winston & Strawn to represent:

- Department contractors in addition to Fluor Daniel, Inc., concerning environmental, safety, and health enforcement activities conducted by the Department; and
- Lockheed Martin in an apparent form of "mediation" intended to resolve the Department's "Pit 9" litigation.

#### **Department and Winston & Strawn Proposal for Addressing Similar Issues in the Future**

Winston & Strawn and Department officials advised the OIG that in light of events, they had been working together to try and craft some written understanding of how potential conflict of interest concerns may be more regularly raised and resolved. This written understanding would address which if any potential Winston & Strawn representations required: (1) not being undertaken by Winston & Strawn; (2) disclosure to and approval by the Department; (3) disclosure to the Department but not requiring approval; or (4) neither disclosure to nor approval by the Department.

## **Post-Employment Issues**

Concerns had been raised to the OIG, in the context of Winston & Strawn's bidding on, and performance of, the Yucca legal contract, about whether there were any post-employment violations in light of the fact that a number of Winston & Strawn attorneys are former government officials. No violations of post-employment statutes were identified during the OIG inquiry.

### **Winston & Strawn's Subcontract with TRW**

As noted previously, Winston & Strawn performed work under subcontract to TRW, the former Yucca Mountain M&O contractor, from 1992 to 1999. Winston & Strawn did not disclose its relationships with NEI pursuant to any of its OCI disclosures submitted under that subcontract, either when bidding or at any time during performance. The previous related subcontract was a task order contract and each new task required Winston & Strawn to update its OCI disclosure statements, if necessary.

When interviewed by the OIG, Winston & Strawn stated that it was not required to disclose NEI activities, which dated back to at least 1995, because they did not relate to the scope of work under the previous related subcontract. Nevertheless, certain of the "interim storage" and Nuclear Waste Policy Act amendments legislation previously identified by the OIG on which Winston & Strawn was reported to have been engaged in lobbying activities for NEI, included provisions, if enacted, revoking 10 CFR 960 as it relates to the Yucca Mountain Project and NRC Licensing. The statement of work for the previous related subcontract required Winston & Strawn to advise TRW on the interrelationship between 10 CFR 60 and 10 CFR 960.

#### *The OCI Provisions of the TRW Subcontract*

The OCI provisions for the TRW subcontract were different than those for the Yucca legal contract. For example, Question 5 of the OCI disclosure questionnaire stated:

List the business entities with which you or your organization have a direct or indirect financial, organizational, contractual, or other relationship which could be affected in any way by the proposed work. For each entity listed, discuss the nature of the relationship and how it would be affected by you or your organization's involvement in the proposed work.

#### *Winston & Strawn Invoice Questioned Under TRW Subcontract*

TRW officials questioned Winston & Strawn on at least one occasion concerning whether Winston & Strawn billing activity under the previous related subcontract represented unallowable lobbying costs. Specifically, on December 20, 1995, TRW sent a letter asking Winston & Strawn to certify that Winston & Strawn's August 1995 invoice submitted to TRW did not include any unallowable costs, particularly with respect to " . . .

costs associated with H.R. 1020." Winston & Strawn was further advised that "[q]uestions have been raised that these costs may be unallowable per DEAR 970.5204-17 Legislative lobbying cost prohibition (enclosed)."

In a letter to TRW dated January 15, 1996, a Winston & Strawn attorney certified that Winston & Strawn's August 1995 invoice did not include any unallowable lobbying costs. Winston & Strawn's letter further stated that "Winston & Strawn communicated only with [TRW] and not with any government official or employee for the purpose of attempting to influence the introduction, enactment, or modification of any legislation."

Winston & Strawn's lobbying records, dated August 12, 1996, for activity during the first half of 1996 (January 1 to June 30, 1996) reported lobbying activity on behalf of NEI concerning H.R. 1020.

#### *Request for Proposal for TRW Subcontract*

The Request for Proposal issued in 1992 by the then-Yucca Mountain M&O contractor, TRW, seeking bidders for the previous related subcontract, sought a law firm with specific nuclear experience, including "[r]epresenting industry groups in rulemakings."

#### **Winston & Strawn's Contract with the Waste Isolation Pilot Plant**

Winston & Strawn performed work under contract with the Department, concerning the Waste Isolation Pilot Plant (WIPP), from July 1997 to September 2001. Pursuant to this contract, Winston & Strawn provided legal support to include research and consultation assistance services for environmental permitting and compliance programs in support of the opening of WIPP in accordance with applicable Federal and State of New Mexico statutes, regulations and Department Orders. This was a fixed price contract. The WIPP contract was also a sole source procurement following legal services Winston & Strawn provided as a subcontractor to another company that provided technical support to the Department concerning WIPP. Under the previous time and materials subcontract, from August 1996 to July 1997, Winston & Strawn was subject to contract OCI disclosure requirements. Winston & Strawn provided OCI disclosure statements under the provisions of the subcontract, but did not disclose its relationships with NEI.

The WIPP contract with Winston & Strawn imposed no OCI disclosure requirements on Winston & Strawn. In certain other information documenting Winston & Strawn's previous experience and submitted by Winston & Strawn in bidding on the WIPP contract, Winston & Strawn mentioned previous work for NEI. These references did not mention lobbying, but did identify NEI by name. Specifically, in certain firm brochures, Winston & Strawn stated that it:

Represents broad-based and special-issue industry groups such as NEI . . . on a variety of issues.

In these brochures, Winston & Strawn also advised that:

...[Winston & Strawn's] attorneys also participate in the legislative and policy-making process on behalf of clients... draft environmental legislation for consideration by Congress...submit comments on proposed regulations and rules, and confer with federal...executive and administrative officials concerning the applicability and interpretation of existing rules.

### **III. COORDINATION WITH THE U.S. DEPARTMENT OF JUSTICE**

Certain matters raised during the OIG inquiry were coordinated with the Public Integrity Section of the U.S. Department of Justice (DOJ). DOJ deferred at that time in favor of appropriate Department action, and specifically asserted that the Department needed to make its own determination whether there was an actual conflict of interest under the Yucca legal contract.

### **IV. OTHER MATTERS**

The OIG inquiry disclosed the following additional matters that the Department needs to consider concerning the Yucca Mountain Project.

According to lobbying records, TRW, Inc., was a registered lobbyist concerning the Yucca Mountain Project at times when its affiliate, TRW Environmental Safety Systems, Inc., was serving as the Yucca Mountain Project M&O contractor. According to a "year end" report covering activities from July 1 to December 31, 1998, TRW, Inc. engaged in lobbying activities, including with respect to the "Yucca Mountain Permanent Waste Repository (no bill)" and as reported, had contacts with both houses of the Congress as well as the Department. According to a "mid-year" report covering activities from January 1 to June 30, 1999, TRW, Inc. engaged in lobbying activities, including with respect to "HR 2605...All provisions related to permanent storage of spent nuclear fuel," "S 1186...All provisions related to permanent storage of spent nuclear fuel," "HR 45 Nuclear Waste Interim Storage Bill, Provisions related to transporting and storing spent nuclear fuel," and "S 608/S 1287 Nuclear Waste Interim Storage Bill, Provisions related to transporting and storing spent nuclear fuel."

When interviewed and shown these reports by the OIG, a senior Department nuclear waste official stated that it was "news to" him. This senior official also characterized these facts as raising a perception issue that could be a "big deal." This senior official further stated that a TRW, Inc. official identified in the reports as engaged in the lobbying activities had been introduced to him by a TRW M&O contractor official at some time in the past, and they had discussed the budget for the Yucca Mountain Project.

According to lobbying records, a number of TRW's Yucca Mountain subcontractors or subcontractor affiliates appeared to be engaged, at various times during the M&O contract, in lobbying activities concerning nuclear waste legislation relevant to the Yucca Mountain Project, or had engaged the services of others to lobby on their behalf.

## **V. RECOMMENDATIONS**

The OIG recommends that:

- (1) the contracting officer evaluate the facts disclosed, and determine whether Winston & Strawn has violated the conflict of interest or other terms of the Yucca legal contract. In the event the contracting officer determines that there has been a violation, the contracting officer should pursue appropriate and available contract remedies;
- (2) the General Counsel assist the contracting officer, as appropriate, in making these determinations, and further, determine whether Winston & Strawn has acted in a manner consistent with its professional ethical responsibilities to its client, the Department. If not, the General Counsel should take appropriate action, including advising the contracting officer concerning available contract remedies; and
- (3) the General Counsel, in consultation with appropriate contracting officials and the Acting Director, Office of Civilian Radioactive Waste Management, review the facts disclosed concerning other reported lobbying by Yucca Mountain contractor affiliates, or subcontractor affiliates or agents, and advise responsible Department officials on what, if any, actions may be necessary to ensure the integrity of the Yucca Mountain Project.

Management's actions in response to these recommendations should be tracked through the Departmental Audit Report Tracking System. As such, we would appreciate receiving preliminary comments from the Department within 15 working days.

**Scope and Methodology**

During the inquiry, the OIG:

- Performed field work from August 6, 2001, to October 18, 2001;
- Interviewed Department officials, including those involved in competing, awarding, and administering the Yucca legal contract with Winston & Strawn;
- Reviewed relevant Department and contractor records and information, including information submitted to the Department by Winston & Strawn in connection with the Yucca legal contract;
- Reviewed records and information concerning other Winston & Strawn contracts or subcontracts relating to the Yucca Mountain Project or the WIPP;
- Interviewed Winston & Strawn attorneys;
- Reviewed publicly-filed lobbying disclosure records;
- Reviewed the authorities listed in the Table of Authorities of this report;
- Coordinated with the NRC Office of Inspector General, interviewed officials of the NRC, and obtained relevant NRC records;
- Coordinated with the U.S. Office of Government Ethics; and
- Coordinated with the Public Integrity Section of the DOJ.

**Table of Authorities**

During the inquiry, the OIG reviewed the following authorities:

- Department of Energy Acquisition Regulations (DEAR);
- Federal Acquisition Regulations (FAR);
- Statutes governing lobbying activities;
- Professional legal ethics rules governing attorneys admitted to practice in the District of Columbia;
- Federal conflict of interest and other statutes, including those relating to procurement integrity and post-employment activities;
- Proposed amendments to the Nuclear Waste Policy Act; and
- Relevant Department policy statements and administrative directions.

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