



U.S. Department of Energy
Office of Inspector General
Office of Audit Services

Special Report

Review of Alleged Conflicts of Interest
Involving a Legal Services Contractor for
the Yucca Mountain Project License
Application

DOE/IG-0792

April 2008




Department of Energy

Washington, DC 20585

April 2, 2008

MEMORANDUM FOR THE SECRETARY

FROM:


Gregory H. Friedman
Inspector General

SUBJECT:

INFORMATION: Special Report on "Review of Alleged Conflicts of Interest Involving a Legal Services Contractor for the Yucca Mountain Project License Application"

INTRODUCTION

In September 2007, the Department of Energy awarded a legal services contract to the law firm of Morgan, Lewis, and Bockius LLP (Morgan Lewis). The firm was to assist the Department in preparing a license application for the Yucca Mountain repository, the site selected for the disposal of the Nation's spent nuclear fuel and high-level nuclear waste. The agency awarded the contract using an informal process that was "other than competitive" to evaluate different law firms, rather than the more formalized competitive process set out in the Competition in Contracting Act. Prior to the award of the contract, in April 2007, the Department notified Congress of its intent to follow the informal process. The notification was pursuant to 41 U.S.C. Section 253(c)(7), and the Department included its justification that proceeding in this manner was necessary in the public interest. Following an expedited process, the Department awarded a contract to Morgan Lewis, with a five-year performance period and a five-year option period. The total value of the contract is over \$100 million.

In December 2007, the State of Nevada's congressional delegation requested that the Office of Inspector General review potential conflicts of interest related to the contract with Morgan Lewis. The delegation's concerns focused on three primary areas. First, Morgan Lewis represented commercial utilities that had filed lawsuits against the Government regarding the acceptance and disposal of commercial spent nuclear fuel. Second, the firm performed lobbying activities on behalf of the nuclear industry trade association, the Nuclear Energy Institute (NEI). Lastly, the delegation noted that the Department had hired Morgan Lewis in 2001 to evaluate the "safety conscious work environment" at Yucca Mountain; and, that the firm may have "looked past critical flaws" in the Department's quality assurance program. Further, the delegation was concerned that Morgan Lewis could now be placed in a position of reviewing its own prior work.

Previously, in November 2001, the Office of Inspector General addressed similar issues related to a prior legal services contractor in a report entitled *Review of Alleged Conflicts of Interest Involving a Legal Services Contract for the Yucca Mountain Project* (DOE/IG-1011G001). Given the current and past concerns, we conducted an examination of the Department's award and administration of the 2007 contract in support of the Yucca Mountain license application.



RESULTS OF FACT FINDING REVIEW

Presented below is our analysis of the issues raised by the delegation, as well as our observations regarding the Department's documentation of key decision points in awarding the 2007 legal services contract.

Representation of Utilities

The Department selected Morgan Lewis, a firm which represented utilities in the spent nuclear fuel litigation against the Government. In so doing, the Department accepted a firm with a conflict of interest. However, the agency's selection of Morgan Lewis was inconsistent with the Department's position in 1999, when it excluded firms with this conflict from participating in a similar contract. The Department's view on this change was that in 2007, its needs could only be met by firms with extensive Nuclear Regulatory Commission licensing expertise, and it determined that "any alternative law firm with [this expertise] would have similar potential conflict issues."

In accordance with applicable regulations, the Department provided a waiver of the conflict of interest, and it incorporated a mitigation plan into the contract. Agency officials determined that the plan would mitigate any legal ethics conflict and/or any organizational conflict of interest to the "maximum extent practicable."

Overall, the 2007 procurement for legal services appeared to follow the conflicts of interest requirements set forth in the Federal Acquisition Regulations, Department of Energy Acquisition Regulations, and District of Columbia Bar Rules of Professional Conduct. We also found that the firm had implemented the mitigation plan in accordance with the contract requirements.

Representation of Nuclear Industry

Morgan Lewis disclosed work for NEI. Specifically, Morgan Lewis disclosed to the Department that it had periodically advised the NEI on "matters involving the Nuclear Waste Policy Act, spent nuclear fuel, high-level waste, and other related matters; however, such work over the past twelve months [preceding the contract award] has not related factually, commercially or legally to the Yucca Mountain Repository licensing." Independent of the firm's disclosure, our review showed that the firm terminated its lobbying activities for NEI in 2002, five years prior to the award of the current contract.

2001 Report on Safety Conscious Work Environment

The law firm's 2001 work was critical of the safety conscious work environment in existence at Yucca Mountain at that time. Morgan Lewis' report included recommendations to further strengthen the program. In our discussions with Department officials, they stated that the quality assurance program for the Yucca Mountain Program had evolved significantly since 2001. We noted that the current program had been

recently reviewed by an independent party and was found to be consistent with standard nuclear industry practices. Further, the officials asserted that Morgan Lewis would not be reviewing its 2001 work under the scope of the 2007 contract.

Documentation of Key Decision Points

We found, in conducting our review, that the Department had not fully developed a written record memorializing the key decision points underlying its procurement strategy and selection process. Given the controversial nature of the Yucca Mountain Project; the history of allegations concerning conflicts of interest; and, the likely public scrutiny of any Yucca Mountain Project legal services contract, we found the absence of such documentation disturbing. Had a full written record of the Department's decision process been developed, it would have been of great assistance in conducting this review. Of far greater importance, it may well have anticipated many of the concerns that have been raised regarding the contract with Morgan Lewis.

The absence of a clear record relating to the following matters was of particular concern:

- Agency officials did not document their rationale for the apparent shift in procurement strategy and approach to addressing conflicts of interest relative to the Department's 1999 position. In our view, the procurement record should have addressed this important question.
- The Department did not document its comparative analysis of the proposals which formed the basis for selecting Morgan Lewis in 2007. A comparative analysis would have assessed statements of qualifications and potential conflicts of interest. This was especially important because our review showed that one of the firms invited to submit statements of qualifications did not have a conflict of interest relating to the spent nuclear fuel litigation. Officials stated that the firm in question did not have sufficient available resources (attorneys with NRC licensing experience) to apply to the contract. We noted that the record on this matter was not documented.

In addition, Morgan Lewis disclosed other activities relating to its work for NEI. Department officials held follow-up discussions with Morgan Lewis to more fully develop the disclosures. As a result of these discussions, the firm modified its disclosures prior to the award of the contract and provided additional clarification of its work on behalf of NEI. However, the procurement file did not contain a "trail" of the Department's review of the disclosures. Such a document would have allowed us to determine if the Department adequately addressed whether the disclosed issues presented a conflict of interest and, if so, whether they had been effectively mitigated.

Department officials stated that no such documentation was required and asserted that the decision to award the 2007 contract to Morgan Lewis was based on its need for legal services from a firm with extensive NRC licensing expertise and that this need was documented in the procurement file. Department officials also informed us that while

they did not prepare a comparative analysis of law firms, there was extensive consideration in the selection of the law firm. Finally, officials stated that there was no indication of an inaccuracy in Morgan Lewis' disclosures of its work on behalf of NEI.

In our view, the public interest would have been better served had the Department done more to document the key decision points relating to this procurement.

A detailed discussion of our general observations, as well as the issues raised by the delegation is included in the body of the attached report.

Attachment

cc: Acting Deputy Secretary
Under Secretary of Energy
Director, Office of Civilian Radioactive Waste Management
General Counsel
Chief of Staff

SPECIAL REPORT ON REVIEW OF ALLEGED CONFLICTS OF INTEREST INVOLVING A LEGAL SERVICES CONTRACTOR FOR THE YUCCA MOUNTAIN PROJECT LICENSE APPLICATION

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CONFLICTS OF INTEREST

BACKGROUND

Under the Nuclear Waste Policy Act, the Department of Energy (Department) is responsible for providing a repository for high-level radioactive waste and spent nuclear fuel. As part of this effort, the Department is required to prepare and submit a license application to the Nuclear Regulatory Commission (NRC) for the construction and operation of the high-level waste repository at Yucca Mountain. Further, the Act mandated a contractual relationship between commercial utilities and the Department whereby the utilities pay for the cost of spent nuclear fuel disposal while the Federal Government provides disposal services in a manner protective of the public health and environment.

In September 2007, the Department awarded a legal services contract to a law firm, Morgan, Lewis, and Bockius LLP (Morgan Lewis), in connection with the Yucca Mountain Project. Morgan Lewis is to assist in preparing the license application to be submitted to the NRC. The Department awarded the contract using an informal process that was "other than competitive" to evaluate different law firms, rather than the more formalized competitive process set forth in the Competition in Contracting Act. Prior to the award of the contract, the Department notified Congress in April 2007 of its intent to follow the informal process. The notification was pursuant to 41 U.S.C. Section 253(c)(7), and included the Department's determination and findings that proceeding in this manner was necessary in the public interest.

As part of the pre-award requirements, Morgan Lewis disclosed potential conflicts of interest due to its representation of commercial utilities in the spent nuclear fuel litigation. The litigation related to cases filed by utilities against the Government for its partial breach of contract regarding the disposal of spent nuclear fuel. While many of these cases had been resolved, others were still pending resolution.

PROCUREMENT STRATEGY

A primary concern raised by the State of Nevada's congressional delegation was that the 2007 procurement did not follow the conflict of interest restrictions contained in the Department's 1999 legal services procurement for the Yucca Mountain Project. To address this concern, we examined the conflicts of interest strategy used by the Department in awarding the three legal services contracts since 1999.

We found that for each of these three contracts, the Department used a distinct approach to address potential conflicts of interest, specifically with regards to those firms that had represented commercial utilities in the spent nuclear fuel litigation against the Government. In 1999, the Department excluded firms with such conflicts from participating in the procurement. In 2003, the Department invited firms, some of which represented utilities in the spent nuclear fuel litigation, to participate in the procurement. Ultimately, the agency decided to award the contract to a firm that did not represent

utilities in the spent nuclear fuel litigation, based, in part, on conflict of interest concerns. In 2007, the Department hired Morgan Lewis, despite the firm's representation of utilities in the spent nuclear fuel litigation.

1999 Procurement

The Department issued a request for proposal in 1999 for a legal services contractor for the Yucca Mountain Project. After conducting market research, which showed that there were several large firms with litigation and NRC experience available to perform the work, the Department issued its solicitation. The solicitation included the following "special organizational conflict of interest" provision:

A firm will be deemed to have organizational conflicts of interest if the firm has represented in the last five years, or is currently representing parties in litigation, either administrative or judicial, against the Department of Energy involving the Standard Contract for Disposal of Spent Nuclear Fuel.

The Department concluded that responses from firms with these conflicts would be considered "non-responsive and eliminated from competition." The Department memorialized its decision to include the special organizational conflict of interest provision. Specifically, the contract file contained a memorandum which included the following information:

- A law firm whose loyalties lie with the utility companies might urge a less thorough process that could conclude earlier, when the Department's best interests lie with a careful approach that may indeed take longer and be a more expensive process;
- Lawyers for the utilities might seek discovery from the Department and its licensing support contractor, thus seeking discovery from themselves; and,
- The Department should not place itself in the position of being challenged by third parties based on the license application being improperly influenced, directly or indirectly, by interests of the utility companies that were party to the litigation.

An excluded law firm protested the terms of the solicitation as unduly restrictive. In response, a Departmental Head of Contracting Activity (HCA) upheld the special organizational conflict of interest provision and denied the protest. The HCA stated that although the utilities and the Department both had an interest in having the license for the Yucca Mountain repository issued quickly, the Department also served a broader interest of protecting the environment and public health. According to the decision, this difference created "a divergence in interests between the utilities and the DOE that gives rise to the various potential conflicts of interest."

The Department's position was that it "is not willing to consider mitigation measures that will not completely obviate the conflict when there are other parties available to perform

the work"; and further, that this conflict could not be mitigated "simply by imposing a firewall" for the protection of the agency's confidential information. The HCA, in his decision, further stated that:

. . . It must be recognized that this is a highly charged issue and thus one in which the public's perception should be taken into account. Given the public health and safety and environmental concerns about the repository, DOE cannot afford a public perception that its licensing decisions regarding the repository were influenced by a firm that owes loyalties to the nuclear utilities. Thus, after consideration, DOE retained the [organizational conflict of interest] provision that excludes those firms that are or recently were engaged in the [spent nuclear fuel] litigation against the DOE.

During the course of the contract performance period, the law firm selected for the 1999 procurement faced allegations of possible conflict of interest disclosure violations. In response to the concerns raised, the Office of Inspector General initiated an inquiry of the allegations, and issued a report on November 13, 2001. On November 29, 2001, the Department and the firm mutually agreed to discontinue the contract.

2003 Procurement

The Department modified its approach to awarding and handling potential conflicts of interest related to the spent nuclear fuel litigation in its 2003 procurement. It awarded the \$63 million contract using an "other than competitive" procurement process. The Department notified Congress of its intent to follow this process pursuant to 41 U.S.C. Section 253(c)(7). The agency conducted market research and identified 18 prospective law firms with litigation and NRC experience that could be considered for the contract. The Department invited these firms, some of which represented utilities in the spent nuclear fuel litigation, and others which did not, to participate. The respondents were required to disclose any potential conflicts of interest. Department officials informed us that they required firms involved in the spent nuclear fuel litigation to provide written information and attend meetings relating exclusively to conflicts before determining that it would be permissible to consider such firms.

As part of the selection process, the Department considered firms with complex administrative litigation experience and NRC expertise. Since the NRC had not licensed a new reactor for over 30 years, the Department did not consider a firm's NRC licensing experience as a prerequisite for the contract – even though NRC experience was a criteria in the preceding (1999) and subsequent (2007) legal services contracts. Ultimately, the agency selected a law firm with extensive litigation experience, but one that did not have conflicts of interest related to the spent nuclear fuel litigation. During our review, Department officials indicated that they had considered the absence of such a conflict a key factor in their selection of the firm.

2007 Procurement

In 2007, the Department determined that, given the scope and magnitude of the legal work associated with the Yucca Mountain Project, it required the services of an additional law firm with recent NRC licensing experience to focus exclusively on its license application. Following the same process as in 2003, the Department used the informal, "other than competitive" procurement approach to evaluate different law firms for this contract. As an initial step in its procurement, the Department performed research and identified law firms with NRC expertise and recent experience with contested NRC proceedings, as well as litigation experience. According to Department officials, they could only identify three law firms with these qualifications. The Department held meetings with firms to explore in more detail, experience, expertise, workload capabilities, and conflict of interest concerns.

Ultimately, the Department hired Morgan Lewis, despite the firm's representation of utilities in the spent nuclear fuel litigation. Officials informed us that, for the 2007 procurement, the need for specialized legal services (a firm with NRC licensing expertise) and the resulting limited pool of available firms with such expertise led to the acceptance and mitigation of the conflict of interest related to representation of utilities in the spent nuclear fuel litigation. The HCA determined that Morgan Lewis proposed a "comprehensive mitigation plan that would mitigate any conflict to the maximum extent practicable." Further, "in an abundance of caution," officials granted a waiver under the applicable Federal Acquisition Regulations (FAR) provisions of any organizational conflict of interest relating to Morgan Lewis' representation of utilities in the spent nuclear fuel litigation. Officials also consented to representation under the District of Columbia Bar Rules of Professional Conduct.

Change in Approach and Basis for Contractor Selection

We attempted to obtain a better understanding of key decision points underlying the Department's 2007 procurement strategy and selection process. Specifically, we attempted to determine the Department's rationale for its: (1) change in position from 1999 to 2003 and 2007 relating to conflicts of interest for the spent nuclear fuel litigation; and, (2) selection of Morgan Lewis (based on a comparative analysis) for the 2007 legal services contract. With reference to both points, we found that the procurement file and related documentation were insufficient to provide an adequate explanation of the Department's rationale on these matters.

We could not find a document or record that explained the Department's change in position on conflicts of interest between 1999, 2003 and 2007, and none was provided to us. Specifically, as part of its 2007 procurement, the Department did not address the three critical factors (see page 2 of this report) that were raised in its 1999 decision to include the special organizational conflict of interest provision as part of its procurement strategy. Department officials told us that they did not develop a written record that documented this process, and they stated that there is no requirement to document the rationale for the different approaches. Officials stated that they thoroughly considered conflicts of interest issues in 2003 and again in 2007. Given the significant controversy

surrounding the project and allegations concerning conflicts of interest, in our judgment, agency officials should have fully documented the relevance, importance, and applicability of these factors as they related to the current procurement.

We also did not find a record of the Department's comparative analysis that formed the basis for the selection of Morgan Lewis. Such a record would have been helpful given that our independent review of publicly available information showed that one of the firms invited to meet with Department officials to discuss their capabilities and proposed approach to the Yucca Mountain licensing representation did not have a conflict of interest related to the spent nuclear fuel litigation. This was confusing since the waiver granted by the HCA stated that "any alternative law firm with NRC licensing expertise would have similar potential conflict issues." Officials stated that the firm in question was not considered an alternative law firm because it had significantly fewer attorneys with NRC licensing experience than the Department was seeking. The Department's selection of Morgan Lewis was presented in a "Chronology" to the file. Nonetheless, in our view, the absence of a documented comparative analysis that formed the basis of selection was problematic. The lack of documentation appeared to result from the Department's use of the "other than competitive" procurement process.

CONFLICT OF INTEREST REGULATIONS AND RULES

The Department's contractual awards for legal services are subject to the organizational conflict of interest provisions contained in the FAR, subpart 9.5, and in the Department of Energy's Acquisition Regulations (DEAR), subparts 909.5 and 952. According to the regulations, an organizational conflict of interest exists when a contractor's other activities or relationships render the contractor unable or potentially unable, to render impartial assistance, advice, or objectivity to the Government.

Procurement Regulations

The regulations require that the Department analyze a planned procurement to identify and evaluate potential conflicts of interest as early in the acquisition process as possible. Specifically, the DEAR requires an apparent successful bidder to provide: "a statement of any past (within the past 12 months), present, or currently planned financial, contractual, organization, or other interests relating to the performance of the statement of work."

If an apparent successful bidder discloses a potential conflict of interest, the contracting officer must seek to "avoid, neutralize, or mitigate significant potential conflicts before contract award." The contract must be awarded to the apparent successful offeror unless it is determined that a conflict of interest exists that cannot be avoided or mitigated. The regulations require that the contracting officer exercise "common sense, good judgment, and sound discretion" in deciding whether a significant potential conflict exists and, if so, develop an appropriate means for resolving the conflict. If the contracting officer finds that the contract award is in the best interest of the Government, notwithstanding the conflict of interest, the contracting officer can request a waiver of the conflict of interest to the agency head or designee.

Rules of Legal Ethics

The attorneys working under the Department's contract are also subject to Rule 1.7, District of Columbia Bar Rules of Professional Conduct, since they were licensed in the District of Columbia. This rule prohibits a lawyer from representing another client with respect to a matter if: (1) the client's position is adverse to another client's position in the same matter, even though that client is unrepresented or represented by a different lawyer on that matter; (2) such representation will be or may be adversely affected by representation of another client; or (3) representation of another client will be or may be adversely affected by such representation. Under the rules, this conflict can be waived after each potentially affected client is provided with full disclosure of the conflict and the potential adverse consequences of such representation and provides consent. However, a conflict cannot be waived if it involved representing adverse positions in the "same matter."

APPLICATION OF REQUIREMENTS

The 2007 procurement for legal services related to the Yucca Mountain license application appeared to follow the conflicts of interest requirements set forth in the FAR, DEAR, and District of Columbia Bar Rules of Professional Conduct.

In accordance with the FAR and DEAR, the Department required Morgan Lewis to make certain pre-award disclosures regarding potential conflicts of interest arising out of their work. Specifically, the instructions included identifying, among others, the following potential conflicts:

- Representing a plaintiff in the spent nuclear fuel litigation pending in the United States Court of Federal Claims;
- Representing any entity that could potentially benefit economically or otherwise as a result of licensing or failure to license a repository at Yucca Mountain; and,
- Representing any entity that could be potentially injured economically or otherwise as a result of licensing a repository at Yucca Mountain.

Morgan Lewis provided additional disclosures, prior to the award of the contract, some of which extended beyond the required 12-month period.

As part of the acquisition process, the contracting officer required Morgan Lewis to provide a plan to avoid or mitigate organizational conflicts of interest. The contracting officer determined that the plan was comprehensive and would "mitigate any conflict to the maximum extent practicable." Further, in accordance with the FAR, the contracting officer requested a waiver of the organizational conflict of interest related to the firm's representation of clients in the spent nuclear fuel litigation. According to the contracting officer, a strong plan of disclosure, informed consent, and a comprehensive mitigation plan provided adequate mitigation of any conflict arising out of the firm's representation of utilities in the spent nuclear fuel litigation.

Further, on September 26, 2007, "in an abundance of caution," the HCA granted the contracting officer's request for a waiver of any organizational conflict of interest relating to the firm's "representation of the identified entities in the [spent nuclear fuel] litigation and/or litigation unrelated to the Yucca Mountain repository wherein [the firm] represents entities in matters that are adverse to the Department." The HCA, in making his decision, stated that:

Due to the critical need for the legal services involving expertise in NRC licensing to assist the Department in the Yucca Mountain licensing proceeding, it is in the best interest of the United States to award this contract even if an organizational conflict of interest existed. Moreover, the Department determined that Morgan Lewis was the best choice to represent the Department in the Yucca Mountain licensing proceeding. Furthermore, any alternative law firm with NRC licensing expertise would have similar potential conflict issues, and Morgan Lewis has proposed a strong mitigation plan.

The Department also consented to Morgan Lewis' legal representation of the agency under the District of Columbia Rules of Professional Conduct. Regarding the matters that involved the spent nuclear fuel litigation, the Department granted a waiver based on its view that:

The overlap of subject matter (disposition of spent nuclear fuel) for the [spent nuclear fuel] litigation requires [Morgan Lewis] to undertake significant action to provide DOE with sufficient assurance that the conflict will not affect the quality of DOE's representation or the protection of DOE's interests. [Morgan Lewis] has agreed to undertake a comprehensive "Organizational Conflict of Interest Avoidance/Mitigation Plan" (mitigation plan) concerning the [spent nuclear fuel] litigation to ensure that the interests of DOE in each matter are protected.

The Department determined that if implemented as described, the plan would mitigate any adverse effect to the agency in either the spent nuclear fuel litigation or the license proceedings before the NRC.

IMPLEMENTATION OF MITIGATION PLAN

The Department incorporated Morgan Lewis' mitigation plan into the contract. Overall, the mitigation plan provided that the firm would "implement screening procedures to ensure personnel working on the [spent nuclear fuel] claims will be completely screened off from access to any information related to licensing of the repository, and vice versa." Specifically, the mitigation plan included three mechanisms related to screening. First, the plan stipulated that selected teams of lawyers and support staff would work on the Department's contract, and a separate group of personnel would work on the spent nuclear fuel litigation. Second, the plan required that the file rooms for the Department's contract would be physically separated from the firm's other work. Finally, the plan provided that separate "security groups" would be established within the firm's computer network that would restrict access to documents related to the Department's contract.

As part of our review, we performed a site visit to Morgan Lewis' Washington, D.C., office in January 2008. We interviewed key personnel and observed the firm's implementation of its mitigation plan in effect as of that date.

Personnel Screening

We observed Morgan Lewis' screening procedures between the personnel assigned to the Department's contract and personnel assigned to the spent nuclear fuel litigation. Overall, we noted that personnel working on the Department's contract were separated, both by organizational assignment and physical location, from the personnel working on the spent nuclear fuel litigation. We raised questions regarding the mitigation plan's screening of "lawyers and support staff." The firm's representatives acknowledged that administrative support staff had not been included in the screening and were, in some instances, shared among the segregated working groups. Subsequent to our site visit, the firm's representative informed us that the mitigation plan related to the separation of personnel was updated to include administrative staff.

Access to Documents

Further, during our site visit, we noted that the documents related to the Department's contract were stored in a separately designated and secured room. The documents were labeled:

Important Note: This file may not be viewed by [attorneys assigned to the spent nuclear fuel litigation] or any other members of the firm's professional or support staffs assigned to work on behalf of [the firm's spent nuclear fuel clients] in connection with claims against the United States Department of Energy involving the disposal of spent nuclear fuel....

Access to Electronic Documents

Finally, we observed Morgan Lewis' screening mechanism for access to electronic documents. Specifically, documents related to the Department's contract were withheld from the firm's "public" database and were placed in a "private" section of the database. As of December 2007, a separate "security group" was created within the firm's computer network that allowed access to documents related to the Department's contract only to specified personnel authorized to work on those respective matters. For demonstration purposes, a Morgan Lewis staff member who was not assigned to the Department's contract attempted to gain access to the files, and the system did not reveal any records related to the firm's work on the Department's contract.

WORK FOR THE NUCLEAR ENERGY INSTITUTE

The Nevada delegation also raised a concern that Morgan Lewis had a potential conflict of interest as a result of its work for the Nuclear Energy Institute (NEI). The NEI is a nuclear energy industry trade group, and its members include commercial utilities with

spent nuclear fuel destined for Yucca Mountain. The NEI, with member participation, also develops policy on key legislative and regulatory issues affecting the nuclear industry.

To address a specific concern regarding Morgan Lewis' lobbying activities for NEI, we reviewed the U.S. Senate Lobby Disclosure Act database and the U.S. House of Representatives Lobbying Disclosure Filing Search as of January 23, 2008. An examination of these sources indicated that Morgan Lewis terminated its registration as a lobbyist for the NEI on July 9, 2002.

Morgan Lewis disclosed to the Department that it had periodically advised the NEI on "matters involving the Nuclear Waste Policy Act, spent nuclear fuel, high-level waste, and other related matters." Nonetheless, the firm asserted that "such work over the twelve months [preceding the contract award] has not related factually, commercially or legally to the Yucca Mountain Repository licensing." The firm also reported in its disclosures that it was a member of the NEI.

To address possible conflicts of interest, the firm's pre-award disclosure and the subsequent contract stated that the firm "will not perform any work, including being a registered lobbyist, where such work for any organization or individual directly involves matters factually, commercially, or legally related to the Yucca Mountain Repository licensing."

We questioned responsible Department officials on this subject. Department officials informed us that prior to the award of the contract, they held follow-up discussions with Morgan Lewis to more fully develop the disclosures. As a result of these discussions, the firm modified its disclosures, and provided additional clarification of its work on behalf of NEI. Department officials informed us that, based on their discussions with Morgan Lewis, they did not view the firm's work for NEI as a conflict, and therefore did not seek a plan of mitigation or waiver.

However, the procurement file did not contain a "trail" of the Department's review of the disclosures. Such a document would have allowed us to determine if the Department adequately addressed whether the disclosed issues presented a conflict of interest and, if so, whether they had been effectively mitigated.

PRIOR WORK – SAFETY CONSCIOUS WORK ENVIRONMENT

Concerns related to Morgan Lewis' prior work for the Department in 2001 were also raised. The concerns were that the firm potentially:

- Looked past critical flaws in the Department's quality assurance program;
- Targeted a quality assurance official, who was subsequently dismissed; and,
- Was placed in a position of choosing between protecting itself, and ensuring that the Department's quality assurance deficiencies have been adequately addressed.

To address these issues, we:

- Compared Morgan Lewis' 2001 scope of work with the 2007 scope of work;
- Reviewed Morgan Lewis' 2001 report on the Safety Conscious Work Environment;
- Reviewed the U.S. Department of Labor's (Labor) decision on the termination of a quality assurance senior official;
- Reviewed the NRC's license application requirements for a quality assurance program; and,
- Reviewed recent reports on the Department's quality assurance program.

2001 Report – Safety Conscious Work Environment

Our review of the prior work showed that Morgan Lewis was critical of the safety conscious work environment in existence at Yucca Mountain at that time and its report included recommendations for improvement. According to the 2001 scope of work, the Department retained Morgan Lewis to, in part, assess and make recommendations regarding its contractor's safety conscious work environment. The firm used the NRC's policy statement *Freedom of Employees in the Nuclear Industry to Raise Concerns Without Fear of Retaliation*, May 14, 1996, and nuclear industry safety conscious work environment guidelines to perform its review. The NRC defined a safety conscious work environment as one in which employees feel free to raise safety concerns, both to the management and to the NRC, without fear of retaliation.

Morgan Lewis presented the results of its work in the document *Safety Conscious Work Environment Final Report*, dated August 28, 2001. According to the report, senior contractor management allowed an unhealthy safety conscious work environment within the quality assurance organization and did not initiate an integrated, broader effort to create a uniform set of expectations for the safety conscious work environment throughout the project. The report further disclosed that past attempts to enhance the work environment were ineffective and eroded employee confidence in management's ability to make meaningful changes necessary to create a safety conscious work environment consistent with NRC expectations. The report made a number of recommendations to assist management in undertaking the initiative and setting the tone for a safety conscious work environment.

Dismissal of A Quality Assurance Official

An analysis of Morgan Lewis' 2001 report and related documentation showed that the review addressed the role and activities of a quality assurance official working for a contractor on the Yucca Mountain Project. Specifically, the Department tasked Morgan Lewis to investigate certain allegations related to actions taken by a quality assurance official. In addition to its findings on the overall safety conscious work environment, Morgan Lewis found that this official had abused his authority in a number of respects.

According to the report, interviews with employees disclosed that the official had retaliated against an individual, and that this abuse contributed to the safety conscious work environment's problems. Following the report's release, the senior official was terminated.

Department of Labor Decision

The terminated employee protested the termination and appealed the decision to the Department of Labor. The Labor regional administrator was critical that the employer based the termination on the Morgan Lewis report and stated that the report had:

Insufficient verifiable and credible evidence in it to conclude that it is not more than a sophisticated recitation of anonymous charges designed to provide pretextual reasons to support an already decided upon course of action to terminate [the employee].

The regional administrator found that the termination violated the employee's protected activities under the Energy Reorganization Act. In addition, the regional administrator stated that the: (1) employer did not complete an independent onsite investigation, (2) employee was not provided a final copy of the report, or (3) employee was not provided an opportunity to rebut the charges or appeal the termination.

Status of Quality Assurance Program

During our review, officials noted that there had been significant evolution of the quality assurance program for the Yucca Mountain Project since 2001, and the current program had been reviewed by independent parties and was found to be generally competent. We reviewed the record of reports on the quality assurance program for Yucca Mountain. As far back as 2005, the Office of Inspector General reported on quality assurance challenges at the project (see Appendix 2). However, according to the Government Accountability Office, as of 2007, the Department made progress in implementing the quality assurance recommendations made in its March 2006 report. The report cautioned that some of the recommendations would take several years to resolve. Further, an October 2007 review performed by a contractor noted that the Department's quality assurance program saw significant improvements and successes in correcting historical quality-related problems. The results of the review deemed the existing quality assurance program as being implemented consistent with standard nuclear industry practices.

Consideration of 2001 Work

Morgan Lewis included its 2001 work in its pre-award disclosures for the 2007 contract. We interviewed Department officials regarding the firm's 2001 work, and officials stated that the quality of the firm's work was acceptable. According to Department officials, Morgan Lewis will not be placed in a position of defending or protecting its prior work as part of its current contract requirements.

APPENDIX 1

OBJECTIVE, SCOPE, AND METHODOLOGY

OBJECTIVE

The objective of our review was to examine the Department of Energy's (Department) award and administration of its September 2007 contract for legal services with Morgan, Lewis, and Bockius LLP (Morgan Lewis).

SCOPE

The review was performed from December 2007 through March 2008 at the Department's Headquarters in Washington, D.C. In particular, the review examined the procurement of the contract and the internal controls established by the Department and Morgan Lewis to mitigate conflicts of interest.

METHODOLOGY

To assess the Department's award and administration of its September 2007 contract for legal services, we:

- Compared the Department's procurement strategy for its 1999 and 2003 legal services contracts with the procurement strategy for the 2007 contract;
- Determined the applicable laws and regulations related to organizational conflicts of interest;
- Reviewed the procurement files for the 2007 contract;
- Reviewed Morgan Lewis' plan for mitigating potential conflicts of interest;
- Performed a site visit to Morgan Lewis' Washington, D.C., office and interviewed key personnel and observed aspects of the implementation of the mitigation plan as of January 2008;
- Analyzed invoices of time charges submitted to the Department as of November 26, 2007;
- Reviewed Morgan Lewis' disclosures related to its work for the Nuclear Energy Institute;
- Searched the U.S. Senate Lobby Disclosure Act database and the United States House of Representatives Lobbying Disclosure Filing Search and determined Morgan Lewis' status as a lobbyist for the Nuclear Energy Institute;

- Reviewed Morgan Lewis' 2001 work for the Department and compared it to the 2007 scope of work; and,
- Interviewed Department officials from the Office of General Counsel, Office of Procurement and Assistance Management, and the Office of Civilian Radioactive Waste Management.

APPENDIX 2

PRIOR REPORTS

Office of Inspector General

- *Review of Alleged Conflicts of Interest Involving a Legal Services Contract for the Yucca Mountain Project* (DOE/IG-I01IG001, November 2001). The review found that a legal services contractor contemporaneously served as a registered lobbyist for the Nuclear Energy Institute while under contract for legal services for the Yucca Mountain Project and failed to disclose these lobbying activities to the Department of Energy (Department). The Office of Inspector General recommended an evaluation and determination as to whether the legal services contractor violated the terms of its contract or otherwise acted in a manner not in keeping with its professional ethical standards to the Department.
- *Quality Assurance Weaknesses in the Review of Yucca Mountain Electronic Mail for Relevancy to the Licensing Process* (DOE/IG-0708, November 2005). The review identified potential quality assurance issues that had not been entered into the Corrective Action Program. The Nuclear Regulatory Commission (NRC) process for granting a license for the repository required that the Department publicly disclose on a website all documents, including e-mails, relevant to the process. The review found that the process for examining the archived e-mails did not fully assure that quality assurance issues were promptly identified, investigated, reported and resolved. The Office of Inspector General recommended that the Department expand its quality assurance-related search effort to include a more comprehensive review of the archived e-mails.
- *The Office of Civilian Radioactive Waste Management's Corrective Action Program* (DOE/IG-0736, August 2006). The Corrective Action Program was not effectively managing and resolving conditions adverse to quality at the Yucca Mountain Project. Specifically, over 100 potential conditions were not being managed in the Corrective Action Program system, but should have been. Also, more than half of the most significant planned corrective actions had not been implemented in a timely manner. Finally, the report noted that conditions continued to recur even after management reported that appropriate corrective actions had been taken. Corrective Action Program officials did not always support employee participation in the process; make needed improvements to the system and procedures; review the effectiveness of corrective actions; and, utilize the system's trend analysis capabilities to identify repeat occurrences and generic issues. The Office of Inspector General made several recommendations to further assist management in ensuring that the Corrective Action Program meets its goals.
- *Investigation of Allegations Involving False Statements and False Claims at the Yucca Mountain Project* (DOE/IG Case No. I05LV002, April 25, 2006). The Office of Inspector General initiated a criminal investigation focusing on potential falsification of research data pertaining to computer modeling of "net water

infiltration" of the Yucca Mountain repository and false representation of compliance with Yucca Mountain's Quality Assurance requirements. The United States Attorney's office declined to pursue prosecution. Nonetheless, the actions of those involved – which have been described by observers as irresponsible and reckless – have had the effect of undermining public confidence in the quality of the science of the Yucca Mountain Project. Department of Energy program officials informed us that the Department initiated steps to remediate or replace certain work of the Geological Survey. This will be a costly, time-consuming process with significant impact on the Yucca Mountain Project. Yet, we believe that it is an unavoidable step if quality assurance concerns emanating from the e-mail episode are to be satisfactorily addressed.

Government Accountability Office

- *Yucca Mountain – DOE Has Improved Its Quality Assurance Program, but Whether Its Application for a NRC License Will Be High Quality is Unclear* (August 2007, GAO-07-1010). The Government Accountability Office (GAO) reported that the Department set the June 30, 2008 date for filing a repository license application with the NRC. However, it is unclear as to whether DOE's license application would be of sufficient quality to enable NRC to conduct a timely review. The GAO report also noted that the Department had made progress in resolving the quality assurance recommendations and challenges identified in its March 2006 report, including taking several important actions to change the organizational culture. No recommendations were made in this report.
- *Yucca Mountain – Quality Assurance at DOE's Planned Nuclear Waste Repository Needs Increased Management Attention* (March 2006, GAO-06-313). The GAO reported that the Department continued to face substantial quality assurance problems and other challenges that could further delay the license application process. In the report, GAO cited ineffective management tools in addressing these challenges. GAO recommended that the Department: reassess the coverage of their quality assurance management tools to ensure effective monitoring of issues, incorporate project wide trend analysis, establish quality guidelines for trend evaluations, develop consistent performance indicators, and, focus on the significance of monitored conditions.
- *Yucca Mountain – Persistent Quality Assurance Problems Could Delay Repository Licensing and Operation* (April 2004, GAO-04-460). GAO identified lingering quality problems with data, models, and software and continuing management weaknesses. The Department developed a corrective action plan in 2002 to fix recurring problems with the data; however, GAO found that the plan lacked objective measurements and time frames for determining success. GAO recommended the Department revise the performance goals in the 2002 action plan to include quantifiable measures of the performance expected and time frames for achieving and maintaining this expected level of performance. Further, GAO recommended that the Department close the 2002 plan once sufficient evidence shows that the recurring quality assurance problems and management weaknesses that are causing them have been successfully corrected.

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