

**UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION**

BEFORE THE COMMISSION

In the Matter of)	Docket No. PAPO-001
)	
U.S. DEPARTMENT OF ENERGY)	ASLBP No. 08-861-01-PAPO-BD01
)	
(High-Level Waste Repository: Pre-Application Matters, Advisory PAPO Board))	April 14, 2008

**U.S. DEPARTMENT OF ENERGY’S ANSWER IN OPPOSITION
TO THE STATE OF NEVADA’S MOTION TO DISQUALIFY
THE LAW FIRM OF MORGAN, LEWIS & BOCKIUS LLP**

I. INTRODUCTION

Pursuant to 10 C.F.R. § 2.323(c), the Department of Energy (“the Department” or “DOE”) submits this answer in opposition to the Motion of the State of Nevada to Disqualify the Law Firm of Morgan, Lewis & Bockius LLP Because of Conflicts of Interest (“Motion”). On April 3, 2008, the State of Nevada (“Nevada”) filed its Motion in response to the filing by Morgan, Lewis & Bockius LLP (“Morgan Lewis”) of notices of appearances before the Advisory Atomic Safety and Licensing Board that is considering pre-application matters in Docket No. PAPO-0001 on behalf of DOE. The Motion should be denied because:

- (a) Nevada does not have standing to seek to have the Nuclear Regulatory Commission (“NRC” or “the Commission”) disqualify DOE’s choice of counsel;
- (b) The NRC is the wrong forum for Nevada to raise challenges to either DOE’s procurement decision or its choice of counsel;
- (c) DOE and Morgan Lewis complied with all relevant procurement regulations and rules of professional conduct; and

(d) Nevada has not met its burden of establishing that disqualification of DOE's counsel, which is a discretionary remedy, is appropriate under the circumstances.

II. PROCEDURAL BACKGROUND

The Department is required by the Nuclear Waste Policy Act of 1982 ("NWPA"), 42 U.S.C. § 10101, *et seq.*, to prepare and submit to the NRC a license application seeking authorization to construct a repository for spent nuclear fuel and high level radioactive waste at Yucca Mountain.¹ During 2007, the Department determined that it had a need for additional "specialized legal services to aid in these unique, complex, and important licensing proceedings."² While the Department has retained one outside law firm to assist with documentary and other licensing matters, the Department determined that given the scope and magnitude of the proceeding, it would need to hire one or more additional firm(s) with appropriate experience to assist with the proceeding. (Ex. 1.)

In April 2007, the Secretary of Energy submitted to the Congress a Determination and Findings pursuant to 41 U.S.C. § 253(c)(7). (*See* Ex. 1.) The Secretary found that it was "necessary in the public interest to use other than competitive procedures, as defined in the Office of Federal Procurement Policy Act, in obtaining the legal services necessary to support activities associated with the Department's program for development and operation of a repository at Yucca Mountain and the licensing proceedings before the NRC." (Ex. 1, Determination and Findings at 3.) The Secretary notified Congress of the Department's intent to do so. (*See* Ex. 1.)

¹ *See* Section 114 of the NWPA, 42 U.S.C. §§ 10101, 10134; *see also* H.J. Res. 87, 107th Cong. 2d Sess. (2002) (Pub. L. No. 107-200).

² *See* Notification Letters and Secretarial Determination and Findings dated April 3, 2007, attached hereto as Ex. 1 (Letters to Hon. Pelosi and Hon. Cheney at 1).

Ultimately, on September 27, 2007, DOE awarded Morgan Lewis that contract to represent the Department in the preparation and defense of an application for a repository at Yucca Mountain. Before DOE awarded the contract to Morgan Lewis, however, Morgan Lewis made pre-award disclosures regarding organizational conflicts of interest and submitted a plan to DOE that would mitigate or avoid such conflicts of interest. In addition, DOE issued waivers of conflicts under the Federal Acquisition Regulation (“FAR”), Department of Energy Acquisition Regulation (“DEAR”), and the D.C. Rules of Professional Conduct (“D.C. Rules”).³

In December 2007, Nevada’s Congressional delegation requested that the DOE Inspector General (“IG”) review DOE’s retention of Morgan Lewis. (*See* December 5, 2007 letter from Senator Reid, et al. to DOE IG, attached hereto as Ex. 8.)⁴ On April 3, 2007, the IG released a report on his investigation of the contract award to Morgan Lewis. (*See* April 2, 2008 DOE IG Special Report on Review of Alleged Conflicts of Interest Involving a Legal Services Contractor for the Yucca Mountain Project License Application, attached as Ex. A to Nevada’s Motion and hereinafter referred to as the “IG Report”). The IG concluded that DOE followed “the Federal Acquisition Regulation[], Department of Energy Acquisition Regulation[], and District of

³ *See* May 8, 2007 Letter from DOE to Morgan Lewis (attached hereto as Ex. 2); September 24, 2007 Letter from Morgan Lewis to DOE making pre-award disclosures regarding organizational conflicts of interest and providing plan to mitigate or avoid such conflicts of interest (attached as Ex. B to Nevada’s Motion); September 25, 2007 Chronology of Selection of a Law Firm for Legal Services for Yucca Mountain Licensing (attached hereto as Ex. 3); September 25, 2007 Consent to Legal Representation (attached hereto as Ex. 4); Determination and Request for Waiver (attached hereto as Ex. 5); September 26, 2007 Waiver Under FAR 9.503 (attached as Ex. C to Nevada’s Motion); and September 27, 2007 Contract (attached hereto as Ex. 6).

⁴ Nevada states that the impetus for its Motion is the March 24, 2008 notice of appearance filed by Morgan Lewis (Motion at 1 and 2) and thus implicitly suggests that its Motion is timely under NRC Rules. *See* 10 C.F.R. § 2.323(a) (requiring a motion to be “made no later than ten (10) days after the occurrence or circumstance from which the motion arises”). But Nevada and its counsel, as indicated by their public comments, both knew of the contract award and the essential grounds for its motion by, at the latest, November 7, 2007. (*See* November 7, 2007 Review Journal attached hereto as Ex. 7.) Moreover, during the meet and confer with Morgan Lewis on April 1, 2008, Nevada counsel stated that they were aware that the DOE IG was conducting a review in response to the Nevada Congressional delegation’s request and that they were hoping that the IG report would be forthcoming. Accordingly, there is ample evidence that Nevada’s Motion is out of time under 10 C.F.R. § 2.232(a) and duplicates the conflict challenges raised with the DOE IG.

Columbia Bar Rules of Professional Conduct” and that “the firm had implemented the mitigation plan in accordance with the contract requirements.” (See IG Report, Memorandum for the Secretary at 2.)

In its Motion, Nevada seeks the NRC’s review of: (a) DOE’s compliance with the federal procurement process;⁵ and (b) DOE’s substantive determination to retain Morgan Lewis and waive any conflict that exists with respect to Morgan Lewis’s representation of utilities in litigation against DOE (Motion at 3).

III. ARGUMENT

Nevada does not identify a basis in the NRC regulations for its Motion. Nor does Nevada cite to any authority under which NRC can review DOE’s procurement decision or choice of counsel. NRC has no such authority under the facts alleged. NRC regulations do specify limited reasons for the Commission to order a “reprimand, censure or suspension from participation in the particular proceedings”—reasons that are not remotely alleged here. See 10 C.F.R. § 2.314(c)(1) (discipline authorized if a party refuses to comply with NRC directions or if a party is disorderly, disruptive, or engages in contemptuous conduct). NRC’s authority also extends to ensuring that parties and their representatives conduct themselves with “honor, dignity, and decorum as they should before a court of law.”⁶ Again, Nevada is not alleging any transgression in this respect. As demonstrated below, even assuming that Nevada has standing to raise its Motion and NRC has authority to entertain the requested relief—which DOE does not accept—DOE followed all applicable regulatory and ethical requirements in its retention of Morgan Lewis, properly concluded that the disclosed conflicts were waivable, exercised its discretion to

⁵ See Motion at 3 (arguing that “DOE has unlawfully failed to explain its departure from past determinations it made that Morgan Lewis was irreconcilably conflicted out of representing DOE in connection with Yucca Mountain licensing”); Motion at 6 (arguing that DOE’s “agency action is arbitrary and capricious under well-established administrative law”).

⁶ 10 C.F.R. § 2.314(a).

determine that the best interests of the Government would be served by a waiver, and then properly waived the conflicts.

A. Nevada Does Not Have Standing To Seek To Have The NRC Disqualify DOE's Counsel Of Choice.

There is only one action that Nevada challenges in its Motion and that is DOE's decision to retain Morgan Lewis. Nevada, however, is not a law firm and was neither an actual bidder nor prospective bidder for the legal services contract it seeks NRC to review. Nevada also is not a client of Morgan Lewis or even a former client of Morgan Lewis, which potentially could give it standing to raise a conflict by the Firm. Nevada is a prospective intervenor in a future licensing proceeding who intends to oppose the license and is seeking to disqualify counsel chosen by the license applicant.

One of the very cases that Nevada cites—*LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Abraham*, 347 F.3d 315 (D.C. Cir. 2003)—demonstrates why Nevada, not having been a bidder or prospective bidder, has no standing to bring this challenge. As the *LeBoeuf* case illustrates, Nevada is no stranger to efforts to disqualify DOE's chosen law firm for purposes of NRC representation. Nevada attempted to raise many of the same conflicts issues in the *LeBoeuf* federal district court litigation by seeking to intervene there and the court concluded that Nevada did *not* have standing to intervene. *LeBoeuf, Lamb, Greene & MacRae v. Abraham, L.L.P.*, 205 F.R.D. 13, 20 (D.D.C. 2001) (denying Nevada's motion to intervene because it was not an actual or prospective bidder or offeror). In denying Nevada's intervention motion in the *LeBoeuf* case, the district court questioned Nevada's interest in seeking to participate in a Tucker Act and Administrative Procedure Act challenge, given that Nevada did not claim that DOE's action would obstruct Nevada's right to participate in the licensing proceeding. *See LeBoeuf*, 205 F.R.D. at 20.

The settled law is that in order to be able to protest a federal procurement decision, the protestor must be an actual or prospective offerer. *See Rex Serv. Corp. v. United States*, 448 F.3d 1305, 1307 (Fed. Cir. 2006). Again, in *LeBoeuf*, the plaintiff was an unsuccessful law firm that failed to win a contract with DOE. *LeBoeuf*, 347 F.3d at 318. As the unsuccessful offeror, the plaintiff filed a bid protest with what was then the General Accounting Office (“GAO”),⁷ seeking review of DOE’s award. *See id.* at 318-19. The protest was denied. *Id.* Thereafter, the plaintiff law firm filed suit in the U.S. District Court for the District of Columbia asserting claims against DOE under the Tucker Act, 28 U.S.C. § 1491(b), and the Administrative Procedure Act, 5 U.S.C. §§ 702, 706. *See LeBoeuf*, 205 F.R.D. at 20. Unlike the plaintiff in *LeBoeuf*, Nevada is not an unsuccessful offeror in the procurement decision at issue here and would not be able to seek either administrative or federal court review of the decision.⁸ Certainly, Nevada lacks standing to challenge before the NRC a DOE procurement issue that it lacks standing to challenge before any of the forums that do have jurisdiction to entertain federal procurement protests, including the GAO and the Court of Federal Claims.

Not only does Nevada assert no interest as an actual or prospective offerer and fail to claim that Morgan Lewis’s representation of DOE will impede its ability to participate in the licensing proceeding, Nevada also claims no interest in the procurement decision as a client or a former client of Morgan Lewis. This makes Nevada’s conflicts arguments suspect.

“Disqualification motions ‘have become increasingly popular tools of the litigation process, being used . . . for purely strategic purposes.’” *Laker Airways Ltd. v. Pan Am Airways*, 103 F.R.D. 22, 28 (D.D.C. 1984) (quoting *Rice v. Baron*, 456 F. Supp. 1361, 1368 (S.D.N.Y. 1978)).

⁷ Effective July 7, 2004, the GAO’s legal name became the Government Accountability Office.

⁸ Indeed, as noted above, when Nevada attempted to intervene in the *LeBoeuf* case, the district court found Nevada had no standing to do so. *LeBoeuf*, 205 F.R.D. at 20.

So much so that even when a current or former client makes a disqualification challenge, courts now approach such motions “with cautious scrutiny.” *Id.* But when brought by someone who is not a current or former client, and thus not a party to the conflict, these motions are even more dubious and accordingly are examined with “[a] degree of skepticism.” *Chavez v. New Mexico*, 397 F.3d 826, 840 (10th Cir. 2005) (reviewing with skepticism plaintiffs’ conflict of interest challenge to defense counsel’s representation of multiple defendants where plaintiffs were not his clients or former clients).⁹ Thus, Nevada bears an extremely high burden of proof for disqualification, as articulated by the Court of Appeals in *Koller v. Richardson-Merrell, Inc.*, 737 F.2d 1038, 1056 (D.C. Cir.1984), *vacated on other grounds*, 472 U.S. 424 (1985). The Supreme Court itself has expressed “concern about the tactical use of disqualification motions to harass opposing counsel.” *Richardson-Merrell v. Koller*, 472 U.S. 424, 436 (1985) (internal quotations and citations omitted). Nevada’s history of seeking disqualification of NRC licensing counsel that DOE engaged for Yucca Mountain work in 1999 strongly suggests that Nevada’s Motion here is tactical, calculated to distract and delay review of the licensing application on the merits. *See LeBoeuf*, 205 F.R.D. at 20. Indeed, Nevada’s Motion seems to be intended to impair DOE’s ability to participate effectively in the pending licensing proceedings.

In summary, because Nevada is not an actual or prospective offeror, claims no injury to its ability to participate in the proceeding due to Morgan Lewis’s representation of DOE, and is not a current or former client of Morgan Lewis, Nevada has no standing to challenge DOE’s procurement decision before DOE let alone here before the NRC.

⁹ *See also Cauderlier & Assoc., Inc. v. Zambrana*, No. 05-1653, 2006 WL 3445493, at *2 (D.D.C. Oct. 6, 2006) (defendant who “is not now nor has ever been [a] client” has an “insuperable hurdle” to clear in its motion to disqualify).

B. The NRC Is The Wrong Forum For Nevada’s Challenges To Either DOE’s Procurement Decision Or DOE’s Choice Of Counsel.

There is another fundamental defect in Nevada’s Motion: the NRC is the wrong forum for its challenge. Assuming Nevada has standing, to the extent that Nevada is challenging DOE’s procurement decision, the NRC is not the proper agency to pass judgment on DOE’s and Morgan Lewis’s compliance with federal procurement law and regulations.¹⁰ Rather, questions about DOE’s compliance with federal procurement law and regulations should be addressed through the federal procurement process, which allows for protests to the agency, the GAO or the Court of Federal Claims. 28 U.S.C. § 1491(a)(1) (jurisdiction of Court of Federal Claims); 31 U.S.C. § 3552 (jurisdiction of GAO); 48 C.F.R. Subpart 33.1 (protests to agency and GAO).¹¹ Nevada is well-aware of this protest process, having sought intervention unsuccessfully in district court litigation in the *LeBoeuf* case in an attempt to raise an earlier disqualification challenge against DOE counsel.¹²

¹⁰ The Commission itself has recognized that “[its] adjudicatory process was not the proper forum for investigating alleged violations that are primarily the responsibility of other Federal, state, or local agencies.” *PPL Susquehanna (Susquehanna Steam Electric Station, Units 1 & 2)*, CLI-07-25, __ NRC __ (2007). See also *Georgia Institute of Technology* (Georgia Tech Research Reactor), LBP-95-6, 41 NRC 281, 305 (1995) (denying admission of a contention alleging that the state environmental monitoring agency, which was also a customer of the reactor operator, had a conflict of interest that prevented effective monitoring, because the contention alleged “performance deficiencies by an agency of the State of Georgia that are beyond our jurisdiction to consider”). For example, the NRC has declined to “monitor FEMA’s work for compliance with that agency’s own regulations.” See *Philadelphia Elec. Co.* (Limerick Generating Station, Units 1 & 2), ALAB-836, 23 NRC 479, 499 (1986).

¹¹ Even if Nevada had standing before DOE (which it does not), it would be entitled to only a limited review of the legal counsel selection decision, not including a comparative assessment of proposals submitted. The DOE Secretary used what is commonly referred to as the public interest exception (41 U.S.C. § 253(c)(7)) to authorize an informal process to evaluate the law firms that submitted proposals. (Ex. 1.) Under this public interest exception, courts have found that the review of an agency source selection decision is much circumscribed. See *Varicon Int’l v. Office of Personnel Management*, 934 F. Supp. 440, 444 (D.D.C. 1996) (language of section 253(c)(7) “strongly suggests” the contracting decision is “committed to agency discretion by law” and thus not subject to review under the Administrative Procedure Act); see also *Spherix, Inc. v. United States*, 58 Fed.Cl. 514, 517-18 (2003) (where section 253(c)(7) is found to be properly invoked, there is no further review of the procurement decision).

¹² As a result of an amendment to the Tucker Act, federal district courts no longer have jurisdiction over bid protests, as they did at the time of *LeBoeuf*. See *Public Warehousing Company K.S.C. v. Defense Supply Center Philadelphia*, 489 F. Supp. 2d 30, 35-37 (D.D.C. 2007).

To the extent that Nevada challenges DOE's application of Rules 1.7(b) and (c) of the D.C. Rules of Professional Conduct or some duty under the NWPA, the NRC is still not the proper forum. As indicated above, under NRC's regulatory scheme, the Commission has limited grounds for suspending counsel. *See* 10 C.F.R. § 2.314(c)(1) (failure to comply with NRC directions or if a party is disorderly, disruptive, or engages in contemptuous conduct). Even if the NRC's discretion is viewed most broadly,¹³ its determination would be limited to whether an unwaived conflict existed and warranted disqualification.¹⁴ Here, there is no factual question that DOE, through counsel and the contracting officer, granted conflict waivers. (*See* Ex. 4; Ex. C to Nevada's Motion.) The question of whether the waivers were properly obtained requires review of DOE's exercise of discretion to waive a conflict. That question of another agency's discretion is not one that falls within the NRC's regulatory or general statutory authority to regulate attorney conduct.

C. DOE And Morgan Lewis Complied With All Relevant Procurement Regulations And Ethics Rules.

In examining the relevant regulations and rules of professional conduct and in applying those provisions to the very factual circumstances surrounding the Department's award to Morgan Lewis that Nevada attempts to challenge through its Motion, the IG concluded that:

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

¹³ Although *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-332, 3 NRC 785 (1976), suggested that there is implied NRC authority under general statutory powers to review conflict issues as a basis for a motion to disqualify counsel, the NRC regulations are now much more restrictive than in 1976. *See* 10 C.F.R. § 2.314(c)(1).

¹⁴ *See Cauderlier*, 2006 WL 3445493, at *2 (holding that because conflict waivers were executed, no basis for disqualification existed).

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 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 Regulation[], Department of Energy Acquisition Regulation[], and District of Columbia Bar Rules of Professional Conduct. We also found that the firm had implemented the mitigation plan in accordance with contract requirements.

(See IG Report, Memorandum for the Secretary at 1) (emphasis added). Nevada ignores this dispositive, unequivocal conclusion.

1. The relevant FAR and DEAR provisions permit waiver of organizational conflicts of interest and as the IG concluded, DOE provided a properly executed waiver under those provisions.

The FAR and DOE’s supplement to the FAR, the DEAR, specifically contemplate that conflicts of interest (“Organization Conflicts of Interest” or “OCIs”) might arise in contracting. See FAR 9.5 & DEAR 909.5.¹⁵ The FAR and DEAR provide that the contracting officer is to identify and evaluate any such OCIs. FAR 9.504(a); DEAR 909.504(a). The FAR and the DEAR also specifically recognize that it may not be possible for an Agency to mitigate or avoid these conflicts and yet circumstances may justify waiver of the conflicts. See FAR 9.504(d); see also DEAR 909.504(e) (where conflicts cannot be avoided or mitigated, the contracting officer may “find[] that it is in the best interest of the United States to award the contract notwithstanding a conflict of interest”). Thus, the contracting officer may determine that a waiver of the conflict is justified and submit a “request for waiver” in accordance with 48 C.F.R. § 9.503. The waiver request “must be in writing, shall set forth the extent of the conflict, and

¹⁵ Organizational Conflicts of Interests include not only legal conflicts, but financial and other forms of conflict. See DEAR 952.209-72(a).

requires approval by the agency head or a designee.” FAR 9.503. An agency head or designee may grant the waiver by determining that application of the OCI rules “would not be in the Government’s interest.” FAR 9.503; *see also* DEAR 909.503.

The record reflects that DOE complied with these regulations in all respects. First, as part of the procurement process, and in accordance with FAR 9.504(a) and DEAR 909.504(a), the Department required prospective firms to identify “[a]ny potential conflicts of interest or appearances of a conflict of interest that the firm or any of its professionals would have with working under contract to the Department of Energy.” (*See* Ex. 2 at 2, Solicitation Letter to Morgan Lewis.) Second, the Department held extensive meetings, “lasting several hours” to “explore in more detail [each] firm’s experience, expertise, workload capabilities and any conflict of interest concerns.” (Ex. 3 at 2, Chronology.)

Third, when DOE determined that it should hire Morgan Lewis, it took steps in compliance with the FAR and DEAR to address the fact that Morgan Lewis’s participation in the “Standard Contract litigation” presented a possible OCI under the FAR and DEAR. (*See* Ex. 5, Determination and Request for Waiver.) After considering the OCI, however, the contracting officer determined that the conflict could be mitigated through Morgan Lewis’s proposed mitigation plan, as provided for in FAR 9.504(a)(2).¹⁶ This conclusion was documented in the Determination and Request for Waiver prepared by the contracting officer. (*Id.*; *see also* Ex. 6, Contract, at Attachment A.) The contracting officer also decided, “in an abundance of caution,” to request a waiver under FAR 9.504(e) of any conflict created by Morgan Lewis’s involvement in the Standard Contract litigation. (*See* Ex. 5.)

¹⁶ A comprehensive mitigation plan has been adopted. (*See* Ex. 6, Contract at Attachment A.) The IG reviewed this plan, conducted an on-site visit to Morgan Lewis, and determined that Morgan Lewis “had implemented the mitigation plan in accordance with the contract requirements.” (*See* IG Report, Memorandum for the Secretary at 2; *see also* IG Report at 7-8.)

Fourth, following FAR 9.504, the contracting officer submitted a request in writing for the Department to waive the conflict of interest. (Ex. 5.) As required by FAR 9.503, the contracting officer set forth the extent of the conflict and his conclusion that

[d]ue to the critical need for 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 OCI existed. The Department has determined that [Morgan Lewis] is the best choice to represent the Department in the Yucca Mountain licensing proceeding and that these services are critical.

(Ex. 5 at 2.) Finally, this request for a waiver was approved in writing by the Head of Contracting Activity, as provided by FAR 9.503. (See Ex. C to Nevada’s Motion.) Thus, at every step of the procurement process, DOE adhered to the FAR and DEAR regulations regarding organizational conflicts of interest.

2. The Inspector General confirmed that DOE properly followed the relevant procurement regulations and rules of professional responsibility.

Nevada’s collateral challenge to DOE’s procurement decision has a further fundamental flaw: DOE’s action was in accordance with all applicable rules. Rather than accepting that the IG’s investigation and report foreclosed its Motion, Nevada presses two irrelevant challenges to DOE’s award of the contract to Morgan Lewis. Neither has any merit.

First, Nevada seeks disqualification because the Department did not take the same approach with the 2007 procurement as it did in connection with a prior procurement of legal services for the Yucca Mountain Project in 1999. Although Nevada claims that the 2007 decision was a “sudden new determination,” this ignores the procurement process for a similar legal-services contract in 2003. (Motion at 6.) In connection with the 1999 procurement, DOE did decline to consider firms with representations adverse to DOE in the Standard Contract litigation. But the Department’s 2003 procurement demonstrates that by then, the Department

had reevaluated its earlier position and considered such firms. (See IG Report at 1.) Put in proper context, the 2007 decision is not a “sudden” change in the Department’s approach to obtain legal services “to aid in these unique, complex, and important licensing proceedings.” That the Department’s view of conflicts evolved over time is consistent with the fact that the both the Department’s needs for specialized legal services in the Yucca Mountain proceedings and the Standard Contract litigation also have evolved from 1999 to 2007.

Perhaps more to the point, the entire premise of Nevada’s argument challenging DOE’s change from its 1999 approach is flawed. As discussed in the IG Report (see IG Report at 4), DOE determined that for the 2007 procurement the need for specialized legal services and the resulting limited pool of available firms with such expertise justified the acceptance and mitigation of a specific conflict of interest that the agency had defined as unacceptable at the time of the 1999 procurement.

This type of reconsideration is entirely appropriate and not unusual in government procurements. The GAO repeatedly has held that each procurement is a separate transaction that stands on its own, and that an agency’s actions in one procurement do not affect the propriety of its actions in another. See, e.g., *Alfa Consult S.A.*, B-298164.2, 2006 CPD ¶ 127 at 4 (Aug. 3, 2006) (agency not required to implement same type of corrective actions under two procurements even though evaluation schemes of two procurements were virtually identical); *Gemmo Impianti SpA*, B-290427.2, 2003 CPD ¶ 59 at 8 (March 12, 2003) (agency reasonably found offeror’s quality control plan acceptable even though it would have been found to impair operational autonomy in earlier contract); *Coast Waste Management*, B-251167.3, 93-1 CPD ¶ 460 at 4 (June 10, 1993) (fact that agency in an earlier procurement – correctly or incorrectly – had not required Certificate of Procurement Integrity did not prevent it from requiring the

certificate in subject procurement). DOE further explained to the IG that there is no rule or requirement that DOE justify the difference in procurement approaches. The IG cited no statute, regulation or other authority to contradict DOE's view. Likewise, Nevada cites no statute or regulation demonstrating such an obligation. Instead, it relies on two cases, *Southwestern Elec. Power Co. v. FERC*, 810 F.2d 289, 291 (D.C. Cir. 1987), and *Greyhound Corp. v. ICC*, 551 F.2d 414, 416 (D.C. Cir. 1977), that do not involve procurement decisions and therefore are irrelevant.

Second, Nevada attempts to make the lack of documentation that is not required by law a basis for finding the procurement improper. When a procurement proceeds under 41 U.S.C. § 253(c)(7), there is no requirement that an agency prepare any particular documentation, or any documentation at all. Not only is there no requirement that the Department document, in a written comparative analysis, its evaluation of the relative merits of the firms considered, the Secretary specifically stated that DOE would need to focus on "intangible qualities," which in turn was a fundamental element of the Secretary's Determination and Findings.¹⁷ The IG was careful, however, not to impose its preferences for more documentation on its assessment of the propriety of the procurement and DOE's compliance with applicable regulations and rules of

¹⁷ Specifically, the Secretary described why a formal procurement process would be ill-suited for a legal-services contract of the nature that DOE sought:

As a general matter, businesses do not typically use any process remotely resembling the government's formal competitive procedures to retain outside legal services. Instead, while they generally consider several options, they typically view a less formal process as the best mechanism for selecting a firm in which they are prepared to place the kind of confidence and trust necessary for a successful counseling relationship. This kind of informal evaluation makes particular sense in this case. The qualifications and professional characteristics that the Department seeks in the firm(s) that it will hire to assist it with the Yucca Mountain effort- particularly the intangible qualities required to recognize and understand the nature and significance of various public interest considerations – cannot readily be reduced to specific evaluation criteria that are essential elements of the government's more formalized competitive acquisition process. Yet this kind of specificity would be necessary in a formal competition so that offerors could respond to the requirement. This exercise of developing and relying on formal evaluation criteria would not only artificially constrain rather than assist the Department's ability to evaluate potential firms, it would also artificially constrain the firms' ability to communicate their qualifications in a way that would be most informative to the Department.

(Ex. 1).

professional conduct. The IG did not reach the conclusion that the procurement was improper and neither should the Commission.

3. Morgan Lewis Does Not Have A Conflict That “Is Not Legally Waivable.”

Nevada asserts that Morgan Lewis has a conflict of interest that “is not legally waivable” (Motion at 3), because Morgan Lewis represents nuclear utility clients in litigation adverse to the U.S. Government under the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Radioactive Waste.

In presenting this argument, Nevada recognizes that DOE has examined the relationship between (a) the representation of DOE before the NRC on Yucca Mountain repository licensing matters, and (b) the representation of nuclear utilities before the Court of Federal Claims in Standard Contract litigation, and based on such examination and a mitigation plan, provided Morgan Lewis with a legal conflict waiver fully consistent with the D.C. Rules of Professional Conduct (“D.C. Rules”).¹⁸ The Consent to Legal Representation, signed on September 25, 2007, by the Deputy General Counsel for Environment and Nuclear Programs, sets forth a fully lawful and enforceable waiver under the District of Columbia Rules of Professional Conduct, which are the applicable ethics rules. (Ex. 4.)¹⁹

Nevada’s apparent argument is either that the professional responsibility standards for a conflict waiver have not been met, or that substantive legal standards applicable to the licensing of Yucca Mountain preclude such waiver. Neither argument has any basis in law.

¹⁸ The D.C. Rules control because Morgan Lewis has advised DOE that it will rely upon D.C. licensed lawyers to provide the majority of legal services under the contract. (Ex. 4). There is no appreciable, relevant difference between the D.C. Rules and the American Bar Association Model Rules of Professional Responsibility (“ABA Rules”) with respect to the provisions that control conflicts and waivers.

¹⁹ Under the D.C. Rules, “Where the waiving client has other counsel (in-house or outside) available, there is a strong presumption that its conflicts waiver is informed and sufficient.” D.C. Bar Op. No. 317 (2002), note 7.

a. **The D.C. Rules of Professional Conduct permit the waiver of conflicts arising from different matters.**

Nevada's suggestion that there is an impropriety or irregularity in DOE providing a waiver of conflicts under D.C. Rules to Morgan Lewis is misplaced. The D.C. Bar has succinctly summarized the applicable professional responsibility standards:

Permitting clients to waive conflicts of interest on the part of their lawyers is an alternative to automatic disqualification that has been recognized for a century. See American Bar Association, Opinions on Professional Ethics 22 (1967) (text of Canon 6 of the Canons of Ethics, adopted in 1908). The District of Columbia Rules of Professional Conduct ("D.C. Rules" or "Rules") prohibit a waiver that would let a lawyer take adverse positions (i.e., represent differing interests) in the same matter. D.C. Rule 1.7(a) & comments [1]-[6]. The Rules do permit, however, waivers of such other conflicts of interest as those in which a lawyer opposes her own client in a matter where that client is represented by a different law firm, see D.C. Rule 1.7(b)(1), and those in which a lawyer's personal interests, or her responsibilities to another client, might affect adversely the representation, see D.C. Rule 1.7(b)(2)-(4). In some circumstances a waiver may be granted even before a conflict arises. D.C. Bar Ethics Op. 309 (2001). Finally, a conflict involving a former client, which arises only if the new matter is the same as or substantially related to the earlier one, also may be waived. D.C. Rule 1.9 & comment [3].

D.C. Bar Op. 317 (2002).²⁰

Under the D.C. Rules, like the ABA Rules, the only conflicts that a client may not waive are those under Rule 1.7 (a): "A lawyer shall not advance two or more adverse positions in the same matter." See D.C. Bar Op. 317 (2002); D.C. Bar Op. 272 (1997); D.C. Bar Op. 248 (1994).²¹

²⁰ For D.C. Bar Opinions, see http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions.cfm.

²¹ Nevada's argument that a different standard applies for a governmental client also is incorrect. See D.C. Bar Op. 268 (1996) (waiver of conflicts with D.C. government client). Federal entities, like private entities, agree to conflict waivers. For example, the Federal Deposit Insurance Corporation, which regularly retains outside counsel, has promulgated an "Outside Counsel" handbook that addresses conflict waivers, and has a regular process for review of conflicts and granting of waivers. See http://www.fdic.gov/buying/legal/outside/oc_conflicts_interest.html. Similarly, under Rule 1.11, which addresses conflicts arising from service as a government attorney, the D.C. Bar has repeatedly addressed conflict issues related to representation of the government, including a variation on the "same matter" standard.

Unless the Yucca Mountain NRC licensing proceeding and the Standard Contract litigation are the “same matter,” and unless Morgan Lewis would be taking “adverse positions” in the two proceedings, the conflict is fully waivable under legal ethics rules. But as DOE correctly concluded prior to retaining Morgan Lewis, this NRC licensing proceeding and the Standard Contract litigation are *not* the same matter and Morgan Lewis has presented a mitigation plan to provide assurance of effective representation to DOE before the NRC.

b. **The NRC Yucca Mountain licensing proceeding and the Standard Contract litigation are not “the same matter”.**

The D.C. and ABA rules and standards for determining whether legal representations are the “same matters” demonstrate that DOE’s determination is legally correct. As used in the legal ethics rules, “same matter” has been described as follows:

The same lawsuit or litigation is the same matter. The same issue of fact involving the same parties and the same situation or conduct is the same matter.

ABA Formal Opinion 342 (1975).

The term “matter” is used in several other provisions of the Rules of Professional Conduct, including Rules 1.7 and 1.9 (conflicts of interest), and Rule 1.10 (imputed disqualification). It is nowhere defined, but Comment [3] to Rule 1.7 states, with reference to when a lawyer is adverse to a client in a “matter,” that: the concept of “matter” is typically apparent in on-the-record adversary proceedings or other proceedings in which a written record of the position of parties exists. This Comment suggests that, at least with respect to litigation, a particular litigation is a “matter.”

D.C. Bar Op. 263 (1996). “Rule 1.7 implies that the problem to be avoided under the Rule is ‘seeking a result to which another client is opposed’ *from the same decision maker.*” D.C. Bar Op. 232 (1992) (emphasis added).

There should be no question that under the D.C. Rules, the Yucca Mountain licensing proceeding before the NRC and the Standard Contract litigation before the Court of Federal claims are *not* the same matter. DOE recognized that there is some overlap of subject matter (disposition of spent nuclear fuel) between this licensing proceeding and the Standard Contract

litigation. But the different nature of the matters is apparent in the differences in forum and in legal and factual issues. The current case is an NRC licensing proceeding with DOE as the applicant, and is focused on the future construction and operation of a nuclear repository at Yucca Mountain. The Standard Contract litigation has been before the United States Court of Claims, the Federal Circuit, and the D.C. Circuit, with the individual nuclear utilities and the United States as the parties, and is focused on damages under the Standard Contract.²² The Yucca Mountain licensing proceeding relates to compliance with the requirements for authorization for the construction and operation of a geologic repository at the Yucca Mountain site pursuant to the NWPA and NRC's applicable regulations, while the Standard Contract litigation relates to DOE's alleged breach of the federal government's contracts to accept spent nuclear fuel from the nuclear utilities and damages to the utilities attributable to the alleged breach. Thus, there are different decision makers, in different forums, with different parties, who will decide distinct factual and legal issues.

Under the D.C. Rules' and the ABA Rules' definitions, these factors make this NRC licensing proceeding and the Standard Contract litigation different "matters," and remove the situation from that of unwaivable "same matters" under Rule 1.7(a). Nevada's argument to the contrary is unsubstantiated and incorrect under the applicable rules of professional responsibility.

²² See *Indiana Michigan Power Co. v. Department of Energy*, 88 F.3d 1272, 1277 (D.C. Cir. 1996); *Northern States Power Co. v. United States*, 128 F.3d 754, 761 (D.C. Cir. 1997); *Northern States Power Co. v. United States*, 224 F.3d 1361, 1365 (Fed. Cir. 2000); *System Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 175 (2005); and *System Fuels, Inc. v. United States*, 66 Fed. Cl. 722, 729-30 (2005). See also *Maine Yankee Atomic Power Co. v. United States*, 225 F.3d 1336, 1343 (Fed. Cir. 2000); *Consumers Energy Co. v. United States*, 65 Fed. Cl. 364, 374 (2005); *Energy Northwest v. United States*, 69 Fed. Cl. 500, 506 (2006); see generally *Pac. Gas & Elec. Co. v. United States*, 73 Fed. Cl. 333 (2006).

4. Nevada’s “loyalty” argument based on the nuclear utilities’ interest in approval of a Yucca Mountain repository is also unavailing.

Nevada’s ultimate argument is an amalgam of its construction of the ethical “duty of loyalty” and its construction of the statutory obligations of DOE. Citing DOE’s obligation under Section 113(c)(3) of the NWPA, with respect to a possible withdrawal of a license application, and the nuclear utilities’ interest in the construction of a nuclear repository, Nevada asserts that Morgan Lewis cannot adequately represent DOE’s interests in this licensing proceeding. (Motion at 4-6.) As support for this argument, Nevada cites the July 30, 1999 decision of the Head of Contracting Activity in the Office of Procurement Services, in which the DOE initially determined not to accept offers from law firms that were also representing nuclear utilities in Standard Contract litigation. Nevada’s ultimate argument is wrong for two reasons.

First, Nevada misconstrues DOE’s earlier procurement decision for legal services as a necessary interpretation of the NWPA. Although, the 1999 procurement approach “created a special conflict of interest provision,” as the D.C. Circuit described it in assessing whether DOE complied with its procurement rules (*LeBoeuf*, 347 F.3d at 318), there is no basis in the NWPA, DOE regulations, ethics rules, or the *LeBoeuf* decision to conclude that DOE had to follow the same discretionary approach in 2007. As noted previously, such a conclusion would be contrary to normal procurement law and practice and fails to recognize that the 2007 procurement took place eight years later and under changed circumstances. Moreover, as the DOE IG report recognizes, DOE in fact abandoned the 1999 procurement approach in 2003. (See IG Report at 1.)

Second, Nevada’s novel and expansive “loyalty” argument ultimately proves too much, for if it were correct, it would exclude from consideration *any* law firm which has *any* client

relationship with a nuclear utility.²³ The “duty of loyalty” under ethics rules applies any time there is a client relationship, and is not limited by the subject matter of the representation. *See* ABA Model Rule of Professional Responsibility 1.7, comment [6] (Duty of “[I]oyalty to a current client” applicable in “undertaking representation directly adverse to that client...even when the matters are wholly unrelated.”). Under Nevada’s argument, the “loyalty” issue would be present even if Morgan Lewis’s nuclear utilities representation did not involve Standard Contract litigation.²⁴ Nevada’s argument would ultimately require disqualification of any firm representing a nuclear utility client.

DOE’s selection of Morgan Lewis ultimately is justified by DOE’s determination of its need for the specialized legal services, the firm’s disclosures, and the firm’s mitigation plan for avoiding or mitigating existing or future conflicts of interest. DOE’s judgment to retain counsel under such an arrangement is a decision for the retention of specialized legal counsel that is within its authority as a procuring federal agency under applicable regulations, and as an informed client under the ethics rules.

D. If The Commission Decides To Consider Nevada’s Motion, It Should Be Denied In The Commission’s Discretion.

As demonstrated above, Nevada has failed to meet its burden of proving that DOE’s retention of Morgan Lewis presents an unwaivable conflict of interest, or that Nevada even has

²³ With its “duty of loyalty” argument, Nevada appears to be arguing in favor of some form of an “appearance of impropriety” standard, a standard which is no longer applicable in legal ethics analysis. “The ‘appearance’ standard was dropped entirely from the Rules of Professional Conduct, and the conflict of interest rules provide that conflicts may generally be waived by the client. *See* Rule 1.7(b) and (c). Under the current D.C. Rules, the only conflict that cannot be relieved by client consent is the one that arises where a lawyer seeks to take ‘adverse’ positions on behalf of two different clients in the same matter. *See* Rule 1.7(a).” D.C. Bar Op. 268 (1996).

²⁴ The mitigation plan includes ethical screens between those Morgan Lewis lawyers representing DOE before the NRC and those adverse to DOE in the Standard Contract litigation, which addresses the potential for related confidences and compliance with D.C. Rule 1.6. *See* D.C. Bar Op. 174 (1992) (firm must screen individual lawyers *and* obtain client consent to avoid imputed disqualification between lawyers involved with different clients).

standing to present the issue before the NRC. Nonetheless, if the NRC were to determine that it should address the substance of Nevada's motion, and were to find that it has any merit, any decision to disqualify is not mandatory, but discretionary. *See Laker Airways*, 103 F.R.D. at 27. Unless a movant can meet his burden of showing that there are "serious questions as to counsel's ability to act as a zealous and effective advocate for the client," or "a substantial possibility of an unfair advantage to the current client," a motion to disqualify should rarely be granted. *See Koller*, 737 F.2d at 1056. In making the disqualification determination, the availability of other, less prejudicial means for addressing the conflict should be considered. *Id.* The ultimate decision therefore should "balance the need to ensure proper conduct on the part of lawyers appearing before it against the harm to other social interests which may ensue if disqualification is improvidently granted." *Laker Airways*, 103 F.R.D. at 27.

Nevada has not met its burden of proving that disqualification is necessary. Nevada does not claim that Morgan Lewis is unable to be a zealous or effective advocate for DOE, or that Morgan Lewis's representation would cause an "unfair advantage to DOE." With respect to the specific conflict raised, DOE and Morgan Lewis have implemented a detailed mitigation plan. Nevada does not even claim that it would suffer prejudice from Morgan Lewis's representation.²⁵ Indeed, Nevada is not a client or former client of Morgan Lewis. At the same time, "[d]isqualification is wasteful and time-consuming," *see Koller*, 737 F.2d at 1056 (quoting *Board of Educ. of New York City v. Nyquist*, 590 F.2d 1241, 1246 (2d Cir. 1979)), and in this case would result in delay and disruption of the licensing proceedings.

The Commission therefore should find that on balance, disqualification is not warranted.

²⁵ *See Cauderlier*, 2006 WL 3445493, at *2 (third-party moving for disqualification could not "possibly claim that his right to a fair resolution of his claims will be affected by what law firm represents his opponents. His complaint is that his opponents should be taking positions similar to his own but his ability to make his case and convince [the judge] of the correctness of his contentions is a function of his proof and his own counsel's abilities. It has nothing whatsoever to do with and cannot be affected by who represents his opponent.").

IV. CONCLUSION

For the foregoing reasons, the Commission should deny Nevada's Motion.

Respectfully submitted,

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