



**Department of Energy**  
Washington, DC 20585

**DETERMINATION AND REQUEST FOR WAIVER**

The Department of Energy (DOE or the Department) plans to hire Morgan, Lewis & Bockius, LLP (ML) to provide legal services with respect to the licensing of the proposed Yucca Mountain repository (the Yucca Mountain licensing proceeding).

ML currently represents a number of utilities in lawsuits against DOE relating to the failure of the Department to begin acceptance by 1998 of spent nuclear fuel at the Yucca Mountain repository under the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-Level Waste (the "Standard Contract litigation"). Because ML is asserting positions on behalf of clients that are adverse to the positions asserted by the Department in those lawsuits, retention of ML would give rise to a conflict of interest for purposes of the Organizational Conflicts of Interest (OCI) provisions of the Federal Acquisition Regulation (FAR) and DOE Acquisition Regulation (DEAR). To a much lesser extent, there are other matters wherein ML represents clients in matters that have no connection to Yucca Mountain but are adverse to DOE or the U.S. Government. The DOE Office of General Counsel (GC) has advised that this situation, particularly the Standard Contract litigation, would give rise to a conflict regarding professional legal ethics under the DC Rules of Professional Conduct. GC has also advised that any legal ethical conflict is waivable; GC will provide a consent on that issue that will be added to the Contract File.

With respect to an OCI, FAR 9.504 requires that the Contracting Officer (CO) identify and evaluate potential OCIs and, thereafter, take steps to avoid, neutralize, or mitigate significant potential conflicts. Furthermore, FAR 9.505 and DEAR 952.209-72 require the CO to examine whether there are potential conflicting roles that might bias a contractor's judgment in the performance of a Government contract or provide an unfair competitive advantage. As part of this examination, the CO should consider whether there may be an appropriate means for resolving the conflict.

In this case, the Standard Contract litigation presents the possibility of a conflicting role for ML that could potentially bias its performance. The potential for bias with respect to the other litigation matters and other matters disclosed is minimal, at best. The same is true with respect to any potential competitive advantage.

ML has proposed, however, a comprehensive mitigation plan that would mitigate any conflict to the maximum extent practical. After examining the disclosure of potential conflicts and the mitigation plan concerning the Standard Contract litigation submitted by ML by letter dated September 24, 2007, GC has concluded that the mitigation plan should mitigate any legal ethics conflict and/or any OCI to ensure that the interests of DOE in each matter are protected to the maximum extent practical. I agree with that conclusion with respect to the OCI issue. The mitigation plan would establish a variety of screening and security procedures that should mitigate the risk of bias and ensure confidentiality of the Department's confidential information relating to the Yucca



Mountain licensing proceeding. Finally, the mitigation plan should cover both OCI and legal ethical requirements.

Although finding that any OCI is adequately mitigated, in an abundance of caution, on behalf of the Department of Energy, I hereby request a waiver under FAR 9.504 of any OCI relating to ML's representation of the Department in the Yucca Mountain licensing proceeding caused by ML's representation of the identified entities in the Standard Contract litigation and/or litigation unrelated to the Yucca Mountain repository wherein ML represents entities in matters that are adverse to the Department.

Due 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 ML is the best choice to represent the Department in the Yucca Mountain licensing proceeding and that these services are critical. Furthermore, any alternative law firm with NRC licensing expertise would have similar potential conflict issues. Finally, a strong plan of disclosure, informed consent, and a comprehensive mitigation plan provides adequate mitigation of any conflict.



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Contracting Officer, MA-642.1