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PERSONNEL

[redacted]

6 March 1963

BRIBERY, GRAFT, AND CONFLICTS OF INTEREST

1. NEW STATUTORY REQUIREMENTS

A statute which became effective 21 January 1963 (Public Law 87-849) revises law concerning bribery, graft, conflicts of interest, and related activities with respect to Government personnel.

2. INTENDED TO FACILITATE RECRUITMENT

One of the main purposes of the statute is to assist the Government in obtaining the temporary or intermittent services of persons with special knowledge and skills whose principal employment is outside the Government. For this purpose, the statute relaxes the conflicts-of-interest rules with respect to consultants, advisers, and other experts.

3. DEFINITIONS

a. A "special Government employee" is an employee who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed 130 days during any period of 365 consecutive days, temporary duties either on a full-time or intermittent basis. In general, consultants, advisers, and other experts are special Government employees.

b. "Official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action.

4. PROHIBITIONS APPLICABLE TO SPECIAL GOVERNMENT EMPLOYEES

A special Government employee is in general subject only to the following major prohibitions:

a. He may not, except in the discharge of his official duties, represent anyone else before a court or Government agency in a matter in which the United States is a party or has an interest and in which he has at any time participated personally and substantially for the Government (18 U.S.C. 203 and 205).

b. He may not, except in the discharge of his official duties, represent anyone else in a matter pending before the agency he serves unless he has served there no more than 60 days during the past 365 (18 U.S.C. 203 and 205). He is bound by this restraint even if the matter is not one in which he has ever participated personally and substantially.

c. He may not participate in his governmental capacity in any matter in which he, his spouse, minor child, outside business associate, or any person with whom he is negotiating for employment has a financial interest (18 U.S.C. 208).

d. He may not, after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and in which he participated personally and substantially for the Government (18 U.S.C. 207(a)). HB

e. He may not, for one year after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and which was within the boundaries of his official responsibility during the last year of his Government service (18 U.S.C. 207(b)). This temporary restraint of course gives way to the permanent restriction described in subparagraph 4d above if the matter is one in which he participated personally and substantially.

5. PROHIBITIONS APPLICABLE TO OTHER EMPLOYEES

Any other employee of the Government is in general subject to the following major prohibitions:

a. He may not, except in the discharge of his official duties, represent anyone else before a court or Government agency in a matter in which the United States is a party or has an interest. This prohibition applies both to paid and unpaid representation of another (18 U.S.C. 203 and 205).

b. He may not participate in his governmental capacity in any matter in which he, his spouse, minor child, outside business associate, or any person with whom he is negotiating for employment has a financial interest (18 U.S.C. 208).

c. He may not, after his Government employment has ended, represent anyone other than the United States in connection with a matter

in which the United States is a party or has an interest and in which he participated personally and substantially for the Government (18 U.S.C. 207(a)).

d. He may not, for one year after his Government employment has ended, represent anyone other than the United States in connection with a matter in which the United States is a party or has an interest and which was within the boundaries of his official responsibility during the last year of his Government service (18 U.S.C. 207(b)). This temporary restraint of course gives way to the permanent restraint described in subparagraph 5c above if the matter is one in which he participated personally and substantially.

e. He may not receive any salary, or supplementation of his Government salary, from a private source as compensation for his services to the Government (18 U.S.C. 209).

6. AGENCY IMPLEMENTATION

During January and July of each year, each Deputy Director and the Comptroller, the Inspector General, and the General Counsel shall bring the provisions of this notice to the attention of the employees under his supervision.

JOHN A. McCONE
Director of Central Intelligence

DISTRIBUTION: ALL EMPLOYEES

Rules for the Avoidance of Organizational Conflicts of Interest

I. PREAMBLE

The Report to the President on Government Contracting for Research and Development (generally known as the Bell Report) states that "today about 80% of Federal expenditures for research and development are made through non-Federal institutions" and that "there is no doubt that the Government must continue to rely on the private sector for the major share of the scientific and technical work which it requires."

In such contracting, it is the policy of the Department of Defense that the contractor should be given the maximum responsibility and authority for the performance of assigned tasks, and these tasks be of such a nature, even when they are part of a major system, as to be self-contained from a management point of view. The Report further states that there are certain essential management functions in the research and development area that must be retained within Government. For instance, the integration and coordination of the separate parts of a large weapons system contract involving several major contractors would, as a general rule, be handled by Government agencies. To achieve this integration and coordination, however, special arrangements are sometimes needed such as are made with nonprofit organizations and industrial organizations. In this case, the Government must be able to establish rules for its relationships with the nonprofit or industrial organizations which may be stricter than those normally employed with prime contractors. All prospective contractors will be advised of the applicability of the rules by a notice in solicitations and by a clause in resulting contracts.

Where the Department of Defense does contract for research and development work, as it must for the bulk of that work, its choice of a contractor should be based primarily upon two considerations:

"(1) Getting the job done effectively and efficiently, with due regard to the long-term strength of the Nation's scientific and technical resources, and

"(2) Avoiding assignments of work which would create inherent conflicts of interest."

The Report points out that while there are advantages and disadvantages to the various types of organizations within the private sector (universities, private nonprofit organizations and industrial corporations), these types of organizations should not "be given areas of monopoly on different kinds of work," or be permitted to develop a privileged relationship to the Department of Defense.

In connection with the second criterion, the Report proposes that each department develop a "Code of Conduct" for organizations in the research and development field. These rules have been developed in accordance with that instruction.

It should be borne in mind that the pragmatic test for the the selection of a contractor for a particular research and development contract covers both profit and nonprofit organizations, including those created largely or wholly with Government funds. But the rules do not deal with the criteria for the creation of additional Government-sponsored nonprofit organizations in this category. It is the policy of the Department of Defense that such organizations are created only under extraordinary circumstances, when private resources are not available to accomplish a necessary objective beyond the scope of in-house capabilities. Their termination is governed by the organic statutes of the individual organizations. These rules should make it even less likely that any additional Government-financed nonprofit organizations need be created. While these organizations are in existence they will be treated by the Department on arms length basis, as the rules prescribe.

II. RULES

The following rules state general prohibitions which are then explained and illustrated by specific examples. There will undoubtedly occur cases which are not resolved by these rules. As the Bell Report said, "[Conflict of Interest] arises in several forms--not all of which are by any means yet fully understood." In order to assist in deciding what, if any, prohibitions should be applied in such instances, the two basic principles of this code--(1) preventing conflicting roles which might bias a contractor's judgment, and (2) preventing unfair competitive advantage--should be paramount. The following rules and examples are not all inclusive but merely attempt to achieve these two goals in a variety of situations. The ultimate test should always be: Is the contractor placed in a position where his judgment may be biased, or where he has an unfair competitive advantage? If so, corrective action must be taken in accordance with the rules below.

As used in these rules, "contractor" means the person under contract to the Department of Defense to perform the work described in each rule, and its affiliates; "system" means system, subsystem, project or item. The term "systems engineering" includes a combination of substantially all the following activities: determination of specifications, identification and solution of interfaces between parts of the system, development of test requirements or plans and evaluation of test data, and supervision of design work. The term "technical direction" includes a combination of substantially all the following activities: preparation of work statements for contractors, determination of parameters, direction of contractors' operations, and resolution of technical controversies.

1. If a contractor agrees to provide systems engineering and technical direction (SE/TD) for a system, without at the same time assuming over-all contractual responsibility for: (a) development, or (b) integration, assembly and checkout (IAC), or (c) production of the system, then that contractor shall not later be allowed to supply the system or any major components thereof, or to be a subcontractor or consultant to a supplier of the system or any major components thereof.

Explanation: The SE/TD contractor occupies a highly influential and responsible position as an agent of the Department of

Defense both in determining basic concepts of a system and in supervising their execution by other contractors. To assure the objectivity of its services and hence a more soundly planned system, the SE/TD contractor must not be in a position to make decisions which could favor its own products. Furthermore, it would be inconsistent with the managerial responsibility of an SE/TD contractor for it to be concurrently one of the component suppliers.

Example A: Company A agrees to provide SE/TD for the Navy on the power plant for a group of submarines (i.e., turbine, drive shafts, props, etc.). Company A shall not be allowed to supply any power plant components. Company A can, however, supply components of the submarine unrelated to the power plant (e.g., fire control, navigation, etc.). In this example, the system is the power plant, not the submarine, and the ban on the supply of components is coterminous with the system only.

Example B: Company A is the SE/TD contractor for system X. After some progress, but prior to completion, the system is canceled. Later, system Y is developed to achieve the same purposes as system X, but in a fundamentally different fashion. Company B is the SE/TD contractor for system Y. Company A may bid to produce system Y or its components.

2. If a contractor agrees to prepare and furnish complete specifications covering nondevelopmental items to be used in competitive procurement, that contractor shall not be allowed to furnish such items, either as a prime or subcontractor, for a reasonable period of time including, at least, the initial procurement. This rule shall not apply to:

a. Contractors who furnish at Government request specifications or data with respect to the product they furnished, even though the specifications or data may have been paid for separately or in the price of the product.

b. Situations where one or more contractors acting as industry representatives assist Department of Defense agencies in preparing, refining or coordinating specifications, regardless of source, which assistance is supervised and controlled by Government representatives.

c. Contracts for developmental or prototype items.

Explanation: If a single contractor is engaged by the Government to draft complete specifications for nondevelopmental equipment, he should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation where he could draft specifications which would favor his own products or capabilities. In this way the Government can be assured of getting unbiased advice as to the content of its specifications and can avoid allegations of favoritism in the award of production contracts.

In development work it is normal to select firms which have done the most advanced work in the field. It is to be expected that these firms will design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms which did not participate in the development, and this affects the time and quality of production, both of which are important to the Department of Defense. In many instances the Government may have financed such development. Thus, the development contractor may have an unavoidable competitive advantage which is not considered unfair and no prohibition should be imposed.

In instances of cooperation between industry and Department of Defense agencies to prepare, refine or coordinate specifications, there is continuous participation and supervision by Government representatives and, usually, more than one contractor concerned. In these circumstances Government supervision prevents the establishment of specifications oriented to favor a given contractor's products or capabilities.

Example A: Company A prepares updated Government specifications for a standard refrigerator to be procured competitively. Company A shall not be allowed for a reasonable period of time to compete for supply of the refrigerator.

Example B: Company A designs or develops a new electronic equipment and, as a result of the design or development, prepares specifications. Company A may supply the electronics equipment.

Example C: XYZ Tool Company and/or KLM Machinery Company representing the American Tool Institute work under the supervision and control of Government representatives to refine specifications or to clarify the requirements of a specific procurement. These companies may supply the item.

3. If a single contractor, other than a company which has participated in the development or design of a system, agrees to assist the Department of Defense or a contractor of the Department of Defense in the preparation of a statement of work, or agrees to provide material leading directly, predictably, and without delay to a statement of work, to be used in the competitive procurement of a system or services, that contractor shall not be allowed to supply the services, or the system or major components thereof, unless he is the sole source. The content of a statement of work shall not be considered predictable if more than one contractor is involved in the preparation of material leading to it.

Explanation: The various services related to a statement of work to be used in a competitive procurement should normally be performed by the Department of Defense. However, when it is necessary to seek the assistance of contractors, they may often be in a position to favor their own products or capabilities. To overcome this possibility of bias, such contractors are to be prohibited from supplying a system or services procured on the basis of work statements growing out of their services.

No prohibitions are imposed on development contractors for the reasons given in the explanation to rule 2.

Example A: Company A receives a contract to define the detailed performance characteristics the Department of Defense will require for the purchase of rocket fuels. A has not developed the particular fuels. At the time the contract is awarded, it is clear to both parties that the performance characteristics arrived at will be used by the Department of Defense to choose competitively a contractor to develop or produce the fuels. Company A shall not be permitted to bid on this procurement.

Example B: Company A receives a contract to prepare a detailed plan for the procurement of services aimed at the advanced scientific and engineering training of Department of Defense personnel.