



## SBTC White Paper How Congress Can Help SBIR Companies Create Jobs

June 25, 2014

The Small Business Innovation Research (SBIR) program is a workhorse for American technology and technology-based jobs development, with many competing nations looking to imitate it. SBIR involved firms have been issued almost 100,000 patents, making them one of the largest creators of intellectual wealth in the nation. They produce 10-12 US patents per day;<sup>1</sup> and 25% of America's R&D 100 Awards, on less than 3% of the Federal R&D budget, providing a 10 to 1 "Bang for the Buck".<sup>2</sup> Compared with research universities, SBIR/STTR companies produce 58% more patents, more than three times as many key innovations, and have a far better record of commercialization, on about 12% of the funding that universities receive.<sup>3</sup> Smaller companies produce about **5 times** more patents per employee than large firms and **20 times** more than universities.<sup>4</sup> With regard to wealth creation, SBIR firms have been involved in 1,713 M&A transactions, 7.8% of all awardees. The median value of these transactions is \$42 million, with an average price of \$365 million. Most acquirers are large corporations, many of whom have acquired multiple SBIR firms. In addition, 1,978 major/mid-sized corporations have working relationships and/or business transactions with SBIR-involved firms.<sup>5</sup>

The SBIR program is efficiently-structured, merit-based and highly competitive. Some one in ten Phase I proof-of-concept proposals are accepted for funding, with only 30-40% of these Phase I projects advancing to substantive Phase II R&D projects. The technologies are then intended to transition forward into follow-on commercialization (labeled Phase III), either in with private sector money or non-SBIR Federal dollars (as is common with the DoD). The result has been thousands of new technologies transforming the American economy and driving much of the strong new jobs growth created by small business.

But the last five years have been quite difficult for America's SBIR companies, restraining American innovation and jobs creation. The number of SBIR awards has dropped by 36 percent in the last decade. SBIR budgets have plunged 25% in the last three years (see Figure 1). Since 2008, bank lending to small business has declined 18%, by \$126B. Angel groups now reject 99% of their requests, and VC financing in 1Q 2014 was only \$125M for 41 start/seed deals. The patent reform bills are raising the costs of innovation while hurting company valuations and reducing available capital.

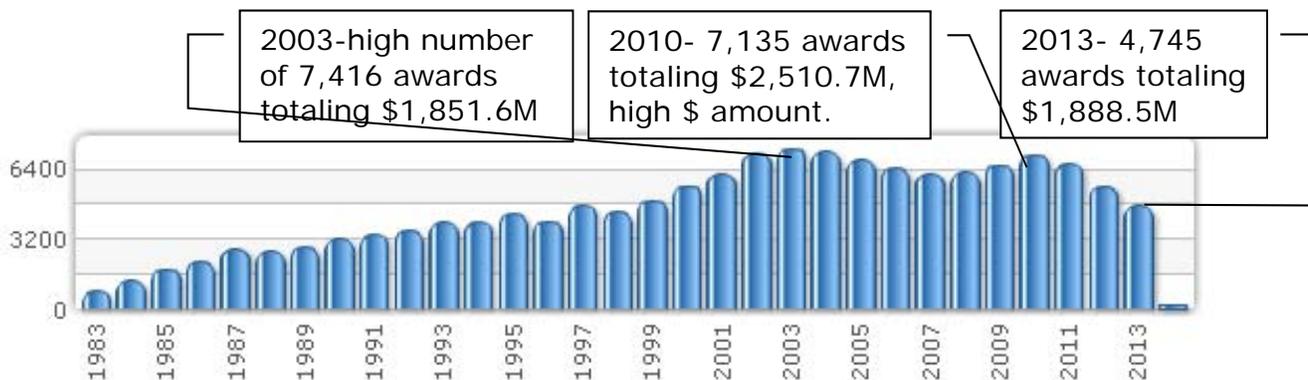
Despite its reduced funding, the SBIR program is still the most important technology development funding source for small growing high-tech businesses, contributing some \$1.9B per year and continuing to produce a strong flow of new technologies. But Federal government procurement has fallen short of its small business procurement goals, insufficiently transitioning SBIR breakthroughs into government performance and savings. Since the revision of the law in Dec. 2011, DOD has taken some steps, but after 30 months the Agency has not revised the FAR, produced new manuals, performed training, set goals, or developed incentives as required by the law; and DOD has no current mechanism in place to track its progress with SBIR awards.

For over two decades DoD Undersecretaries for Acquisition and Technology, under both Democrats and Republicans, have concluded that SBIR is the answer to getting the best technology to the warfighter faster and at lower cost, as well as creating jobs and improving the economy. Yet DoD Phase III transitions from Phase II have been languishing, and Agency culture often defers to the convenience of large prime awards. Our companies are creating the technological opportunities that could substantially grow jobs while better meeting the needs of a higher technology albeit budget-constrained military and American economy. But inadequate Federal implementation of SBIR technology transitions is holding back the potential.

Even without added funding, Federal legislative and agency action could remove the roadblocks restraining full achievement of SBIR's potential. These are summarized below.

The nation's small business community which makes up 99.7% of U.S. firms<sup>6</sup> needs Congressional representatives to take the following actions to maximize the government's return on the SBIR program investments and maintain and expand U.S. innovative competitiveness:

- A. Insist the SBIR Phase III law and Policy Directive be fully implemented by executive agencies.
  - 1. Modify 15 USC 638 to require better implementation of SBIR Phase III rules.
  - 2. Federal Phase III actions should be used as required by law: "to the greatest extent practicable" and this should be tracked fully, and in real-time.
  - 3. The Federal Acquisition Regulations, FAR agency supplements, procurement manuals and procedures should be revised to implement the law, and training and oversight developed and provided to implement these changes.
  - 4. Ensure incentives for Agency Program Managers, Contracting Officers, ACOs, Contracting Officer Representatives, and others include proper recognition of SBIR objectives.
  - 5. Revise the law to require at least 25% of the members of the Defense Business Board represent small businesses
- B. 6. Retain the DoD Rapid Innovation Fund (RIF) program exclusively for its original purpose of SBIR Phase III transition, and develop similar programs for other agencies.
- C. Maintain strong intellectual property protection for SBIR innovations at all Phases.
  - 7. Patent reform must ensure that small business innovation is not crushed by the interests of large businesses. Small business innovation and its resulting patents are core drivers for America's high value production and standard of living. The small business technology sector must be given a voice in the development of such laws.
  - 8. Protect the proper allowability of patent expense in SBIR awards.
- D. 9. Protect the STTR program against attempts to siphon off funding for other programs, protecting Small Business product development. Do not adopt Section 829 of the House NDAA, which seeks to shift money to University "entrepreneurship" programs at the expense of small business.
- E. Consider the following changes to more broadly restart America's growth engine:
  - 10. Actually meet small business procurement goals of 23% in each agency each year.
  - 11. Increase small business procurement goals to 25% for prime contracts and 40% for subcontracts, supporting efficiency and faster new technology adoption.
  - 12. Provide increased funding for R&D and SBIR so that America does not lose our technological edge to China, and to strengthen America's technology and jobs.
  - 13. Provide an environment that makes credit and equity available to grow small business.



**Figure 1:** The number of SBIR Awards has dropped by 36 percent in the last decade; and the dollar amount awarded has dropped by 25% in the last three years.<sup>7</sup>

<sup>1</sup> <http://www.innovation.com/>

<sup>2</sup> Fred Block and Matthew R. Keller, "Where Do Innovations Come From? Transformations in the U.S. National Innovation System, 1970-2006", THE INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, July 2008, pg. 15, [http://www.itif.org/files/Where\\_do\\_innovations\\_come\\_from.pdf](http://www.itif.org/files/Where_do_innovations_come_from.pdf).

<sup>3</sup> [http://archives.democrats.science.house.gov/Media/File/Commdocs/hearings/2007/tech/26apr/schmidt\\_testimony.pdf](http://archives.democrats.science.house.gov/Media/File/Commdocs/hearings/2007/tech/26apr/schmidt_testimony.pdf) Pages 6, 7

<sup>4</sup> *Small Serial Innovators: The Small Firm Contribution To Technical Change*, CHI Research, Inc, under contract to the U.S. Small Business Administration, March 2003, [www.sba.gov/advo/research/rs225tot.pdf](http://www.sba.gov/advo/research/rs225tot.pdf).

<sup>5</sup> Source: SBIR patent databases, Innovation Development Institute, [www.innovation.com](http://www.innovation.com), and U.S. Small Business Administration Office of Technology

<sup>6</sup> [http://www.sba.gov/sites/default/files/FAQ\\_Sept\\_2012.pdf](http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf)

<sup>7</sup> <https://www.sbir.gov/past-awards>



## **SBTC White Paper Details**

### **How Congress Can Help SBIR Companies Create Jobs**

#### **A. Implement the law as it has been passed, but not yet enforced:**

- 1) **Modify 15 USC 638 to require implementation of the SBIR rules.** The FAR and other DoD procurement manuals and procedures are not aligned with the SBIR legislation and Policy Directive. Specific recommendations are provided in Attachment A.
- 2) **Federal Phase III actions should be used as required by law: “to the greatest extent practicable” and this should be tracked fully, and in real-time.** Phase III provides the government, especially the DoD, with the opportunity to benefit from the innovation created by SBIR, but bureaucratic culture, inertia and preference for centralized large prime awards are providing a final barrier against this technology transition. The SBIR law and Policy Directive correctly direct that Phase IIIs should be pursued and provide directive for their adoption. The Agencies should effectively implement this directive. If the law and Policy Directive were implemented, the Federal Government would be making high value use of much more SBIR technology, beneficially impacting government productivity and American jobs. This is further discussed in Attachment B.
- 3) **The FAR, procurement manuals and procedures should be revised to implement the law, and training and oversight developed and provided to implement these changes.**
- 4) **Ensure incentives for PMs, COs, and others for Phase III SBIR Contract Awards.**

The law compels the Secretary of Defense to use incentives to encourage agency program managers and prime contractors to meet goals set for transitioning Phase II contracts into programs of record or fielded systems. However, to date no goals or incentives have been implemented. DOD hasn't even begun the reporting procedures in the law to track the number and dollar amount of Phase II technologies that were successfully transitioned. Without this information it is impossible to establish a baseline to compare improved commercialization results.

This continued lack of compliance with the law is slowing transition of promising new technologies to the warfighter. The SBTC recommends an incentive of at least \$5,000 for each Program Manager or PEO that meets the Secretary's goal for SBIR technology insertion. Incentives could also include step-grade or band promotions to persons of SBIR insertion achievement other than PMs or acquisition executives. (Note: these recommendations come from the SBTC's earlier DoD white paper from 2012.)<sup>8</sup>

The recent NDAA that passed the House<sup>9</sup> includes language that would further strengthen goaling and incentivization for small business by mandating an increase in the percent of subcontracting that small businesses are required to participate in. With this, Congress has sent a clear message to DOD to stop dragging their feet on implementing goals and incentives.

- 5) **Revise the law to require at least 25% of the members of the Defense Business Board represent small businesses.**

To help provide input from Small Businesses in Federal procurement practices, Small Businesses should participate in the Defense Business Board. At least 25% of the members should be individuals who are personally owners/executives of small businesses or be executives in organizations that exclusively represent small business.

- B. 6) **Retain the RIF program exclusively for its original purpose, Phase III SBIR support.**

The original purpose of the Rapid Innovation Fund (RIF) was to transition innovative technologies developed by small businesses under the SBIR program. This would allow Department of Defense operational challenges to be addressed in the most cost effective manner, while creating American jobs in small businesses. RIF Program funding should be restored to full \$500,000,000 level exclusively for Phase III SBIR programs.

**C. Maintain strong intellectual property protection for all SBIR companies on all Phases of contracts**

- 7) **Any “Patent Reform” bill proposed in Congress must maintain a strong intellectual property (IP) system in America.** Requiring patent owners to pay litigation costs that other types of litigants do not have to pay is anti-innovation and anti-job. Patent owners must not be punished simply because they invent, as has recently been proposed. Patent reform to date has seriously damaged the environment for small business innovation, and currently contemplated changes such as those against trolls have been written such that they will also fall hard on small business innovators.

The “Invention Tax” must be eliminated. Withholding patent office fees not only delays patents and causes confusion in the issuance of patents; it hurts the economy as new innovative companies experience delays in obtaining funding when their patents are delayed.

The American Invents Act caused the one year grace period to be put in question. This must be clarified and reinstated in the law to allow companies to perfect their inventions and raise funding, helping create new jobs.

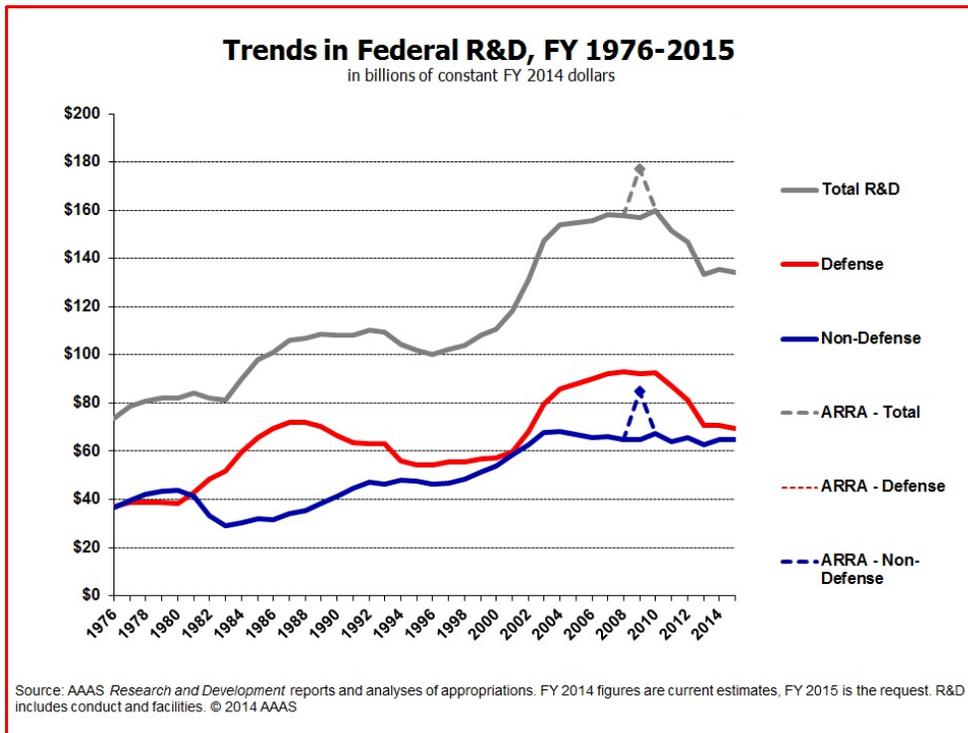
- 8) **Patent expense treatment should be aligned for proper classification as indirect costs.** A central tenet of SBIR commercialization is the protection of long term intellectual property, yet government accounting and audit policies varies in this area. Allowance of patent costs as Indirect Costs will allow American Jobs to be protected by patent laws. To assure SBIR companies can protect their intellectual property and keep jobs in America, the law should be clarified to allow all patent costs where the Government has Government Purpose License Rights to be included as an allowable G&A expense. The law should require that the FAR be modified to include this change within 90 days of the signing of the bill.

#### **D. 9) Ensure STTR remains for Small Business product development, not for University “entrepreneurship” programs**

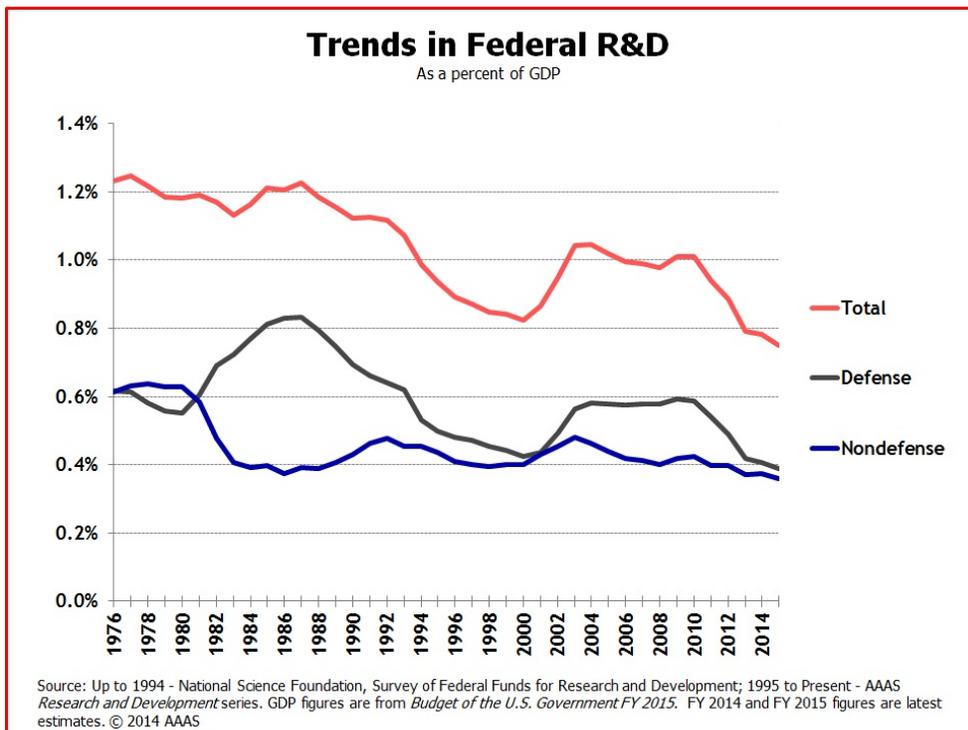
The House inserted the language of the Transfer Act of 2013, H.R.2981, into its NDAA. Section 829 of HR 4435 will decrease the STTR program funding by 25%, shifting the money to subsidize university programs while removing agency discretion over individual awards. We request Congress keep this language out of the Senate and final reconciled NDAA.

**E. Consider the following changes to more broadly restart America’s growth engine:**

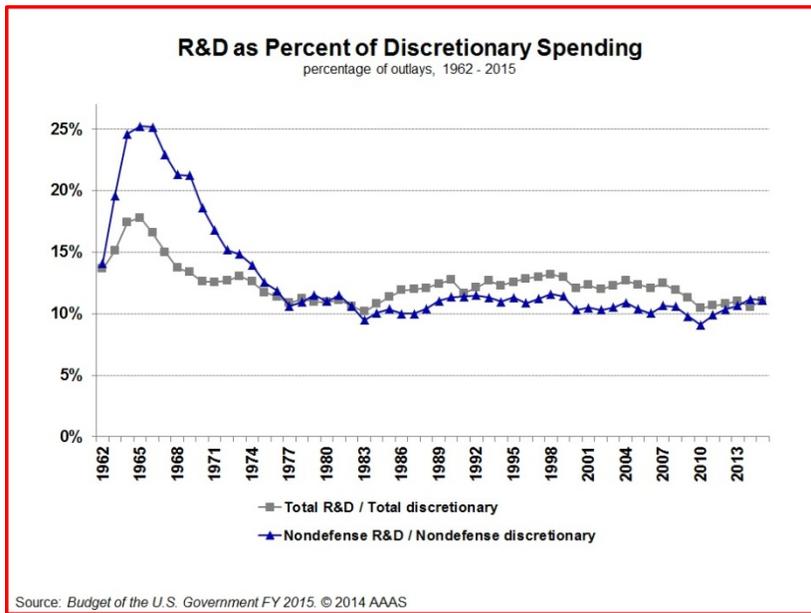
- 10) **Meet small business procurement goals of 23%, for every agency, every year.** Despite the fact that Small businesses make up **99.7 percent** of U.S. employer firms, **64 percent** of net new private-sector jobs, and 49.2 percent of private-sector employment,<sup>10</sup> the Government reports that Small Businesses receive about 22% of all federal prime contract dollars.<sup>11</sup> The federal government missed its stated small business contracting goal of 23 percent of total procurement across all agencies for the eleventh straight year in 2012.<sup>12</sup> The GAO has found that agencies are misreporting data and that the SBA does not collect complete information on bundled contracts and has not reported to congressional committees as required.<sup>13</sup> Almost half (7/16) of the Agencies were not in compliance with OSDDBU directors reporting requirements; and that lower-level officials did not meet the reporting requirement.<sup>14</sup> Furthermore, in spite of the fact that the agencies miss their goals, many more problems with the data show that many contracts are excluded from the base in the calculation, making the Agencies results worse. In fact, the revised calculations show that **small businesses received less than 19 percent of all prime contracting dollars in 2012.**<sup>15</sup>
- 11) **Support an increase to 25% for prime contracts and 40% for subcontracts.**<sup>16</sup> [H.R.4093](#), the “Greater Opportunities for Small Business Act of 2014” deserves support. It will help small businesses create more US jobs, while not adding a dime to the budget. It is a wise investment.<sup>17</sup>
- 12) **Provide increased funding for R&D and SBIR so that America does not lose our technological edge to China.** The budget has continually reduced R&D funding.<sup>18</sup> The following charts can be found at: <http://www.aas.org/page/historical-trends-federal-rd>. **Figure 2** shows the trend in R&D spending, falling about 25% in the last 5 years. **Figure 3** plots R&D funding as a percentage of GDP, showing the decline of 40% over the last four decades. **Figure 4** shows Non-Defense R&D as a percent of discretionary spending has fallen about 56% over the last five decades. Finally, **Figure 5** shows Federal R&D spending has fallen about 70% as a percentage of the Federal budget in the last 50 years.



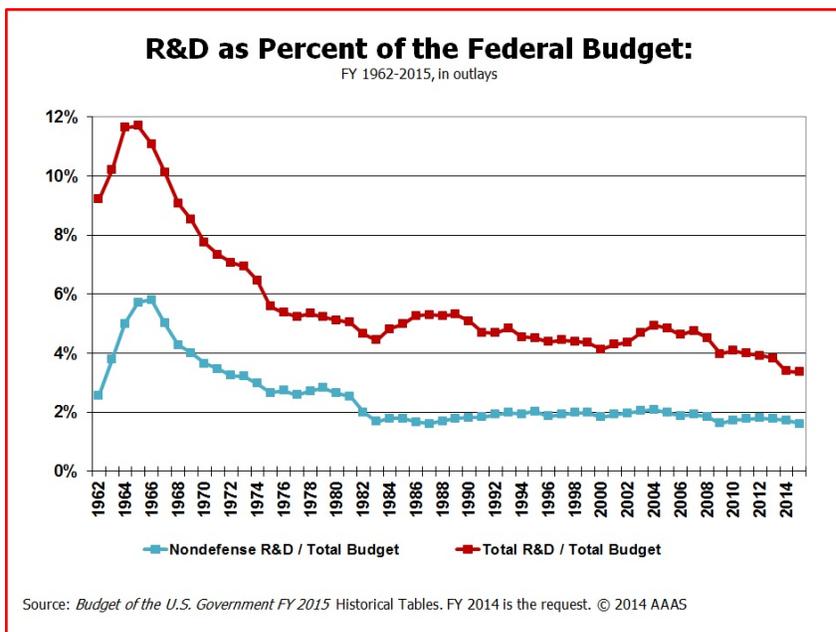
**Figure 2:** R&D spending has fallen 25% in the last 5 years.



**Figure 3:** R&D funding as a percentage of GDP has fallen 40% over the last four decades.

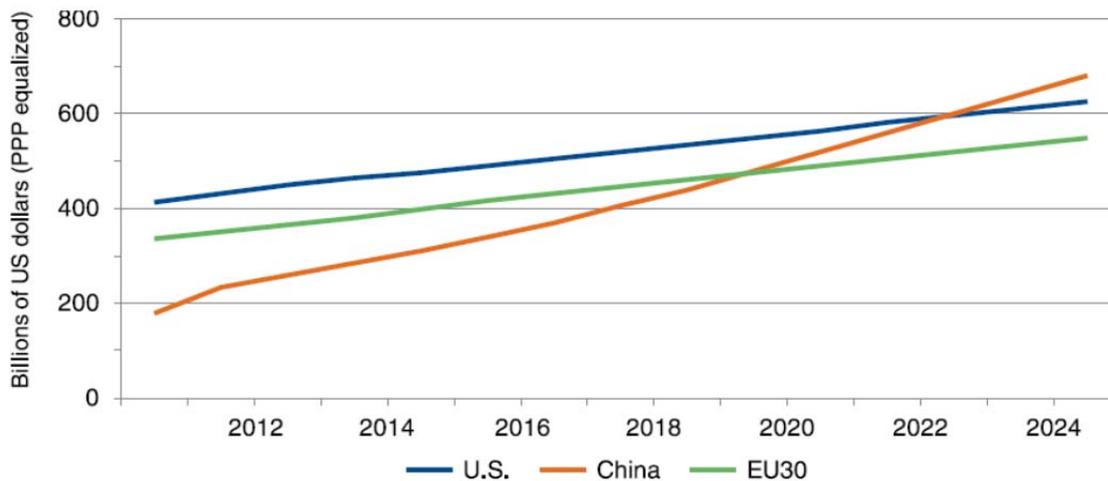


**Figure 4:** Non-Defense R&D as a percent of discretionary spending has fallen about 56% over the last five decades.



**Figure 5:** Federal R&D spending has fallen about 70% as a percentage of the Federal budget.

Let's compare and contrast America's R&D investment to China's. China's total R&D funding is expected to surpass that of the U.S. by about 2022, according to the 2014 Global R&D Funding Forecast, prepared by Battelle, a research and technology development organization, and *R&D Magazine*.<sup>19</sup> Last year, America's total R&D grew at 1.4%, while China's grew at 11.6%. **Figure 6** shows the result of slower R&D growth in America versus China. Even more importantly, since the Federal Government's share is primarily in earlier stage research than America as a whole, and since the Federal R&D is declining, this bodes even worse for America's long term prospect.



**Figure 6:** China’s rapidly growing R&D will surpass the US in about 2022.

**13) Provide an environment that makes credit and equity available to grow small businesses.**

Bank lending to small business is severely depressed. Since 2008 lending to small business has declined by \$126 Billion. The problem is compounded because many of the extremely large banks that received TARP funding from the federal government have pulled out of small business lending. Small businesses who had never missed a payment suddenly found their notes are called by their bank. Unfortunately this pattern has continued. Venture capital has also continued to make few investments in seed and start up enterprises. The majority of these investments have been in software and IT industries with the vast majority of these seed and start up deals being made in the Silicon Valley. In the first quarter of 2014 there were only 41 of these startup/seed deals totaling \$125 million. The Federal government has not made its procurement goals for small business purchases. The decline of home values has even reduced home equity as a source of funds to grow small business. These changes have occurred at the same time that regulatory burdens by the state and federal government have been increasing.

This environment needs to change for Small Business to thrive. Banking laws must be evaluated to make credit more available for small high technology companies. Collateralization of patents would be the most significant change to help these companies fund their growth.

<sup>8</sup> [http://www.nsba.biz/docs/sbtc\\_dod\\_white\\_paper\\_4-24-2012.pdf](http://www.nsba.biz/docs/sbtc_dod_white_paper_4-24-2012.pdf)

<sup>9</sup> HR 4435, <http://armedservices.house.gov/index.cfm/ndaa-home?p=ndaa>

<sup>10</sup> [http://www.sba.gov/sites/default/files/FAQ\\_Sept\\_2012.pdf](http://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf)

<sup>11</sup> [http://www.sba.gov/sites/default/files/files/FY12\\_Final\\_Scorecard\\_Government-Wide\\_2013-06-20.pdf](http://www.sba.gov/sites/default/files/files/FY12_Final_Scorecard_Government-Wide_2013-06-20.pdf)

<sup>12</sup> [http://www.washingtonpost.com/business/on-small-business/obama-signs-law-intended-to-deliver-more-government-contracts-to-small-businesses/2013/01/04/eb452e10-55f7-11e2-bf3e-76c0a789346f\\_story.html](http://www.washingtonpost.com/business/on-small-business/obama-signs-law-intended-to-deliver-more-government-contracts-to-small-businesses/2013/01/04/eb452e10-55f7-11e2-bf3e-76c0a789346f_story.html)

<sup>13</sup> GAO Report on Small Business Contracting, 14-36, November 2013.

<http://www.gao.gov/assets/660/659254.pdf>

<sup>14</sup> GAO Report on Small Business Contracting, 11-418, June 2011, <http://www.gao.gov/new.items/d11418.pdf>

<sup>15</sup> “Small business contracting numbers inflated by errors and exclusions, data show,” Washington Post, July 28, 2013.

[http://www.washingtonpost.com/business/on-small-business/small-business-contracting-numbers-inflated-by-errors-and-exclusions-data-show/2013/07/28/7fa2a4fc-f2f6-11e2-8505-bf6f231e77b4\\_story.html](http://www.washingtonpost.com/business/on-small-business/small-business-contracting-numbers-inflated-by-errors-and-exclusions-data-show/2013/07/28/7fa2a4fc-f2f6-11e2-8505-bf6f231e77b4_story.html)

<sup>16</sup> <http://smallbusiness.house.gov/news/documentsingle.aspx?DocumentID=370864>

<sup>17</sup> HR4435, 2015 NDAA, <http://www.gpo.gov/fdsys/pkg/BILLS-113hr4435pcs/pdf/BILLS-113hr4435pcs.pdf>

Section 818; formerly HR 4093 shown at: <https://www.govtrack.us/congress/bills/113/hr4093/text>.

<sup>18</sup> [http://smallbusiness.house.gov/uploadedfiles/5-21-2014\\_schmidt\\_revised\\_testimony.pdf](http://smallbusiness.house.gov/uploadedfiles/5-21-2014_schmidt_revised_testimony.pdf) pages 8 *et. seq.*)

<sup>19</sup> 2014 GLOBAL R&D FUNDING FORECAST, Battelle and R&D Magazine, December 2013.

[http://www.battelle.org/docs/tpp/2014\\_global\\_rd\\_funding\\_forecast.pdf?sfvrsn=4](http://www.battelle.org/docs/tpp/2014_global_rd_funding_forecast.pdf?sfvrsn=4)



## **Appendix A**

### **SBTC White Paper**

# **National Defense Authorization Act Legislation That Will Help America's Warfighters and Job Creation**

The SBTC recommends that the House and Senate Armed Services Committees consider the following items be included in this 2015 NDAA. We believe these items will:

- Improve America's warfighting capability and save American lives.
- Reduce the cost of development of new military systems
- Create new American jobs, keeping the warfighting industrial base in the US by maximizing the use of small business.

In addition to the SBTC:

- supporting Section 818 of the House passed NDAA (HR 4435) increasing the procurement goals for small businesses, and
- opposing Section 829 of the House passed NDAA (HR 4435) which reduces the STTR funding for small business by about 25%,

The SBTC also recommends the following items be included in the legislation:

**Paragraphs (e)(4) and (e)(6) in 15 USC 638 are revised as follows as shown in red below:**

**(e) Definitions**

(4) the term "Small Business Innovation Research Program" or "SBIR" means a program under which a portion of a Federal agency's research or research and development effort is reserved for award to small business concerns through a uniform process having—

(A) a first phase for determining, insofar as possible, the scientific and technical merit and feasibility of ideas that appear to have commercial potential, as described in subparagraph (B), submitted pursuant to SBIR program solicitations;

(B) a second phase, which shall not include any invitation, pre-screening, or pre-selection process for eligibility for Phase II, that will further develop proposals which meet particular program needs, in which awards shall be made based on the scientific and technical merit and feasibility of the proposals, as evidenced by the first phase, considering, among other things, the proposal's commercial potential, as evidenced by—

(i) the small business concern's record of successfully commercializing SBIR or other research;

(ii) the existence of second phase funding commitments from private sector or non-SBIR funding sources;

(iii) the existence of third phase, follow-on commitments for the subject of the research; and

(iv) the presence of other indicators of the commercial potential of the idea; and

(C) ~~where appropriate,~~ a third phase for work that derives from, extends, or completes efforts made under prior funding agreements under the SBIR program—

(i) in which commercial applications of SBIR-funded research or research and development are funded by non-Federal sources of capital or, for products or services intended for use by the Federal Government, by follow-on non-SBIR Federal funding awards; or

(ii) for which awards from non-SBIR Federal funding sources are used for the continuation of research or research and development that has been competitively selected using peer review or merit-based selection procedures;

(6) the term “Small Business Technology Transfer Program” or “STTR” means a program under which a portion of a Federal agency’s extramural research or research and development effort is reserved for award to small business concerns for cooperative research and development through a uniform process having—

- (A) a first phase, to determine, to the extent possible, the scientific, technical, and commercial merit and feasibility of ideas submitted pursuant to STTR program solicitations;
- (B) a second phase, which shall not include any invitation, pre-screening, or pre-selection process for eligibility for Phase II, that will further develop proposals that meet particular program needs, in which awards shall be made based on the scientific, technical, and commercial merit and feasibility of the idea, as evidenced by the first phase and by other relevant information; and
- (C) ~~where appropriate,~~ a third phase for work that derives from, extends, or completes efforts made under prior funding agreements under the STTR program—
  - (i) in which commercial applications of STTR-funded research or research and development are funded by non-Federal sources of capital or, for products or services intended for use by the Federal Government, by follow-on non-STTR Federal funding awards; and
  - (ii) for which awards from non-STTR Federal funding sources are used for the continuation of research or research and development that has been competitively selected using peer review or scientific review criteria;

**Paragraph (r) in 15 USC 638 is revised as follows as shown in red below:**

**(r) Phase III agreements**

**(1) In general**

In the case of a small business concern that is awarded a funding agreement for Phase II of an SBIR or STTR program, a Federal agency may enter into a Phase III agreement with that business concern for additional work to be performed during or after the Phase II period. The Phase II funding agreement with the small business concern may, at the discretion of the agency awarding the agreement, set out the procedures applicable to Phase III agreements with that agency or any other agency.

**(2) Definition**

(A) In this subsection, the term “Phase III agreement” means a follow-on, non-SBIR or non-STTR funded contract as described in paragraph (4)(C) or paragraph (6)(C) of subsection (e) of this section.

~~(B) In accordance with the definition for Phase III agreement in paragraph (4)(C) or paragraph (6)(C) of subsection (e) of this section, the contracting officer for a Federal Agency or contracting official for a prime contractor is instructed that determination of whether or not a contract award or subcontract award to a small business constitutes a Phase III agreement is based solely on the definitions stated in paragraph (4)(C) or paragraph (6)(C) of subsection (e) of this section, and not on the subject, type or nature of the procurement. The nature of any contract awarded by the Federal Agency directly to a small business or to a prime contractor which subcontracts to a small business shall not be used as the basis for the determination of whether a direct contract award or a subcontract award to a small business is a Phase III agreement.~~

**(3) Intellectual property rights**

(A) Each funding agreement under an SBIR or STTR program shall include provisions setting forth the respective rights of the United States and the small business concern with respect to intellectual property rights and with respect to any right to carry out follow-on research.

~~(B) Each funding agreement, whether a Federal Agency award or federally-funded prime contractor subcontract award, which meets the definition of a Phase III agreement as described in paragraph (4)(C) or paragraph (6)(C) of subsection (e) of this section shall include the appropriate SBIR or STTR rights clause from the Federal Acquisition Regulations and/or the applicable agency supplement to the FAR addressing SBIR or STTR data rights.~~

The appropriate SBIR data rights language does not need to be listed as a flowdown clause in the prime contractor's agreement with the Federal Agency in order for this section to apply.  
(C) Under no circumstances shall a Federal Agency or prime contractor require a small business to relinquish its SBIR or STTR or Limited data rights as a condition for award or include relinquishment of same data rights in any solicitation or procurement action.

**(4) Phase III awards**

(A) To the greatest extent practicable, Federal agencies and Federal prime contractors shall issue Phase III awards relating to technology, including sole source awards, to the SBIR and STTR award recipients that developed the technology.

(B) When the subject matter of a contract or subcontract award meets the definitions for a Phase III agreement as described in paragraph (4)(C) or paragraph (6)(C) of subsection (e) of this section, the Federal agency or Federal prime contractors shall insert the following language in the agreement: "This contract or purchase order is an SBIR Phase III Agreement."

**Protect the proper allowability of patent expense**

The SBIR program assumes that patents will be sought to promote commercial sustainability, and requires the small business to seek patents with government's use rights (which it receives under SBIR rules). Congress should ensure these requirements are accompanied by allowability of the related costs of SBIR-derived patents under government cost accounting. As patents are a long term asset affecting multiple potential sales both for the business and the government, the proper treatment should be allowed as a general and administrative cost. This is consistent with prior treatment by the ASBCA.

See, e.g., Allied Materials & Equip. Co., ASBCA No. 17318, 75-1 BCA ¶ 11,150, at 53,086 ("Generally, legal expenses are subsumed in the general and administrative expense pool. That practice is widely employed because the services are generally rendered as supportive to managerial services with the benefits spread over or flowing to a contractor's entire business organization or business unit, including Government and industry contract activity as well as other commercial business."); TRW Sys. Group of TRW, Inc., ASBCA No. 11499, 68-2 BCA ¶ 7117, at 32,971 (holding that domestic patent costs are properly included in G&A expense pool).



## **Appendix B**

### **SBTC White Paper**

#### **DoD Recommended Policy Changes**

#### **DoD Under-Recognition of SBIR Phase III Actions**

DoD is making far greater use of SBIR technology than even it recognizes. Underreporting these actions masks the recognized effectiveness of the program and impairs effective transition action, while enabling erroneous contract actions that fail to recognize SBIR Phase III status and resulting data rights treatment.

We recommend that DoD take several actions to substantially boost its accuracy in reporting SBIR Phase III actions.

1. Better training and oversight to ensure ACOs across DoD understand the simple requirements for designation as a Phase III action. Failure to understand the law in this area continues, straining DoD-prime-supplier relationships, leading to small businesses losing business or at least their SBIR data rights, and slowing contract actions.
2. Improve FPDS and DD350 accuracy: The FPDS system has a field for capturing Phase III status, fed by DD350 or direct input from automated contract software. This source data is often inaccurate. An informal survey found 50% of Phase III's contracts in FPDS were mislabeled or not recognized as Phase III's.
  - a. Better DD350 instructions: The DD350 has misleading instructions relating to the SBIR designation under section D7 (see Appendix B-1, page 4 of 4). It implies selection of this choice needs to be part of the SBIR program, which often leads ACOs to consider a non-SBIR funded or fully competed solicitation as non-SBIR program.
  - b. Automatic error checking requiring the question on SBIR status be filled in together with better training and other error checking would boost accuracy.
  - c. Creating a contractor-initiated correction form to allow recommended correction of designation errors would provide a backup.
3. Capture subcontracted Phase IIIs: Subcontracted Phase III actions are not captured in FPDS, yet these may comprise an even larger revenue share than those now captured as prime awards in FPDS. These could be readily captured by creating a prime contractor-initiated DD 350-equivalent reporting mechanism, noting a subcontracted Phase III action for submission to the prime's ACO, who could approve and forward the information to an SBIR database.
4. Capturing DoD cooperative agreements: These are not captured in FPDS, but could be readily added by requiring the ACO to also fill out a DD 350 on a cooperative agreement that also has Phase III designation, and requiring the same for primes under a cooperative agreement who subcontract a Phase III award.



**INDIVIDUAL CONTRACTING ACTION REPORT**

Report Control Symbol DD-AT&L(M)1014

- A1 Type of Report \_\_\_\_ (0) Original; (1) Canceling; or (2) Correcting
- A2 Report Number \_\_\_\_\_
- A3 Contracting Office \_\_\_\_\_
- A3A Reporting Agency FIPS 95 Code \_\_\_\_\_
- A3B Contracting Office Code \_\_\_\_\_
- A4 Name of Contracting Office \_\_\_\_\_

**B1 Contract Identification Information**

- B1A Contract Number \_\_\_\_\_
- B1B Origin of Contract \_\_\_\_ (A) DoD; (B) NASA; or (C) Other Non-DoD Agency
- B1C Bundled Contract \_\_\_\_ (Y) Yes; or (N) No
- B1D Bundled Contract Exception \_\_\_\_ (A) Mission Critical; (B) OMB Circular A-76; or (C) Other
- B1E Performance-Based Service Contract \_\_\_\_ (Y) Yes; or (N) No

**B2 Modification Order, or Other ID Number**

- B2A Order, or Other ID Number \_\_\_\_\_
- B2B Modification Number \_\_\_\_\_
- B3 Action Date (yyyymmdd) \_\_\_\_\_
- B4 Completion Date (yyyymmdd) \_\_\_\_\_

**B5 Contractor Identification Information**

- B5A Contractor Identification Number (DUNS) \_\_\_\_\_
- B5B Government Agency \_\_\_\_ (Y) Yes; or (N) No
- B5D Contractor Name and Division Name

Contractor \_\_\_\_\_  
Division \_\_\_\_\_

**B5E Contractor Address**

Street or PO Box \_\_\_\_\_  
City or Town \_\_\_\_\_  
State or Country \_\_\_\_\_ Zip Code \_\_\_\_\_

- B5F Taxpayer Identification Number \_\_\_\_\_
- B5G Parent Taxpayer Identification Number \_\_\_\_\_
- B5H Parent Name \_\_\_\_\_

**B6 Principal Place of Performance**

- B6A City or Place Code \_\_\_\_\_
- B6B State or Country Code \_\_\_\_\_
- B6C City or Place and State or Country Name \_\_\_\_\_

**B7 Type Obligation \_\_\_\_ (1) Obligation; (2) Deobligation; or (3) No Dollars Obligated or Deobligated**

B8 Obligated or Deobligated Dollars *(Enter Whole Dollars Only)* \_\_\_\_\_

B9 Foreign Military Sale \_\_\_\_ (Y) Yes; or (N) No

B10 Multiyear Contract \_\_\_\_ (Y) Yes; or (N) No

B11 Total Estimated Contract Value *(Enter Whole Dollars Only)* \_\_\_\_\_

**B12 Principal Product or Service**

- B12A Federal Supply Class or Service Code \_\_\_\_\_
- B12B DoD Claimant Program Code \_\_\_\_\_
- B12C MDAP, MAIS, or Other Program Code \_\_\_\_\_

### INDIVIDUAL CONTRACTING ACTION REPORT

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- B12D NAICS Code \_\_\_\_\_
- B12E Name or Description \_\_\_\_\_
- B12F EPA-Designated Product(s) \_\_\_\_\_ (A) EPA-Designated Product(s) with Minimum Recovered Material Content; (B) FAR 23.405(c)(1) Justification; (C) FAR 23.405(c)(2) Justification; (D) FAR 23.405(c)(3) Justification; or (E) No EPA-Designated Product(s) Acquired
- B12G Recovered Material Clauses \_\_\_\_\_ (A) FAR 52.223-4; or (B) FAR 52.223-4 and FAR 52.223-9
- B13 Kind of Action
- B13A Contract or Order \_\_\_\_\_ (1) Letter Contract; (3) Definitive Contract; (4) Order under an Agreement; (5) Order under Indefinite-Delivery Contract; (6) Order under Federal Schedule; (7) BPA Order under Federal Schedule; (8) Order from UNICOR or JWOD; or (9) Award under FAR Part 13
- B13B Type of Indefinite-Delivery Contract \_\_\_\_\_ (A) Requirements Contract (FAR 52.216-21); (B) Indefinite-Quantity Contract (FAR 52.216-22); or (C) Definite-Quantity Contract (FAR 52.216-20)
- B13C Multiple or Single Award Indefinite-Delivery Contract \_\_\_\_\_ (M) Multiple Award; or (S) Single Award
- B13D Modification \_\_\_\_\_ (A) Additional Work (new agreement); (B) Additional Work (other); (C) Funding Action; (D) Change Order; (E) Termination for Default; (F) Termination for Convenience; (G) Cancellation; (H) Exercise of an Option; or (J) Definitization
- B13E Multiple Award Contract Fair Opportunity \_\_\_\_\_ (A) Fair Opportunity Process; (B) Urgency; (C) One/Unique Source; (D) Follow-On Contract; or (E) Minimum Guarantee
- B13F Indefinite-Delivery Contract Use \_\_\_\_\_ (A) Government-Wide; (B) DoD-Wide; (C) DoD Department or Agency Only; or (D) Contracting Office Only
- B13G Indefinite-Delivery Contract Ordering Period Ending Date (yyyymmdd) \_\_\_\_\_
- B14 CICA Applicability \_\_\_\_\_ (A) Pre-CICA; (B) CICA Applicable; (C) Simplified Acquisition Procedures Other than FAR Subpart 13.5; or (D) Simplified Acquisition Procedures Pursuant to FAR Subpart 13.5
- B15 Information Technology Products or Services \_\_\_\_\_ (A) Commercially Available Off-the-Shelf Item; (B) Other Commercial Item of Supply; (C) Nondevelopmental Item Other than Commercial Item; (D) Other Noncommercial Item of Supply; (E) Commercial Service; or (F) Noncommercial Service.
- B16 Clinger-Cohen Act Planning Compliance \_\_\_\_\_ (Y) Yes; or (N) No

**Do not complete Part C if Line B5B is coded Y.**

- C1 Synopsis \_\_\_\_\_ (A) Synopsis Only; (B) Combined Synopsis/Solicitation; or (N) Not Synopsized
- C2 Reason Not Synopsized \_\_\_\_\_ (A) Urgency; (B) FAR 5.202(a)(13); (C) SBA/OFPP Pilot Program; or (Z) Other Reason
- C3 Extent Competed \_\_\_\_\_ (A) Competed Action; (B) Not Available for Competition; (C) Follow-On to Competed Action; or (D) Not Competed
- C4 Sea Transportation \_\_\_\_\_ (Y) Yes - Positive Response to DFARS 252.247-7022 or 252.212-7000(c)(2); (N) No - Negative Response to DFARS 252.247-7022 or 252.212-7000(c)(2); or (U) Unknown - No Response or Provision Not Included in Solicitation

**INDIVIDUAL CONTRACTING ACTION REPORT**

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- C5 Type of Contract \_\_\_\_ (A) Fixed-Price Redetermination; (J) Firm-Fixed-Price; (K) Fixed-Price Economic Price Adjustment; (L) Fixed-Price Incentive; (M) Fixed-Price-Award-Fee; (R) Cost-Plus-Award-Fee; (S) Cost Contract; (T) Cost-Sharing; (U) Cost-Plus-Fixed-Fee; (V) Cost-Plus-Incentive-Fee; (Y) Time-and-Materials; or (Z) Labor-Hour
- C6 Number of Offerors Solicited \_\_\_\_ (1) One; or (2) More than One
- C7 Number of Offers Received \_\_\_\_\_
- C8 Solicitation Procedures \_\_\_\_ (A) Full and Open Competition – Sealed Bid; (B) Full and Open Competition – Competitive Proposal; (C) Full and Open Competition – Combination; (D) Architect-Engineer; (E) Basic Research; (F) Multiple Award Schedule; (G) Alternative Sources; (K) Set-Aside; or (N) Other than Full and Open Competition
- C9 Authority for Other Than Full and Open Competition \_\_\_\_ (1A) Unique Source; (1B) Follow-On Contract; (1C) Unsolicited Research Proposal; (1D) Patent or Data Rights; (1E) Utilities; (1F) Standardization; (1G) Only One Source – Other; (2A) Urgency; (3A) Particular Sources; (4A) International Agreement; (5A) Authorized by Statute; (5B) Authorized Resale; (6A) National Security; or (7A) Public Interest
- C10 Subject to Labor Standards Statutes \_\_\_\_ (A) Walsh-Healey Act; (C) Service Contract Act; (D) Davis-Bacon Act; or (Z) Not Applicable
- C11 Cost or Pricing Data \_\_\_\_ (Y) Yes – Obtained; (N) No – Not Obtained; or (W) Not Obtained - Waived
- C12 Contract Financing \_\_\_\_ (A) FAR 52.232-16; (C) Percentage of Completion Progress Payments; (D) Unusual Progress Payments or Advance Payments; (E) Commercial Financing; (F) Performance-Based Financing; or (Z) Not Applicable
- C13 Foreign Trade Data
- C13A Place of Manufacture \_\_\_\_ (A) U.S.; or (B) Foreign
- C13B Country of Origin Code \_\_\_\_\_
- C14 Commercial Item \_\_\_\_ (Y) Yes – FAR 52.212-4 Included; or (N) No – FAR 52.212-4 Not Included

**Do not complete Part D if Line B5B is coded Y or if Line B13A is coded 6.**

- D1 Type of Contractor
- D1A Type of Entity \_\_\_\_ (A) Small Disadvantaged Business (SDB) Performing in U.S.; (B) Other Small Business (SB) Performing in U.S.; (C) Large Business Performing in U.S.; (D) JWOD Participating Nonprofit Agency; (F) Hospital; (L) Foreign Concern or Entity; (M) Domestic Firm Performing Outside U.S.; (T) Historically Black College or University (HBCU); (U) Minority Institution (MI); (V) Other Educational or (Z) Other Nonprofit
- D1B Women-Owned Business \_\_\_\_ (Y) Yes; (N) No; or (U) Uncertified
- D1C HUBZone Representation \_\_\_\_ (Y) Yes; or (N) No
- D1D Ethnic Group \_\_\_\_ (A) Asian-Indian American; (B) Asian-Pacific American; (C) Black American; (D) Hispanic American; (E) Native American; (F) Other SDB Certified or Determined by SBA; or (Z) No Representation
- D1E Veteran-Owned Small Business \_\_\_\_ (A) Service-Disabled Veteran; or (B) Other Veteran

**INDIVIDUAL CONTRACTING ACTION REPORT**

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- D2 Reason Not Awarded to SDB \_\_\_\_ (A) No Known SDB Source; (B) SDB Not Solicited; (C) SDB Solicited and No Offer Received; (D) SDB Solicited and Offer Was Not Low; or (Z) Other Reason
- D3 Reason Not Awarded to SB \_\_\_\_ (A) No Known SB Source; (B) SB Not Solicited; (C) SB Solicited and No Offer Received; (D) SB Solicited and Offer Was Not Low; or (Z) Other Reason
- D4 Set-Aside or Preference Program
- D4A Type of Set-Aside \_\_\_\_ (A) None; (B) Total SB Set-Aside; (C) Partial SB Set-Aside; (D) Section 8(a) Set-Aside or Sole Source; (E) Total SDB Set-Aside; (F) HBCU or MI – Total Set-Aside; (G) HBCU or MI – Partial Set-Aside; (H) Very Small Business Set-Aside; (J) Emerging Small Business Set-Aside; (K) HUBZone Set-Aside or Sole Source; (L) Combination HUBZone and 8(a)
- D4B Type of Preference \_\_\_\_ (A) None; (B) SDB Price Evaluation Adjustment – Unrestricted; (C) SDB Preferential Consideration - Partial SB Set-Aside; (D) HUBZone Price Evaluation Preference; or (E) Combination HUBZone Price Evaluation Preference and SDB Price Evaluation Adjustment
- D4C Premium Percent \_\_\_\_\_
- D7 Small Business Innovation Research (SBIR) Program \_\_\_\_ (A) Not a SBIR Program Phase I, II, or III; (B) SBIR Program Phase I Action; (C) SBIR Program Phase II Action; or (D) SBIR Program Phase III Action
- D8 Subcontracting Plan - SB, SDB, HBCU, or MI \_\_\_\_ (A) Plan Not Included – No Subcontracting Possibilities; (B) Plan Not Required; (C) Plan Required – Incentive Not Included; or (D) Plan Required – Incentive Included
- D9 Small Business Competitiveness Demonstration Program \_\_\_\_ (Y) Yes; or (N) No
- D10 Size of Small Business \_\_\_\_\_
- |           |                 |                                      |
|-----------|-----------------|--------------------------------------|
| Employees | (A) 50 or fewer | Annual Gross Revenues                |
|           | (B) 51 - 100    | (M) \$1 million or less              |
|           | (C) 101 - 250   | (N) Over \$1 million - \$2 million   |
|           | (D) 251 - 500   | (P) Over \$2 million - \$3.5 million |
|           | (E) 501 - 750   | (R) Over \$3.5 million - \$5 million |
|           | (F) 751 - 1000  | (S) Over \$5 million - \$10 million  |
|           | (G) Over 1000   | (T) Over \$10 million - \$17 million |
|           |                 | (U) Over \$17 million.               |
- D11 Emerging Small Business \_\_\_\_ (Y) Yes; or (N) No
- E1 Contingency, Humanitarian, or Peacekeeping Operation \_\_\_\_ (Y) Yes; or Leave Blank
- E2 Cost Accounting Standards Clause \_\_\_\_ (Y) Yes; or Leave Blank
- E3 Requesting Agency Code (FIPS 95) \_\_\_\_\_
- E4 Requesting Activity Code \_\_\_\_\_
- E5 Number of Actions \_\_\_\_\_
- E6 Payment by Governmentwide Purchase Card \_\_\_\_ (Y) Yes; or Leave Blank
- F1 Name of Contracting Officer or Representative \_\_\_\_\_
- F2 Signature \_\_\_\_\_
- F3 Telephone Number \_\_\_\_\_
- F4 Date (yyymmdd) \_\_\_\_\_

