

In response to the Small Business Administration’s (SBA) request for comments on its proposed size regulations for the SBIR and the STTR program, the Small Business Technology Council (SBTC) submits the following comments. These comments are endorsed and supported by the National Small Business Association (NSBA).

The Small Business Technology Council is a non-partisan, non-profit industry association of companies dedicated to promoting the creation and growth of research intensive, technology-based U. S. small business. SBTC encourages the promotion and growth of these U. S. small businesses through advocacy and education. SBTC applies the collective wisdom of its board to guide the future of small business in the technology sector. Its mission is closely aligned with the statutory objectives of the SBIR and the STTR programs. Therefore SBTC and its members have a direct interest in the SBA proposals which, by congressional mandate, are to preserve and maintain “…the integrity of the SBIR program as a program for small business concerns in the United States by prohibiting large businesses or large entities or foreign-owned entities from participation in the program…” (Small Business Reauthorization Act of 2011).

BACKGROUND

A key element of the SBIR program is the commercialization of technology developed under the SBIR program. The law’s commercialization provisions have been strengthened on a number of occasions by Congress and the SBA. In the 2000 SBIR Reauthorization Act, a provision was entered requiring that the agencies government to increase commercialization returns, and in 2002 SBA issued the SBIR Policy Directive implementing and strengthening that Law. These changes required that any agency awarding a Phase III contract “for work that derives from, extends, or completes efforts made under prior funding agreements under the SBIR program” to a company that did not originally develop the technology under SBIR report to SBA the justifications for doing so.

SBA was also to report to Congress any instance where this occurred. SBA has yet to report to Congress of a single instance where an agency has awarded a follow on contract for a technology to a firm other than the SBIR firm that developed the SBIR-funded technology. This is in spite of numerous instances where agencies have not reported to SBA and where small businesses have asked for SBA’s help. Even cases where SBA has formally intervened have not been reported to Congress. I know of no instance when the agency itself has reported to SBA a Phase III issue. SBTC survey of SBIR companies shows that **XX**% of small business responding have had difficulties in getting agencies to recognize the rights the law gives to SBIR firms.

The 2012 SBIR Reauthorization Act further strengthened the requirement that agencies award Phase III contracts to develop SBIR technologies by requiring: “To the greatest extent possible, 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”. Despite this clear legal mandate, the problem remains and more needs to be done. We commend the Navy for issuing the Phase III Guidebook, the Federal Acquisition Regulations, the DEFAR and HSR have yet been updated to include even the requirements in the 2000 Reauthorization Act and the 2002 SBA Policy Directives much less the 2012 Reauthorization provision passed over two years ago. The 2012 Reauthorization Act placed into law a number of provisions that were previously in the SBA policy directive. Even though these provisions are now in the law the FAR, DFARS and HHSAR have not been updated.

In 2014 the Federal Government spent $135 billion dollars on Research and Development. While less than 5% percent of this money goes to small business, the most innovative sector of the U.S. economy, and only 3% goes through the SBIR/STTR program, the SBIR/STTR firms account for 25% of key innovations in America. SBIR firms are far better at commercializing their technology than universities, large firms, or the government. According to the National Academy of Sciences, SBIR firms commercialize 40-50% of SBIR technology. Since SBIR firms are also required to be owned by U.S. citizens and the research most be done in America, this means the SBIR firms create American jobs. Given SBIR/STTR’s remarkable record is easy to see why Congress has strengthened the commercialization provisions of the Law. Unfortunately, the Federal Government has lagged behind in requiring agencies and prime contractors to comply with the law.

With this background we welcome the opportunity to respond to SBA’s Advanced Notice of Policy Directive Amendments.

First, the Federal government should comply with the commercialization provision of the law. Shortly after the law was passed SBTC issued and delivered to DOD a white paper outlining what the 2012 Reauthorization Act requires and our recommendations <http://www.nsba.biz/docs/sbtc_dod_white_paper_4-24-2012.pdf>. We urge DOD to implement these recommendations and SBA to include them in the amendments to its policy directive.

Second, we believe that the Federal Acquisition Regulations, the DFARS, and HHSAR should be updated to include the commercialization provisions in the 2000 Reauthorization, the 2002 SBA Policy Directive and the 2012 Reauthorization Act. Many of the problems identified in SBTC’s Phase III survey would not have occurred if the FAR and DFARS were clear about what the law is concerning commercialization. Our survey shows that contracting officers are not aware of the provisions in the law and routinely deny awarding Phase III contracts to SBIR firms.

While the Navy has issued its Phase III Guidebook which is helpful in telling SBIR firms and government officials what the law required and permits, DOD itself has not issued clear directions to its contracting officers and prime contractors. There are no incentives or goals set for program managers and PEOs or for the prime contractors, nor have the reporting requirements for program managers or prime contracts been published. SBA and the federal agencies should issue goals and incentives and require reports on Phase III contracts and awards. SBA should require that this be done and report to Congress why it hasn’t been done in the two years since the law was passed.

It is especially important that SBA and the agencies strengthen and update their use of Phase III since SBIR firms can be excluded from the program if their commercialization rate is too low.

**Data Rights Comment**

* **The extent to which the awardee owns the data it generates in performance of an award.**

The data produced by SBIR-funded research is 100% owned by the SBIR firm. From the very beginning of the law, it has been clear that the small business retains all data and owns the technology developed under the SBIR program. The government has a license to use the data for government purposed only. Since our survey clearly show that many contracting officers do not know that the law allows SBIR firms to own 100% of the data, government regulations including the SBA policy directive could attempt to make it clearer.

* **The Government's obligations to protect SBIR/STTR data from disclosure for at least four years following the delivery of the last deliverable of an SBIR/STTR award.**

The government is required to keep SBIR/STTR data confidential and not disclose the SBIR data. This obligation continues until four (five at DOD) years after the last deliverable under a SBIR/STTR award. During the protection period, the Government's right to access, review and evaluate SBIR/STTR data, but not to modify the data. We agree with this. If the data needs to be modified, then it requires a Phase III to the SBIR firm.

* **After the protection period expires, the Government's right to use and disclose the data solely on behalf of the government, which means that the government may use and disclose data for competitive procurements (with non-disclosure agreements) but cannot use the data for commercial (non-governmental) purposes.**

We agree with this statement and it should be included in the SBA Policy Directive and FAR

* **Possible discrepancies between current FAR and agency supplemental regulations and SBA's SBIR/STTR Policy Directives.**

The FAR, DFARS and HHSAR have not been updated to reflect the changes in the law on the 2000 Reauthorization Act and the 2012 Reauthorization Act and in SBA’s 2002 Policy Directive. They should be immediately updated to reflect all of the changes in the law and SBA Policy Directive. Many of the issues raised in our submission should be included in the revised FAR, DFARS and HHSAR.

* **The feasibility and helpfulness of a short form data rights option (especially for grant agencies). Such a short form would be a simple agreement stating that the Government receives essentially no rights to SBIR/STTR technical data. The simplified data rights option would be for any agency or specific award.**

We do not believe that this should be a priority. The data rights below to the SBIR firm and SBA’s priority should be to have the FAR updated to include all of the provisions of the law and SBA policy directive.

**Phase III Policy Comment**

* **Whether SBA should define “to the greatest extent practicable” with respect to when agencies shall issue these Phase III awards; and if so, how the phrase should be defined.**

SBA should define the terms and used the standard definition in the dictionary.

Practicable definition: “capable of being put into [practice](http://www.merriam-webster.com/dictionary/practice) or of being done or accomplished”

Greatest definition: “remarkable in magnitude, degree, or effectiveness”

There are 2 questions to the agency should ask:

1. Is the SBIR firm available,

2. Is it capable? By capable, it means is the SBIR firm capable of developing its SBIR technology?

If yes to both then the SBIR firm should receive either a prime contract. If the project is so large that it includes other parts not related to the SBIR technology, and then solicitation should state that the SBIR firm should receive a directed subcontract. If SBIR firm is available and capable then the contract or subcontract should be awarded to the SBIR firm.

* **Whether, if the agency elects not to issue a Phase III sole source award to the SBIR or STTR Phase II awardees for follow-on Phase III work, there are other ways the agency could meet this statutory requirement.**

Yes, agencies should be required to show that they have search for and determined that no SBIR technology is capable of performing the task.

If the project is so large that it includes other parts not related to the SBIR technology and then solicitation should state that the SBIR firm should receive a directed subcontract. While a few contracting officers have begun doing this, SBA and DOD should make it clear that this is an appropriate and required way to deal with Phase III. If SBIR firm is available and capable of developing its SBIR technology then the contract or subcontract should be awarded to the SBIR firm.

* **Whether an SBIR or STTR awardee can receive the required Phase III preference within a full and open competition.**

Where a preference should be given is where there are two or more technologies that are capable of doing the project. In that case the agency should be required to give the contract or require a subcontract be given to the SBIR firm. The government has already paid to have the SBIR research and the law gives a preference in this instance to the SBIR firm.

In other instances, the law currently requires “to the greatest extent practicable” the contract or subcontract shall be made to the SBIR firm. If the technology is derived from or logically extends the SBIR technology, then the law requires that the contract be give to small business. More than a preference the law requires that the SBIR firm receive a sole source contract “for work that derives from, extends, or completes efforts made under prior funding agreements under the SBIR program”. There should not be a competition, the SBIR firm should simply receive the award. SBA should make it clear in the amended policy directive that Phase III contracts must be awarded unless the agency specifically finds that awarding the contract or subcontract is no practicable as defined above. Agencies should be made to report as provided in Section 4(c)(8) of the 2012 SBIR Policy Directive, and SBA shall report to Congress each time that the issue of a Phase III award occurs. Section 4(c)(8) requires before awarding a contract to a non SBIR entity that the agency report to SBA.

If the agency decides that the project is not a phase III and that the SBIR firm is not capable of advancing its own technology, then the agency must make a determination with written justification with the reasons why it has determined not to award a phase III to the SBIR firm. This determination should be sent to SBA pursuant to the Policy Directive. Agencies should not be allowed raise issues or arguments in subsequent proceedings that it didn’t raise in its report to SBA.

* **Whether the policy directive should outline the steps an agency must take in deciding or understanding when the Phase III preference applies.**

Yes. SBA should make Section 4(c)(8) binding. SBA policy directive should direct that if an agency does not comply with Section 4(c)(8) it cannot in subsequent proceedings raise arguments or facts that it didn’t raise in its report to SBA.