



January 6, 2014

SBTC Comment on SBIR and STTR Data Rights and Phase III Policy Directives

In response to the Small Business Administration's (SBA) request for comments on its proposed Policy Directives 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 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 rulemaking which, by congressional mandate, are required 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..."¹

EXECUTIVE SUMMARY

The issues SBA raised in its Proposed SBIR Policy Directive Amendment notice are very relevant and important to SBIR companies, and the SBTC urges prompt action. For the three years since new Phase III requirements became law, SBTC has heard from its members and SBIR companies about problems they have experienced trying to exercise the rights SBIR companies have with Federal agencies. To that end, SBTC surveyed SBIR companies and requested they identify problems they had encountered in obtaining Phase III follow-on contracts, and protecting their SBIR data rights. The results of our survey clearly show that after three years, there is still a significant problem with agencies officials understanding, knowledge and/or refusal to comply with the data rights provision and Phase III preferences in the law.

Our survey indicates that 29% of contracting officers never heard of SBIR Phase III rights. In addition, 36% of contracting officers were aware of Phase III requirements but chose to ignore Phase III. This means that two thirds (65%) of the contracting officers won't do Phase III programs, despite its requirements in the law. Compounding the problem, 26% of contracting officers erroneously believe that they cannot award a sole source contract to an SBIR company, instead that they have to go to a new public solicitation (in direct contradiction to the law).

¹ SBIR Reauthorization Act of 2011, PL 112-81, div. E, title LI, §5107(c)

The results of our survey clearly document that SBA and DOD need to immediately update FAR, DFAR and HHSAR regulations to comply with the provisions of the SBIR Reauthorization Act passed and signed into law three years ago, but still not implemented. In addition, SBA needs to issue a directive making clear the duty and obligations under the law. The law is clear that SBIR contracts should be awarded “to the greatest extent practicable” and that SBIR data rights exist and should be honored. The full response to the survey is attached. We commend SBA for its notice and urge that quick action be taken to ensure that all personnel involved in the contracting process be made aware of the law, and required to comply with the law. This will necessitate not only updating regulations, but revising all supporting documentation and contracting manuals. Furthermore, an extensive training program needs to be immediately put in place for Contracting Officers, Contract Specialists, Program Officers, Program Managers, and Contracting Officers Representatives.

SBTC also notes with disappointment that the required goals and incentives for PEO and prime contractors have yet to be implemented. In a separate communication, we will express our concerns to the DOD about this.

Below is a question we posed to SBIR companies, asking them to identify any problems or issues they have faced with contracting officers when pursuing a Phase III contract:

Has your company experienced any of the following issues when pursuing Phase III funding (check all that apply):	
Answer Options	Yes
Contracting officer has never heard of the SBIR Phase III program	29.4%
Phase III preference for SBIR companies is ignored by agency/ contracting officer	36.7%
Contracting officer erroneously believes that only the agency that awarded the Phase I/II grant can procure a Phase III	18.3%
Contracting officer decides to make solicitation public rather than do a Phase III despite clear need to express preference	26.6%
Contracting officer believes Phase III cannot be done once solicitation is public	10.1%
Contracting officer cancels solicitation after protest that they did not give SBIR preference and finds existing contracting vehicle to funnel award to another company	7.3%
Contracting officer thinks SBIR awards must go through agency SBIR office	18.3%
Contracting officer believes FAR guidance suggests they need only give preference to disadvantaged and small businesses, not SBIR	4.6%
Contracting officer believes solicitation must be a small business set aside to award a Phase III	11.0%
Contracting officer claims there is no agency directive to issue Phase III awards despite the fact other agencies have issued directives to their staff	22.9%
Contracting officer refuses to recognize SBIR data rights	21.1%
I have not pursued any Phase III funding	27.5%
I have not experienced any issues in securing Phase III funding	9.2%
Other	19.3%

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 the agencies increase commercialization returns by increasing Phase III awards “for work that derives from, extends, or completes efforts made under prior funding agreements under the SBIR program”, 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 to a company other than the company that originally developed the technology 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. We know of no instance

when the agency itself has reported to SBA a Phase III issue. An SBTC survey of SBIR companies shows that over 65% of small business responding have had difficulties in getting agencies to recognize the rights the law gives to SBIR firms with regards to Phase III contracting.

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, but the Federal Acquisition Regulations, the DFARS and HHSAR have yet be updated to include even the requirements in the 2000 Reauthorization Act and the 2002 SBA Policy Directives, much less the 2011 SBIR Reauthorization Act provision passed three years ago. The 2011 SBIR 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, nor have personnel been trained on the changes in the law.

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 must 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.

GENERAL COMMENTS

First, the Federal Government should comply with the commercialization provisions of the law. Shortly after the law was passed SBTC issued to DOD a white paper outlining what the 2011 SBIR Reauthorization Act requires and our recommendations². 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, HHSAR, and all other Agency procurement regulations, manuals, and related documentation 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

² http://www.nsba.biz/docs/sbtc_dod_white_paper_4-24-2012.pdf

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 three years since the law was passed.

The SBA should also notify all companies receiving Phase II awards of the procedures for applying for Phase III programs and how to file formal complaints with SBA when government procurements fail to recognize data rights or the company's rights to a Phase III program. In many cases, small businesses do not know where to go to formally protest the procurements. We recommend that the SBA encourage all federal agencies to follow the Navy's example and develop documentation for their procurement officers and small businesses

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

SBTC's survey of SBIR companies has shown that many Contracting Officers do not understand what the law is with respect to protecting SBIR data rights. We asked respondents to share with us any issues or problems they encountered when pursuing a Phase III contract, and received many comments saying that Contracting Officers refused to recognize SBIR Phase III data rights, threatening not to award a contract or even cancelling a contract when the firm insists on maintaining their data rights. Here are some examples of responses from SBIR companies:

- "Contracting officers do not want an SBIR Phase III because of fears related to the Data Rights clause."
- "Contracting Officers specifically refused to let a contract that included FAR SBIR clauses and SBIR data rights effectively telling small business it will not let the contract under those terms despite the fact that SBIR Phase II data was specifically used to justify the contract and explicitly cited as such in the proposal."
- "It was made clear to us that if we insist on data rights, we won't get a contract."
- "In September 2014, we were denied significant task order funding after winning a contract after requesting SBIR data rights."
- "I have encountered issues with Prime contractors not wanting to recognize Phase III or Data Rights on government prime contracts."
- "We have been told by agencies that if we don't give up SBIR data rights, they won't issue a Phase III."

All of these examples of behavior by agencies and contracting officers are inconsistent with the law and the SBA's policy directives.

Below are SBTC's responses to the specific questions on data rights policy posed by SBA in the request for 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 purposes only. Since our survey clearly shows 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, FAR, and all supporting contracting documentation and training materials.

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

The FAR, DFARS, HHSAR, and other Agency regulations, manuals, and training materials 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. Furthermore, all personnel involved in the contracting process need to undergo training in these changes (some of which are more than a decade out of date). This training needs to be documented, and reported to the SBA to assure that it is being completed promptly and thoroughly.

❖ **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 belong to the SBIR firm and SBA's priority should be to have the FAR updated along with all supporting materials to include all of the provisions of the law and SBA policy directive.

Phase III Policy Comment

Aside from data rights SBTC's survey also uncovered a number of issues SBIR companies have had with agencies stemming from a general lack of knowledge of the Phase III program, and how it is supposed to work. Here are some examples of responses we received when asking companies what issues they have faced in pursuing Phase III contracts:

- "Ignorance of the SBIR Phase III program. Army just ignores the program in our experience."
- "An agency requested competition between large prime and small business for award of contract for Phase III that specifically used Phase II technology developed by the small business. When agency who funded the original Phase I (different agency than procuring agency) contacted the procuring agency to protest the manner in which the procurement was occurring, suggesting a Phase III to the small business was the proper procurement strategy the opportunity went away. The company has further had a Phase III SBIR terminated for the convenience of the government only to learn funds had been allocated to another company to replicate the technology."
- "No one seems to understand how Phase III works and no one can assist us in this area"
- "Although never totally ignorant of Phase III preferences etc. not many contracting officers have had direct experience with Phase III awards."
- "Lack of knowledge of Phase III, or lack of belief that the system will support Phase III is the biggest impediment"
- "CO's supervisor does not understand SBIR and will not allow or they have gotten a directive to buy under a pillar contract - even though going direct and invoking SBIR is cheaper"

Below are SBTC's responses to the specific questions on data rights policy posed by SBA in the request for 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 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 (by name) should receive a directed subcontract to the full extent of the SBIR developed technology. 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 searched 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 (by name) should receive a directed subcontract to the full extent of the SBIR developed technology. While a few contracting officers have begun doing this, SBA and the agencies should make it clear that this is required, and appropriate, to deal with Phase III. If an SBIR firm is available and capable of developing its SBIR technology then the contract or subcontract shall 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 not 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. The 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.

Conclusion

While SBTC is pleased that SBA issued this notice and is addressing these issues, we are deeply concerned that the law was passed three years ago and there has been so little action and education of governmental officials of these important provisions in the law.

We would be happy to meet with you in the near future to further discuss these issues, and possible solutions to address them.

Thank you,

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