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July 6, 2016

Mr. Edsel Brown
Assistant Director, Office of Innovation
US Small Business Administration
Small Business Administration
409 Third Street, SW
Washington DC, 201416

Subject: Response to Notice of Proposed Amendments to SBIR and STTR Policy Directives
Reference: RIN 3245-AG64

Dear Mr. Brown:

On behalf of the Small Business Technology Council (SBTC), and the National Small Business Association (NSBA), we would like to submit the following comments to the proposed changes to the SBIR/STTR Program Policy Directive.

SBTC, the nation's largest association of small, technology-based companies in diverse fields, is proud to serve as the technology council of the NSBA, the nation's oldest nonprofit advocacy organization for small business, serving more than 150,000 small companies throughout the United States.

The SBIR program remains a mainstay of American innovation, small business growth, and contribution to America's technology-based economy. A number of changes have occurred since the last SBIR reauthorization. First, the law and SBIR Regulations now require SBIR firms to commercialize their technology if they want to continue to compete in the SBIR/STTR Programs. Secondly, commercialization of technology has become more difficult. Early stage venture capital funding is much harder to obtain, banks are lending less to small businesses, regulatory burdens have increased, and the value of patents has declined. Under these circumstances, it is critical that the SBIR/STTR Programs be more efficient and effective in enabling SBIR firms to transition their technology for full commercial impact. Many of the existing provisions in the law and in SBA's Policy Directives have still not been fully implemented.

SBTC would like to thank the SBA and agency personnel for all of their hard work in putting together a new Policy Directive for the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs. They have proposed a number of changes that will improve the program. However, SBA has proposed some provisions that SBTC opposes. We provide comments below following the order of the proposed Policy Directive amendments.

Section 3 - Definitions

(m) *Essentially Equivalent Work*. SBTC takes exception to the changes to the definition to include "State programs." Many states have implemented assistance to SBIR awardees, including matching funds. States provide matching funds to help the SBIR/STTR firms commercialize their technology, complete research on the project and assist the SBIR firm, and generally to support the advancement to commercialization of the SBIR technology. This proposed change will discourage the states from engaging in this kind of activity. This proposal will result in unneeded and complicated accounting and reporting. Furthermore, to the basic concept of essentially equivalent work, we believe that the term "essentially equivalent work" is confusing and ambiguous, and misdirected. The SBIR program seeks added investment in the technology, whether by government or private industry, and much of this can appear essentially equivalent, even though the work is different. The policy directive should instead focus upon prohibiting being paid twice for the same work effort to oppose fraud.

(u) *Intellectual Property*. We oppose these changes to the definition; they are unnecessary, and inappropriately narrow the definition of SBC intellectual property. Some of the deletions are quite substantive, e.g. (5) SBIR technical data, (6) ideas, and (12) all types of intangible assets either proposed or generated by an SBC as a result of its participation in the SBIR program. SBTC would recommend simply adding "mask works" to the existing definition.

(bb) *Prototype*. We agree that Prototypes, including software and computer programs, are delivered data and should be protected. Many prototypes are too small to be physically marked, and this is a common sense solution to the problem of SBIR data being embedded in physical deliverables. However, we disagree that the prototype, its associated software, and computer programs embedded in the device should be released at the end of the Protection Period. Frequently the SBC has developed some of the prototype, software, or computer programs prior to the SBIR award and this should be protected by Limited or Restricted Rights. We believe that the text should be changed to remove the phrase "other than Computer Software". Computer Software should be excluded from the things that can be provided as a prototype. Software companies often deliver prototype demonstrations and such that are purely a software prototype.

The concepts of Limited Rights and Restricted Rights seem to have been ignored by this proposed PD. This will greatly harm the SBC to the benefit of large international competitors and is inconsistent with SBIR purposes.

(dd) *Research Institution*. SBTC agrees with the addition of this definition.

(ee) *SBIR/STTR Computer Software Rights*. We appreciate what the Government is trying to accomplish with respect to protection of SBIR/STTR Computer Software Rights during the period of protection by having a non-Governmental entity sign a Non-Disclosure Agreement (NDA), during the protection period when servicing the Government. However, SBTC members have

serious concerns about competitors, who are often service contractors, gaining exposure to a small business' proprietary software technology. Additionally, the NDA language only serves to allow the Government to hold the service contractor accountable but gives the small business (SBC) no remedies at all in law or equity since no privity of contract exists between the SBC and the non-Governmental entity. We suggest the provision be modified so that the SBIR firm is also a signatory to any NDA.

SBTC understands that SBA is trying to find a compromise to allow the Government more use of the data during the protection period; however, given the heavily integrated involvement of industry competitors (specifically in DOD programs) in service, integration and support contracts, the proposed definition by SBA acts as a disincentive to small businesses who are required by the SBIR/STTR program to actively commercialize but who may have their innovations exposed to competitors in the early stages of development through the proposed definition. SBTC agrees with the concept of treating SBIR/STTR Computer Software Rights as Restricted Rights during the protection period and respectfully opposes the proposed definition.

The proposed PD adds the word "modify" to the list of thing the Government can do with software. This is a significant change that could adversely impact small firms contracting opportunities. Modify should be removed from the list. Likewise (ii) should be deleted. The terms Modification, adaptation or combination allows firms other that the SBIR firm rights that don't currently exist. These provisions are inconsistent with the following section (2) that prohibits releasing, disclosing or accessing SBIR Data. How can an outside firm "modify, adapt, or combine" software if they don't have access to the data. These new provisions should be removed.

(gg) *SBIR/STTR Data Rights*. We oppose this new definition. A number of SBTC members, such as Precision Combustion, Inc., have submitted detailed comments and concerns about the data rights issues. SBTC shares their concerns. Among these concerns is the move to unlimited rights from government purpose rights after the protection period, as is the clear treatment in prior Policy Directives and in the FAR. Reducing the property rights of the SBC could have very large negative impacts upon the commercialization capabilities of SBCs, including reducing the values of commercial licenses relating to data and enabling third parties to use an SBC's SBIR data to compete with it. The argument that there is no definition for government purpose is specious. The suggested equivalence of the government being relieved of all disclosure prohibitions with an implied government policy to publish all is not supported. The proposed changes to the data rights in general strike deeply at the commercialization prospects of SBIR firms, and harms the commercialization potential for a relatively minor administrative convenience.

(hh) *SBIR/STTR Protection Period*. We oppose this. Twelve years is too short, and the government should continue to use the existing the protection period. Technical data is the lifeblood of a small technology business. No commercial technology business can be viable with a 12 year limit on the life of technical data, and the implied public release of SBIR data in the midst of SBC commercialization could be disastrous for the SBC. Further, no private firm releases all of its old technical data. If there is to be any release at all, it comes after a

review of the data and a decision on what information shall be released and what information shall continue to be kept confidential for competition purposes. Further, the implied policy of potential release would be unprecedented in terms of publication of America's technical data in commercial use. Further, the SBA and all agencies are fully aware that SBIR reports contain significant Limited or Restricted Rights content or competition sensitive information notwithstanding the SBIR marking, including description of the proprietary concept itself; inventions; company, personnel and third party data; business plans; marketing strategies; and business relationships. Any potential release should come only after the SBC has been provided an appropriate opportunity to redact from its reports any information that it judges to be competitively-sensitive. The data would not only be used by competing American firms, including large ones, but also by foreign firms, which could see a release as a windfall of technical art released to the world for its competitive use. (We assume that the data referred to for potential release comprises only the SBIR final reports, but this should be clarified as it is not currently stated.)

Additionally, the 12 year protection period is proposed by SBA as a compromise that may meet the needs of the companies while providing the agencies clarity on when data is released from SBIR restriction. But the issue of retroactive application of the proposed Policy Directive amendment is not discussed or considered. In fact, existing SBIR/STTR protection periods are embedded in current and completed contracts, and contract law and estoppel states that such terms must be enforced as may have been expected in the contract at the time of execution, which universally fit under the concept of Phase III extensions to the protection period. The proposed change in data rights' term cannot be applied retroactively, and so does not resolve the administrative issue said to be motivating the change.

Further, we note the restatement of the commitment to award Phase IIIs to the SBIR firm, and ask how this commitment co-exists with the apparent intent to provide the SBIR data after the protection period to third parties for the purposes of competitive procurement. It would be our interpretation that award to the greatest extent practicable would not involve competitive procurement procedures.

Finally, we do not believe that issues of administrative convenience should override the SBA's heretofore strong defense of the overriding commercialization intent of the SBIR program intended to work through the commercial success of the SBC winning the SBIR award.

SBTC prefers to leave the protection period as it is now. If the period has to be limited, we suggest that the initial period be 20 years, the same protection period as afforded by patents. If that is not possible, we suggest an automatic extension beyond 12 years of 4 years upon request by the SBIR firm and an additional extension of 4 years on a showing of good cause.

There should be no retroactivity to any changes in the data rights provisions. If there are any changes in the data rights and the data rights period, the changes should not apply to existing SBIRs. Those awards occurred under the current policy and cannot be changed. The recent Supreme Court ruling in *Encino Motorcars, LLC v. rNavarro et al (2016)*, requires an agency to provide adequate reasons for its decisions during administrative rulemaking. Further, when changing existing policies an agency must be cognizant that longstanding policies may have "engendered serious reliance interests that must be taken into account." There is no justification to make any changes retroactive to prior awards. Any changes in Data Rights and Disclosure requirements only apply to newly awarded contracts signed after this PD goes into effect.

Data rights are a separate issue from publication. The disclosure of SBIR data is a serious problem. If an agency discloses sensitive and confidential data, it could seriously harm the small business. SBIR reporting and deliverables will normally include substantial amounts of SBC limited rights and restricted rights data that is highly competition-sensitive and whose release would harm the commercial prospects of the small business. The small business should always be advised that its data and reports are going to be disclosed and given an opportunity to object – similar to a FOIA request scenario. Even if the government takes "unlimited rights," it doesn't mean that the government can release data and report without contacting the firm to see if portions of the documents contain proprietary, competition-sensitive, and/or even ITAR controlled data that should not be released.

It is strongly recommended that the entire concept of changing the Protection Period and disclosing SBIR Data be sent back to the drawing board.

(ii) *SBIR/STTR Technical Data Rights*. SBTC opposes the new definition. The deleted sentences contained useful content, including the clear references to Phases I, II and III and the clear statement that the data is provided to the government under a license. Further, the release to foreign governments would seem to clearly infringe the commercialization rights of the SBC, and the release to support services contractors should also clarify that the data may not be used for any manufacture, commercial or otherwise, except as covered in section (i). Finally, the wording should be modified to clarify that the purpose of any such release must be for a government purpose. SBTC would suggest changes similar to those proposed under the section above discussing *SBIR/STTR Computer Software Rights.*

(pp) *Technical Data*. SBTC supports this proposed wording.

We have no objection to merging SBIR and STTR Policy Directive.

4. Phased Structure of Programs

3. Competition Requirement. SBTC supports this language. This section streamline, simplifies and educates officials on how to make Phase III awards with a sole source contract without further justification and approval. While the law and current Policy Directive make this clear, the proposed policy direct makes it even clearer and reduces the potential for confusion. However, we suggest that the use of the word ""extension" is unduly restrictive

when a Phase III has already been defined as work that "derives from, extends or completes" prior SBIR work, and ignores that a Phase III may derive from another Phase III. Replace the clause beginning with "(which …" with "(which derives from, extends or completes prior SBIR I and/or II and/or III awards)

7. Special acquisition requirement. SBTC supports the changes made in Section 7 with some suggestions. We agree and would add "significant" in front of preference in (7) (iii). It makes it clear that agencies and prime contractors "to the greatest extent practicable" must make Phase III awards to the SBIR award recipients that developed the technology. This section the duties and responsibilities of government officials and prime contractors their obligations under the SBIR/STTR Program. This would be clearer if subsections i, ii and iii also referred to GOCOs, FFRDCs and primes, even though the first paragraph states this. We believe that the provision in ii, that an agency must award a non-competitive contract to an SBIR Awardee found to be practicable is helpful and will eliminate confusion and delay in the award process.

Section (7) makes it clear that sole source Phase III contracts are the norm and should be awarded in the vast majority of situations. These provisions will expedite and simplify the process of awarding Phase III contract by the Government by eliminating the Justification and Approval process. 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. This provision also requires any official who makes a decision not to award a Phase III contract document their decision and justify that decision in the contract file. It also makes the notice and appeal process much clearer. We believe that these changes will be helpful. SBC rights would be better protected when an agency is determining it could not award to the SBC if there were a requirement to also notify the SBC on a timely basis so that it can best represent the facts and its interests.

5. Program Solicitation Process

SBTC agrees to changing TechNet to SBIR.gov.

6. Eligibility and Application (Proposal) Requirements

(a) *Eligibility Requirements*. SBTC supports both the changes that allow Tribally-owned applicants and awardees into the SBIR/STTR programs, and eliminating the STTR requirement that a business partner with only a single research institution.

7. Program Funding Process

(d) *Essentially Equivalent Work*. SBTC objects to this language. Many states have implemented assistance to SBIR awardees, including, in many states, providing matching funds to help the SBIR/STTR firms commercialize their technology, complete research on the project, and assist the SBIR firm. This proposal will discourage the states from engaging in this kind of activity, and will result in unneeded and complicated accounting and reporting. We believe that the term "essentially equivalent work" is confusing and ambiguous. The policy directive should prohibit being paid twice for the same work the term essentially

equivalent has led to significant ambiguity in prior legal proceedings and should be replaced with rules saying a firm cannot be paid for the same work twice.

8. Terms of Agreement Under SBIR/STTR Awards

(b) Rights in Data Developed

(1) *General.* We object to the subsequent deletions in this paragraph, but in general the additions at the front end are helpful, except the word "inappropriate" should be deleted (rights should not be diminished, period).

(2) *Application of SBIR/STTR Data Rights.* SBTC opposes the new language. Materials discussing the extension of the protection period should not be deleted, and the wording in the data rights license should not change, and should not relinquish to unlimited rights when the protection period lapses. Please note that Limited and Restricted Rights should not lapse or convert to Unlimited Rights.

(3) *SBIR/STTR Data Rights – Main Elements*

(3)(A) – SBTC supports this language.

(3)(B), (C) - SBTC opposes this language. Government purposes rights should not be reduced to unlimited after the protection period as this works as a disincentive to SBC's to participate in the program if they know that their data will be fully available at the end of the protection period for all competitors to use. Given that commercialization in the fields of aerospace and medicine and truly innovative technologies can take up to 10-20 years or more, this change from Government Purpose to Unlimited Rights works against the efforts of the SBC and its potential successors to commercialize.

(4) SBIR/STTR Protection Period. SBTC opposes the changes as stated previously above.

(5) Marking Requirements. SBTC supports this change. The 6 months gives reasonable time to correct.

(6) Negotiated Rights.

(6)(A): SBTC opposes this section and requests that if it is included, SBA modify this statement. This should say that an agency may not in any way make issuance of any award conditional upon the Awardee negotiating a special license for its SBIR/STTR data. The most common response to such pressures our SBCs receive is that the award in consideration is not an SBIR award, so the Policy Directive should remove this issue.

(6)(B) We do not understand the motivation for this section, nor is it explained in the Policy Directive discussion section. How would a voluntary restriction to SBIR data rights not be because follow-on work would not be awarded if the restriction

were not allowed? We believe the issue is fraught with potential for effective pressure being brought on the SBIR awardee.

7) *SBIR/STTR Data Rights Clause.* SBTC agrees with the concept for its clarity, but not the reference to the new data rights clause. We do not agree with the modified data rights clause, for reasons otherwise discussed herein.

(c) *Nondisclosure Agreement for Releases Outside the Government.* The concept of the NDA is agreeable. The NDA should be written so as to also preclude the non-governmental entity from using the data to meet prohibited uses with the government, such as beyond simple governmental support services using the data for manufacturing or Phase III services that the SBIR/STTR awardee might have provided. SBA should consider adding the SBIR firm as a signatory to the NDA to provide privity of contract.

(d) *[STTR only] Allocation of Intellectual Property Rights in STTR Award.* SBTC agrees with the concept for its clarity, but not the reference to the new data rights clause. We do not agree with the modified data rights clause, for reasons otherwise discussed herein.

(l) *Prototypes.* SBTC supports this new language.

10. Reporting Requirements—for Agencies, Applicants and Awardees
We agree and urge SBA to simplify, standardize and eliminate all duplicate reporting of commercialization data.

(e) [STTR only] *Phase 0 Proof of Concept Partnership Pilot Program*. Recommend adding new:

> Report NSF shall report the names of each organization receiving a grant under the program. Each recipient shall report the number and names of entities that were helped by each recipient, the number of firms that submit SBIR proposals by the entities, the number of recipients that receive a SBIR/STTR award and the cost per entity, firm, and project.

Appendix I: Instructions for SBIR and STTR Program Solicitation Preparation
SBTC has the same comments about the Appendix as in the above. For example, we believe the current standard in Appendix I of the existing Policy Directive, at Section 5: "Considerations", paragraph (d)(iii), the Directive states that the "Government may not use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend" during the protection period." SBTC urges that this language be applied in all situations and not the more limited rights mentioned in the proposed Section 8. The Appendix needs to be modified to conform to changes in the proposed policy directive.

SBIR/STTR Funding Agreement Certification addition to (10) the word "material" should be added before information. This change will avoid creating a problem with minor/non-material information.

Additional concerns

To date, the FAR and DFAR have not been fully updated to reflect the last several changes in the SBIR law. Until the FAR and DFAR are updated, it should be noted at relevant places in the FAR and DFAR that reviewers should consult the SBA SBIR Policy Directive pending FAR and DFAR updates. This will help eliminate confusion that current exist.

SBA's Performance Benchmark Requirements need to be updated. There are significantly fewer SBIRs being awarded and that there are also significantly fewer SBCs participating in the SBIR/STTR program now based on the dwindling number of awards. The Benchmarks do not even account for a Phase I direct to a Phase III or cases where Phase II topics were cancelled. For instance, the total number of SBIR awards dropped by 30% overall and by 42% at DoD; and the number of firms participating in the DoD SBIR program decreased by 52% in the last five years (since the last SBIR reauthorization which prompted the commercialization benchmarks was being drafted). There are also significantly fewer seed stage financings making it harder to find funding for commercialization. Given the lack of seed funding and the decline in the number of awards, SBA should lower the Benchmark Requirements.

SBTC appreciates SBA's efforts for the SBIR/STTR programs and on behalf of our entire membership respectfully submit these comments for consideration.

Sincerely,

Jere W. Glover
Executive Director
Small Business Technology Council