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May 23, 2023

VIA FEDERAL ERulemaking Portal

Ms. Mahruba Uddowla
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General Services Administration
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**Re: Comments on Proposed Rule, Small Business Innovation Research
and Technology Transfer Programs, FAR Case No. 2020-010**

Dear Ms. Uddowla:

On behalf of the American Bar Association (“ABA”) Section of Public Contract Law (the “Section”), I am submitting comments on the proposed rule cited above (the “Proposed Rule” or the “Proposed FAR Rule”).¹ The Section consists of attorneys and associated professionals in private practice, industry, and government service. The Section’s governing Council and substantive committees include members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The views expressed herein are presented on behalf of the Section. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the ABA and, therefore, should not be construed as representing the position of the ABA.²

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

¹ Mary Ellen Coster Williams, Section Delegate to the ABA House of Delegates, and Elizabeth Witwer, member of the Section’s Council, did not participate in the Section’s consideration of these comments and abstained from the voting to approve and send this letter.

² The letter is available in pdf format at
http://www.americanbar.org/groups/public_contract_law/resources/prior_section_comments/

I. INTRODUCTION AND BACKGROUND OF PROPOSED RULE

The Section is pleased to offer comments on the Proposed Rule, Federal Acquisition Regulation: Small Business Innovation Research and Technology Transfer Programs, FAR Case No. 2020–010 (the “Proposed Rule”) by the Department of Defense (“DoD”), General Services Administration (“GSA”), and National Aeronautics and Space Administration (“NASA”) (collectively, the “FAR Council”). The Proposed Rule proposes to (a) amend the Federal Acquisition Regulation (“FAR”) to implement changes related to data rights in the Small Business Administration (“SBA”)’s Policy Directive, 84 Fed. Reg. 12794 (Apr. 2, 2019) (the “SBA Policy Directive”), regarding the Small Business Innovation Research (“SBIR”) and Small Business Technology Transfer (“STTR”) Programs; and (b) implement competition requirements unique to Phase II and III awards under the SBIR/STTR Programs. The Section believes that the vast majority of the Proposed Rule is exceptionally well-conceived and addresses the concerns of industry and the Section. The Section greatly appreciates the FAR Council’s efforts to clarify the SBIR and STTR Programs and eliminate inconsistencies between the Federal Acquisition Regulation (“FAR”) and the Defense Federal Acquisition Regulation Supplement (“DFARS”) and better align these regulations with the SBA’s Policy Directive.

As an initial matter, the Section wishes to highlight its appreciation for several provisions in the Proposed Rule, which provide important clarity for the procurement community as a whole. *First*, the Section applauds the Proposed Rule’s creation of a specific FAR section to (a) explain the role of the SBA Policy Directive; and (b) provide guidance to contracting officers on awarding SBIR contracts. This change will provide significant clarity to acquisition professionals to the benefit of the government contractor community, including small businesses and the Federal Government. *Second*, the Section appreciates the clarification that SBIR rights apply to STTR contracts, which eliminates confusion that had existed within the community on the subject. *Third*, the Section recognizes the clarity provided by the inclusion of the SBIR/STTR Programs in the list of statutory exemptions for competition, which crystalizes the original intent of the SBIR program and provides explicit authority to allow sole source awards to further the purposes of the SBIR/STTR Programs. *Fourth*, the Section wishes to convey its appreciation of the clarity provided by the Proposed Rule’s added language to FAR 6.302–5, which clarifies that contracting officers may award sole-source actions under some Phase II and every Phase III of the SBIR/STTR programs without further justification in accordance with the statutory authority in the Small Business Act (15 U.S.C. 638(r)(4)). *Finally*, the Section compliments the Proposed Rule’s updates to the FAR to align with the SBA Policy Directive’s protection period and Government Purpose Rights provisions.

The Section offers the below Comments to address its concerns with a small portion of the Proposed Rule. In these comments, the Section identifies those few areas where the FAR could be (a) improved to further align with the SBA’s Policy Directive, (b) clarified or revised to (1)

better protect stakeholders and policy goals, or (2) prevent continued regulatory inconsistency or uncertainty. For these reasons, the Section respectfully submits the below comments for the Council's consideration.

II. COMMENTS

As correctly noted in the Proposed Rule, the purpose of the SBIR/STTR Program is to strengthen the role of innovative small business concerns in Federally-funded research or research and development. The SBA Policy Directive also notes the specific program purposes to include: (a) stimulating technological innovation; (b) using small businesses to meet Federal Research and Research and Development ("Federal R/R&D") needs; (c) fostering and encouraging participation by socially and economically disadvantaged small business concerns and women-owned small businesses in technological innovation; and (d) increasing private sector commercialization of innovations derived from Federal R/R&D, thereby increasing competition, productivity and economic growth. *See* 84 Fed. Reg. 12806. After reviewing the Proposed rule, we identified a few areas wherein the FAR could be improved to further enable all of the above listed purposes in the SBA Policy Directive and note that some of our suggested changes are adopted from the proposed DFARS rule, *Small Business Innovation Research Data Rights*, DFARS Case 2019-D043, 87 Fed. Reg. 77680, December 19, 2022 (the "DFARS Proposed Rule").

A. Analysis of Definitions being revised in FAR and Policy Directive

The Proposed Rule modifies the definition of "unlimited rights" to conform the FAR definition at FAR 27.401 to the SBIR/STTR Policy Directive definition. While that alignment effort is commendable, the proposed change does not address the more significant lack of alignment between the FAR and DFARS unlimited rights license language.

The FAR and DFARS have long used different terminology to define the scope of the Government's rights in unlimited rights data, specifically with regards to the Government's rights to (1) make changes to unlimited rights data, and (2) to distribute unlimited rights data. The current FAR grants the Government the rights to "prepare derivative works" and to "distribute" unlimited rights data, not found in the DFARS, while the DFARS grants the Government rights to "modify" and "reproduce" unlimited rights data, not previously found in the FAR. *Compare* FAR 27.401, 52.227-14(a) *with* DFARS 227.7101(b), 252.227-7013, 227.7201(b), 252.227-7014.

The SBIR/STTR Policy Directive specifies all four rights from both regulations. To align with the Policy Directive, the Proposed Rule adds the rights to "modify" and "reproduce," but keeps the rights to "prepare derivative works" and "distribute" the data as well.

The Section believes a best practice would be to ensure that the FAR rights allocation language mirrors the language in the DFARS, and that the SBIR/STTR Policy Directive be similarly revised. There are no apparent grounds for the Government to receive different rights in unlimited rights data under the FAR and the DFARS, and the different terminology creates uncertainty for the Government and contractors alike. As proposed, the FAR would arguably grant

civilian agencies additional rights in unlimited rights data not available to DoD under the DFARS, but the DFARS would remain unchanged -- the practical differences in substantive rights, especially for small businesses that engage in SBIR/STTR contracting with both civilian and defense agencies, are unclear.

When there is no reason to maintain diverging approaches, the FAR and DFARS should grant the same intellectual property rights using the same rights allocation language. The Section recommends the FAR language adopt the DFARS definition of “unlimited rights,” removing the disparate terminology for the rights that the Government will have, to “prepare derivative works” and to “distribute” unlimited rights data:

“Unlimited rights” means rights to use, modify, reproduce, perform, display, release, or disclose [data] in whole or in part, in any manner, and for any purpose whatsoever, and to have or authorize others to do so.

DFARS 252.227-7013(a)(16). *See also* DFARS 252.227-7015(a)(16). The SBIR/STTR Policy Directive then should be revised to adjust the unlimited rights definition to match the common FAR and DFARS definition.

This approach would also address one other ambiguity in the definition: stating the Government’s right to “authorize” others to exercise the other enumerated rights, instead of the similar but not identical Government right to “permit” others to exercise them. The current FAR uses “permit” and the Proposed Rule would keep that term, though it is different from both the SBIR/STTR Policy Directive and the DFARS. There is no apparent reason to use “permit” instead of “authorize” in the FAR and this disparate terminology makes the intent here unclear.

B. The Section Proposes Revising the Proposed Rule’s Definition of SBIR/STTR Computer Software Rights.

The Section agrees with the Proposed Rule’s stated intent for the FAR definitions regarding the SBIR/STTR Programs to be consistent with the SBA Policy Directive and the DFARS. The Section is concerned that the Proposed Rule, as written, includes a proposed definition of SBIR/STTR Computer Software Rights that may unintentionally create inconsistency and confusion when read in parallel with SBA’s Policy Directive and the DFARS. Specifically, the proposed definition fails to specify how the Government may use the SBIR/STTR computer software. The Section is aware that certain Government customers have attempted to obtain source code under an SBIR/STTR contract so it does not have to purchase licenses in the future. The Section respectfully believes that this type of action is contrary to the stated purpose of the SBIR/STTR Program, which is to “increase private sector commercialization of innovations derived from Federal R/R&D, thereby increasing competition, productivity and economic growth.” *See* 84 Fed. Reg. 12806.³ Additionally, the Section believes this is inconsistent with the

³ The DFARS provision is also consistent with Bayh-Dole policy. *See, also* footnote 2, *supra*.

FAR definition of Restricted Rights, as well as the definition of SBIR/STTR Computer Software Rights in the Proposed DFARS Rule, which the Section believes are clearer and specify that the Government's use is restricted to a specific quantity of computers.

Accordingly, the Section recommends the FAR Council make two changes to language in the Proposed Rule.

First, the Section recommends adding the below language to FAR 27.409(d)(2):

The Small Business Administration's SBIR and STTR Program Policy Directive (effective May 2, 2019) provides for special consideration regarding the handling (e.g., disclosure, reverse engineering) of prototypes generated under SBIR and STTR awards, to avoid effects that may appear to be inconsistent with the SBIR and STTR program objectives and to allow the SBIR/STTR awardee to retain rights in SBIR/STTR data during the SBIR/STTR data protection period.

Second, the Section recommends either (a) adopting the DFARS Proposed Rule's equation of SBIR/STTR Computer Software Rights to the FAR's definition of Restricted Rights; or (b) at a minimum, revising the definition of SBIR/STTR computer software rights in FAR 52.227-20(a) as follows:

(1) Use, modify, reproduce, release, perform, display, or disclose SBIR/STTR data that are computer software within the Government for the following purposes:

(i) ~~Use in Government computer(s)~~ Use a computer program with one computer at one time. The program may not be accessed by more than one terminal or central processing unit or time shared unless otherwise permitted by this contract;

(ii) Archival or backup;

(iii) Modify, adapt, or combine with other computer software, provided that the modified, adapted or combined portion of the software incorporating any of the delivered, restricted computer software shall only be used for the same purposes in paragraphs (i) and (ii) and shall be subject to the same SBIR/STTR computer software rights; or

(iv) Distribute to another agency if, prior to the distribution, the Contractor is notified of the distribution and the identity of the

recipient, and a copy of the SBIR/STTR computer software rights is provided to the recipient.

The Section notes this recommended revision would be consistent with the Proposed Rule's definition of SBIR/STTR Technical Data Rights aligning with the FAR's definition of Limited Rights.

C. The Section Proposes Revising the Proposed Rule to Align with the Proposed DFARS Rule Regarding Negotiation of Different Data Rights Protection Periods.

The Section supports the Proposed Rule's amendment of FAR 27.409 to allow a contractor and contracting officer to engage in post-award negotiations regarding a different SBIR/STTR rights protection period. The Section is concerned that the Proposed Rule, as written, may unintentionally allow the Government to pressure companies to negotiate a shorter protection period. In comparison, the Proposed DFARS Rule includes language, which provides that contracting officers cannot require an offeror to sell or relinquish SBIR/STTR rights to data as a condition of proposal responsiveness or contract award.

Accordingly, the Section recommends the Proposed Rule utilize language in the Proposed DFARS Rule, which explicitly provides that negotiation for a shorter period cannot be a requirement or mandate by the Government. Specifically, the Section recommends adding a new subparagraph (3) into FAR 27.409(d) as follows:

(3) Contracting officers shall not require an offeror, either as a condition of being responsive to a solicitation or as a condition for award, to sell or otherwise relinquish to the Government any rights in technical data related to items, components, or processes developed under a SBIR/STTR contract or any rights in software generated under a SBIR/STTR contract.

D. The Section Proposes Revising the Proposed Rule to Align with the Proposed DFARS Rule to Address the Need to Include the SBIR/STTR Clause into Lower-Tier Subcontracts.

The Section believes the Proposed Rule, as written, has a notable gap by not requiring prime contractors to include FAR 52.227-20 (Rights in Data-SBIR Program) into lower-tier subcontracts when SBIR/STTR data rights are being provided under the lower-tier subcontract qualifying as a Phase III Award—even if the prime contract itself is not subject to the SBIR Program or STTR Program. In comparison, the Proposed DFARS Rule includes language that prescribes insertion of DFARS 252.227-7018 (Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research Program and Small Business Technology Transfer Program) into solicitations and contracts “when SBIR/STTR data are delivered, developed, or generated during contract performance, and when any portion of contract

performance is governed by the SBIR or STTR program (e.g., performance of one or more subcontracts qualifies as a phase III SBIR or STTR award).” 87 Fed. Reg. 77689 (2022).

The Section maintains this language is needed in the Proposed Rule to (a) clarify the applicability to subcontracts; (b) align with the Proposed DFARS Rule; and (c) align with the SBA Policy Directive’s definition of SBIR/STTR subcontracts. The Section believes these flowdown requirements are needed to ensure that subcontractors, including small businesses, are afforded the same protections as prime contractors. The Section is also concerned that without the below language added to the Proposed Rule (and accordingly amending the FAR), there could be unintended negative consequences for a small business to commercialize its technology in Phase III awards and discrepancies between the FAR and DFARS once the Proposed DFARS Rule is final. Accordingly, the Section recommends the Proposed Rule be revised in three places by utilizing the following language from the Proposed DFARS Rule.

First, the Section recommends that the Proposed Rule amend FAR 27.410(h) to add the below prescriptive language in red.

If the contract is a SBIR or STTR contract, insert the clause at 52.227–20, Rights in Data—Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs, in all Phase I, Phase II, and Phase III contracts awarded under the SBIR or STTR Program established pursuant to 15 U.S.C. 638, **and when any portion of the contract performance is governed by the SBIR or STTR program (e.g., performance of one or more subcontracts qualifies as a phase III SBIR or STTR award).** This clause implements 15 U.S.C. 638 and the Small Business Administration’s “Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Program Policy Directive” (84 FR 12794, April 2, 2019; see <https://www.sbir.gov>).

FAR 27.410(h).

Second, the Section recommends that the Proposed Rule amend FAR 27.409(d) to add the below language in red.

Solicitations and contracts, **including when any portion of the contract performance is governed by the SBIR or STTR program, including subcontractors providing SBIR or STTR licensed technical data or computer software,** awarded under the SBIR/STTR programs must include clause 52.227–20, Rights in Data—Small Business Innovation

Research (SBIR) and Small Business Technology Transfer (STTR)
Programs (see 27.410(h)).

FAR 27.409(d).

Third, the Section recommends that the Proposed Rule amend FAR 52.227-20(a) to add the below language in red.

SBIR/STTR data means all data first produced by a Contractor in the performance of an SBIR or STTR award or subcontract, including technical data and computer software developed or generated in the performance of an SBIR or STTR award or subcontract. The term does not include publicly available information, information otherwise available to the Government, or information incidental to contract administration, such as financial, administrative, cost or pricing or management information.

FAR 52.227-20(a).

E. The Proposed FAR Rule Contains Additional Differences from the Proposed DFARS Rule that Could Result in Inconsistencies with How the Regulations are Applied.

As discussed above, and as noted in the Proposed Rule itself, one of the primary objectives of the Proposed Rule is to eliminate inconsistencies among the FAR, the DFARS, and the Policy Directive regarding the treatment of data rights terminology and allocations for SBIR/STTR data. 88 Fed. Reg. 20822, 20823. As stated in the Background section to the Proposed Rule: “The inconsistencies may have led to confusion and placed an unnecessary burden on small businesses because they had to operate under three different interpretations of the same programs.” *Id.* In addition, any inconsistencies between the sets of rulemaking are particularly problematic because under the Federal Acquisition Regulation System, agency FAR supplements may not, as a general rule, conflict or be inconsistent with FAR content. FAR 1.304(b)(2). Accordingly, the Section believes it is in the best interest of small businesses that certain aspects of the Proposed Rule be revised to be more consistent with the language used in the Proposed DFARS Rule, which we believe is preferable in several respects.

First, the Proposed DFARS Rule includes language that prohibits contracting officers from requiring an offeror to sell or relinquish SBIR/STTR data rights as a condition to being responsive to a solicitation or being eligible for contract award. 87 Fed. Reg. 77680, 77688. The Proposed Rule, however, does not contain this prohibition. Without such a prohibition in place to govern civilian agency acquisitions, small businesses may be unwilling to participate in the SBIR/STTR programs for fear of being unable to enjoy the benefits of SBIR data rights. And the absence of

such a prohibition in the Proposed Rule also may complicate implementation of the Policy Directive's instruction that the Government must, to the greatest extent practicable, pursue Phase III awards that derive from, extend, or complete efforts made under prior funding agreements under the SBIR program with the SBIR/STTR awardee that performed the earlier work. 84 Fed. Reg. 12794, 12802. Implicitly allowing civilian agencies to force SBIR contractors to sell or relinquish their SBIR/STTR data as a condition to receipt of a Phase III award will necessarily have a chilling effect on the marketplace which flies in the face of the stated purpose of the SBIR/STTR Program to enable small businesses to commercialize their technology developed through Phase II awards and make them available to the Government. This will result in agencies more often foregoing a Phase III award in favor of performing the work with non-SBIR/STTR data or with a non-SBIR/STTR contractor. In either case, the Government will need to invest Government funds to develop a replacement, and small businesses will suffer, as will the procurement ecosystem benefiting from their participation.

Accordingly, the Proposed Rule should be updated to include the Proposed DFARS Rule's prohibition against requiring the sale or relinquishment of SBIR/STTR data rights as a condition for bid responsiveness or award, as set forth in § II.C of these Comments above.⁴

Second, the definitions governing SBIR/STTR data rights that are used in the Proposed Rule differ in a number of respects from the definitions used in the Proposed DFARS Rule. One significant difference is addressed above, *supra* Section A. But other differences, if left intact, could also result in confusion among contractors and agency personnel alike as to how SBIR/STTR data rights are to be allocated and protected. For instance, whereas the Proposed Rule defines "data" generally as "all recorded information, regardless of the form, method of recording, or the media on which it may be recorded," 88 Fed. Reg. at 20826, in promulgating the Proposed DFARS Rule, the DoD accepted a comment not to utilize the generic term "data" but rather continue to use different definitions for "technical data" and "computer software" across the DFARS data rights clauses. 87 Fed. Reg. at 77681. The DoD also accepted a comment to use a consistent definition of the term "generated" throughout the affected data rights clauses, and accepted a comment to refer to technical data or software as being "developed" under SBIR/STTR contracts, to ensure consistent use of these terms in the SBIR/STTR data rights clause. 87 Fed. Reg. at 77682. By contrast, the Proposed Rule opted for a less consistent approach to its use of those terms. *See, e.g.*, 88 Fed. Reg. at 20828 (using terms interchangeably in definition of "SBIR/STTR data"). Further, in its definition of "SBIR/STTR data protection period," the Proposed DFARS Rule specifies that the "protection period begins on the date of award of *the contract under which the SBIR/STTR data are developed or generated* and ends 20 years after that date *unless, subsequent to the award, the agency and the Contractor negotiate for some other protection period for the SBIR/STTR data*

⁴ This position also would be consistent with the policy in the Bayh-Dole Act, encouraging small businesses to promote the commercialization of federally funded research inventions. 86 Fed. Reg. 35.

developed or generated under that contract.” 87 Fed. Reg. at 77698 (emphasis added). By contrast, the Proposed Rule states that the “protection period begins at award of *an SBIR or STTR contract* and ends not less than 20 years from that date, *unless negotiated otherwise after award.*” 88 Fed. Reg. at 20828 (emphasis added). As the italicized language demonstrates, the Proposed DFARS Rule utilizes clearer language to refer to the kinds of contracts which trigger the protection period, and for which the parties may negotiate a different protection period, than the Proposed Rule does. Accordingly, the Section advises that these inconsistencies be reconciled in the final FAR rule, and that the FAR Council adopt the language used in the DFARS, in the interest of both clarity and consistency.

Third, the Proposed DFARS Rule specifies that the Government obtains an unlimited rights license in “[t]echnical data or computer software furnished to the Government under this or any other Government contract or subcontractor thereunder, *with license rights for which all restrictive conditions on the Government have expired.*” 87 Fed. Reg. at 77682 (emphasis added). This language was inserted to clarify that the Government’s rights to SBIR/STTR data do not become unlimited but instead remain subject to a perpetual government purpose rights license upon the expiration of the SBIR/STTR data protection period. The Proposed Rule, however, does not include this language in the definition of “unlimited rights,” making this term, at a minimum, potentially ambiguous with respect to the status of SBIR/STTR rights following the expiration of the protection period. Accordingly, the Section advises that the definition of “unlimited rights” be made consistent with the Proposed DFARS Rule in this respect.

III. CONCLUSION

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Annejanette Heckman Pickens
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