



Heidi Jacobus
Robert Schmidt
Co-Chairmen

April 17, 2014

Jere Glover
Executive Director

Jacqueline L. Wicecarver
Assistant Inspector General
Acquisition, Parts, and Inventory
4800 Mark Center Drive
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Larry Nannis
Treasurer

Kevin Burns
Greg Zacharias
New England
Regional Chairs

Dear Ms. Wicecarver,

Matt Oristano
Joseph Schwartz
Mid-Atlantic
Regional Chair

In response to your request, the Small Business Technology Council writes to comment upon your Report No. DODIG-2014-049 (entitled "DOD Considered Small Business Innovation Research Intellectual Property Protections in Phase III Contracts, but Program Improvements are Needed").

Ash Thakker
Southeast
Regional Chair

Mary Delahunty
Southwest
Regional Chair

The Report properly recognizes a number of shortfalls in current DOD SBIR intellectual property practices relating to training, data collection and inconsistency in guidance regarding procedures.

Russ Farmer
Mountain
Regional Chair

But the Report fails to adequately respond to the House request, and avoids recognizing substantive evidence of shortfall in DOD protection of SBIR data and other rights. By narrowing its focus to a statistically insufficient FDPS-identified Phase III dataset that was not the subject of complaint, the Report finds the government acted properly in that dataset and makes an unsupported inference to the case in general. The result is the Report does not recognize the large scope and impact of the problem.

Michael Browne
Pacific
Regional Chair

Roy Keller
State Liaison

We request that the IG to take our comments into consideration and to retackle the task with broadened focus, to properly complete it.

Greg Zacharias
DOD Committee
Chair

Among the key findings missed by this report are the following:

Paul Donovan
Michael Squillante
NIH Committee
Co-Chairs

Ash Thakker
Phase III Committee
Chair

Russ Farmer
DCAA Committee
Chair

- DOD-designated SBIR Phase III awards (as focused on by the report) are not the problem. Proper Phase III designation is the desired outcome of contract actions for work that meets the SBIR Phase III definition. *The real problem is that in many, perhaps most, cases the DOD and its prime contractors fail to properly recognize that a contemplated contract action covers work that should be designated as Phase III.* The IG report's data sample pre-selected cases where the DOD had already made the proper designation. The challenge is finding all the other cases where proper designation did not happen, or happened only after improper resistance by contracting officers or primes.
- Failure of contracting officers to recognize SBIR Phase III status can and does occur for many reasons relating to the absence of effective procedure development, training, and enforcement for identifying Phase IIIs. This leads to contracting officer or prime contractor errors effectively stripping SBIR firms of their IP rights. All of the following



improper rationales reflect failures of DOD policy enforcement and all have been improperly provided by DOD contracting officers as reasons for rejecting SBIR Phase III status:

- The RFP did not define the opportunity as SBIR Phase III.
 - The contracting action was competed under a BAA or other non-SBIR contract mechanism, and therefore the award is not an SBIR Phase III.
 - The government (or prime) requires unlimited data rights, denying SBIR data rights.
 - The contract action was not initiated as an SBIR award.
 - No SBIR Phase III designation may be made if the Prime award was not awarded with SBIR designation or the SBIR data clause.
 - The government wishes to award the work to a third party that is not the SBIR company.
 - The government wishes to award the work to a preferred third party and can avoid the requirement for advance SBA notification if there is no finding of SBIR follow-on status.
- Failure to recognize the SBIR Phase III status of work can lead to multiple government actions contravening DOD's responsibilities under the SBIR Policy Directive, including:
 - The government or its Prime fails to provide the small business its proper data rights and other Phase III designation rights.
 - The contracting officer pressures the SBIR company to give up its data rights as a condition of contract award.
 - Contracting officer resistance to Phase III designation is communicated to DOD program offices, deterring program office support for an SBIR company's contemplated award or for a sole source negotiation.
 - The prime contractor pressures the SBIR company to give up its data rights in order to win the contract.
 - The prime contractor decides to not make a contemplated Phase III follow-on work award or to do the work internally or make the award to a third party, based upon the small business requesting SBIR designation.
 - The government chooses to internally undertake a Phase III without preference for award of the work to the SBIR company.
 - The government chooses to furnish SBIR materials to the small business's competitors for government procurement or other purposes.
 - The government selects a third party (generally a major prime) to do the work, without the prime having been assigned rights from the SBIR company and without the government submitting the required advance notification to the SBA. By failing to adequately address the practice of not designating Phase III work as such and then awarding a contract on that work to other than the small business, the report misses a primary means by which Phase III IP rights are removed. This activity is not captured in any database because it is not noticed or recorded in any way, except through a complaint from the SBIR firm.



- The small business is deterred from proposing under a BAA due to its requirement for unlimited data rights, or proposes and is rejected for requesting SBIR designation.
- Failing to meet the requirement of the law that Phase III data from the agencies be included in the annual SBIR/STTR report to Congress.¹
- The IG report accepted that DOD personnel were not required to track IP complaints and believed that none existed. As an attempt to discover complaints and disputes, this is overly limited.
 - While it is possible SBIR office personnel were not required to track such complaints, it would be surprising if Contracting Officer personnel do not track complaints to them as this would be an element of contract management. Complaints and requests for resolution would appear to be first properly directed to the Contracting Officer.
 - Perhaps DOD IP counsel would recognize in their experience whether there had been disputes. We are familiar with many such discussions.
 - For your convenience to show one such case, we have attached correspondence from a Small Business to the Army SBIR office regarding work that “derived from, extended, or logically concluded” SBIR research that was subsequently awarded to an entity other than the original SBIR awardee. The small business was told by the Army SBIR Office that it had no authority to enforce the SBIR Policy Directive within Army program Offices and the only recourse available to the small business was through the SBA. The SBA Office of Technology did review this case and provided a Notice of Intent to Appeal to the Army Program Office (**see attached**). There apparently was no record of this provided by the Army to the IG.
 - If you wish, we can provide you with many more examples, or you can request them yourself from small business complainants.
 - The House report itself contains data on complaints to DOD, including direct reference to the House Panel report “Challenges to Doing Business with the DOD” and to the Spectrum case.
 - We doubt that “DOD [SBIR] officials believe that [no IP complaints] existed.” We are aware SBIR companies often make such complaints to DOD SBIR officials, many of whom have been very helpful. Such officials also frequently face such complaints in their public meetings with companies. How wide a set of DOD SBIR officials were asked, and what was the specific question?
 - As the charge from the House was to study the issue of complaints, the IG report would more strongly fulfill this charge by widening its search:
 - Were any companies asked of potential complaints?
 - SBA is often brought into elevated complaints. Was the SBA contacted?
 - Were any primes asked if they had received any such complaints?

¹ 15 USC §638(kk) Phase III Reporting



- The report's brief reference to controls does not highlight the significant issue that there appear to be no internal controls within DOD organizations to enforce the SBIR Policy Directive and to assure that small businesses are receiving protection for their intellectual property and the required preference for work that derives from, extends or logically concludes their SBIR contracts. This could be the subject for a recommendation.
- By not grappling with actual issues from actual complaints, the report also avoids engaging in the wide set of specific issues of non-enforcement of SBIR IP rights. The simplistic conclusion that DOD regulations regarding IP are inconsistent avoids identifying how actual DOD regulations do not fulfill the requirements of the SBIR Policy Directive.

The report was prepared in response to the House Armed Services Committee Report 112-479, which tasked the Inspector General with collecting and evaluating empirical data on a "representative sample of protests, including lawsuits and other administrative contracting procedures, between the Government and contractors, as well as between prime contractors and their subcontractors, in order to: ... (1) Estimate the number of cases involving breaches of intellectual property rights; (2) Analyze the representative cases ... [for] similarities ...; (3) Determine if there was compliance with current laws and regulations related to intellectual property rights; (4) Assess if there are trends ... that might indicate gaps in existing intellectual property rights laws and regulations; (5) Report on ... outcomes ...; and (6) Provide recommendations as appropriate."

The report does not do this.

- The report does not review protests, lawsuits or administrative procedures as requested by the House, saying it could find none.
- The report does not review action by primes, as similarly requested.
- The FDPS database used in your study is inappropriate for the purpose in many ways, notably in focusing on already-identified SBIR Phase IIIs (a selection bias against problem cases), in assuming awards not identified as Phase IIIs were in fact not Phase IIIs, and in focusing on prime awards, whereas SBIR technology transitions to the field will frequently be through subawards from Primes.
- It simply accepts DOD personnel assertions that complaints were not required to be tracked within the SBIR program and that none were believed to exist.
- The IG report does not see fit to test this no-problem-reported finding with any interview with any small businesses or the SBA in a search to find complaints.

Given that small businesses are being referred to the SBA for handling intellectual property disputes, we would respectfully recommend that improved information on complaints would involve the following actions before concluding your report.

- Request data from the SBA Office of Technology on complaints that they have received from small businesses regarding SBIR policy directive violations within the DOD
- Publish in the Federal Register a notice to small businesses requesting them to provide input to your report and requesting information on any representative cases involving



breaches of intellectual property rights within the DOD and what the outcomes of the cases were that have been concluded.

- Review these representative cases to determine if there are significant similarities and if there was compliance with current laws and regulations related to intellectual property rights.

DOD Instruction 5010.40, "Managers' Internal Control Program Procedures," May 30, 2013, requires DOD organizations to implement a comprehensive system of internal controls that provides reasonable assurance that programs are operating as intended and to evaluate the effectiveness of the controls. This should include both tracking of SBIR IP issues and complaints and development of a DOD process for ensuring proper implementation of standards. This could reside within the Contracting Office organization as a responsibility, with institutionalized responsiveness to DOD's SBIR offices. You correctly identified that DOD OSBP SBIR used reporting systems that did not fully track SBIR Phase III awards to support the success of a congressionally authorized program. However, you then used that incomplete tracking system to identify Phase IIIs for evaluation; in this process the most serious shortfalls are omitted from consideration.

Your recommendation 1c "Phase III Databases" has been a goal for a while. The law requires the Secretary of Defense to create goals & incentives to transition Phase III technologies in subcontracting plans; but as of April 2014, these goals & incentives have not been implemented.² The inability to effectively identify SBIR Phase III awards whereby most such awards are not in the database is a major barrier to success. A recommendation that truly addresses implementing effective protections for SBIR IP rights could require that small business requests for SBIR Phase III designation would be centrally reported into a database together with the responding ruling made by the contracting office: this would provide a targeted mechanism for central review and audit.

Finally, SBTC recommends that the IG consider recommending to the DOD that more detailed policies and procedures be written to preserve SBIR data rights and to implement the intent of the law "to accelerate the transition of technologies, products, and services developed under the Small Business Innovation Research Program or Small Business Technology Transfer Program to Phase III, including the acquisition process," and that all contracting officers, contract specialists, program managers and their key staff, contracting officers representatives, and small business personnel be trained in these policies and procedures within the year and on a recurring basis. And, to further implement the goal of the legislation to increase the number of Phase II SBIR contracts and the number of Phase II STTR contracts awarded by the Secretary that lead to technology transition into programs of record or fielded systems, incentives should be used or created to encourage agency program managers and prime contractors to meet the goal under the law.³

² 15 USC §638(y)(5-6)

³ 15 USC §638(y)(6)



Based upon the reports of our small business membership, we believe that the House report is correct to seek more information on DOD enforcement of small business IP policies. This report contains structural flaws that contravene its conclusions and leave its task undone. We hope you will see fit to examine our concerns expressed herein and extend your investigation to appropriately respond to these concerns and to Congress's requests in this area.

We would be available at your convenience to discuss these issues further.

Sincerely,

A handwritten signature in black ink that reads "Jere W. Glover". The signature is fluid and cursive, with the first letters of each name being capitalized and prominent.

Jere W. Glover
Executive Director
Small Business Technology Council
jereglover@brandlawgroup.com

cc: Andre Gudger; Director, DOD Office of Small Business Programs
Javier Saade; Associate Administrator, SBA Office of Investment and Innovation
Edsel Brown; Assistant Director, SBA Office of Technology
Winslow Sargeant; Chief Counsel, SBA Office of Advocacy
The Honorable Sam Graves; Chairman, House Committee on Small Business
The Honorable Nydia Velazquez; Ranking Member, House Committee on Small Business
The Honorable Maria Cantwell; Chairwoman, Senate Committee on Small Business
The Honorable James Risch; Ranking Member, Senate Committee on Small Business
The Honorable Buck McKeon; Chairman, House Armed Services Committee
The Honorable Adam Smith; Ranking Member, House Armed Services Committee
The Honorable Carl Levin; Chairman, Senate Armed Services Committee
The Honorable James Inhofe; Ranking Member, Senate Armed Services Committee

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 is a council of the National Small Business Association (NSBA), the nation's first small-business advocacy organization celebrating more than 75 years in operation.