

## **21. Small Business Innovation Research (SBIR) (Flow-down to Suppliers; Inability to Share with Primes; Evaluation)**

### Tension Point

SBIR Mandatory Data Rights provisions for Phase III (non-SBIR funded) Contracts or Subcontracts

### Issue

10 U.S.C. 2320 states that the establishment of any rights in technical data should include consideration of the Small Business Innovation Development Act of 1982 (15 U.S.C. 638 note), and the Small Business Act (15 U.S.C. 631). This legislation established the SBIR program with the purpose of strengthening the role of small, innovative firms in federally funded research and development. Small business DoD contractors are rewarded for their innovation and invention in the SBIR program by receiving a special class of SBIR technical data rights, delineated for DoD contracts in DFARS 252.227-7018<sup>1</sup>. SBIR technical data rights apply to all SBIR awards, including subcontracts to such awards, that fall within the statutory definition of Phase I, II, or III of the SBIR Program.

### Discussion

15 U.S.C. 638(e)(4)(C) states that a Phase III award is one that: *derives from, extends, or completes efforts made under prior funding agreements under the SBIR program—*

- (i) *in which commercial applications of SBIR-funded research or research and development are funded by non-Federal sources of capital or, for products or services intended for use by the Federal Government, by follow-on non-SBIR Federal funding awards; or*
- (ii) *for which awards from non-SBIR Federal funding sources are used for the continuation of research or research and development that has been competitively selected using peer review or merit-based selection procedures.*

Phase III work is typically oriented towards commercialization of SBIR research or technology and may be either a competitive or non-competitive award of a contract, or a subcontract, to a small business. SBIR data rights clauses are non-negotiable and must not be the subject of negotiations pertaining to a SBIR Phase III award, or diminished or removed during award

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<sup>1</sup> <https://www.gpo.gov/fdsys/pkg/CFR-2009-title48-vol3/pdf/CFR-2009-title48-vol3-sec252-227-7018.pdf>

administration<sup>2</sup>. During Panel deliberations and comments provided by small businesses to the Panel, the following tension points were raised which related to follow-on “Phase III” awards where SBIR data rights clauses would apply.

By law, an agency must not, in any way, make issuance of a SBIR Phase III award conditional on relinquishing data rights. Moreover, in the FY 2012 NDAA, special acquisition preference was clarified for SBIR/STTR and goals were set for SBIR-STTR Technology Insertion. As a result, USD (AT&L) Memo “Implementation Directive for Better Buying Power 2.0 (24 APR 2013)” and DoDI 5000.02 issued direction for program managers with contracts with a value at or above \$100 million to establish goals for the transition of Phase III technologies in subcontracting plans and require primes to report the number and dollar amount of Phase III SBIR or STTR contracts. The Panel heard that based on direction from ASN (RDA) the Navy now requires PEO-level formulation of a Small Business strategy with DPM support as “... the Small Business Advocate responsible for identifying opportunities within the program for Small Business participation.” The DON Phase III Guidebook includes examples of SBIR/STTR incentives that COs and/or CORs may use in supporting PMs, PEOs, and CAEs in responding to these requirements, and includes candidate language for inclusion in Sections C, I, L, and M of an RFP. This type of specific guidance is not yet included though in the broader agency-wide Defense Acquisition Guidebook.

When prime contractors elect to make a subcontract award to a small business supplier if the award would “*derive from, extend, or complete efforts made under prior funding agreements under the SBIR program*” then the subcontract would be considered a Phase III award and the law requires that the SBIR data rights clause (DFARS 252.227-7018) must be included in the subcontract. This creates an issue if there is a mandatory flow-down of Government Purpose Rights (GPR) data rights from the prime contractor (see Tension Point 19) as SBIR data rights are non-negotiable, even if the prime contract includes non-SBIR data rights clauses (DFARS 252.227-7013<sup>3</sup> and 252.227-7014<sup>4</sup>).

The panel discussed SBIR Phase III issues that can arise, when data rights are used as an evaluation factor (see Tension Point 4) or when unlimited data rights or GPR are required as a condition of award (see Tension Point 1). If a prime contractor’s response includes subcontracted work to a small business that “*derives from, extends, or completes efforts made under prior funding agreements under the SBIR program*” then that work would be considered a SBIR Phase III. By law, SBIR data rights accord to any contract that would be considered a SBIR Phase III, even if the solicitation provides for other rights, and an agency must not, in any way, make issuance of a SBIR Phase III award conditional on data rights. If a prime contractor

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<sup>2</sup> <https://www.sbir.gov/about/about-sbir#sbir-policy-directive>

<sup>3</sup> <https://www.gpo.gov/fdsys/pkg/CFR-2011-title48-vol3/pdf/CFR-2011-title48-vol3-sec252-227-7013.pdf>

<sup>4</sup> <https://www.gpo.gov/fdsys/pkg/CFR-2011-title48-vol3/pdf/CFR-2011-title48-vol3-sec252-227-7014.pdf>

proposes use of a SBIR developer as a subcontractor, the law would prohibit inclusion of SBIR data rights as a factor in the evaluation of the prime contractor.

Similarly, small businesses pointed to issues when a competitive solicitation, such as a BAA, required delivery with unlimited data rights (e.g. DFARS 252.227-7013). If the proposed approach would be considered a Phase III effort, then the law requires that issuance of a contract could not be conditioned on relinquishing SBIR data rights. If the SBIR awardee wishes to transfer its SBIR data rights to the awarding agency or to a third party, it must do so in writing under a separate agreement. A decision by the awardee to relinquish, transfer, or modify in any way its SBIR data rights must be made without pressure or coercion by the agency or any other party and any other data rights agreement must be entered into only after the SBIR Phase III award, which includes the appropriate SBIR data rights clause, has been signed.

While SBIR technical data rights allow the Government to use technical data for Government purposes, to protect the competitive interests of the small business, there are restrictions on the disclosure of this data outside of the Government, including disclosure for procurement purposes (FAR 52.227-20). A tension point was raised that this restriction made it difficult for the Government to share technical SBIR data with their primes for evaluation of whether the innovations developed by the small business could be leveraged within a program of record. During the SBIR data rights protection period, the SBIR Policy Directive § 8(b)(2) requires agencies protect from disclosure and nongovernmental use all SBIR technical data developed from work performed under an SBIR funding agreement unless, subject to paragraph (b)(3), the agency obtains permission to disclose such SBIR technical data from the awardee or SBIR applicant. DFARS 252.227-7018 provides five years of data rights protection for SBIR/STTR data from the date of the last contract deliverable. This data rights protection period will be extended if the SBIR/STTR data is protected and referenced under a subsequent SBIR/STTR contract. The Panel heard that this problem is currently handled by primes establishing an NDA directly with the small business in order to receive technical data protected by SBIR data rights.

The Panel discussed recommendations on how to consider data rights solutions in relation to program needs, in particular for life cycle support (see tension points 10, 11 and 12). The Department of the Navy SBIR and STTR Phase III Guidebook<sup>5</sup>, presents methods on how SBIR/STTR technology can be used to realize mission cost savings and technology objectives, and recommends approaches for SBIR/STTR inclusion in program planning and management over program life cycles. These included guidance on how to handle flow-down of the SBIR/STTR data rights clauses in a subcontract from a prime, how to introduce competition by working with the small business to develop a second source for SBIR developed technology, and how to handle award to another company, in accordance with the SBA Policy Directives, in the event of poor performance by a SBIR company.

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<sup>5</sup>[http://www.secnav.navy.mil/smallbusiness/Documents/DON%20SBIR\\_STTR%20Guidebook\\_09.16.2014%20final.pdf](http://www.secnav.navy.mil/smallbusiness/Documents/DON%20SBIR_STTR%20Guidebook_09.16.2014%20final.pdf)

The Panel also discussed how to handle SBIR data rights with respect to major system interfaces. The FY2017 NDAA provides for GPR in technical data pertaining to major systems interfaces (MSI) that is (i) developed either exclusively at private expense or with mixed funding and (ii) used in a modular open system approach (MOSA), under the condition that the Secretary of Defense shall negotiate with the contractor the appropriate and reasonable compensation for such technical data (see Tension Point 29 and 10 U.S.C. 2320(a)(2)(G)). While the Government is prohibited from making an award conditional on relinquishing SBIR data rights, the SBA Policy Directives<sup>2</sup> do allow, after an award is made, for the Government to negotiate with the contractor the appropriate and reasonable compensation for acquiring GPR for SBIR data rights protected technical data. The panel has made recommendations on statutory changes to clarify handling of SBIR protected data in MSI.

Industry panelists expressed a concern about applying the doctrine of segregability to SBIR data in regulatory implementation. In situations where a small business' item or process will be incorporated into or merged with an item or process developed at least in part with Government funds, the Government would obtain GPR to the resulting technical data or software deliverables unless the parties segregate the SBIR data or software from the data or software pertaining to the portions of the item or process developed at least in part with Government funds. In such situations, the onus will be on the small business to take the steps necessary to protect segregable portions of the SBIR data/software. Additional training would be helpful to educate small businesses about the risks associated with integrating SBIR technology into items or processes otherwise developed at least in part with Government funding.

The panel also discussed the lack of appeal rights for small businesses asserting SBIR data rights as a subcontractor as, under the Contractor Disputes Act (CDA), only a contractor may appeal to the Armed Services Board of Contract Appeals (ASBCA) (see Tension point 18)<sup>6</sup>.

### Recommendation

The Panel recommends the following statutory revisions to 10 U.S.C. 2320(a)(2)(A) to clarify that for the purpose of 10 U.S.C. 2320, an item or process developed under a contract or subcontract to which the SBIR regulations apply shall be treated as though developed at private expense during the protection period authorized in the SBIR regulations:

"(A) Development exclusively with Federal funds. (i) Except as provided in subparagraph (ii), in the case of an item or process that is developed by a contractor or subcontractor exclusively with Federal funds, the United States shall have the unlimited right to--

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<sup>6</sup>Binghamton Simulator Company (BSC) ASBCA decision 59117

"(I) use technical data pertaining to the item or process; or

"(II) release or disclose the technical data to persons outside the Government or permit the use of the technical data by such persons.

"(ii) Small business innovation research. An item or process developed under a contract or subcontract to which regulations under section 9(j)(2) of the Small Business Act (*15 U.S.C. 638(j)(2)*) apply shall be treated as an item or process developed at private expense, except as otherwise permitted by those regulations. Upon the expiration of the protection period authorized in those regulations, the rights of the United States shall be as set forth in subparagraph (i). "

The panel also recommends the following regulatory changes:

- Amend DFARS to clarify that a change in data rights clause can be flowed down based on whether the subcontractor or supplier is eligible for SBIR protections:

DFARS 252.227-7013

...

(k) Applicability to subcontractors or suppliers. (1) The Contractor shall ensure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, and 15 U.S.C. 638, and the identification, assertion, and delivery processes of paragraph (e) of this clause are recognized and protected.

...

(6) The Contractor shall include the substance of the Rights in Noncommercial Technical Data and Computer Software—Small Business Innovation Research (SBIR) Program clause set forth at 252.227-7018 of the Defense Federal Acquisition Regulation Supplement (DFARS), in all subcontracts for technology within the scope of the SBIR program, as defined in DFARS 227.7104, and for which the subcontractor has asserted SBIR data rights

Make Like changes to DFARS 252.227-7014 and 252.227-7015

DFARS 252.227-7018

(k) Applicability to subcontractors or suppliers. (1) the Contractor shall assure that the rights afforded its subcontractors and suppliers under 10 U.S.C. 2320, 10 U.S.C. 2321, and 15 U.S.C. 638, and the identification, assertion, and delivery processes required by paragraph (e) of this clause are recognized and protected.

...

(6)Whenever any noncommercial technical data or computer software which is not restricted under the SBIR program and is to be obtained from a

subcontractor or supplier who is not in the SBIR program, for delivery to the Government under this contract, the Contractor shall use the Rights in Technical Data—Noncommercial items clause set forth in 252.227-7013 of the Defense Federal Acquisition Regulation Supplement (DFARS) for non-commercial technical data, or the Rights in Noncommercial Computer Software and Noncommercial Computer Software Documentation clause set forth in 252.227-7014 of the DFARS in the subcontract or other contractual instrument, and require its subcontractors or suppliers to do so, without alteration, except to identify the parties. The Contractor shall use the Technical Data—Commercial Items clause set forth in 252.227-7015 of the DFARS to obtain technical data pertaining to commercial items, components, or processes. No other clause shall be used to enlarge or diminish the Government's, the Contractor's, or a higher tier subcontractor's or supplier's rights in a subcontractor's or supplier's technical data or computer software.

- The Panel recommends that the assertion tables in DFARS 252.227-7017, 252.227-7013, and 252.227-7014 have a basis for assertion which directly references SBIR data rights protection in addition to those bases for assertions related to funding. (See DFARS case 2010-D001)
- The panel recommends an update in Defense Acquisition Guidebook at <https://dag.dau.mil/> and Department of Defense Source Selection Procedures to provide specific guidance for inclusion of SBIR/STTR technologies in acquisition programs, similar to the guidance provided by the Navy in their DON Phase III Guidebook<sup>5</sup>.
- SBIR

The panel recommends that additional training would be helpful to educate small businesses about the risks associated with integrating SBIR technology into items or processes otherwise developed at least in part with Government funding.