



Small Business Data Rights Seminar

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Agenda



- What are Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Data Rights?
- What is a Government Phase III award?
- Why is protecting SBIR/STTR Data important?
- To what agencies does this apply?
- How and when to mark SBIR/STTR Data?



What are SBIR/STTR Data Rights?



- They grant the Government a non-exclusive, royalty-free, paid-up, worldwide license to limited use of SBIR/STTR Data, but the Government cannot publicly disclose the Data as long as the protection period remains in effect
- The Data Rights protection period is now 20 years from the date of award – The Small Business Administration (SBA) eliminated the “roll-over” provision in 2019 extending protection periods under prior funding agreements
- Government disclosure of the Data could provide competitors free entry into the SBIR/STTR firm’s market, without investment or effort



Essential Attributes of SBIR/STTR Data



1. They are *recorded* information, i.e., reduced to writing
 - SBIR/STTR Data can be source code, sketches, drawings, formulae, equations, reports, technical descriptions of SBIR/STTR effort, etc.
2. SBIR/STTR Data are *technical* in nature
 - General statements and non-technical data do not qualify as SBIR/STTR Data



Essential Attributes of SBIR/STTR Data (cont.)



3. SBIR/STTR Data are *generated under an SBIR or STTR funding agreement and appropriately marked*
 - Proprietary data that the firm developed with its own private funds is not SBIR/STTR Data – they are separately marked as such
 - Hardware is not SBIR/STTR Data, it is: 1) not recorded or written information; and 2) is visible to the naked eye; therefore, it cannot be the subject of a non-disclosure obligation
 - Do not mark hardware as SBIR/STTR Data
 - Software in a black box can be SBIR/STTR Data, if generated under an SBIR/STTR funding agreement, and if it is inaccessible when the black box is integrated, manipulated, or otherwise used
 - An agency receives one seat for SBIR/STTR computer program Data



Important to Know



- Under SBA's SBIR/STTR Policy Directive, any SBIR/STTR Data delivered must be marked with the appropriate SBIR/STTR Data Rights legend
- Since the 1990's, the Policy Directive has had the force of law and as a regulation, binds agencies by law
- Agencies cannot change nor circumvent SBIR/STTR laws by requesting SBIR/STTR firms to waive SBIR/STTR Data requirements



What is a Phase III Award?



- In order to secure SBIR/STTR Data Rights under a Phase III, one must know how a Phase III is defined
- A Phase III is defined as an award that derives from, extends or completes prior SBIR/STTR effort with non-SBIR/STTR (non-set aside) funds
 - **“Derives from”** means the Phase III work under consideration traces back to prior SBIR/STTR effort and is funded with non-set-aside funds
 - **“Extends”** means that the proposed Phase III work can be for an entirely different application of the technology than was developed in a prior Phase I, Phase II, or even a prior Phase III
 - **“Completes”** refers to the process of converting prior SBIR/STTR research and effort into a product
 - The **“or”** means that if any one of these terms applies, the new requirement can be a Phase III



What Makes SBIR/STTR Data Rights Valuable?



- Phase III status brings with it:
 - The right to awards without competition
 - SBIR/STTR Data protection
 - Exemption from SBA size standards
 - No limits on number, funding, duration or time between Phase III awards
 - The right to a Phase III mandate – the SBIR/STTR firm has a right to be awarded a future Phase III award to the greatest extent practicable
 - Application to subcontracts, which can be received for Phase III work without competition
 - The ability to pursue research, research and development (R&D), services, products, production or any combination of these



Phase III Awards by the Government



- Can be made by any Federal agency, even if the agency is not an SBIR/STTR program participant
- Federal agencies may enter into a Phase III SBIR/STTR agreement at any time with a Phase I or II awardee – regardless of the stage of completion



Phase III Commercialization



- Consists of commercializing work that derives from, extends or completes an effort performed under prior SBIR/STTR agreements, including:
 - Activity in the military, civilian, or private sector
 - SBIR/STTR-derived products or services
 - Continuation of R&D
- Increasingly, agency level rules are requiring commercialization to a marketable product
- Additional considerations:
 - Businesses awarded a Phase I, II, or III, or successor-in-interest firms, are eligible for Phase IIIs
 - A successor-in-interest can occur through an acquisition, novation, or by assignment of the SBIR/STTR Data Rights and technology
 - Selling or even licensing of SBIR/STTR technologies should be done carefully so as not to create a large competitor
- The SBIR/STTR Act now has restrictions/requirements on commercialization



Required Phase II Awards



- If pursuing Phase III work with [an SBIR/STTR Awardee] *is found to be practicable*, [agencies or Government-Owned, Contractor Operated (GOCO) facilities or Federally-Funded Research and Development Centers (FFRDCs) or prime contractors] *must* award a non-competitive funding agreement to the firm (SBA Policy Directive, § 4(c)(7)(ii))
- Agencies must consider the practicality of pursuing the work with the awardee through a direct follow-on award through market research to determine if firm is available, capable, and willing to perform the work
- If a Phase III is determined not to be practicable, an agency must provide a copy of the written decision and rationale to SBA (technology@sba.gov), which can appeal the decision not to award an SBIR/STTR



SBIR/STTR Data Rights Legend



Three essential elements in the SBIR/STTR Data Rights legend:

- TITLE: SBIR/STTR Data Rights
- Five Row Chart
 1. Funding Agreement Number
 2. Award Date
 3. Date 20 years out from Award Date
 4. Awardee's Name
 5. Awardee's Address
- Paragraph of text describing the Government's Rights and Obligations



Marking SBIR/STTR Data



- “Marking” SBIR/STTR Data refers to the process of affixing the three-part legend to a document accurately, completely, and in a filled-out form
- All agencies have now agreed to abandon the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) clauses and use SBA’s new clause instead, which includes the legend
- DoD’s new 17 March 2020 “DFARS 252.227-7018 (DEVIATION 2020-O0007)” SBIR Data Rights clause is now in use and carefully sets out SBA’s legend



What are the Consequences of NOT Marking SBIR/STTR Data Correctly?



- Failure to mark, or inappropriately marking SBIR/STTR Data, gives the Government Unlimited Rights in the SBIR/STTR Data
- With such rights, the Government can include this unmarked or inappropriately marked data in solicitations, disclose it directly to commercial firms, including the SBIR/STTR firm's competitors, and use them for any purpose, even to develop a commercial product from it and sell it, or have others do so
- Awardees have six months to correct inappropriate or failed markings, but the Government retains Unlimited Rights to the Data until it is corrected
- Appropriately marking turns the tables completely
- Appropriately marked SBIR/STTR Data constitute trade secrets and are covered by the Federal Trade Secrets Act, 18 U.S.C. § 1905, which makes it a felony for a Federal official to disclose such Data, punishable by not more than one year in prison and not to exceed \$100,000 per disclosure



How to Correctly Mark SBIR/STTR Data?



- The entire legend should be on the title page of any submission containing SBIR/STTR Data
- SBA's Policy Directive requires the legend to be included on every succeeding page, however, agencies and the SBA have accepted a shortcut for succeeding pages: *"This page governed by the SBIR/STTR Data Rights legend set forth on the title page, which is incorporated herein, as if written out in full"*



SBIR/STTR Data Marking DOs and DON'Ts



- Apply the required legend to all documents containing SBIR/STTR Data, irrespective of the type of funding agreement – whether a grant, contract, cooperative agreement, Other Transaction Agreement (OTA), task order, or any other type
- Do not affix the SBIR/STTR Data legend to a proposal



Non-Disclosure Agreements



- Support services contractors must sign non-disclosure documents with the Government and are bound by the Federal Trade Secrets Act, like Federal employees
- In reports and submissions, submit as little SBIR/STTR Data as possible to be consistent with award terms – an agency cannot disclose what it does not know
- Do NOT voluntarily disclose SBIR/STTR Data outside of the Government without a non-disclosure agreement
- Watch PowerPoint presentations – ensure all attendees are Federal employees or service contractors



A Former Procuring Contracting Officer's (PCO's) Perspective on the SBIR/STTR and Phase III Contracting Process



Why Participate in the SBIR/STTR Program?



- To address National Research needs as proffered by DoD
- To further develop technologies that have dual applications in both the military and commercial markets (“dual use”)
- To mature that technology during the process to provide solutions to the Government’s stated needs and to provide solutions to the commercial marketplace



DoD Investment in SBIR/STTR (FY19-22)



From FY19-FY22, DoD investments in SBIR/STTR activities were as follows:

- *SBIR Phase I:* \$ 789,762,443
- *SBIR Phase II:* \$ 5,610,822,984

- *STTR Phase I:* \$ 253,434,383
- *STTR Phase II:* \$ 880,215,768

- **Phase Totals:** \$ 7,534,235,578

Source: Federal Procurement Data System (FPDS)



Keys to SBIR/STTR Contracting Success



1. Time is of the essence
2. Standardization/clarity in communication is NOT a dirty word
3. The objective of the program is Phase III (Production)



Key #1 to SBIR/STTR Contracting



- Time is of the essence – Why?
 - DoD equipment is designed and deployed with the prospect of being in service for a period exceeding 25 years (case in point: B-52 aircraft)
 - This development results in the following considerations:
 - Obsolescence
 - Potential safety concerns
 - Maintainability challenges
 - Capability enhancements to meet emerging threats



Key #2 to SBIR/STTR Contracting



- Standardization is not a “dirty” word – Why?
 - Over the past several years, component commands have moved in the direction of standard practices as well as organizational structures that enhance performance
 - Reasons for their successful performance in this area is what we would attribute to an approach described as “Management 101”
 - They organized their operation to service a given customer (i.e., contracting center of excellence approach)
 - They developed the use of templates for the solicitation, negotiation, and award of projects
 - They developed a cadre of core personnel to process the work to be completed by others when necessary
 - They developed a communication model with their respective contractor base to manage expectations for proposal submittals and award justifications



Key #3 to SBIR/STTR Contracting



- Phase III awards should always be the objective – Why?
 - Programs are identifying that solutions to existing problems can be readily achieved thru the SBIR/STTR Program (case in point: Air Force use of Commercial Solution Opportunities)
 - Perception is that the small business community represents an agile, technically sound, cost effective, responsible partner when proceeding to implement a solution



Contractor Actions that Facilitate the Process



- Recognize that due to the sense of urgency associated with the process, contractors can make adjustments to their internal (“back office”) processes (material acquisition, subcontracting, etc.) that will accelerate getting to an award
- Understand the Government’s structure and communication models in order to be prepared to provide responses to anticipated questions (e.g., How do you acquire your materials? Has your accounting system been audited?)
- Understand the organization with which you are in negotiation and the stakeholders (e.g., Program Manager (PM), Technical Point of Contact (TPOC), Contracting Officer’s Representative (COR), PCO, etc.) to whom you should address challenges during the acquisition process



DoD Phase III Awards (FY19-FY22)



\$8,670,502,908



Good News



- If we work together, we all win!
- Our Best Approach:
 - Stay flexible in how we approach contracting
 - It's an ART *not* a SCIENCE
 - Communicate clearly (and often)
 - Be prepared to respond



Less Than Good News



- Over the past few years, there has been “unfortunate” interpretations of what is permissible under the program
- The following scenarios are offered as examples of certain occurrences and an initial assessment of the facts with an opinion on how these interpretations should be handled



Scenario #1: “Just Give Me the Data”



- Company “X” has been working closely with a DoD Component Command to provide a solution to a vexing problem associated with foreign substance penetration of smooth mechanical surfaces
- During the Phase II effort that had been awarded to Company “X”, a Government stakeholder (e.g., PM, COR, Contracting Officer’s Technical Representative (COTR), etc.) requests that the firm...“Provide all your detailed research documents (e.g., drawings, performance standards, etc.) without markings on the data.”
- *Is this an acceptable request by the Government of Company “X”?*



Scenario #1 Assessment



- **NO!!** Repeatedly, it has been maintained that the Small Business Concern (SBC) has those rights that it has asserted and protected under the SBIR/STTR Program
- It is inappropriate for the Government to require an SBC, whether under a Prime contract or subcontract, to deliver its data without allowing the SBC marking of SBIR/STTR data restrictions under an SBIR/STTR contract, inclusive of Phase III awards
- The Government may approach the SBC to define/re-define SBIR/STTR Data Rights that were developed/acquired under the SBIR/STTR funding agreements; however, this must be a separate agreement and not a contingency to receive a SBIR/STTR funding agreement



Scenario #2: “Let’s Just Have a Lot of Prototypes”



- An SBC is requested to provide 20 copies of a software product under a Phase II contract as “prototypes”
- The government has no intention of acquiring any additional copies of the software under a Phase III award
- *Is this an acceptable definition of “prototype” for the purposes of a Phase II award?*



Scenario #2 Assessment



- **NO!!** The concept of producing a prototype under a Phase II agreement is intended to allow for the testing and determining whether the item acquired meets the requirements of the concepts developed under the topic
- For guidance, researching “Prototype Other Transactions”, the development contract may be used to acquire a **reasonable** number of prototypes to test in the field before making a decision to purchase in quantity – in that instance, the purchase in quantity will be the Phase III / Production effort
- The attempt to use the development contract (Phase II) also as the transition to Production (Phase III) is an inappropriate use of the contractual vehicle, as well as the appropriation obligated (i.e., SBIR/STTR funding)



Scenario #3: “May I Have Your Access Code...please?!”



- An SBC is requested to provide the “Access Code” (i.e., source code) to its software during performance under the SBIR/STTR Funding Agreement
- *Is this an appropriate request?*



Scenario #3 Assessment



- **...YES!** The Defense Innovation Board (DIB) publication on “Software Acquisition and Practices” (SWAP) cites “...the Government should and will require the access code to acquired software (i.e., whenever feasible and useful, DoD should seek to obtain source code for non-custom software for the purposes of vulnerability scanning and related analyses)” – *in this time of heightened cybersecurity concerns this activity has taken on greater relevance*
- *From the DIB SWAP Report: “Commandment #6. Every purpose-built DoD software system should include source code as a deliverable. DoD should have the rights to and be able to modify (DoD-specific) code when new conditions and features arise. Providing source code will also allow the DoD to perform detailed (and automated) evaluation of software correctness, security, and performance, enabling more rapid deployment of both initial software releases and (most importantly) upgrades (patches and enhancements).”*
- However, the request to deliver a software access code in no way abrogates the ownership rights in SBIR/STTR data resident with the SBC – in those stated instances it is incumbent that the SBC properly assert and mark delivered data to the Government to assure adequate protection of its SBIR/STTR data



Question & Answer (Q&A)

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