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Phase III Funding Agreements With the Federal Government

A Presentation at
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by

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Phase III SBIR Funding Agreements

- ❖ The September 24, 2002 Small Business Administration Small Business Innovation Research Program Policy Directive
 - Is the final Directive
 - Has the force of law
 - Changed/clarified some Phase III rights
- ❖ The Directive favors SBIR firms, but SBIR firms must know of its provisions to protect their rights

Phase III SBIR Funding Agreements

- ❖ What are SBIR eligible firms?
 - Small Business Concern (SBC) definition (applies only to Phases I and II):
 - ◆ “Organized for profit”
 - ◆ Not to exceed 500 employees
 - ◆ At least 51% of concern is owned and controlled by individuals who are “citizens of or permanent resident aliens in” the U.S.
 - ◆ On the date of award

Phase III SBIR Funding Agreements

- ❖ What is a Phase III Funding Agreement?
 - Commercial applications:
 - ◆ SBIR Policy Directive does not apply to SBIR firm efforts funded by non-Federal sources
 - Government-funded applications:
 - ◆ Work that “derives from, extends, or logically concludes effort(s) performed under prior SBIR funding agreements”
 - ◆ Funded by non-SBIR sources of Federal funds

Phase III SBIR Funding Agreements

- ❖ Phase III award may be for “products, production, services, R/R&D, or any combination thereof”
- ❖ If an SBIR awardee wins a competition for work that “derives from, extends, or logically concludes that firm’s work under a prior SBIR funding agreement, then the new funding agreement is a Phase III and is accorded all rights of a Phase III
- ❖ May go straight from a Phase I to a Phase III
- ❖ The Directive determines Phase III status

Phase III SBIR Funding Agreements

- ❖ The following constitute Phase activities under the Directive:
 - Commercial applications of SBIR work
 - SBIR-derived products or services intended for use by the Federal Government, funded with non-SBIR sources of Federal funds
 - Continuation of R/R&D that has been competitively selected through peer review and funded with non-SBIR funding

Phase III SBIR Funding Agreements

- ❖ What are the Benefits of Establishing Phase III Status for a Funding Agreement?
 - No further competition required
 - ◆ Phase I/Phase II competition is sufficient under statutes such as FPASA, ASPA and the Competition in Contracting Act (“CICA”)
 - ◆ An agency wishing to award a Phase III award can do it “sole source”
 - ◆ Need only cite in a Justification and Approval, if one is used, that the award “derives from, extends, or logically concludes” prior SBIR efforts

Phase III SBIR Funding Agreements

- ❖ *Preference* given to the SBIR developer for agency requirements that constitute a Phase III
 - Congress intended that Phase IIIs be awarded sole source to the SBIR developer
 - Award of a Phase III to other than the SBIR developer must be reported to SBA prior to award
 - Agencies must report annually all such instances to SBA
 - SBA must report all such instances to Congress

Phase III SBIR Funding Agreements

- ❖ SBA may appeal the decision to the Head of the Contracting Activity (HCA):
 - By a notice of intent to appeal within 5 days after receipt of the intent to make award
 - Receipt of the appeal automatically stays the award – suspends further action on it
 - Contracting Officer must justify the determination – with a copy to SBA
 - The HCA then renders a decision

Phase III SBIR Funding Agreements

- ❖ No limit on the number of Phase IIIs
- ❖ No limit on duration of the funding agreement
- ❖ No limit on the type of funding agreement – i.e., grant, contract, cooperative agreement, “other transaction,” or subcontract
- ❖ No limit on dollar value
- ❖ Phase III may be funded by different agency or agencies that funded Phases I and II

Phase III SBIR Funding Agreements

- ❖ There is no limit on the time that may elapse between Phase I/II award and a Phase III
- ❖ There is no limit on the time that may elapse between one Phase III and a follow-on Phase III
- ❖ The small business size limits do not apply to Phase IIIs
 - 500 employee size limit does not apply
 - Therefore, the “affiliation rule” has no practical application

Phase III SBIR Funding Agreements

- ❖ Phase III funding agreements must include the SBIR Data Rights Clause
 - Under the SBIR Data Rights Clause, the Government:
 - ◆ Protects all proprietary information, including all information developed under the Phase III, from disclosure, except for proposal review purposes
 - ◆ Agency must refrain from disclosing SBIR Data Rights to the SBIR developer's competitors

Phase III SBIR Funding Agreements

- ◆ SBIR firm retains, under the Act: “rights to data generated by the concern in the performance of an SBIR award”
- ◆ For data rights retention, Phase IIIs are SBIR awards, even though funded with non-SBIR funds
- ◆ Agencies cannot *use* SBIR rights in technical data to produce future technical procurement specifications
- ◆ Protections last under the Directive “for not less than 4 years” –for DOD, 5 years

Phase III SBIR Funding Agreements

- ◆ Protection of rights under prior agreements “rolls over” when a new SBIR agreement is executed
- ◆ This is a more expanded protection than under the prior Directive
- ◆ Agencies receive a nonexclusive, royalty free license in technical data generated under a Phase III award, but may not disclose them during the protection period
- ◆ SBIR technical data rights apply to all SBIR awards, including subcontracts to such awards, that fall within the definition of Phase I, II or III

Phase III SBIR Funding Agreements

- ❖ Agencies must insert the SBIR technical data rights clause in every Phase III
- ❖ SBIR technical data rights are non-negotiable during Phase III award
- ❖ An agency may not in any way make issuance of an SBIR award, including a Phase III, conditional on data rights
- ❖ An agency may not diminish or remove SBIR Phase III technical data rights during contract administration

Phase III SBIR Funding Agreements

- ❖ Any decision by an SBIR awardee to relinquish or diminish its rights must be made without pressure or coercion by the agency *or any other party*
- ❖ Any transfer of technical data rights to the agency or any other party must be in writing and such an agreement can only be entered into after the SBIR award is signed
- ❖ SBA must *immediately* report to Congress any attempt or action by an agency to condition, exclude or diminish SBIR data rights

Phase III SBIR Funding Agreement

- ❖ Agencies have a duty to protect SBIR data rights
- ❖ Agencies may transfer title to SBIR awardees, including Phase IIIs “where such transfer would be more cost effective than recovery of the property”

Phase III SBIR Funding Agreements

Questions

Question: Does a Phase III need to be awarded by the same agency that awarded the Phase I or Phases I and II?

❖ Answer: No. A different agency can award the Phase III.

Question: Does the agency awarding the Phase III have to be an SBIR Program participant?

❖ Answer: No. Any agency can award a Phase III.

Phase III SBIR Funding Agreements

Question: How can I maximize my chances of receiving a Phase II award?

❖ Answer: Be as expansive as possible in describing potential applications and uses in your Phase I and IIs.

Question: Can an SBIR Phase III be a subcontract?

❖ Answer: Yes. I believe it can; there is no limit on the *type* of award for a Phase III.

Phase III SBIR Funding Agreement

Question: What does “derived from” mean?

❖ Answer: The proposed procurement/award of the agency has its roots in or traces back to your SBIR effort.

Question: What does “extends” mean?

❖ Answer: The proposed agency procurement or award *continues* work begun in your SBIR awards. The proposed agency award could be for an application not included in your SBIR work.

Phase III SBIR Funding Agreements

Question: How do I demonstrate to an agency that the prospective procurement/award it is considering constitutes a Phase III of my work?

❖ Answer: Do a “side-by-side” comparison of the prior Phase I and/or Phase II and /or Phase III proposals and reports to the agency description of the work they propose (RFP, solicitation, SOW or other proposal for the work).

SBIR Phase III Funding Agreements

Question: Why is it so urgent to obtain the SBIR Clause in a Phase III?

❖ Answer: Two basic reasons:

- The agency cannot disclose your SBIR data to your competitors during the protection period.
- The agency cannot use your SBIR data to develop technical procurement specifications for purposes of competing it, and must award procurements based upon it to you sole source.

Phase III SBIR Funding Agreement

Question: What if the agency refuses to include the data rights clauses in my Phase III?

❖ Answer: Report the refusal to the SBA's Office of Research & Technology ("ORT") or to your congressional representative.

Question: What if the Agency refuses to recognize its procurement as a Phase III?

❖ Answer: This is the most often used agency defense against Phase IIIs. See answer above.

Phase III SBIR Funding Agreements

Conclusions/Recommendations

- ❖ The new Policy Directive provides for sole source “regular” procurements based upon SBIR work
- ❖ SBIR firms can now build companies around the SBIR Program
- ❖ Commercialize Phases I and II into Phase IIIs
- ❖ Prepare for Phase III by drafting Phases I and II reports very broadly

Phase III SBIR Funding Agreements

Questions or Comments to:

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