Phase III Contracting Q&A

References:

SBIR Reauthorization Law; PL 112-81:

SBIR in the US Code; 15 USC 638 (Section 9 of US Small Business Act):

SBA 2012 SBIR Policy Directive:
http://www.sbir.gov/about/sbir-policy-directive

1. If a company wins a Phase I or Phase II SBIR, can the Government enter into a contract to purchase or develop the SBIR technology?
   a. Yes, not only can the Government do so, but follow-on SBIR contracts are also encouraged. The National Defense Authorization Act of 2012 contains the SBIR/STTR reauthorization provisions, and includes new language that indicates strong Congressional intent to improve the process of rapidly transitioning SBIR/STTR innovative technologies for insertion into DOD fielded systems and platforms. The law specifically states:

   “Sec. 5108: To the greatest extent practicable, Federal agencies and Federal prime contractors shall issue Phase III awards relating to technology, including sole source awards, to the SBIR and STTR award recipients that developed the technology.” ¹ [Emphasis added.]

   [Phase III is further defined as, see Sec. 5125 – “for work that derives from, extends, or completes efforts made under prior funding agreements under the SBIR program.”²]

   This provision is the strongest statement to date that Congress is serious that agencies and prime contractors issue Phase III awards to SBIR producers of technology - a mandate, - no longer merely an issue of discretion.

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¹ 15 USC 638(r)(4) Phase III Awards.
² 15 USC 638(e)(4)(C).
2. Can an agency enter into a Phase III contract even if a different agency awarded the Phase I or II SBIR award?  
   a. Yes.  

3. May an agency enter into a Phase III contract as a sole source contract?  
   a. Yes, see Section 5108 that specifically authorized sole source awards to SBIR and STTR recipients. See also SBA’s August 6, 2012 SBIR Policy Directive, section 4(c)(3) which states:  
      “The competition for SBIR Phase I and Phase II awards satisfies any competition requirement of the Armed Services Procurement Act, the Federal Property and Administrative Services Act, and the Competition in Contracting Act. Therefore, an agency that wishes to fund an SBIR Phase III project is not required to conduct another competition in order to satisfy those statutory provisions. As a result, in conducting actions relative to a Phase III SBIR award, it is sufficient to state for purposes of a Justification and Approval pursuant to FAR 6.302-5, that the project is a SBIR Phase III award that is derived from, extends, or completes efforts made under prior SBIR funding agreements and is authorized under 10 U.S.C. 2304(b)(2) or 41 U.S.C. 3303(b).”  
   b. Agencies may issue sole source Phase III awards to the SBIR Phase I or Phase II awardee to meet these statutory and regulatory requirements. At times, agencies have failed to use this authority, by-passed the small business that created the technology, and pursued the Phase III work with another business. Congress has expressed, again, and now in stronger terms, a clear intent for the agencies to issue Phase III awards to the SBIR awardees that created the technology so that these small businesses can commercialize it.  

4. Does the law require an agency award to award a phase III contract to the SBIR company that developed the technology?  
   a. No. The law requires that the agency (or agencies) provide a "preference" to the SBIR and STTR technology developer. The title of Section 5108 is “SBIR and STTR special acquisition preference”, and states: “To the greatest extent practicable, Federal agencies and Prime contractors shall issue Phase III awards relating to...SBIR and STTR Phase I or II awards.” The preference is legally required. SBA has stated that the preference process consists of the agency determining whether or not the SBIR/STTR developing firm is: 1) available; and 2) capable of performing the requirement. Once these tests are met, the agency faces an almost overwhelming requirement to make the award to the SBIR/STTR developer as a sole-source award.  

3 15 USC 638(bb)(1) Agency Flexibility.  
4 SBA 2012 SBIR Policy Directive Section 4(c)(3)  
5 15 USC 638(r)(4) Phase III Awards
5. Does this preference apply to DOD prime contractors?
   a. Yes. US Code 15 USC 638(r)(4) specifically states that to the greatest extent practicable Federal agencies and Federal prime contractor shall issue phase III awards relating to SBIR technology.\(^6\)

6. Are there goals for agencies and prime contractor for transitioning SBIR and STTR technology into programs of record and fielded systems?
   a. Yes, Section 5122(a)(7) of the SBIR reauthorization language provides that the Secretary of Defense shall establish goals for transitioning SBIR technology into Phase III.\(^7\)

7. Are there incentives for agency program managers and prime contractors to use Phase III?
   a. Yes. Section 5122(a)(7) of the SBIR reauthorization language provides that the Secretary of Defense use any incentive in existence at the enactment of the law or create any new incentive to encourage the transition SBIR technology.\(^8\)

8. Has the Secretary of Defense established goals for SBIR Phase III?
   a. Not yet.

9. Is it a problem for an agency if it doesn't use an SBIR technology that derives from, extends, or completes prior SBIR effort?
   a. Yes. In fact, the Act requires at 638(b)(7)\(^9\) that SBA report to Congress all instances in which an agency pursues research, development, or production of a technology developed by an SBIR awardees, with a business concern or entity other than the one that developed the SBIR technology. The SBA policy Directive at section 4(c)(8) also requires agencies to notify the SBA prior to award of such a funding agreement.\(^10\) SBA will report such instances, including those discovered independently by SBA, to Congress.

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\(^6\) 15 USC 638(r)(4) Phase III Awards  
\(^7\) 15 USC 638(y)(5)(A)  
\(^8\) 15 USC 638(y)(5)(B)  
\(^9\) 15 USC 638(b)(7)  
\(^10\) SBA 2012 SBIR Policy Directive 4(c)(8)
b. If an agency refuses to acknowledge that a requirement is a Phase III, first attempt to persuade the agency that it is. Develop a "side by side" comparison of prior SBIR research (SBIR proposals and contracts or funding agreements) with the requirement. Compare functionalities, metrics, language and other similarities. Show this to the agency. Once the Phase III status is established, the rest of the SBIR rights, including the preference, follow by law. It is this document, in addition to a persuasive paper arguing the case, that will become part of the appeal of the case (see below).

c. Agencies, their Government-owned, contractor-operated facilities, or Federally-funded research and development centers, that intend to pursue R/R&D, production, services, or any combination thereof of a technology developed under an SBIR award, with an entity other than that SBIR awardee, must notify SBA in writing prior to such an award. This notification must include, at a minimum:
   i. The reasons why the follow-on funding agreement with the SBIR awardee is not practicable;
   ii. The identity of the entity with which the agency intends to make an award to perform research, development, or production.

10. If an agency decides to award a contract for SBIR technology to a different company can an SBIR company object?
   a. Yes, SBA may appeal an agency decision to pursue Phase III work with a business concern other than the SBIR awardee that developed the technology to the head of the contracting activity within 5 days. Only then can an agency can proceed to make an award to the non-SBIR Company.
   b. That said, it is advisable to object to the agency as soon as possible, preferably before award of the technology to another firm, and make the case that this is a Phase III and must be afforded preference rights. If an agency threatens to compete a Phase III requirement, letters to and meetings with the agency are preferable to waiting until an award is made to other than the SBIR/STTR firm.

11. What should an SBIR winner do if an agency or Prime contractor should be using SBIR technology and they are not?
   a. First, make sure they know that your SBIR technology is appropriate. If they don’t agree to use your technology, work with the technical point of contact and the SBIR program office. If that does not work, notify them that you plan on going to SBA with the situation. Submit a clear and detailed statement showing that the technology developed under your SBIR awards, that it was “for work that derives from, extends, or completes efforts made under prior funding agreements under the SBIR program” Section 5125.

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11 SBA 2012 SBIR Policy Directive 4(c)(8)(iii)
12. Why don’t agencies use SBIR Phase III awards more often?
   a. First, the contracting officers and program managers are not aware of the law. These
      changes are relative new. Many contracting officers and program managers have not
      been trained on the use of SBIR technology. Second, the goals and incentives for using
      SBIR Phase III have not been issued by the Secretary of Defense. Third, the FAR and
      some program manuals have not been updated to reflect the changes in the law. Once
      agency officials become aware of the provisions of the SBIR reauthorization they will
      often decide to use the SBIR technology.

13. Should SBIR Data Rights (inclusion of DFARS 252.227-7018 clause) be granted to all Phase III
    contracts awarded by government and prime contractors? Yes.
    a. How does a prime contractor include the SBIR clause in a subcontract to a small
       business?
       This is done by "insertion" of the clause into the subcontract, not flowing it down, since
       the large firm will not have the SBIR clause in its prime contract. This is a common hang-
       up and misconception for large firm lawyers.
    b. Is there a requirement to do so since the prime may argue that it has to deliver to the
       government with unlimited rights?
       The answer to this is "Yes," the law requires the SBIR clause in the subcontract. Section
       4(c)(2) of the Directive states that a Phase III is in essence an SBIR contract, and must be
       accorded all SBIR rights, including SBIR data rights.

14. Who has rights and title (ownership) to the technology developed under SBIR Phase I, II, and III
    contracts?
    a. What are the government rights in the technology?
       The small business owns the technical data generated under an SBIR contract and the
       government receives a royalty-free license to use it.
    b. What is meant by the fact that the government can disclose to (on-site) government
       contractors, and for what purposes?
       This applies only to government support contractors. A true support contractor is one
       that has signed a nondisclosure agreement consistent with the DFARS, and has an
       organizational conflict of interest provision in its contract for support prohibiting that
       contractor from bidding on any contract involving that data or technology. "On-site"
       contractor is not a good substitute for support contractor, since many outside (non-
       support contractors) have people who work on-site.
15. Can an SBIR technology be licensed or sold to a prime contractor, e.g. for production for prime contractor purposes?
   a. Yes. Lines of SBIR technology can be sold as assets. These sales transfer SBIR rights to the prime contractor.
   b. Would licensing costs incurred by a prime contractor be allowable by the government?
      i. Yes. Licensing costs can be recovered by the prime contractor. While the government many times asserts (or feels) that they have paid for the SBIR technology, in fact, that has not actually occurred. The SBIR technology may have been changed, or include technical data that was not generated under the SBIR contract. The Government has no royalty-free license in any data not generated under the SBIR contract that was developed at private expense. License fees can cover use by the prime contractor or the Government of this technical data.

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