

## NOAA SBIR PHASE III CONTRACTING GUIDE

### Background:

The SBIR program allots a portion of NOAA's extramural research dollars for award to small businesses with the goal of stimulating and fostering scientific and technological innovation and increasing commercialization of Federal research and development. The SBIR program was designed by Congress as three phase program:

- Phase I is the start-up phase. Awards support exploration of the technical merit or feasibility of an idea or technology.
- Phase II awards expand Phase I results. During this time, the R&D work is performed and the developer evaluates commercialization potential. Only Phase I award winners are considered for Phase II.
- Phase III is the period during which the Phase I/Phase II innovation moves from the laboratory into the marketplace. No SBIR funds support this phase. The small business must find funding in the private sector or other non-SBIR federal agency funding.

NOAA issues a Phase I solicitation annually for the SBIR program. Phase II proposals are submitted at the end of the Phase I contracts. There is no formal Phase III solicitation process. A Phase III contract can be awarded at any time with a Phase I or Phase II awardee. (Note: while a Phase III could theoretically be awarded while a Phase I effort was still underway, it is unlikely that this would be in the best interests of the Government since the Phase I is the feasibility study and is a short term contract.).

NOAA can issue a Phase III contract for products or services which are applications of SBIR-funded research and development or for the continuation of research or research and development that was initiated during the Phase I or Phase II effort. **Phase III awards must be funded from non-SBIR funding sources.** While the NOAA SBIR Program Office tracks Phase III awards as a metric of the success of the program, the Program Office does not control the Phase III award process at the agency level. The decision to award a Phase III contract does not require concurrence by the NOAA SBIR Program Office.

### SBA Phase III Guidance:

The SBIR program is administered by the Small Business Administration(SBA). The SBA has issued policy directives for the SBIR program available on-line at <http://www.sba.gov/sbir/indexsbir-sttr.html>. is still going through the review process.)

The SBA policy directive provides the following guidance on third phase agreements:

*“4.(c) **PHASE III.** SBIR Phase III refers to work that derives from, extends, or logically concludes effort(s) performed under prior SBIR funding agreements, but is funded by sources other than the SBIR Program. Phase III work is typically oriented towards commercialization of SBIR research or technology.*

*(1) Each of the following types of activity constitutes SBIR Phase III work:*

- (i) commercial application of SBIR-funded R/R&D financed by non-Federal sources of capital (Note: The guidance in this Policy Directive regarding SBIR Phase III pertains to the non-SBIR federally-funded work described in (ii) and (iii) below. It does not address the nature of private agreements the SBIR firm may make in the commercialization of its technology.);*
- (ii) SBIR-derived products or services intended for use by the Federal Government, funded by non-SBIR sources of Federal funding;*
- (iii) Continuation of R/R&D that has been competitively selected using peer review or scientific review criteria, funded by non-SBIR Federal funding sources.*

- (2) *A Phase III award is, by its nature, an SBIR award, has SBIR status, and must be accorded SBIR data rights. (See Section 8(b)(2) regarding the protection period for data rights.) 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 funding agreement for the new, competed work must have all SBIR Phase III status and data rights. A Federal agency may enter into a Phase III SBIR agreement at any time with a Phase II awardee. Similarly, a Federal agency may enter into a Phase III SBIR agreement at any time with a Phase I awardee. An agency official may determine, using the criteria set forth in the Directive as guidance, whether a contract or agreement is a Phase III award.*
- (3) *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 logically concludes efforts performed under prior SBIR funding agreements and is authorized under 10 U.S.C. 2304(b)(2) or 41 U.S.C. 253(b)(2).*
- (4) *Phase III work may be for products, production, services, R/R&D, or any combination thereof.*
- (5) *There is no limit on the number, duration, type, or dollar value of Phase III awards made to a business concern. There is no limit on the time that may elapse between a Phase I or Phase II award and Phase III award, or between a Phase III award and any subsequent Phase III award.*
- (6) *The small business size limits for Phase I and Phase II awards do not apply to Phase III awards.*
- (7) *For Phase III, Congress intends that agencies or their Government-owned, contractor-operated facilities, Federally-funded research and development centers, or Government prime contractors that pursue R/R&D or production developed under the SBIR Program, give preference, including sole source awards, to the awardee that developed the technology. In fact, the Act requires reporting to SBA of all instances in which an agency pursues research, development, or production of a technology developed by an SBIR awardee, with a concern other than the one that developed the SBIR technology. (See Section 4(c)(8) immediately below for agency notification to SBA prior to award of such a funding agreement and Section 9(a)(12) regarding agency reporting of the issuance of such award.) SBA will report such instances, including those discovered independently by SBA, to Congress.*
- (8) *For Phase III, 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 by an SBIR awardee of that agency, with an entity other than that SBIR awardee, must notify SBA in writing prior to such an award. This notice requirement also applies to technologies of SBIR awardees with SBIR funding from two or more agencies where one of the agencies determines to pursue the technology with an entity other than that awardee. This notification must include, at a minimum: (a) the reasons why the follow-on funding agreement with the SBIR awardee is not practicable; (b) the identity of the entity with which the agency intends to make an award to perform research, development, or production; and (c) a description of the type of funding award under which the research, development, or production will be obtained. SBA may appeal the decision to the head of the contracting activity. If SBA decides to appeal the decision, it must file a notice of intent to appeal with the contracting officer no later than 5 business days after receiving the agency's notice of intent to make award. Upon receipt of SBA's notice of intent to appeal, the contracting officer must suspend further action on the acquisition until the head of the contracting activity issues a written decision on the appeal. The contracting officer may proceed with award if he or she determines in writing that the award must be made to protect the public interest. The contracting officer must include a statement of the facts justifying that determination and provide a copy of its determination to SBA.*

- (9) *Within 30 days of receiving SBA's appeal, the head of the contracting activity must render a written decision setting forth the basis of his or her determination.*"

### **Phase III Competition Requirements:**

The SBA Policy Guide indicates that the competition for Phase I and Phase II awards satisfies any competition requirement of the Competition in Contracting Act. This means that a Phase III contract can be awarded to a SBIR/STTR firm without seeking further competition. The Policy Guide also states that Agencies pursuing research, research and development or production developed under the SBIR Program will give special acquisition preference to the SBIR company which developed the technology. The impact of this is that a Phase III award can be processed considerably faster than a non-Phase II contract of the same dollar value because it is not necessary to issue a competitive procurement.

The policy guide instructions in this area are supported by the Committee report on the 1992 Small Business Research and Development Enhancement Act. The Committee report states:

*"...an agency which wishes to fund an SBIR project in Phase III (with non-SBIR monies) or enter into a follow-on procurement with an SBIR company, need not conduct another competition in order to satisfy the Federal Competition in Contracting Act (CICA). Rather, by Phase III the project has survived two competitions and thus has already satisfied the requirements of CICA...."*

A justification for other than full and open competition (JOFOC) is not required for a Phase III procurement. The SBIR policy guide indicates that it is sufficient to document the file to state that the project is an SBIR Phase III award that is derived from, extends or logically concludes efforts performed under a prior SBIR funding agreement. The file should also contain reference to the prior contract number of the Phase I and/or Phase II efforts, regardless of whether it was a NASA contract or another agency's award

### **Procurement Procedures:**

Prior to initiating a purchase request for a Phase III contract, a technical requester should contact the appropriate procurement office to discuss the particular requirement. The dollar value and complexity of the effort will determine the appropriate procurement instrument to be used and the type of contract. In most cases, a formal solicitation will not be required as either an unsolicited proposal or a letter RFP will be the method used to obtain a proposal from the SBIR contractor. In some cases, a formal RFP may be considered necessary. In accordance with Federal Acquisition Regulation 5.202(a)(7), a synopsis is not required. A synopsis of the contract award is also not required for SBIR contracts [Ref: FAR 5.3(b)(3)].

### **Data Rights:**

All Phase III contracts must include the special "Rights in Data – SBIR Program" clause set forth in the FAR at 52.227-20. Contractors cannot be forced to give up their SBIR data rights in order to receive a Phase III award. If a Contractor elects to identify data created under the contract as SBIR data, the Government acquires limited rights to use the data for government purposes only for four years after the acceptance of all items to be delivered under the contract. The Government has the obligation to not disclose SBIR data outside the government without the permission of the Contractor during this four year period. After the four years, the Government will have a royalty-free license to use and authorize others to use on the Government's behalf, any data delivered under the contract and is relieved of all disclosure prohibitions.

### **Restrictions:**

A Phase III contract may not be appropriate in all cases even if the effort is a follow-on to a SBIR Phase II contract. If multiple sources are available for an item or if similar technologies are available on the open market, the Government's needs may best be met through a competitive procurement. In general, the longer the period of time since the completion of the Phase II, the greater the likelihood that the technology is no longer unique. If more than four years have passed since the completion of the Phase II, a market

survey should be performed to determine if the same or similar technology is available from multiple sources. The contract file should be documented to indicate the results of the market survey.

The use of other sources for the procurement of products or R/R&D originally developed under an SBIR contract should be strongly discouraged. SBIR legislation includes provisions directing that agencies pursuing R/R&D or production developed under the SBIR program give preference to the awardee that developed the technology. The legislation requires reporting to the SBA of all instances where an agency pursues such R/R&D or production with a firm other than the one that developed it under the SBIR program. SBA is in turn required to notify Congress of such instances. Therefore, anyone considering either issuing a competitive solicitation for a technology originally developed under the SBIR program, or awarding a sole source to other than the SBIR firm, should discuss this situation with their Center SBIR Program Manger, local Patent Counsel, and a procurement representative. The Supplementary Information included at the beginning of the policy guide indicates that “It is clear that Congress intends, to the greatest extent practicable, that agencies issue Phase III awards to the SBIR awardees that developed the technology.”

**Phase III Reporting:**

Because the number and size of Phase III awards are one metric used to gauge the success of NOAA’s SBIR program, it is essential that Phase III awards be tracked by the SBIR Program Office. While no formal approval is required from the SBIR Program Office prior to proceeding with a Phase III contract, the local SBIR Program Office should be notified that a Phase III is underway. A “Phase III Notification Form” (Attachment A or Center equivalent form) should be submitted to the local SBIR Program Office at the time of initiation of a purchase request for a Phase III effort. The local SBIR Program Office can provide advice and assistance to technical personnel who are considering the use of a Phase III contract. Also, a copy of the Phase III contract should be sent to the local SBIR Program Office after award.

The Contracting Officer should report all Phase III awards as such in the procurement reporting system. For reporting purposes, Phase III actions are considered to be negotiated, competitive set-aside awards since they result from the competition held for Phase I and Phase II awards.

## **SBIR PHASE III FREQUENTLY ASKED QUESTIONS**

- 1. Can a NOAA office award a Phase III contract resulting from a Phase I/II efforts which were originally awarded by another NOAA office?**

Yes - any NOAA office can make a Phase III award resulting from any NOAA funded Phase I or Phase II SBIR. However, there may be advantages to continuing the technical and/or procurement relationships which were established by the originating office. If the originating office is willing to accept the request to award and administer a Phase III contract to be funded by another office, the funds can be transferred between offices. Even if the originating office is not requested to make the award, the SBIR Project Office at the originating office should be notified of the award so that their records of SBIR success stories are accurate.

- 2. Can a NOAA office award a Phase III contract resulting from a Phase I/II efforts which were originally awarded by another agency?**

Yes - NOAA can award a Phase III contract resulting from a SBIR effort at another agency so long as the contract is for a commercial application of SBIR-funded research and development or for the continuation of research or research and development that was competitively selected in the SBIR program using peer review or scientific review criteria.

NOAA personnel should be aware that the terms of another agency's SBIR contract (or grant) may be somewhat different than NOAA's contracts. A Phase II contract may include procedures applicable to third phase agreements with the originating agency or any other agency as well as provisions with respect to intellectual property rights for follow-on research that differ from the standard NOAA clauses. Because of this, a copy of the Phase II funding agreement (contract or grant) between the originating agency and the small business concern should be carefully reviewed by both the NOAA technical and procurement personnel prior to initiating a Phase III follow-on to another agency's SBIR effort.

- 3. Can a SBIR Phase III contract be awarded to a company which has either outgrown the small business size standard or which has been acquired by a large business?**

Yes - the SBA has now indicated that a Phase III contract may be awarded to a firm which has outgrown the small business size standard. Also, the current policy guide (and the Supplementary Information at the beginning of the guide) indicate that a novated awardee or a successor in interest may receive an award. Agencies may require an original awardee to relinquish its rights and interests in an SBIR project in favor of another applicant as a condition for that applicant's eligibility to participate in the SBIR program for a particular project. [Reference: Section 4(b)]

- 4. Can a Phase III contract be initiated before the Phase II effort is complete?**

Yes - the SBA policy guide indicates that a Federal agency may enter into a third phase agreement at any time with a Phase I or Phase II awardee. As a practical matter, caution should be exercised to ensure that the resources of the small business concern are adequate to allow timely completion of the Phase II if a Phase III is initiated prior to completion of the original effort. SBIR firms are small businesses with limited personnel and may not have the resources to complete overlapping contracts requiring use of the same resources.

**5. Can the Phase III effort be added to an existing Phase II contract?**

It may be possible to add non-SBIR funds to a Phase II contract to accomplish additional work. However, Phase II contracts are limited by the SBIR legislation to a total dollar value of \$750,000. If the new work would increase the value of the contract to more than \$750,000, a new contract would be more appropriate. Also, the duration of the Phase II contract, the contract type, and the scope of the work may not be suitable for the anticipated Phase III effort. The Contracting Officer for the Phase II effort can provide advice on whether the proposed Phase III can be added to the Phase II contract by modification.

**6. Can a Phase III requirement be procured using simplified acquisition techniques?**

Yes - if the dollar value of the Phase III effort is below the Simplified Acquisition threshold or if the procurement meets the requirements of FAR 13.5 for commercial items, the simplified process may be utilized.

**7. Must an RFP be issued for a Phase III effort?**

A Phase III contract could result from an unsolicited proposal. Alternatively, a letter RFP or a formal RFP may be issued to the SBIR firm to obtain a proposal.

**8. Can a Phase III contract include options for additional work or additional quantities?**

Yes, however, the use of options needs to be justified in accordance with the FAR procedures at 17.205.

**9. Must a Phase III contract be approved by the SBIR Program Office?**

No, the SBIR Program Office does not approve Phase III contracts. .

**10. How do I know if a proposed effort is an SBIR derived product or process?**

An SBIR derived product or process is one which follows on to the Phase II thesis. The product must be substantially derived from the technology developed under the Phase II. A Phase III for continued research must be an extension of the Phase II thesis. The SBIR Program Office should be consulted if there is any question as to whether the proposed procurement meets this requirement.

**11. How long after the completion of a Phase I or Phase II contract can a Phase III be issued?**

There is no statutory time limit for the issuance of a Phase III contract. However, the SBIR firm retains exclusive data rights for only four years after the completion of the Phase II effort. After that period of time, it would be reasonable to question whether the technology is exclusive to the SBIR firm. Also, given the rapid pace of technological development in many industries, it is possible that SBIR technology that is more than four years old may no longer be the most advanced technology available.

As a general rule, the longer the period of time since the completion of the Phase II, the more carefully you should review the status of the technology and other products available in the open market. As a minimum guideline, if four years have passed since the completion of the Phase II effort, a market survey should be performed to ensure that other sources are not available.

**12. Can multiple Phase III contracts be awarded to the same firm?**

Yes. There is no limit in the number of Phase III contracts which can be received by the same firm.

**13. What data rights issues need to be addressed in a Phase III contract?**

Data rights issues will vary. In some cases, the Phase III contract will be for the procurement of a commercialized product. In that case, the data rights provisions used in commercial contracts would apply. (See FAR 12.211 for data rights provisions under commercial contracts.)

The most recent Congressional re-authorization of the SBIR program included provisions clarifying that Congress intended to have the special "Rights in Data - SBIR Program" clause at FAR 52.227-20 apply to all three Phases of the program. (Prior to this clarification, NASA and other agencies only included the SBIR Rights in Data clause in Phase I and Phase II contracts and left the determination of the appropriate data rights provisions up to the contracting officer in consultation with legal counsel.) The SBA addressed this in the revised policy guide and clearly indicated that SBIR data rights apply to Phase III's as well as the first two phases of the program.

**14. Is use of a Phase III contract mandatory if I am aware of other firms with similar capabilities as the former SBIR contractor?**

No. Use of a Phase III contract is never mandatory. One of the goals of the SBIR program is to encourage commercialization of new technologies by small businesses. The Government has already made a substantial investment in the technology developed under SBIR contracts, so use of the resulting products or processes is to be encouraged. However, if you are aware of multiple firms that offer similar technologies which could meet the Government's needs, it may be more appropriate to conduct a competitive procurement. It is not mandatory that SBIR technology be utilized when there are multiple sources available to meet a Government need. The decision to issue a competitive procurement versus utilizing a Phase III procurement should be discussed with the Contracting Officer.

**15. Must a Phase III contract be a fixed price effort?**

No, any type of contract can be used. The choice of contract type should be discussed with the Contracting Officer.

**16. Where can additional information on the Phase III contracting process be obtained?**

For further information on Phase III contracts, contact the SBIR Program Office.

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**ATTACHMENT A**

**PHASE III NOTIFICATION FORM**

To be completed by procurement initiator:

TO: (NOAA SBIR PROGRAM OFFICE)

FROM: (PROCUREMENT INITIATOR)

SUBJECT: PROPOSED SBIR PHASE III PROCUREMENT

The following SBIRPhase III procurement action is being initiated by this office:

Contractor Name:

Title/Description of Procurement:

Estimated Dollar Amount of Procurement:

Purchase Request Number/Date Initiated:

Title/Proposal Number of Phase I and Phase II SBIR award:

Date of completion of Phase I and Phase II SBIR awards:

To be completed by Contracting Officer at time of Award:

TO: (NOAA SBIR PROGRAM OFFICE)

FROM: CONTRACTING OFFICER

SUBJECT: AWARD OF SBIR PHASE III PROCUREMENT

The Phase III effort described above has been awarded.

Contract/Order Number:

Award Amount:

Date of Award: