



Billing Code: 8026-03

## **SMALL BUSINESS ADMINISTRATION**

### **Small Business Innovation Research Program and Small Business Technology**

#### **Transfer Program Policy Directive**

**RIN: 3245-AH31**

**AGENCY:** Small Business Administration.

**ACTION:** Notice of technical amendment; request for comment.

**SUMMARY:** The Small Business Administration is amending the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs Policy Directive to clarify that successor-in-interest entities are eligible to receive phase III awards.

**DATES:** These revisions to the SBIR/STTR Policy Directive take effect on **[INSERT DATE 45 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, without further action, unless significant adverse comment is received by **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. If significant adverse comment is received, SBA will publish a timely withdrawal of the notice in the Federal Register

**ADDRESSES:** You may submit comments, identified by number SBA-2020-0045 through the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

SBA will post all comments on [www.regulations.gov](http://www.regulations.gov). Please do not submit confidential business information (CBI) as defined in the User Notice at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** Jennifer Shieh at (202) 205-6817 or Jennifer.shieh@sba.gov.

**SUPPLEMENTARY INFORMATION:**

I. Executive Summary

The mission of the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) programs is to engage small business concerns (SBCs) to support scientific excellence and technological innovation through the investment of Federal research and research and development (R/R&D) funding in critical American priorities to build a strong national economy. Both programs follow a three-phase process throughout the Federal Government to solicit proposals and award funding agreements for R/R&D: Phase I, Phase II, and Phase III.

The Small Business Act (the Act) requires that the Small Business Administration (SBA) issue a policy directive setting forth guidance to the Federal Agencies participating in the SBIR and STTR programs (Participating Agencies). The SBIR and STTR (SBIR/STTR) Policy Directive outlines how agencies must generally conduct their programs. Each Participating Agency, however, may tailor its program to meet the needs of the individual Agency, as long as the general principles of the program set forth in the Act and directive are followed. Therefore, when incorporating SBIR/STTR policy into agency-specific regulations and procedures, Participating Agencies may develop and apply processes needed to implement the policy effectively; however, no Participating Agency may develop and apply policies, directives, or clauses, that contradict, weaken, or conflict with the policy as stated in the directive.

SBA reviews its Policy Directive regularly to determine areas that need updating and further clarification. It has come to SBA's attention that the language in section 6(a)(5) requires clarification to confirm for Participating Agencies and applicants that successor-in-interest entities are eligible to receive phase III SBIR/STTR awards. Section 6(a) of the Policy Directive addresses eligibility to receive SBIR/STTR awards. Paragraph (5) of this section specifically relates to the eligibility of entities that have received a novated award, a similarly-revised award, or are successor-in-interest entities. SBA is clarifying this paragraph in order to confirm the Agency's long-standing interpretation that permits successor-in-interest entities to receive phase III SBIR/STTR awards.

## II. Amendment

### Section 6 – Eligibility and Application (Proposal) Requirements

The Small Business Act describes the three-phase nature of the programs. The first phase (phase I) award generally does not exceed \$150,000 and is intended to fund the determination of the technical and scientific merit, and feasibility of ideas that appear to have commercial potential. *See* 15 U.S.C. § 638(e)(4)(A). The second phase (phase II) award generally does not exceed \$1,000,000 and is intended to further develop proposals with commercial potential. *See id.* at § 638(e)(4)(B). The final third phase award (phase III) is defined, as follows:

(C) where appropriate, a third phase for work 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;

15 U.S.C. 638(e)(4)(C) (emphasis added). One way that an SBC has achieved commercialization is through a phase III award.

A major feature of the SBIR/STTR programs, and incentive for SBC participation, is that the Government receives a limited rights license in data developed under an SBIR/STTR award, which fosters a competitive advantage for the SBC, as opposed to potential larger competitors, to achieve commercialization. The Government's limited rights license in SBIR/STTR data, combined with the statutory requirement for Participating Agencies to pursue phase III awards on a non-competitive basis with the SBC that performed prior SBIR/STTR awards, is a central aspect of the program.

The SBIR/STTR programs are intended to economically assist SBCs performing R/R&D work by creating an advantage for those firms to receive Government funding at the early often riskiest stage, from an investment perspective, through commercialization. This intention may be hindered if the SBC's rights and interests in SBIR/STTR data cannot be assigned through a merger or sale with another business concern, along with the attendant incentives for non-competitive phase III awards. Such a policy interpretation would create inefficiencies in the marketplace and discourage valuations and transactions among businesses that may otherwise allow for greater investment in new ideas and products.

Consistent with the statutory purposes and policy goals of the program, a firm may be considered a successor-in-interest and receive a subsequent SBIR/STTR award. An entity may be considered a successor-in-interest, if it has secured the transfer of: (1) all the small business concern's assets; or (2) the entire portion of the assets involved in

performing the award. Examples of such transactions include, but are not limited to: (1) sale of these assets with a provision for assuming liabilities; (2) transfer of these assets incident to a merger or corporate consolidation; and (3) incorporation of a proprietorship or partnership, or formation of a partnership. Further, to be considered a successor-in-interest, the firm must meet any applicable eligibility requirements. If performance of the funding agreement is complete prior to the transfer of assets, an entity may be considered a successor-in-interest without a novation. If the transfer of assets occurs during performance of the funding agreement, the awardee should verify with the awarding agency whether a novation is necessary.

Section 6(a)(5) of the Policy Directive provides, only as an example, that a phase III award can be made when the previous SBIR/STTR awardee has received a phase I or phase II award, or been novated one of those awards. This was never intended to be an exclusive list of all scenarios where an SBIR/STTR award could be made to a firm other than the recipient of a prior phase I or phase II award.

SBA amends the second sentence of section 6(a) of the Policy Directive to clarify SBA's long-standing intent regarding the eligibility of successor-in-interest entities to receive phase III awards. Currently, the first two sentences of this paragraph read as follows: "An SBIR/STTR Awardee may include, and SBIR/STTR work may be performed by, those identified via a 'novated' or 'successor in interest' or similarly-revised Funding Agreement. For example, in order to receive a Phase III award, the Awardee must have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award (or received a revised Phase I or Phase II award if a grant or cooperative grant)." SBA changes "must" to "may" in the second sentence and adds

“successor-in-interest” to the list of possible eligible entities at the end of the sentence. This would not be a change in policy, but rather, a clarification of existing policy.

This clarification is necessary to provide confidence to Participating Agencies and applicants that entities that acquire access to the relevant SBIR/STTR data developed pursuant to prior SBIR/STTR awards, may be eligible to receive a phase III award as a successor-in-interest without novation if the performance of the prior SBIR/STTR award is complete.

Notice of Clarification of Phase III Eligibility in the Policy Directive for the Small Business Innovation Research (SBIR) and Small Business Technology Transfer Research (STTR) Programs

To: The SBIR and STTR Program Managers

Subject: SBIR/STTR Policy Directive

1. Purpose. The Small Business Administration (SBA) is updating its Small Business Innovation Research and Small Business Technology Transfer Research (SBIR/STTR) Policy Directives to clarify SBA’s current policy that successor-in-interest entities are eligible to receive phase III SBIR/STTR awards.

2. Authority. The Small Business Act (15 U.S.C. 638(j) and (p)) requires the SBA Administrator to issue an SBIR and STTR program Policy Directive for the general conduct of the programs.

3. Procurement Regulations. There are no procurement regulations created by this proposed clarification.

4. Personnel Concerned. This SBIR/STTR Policy Directive serves as guidance for all Federal Government personnel who are involved in the administration of the SBIR

and STTR programs, issuance and management of funding agreements or contracts pursuant to the programs, and/or the establishment of goals for small business concerns in research or research and development acquisition or grants.

5. Originator. SBA's Office of Investment and Innovation.

This amendment to the SBIR/STTR Policy Directive will be effective on the date shown in the **DATES** section unless SBA receives any significant adverse comments on or before the deadline for comments set forth in the **DATES** section. Significant adverse comments are comments that provide strong justifications why the clarifying amendment to the PD should not be adopted as written or should be changed further. SBA does not expect to receive any significant adverse comments because the amendment does not change SBA's or Participating Agencies' interpretation of existing policy, and continues to confer the intended incentive for SBIR/STTR awardee successor-in-interest entities. Implementation of this change will benefit the public by ensuring that the plain language interpretation of the SBIR/STTR Policy Directive is consistent with SBA's policy intent. If SBA receives any significant adverse comments, SBA will publish a notice in the **Federal Register** withdrawing this notice before the effective date.

6. Date. Public comments on the proposed amendments to the Policy Directive must be submitted within 30 days following publication in the **Federal Register**.

Authorized By:

**Jovita Carranza,**

*Administrator.*

SBA revises section 6(a)(5) of the SBIR/STTR Policy Directive as follows:

**6. Eligibility and Application (Proposal) Requirements**

(a) Eligibility Requirements

(1) \* \* \*

\* \* \* \* \*

(5) Novated/Successor in Interested/Revised Funding Agreements. An SBIR/STTR Awardee may include, and SBIR/STTR work may be performed by, those identified via a “novated” or “successor in interest” or similarly-revised Funding Agreement. For example, a phase III Awardee may have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award (or received a revised Phase I or Phase II award if a grant or cooperative grant) or be a successor-in-interest entity. \*\*\*

\* \* \* \* \*

[FR Doc. 2020-17815 Filed: 8/14/2020 8:45 am; Publication Date: 8/17/2020]