

Graduation to SBIR Phase III

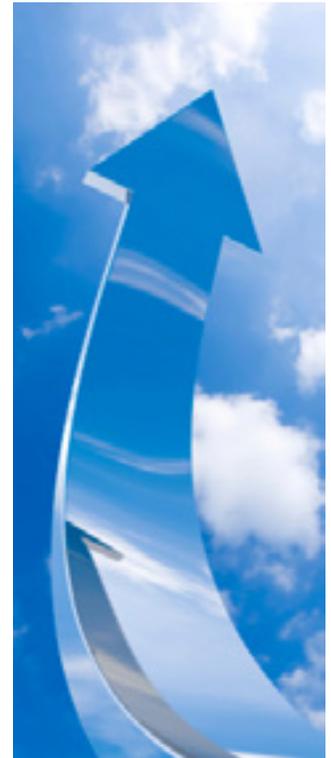
Now that you've proven your concept is feasible and successfully demonstrated your prototype, you are ready to graduate to SBIR Phase III. Phase III awards are where commercial applications of SBIR-funded research/research & development are funded by non-Federal sources of capital; or where products, services, or further research intended for use by the federal Government are funded by follow-on non-SBIR Federal Funding Agreements. Phase III work "derives from, extends, or completes an effort" made under prior SBIR Phase I and II funding agreements. Even if you have outgrown your small business status, you are still eligible for a Phase III award.

One of the key benefits of SBIR Phase III awards is the extension of SBIR Data Rights protections. SBIR Data Rights are unique in the Government's intellectual property scheme. Under SBIR Data Rights, the Government cannot disclose your SBIR Data outside of the Government, and receives only a limited nonexclusive license. This protection period lasts for four years from the end of the SBIR award for civilian awards and five years from the end of the project for military SBIR awards, but will also "roll over" to four or five additional years after the last SBIR award. There is no limit to the number of rollovers. That is, every Phase III award you receive can extend your SBIR Data Rights for the additional time period, keeping this valuable intellectual property for your company.

Obtaining a SBIR Phase III award often depends on the relationships you have built with government contracting officers and program managers. The SBIR statute and related regulations provide that in Phase III, SBIR contractors are eligible to receive a contracting preference. 15 USC § 638(r)(4) and the SBA's SBIR and STTR Policy Directives (February 2014), §4(c)(8), §10(h)(4), provide that "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." There is no dollar limit to Phase III awards.

Unfortunately, the boundaries of the preference are not well-defined and, at present, there is little case law interpreting the preference. Although the SBIR statute authorizes agencies and prime contractors to issue Phase III awards using noncompetitive procedures, the Government Accountability Office (GAO) and the Court of Federal Claims (COFC) have both found that Section 638(r) does not confer a *right* to receive a Phase III sole-source award. At least one GAO case has explored the possibility that Section 638(r) confers a right on a potential Phase III recipient to receive a contracting preference in a full and open competition. But, the decision was inconclusive and the preference undefined because in that case GAO determined that the requirement did not "derive from, extend, or complete" a SBIR effort.

Given this uncertainty, it is important to market your SBIR technology and interest in performing a Phase III award to potential government and prime contract customers. But, if the Government proceeds with a competition for a product or service that is an extension of your prior SBIR-funded effort, then a protest may be an effective way to ensure your earlier work is appropriately recognized and credited in the evaluation.



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