

COURSE 6, TUTORIAL 4

USING SUBCONTRACTORS AND CONSULTANTS TO ENHANCE YOUR TEAM



Often a small business applying for an SBIR or STTR award does not have all of the skills and capabilities in house that it needs and therefore may look for a subcontractor or a consultant. At other times, the applicant may be concerned that a reviewer may consider them unqualified, although the small business is confident that they have the requisite skills. Therefore, it's common for SBIR/STTR applicants to consider using subcontractors and consultants to supplement their employees' capabilities and qualifications.

SOME DEFINITIONS

Let's start by clarifying what is meant by subcontracts, consultants and subcontractors. A **subcontract** is defined by the various agencies that have SBIR programs as an agreement between the small business applying for an SBIR or STTR award, and a third party that will help perform the research.

Now let's look at the word "**consultant.**" According to the Department of Energy's SBIR program, a consultant "is generally an individual who is not using any institutional or organization facilities...the individual usually bills by the hour... Consultants are normally subject matter experts." A consultant, then, is a person rather than an entity. The National Science Foundation (NSF) reinforces this distinction stating that "consultant services are services rendered by persons who are members of a particular profession or possess a special skill..."

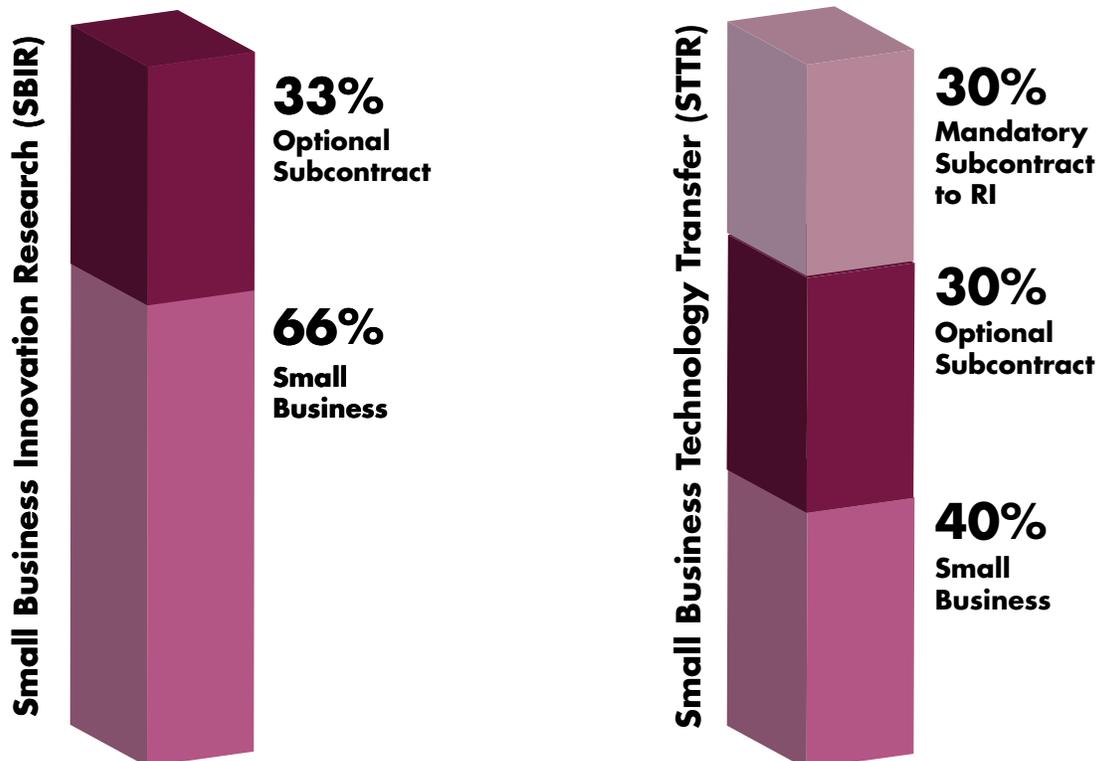
The definition of a **subcontractor** is less precise and a clear definition is not evident in the solicitations. However, it appears that typically a subcontractor is thought of as an entity,

such as a university, Federal lab, or private business that provides goods and services to an SBIR or STTR project. Therefore, for purposes of this tutorial, the term consultant will be used when referring to individuals and the term subcontractor will be used to refer to entities, with the latter ranging from universities and Federal laboratories to for-profit corporations, both large and small.

The agencies encourage applicants to consider subcontracting. NSF writes that "proposing firms are... encouraged to take advantage of research expertise and facilities that may be available to them at colleges, universities, national laboratories, and from other research providers. Such collaborations may include research subcontracts or consulting agreements." And the Department of Agriculture (USDA) says "Involvement of university, government, or other outside personnel in the planning and research stages of the project as consultants or through subcontracting arrangements is permitted and may be particularly helpful to small businesses that have not previously received Federal research awards."



WITH STTR A SUBCONTRACTOR IS MANDATORY



When it comes to the STTR program, subcontracting is mandatory to a Research Institution (RI). An STTR is defined as a collaboration between the small business applicant and a nonprofit research entity, typically a university or federal laboratory. The STTR award is always made to the small business, with the nonprofit partner being brought in as a subcontractor. Therefore, a university professor who consults is not going to qualify as the required subcontractor on an STTR project.

While STTR mandates that there be a subcontract and that it be with a subcontractor (an entity), there is greater flexibility with an SBIR where up to 33% of a Phase I project, and up to 50% of a Phase II project, can be subcontracted to a consultant, a subcontractor, or both. There are several considerations when deciding whether to bring in an individual consultant or a subcontractor onto the team:

- » » Bringing a university faculty member onto your project as a consultant may reduce the time, cost and administrative burden associated with making him or her part of your team.
- » » Bringing a university or Federal Laboratory staff member onto your team as a consultant also may avoid some of the intellectual property (IP) issues that can arise if the university or Lab is made a subcontractor on the project. However, this is not always the case—some institutions

require, through their employment agreements that any IP created by their staff members belongs to the institution, even if the staffer created it on their “personal time.”

- » » Having a well known institution or company as a subcontractor can elevate the credibility and prestige of the small company applicant in ways that may not be possible if just an individual joins the team as a consultant. The exception to this is when that individual is well known and respected in his/her own right.
- » » Having a large subcontractor, such as a university or large corporation, may discourage potential IP infringers that do not want to take on a large entity that has substantial resources for litigation.

CALCULATING THE DOLLAR AMOUNT YOU CAN SUBCONTRACT

Therefore, careful thought and consideration should be put into deciding on whether you will include a consultant versus a subcontractor on your SBIR/STTR team.

As stated previously, up to 33% of a Phase I SBIR project can be subcontracted, and at least 30% of an STTR project must be. But how do the agencies measure these percentages? There are multiple models, and they yield different results. For example, the National Institutes of Health (NIH), NSF and DHS



simply say that it is (in a Phase I SBIR) 33% of the total contract or grant amount. So if the Phase I award is for \$150,000, then up to \$50,000 can be subcontracted.

But at the Department of Defense (DoD) the calculation is made after profit/fee is removed from the total amount. If the total contract is for \$150,000 with \$10,000 of it being for profit/fee,

then DoD will limit a Phase I SBIR subcontract to \$46,200. DOE

wants you to include profit/fee in the calculation, but remove any materials, supplies, and equipment pur-

chased or leased before figuring the subcontract maximum. NASA is perhaps the most complicated, requiring that profit be removed, then the dollar value of any G&A cost of the applicant that is being applied to the subcontract must be added to the subcontract value before calculating the percentage. Therefore, you should carefully read the agency's solicitation regarding how it wants you to calculate the subcontracted percentage, especially if you want to maximize the subcontracted amount.

You need to follow the agency's requirements with respect to how and where you incorporate any consultant or subcontractor in your proposal. Most of the agencies ask you to indicate the role of subcontractors and consultants in the work plan (aka research plan or scope of work). Most of the agencies want you to include bios for consultants and subcontractor employees who you consider to be "key/senior" members of your project team. Most also require that you include letters of support/commitment/collaboration in your proposal from any consultants or subcontractors.

Those agencies that use the grants.gov electronic proposal submission system also expect you to separate out the budgets for consultants from those of subcontractors, because the grants.gov budget form treats each separately. And sometimes consultants are treated differently than subcontractors. For example, subcontractors are expected to fill out sub-recipient budgets if the awarding agency uses the grants.gov submission system, while consultants are not. The best advice we can offer here is to realize the agencies are different in how they expect you to include subcontractors and consultants in your SBIR/STTR proposal, and you need to carefully read the current solicitation for the agency to which you are applying to understand their requirements.

If you are using a University professor as a consultant [as opposed to a subcontractor] ask them to check their employee's agreement regarding intellectual property.

SOME FINAL CONSIDERATIONS

To close, we offer the following advice:

- » Before bringing a professor or Federal lab employee onto your SBIR/STTR proposal as a consultant, make sure that they confirm their primary employer's rules regarding outside activities like consulting. Questions like ownership of intellectual property, maximum amount of consulting allowed, and conflict of interest with regards to funding agencies need to be answered before bringing them on board. If an independent consultant relationship is proposed, the signed letter should not be on University letterhead.
- » Issues related to intellectual property are important to consider when using consultants and subcontractors. If you wish to retain ownership of the intellectual property created under the contract, you need to carefully define the role of the subcontractor or consultant. The articles in the Links tool provide some insight into the question of inventorship and encourages individuals to consult with counsel on this topic.
- » If you don't already have a relationship with a subcontractor or consultant, it could take some time to establish it. There are many unfortunate cases of small firms and universities that teamed on STTR projects, for example, and then found their philosophies, work styles, schedule, and/or expectations were incompatible. These relationships may be put together in days or weeks, but they have a better chance of being sustained and effective if they develop over months or even years.
- » Concerns about citizenship of workers on an SBIR/STTR project extends to subcontractors and consultants, so disclose fully for them, as well as the applicant small business' employees.
- » Finally, it is strongly recommended that you have a written agreement between the applicant small business and any subcontractor or consultant. Such an agreement is required for an STTR, and must address allocation of intellectual property between the applicant and the research institution.