

COURSE 9, TUTORIAL 4

WHAT MAKES PHASE III SO VALUABLE?



As explained earlier, Phase III status is the admission ticket to receiving SBIR Data Rights in a funding agreement. That is why it is so critical to recognize a Phase III requirement, and to insist that SBIR rights be accorded a Phase III. As in the prior Sections, we will make reference to SBIR Data Rights, instead of the longer reference to SBIR/STTR Data Rights. However, because SBIR and STTR Data Rights are identical, references below to SBIR Data Rights apply equally to STTR Data Rights, unless noted otherwise.



The stakes in recognizing and acknowledging a Phase III are high. Not only are SBIR Data Rights at stake, but also all other Phase III rights and benefits depend on it. Section 4(c)(2) of the May 2, 2019 SBA SBIR Policy Directive states that a Phase III is by nature an SBIR, and must be accorded SBIR status, including SBIR Data Rights. The Directive has the force of law and this provision provides a legal basis for defending Phase III status of a funding agreement, when it is questioned. Let's review the important rights that accrue to a Phase III.

SBIR Data Rights are some of the most important of these rights to be sure. SBIR Data Rights are the foundation on which most other SBIR rights rest. It is true to say that without SBIR Data Rights, many or even most of the other rights would not exist. So let's take a look at these other rights that accrue from Phase III status, why these SBIR Data Rights are so valuable, and why preserving them is so critical.

In addition to SBIR Data Rights, Phase III status brings with it:

1. the right to sole-source contracts;
2. exemption from SBA size standards for a procurement;
3. no limits on the dollar size of a Phase III procurement;
4. a right to the Phase III mandate, by which the SBIR firm has a right to be awarded a future Phase III award to the greatest extent practicable;
5. the right to receive subcontracts for Phase III work on a sole-source basis; and
6. the ability to pursue research, research and development, services, products, production, or any combination of those under a Phase III.

Let's look closer at these rights one at a time.



The right to receive sole-source funding agreements is a key Phase III right. This right is expressly provided in the SBIR Reauthorization Act as well in the SBA SBIR/STTR Policy Directive. The right to sole-source contracts stems directly from the SBIR firm's Data. The government is prohibited from disclosing SBIR Data to a private firm outside the government. Hence, the government cannot make an award to another firm for work or a product that the government cannot even describe to that other firm. This nondisclosure obligation creates the imperative, the necessity, to deal only with the SBIR firm that developed the SBIR Data in the first place.

The right to receive sole-source awards is a real benefit to the government as well. The sole-source award avoids the arduous process the government must go through to compete a requirement – planning the procurement, developing the solicitation, soliciting proposals and evaluating them, sending out questions to offerors, making an award decision and then having it protested and held up in litigation. The entire process can take years. A sole-source award can be made in a matter of months or even weeks. The SBA SBIR/STTR Policy Directive even dictates the justification that an agency can and must use to justify the sole-source award. Predictably, that justification reads that the new award must derive from, extend, or complete prior SBIR effort and be funded with non-SBIR funds. That's all that is required. Nothing could be easier. Fast, quick, and easy—that is what an SBIR sole-source award represents to the government.



Solicitation preparation takes a lot of time

Phase IIIs are also exempt from SBA's size standards. SBIR firms can grow to any size and still get Phase IIIs for their technologies. Additionally, because of this exemption, a large firm can purchase the SBIR firm and still receive Phase IIIs for the SBIR firm's technologies because of this exemption from the size standards.

Phase IIIs can also be for any dollar amount. There is no limit on Phase III awards, like there are on Phase Is (\$150,000) or on Phase IIs (\$1,000,000). SBIR firms have reportedly received Phase III awards in amounts of hundreds of millions of dollars because of this lack of a size limit on Phase III awards. Coupled with the right to receive sole-source awards, this would seem to represent an opportunity for federal agencies and officials to gain access to SBIR technologies that are faster, better, cheaper than existing ways of doing things.

The 20-year SBIR Data Rights protection period allows the SBIR firm not only to commercialize a product, but also to sell it for an adequate number of years to recoup its investment in the technology. This also allows the SBIR firm to sell its technology or the SBIR firm itself to a buyer with an assurance that the valuable SBIR Data underlying the firm's SBIR technology will not be disclosed anytime soon.

Another valuable Phase III right is what is known as the "Phase III mandate." This mandate states that a Phase III must be awarded to the SBIR or the STTR developer to the greatest extent practicable, consistent with the agency's mission. This is the other side of the sole-source right. Not only can an SBIR firm receive a Phase III sole-source, but the government in fact must award a Phase III to the SBIR firm that developed the Phase III technology to the greatest extent practicable. The phrase "to the greatest extent practicable" provides a very narrow exception to the mandate. However, it is exactly that, a very narrow exception. It would seem that it would almost never be possible to justify why it is not "to the greatest extent practicable" to award continuation of a technology to the firm that first invented it. Furthermore, this same SBIR firm proved the technology's feasibility, researched it, and is passionate about developing it into a usable product. Legitimate reasons for advancing an SBIR firm's technology through another firm would be that the SBIR firm declared chapter 7 bankruptcy or otherwise is no longer in business. Few other legitimate reasons

can be imagined. This is especially true because SBIR firms have the capability to team with or subcontract to larger firms to enhance their overall capabilities to perform larger contracts. SBA has strengthened this Phase III mandate in its Directive by requiring federal agencies to justify in writing to the SBA why they did not award a Phase III to the SBIR firm that developed the technology. An additional constraint on this attempt to work around the SBIR firm is the nondisclosure obligation. The agency would have to make the award of the Phase III, which would derive from, extend, or complete a prior SBIR funding agreement, without disclosing any SBIR Data to the firm it desires to award to. If such an attempt seems impossible, that is because it is. There is no exception to the nondisclosure obligation to try to attempt to make such an award to other than the SBIR developer. So one would think that the Phase III mandate would require federal agencies in every case to award SBIR technologies to SBIR firms. Such is



not the case. Agencies sometimes wish to obtain the benefit of SBIR technologies without the restrictions that SBIR awards bring with them. That is why vigilance and an understanding of Phase IIIs is essential to preserving SBIR technologies and SBIR Data Rights.

Phase III status can also apply to subcontracts. Subcontracts can be Phase IIIs and Phase IIIs can be subcontracts. This is important because the Department of Defense, NASA, the Department of Energy and other large agencies like to deal with large firms and insert SBIR technologies into their missions through large prime contractors. While this is perfectly acceptable, many of the employees in these large firms are not fully aware of SBIR laws and regulations. They are not used to having their subcontracts restricted, or having the small firm subcontractor wield so many rights. This can lead to friction and trouble in the relationship. Nevertheless, most times the large firm's employees can be provided with information about the small firm's SBIR rights, and will accept them.

Phase III activities are unlimited. They can be for research, research and development, services, products, production, or any combination of those. Thus, there are no limits on the type of products, services, or activities for which an agency can make use of a Phase III. This flexibility makes the Phase III an extremely useful tool for agency officials looking for faster, better, cheaper ways of accomplishing their missions.

Taken together, these Phase III rights are valuable not only to the SBIR firm, but to the government as well. More and more government officials are learning to incorporate SBIR technologies into their missions, making those missions more cost effective and efficient.

We hope this close examination of Phase III rights has been helpful.

**Phase III can
be for unlimited
activities:
research,
research and
development,
services,
products,
production, or
any combination**

Prepared by
David Metzger, Esq.

TO LEARN MORE ABOUT THIS TOPIC
SBIR.GOV/TUTORIALS
REVISED AUGUST 2019