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SMALL BUSINESS ADMINISTRATION

13 CFR Chapter I

RIN 3245-AF84

Small Business Innovation Research Program Policy Directive

AGENCY: Small Business Administration.

ACTION: Notice of amendments to final policy directive.

SUMMARY: The U.S. Small Business Administration (SBA) is amending its Small Business Innovation Research (SBIR) Program Policy Directive in response to public comments SBA received on the final SBIR Policy Directive, published on August 6, 2012. SBA is also making several minor clarifying changes to ensure that the SBIR participants clearly understand certain program requirements.

DATES: These amendments to the SBIR Policy Directive are effective January 8, 2014.

FOR FURTHER INFORMATION CONTACT: Edsel Brown, Assistant Director, Office of Innovation, at (202) 401-6365 or technet@sba.gov.

SUPPLEMENTARY INFORMATION: On December 31, 2011, the President signed into law the National Defense Authorization Act for Fiscal Year 2012 (Defense Reauthorization Act), Public Law 112-81, 125-Stat. 1298. Section 5001, Division E of the Defense Reauthorization Act contains the SBIR/STTR Reauthorization Act of 2011 (Reauthorization Act), which amended the Small Business Act and made several amendments to the SBIR Program. The Reauthorization Act required SBA to issue amendments to the SBIR Policy Directive and publish the amendments in the **Federal Register** within 180 days of when the Reauthorization Act was passed.

On August 6, 2012, SBA published a final SBIR Policy Directive

implementing the various provisions of the Reauthorization Act at 77 FR 46806. The directive made several key changes to the SBIR Program relating to eligibility, the SBIR award process, SBIR Program administration, and fraud, waste and abuse. Although the SBIR Policy Directive is intended for use by the SBIR participating agencies, SBA believed that public input on the directive from all parties involved in the program would be invaluable. Therefore, SBA sought public comments on the final directive, and stated that it may amend the directive in response to these comments at a later time.

Response to Comments

In response to this request, SBA received comments on various parts of the directive. Several comments recommended that SBA strengthen and clarify the Policy Directive language with regard to SBIR data rights and the obligation of federal agencies to give a preference in contracting to SBIR awardees for follow-on Phase III work. SBA agrees that these are areas of the SBIR policy that are vital to the program and require clarification and improvement. SBA continues to evaluate these issues and will address them in a subsequent Policy Directive revision.

SBA also received comments that the definition of Essentially Equivalent Work in section 3(j) of the Policy Directive should be changed to be more in line with the common usage. The concern is that the definition in the Policy Directive is more stringent than the norm for Government contracting and places a higher burden on the small businesses participating in the SBIR program. The commenter, however, did not provide SBA with this commonly used definition and SBA could not find one. Therefore, SBA has not modified the definition at this time. However, SBA has revised the language in section 7(d) of the Directive to further clarify funding of “essentially equivalent work.”

Section 4(a)(3) of the Policy Directive, “Agency benchmarks for progress towards commercialization” sets forth the program policy regarding an eligibility requirement for Phase I awards. SBA received comments requesting clarification of the time periods used to calculate the transition rate and commercialization rate

benchmark requirements. Commenters also requested clarification about how agencies determine which firms must comply with the transition rate and commercialization rate benchmarks. In response to these comments, SBA revised and reorganized section 4(a)(3) to clarify several procedural elements about the benchmark determinations and enhance its readability.

Section 4(a)(3) clarifies the time periods used to calculate awardee rates of transition from Phase I to Phase II and provides two examples of the calculation. While the rate is calculated using Phase I awards received in the most recent 5, 10, or 15-year period (agencies choose which period they use), excluding the most recently completed fiscal year; the period used when counting the Phase II awards is lagged one year. That is, when calculating the number of Phase I awards received over a particular time period, the time period evaluated does not include the most recently completed fiscal year; however, when calculating the number of Phase II awards received, the time period evaluated does include the most recently completed fiscal year but does not include the first year of the period evaluated for Phase I awards received. The period used to calculate Phase II awards is lagged one-year because it is unlikely that a new Phase I would transition to a Phase II within the same year. SBA also clarified that the Phase II transition benchmark requirement applies only to awardees that have received more than 20 Phase I awards over the applicable time period and that the commercialization benchmark applies only to firms that received more than 15 Phase II awards over the applicable time period.

Based on additional input from the agencies participating in the SBIR program, SBA also revised several procedural elements of the Phase II transition benchmark requirement in section 4(a)(3) to simplify the process for small businesses and reduce the administrative burden on the agencies. Specifically, in section 4(a)(3)(iii), SBA changed the start date for the one-year ineligibility period for firms that do not meet the benchmarks. The date was changed from the date of application submission to June 1st of each year. SBA made this change for several reasons: (1) It is a clearly defined period for affected small businesses; (2) to

provide sufficient time for agencies to enter fully verified award data from the prior fiscal year into the TechNet database; and (3) to eliminate the need for agencies to track multiple periods of ineligibility. SBA will use its TechNet Data system to generate the list of companies that do not meet agency Phase II transition benchmarks and provide this list to the agencies each year on June 1. Finally, SBA also added a procedure to notify awardee firms if they are on the ineligible list and to enable firms to provide feedback directly to SBA if they believe their rate was calculated using incomplete award information.

Some respondents asked if the provision in section 4(b)(5) allowing one Sequential Phase II award included supplementary awards such as Phase 2.5 or Phase IIb awards in the definition of a Phase II award. SBA relocated the language at section 4(b)(6) to new section 4(b)(8) and added new section 4(b)(6) to clarify SBA's policy on supplemental phase II awards. Section 4(b)(6) now clarifies how Phase II award amounts are calculated when supplemental awards are issued. Furthermore, section 4(b)(6) specifies that all supplementary awards, such as a Phase IIb, must be linked to either an initial Phase II or a sequential Phase II award and is added to the amount of that award for the purpose of determining the size of the Phase II award. This means that all supplementary Phase II awards including options, enhancements, administrative supplements, and Phase IIb-type programs are considered as part of the initial Phase II or sequential Phase II from which they derive and are therefore subject to the Phase II per-award guideline amount of \$1 million and limit of \$1.5 million.

SBA repeated the language in section 9(d)(2) in new section 4(b)(7), which explains how a Phase I awardee may receive an award from one agency and also may receive a subsequent Phase II award from another agency. SBA also clarified in section 4(b)(7) that the same process applies to a second, sequential Phase II award that follows an initial Phase II award from a different agency. This policy is relevant to interagency actions, which are found at section 9 of the Policy Directive, and also to Phase II awards, which is found at section 4 of the Policy Directive.

SBA received comments concerning section 9 of the Policy Directive, which address measures to prevent fraud, waste and abuse in the program. The respondents commented that the administrative requirements contained in section 9 may be too stringent and

may discourage small businesses from applying. SBA notes that it developed these requirements, including the procedures and requirements for certification, in consultation with the Council of Inspectors General on Integrity and Efficiency. SBA believes that these provisions can help reduce fraud, waste and abuse in the program and does not think these provisions should be changed at this time.

SBA received comments on the Department of Defense's (DoD's) Commercialization Readiness Program, outlined in section 12(b) of the SBIR Policy Directive. In response to comments that agency efforts to increase transitions to Phase III could reduce the innovative nature of SBIR awards, SBA has added that when DoD reports on its Phase II insertion incentives, it should note efforts to ensure that such incentives do not act to shift the focus of SBIR Phase II awards away from relatively high-risk innovation projects. SBA also amended the provisions relating to the use of SBIR funds for the DoD Commercialization Readiness Program. According to section 1615 of the National Defense Authorization Act for Fiscal Year 2013 (NDAA), Public Law 112-239, 126 Stat. 1632, DoD has the authority to use 1% of its SBIR funding for purposes of administering the Commercialization Readiness Program.

A number of comments asked us to change features that, because they are required by statute, we were not able to modify.

Miscellaneous Changes

The inadvertent omission of the term "extramural" before "R&D budgets" was corrected in section 2(b), which identifies the source of funds for the program.

Section 3 contains definitions of terms that appear throughout the Policy Directive. SBA made an editorial revision to the definition of "Awardee" in section 3(e). SBA revised the word "receiving" to "that receives."

Section 4(b)(1), which identifies the objective and nature of a Phase II award, includes a statement regarding the eligibility of successor in interest firms for SBIR awards. Because this statement pertains more generally to eligibility for all SBIR awards, it was removed from section 4(b)(1) and added to section 6(a) which addresses program eligibility requirements.

In Section 6, SBA removed the reference to the STTR program regarding the option to make awards to small businesses that are majority owned by multiple venture capital operating companies, hedge funds or

private equity firms. When SBA issued its final size regulations on December 27, 2012 (77 FR 76215), it reviewed this issue and determined that such businesses may not participate in the STTR program. Additionally, SBA added the language previously found at section 4(b)(1) regarding successor in interest firms to section 6(a)(5), because section 6(a) addresses general program eligibility. Sections 6(a)(2) through 6(a)(6) were reorganized and renumbered in order to increase readability.

Section 7 addresses issues related to program funding processes. SBA revised the language in paragraph 7(d) to clarify that while duplicate or similar proposals may be submitted in response to apparently similar solicitation topics, essentially equivalent work may not be funded. In addition, SBA revised paragraph (h)(1), which says that funding agreement modifications should be kept to a minimum, to address only modifications that increase the dollar amount of awards. Paragraph (h)(1) also referred to modifications of periods of performance and scope of work. SBA clarified section 7(h)(1) to specify that the concern regarding the number of modifications made to an award pertains only to changes that increase the dollar amount of awards.

Section 8 of the Directive addresses the terms of agreement under SBIR awards. SBA clarified section 8(a) by removing language stating that agencies should discourage SBCs from submitting proprietary information and revised section 8(d) to clarify that the continued use of agency-owned property applies to property acquired by the awardee under the contract.

In response to concerns regarding the cost and accountability of the continuing study by the National Academy of Sciences, SBA modified section 9(h) to clarify that the agreement required between the agencies and the National Academy of Sciences must be made in consultation with the SBA and must comprehensively address the scope and content of the work to be performed.

Section 10(h) explains the process for agencies to submit their SBIR program annual reports to SBA. Paragraph (h)(4) contains a list of information that must be included in each agency's annual report. SBA clarified section 10(h)(4)(xi) to note that agencies must report all instances in which an agency pursued R/R&D, services, production, or any combination thereof of a technology developed under an SBIR award with an entity other than that SBIR awardee.

Section 10(j) contains information on the other reporting requirements for

SBIR participating agencies. Section 10(j)(2) discusses a system that will list any individual or small business concern that received an SBIR award and that has been convicted of a fraud-related crime involving SBIR funds or found civilly liable for a fraud-related violation involving SBIR funds. SBA clarified this section to note that SBA will list those individuals and small business concerns of which SBA has been made aware.

Section 12(b) addresses the Commercialization Readiness Program at the Department of Defense (DoD). SBA clarified the source of funding for this program by removing the sentence in paragraph (b)(4)(ii) stating that funds for the program would come from the 3% administrative set-aside, and by clarifying that the funds shall not be subject to the limitations on the use of funds in section 9(e)(3). In addition, in section 12(b)(6)(iii)(C), SBA clarified that the DoD must include, along with its description of the incentives used for this program, information on measures taken to ensure that such incentives do not shift the focus of the SBIR Phase II awards away from the relatively high-risk innovation projects they are intended to promote.

Section 12(b)(5) addresses DoD's Commercialization Readiness Program. The Policy Directive states that DoD may establish transition goals and reporting requirements for awards less than \$1,000,000,000. The amount listed in section 12(b)(5) contained a typographical error, which was corrected to \$100,000,000.

Appendix I provides instructions for the preparation of program solicitations. In Appendix I, SBA revised the certification check box regarding notification if work is subsequently funded by another Federal agency to clarify that it pertains to work funded and completed under the award rather than to the work proposed for the award.

The updated SBIR Policy Directive, incorporating all changes noted here, will be posted on www.sbir.gov.

Notice of Amendments to Final Policy Directive; Small Business Innovation Research Program

To: The Small Business Innovation Research Program Managers.

Subject: Amendments to SBIR Policy Directive Published on August 6, 2012 at 77 FR 46806.

1. *Purpose.* The purpose of this notice is to inform SBIR agencies of amendments made to the recently published SBIR Policy Directive.

2. *Authority.* Section 9(j)(3) of the Small Business Act (15 U.S.C. 638(j))

requires the Administrator of the U.S. Small Business Administration (SBA) to issue an SBIR Program Policy Directive for the general conduct of the SBIR Program.

3. *Procurement Regulations.* It is recognized that the Federal Acquisition Regulations and agency supplemental regulations may need to be modified to conform to the requirements of the final Policy Directive. SBA's Administrator or designee must review and concur with any regulatory provisions that pertain to areas of SBA responsibility. SBA's Office of Innovation coordinates such regulatory actions.

4. *Personnel Concerned.* This Policy Directive serves as guidance for all federal government personnel who are involved in the administration of the SBIR Program, issuance and management of Funding Agreements or contracts pursuant to the SBIR Program, and the establishment of goals for small business concerns in research or research and development acquisition or grants.

5. *Originator.* SBA's Office of Innovation and Technology.

6. *Date.* The policy directive is effective on January 8, 2014.

Authorized by:

Dated: December 26, 2013.

Pravina Raghavan,

Deputy Associate Administrator, Office of Investment and Innovation Small Business Administration.

Dated: December 26, 2013.

Jeanne Hult,

Acting Administrator.

SBA amends the SBIR Policy Directive as follows:

1. Amend section 2(b) by adding the term "extramural" before "R/R&D budgets" each place it appears.

2. Revise section 3(e) to read as follows:

(e) *Awardee.* The organizational entity that receives an SBIR Phase I, Phase II, or Phase III award.

3. Revise section 4(a)(3) to read as follows:

(3) *Agency benchmarks for progress towards commercialization.* Each agency must determine whether an applicant for a Phase I award that has won multiple prior SBIR awards meets the agency's benchmark requirements for progress towards commercialization before making a new Phase I award to that applicant. For the purpose of this requirement, applicants are assessed using their prior Phase I and Phase II SBIR and STTR awards across all SBIR agencies.

(i) Agencies must apply two benchmark rates addressing an applicant's progress towards

commercialization—the Phase II Transition Rate Benchmark and the Commercialization Rate Benchmark.

(A) The Phase II Transition Rate Benchmark sets the minimum required number of Phase II awards the applicant must have received for a given number of Phase I awards received during the specified period. This Transition Rate Benchmark applies only to Phase I applicants that have received more than 20 Phase I awards over the time period used by the agency for the benchmark determination.

(B) The agency Commercialization Rate Benchmark sets the minimum Phase III commercialization results that a Phase I applicant must have realized from its prior Phase II awards in order to be eligible to receive a new Phase I award from that agency. This benchmark requirement applies only to Phase I applicants that have received more than 15 Phase II awards over the time period used by the agency for the benchmark determination.

(ii) *Consequence.* If an awardee fails to meet either of the benchmarks, that awardee is not eligible for an SBIR Phase I award (and any Phase II award issued pursuant to paragraph (b)(1)(ii) below) for a period of one year from the time of the determination.

(iii) *Timing of the determination and consequence period.* The SBIR awardee Phase II transition rates and commercialization rates are calculated using the data in SBA's TechNet database. For the purpose of these benchmark requirements, awardee firms are assessed once a year, on June 1st, using their prior SBIR and STTR awards across all agencies. SBA makes this tabulation of awardee transition rates and commercialization rates available to the agencies. Each SBIR agency uses this tabulation to determine which companies do not meet that agency's benchmark rates and are therefore ineligible to receive new Phase 1 awards from that agency during the one-year period beginning on June 1st and ending on May 31st. SBA notifies these ineligible firms of the determination and the one year restriction on Phase I awards. Agencies must notify SBA of any applications denied because of the failure to meet the benchmarks.

(iv) *Phase II Transition Rate Benchmark.* Each agency must establish an SBA-approved Phase II Transition Rate Benchmark and applicable time period. The benchmark rates and time periods are posted at www.sbir.gov. Agencies must seek approval for any subsequent changes from SBA.

(A) The agency Phase II Transition Rate Benchmark establishes the number of Phase II awards a small business

concern must have received for a given number of Phase I awards received over the past 5, 10 or 15 fiscal years, excluding the most recently completed fiscal year. Each agency selects both the rate to be applied and the length of time that the agency will use to evaluate whether a small business concern has met the Transition Rate Benchmark. The period over which Phase I awards are counted excludes the most recently completed fiscal year. The time period over which Phase II awards are counted includes the most recently completed fiscal year and excludes the first year of the time period evaluated for Phase I awards.

Example: On August 1, 2014, an SBC submits an application to an agency using a Transition Rate Benchmark of 0.25 and a 5-year time period. The June 1, 2014 TechNet Company Registry tabulation shows that the SBC received 24 Phase I awards during FY08–FY12. Since this SBC has received 20 or more Phase I awards during the 5-year period, the SBC is required to meet the Transition Rate Benchmark. The SBC received 8 Phase II awards in FY09–FY13 and therefore has a 5-year Phase II transition rate of 8/24 or 0.33 (# of Phase II awards in FY09–FY13/# of Phase I awards in FY08–FY12). Because the SBC meets or exceeds the agency Transition Rate Benchmark, it is considered for award through the usual proposal evaluation process.

Example 2: On September 1, 2014, an SBC is interested in applying for a Phase I award, knows it has received a number of Phase I awards in recent years, but is unsure if it is meeting the required Phase II transition rate. The company official logs onto the Company Registry at SBIR.gov to check its status and sees a flag saying it did not meet the required benchmark transition rate of 0.25 on June 1, 2014 and is therefore ineligible for a Phase I award through May 31, 2015. The company checks its records and sees that it received 30 Phase I awards during FY08–FY12 and 6 Phase II awards during FY09–FY13. Its transition rate is therefore 6/30 or 0.20 which is under the required rate of 0.25. The SBC does not apply for a new Phase I award through May 31, 2015 because it knows its application would be rejected.

Example 3: On September 1, 2014, an SBC official interested in applying for a Phase I award logs onto the Company Registry at SBIR.gov and sees the flag saying it did not meet the required benchmark transition rate of 0.25 on June 1, 2014 and is not eligible for a Phase I award through May 31, 2015. However, when the company checks its own records, it sees that it received 8 Phase II awards during FY09–FY13, not the 6 awards showing on the Web site. Its transition rate is therefore 8/30 or 0.26 which is above the required rate of 0.25. The company official therefore goes to SBIR.gov, clicks on the "Dispute Transition Rate" button, and enters the information about the discrepancy. SBA uses the information provided by the company and, working with the relevant agencies, identifies that two Phase II awards from FY09 had been inadvertently omitted.

SBA updates and corrects the database and informs the firm that it is indeed eligible to receive SBIR Phase I awards.

(B) An SBC that has received more than 20 Phase I awards in the relevant time period can view its Phase II transition rate on the Company Registry page at SBIR.gov. Generally, the award data used to calculate an SBC's transition rate will be complete by the end of March each year. An SBC may view its SBIR/STTR award information on the Company Registry at any time. If an awardee believes its Phase II transition rate is calculated using incomplete award information, the awardee may dispute the rate using the link provided on the Company Registry, provide the additional award information, and request a reconsideration of its transition rate. Requests for reconsideration of a firm's transition rate received by SBA from April 1st through April 30th of each year will be considered for the June 1st transition rate assessment.

(C) Agencies must set the Phase II Transition Rate Benchmark as appropriate for their programs and industry sectors. When setting the Transition Rate Benchmark, agencies should consider that Phase I is designed and intended to explore high-risk, early-stage research ideas and, as a result, not all Phase I awards are expected to result in a Phase II award.

(v) *Commercialization Rate Benchmark.* By October 1, 2013, each agency will establish an SBA-approved Commercialization Rate Benchmark that establishes the level of Phase III commercialization results an SBC must have received from work it performed under prior Phase II awards, over the prior 5, 10 or 15 fiscal years, excluding the most recently completed two fiscal years. Agencies may define this benchmark:

(A) in financial terms, such as by using the ratio of the dollar value of revenues and additional investment resulting from prior Phase II awards relative to the dollar value of the Phase II awards received over the time period;

(B) in terms of the share of Phase II awards received over the time period that have resulted in the introduction of a product to market; or

(C) by other means such as using a commercialization scoring system that rates awardees on their past commercialization success.

(vi) Agencies must submit their Transition Rate Benchmark, Commercialization Rate Benchmark, and time periods to SBA for approval. SBA will publish the benchmarks and time periods, seek public comment, and maintain a table of the current

requirements on www.sbir.gov. The benchmarks and time periods become effective when SBA posts the approved measures on www.sbir.gov. Agencies must submit any changes to the benchmarks or time periods to SBA for prior approval.

(vii) SBA maintains a system that records all Phase I, Phase II and Government Phase III awards, and other commercialization information; and calculates the Phase II transition rates for all Phase I awardees and the commercialization rates for all Phase II awardees.

(viii) If an applicant fails to meet an agency's benchmark, its name will appear on the list of companies made available to the agencies on June 1 of each year. An agency may not make a Phase I award to an applicant that does not meet the agency's benchmark.

(ix) If an awardee believes its determination was made in error, it may provide SBA with the pertinent award information and request a reassessment. To do so, awardees may use the link on the Company Registry at www.sbir.gov.

4. Amend section 4(b) by revising paragraph (b)(1) by moving language to 6(a)(4), renumbering paragraph (b)(6) as (b)(8), and inserting paragraphs (b)(6) and (b)(7) to read as follows:

(b) *Phase II.*

(1) The object of Phase II is to continue the R/R&D effort from the completed Phase I. Unless an exception set forth in paragraphs (i) or (ii) below applies, only SBIR Phase I awardees are eligible to participate in Phase II.

(i) A Federal agency may issue an SBIR Phase II award to an STTR Phase I awardee to further develop the work performed under the STTR Phase I award. The agency must base its decision upon the results of work performed under the Phase I award and the scientific and technical merit, and commercial potential of the Phase II proposal. The STTR Phase I awardee must meet the eligibility and program requirements of the SBIR Program in order to receive the SBIR Phase II award.

(ii) During fiscal years (FY) 2012 through 2017, the National Institutes of Health (NIH), Department of Defense (DoD) and the Department of Education (DoEd) may issue a Phase II award to a small business concern that did not receive a Phase I award for that R/R&D. Prior to such an award, the heads of those agencies, or designees, must issue a written determination that the small business has demonstrated the scientific and technical merit and feasibility of the ideas that appear to have commercial potential. The determination must be

submitted to SBA prior to issuing the Phase II award.

. . . [paragraphs (2) through (4) are unchanged] . . .

(5) A Phase II awardee may receive one additional, sequential Phase II award to continue the work of an initial Phase II award. The additional, sequential Phase II award has the same guideline amounts and limits as an initial Phase II award.

(6) Agencies may offer special SBIR awards, such as Phase IIB awards, that supplement or extend Phase II awards. For example, some agencies administer Phase IIB awards that differ from the base Phase II in that they require third party matching of the SBIR funds. Each such supplemental award must be linked to a base Phase II award (the initial Phase II, or the second sequential Phase II award). Any SBIR funds used for such special or supplementary awards are aggregated with the amount of the base Phase II to determine the size of that Phase II award. Therefore, while there is no limit on the number of such special/supplementary awards, there is a limit on the total amount of SBIR funds that can be administered through them—the amounts of these awards count towards the size of the initial Phase II or the sequential Phase II, each of which has a guideline amount of \$1 million and a limit of \$1.5 million. (Note that Phase IIB awards under the NIH SBIR program are administered as second, sequential Phase II awards, not supplemental awards. As such, they are base Phase II awards and subject to the Phase II guideline amounts and limits of \$1 million and \$1.5 million).

(7) A concern that has received a Phase I award from an agency may receive a subsequent Phase II award from another agency if each agency makes a written determination that the topics of the relevant awards are the same and both agencies report the awards to the SBA including a reference to the related Phase I award and initial Phase II award if applicable.

(8) Agencies may issue Phase II awards for testing and evaluation of products, services, or technologies for use in technical or weapons systems.

5. Revise section 6(a)(2) through § 6(a)(6) to read as follows:

(2) For Phase I, a minimum of two-thirds of the research or analytical effort must be performed by the awardee. For Phase II, a minimum of one-half of the research or analytical effort must be performed by the awardee.

Occasionally, deviations from these requirements may occur, and must be approved in writing by the funding agreement officer after consultation with the agency SBIR Program Manager/

Coordinator. An agency can measure this research or analytical effort using the total contract dollars or labor hours, and must explain to the small business in the solicitation how it will be measured.

(3) For both Phase I and Phase II, the primary employment of the principal investigator must be with the SBC at the time of award and during the conduct of the proposed project. Primary employment means that more than one-half of the principal investigator's time is spent in the employ of the SBC. This precludes full-time employment with another organization. Occasionally, deviations from this requirement may occur, and must be approved in writing by the funding agreement officer after consultation with the agency SBIR Program Manager/Coordinator. Further, an SBC may replace the principal investigator on an SBIR Phase I or Phase II award, subject to approval in writing by the funding agreement officer. For purposes of the SBIR Program, personnel obtained through a Professional Employer Organization or other similar personnel leasing company may be considered employees of the awardee. This is consistent with SBA's size regulations, 13 CFR 121.106—Small Business Size Regulations.

(4) For both Phase I and Phase II, the R/R&D work must be performed in the United States. However, based on a rare and unique circumstance, agencies may approve a particular portion of the R/R&D work to be performed or obtained in a country outside of the United States, for example, if a supply or material or other item or project requirement is not available in the United States. The funding agreement officer must approve each such specific condition in writing.

(5) An SBIR awardee may include, and SBIR work may be performed by, those identified via a "novated" or "successor in interest" or similarly-revised funding agreement, or those that have reorganized with the same key staff, regardless of whether they have been assigned a different tax identification number. Agencies may require the 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 that project.

(6) NIH, Department of Energy and National Science Foundation may award not more than 25% of the agency's SBIR funds to SBCs that are owned in majority part by multiple venture capital operating companies, hedge funds, or private equity firms

through competitive, merit-based procedures that are open to all eligible small business concerns. All other SBIR agencies may award not more than 15% of the agency's SBIR funds to such SBCs. SBIR agencies may or may not choose to utilize this funding option. A table listing the agencies that are currently using this authority can be found at www.SBIR.gov. This authority is set forth in 13 CFR 121.701 through 121.705.

(i) Before permitting participation in the SBIR program by SBCs that are owned in majority part by multiple venture capital operating companies, hedge funds, or private equity firms, the SBIR agency must submit a written determination to SBA, the Senate Committee on Small Business and Entrepreneurship, the House Committee on Small Business and the House Committee on Science, Space, and Technology at least 30 calendar days before it begins making awards to such SBCs. The determination must be made by the head of the Federal agency or designee and explain how awards to such SBCs in the SBIR program will:

(A) induce additional venture capital, hedge fund, or private equity firm funding of small business innovations;

(B) substantially contribute to the mission of the Federal agency;

(C) address a demonstrated need for public research; and

(D) otherwise fulfill the capital needs of small business concerns for additional financing for SBIR projects.

(ii) The SBC that is majority-owned by multiple venture capital operating companies, hedge funds, or private equity firms must register with SBA in the Company Registry Database, at www.SBIR.gov, prior to the date it submits an application for an SBIR award.

(iii) The SBC that is majority-owned by multiple venture capital operating companies, hedge funds, or private equity firms must submit a certification with its proposal stating, among other things, that it has registered with SBA.

(iv) Any agency that makes an award under this paragraph during a fiscal year shall collect and submit to SBA data relating to the number and dollar amount of Phase I awards, Phase II awards, and any other category of awards by the Federal agency under the SBIR program during that fiscal year. See section 10 of this directive for the specific reporting requirements.

(v) If an agency awards more than the percentage of the funds authorized under section 6(a)(2) of the Policy Directive, the agency shall transfer from its non-SBIR and non-STTR R&D funds to the agency's SBIR funds any amount

that is in excess of the authorized amount. The agency must transfer the funds not later than 180 days after the date on which the Federal agency made the award that exceeded the authorized amount.

(vi) If a Federal agency makes an award under a solicitation more than 9 months after the date on which the period for submitting applications under the solicitation ends, a Covered Small Business Concern is eligible to receive the award, without regard to whether it meets the eligibility requirements of the program for a SBC that is majority-owned by multiple venture capital operating companies, hedge funds, or private equity firms, if the Covered Small Business Concern meets all other requirements for such an award. In addition, the agency must transfer from its non-SBIR and non-STTR R&D funds to the agency's SBIR funds any amount that is so awarded to a Covered Small Business Concern. The funds must be transferred not later than 90 days after the date on which the Federal agency makes the award.

6. Revise section 7(d) to read as follows:

(d) *Essentially Equivalent Work*. SBIR participants often submit duplicate or similar proposals to more than one soliciting agency when the announcement or solicitation appears to involve similar topics or requirements. However, "essentially equivalent work" must not be funded in the SBIR or other Federal programs, unless an exception to this rule applies. Agencies must verify with the applicant that this is the case by requiring them to certify at the time of award and during the lifecycle of the award that they do not have essentially equivalent work funded by another Federal agency.

7. Revise section 7(h)(1) to read as follows:

(h) *Periods of Performance and Extensions*.

(1) In keeping with the legislative intent to make a large number of relatively small awards, modification of funding agreements to increase the dollar amount should be kept to a minimum, except for options in original Phase I or II awards.

8. Revise section 8(a) to read as follows:

(a) *Proprietary Information Contained in Proposals*. The standardized SBIR Program solicitation will include provisions requiring the confidential treatment of any proprietary information to the extent permitted by law. The solicitation will require that all proprietary information be identified clearly and marked with a prescribed legend. Agencies may elect to require

SBCs to limit proprietary information to that essential to the proposal and to have such information submitted on a separate page or pages keyed to the text. The Government, except for proposal review purposes, protects all proprietary information, regardless of type, submitted in a contract proposal or grant application for a funding agreement under the SBIR Program, from disclosure.

9. Revise section 8(d) to read as follows:

(d) *Continued Use of Government Equipment*. Agencies must allow an SBIR awardee participating in the third phase of the SBIR Program continued use, as a directed bailment, of any property transferred by the agency to the Phase II awardee or acquired by the awardee for the purpose of fulfilling the contract. The Phase II awardee may use the property for a period of not less than 2 years, beginning on the initial date of the concern's participation in the third phase of the SBIR Program.

10. Revise section 9(h) to read as follows:

(h) *National Academy of Sciences Report*. The National Academy of Sciences (NAS) will conduct a study and issue reports on the SBIR and STTR programs.

(1) Prior to and during the period of study, and to ensure that the concerns of small business are appropriately considered, NAS shall consult with and consider the views of SBA's Office of Investment and Innovation and the Office of Advocacy and other interested parties, including entities, organizations, and individuals actively engaged in enhancing or developing the technological capabilities of small business concerns.

(2) The head of each agency with a budget of more than \$50,000,000 for its SBIR Program for fiscal year 1999 shall, in consultation with SBA, and not later than 6 months after December 31, 2011, cooperatively enter into an agreement with NAS regarding the content and performance of the study. SBA and the agencies will work with the Interagency Policy Committee in determining the parameters of the study, including the specific areas of focus and priorities for the broad topics required by statute. The agreement with NAS must set forth these parameters, specific areas of focus and priorities, and comprehensively address the scope and content of the work to be performed. This agreement must also require the NAS to ensure there is participation by and consultation with, the small business community, the SBA, and other interested parties as described in paragraph (1).

(3) NAS shall transmit to SBA, heads of agencies entering into an agreement under this section, the Committee on Science, Space and Technology, the Committee on Small Business of the House of Representatives, and to the Committee on Small Business of the Senate a copy of the report, which includes the results and recommendations, not later than 4 years after December 31, 2011, and every subsequent four years.

11. Revise section 10(h)(4)(xi) to read as follows:

(xi) All instances in which an agency pursued R/R&D, services, production, or any combination thereof of a technology developed under an SBIR award with an entity other than that SBIR awardee. See section 9(a)(12) for minimum reporting requirements.

12. Revise section 10(j)(2) to read as follows:

(2) The system will include a list of any individual or small business concern that has received an SBIR award and that has been convicted of a fraud-related crime involving SBIR funds or found civilly liable for a fraud-related violation involving SBIR funds, of which SBA has been made aware.

13. Revise section 12(b)(4) to read as follows:

(4) *Funding*.

(i) Beginning with FY 2013 and ending in FY 2015, the Secretary of Defense and each Secretary of a military department is authorized to use its SBIR funds for administration of this program in accordance with the procedures and policies set forth in section 9(e)(3) of this directive.

(ii) In addition, the Secretary of Defense and Secretary of each military department is authorized to use not more than an amount equal to 1% of its SBIR funds available to DoD or the military departments for payment of expenses incurred to administer the Commercialization Program. Such funds—

(A) shall not be subject to the limitations on the use of funds in 9(e)(2) or 9(e)(3) of this directive; and

(B) shall not be used to make Phase III awards.

14. Revise section 12(b)(5) to read as follows:

(5) *Contracts Valued at less than \$100,000,000*. For any contract awarded by DoD valued at less than \$100,000,000, the Secretary of Defense may:

(i) establish goals for the transition of Phase III technologies in subcontracting plans; and

(ii) require a prime contractor on such a contract to report the number and dollar amount of the contracts entered

into by the prime contractor for Phase III SBIR projects.

15. Revise section 12(b)(6) to read as follows:

(6) The Secretary of Defense shall:

(i) set a goal to increase the number of SBIR Phase II contracts that lead to technology transition into programs of record of fielded systems;

(ii) use incentives in effect as of December 31, 2011 or create new incentives to encourage agency program managers and prime contractors to meet the goal set forth in paragraph (6)(i) above; and

(iii) submit the following to SBA, as part of the annual report:

(A) the number and percentage of Phase II SBIR contracts awarded by DoD that led to technology transition into programs of record or fielded systems;

(B) information on the status of each project that received funding through the Commercialization Program and the efforts to transition these projects into programs of record or fielded systems; and

(C) a description of each incentive that has been used by DoD, the effectiveness of the incentive with respect to meeting DoD's goal to increase the number of SBIR Phase II contracts that lead to technology transition into programs of record of fielded systems, and measures taken to ensure that such incentives do not act to shift the focus of SBIR Phase II awards away from relatively high-risk innovation projects.

16. Revise paragraph 1(a) of the Appendix I: Instructions for Preparation of SBIR Program Solicitation to read as follows:

(a) Summarize in narrative form the request for proposals and the objectives of the SBIR Program.

17. In Appendix I, in the SBIR Funding Agreement Certification and the SBIR Funding Agreement Certification—Life Cycle Certification, revise the checkbox addressing potential duplicative funding to read as follows:

It will notify the Federal agency immediately if all or a portion of the work authorized and funded under this award is subsequently funded by another Federal agency.

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SMALL BUSINESS ADMINISTRATION

13 CFR Chapter I

RIN 3245-AF45

Small Business Technology Transfer Program Policy Directive

AGENCY: Small Business Administration.

ACTION: Notice of amendments to final policy directive.

SUMMARY: The U.S. Small Business Administration (SBA) is amending its Small Business Technology Transfer (STTR) Program Policy Directive in response to public comments SBA received on the final STTR and Small Business Innovation Research (SBIR) Policy Directives, published on August 6, 2012. SBA is also making several minor clarifying changes to ensure that the STTR participants clearly understand certain program requirements. Additionally, the changes to the STTR Policy Directive are made to maintain concordance with the SBIR program.

DATES: These amendments to the STTR Policy Directive are effective January 8, 2014.

FOR FURTHER INFORMATION CONTACT: Edsel Brown, Assistant Director, Office of Innovation, at (202) 401-6365 or technet@sba.gov.

SUPPLEMENTARY INFORMATION: On December 31, 2011, the President signed into law the National Defense Authorization Act for Fiscal Year 2012 (Defense Reauthorization Act), Public Law 112-81, 125-Stat. 1298. Section 5001, Division E of the Defense Reauthorization Act contains the SBIR/STTR Reauthorization Act of 2011 (Reauthorization Act), which amended the Small Business Act and made several amendments to the STTR Program. The Reauthorization Act required SBA to issue amendments to the STTR Policy Directive and publish the amendments in the **Federal Register** within 180 days of when the Reauthorization Act was passed.

On August 6, 2012, SBA published a final STTR Policy Directive implementing the various provisions of the Reauthorization Act at 77 FR 46855. The directive made several key changes to the STTR Program relating to eligibility, the award process, program administration, and fraud, waste and abuse. Although the STTR Policy Directive is intended for use by the STTR participating agencies, SBA believed that public input on the directive from all parties involved in the program would be invaluable. Therefore, SBA sought public comments

on the final directive, and stated that it may amend the directive in response to these comments at a later time.

Response to Comments

In response to this request, SBA received comments on various parts of the directive. If SBA received comments on a section of the SBIR Policy Directive that also appears in the STTR Policy Directive, SBA clarified the relevant sections in both the SBIR and STTR Policy Directives, when appropriate, in order to maintain concordance between the programs. Several comments recommended that SBA strengthen and clarify the Policy Directive language with regard to SBIR/STTR data rights and the obligation of federal agencies to give a preference in contracting to SBIR/STTR awardees for follow-on Phase III work. SBA agrees that these areas of SBIR/STTR policy are vital to the programs and require clarification and improvement. The SBA continues to evaluate these issues and will address them in a subsequent Policy Directive revision.

Section 4(a)(3) "Agency benchmarks for progress towards commercialization" sets forth the program policy regarding an eligibility requirement for Phase I awards. SBA received comments requesting clarification of the time periods used to calculate the transition rate and commercialization rate benchmark requirements. Commenters also requested clarification about how agencies determine which firms must comply with the transition rate and commercialization rate benchmarks. In response to these comments, SBA revised and reorganized section 4(a)(3) to clarify several procedural elements about the benchmark determinations and enhance its readability.

Section 4(a)(3) clarifies the time periods used to calculate awardee rates of transition from Phase I to Phase II and provides two examples of the calculation. While the rate is calculated using Phase I awards received in the most recent 5, 10, or 15-year period (agencies choose which period they use), excluding the most recently completed fiscal year; the period used when counting the Phase II awards is lagged one year. That is, when calculating the number of Phase I awards received over a particular time period, the time period evaluated does not include the most recently completed fiscal year; however, when calculating the number of Phase II awards received, the time period evaluated does include the most recently completed fiscal year but does not include the first year of the period evaluated for Phase I awards