

The Montana Technology Innovation Partnership (MTIP) program assists tech-based individuals and companies to fund Research and Development (R&D) efforts and commercialize their innovations. This Tech Talk™ Guide will initiate a fundamental understanding of how small businesses can preserve and benefit from SBIR Data Rights.

WHAT IS IT?

All small businesses engaging under the federal Small Business Innovation Research and Small Business Technology Transfer (SBIR/STTR) programs create technical data under their Phase I and Phase II project contracts. The companies retain ownership rights to technical data generated in the performance of an SBIR contract, and that has been recorded in some tangible fashion, including computer source code, reports, illustrations, algorithms, designs, drawings, charts and more.

The sponsoring SBIR/STTR agency receives a royalty-free, non-exclusive license to use the technical data created. However, the agency is constrained from disclosing the SBIR data outside of the Government during the legal protection period, and particularly not to competing entities.

WHY IT MATTERS

SBIR technical data rights are entirely unique in Government contracting. The company is permitted to retain its ownership of the technical data, and gather value from it. The first steps to building that value depend on the small business becoming knowledgeable in how to identify, preserve and assert its rights under the law.

Federal SBIR agencies have a broad duty to protect company SBIR data, disclosing it only inside of the Government. A failure in this duty can enable other interests to use it for free, destroying value for the SBIR business. An agency support contractor may receive the SBIR technical data but will need to have a non-disclosure agreement with the agency, and cannot bid on contracts that involve the use of that technology or data.

Data rights protection periods are detailed below in the referenced Data Rights Clauses. The protection periods can be reinstated indefinitely by including the SBIR data rights clause in every contract in which the SBIR technology and data are used. This rollover of the SBIR data rights extends to the end of the protection period of the *latest* SBIR contract, creating protection for the technical data that can even exceed the protection period that would be achieved with a patent. For a competitor wanting to access the data, they would have to buy the company or technology, or license rights to the data.

IMPLEMENTATION

The Laws: When a company is making strategic decisions about its SBIR data, or is trying to take steps to enforce its rights, it is critical to have a firm grasp of the statute underlying those rights. The following laws relate to SBIR Data Rights:

- The SBIR Reauthorization Act of 2011
- The August 6, 2012 SBA SBIR Policy Directive, as amended on January 8, 2014
- FAR 27.709(h) permitting extension of the protection period
- 13 C.F.R. 121.702 the SBA SBIR eligibility rule
- DFARS 227.7104 – Contracts under the SBIR Program

Data Rights Clauses inserted into the SBIR contract:

- FAR Clause 52.227-20 (non-military) provides four years of data protection from the end of the contract
- DFARS clause 252.227-7018 (military) provides five years of data protection from the end of the project (the date of the last deliverable)

Mark It or Lose It: Companies must mark all SBIR data generated under a contract with the correct data rights legend found in the contract Data Rights Clause. The exact wording must be used. Marking needs to be included for SBIR technical data used in PowerPoint presentations, software, sketches, reporting, patents and more. The legend can be included in full on a title page or first slide, with every subsequent page referencing that it is covered by the title page legend.

Roll-Over: SBIR-funded Phase I and Phase II agreements are clearly linked with the associated SBIR data rights. However, under Section 8 of the SBIR Policy Directive, Government agencies are required to insert the SBIR technical data rights clause into every SBIR contract, including those identified as Phase IIIs. Furthermore, they must notify the prior SBIR funding agency of the roll over and new protection period. Phase III SBIRs are defined as work that “derives from, extends, or completes efforts performed under prior SBIR funding agreements.” The retention of SBIR data rights in Phase III enables the SBIR business to engage sole source federal contracts and preference rights. This saves the government countless hours of procurement time, and it allows the SBIR small business a competitive advantage for its innovations.

COMMON DEFICIENCIES

It must not be forgotten that the rollover and retention of SBIR data rights depends on:

1. Proper marking of the SBIR data,
2. Proper identification of Phase III contracts or subcontracts, and
3. Proper handling by the federal agency.

Federal contract officers are not always well-informed about SBIR data rights and may try to force acceptance of a contract without the SBIR Data Rights Clause. This effort would be contrary to law, but it is up to the small business to report any effort to condition, exclude or diminish SBIR data rights. The SBIR Policy Directive (cited above) has the full force of law and provides the only protections for SBIR Data Rights.

READY FOR THE NEXT STEP?

This Tech Talk™ Guide has been prepared by the Montana Technology Innovation Partnership (MTIP). A program of the Montana Department of Commerce, MTIP provides free coaching to Montana technology-based companies seeking help in applying to federal and state R&D and commercialization funding programs. For more information, contact the MTIP Program Manager at DOCMTIP@mt.gov or visit MTIP’s website at www.mtip.mt.gov.

