

## Client Alert

### **Congress Passes Last Minute Three-Year SBIR/STTR Reauthorization Including New National Security-Related Restrictions and Requirements**

**October 6, 2022**

On September 30, 2022, President Biden signed the [SBIR and STTR Extension Act of 2022](#) (the Act), reauthorizing the Small Business Innovation Research (SBIR), Small Business Technology Transfer (STTR), and six pilot programs for three years, until September 30, 2025. The Act includes new due diligence and reporting requirements, award restrictions, and clawback provisions related to national security risks—particularly regarding firms with ties to China, Russia, North Korea, and Iran—and increased minimum performance standards for multiple SBIR/STTR award winners. The passage and signing of the Act averted a potential lapse of these programs, which were set to expire the day of the reauthorization.

**The Act amends Section 9 of the Small Business Act (15 U.S.C. 638) as follows:**

#### **Foreign Risk Management and Agency Recovery Authority and Ongoing Reporting**

Sections 4 and 5 of the Act require the head of each [participating Federal agency](#), by [June 27, 2023](#), to implement a due diligence program assessing security risks presented by small business concerns seeking any phase of SBIR or STTR award (unless the agency already has such a due diligence program in place). Specifically, the Act calls on agencies to scrutinize small business’s cybersecurity practices, patents, employees, and foreign ties and obligations. Prior to an agency making an award to an SBIR/STTR contractor, those contractors will be required to disclose ownership or other ties to various countries, including the People’s Republic of China, Russia, North Korea, and Iran.

The Act also requires awardees to report any “material misstatement that the Federal agency determines poses a risk to national security” and any “change in ownership, change to entity structure, or other substantial change in circumstances of the small business concern that the Federal agency determines poses a risk to national security.” If such an issue has occurred, the contractor may be required to “to repay all amounts received from the Federal agency under the award.”

#### **Report on Adversarial Military and Foreign Influence**

Section 6 of the Act requires the Department of Defense (DoD), Department of Energy, Department of Health and Human Services, and National Science Foundation to submit reports “assessing the adversarial military and foreign influences in the SBIR and STTR programs” by March 29, 2024. Agencies may engage independent entities to prepare these reports.

#### **Program on Innovation Open Topics**

Section 7 of the Act requires DoD to establish innovation open topic activities using the SBIR and STTR programs by March 29, 2024 and requires the Secretary of Defense to conduct at least one open topic announcement at each DoD component per fiscal year. The goal of this provision is to increase the transition of commercial technology to the Department of Defense, expand the small business nontraditional industrial base, increase commercialization derived from DoD investments, and expand the ability for qualifying small business concerns to propose technology solutions to meet DoD needs.

The Small Business Administration (SBA) must now include data related to open- versus conventional-topic participation in its annual reports to Congress, and the Government Accountability Office (GAO) must issue an annual report comparing open topics and conventional topics under the SBIR and STTR programs.

### **Increased Minimum Performance Standards for Experienced Firms**

Section 8 of the Act imposes increased minimum performance standards for “experienced” firms, effective April 1, 2023. This provision restricts SBIR contractors that are failing to meet certain performance standards, limiting their ability to continue racking up additional SBIR awards and funding.

If an agency determines that an awardee is not meeting an applicable minimum performance standard, the awardee may not receive more than 20 total Phase I awards and Phase II awards from each Federal agency for one year. Awardees that are subject to enhanced Phase II performance standards must submit supporting documentation evidencing that all covered sales were properly used to meet the increased minimum performance standard, and they may not meet the increased minimum performance standard by obtaining patents.

Awarding agencies may apply for an SBIR/STTR program topic waiver exempting awardees from these increased performance standards if the topic is “critical to the mission of the Federal agency or relates to national security.”

SBA must annually submit to Congress a list of awardees that did not meet an applicable minimum performance standard (however, this list will be confidential and exempt from Freedom of Information Act disclosure). The Act further requires the SBA Inspector General to conduct periodic audits and report to Congress on agencies’ implementation of the increased minimum performance requirements and awardees’ proper documentation of award-related sales and investments.

### **Prohibition Against Writing Solicitation Topics**

Section 9 of the Act requires awarding agencies to implement a multi-level review and approval process for solicitation topics to (i) ensure adequate competition and (ii) ensure that no private individual or entity is shaping the requirements for eligibility for the solicitation topic after selection of the solicitation topic.

### **GAO Study on Multiple-Award Winners**

Section 10 of the Act requires GAO to conduct a study and issue a publicly available report on awardees that have received more than 50 SBIR/STTR Phase II awards in the 10 fiscal years preceding the most recent 2 fiscal years and will therefore be subject to the Act's increased minimum performance standards by March 30, 2024.

### **GAO Report on Subcontracting in SBIR and STTR Programs**

Section 11 of the Act requires GAO to report to Congress on subcontracting under SBIR and STTR program awards by September 30, 2023. This report will examine the extent to which small business prime SBIR/STTR awardees are subcontracting to "other than small" entities, which is likely in response to concerns that that extent of such subcontracting may subvert the intent of the SBIR/STTR program.

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