



# Protecting your intellectual property

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With slides also from David Metzger, Esq. (retired)



# AGENDA

- What can the government disclose from your proposal?
- Appropriately marking proprietary data when you submit your DHS proposal
- What is SBIR Data?
- What is a government Phase III award?
- Why is protecting SBIR Data important?
- How and when to mark SBIR Data?



# What can the government disclose?

In submitting a proposal, the Offeror agrees to permit the Government to publicly disclose basic company information (e.g.- company size, company name, award amount, award date etc.) upon award. Other proposal data is considered to be the property of the Offeror, and DHS will protect it from public disclosure to the extent permitted by law including the Freedom of Information Act. Please note, in accordance with the Small Business Administration's SBIR Policy Directive, the DHS SBIR Office will provide the basic proposal information to the Small Business Administration's Application Information database at [www.SBIR.gov](http://www.SBIR.gov), as identified in the Policy Directive.



# What is Proprietary Information(B-2)

- **Proprietary information** is information that is provided which constitutes a trade secret, proprietary commercial or financial information, confidential personal information or data affecting the national security
- Sometimes explicit guidance is given to NOT include proprietary information in some of the documents you will provide.
  - Be sure to then EXCLUDE proprietary information



# From Pre-solicitation

## 3.2 Proposal Cover Sheet, Technical Abstract, Project Aims, and Summary of Results

It is a requirement for the Offeror to provide basic details about the proposed effort on the proposal Cover Sheet. Additionally, the Cover Sheet includes the following fillable sections: Technical Abstract, Project Aims, Summary of Results, and Briefing Chart.

The Technical Abstract is limited to 250 words. The abstract must identify the purpose of the work and briefly describe the work to be carried out, the findings or results, and the potential commercial applications of the effort. If the Offeror's proposal is selected for award, the Technical Abstract section will be publicly posted on the DHS SBIR website and on the SBA's website; therefore, **do not include proprietary** or sensitive information in the Technical Abstract section of the Cover Sheet.

# Where are abstracts printed? SBIR.gov

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## [Spectral Data Fusion for the Detection of Existing and Emerging Synthetic Opioid Analogs](#)

**SBC:** PHYSICAL SCIENCES INC. | **Topic:** DHS241-001

Physical Sciences Inc. (PSI) proposes to develop a multimodal data fusion algorithm that is based on deep learning algorithms to detect previously unseen fentanyl analogs. The algorithm will be deployed on a hardware kit which contains a handheld Raman...

SBIR

Phase I

2024

DHS

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## [Software Defined Radio for Public Safety \(SDR-PS\)](#)

**SBC:** TOYON RESEARCH CORPORATION | **Topic:** DHS241-004

Toyon is proposing an SDR architecture that emphasizes a low-cost, modular design approach using a fully software controlled, multi-channel, wideband RF Front-End (RFFE) board. Toyon's software define radio for public safety (SDR-PS) will be capable of...

SBIR

Phase I

2024

DHS





# Where is proprietary information likely to occur?

- **In the Technical Proposal**
- It is important to determine what information you wish to protect and to MARK IT
- Where is the guidance on Marking?
  - Page 17 of the Pre-solicitation
  - Proprietary information must be clearly marked using the guidelines provided by DHS



# Page 17 of Pre-Solicitation

## **Innovations, Inventions and Patents**

Proprietary Information. Information contained in unsuccessful proposals will remain the property of the applicant. The Government will, however, retain copies of all proposals. Public release of information in any proposal submitted will be subject to existing statutory and regulatory requirements.

If proprietary information is provided by an applicant in a proposal, which constitutes a trade secret, proprietary commercial or financial information, confidential personal information or data affecting the national security, it will be treated in confidence, to the extent permitted by law. This information must be clearly marked by the applicant with the term “proprietary information” and the following legend must appear on the title page of the proposal:



# Legend you **MUST** include to mark proprietary data in DHS proposal



“These data shall not be disclosed outside the Government and shall not be duplicated, used, or disclosed in whole or in part for any purpose other than evaluation of this proposal. If a funding agreement is awarded to this applicant as a result of or in connection with the submission of these data, the Government shall have the right to duplicate, use, or disclose the data to the extent provided in the funding agreement and pursuant to applicable law. This restriction does not limit the Government's right to use information contained in the data if it is obtained from another source without restriction. The data subject to this restriction are contained on pages\_\_\_of this proposal.”

DHS assumes no liability for inadvertent disclosure or use of unmarked data. The Government will limit dissemination of such proprietary information to within official channels.

Marking of Proprietary Information. To properly mark proprietary information on the proposal, use an asterisk (\*) in the right and left margins on pages deemed proprietary. If all information on a page is deemed proprietary, include this statement, “ENTIRE PAGE IS PROPRIETARY,” in both the header and footer of the associated page. Do not label the entire proposal “proprietary.” All other markings (e.g., “Company Confidential”, “Business Sensitive”, etc.) will not be recognized.

**NOTE**

# Questions for DHS....

- What type of people serve as reviewers of DHS SBIR proposals?
- How many reviewers read each proposal?
- How do you minimize a conflict of interest?
- What guidance are reviewers provided regarding how to handle proprietary information?
- If you don't win an award what kind of debrief do you receive?



# What is SBIR data?

Data developed or generated in the performance of an SBIR award



# Why are SBIR Data mentioned?

- Mentioned on page 17 of Pre-Solicitation
- You may wonder what it is...

## Rights in Data Developed Under SBIR Funding Agreements.

SBIR Data: all Data developed or generated in the performance of an SBIR award, including Technical Data and Computer Software developed or generated in the performance of an SBIR or STTR award, is subject to the SBIR data protection period. Upon expiration of the protection period for SBIR Data, the Government has a royalty-free license to use, and to authorize others to use on its behalf, these Data for Government Purposes, and is relieved of all disclosure prohibitions and assumes no liability for unauthorized use of these Data by third parties. The Government receives Unlimited Rights in all Form, Fit, and Function Data, OMIT Data, and unmarked SBIR Data. Please see the Policy Directive for additional information.



# Three essential attributes of SBIR/STTR Data

- **It is recorded information i.e. reduced to writing**
  - SBIR data can be source code, sketches, drawings, formulas, equations, reports, descriptions of SBIR technologies, SBIR final reports
- **It is technical in nature**
  - Non-technical data does not qualify as SBIR/STTR data
- **It is generated under an SBIR or STTR funding agreement and is appropriately marked**
  - Proprietary data that the firm developed with its own private funds is not SBIR/STTR data

# CFY20 SBIR/STTR Policy Directive

## FY20 SBIR/STTR Policy Directive

- “To receive the protections accorded to SBIR/STTR Data pursuant to SBIR/STTR Data Rights, any SBIR/STTR Data that is delivered must be marked with the appropriate SBIR/STTR Data Rights legend or notice in accordance with agency procedures.” (Page 54)
- **A six-month** accommodation is made for omitted or incorrect markings.
- “Any SBIR/STTR Data delivered by the Awardee, and in which the Awardee intends to limit the Federal Government’s rights to SBIR/STTR Data Rights, must be delivered with restrictive markings.” (Page 143-144)



# Data Rights are a special type of Trade Secret



**SBIR Data Rights in Phase I & Phase II**

**PHASE I**

**PHASE II**

**PROTECTS BY NONDISCLOSURE  
FUNDED WITH | SBIR/STTR \$  
ACCORDED | SBIR Data Rights clause**

**COMMON COMMERCIAL AND DEFENSE SBIR CLAUSE**  
From May 2, 2019 SBA SBIR/STTR Policy Directive,  
Appendix 1, providing a non-renewable  
20-year protection period from date of award.

# What is a Phase III Award?



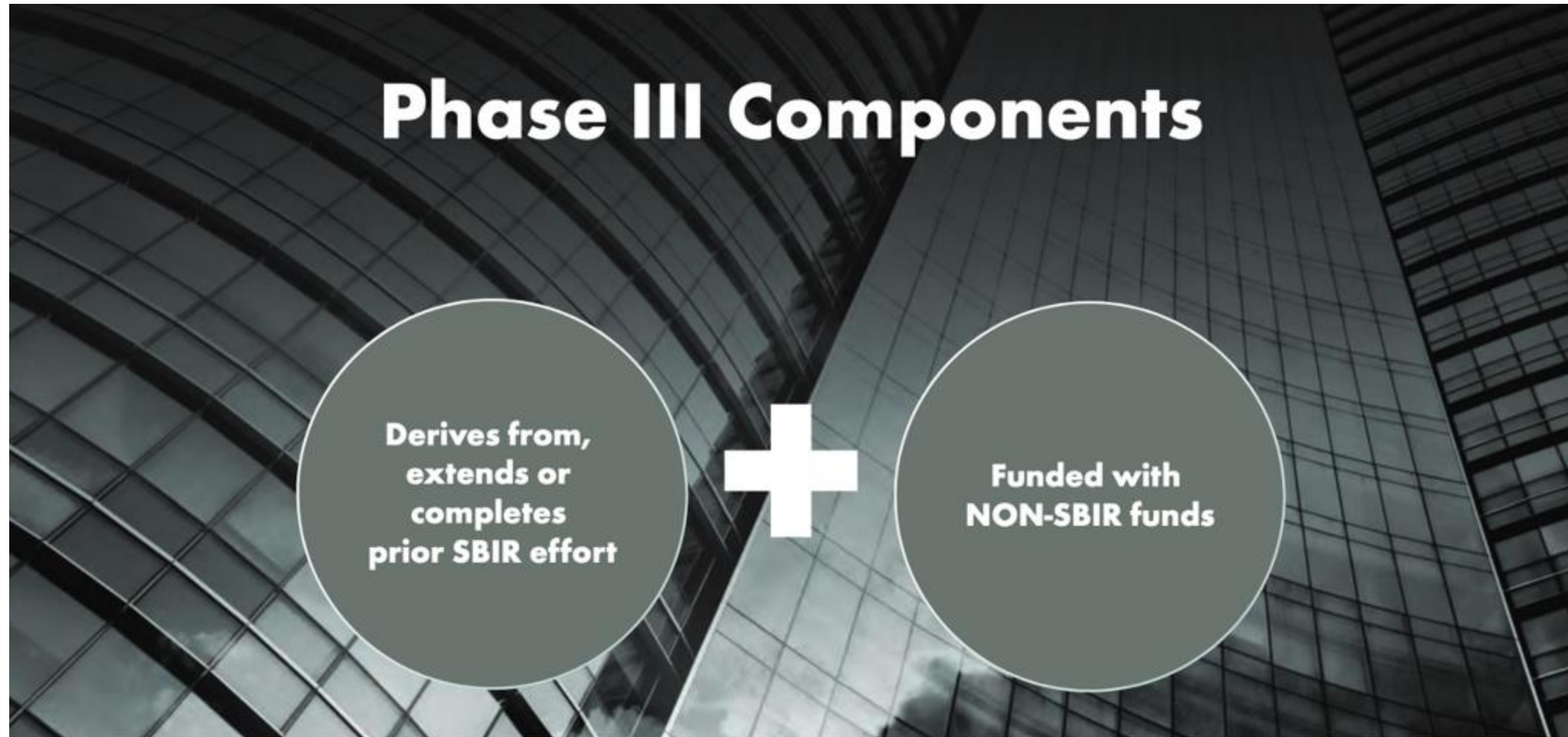




## How is Phase III Defined?

- A Phase III is defined as an award that derives from, extends or completes prior SBIR/STTR effort with non-SBIR funds
- **“Derives from”** means that the Phase III work under consideration must trace back to prior SBIR or STTR effort and is funded
- **“Extends”** means that the proposed Phase III work can be for an entirely different application of the technology that was developed in a prior Phase I, Phase II, or even a prior Phase III.
- **“Completes”** refers to the process of converting prior SBIR research and effort into a product which is the completion of the innovation continuum
- **“or”** implies that if any one of these broad terms applies, the new requirement can be a Phase III

# What is a Phase III Award?



Phase III awards can be given for research, research and development, services products, production or any combination

# What Makes SBIR Data Rights Valuable?

- **Phase III Status brings with it:**
  - The right to award without competition contracts
  - Exemption from SBA size standards for a procurement
  - No limits on the dollar size of a Phase III procurement
  - A right to a Phase III mandate, by which the SBIR firm has a right to be awarded a future Phase III award to the greatest extent practicable
  - A right to receive subcontracts for Phase III work on an award without competition basis
  - The ability to pursue research, research and development, services, products, production or any combination of those under a Phase III



# Government Phase III awards

- Can be made by any agency, regardless of whether or not the agency has an SBIR/STTR program
- Federal agency may enter into a Phase III SBIR agreement at any time with a Phase I or II awardee
- May be for products, production, services, R/R&D, or combo
- No limit on number, award amount, or duration of Phase III contracts
- There is no limit on the time that may elapse between a Phase I or Phase II award and a Phase III award, or between a Phase III award and any subsequent Phase III award





## Phase III Commercialization

- Already met competition requirement; ability to award without competition
  - Phase III funding agreements may be awarded as the result of **competition** (e.g. BAA or RFP) **or on a non-competitive basis** to a Prime contractor or subcontractor at any tier under a government contract and shall be afforded Phase III status and SBIR data rights
- Subcontracts can be Phase IIIs and Phase IIIs can be subcontracts
- Small business size standards do not apply in Phase III



# How to Mark SBIR Data

## If you win an award

# Three essential ingredients

- **TITLE:** SBIR/STTR Data Rights
- **Five Row Chart**
  - (1) Funding agreement number
  - (2) The award date
  - (3) the date 20 years out from the award date
  - (4) the awardee's name
  - (5) the awardee's address
- **Paragraph of text** describing the Governments Rights and obligations



# SBIR/STTR Data Rights

**\*All Required**

Funding Agreement:	55555
Award Date:	09/28/2021
SBIR/STTR Protection Period:	09/28/2041
SBIR/STTR Awardee:	High Tech Corporation
SBIR/STTR Awardee Address:	123 Maple St, Rochester, NY 14620

"This is SBIR/STTR Data (or is Computer Software or a Prototype that embodies or includes SBIR/STTR Data) to which the SBIR/STTR Awardee has SBIR/STTR Data Rights and to which the Federal Government has received SBIR/STTR Technical Data Rights (or SBIR/STTR Computer Software Rights) during the SBIR/STTR Protection Period and rights of use for Government Purposes after the SBIR/STTR Protection Period, as those terms are defined in the SBIR/STTR Funding Agreement. Awards issued by the U.S. Department of Energy are subject to Unlimited Rights after the SBIR/STTR Protection Period, as that term is defined in the SBIR/STTR Funding Agreement. Any reproduction of SBIR/STTR Data or portions of such data marked with this legend must also reproduce the markings."





# How to correctly mark SBIR Data?

Title Page

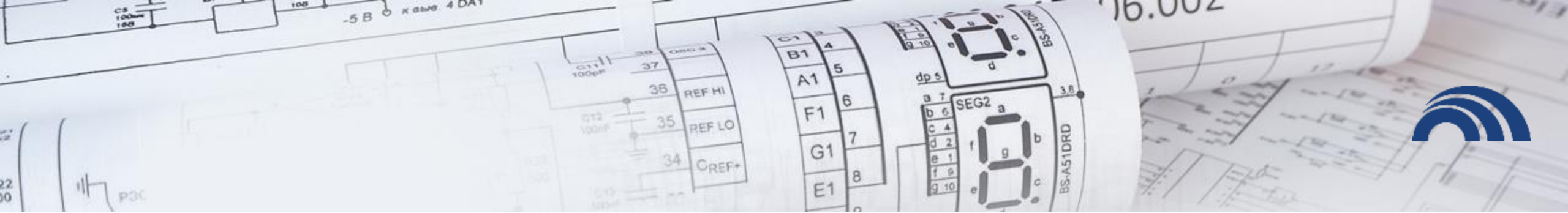
**Quarterly Report**  
September 2021

Contract Number: XYZ2375  
High Tech Corporation  
October 2021

**Title:** SBIR/STTR Data Rights  
**Funding Agreement:** 5555  
**Award Date:** 9/28/21  
**SBIR/STTR Protection Period:** 9/28/21  
**SBIR/STTR Awardee:** High Tech Corporation  
**SBIR/STTR Awardee Address:** 123 Maple Street,  
Rochester, NY 14620

This is SBIR/STTR Data (or is Computer Software or a Prototype that embodies or includes SBIR/STTR Data) to which the SBIR/STTR Awardee has SBIR/STTR Data Rights and to which the Federal Government has received SBIR/STTR Technical Data Rights for SBIR/STTR Computer Software Rights during the SBIR/STTR Protection Period and rights of use for Government Purposes after the SBIR/STTR Protection Period, as those terms are defined in the SBIR/STTR Funding Agreement. Awards issued by the U.S. Department of Energy are subject to Unlimited Rights after the SBIR/STTR Protection Period, as that term is defined in the SBIR/STTR Funding Agreement. Any reproduction of SBIR/STTR Data or portions of such data marked with this legend must also reproduce the markings.

- The entire legend should be on the front page of any report or submission containing SBIR data.
- The legend must be included on every page or better include the following statement in header or footer on every page.
  - “This page governed by the SBIR/STTR Data Rights legend set forth on the title page, which is incorporated herein, as if written out in full.”



## SBIR Marking Do's and Don'ts

- **Do** apply legend to all documents containing SBIR data irrespective of the type of funding agreement – grant, contract, cooperative agreement, Other Transaction Agreement
- **Remember** SBIR data is developed only under an existing agreement – not before, not after
- **Do not** affix the SBIR data legend to a proposal.

# Thanks for joining us today

If you have never written a proposal before and would like to receive mentoring assistance, please complete the registration form

Please take a moment to provide your feedback on today's webinar <https://forms.office.com/r/uvHuZWS5x4>

See the website for [Phase 0 SBIR program for DHS!](#)