



It's Up to You to Protect Your SBIR Data Rights

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One of the hallmarks of the SBIR Program is the intellectual-property protection provision that provides the SBIR awardee with the retention of the rights to data generated in the performance of an SBIR award.

What this means is that, unlike with most government programs where the government pays for the development work, you, the small business concern, get to keep the rights to any new IP created during the SBIR period of performance. And these rights also apply to STTR awards, with the additional proviso that your IP-sharing agreement with your research institution partner also is in effect. Unfortunately, these rights don't last forever five years for DOD, four years for civilian agencies. Moreover, you can unintentionally abrogate these rights by failing to properly mark your deliverables, including all reports and briefing materials you provide to your contract officials.

In your SBIR or STTR contract with MDA, you'll find reference to clause DFARS 252.227-7018. This clause specifies the proper marking (wording) that should accompany all information provided to the Government relating to your work on your SBIR project. If you don't properly mark the title page of any briefing or report, and if you don't tag anything that you provide to the government, you are in jeopardy of forfeiting your rights to the data associated with that deliverable.

I strongly recommend that you review this clause. (You can find a copy of the full wording at: <http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html>.) And I recommend you include the following marking (and fill in the appropriate information) on the title page of a report or briefing or on a tag attached to a deliverable item:

SBIR DATA RIGHTS

- Contract Number:
- Contractor Name:
- Contractor Address:
- Expiration of SBIR Data Rights Period:

The Government's rights to use, modify, reproduce, release, perform, display, or disclose technical data or computer software marked with this legend are restricted during the period shown as provided in paragraph (b)(4) of the Rights in Noncommercial Technical Data and Computer Software Small Business Innovative Research (SBIR)

Program clause contained in the above identified contract. No restrictions apply after the expiration date shown above. Any reproduction of technical data, computer software, or portions thereof marked with this legend must also reproduce the markings.

The Contractor is you. The Contract Number is just that, not the SBIR topic number. The SBIR Data Rights Period expiration date for a DOD contract is five years after the scheduled date of the final deliverable of the contract. Note that follow-on projects, be they Phase II or Phase III, will extend the data rights period to an appropriate point after the end of that follow-on project.

If you don't tell the government what data falls under protection provisions, the government has no obligation to protect it.

Even though the law provides for protection of your rights to the data you create in your SBIR work, by contract law, if you don't tell the government what data falls under the provisions of that protection, the government has no obligation to protect it. You tell the Government by properly marking the data, and it's up to you to remember to do it.

If you don't believe that you have an exposure here, take a lesson from the court decision in Night Vision Corporation's data-rights battle with the Air Force. In a nutshell, Night Vision lost rights to its technology by failing to mark a prototype of the goggles it had created in Phase II when the company delivered the goggles to the Air Force. The Air Force turned over the prototype to a competitor for reverse engineering and issued the competitor a contract to manufacture the goggles. Night Vision sued and lost.

So why is it so important to protect your technical data? There are two basic reasons. (1) The agency cannot disclose your SBIR data to your competitors during the protection period. And (2) the agency cannot use your SBIR data to develop technical specifications for purposes of competing a procurement, and must award procurements based upon it to you on a sole-source basis.

That should be enough incentive to do a good job with your markings. Remember to mark everything you provide. You never know when a piece of data will prove to be the key to your future success.

Fred Patterson (aka The SBIR Coach®) is the former co-founder and executive officer of two successful SBIR-award-winning companies. Since 2001, he has served as a panelist for Technology Applications Reviews sponsored by the MDA Technology Applications Program.