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# Decision

**Matter of:** PublicRelay

**File:** B-421154; B-421154.2

**Date:** January 17, 2023

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## DIGEST

Protest that agency was required to enter into good faith negotiations for a Small Business Innovative Research (SBIR) phase III award on a sole-source basis is denied because such action is not required where the agency was not pursuing production of the technology developed by the SBIR awardee under its prior phase I or II awards, and did not otherwise seek to procure the technology.

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## DECISION

PublicRelay, a small business of Vienna, Virginia, protests the issuance of an order to Red Carrot, Inc., a small business of Miami, Florida, under solicitation No. 73351022Q0087, issued by the Small Business Administration (SBA) for a media database, monitoring and analytics, and news briefing services for SBA's Office of Communication and Public Liaison (OCPL). The protester contends that SBA incorrectly concluded that OCPL's requirement does not qualify for a Small Business Innovative Research (SBIR) phase III award, and should have engaged in good faith negotiations with PublicRelay to enter into a phase III contract.

We deny the protest.

## BACKGROUND

The SBIR program was established under the Small Business Innovation Development Act of 1982, and is codified in section 98 of the Small Business Act. 15 U.S.C. § 638.

The program is designed to increase the participation of small business concerns in federally funded research or research and development (R/R&D). See *id.* Pursuant to

this authority, certain federal agencies are required to provide a program under which a portion of the agency's R/R&D effort is reserved for award to small business concerns.<sup>1</sup> See *id.* § 638(e)(4). The Small Business Act requires SBA to issue policy directives for the operation of the SBIR and STTR programs. *Id.* § 638(j). Under this authority, SBA has promulgated the SBIR/STTR Program Policy Directive through notice and comment rulemaking. See 84 Fed. Reg. 12794-849 (Apr. 2, 2019).

The SBIR program has three phases. Under phase I, firms competitively apply for an award to test the scientific, technical, and commercial merit and feasibility of a concept. 15 U.S.C. § 638(e)(4)(A). Under phase II, a firm may submit a proposal to further develop the concept that it first conceived in phase I. *Id.* § 638(e)(4)(B). For phase III, the Small Business Act provides that "where appropriate," there may be a "third phase for work that derives from, extends, or completes efforts made under prior funding agreements under the SBIR program." *Id.* § 638(e)(4)(C). Under phase III, firms obtain funding from the private sector or non-SBIR government sources to develop concepts from a phase I or II award into commercial products or services for use by the federal government. *Id.*

PublicRelay states that starting in 2011, under contracts awarded by the National Science Foundation (NSF) for SBIR phase I and II efforts, it developed media analysis software, including building and testing prototype content processing modules. See Protest at 3. The record shows that beginning in August 2021, after learning about SBA's then-current contract for news briefing services, PublicRelay initiated communications with OCPL in which it inquired about fulfilling the agency's requirements for media monitoring, daily briefing, and analytics. In that communication, PublicRelay advised the agency that it is an "SBIR phase [III] company that does media monitoring, briefings, and analytics for almost 100 of the Fortune 500." Agency Report (AR), Tab 7, Email Correspondence Aug. 19-Sept. 8, 2021, at 3.

In subsequent communications, PublicRelay expressed an interest in responding to a solicitation for these requirements and inquired as to when the agency would issue such a solicitation. Tab 8, Email Correspondence Nov. 23, 2021-June 2, 2022, at 2, 4-5. On July 22, 2022, the contracting officer advised PublicRelay that the agency would utilize the General Services Administration (GSA) schedules to fulfill the requirement, that "[t]he acquisition strategy is set," and that "there are numerous small businesses under a variety of GSA schedules. Since your company is not listed under this schedule you would not be eligible to compete for this specific requirement." AR, Tab 9, Email Correspondence July 21-22, 2022, at 1.

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<sup>1</sup> A subset of these agencies are additionally required to provide a Small Business Technology Transfer (STTR) program, in addition to an SBIR program. See 15 U.S.C. § 638(e)(6).

On August 9, SBA posted the solicitation to GSA e-Buy,<sup>2</sup> setting aside the requirement for small businesses holding Multiple Award Schedule (MAS) 541820 contracts for public relations services. Contracting Officer's Statement (COS) at 2. In addition to posting the solicitation on GSA e-Buy, the contracting officer also requested from PublicRelay a response addressing how the requirements in the performance work statement of the solicitation derive from, extend, or complete PublicRelay's efforts under its prior SBIR funding agreements; on September 2, PublicRelay submitted its response. AR, Tab 10, Email Correspondence July 21-Aug. 31, 2022, at 5; Tab 11, Email Correspondence Sept. 1-22, 2022, at 2-3.

On September 26, SBA issued an order to Red Carrot, Inc. under the MAS contract. COS at 2. Having received no response to its September 2 submission, on September 30, PublicRelay requested the agency pause the current procurement and make a good faith effort to negotiate a phase III award with PublicRelay because the requirement would extend its prior SBIR efforts. AR, Tab 15, Letter from PublicRelay to SBA, Sept. 30, 2022, at 1, 2. On October 5, the agency responded to PublicRelay and advised as follows:

[OCPL]'s requirement does not constitute an SBIR Phase III opportunity because it does not derive from, extend, or complete your client's SBIR work for the following reasons:

- SBA was unaware of PublicRelay's SBIR work at the time that OCPL drafted this requirement;
- SBA's Performance Work Statement (PWS) did not require the technology as described in your letter, dated September 30, 2022.
- This is a long-standing requirement of the SBA, and OCPL's requirement to access a media database goes back to at least 2005, well before PublicRelay's SBIR awards; and
- SBA did not create this requirement using PublicRelay's original concepts, findings, ideas, or research results.

[SBA] understands that [PublicRelay] would use its SBIR developed technology if awarded this requirement, however, that is not the standard for whether an agency's requirement meets the definition of a SBIR Phase III award.

AR, Tab 16, Letter from SBA Regarding Phase III Status, Oct. 5, 2022. This protest followed.

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<sup>2</sup> The GSA e-Buy system is an online tool designed to facilitate the submission of proposals for a wide variety of commercial goods and services under GSA schedules and technology contracts. See <https://www.ebuy.gsa.gov/ebuy/> (last visited Jan. 17, 2023).

## DISCUSSION

The protester argues that SBA violated the SBIR policy directive, which required that SBA enter into good faith negotiations with PublicRelay for the award of a phase III contract.<sup>3</sup> Protest at 2. Specifically, PublicRelay asserts that SBA incorrectly concluded that the OCPL requirement did not qualify as phase III work, and that performing the OCPL requirements would in fact “extend” the effort performed under its prior SBIR awards.<sup>4</sup> *Id.* at 6-10. The protester argues that none of the reasons identified in the October 5 letter apply the correct standard set forth in the SBIR policy directive to determine whether it can qualify for a phase III award. *Id.* at 11-15. SBA argues that OCPL’s requirement does not derive from, extend, or complete PublicRelay’s prior SBIR work, and therefore it was not required to negotiate with PublicRelay. Memorandum of Law (MOL) at 5. For the reasons discussed below, we conclude that although SBA may have been able to pursue an SBIR phase III award with PublicRelay, the agency was not otherwise required to do so; accordingly, we deny the protest.

Under the Competition in Contracting Act of 1984 and our Bid Protest Regulations, we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, as well as solicitations leading to such awards. See 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. §21.1(a). Our Office does not review small business matters over which SBA has conclusive authority under the Small Business Act. 4 C.F.R. § 21.5(b); *TechAnax, LLC; Rigil Corp.*, B-408685.22, Aug. 16, 2019, 2019 CPD ¶ 294 at 4. Our Office also gives deference to SBA in the interpretation of the regulations it promulgates pursuant to its statutory authority under the Small Business Act. See, e.g., *TechAnax, LLC; Rigil Corp.*, *supra*; *SKC, LLC*, B-415151, Nov. 20, 2017, 2017 CPD ¶ 366 at 4. Notwithstanding this deference, we will sustain a protest where SBA’s

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<sup>3</sup> PublicRelay filed an initial protest on October 6, “in order to secure a stay of performance of the contract awarded on September 26,” and on October 17 filed a consolidated supplemental and initial protest which it states “supplements the protest with additional argument, restates the initial protest’s argument, and elaborates on the initial protest’s argument.” Protest at 1. For ease, we cite only to the October 17 protest filing in this decision.

<sup>4</sup> As noted, the Small Business Act defines phase III as work that “derives from, extends, or completes efforts made under prior funding agreements under the SBIR program.” 15 U.S.C. § 638(e)(4)(C). PublicRelay does not argue that the OCPL requirement either “derives from” or “completes” its prior SBIR efforts at NSF. Rather, the protester argues that “the PWS contemplates work that constitutes a Phase III award because it extends PublicRelay’s SBIR Phase I and II efforts.” Protest at 8. The protester states, “PublicRelay’s solution for this requirement would utilize its SBIR-developed modular software application for the processing of content for the media monitoring/analytics and the news briefing,” and, “[i]n fact, PublicRelay could not perform the PWS requirement without utilizing its SBIR-developed technology.” *Id.* at 10.

interpretation of its regulation is unreasonable. See *ASRC Fed. Data Network Techs., LLC*, B-418028, Dec. 26, 2019, 2019 CPD ¶ 432 at 10.

Our analysis begins with the interpretation of the relevant statute or regulation. See *Curtin Mar. Corp.*, B-417175.2, Mar. 29, 2019, 2019 CPD ¶ 117 at 9 (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (“As in any case of statutory construction, our analysis begins with the ‘language of the statute.’”)). In construing the statute or regulation, “[t]he first step ‘is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in this case.’” *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 450 (2001) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). In this regard, we “begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.” *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009). If the statutory or regulatory language is clear and unambiguous, the inquiry ends with the plain meaning. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Our Office likewise applies the “plain meaning” rule of statutory or regulatory interpretation. See, e.g., *Curtin Mar. Corp.*, *supra*.

The policy directive states as follows regarding phase III work:

(c) Phase III. Phase III refers to work that derives from, extends, or completes an effort made under prior SBIR/STTR Funding Agreements, but is funded by sources other than the SBIR/STTR programs. Phase III work is typically oriented towards Commercialization of SBIR/STTR research or technology, including through further R/R&D work.

(1) Phase III work: Each of the following types of activity constitutes SBIR/STTR Phase III work:

(i) Commercial application . . . of SBIR/STTR funded R/R&D that is financed by non-Federal sources of capital. . . .

(ii) SBIR/STTR-derived products or services intended for use by the Federal Government, funded by non-SBIR/STTR sources of Federal funding.

(iii) Continuation of SBIR/STTR work, funded by non-SBIR/STTR sources of Federal funding including R/R&D.

SBIR/STTR Policy Directive § 4(c)(1). Further, the policy directive states that “[p]hase III work may be for products, production, services, R/R&D, or any such combination.” *Id.* § 4(c)(4). Accordingly, consistent with this definition of phase III work, funding for OCPL’s requirement could be used to fund a phase III award to PublicRelay, if the requirement “extends” PublicRelay’s prior SBIR phase I or II work.

The policy directive further establishes the requirements for the competition of phase III awards as follows:

(3) Competition Requirement. The competitions for SBIR/STTR Phase I and Phase II awards satisfy any competition requirement of the Armed Services Procurement Act, the Federal Property and Administrative Services Act, and the Competition in Contracting Act. *An agency that wishes to fund an SBIR/STTR Phase III award, which is an extension of prior Phase I and/or Phase II awards, is not required to conduct another competition for the Phase III award in order to satisfy those statutory provisions.* As a result, in conducting actions relative to a Phase III SBIR/STTR award, it is sufficient to state for purposes of a Justification and Approval, if one is deemed required by the agency, that the project is an SBIR/STTR Phase III award that is derived from, extends, or completes efforts made under prior SBIR/STTR Funding Agreements and is authorized pursuant to 15 U.S.C. 638(r)(4). Further justification is not needed.

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(7) Special acquisition requirement. Agencies or their Government-owned, contractor-operated (GOCO) facilities, Federally-funded research and development centers (FFRDCs), or Government prime contractors *that pursue R/R&D or production of technology developed under the SBIR/STTR program* shall issue Phase III awards relating to the technology, including sole source awards, to the Awardee that developed the technology under an SBIR/STTR award, to the greatest extent practicable, consistent with an Agency’s mission and optimal small business participation.<sup>[5]</sup>

*Id.* §§ 4(c)(3) and 4(c)(7) (emphasis added). In this regard, the policy directive implements the Small Business Act, which states:

To the greatest extent practicable, Federal agencies and Federal prime contractors shall—  
(A) consider an award under the SBIR program or the STTR program to satisfy the requirements under sections 3201 through 3205 of title 10 and any other applicable competition requirements; and  
(B) issue, without further justification, Phase III awards relating to technology, including sole source awards, to the SBIR and STTR award recipients that developed the technology.

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<sup>5</sup> The policy directive further requires that in implementing the special acquisition requirement, agencies “must make a good faith effort to negotiate with such Awardees regarding the performance of the new, related, work and to issue Phase III awards for the work.” SBIR/STTR Policy Directive § 4(c)(7)(i).

15 U.S.C. § 638(r)(4).

PublicRelay argues that the OCPL requirement meets the definition of a phase III award because it is an extension of the technology that PublicRelay developed under its SBIR phase I and II efforts. In this regard, PublicRelay asserts that it would utilize its SBIR phase I and II technology to propose a solution that would meet the OCPL requirements identified in the solicitation. Protest at 8-10. As a result, the protester maintains, the special acquisition requirement in the SBIR policy directive applies and the agency was required to enter into good faith negotiations with PublicRelay towards the issuance of a sole-source phase III award. *Id.* at 2, 11.

The agency counters that the special acquisition requirement does not apply because OCPL does not specifically require PublicRelay's SBIR-developed technology. Supp. MOL at 4-5. In essence, SBA contends that because OCPL was not specifically seeking PublicRelay's SBIR phase I or II technology, the requirement could not be an extension of PublicRelay's prior SBIR phase I or II awards, and therefore is not phase III work. *Id.* In support of this position, SBA provided a statement from the Director of SBA's Office of Innovation and Technology (OIT), the office within SBA that administers the SBIR program and issues the policy directive. In pertinent part, SBA's director explains as follows:

Procuring agencies must use the special acquisition requirement when SBIR Phase III work is identified by the procuring agency. The special acquisition requirement is a process described in section 4(c)(7) of the SBIR/STTR Policy Directive that requires agencies to issue a sole source Phase III award to the SBIR firm that developed the technology that an agency seeks to procure. If the agency decides it is not practical to issue a sole source award to the SBIR awardee, the special acquisition requirement necessitates a process of documentation and potential appeal by SBA to ensure that procuring agencies do not improperly avoid Phase III awards that should be issued to the SBIR awardee. . . .

OCPL did not solicit the specific SBIR-developed technology that [PublicRelay] has described in its proposal for a Phase II award from NSF. A general requirement of a procuring agency that could be performed by numerous, perhaps hundreds, of technologies developed by prior SBIR awardees is not an extension of a specific prior SBIR award and does not qualify as Phase III work.

Decl. of Director of OIT at ¶¶ 5 and 9.

On this record, we find that the plain meaning of the policy directive affords agencies the discretion to pursue SBIR phase III awards, and mandates an SBIR phase III award only in certain circumstances--that is, when the agency specifically "pursue[s] the

R/R&D or production of technology developed under the SBIR/STTR program.”<sup>6</sup> See SBIR/STTR Policy Directive § 4(c)(7). Thus, we agree with SBA’s interpretation that the special acquisition requirement applies only when an agency seeks the specific technology developed by the SBIR awardee under its prior awards. However, we also find that even if the agency’s requirements might be considered an extension of an SBIR awardee’s prior phase I or II technology because that awardee would utilize this technology in developing its solution, the special acquisition requirement would not apply unless the agency also was pursuing production of that specific technology. Because the agency was not pursuing production of PublicRelay’s technology, and OCPL’s requirement does not specify and is not otherwise limited to the technology developed by PublicRelay under its prior SBIR awards, we conclude that SBA was not subject to the special acquisition requirement of the policy directive.

Otherwise, as noted, the SBIR policy directive affords agencies the discretion to pursue an SBIR phase III award without competition. SBIR Policy Directive § (c)(3) (“An agency that wishes to fund an SBIR/STTR Phase III award. . . is not required to conduct another competition. . .”). Here, SBA elected to conduct market research regarding the OCPL requirement by issuing a sources sought notice to GSA e-Buy, specifically to small businesses holding contracts under MAS 541820, and received capabilities statements from several vendors. COS at 1. Based on the results of the market research, the agency decided to conduct a competition set aside for small businesses using MAS 541820, and as a result of the competition issued an order to Red Carrot, Inc. *Id.* at 2. Thus, SBA chose to compete the OCPL requirement rather than limit the procurement to PublicRelay’s SBIR technology.

Consequently, we need not decide whether the October 5 letter adequately addressed whether OCPL’s requirement would extend PublicRelay’s prior SBIR work. As noted, SBA provided four reasons for its conclusion that its requirement was not phase III work: (1) SBA was unaware of PublicRelay’s SBIR work at the time that OCPL drafted this requirement; (2) the PWS did not require the technology PublicRelay created under prior SBIR awards; (3) OCPL’s requirement for similar services dates back to at least 2005, well before PublicRelay’s SBIR awards; and (4) SBA did not create this requirement using PublicRelay’s original concepts, findings, ideas, or research results.

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<sup>6</sup> The policy directive further states that a phase III award must be made in these circumstances to the greatest extent practicable and provides certain procedures where the agency chooses not to make a phase III award to the SBIR phase I or II awardee that developed the technology. For example, as referenced by the OIT Director, the policy directive mandates that agencies notify SBA of a decision to make an award for SBIR-developed technology to an entity other than the SBIR awardee that developed the technology, and permits SBA to appeal the decision. SBIR/STTR Policy Directive § 4(c)(7)(iv) and (v). The policy directive alternatively requires that agencies afford a preference for the SBIR-developed technology even in instances where a phase III awardee is not available, capable, and willing to perform the work, and making a sole-source award is not practicable. *Id.* § 4(c)(7)(iii).



AR, Tab 16, Letter from SBA Regarding Phase III Status, Oct. 5, 2022. SBA further stated that it understood PublicRelay “would use its SBIR developed technology if awarded this requirement, however, that is not the standard for whether an agency’s requirement meets the definition of a SBIR Phase III award.” *Id.*

We agree with the protester that the reasons stated in the October 5 letter do not conclusively demonstrate that OCPL’s requirement could not “extend” the SBIR work previously performed by PublicRelay. Nevertheless, where the agency is not specifically pursuing the production of technology developed under a prior SBIR phase I or II award, an agency has the discretion to fund such efforts only if it elects to do so. Thus, we need not resolve the question of whether OCPL’s requirement would extend PublicRelay’s SBIR-developed technology.<sup>7</sup>

We find the agency’s conduct of a competition unobjectionable. The protester has cited no authority that required SBA to give precedence to an SBIR phase III award above

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<sup>7</sup> Although cited by the agency to support its position, both parties challenge our decision in *Toyon Research Corp.*, B-409765, Aug. 5, 2014, 2014 CPD ¶ 235. See MOL at 10 (“[T]he standard applied in *Toyon* and [*ASRC Federal Data Network Techs., LLC*, B-418765, Aug. 28, 2020, 2020 CPD ¶ 339] is too narrow because an agency that is aware of a small business’ prior SBIR work could intentionally avoid an SBIR Phase III by drafting a solicitation to exclude any mention of an awardee’s original concepts, findings, research results, or ideas.”); Comments at 11 (“It is time for GAO to rethink the *Toyon* language. The ‘original concepts, findings, ideas, or research results’ language is found nowhere in the SBIR statute or the SBIR Policy Directive and has no basis in those authorities.”).

In *Toyon*, we denied a protest challenging the Army’s failure to pursue an SBIR phase III agreement with the protester despite *Toyon*’s performance of “nearly identical” work under prior SBIR awards. *Toyon, supra* at 1, 9. Specifically, we concluded that the Army’s requirement could not be said to “derive from, extend, or complete” *Toyon*’s prior SBIR awards where the protester could not demonstrate that the agency’s requirement incorporated the “original concepts, findings, ideas, or research results that *Toyon* generated through its SBIR work,” a decision with which SBA then disagreed. *Id.* at 11, 16 n.15. Since subsequent amendments to the Small Business Act and SBA’s reissuance of the SBIR/STTR Policy Directive do not require that “original concepts, findings, ideas, or research results” must clearly be identified in any agency’s requirement, it appears that the analysis in our decision in *Toyon* may have been superseded by the current SBIR/STTR Policy Directive, however, we need not resolve that issue here.

available alternative acquisition strategies. In sum, we find that SBA was not required to enter into good faith negotiations with PublicRelay.<sup>8</sup>

The protest is denied.

Edda Emmanuelli Perez  
General Counsel

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<sup>8</sup> To the extent that the protest also directly challenges the issuance of the order to Red Carrot, Inc., we find that PublicRelay is not an interested party to raise that challenge. A protester must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. 4 C.F.R. § 21.0(a). As noted, SBA sought competition among small business holders of MAS 541820 contracts--an approach which otherwise meets statutory requirements for full and open competition. 41 U.S.C. § 152; Federal Acquisition Regulation 6.102(d)(3). Given that SBA decided to procure its requirement using MAS procedures, and it is undisputed that PublicRelay is not an MAS contract-holder, PublicRelay is not an interested party to protest the order issued to Red Carrot, Inc. *Technical Assocs., Inc.*, B-406524, June 15, 2012, 2012 CPD ¶ 185 at 2.