U.S. GOVERNMENT ACCOUNTABILITY OFFICE

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Comptroller General
of the United States

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Decision

Matter of: Digital Force Technologies, Inc.

File: B-423319

Date: May 19, 2025

Michael D. McGill, Esq., and Kyung Liu-Katz, Esq., Arnold & Porter Kaye Scholar LLP, for the protester.
Colonel Nina R. Padalino, Lawrence M. Anderson, Esq., Hector Rivera-Hernandez, Esq., Katy A. Schwab, Esq., and Maxim V. Kidalov, Esq., Department of the Air Force, for the agency.
Raymond Richards, Esq., and John Sorrenti, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the issuance of a Small Business Innovation Research (SBIR) program phase III solicitation for a sole-source contract is denied where the record demonstrates that the agency is procuring work from a successor-in-interest entity that derives from, extends, or completes efforts of an acquired entity performed under prior SBIR contracts.

DECISION

Digital Force Technologies, Inc. (Digital Force), of San Diego, California, protests the issuance of Small Business Innovation Research program (SBIR) phase III sole-source solicitation No. FA2381-25-R-B004, to Clear Align, LLC, of Nashua, New Hampshire, by the Department of the Air Force. Digital Force contends that the SBIR phase III solicitation was improperly issued to Clear Align and that the agency is required to issue a competitive solicitation for its requirement.

We deny the protest.

BACKGROUND

The SBIR program is designed to increase the participation of small business concerns in federally funded research or research and development (R/R&D). *See* SBIR Program Act of 1982, 15 U.S.C. § 638 (the "SBIR statute"). 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. *See generally id.*

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). If this is successful, a firm may be invited to apply for a phase II award to further develop the concept. *Id.* § 638(e)(4)(B). A phase III award is defined as work that "derives from, extends, or completes efforts made under prior funding agreements under the SBIR program." *Id.* § 638(e)(4)(C). Under this phase, firms are expected to obtain funding from non-SBIR government sources or the private sector to develop the concept into a product for sale in private sector or military markets.

This protest involves the agency's requirement for a tactical security system (TSS). Contracting Officer's Statement (COS) at 2. Put simply, a TSS is a security and surveillance system. *See* Agency Report (AR), Tab 3, July 2023 Requirements Document at 2. Specifically, the agency's requirement is for an "increment 1" TSS which is described as a "modular, scalable, tailorable, lightweight, rapidly deployable, ground-based security and surveillance system." *Id.*; AR, Tab 34, Solicitation at 39.

The contemplated TSS will provide ground-based tactical security and surveillance capability to assist security forces defenders in protecting personnel and mission assets at remote deployment locations. AR, Tab 34, Solicitation at 39. The TSS will provide "site situational awareness" through a network including motion detection, video assessment, and other sensing technologies integrated with command and control capability and connectivity to patrolling defenders. *Id.* Key requirements for the increment 1 TSS involve minimum coverage range, radar coverage, image assessment sensors, ability to operate in high winds, and a maximum weight. COS at 2.

By way of background, in September of 2023, the agency sought to procure a different TSS, called increment 0. COS at 3. Based on its market research, the agency determined that Digital Force offered an "increment 0" TSS, and on September 29, 2023, the agency awarded Digital Force a sole-source contract for the increment 0 TSS. *Id.* at 3-4.

Also in September of 2023, the agency published a request for information (RFI) for the instant requirement, the increment 1 TSS. *Id.* at 4. Fourteen vendors responded, including Digital Force and Anduril Industries (Anduril).[1] *Id.* at 5. Clear Align did not respond to this RFI. *Id.*

Over the next several months, the Air Force continued its market research for the increment 1 TSS requirement. On January 18, 2024, the agency published a second RFI on SAM.gov, the governmentwide point of entry (GPE). *Id.* Ten vendors responded, including Digital Force, Anduril, and Clear Align. *Id.* at 5-8. Additionally, the

[1] As discussed later in this decision, Anduril (of Costa Mesa, California) is relevant to the procurement history. Anduril is not a party to this protest.

agency published the same RFI to the General Services Administration (GSA) website. *Id.* at 7. Four vendors responded to the RFI posted on GSA's website, none of which were Digital Force, Anduril, or Clear Align. *Id.* The agency also directly contacted interested vendors *via* email to share its systems requirement document (SRD) with those vendors and to solicit responses. *Id.* at 9.

Relevant here, the Air Force directly contacted Digital Force, Anduril, and Clear Align about the increment 1 TSS requirement and provided them with the agency's SRD. *Id.* at 9-11. Each of these firms responded to the inquiry. *Id.* The agency also provided another RFI to 16 small businesses that had expressed interest in the increment 1 acquisition. *Id.* at 11. Clear Align, a small business concern, received this RFI. *Id.* at 11-12.

Over the course of conducting its market research, the agency learned information which suggested that both Clear Align and Anduril could be eligible to receive an SBIR phase III award for the increment 1 TSS. *Id.* at 6, 12. On August 20, 2024, the agency decided to fulfill the increment 1 TSS requirement *via* an SBIR phase III award, rather than pursuing a competitive procurement such as a competition under Federal Acquisition Regulation part 15. *Id.* at 17. The agency then issued two sole-source SBIR phase III solicitations for the same increment 1 TSS requirement; one to Clear Align and one to Anduril. *Id.*

On September 3, Digital Force learned that the agency would pursue its increment 1 TSS requirement *via* an SBIR phase III award. *Id.* at 21. Ten days later, Digital Force filed an agency-level protest challenging the agency's decision to pursue an SBIR phase III award rather than conducting a competition for the TSS requirement.[2] *Id.* at 22; AR, Tab 21, Agency-Level Protest at 11-20.

The protester argued that the Air Force's increment 1 TSS requirement was not eligible to be awarded through a sole-source SBIR phase III solicitation because it did not derive from, extend, or complete efforts from a previous SBIR award, as (according to the protester) the requirement did not include original concepts, findings, ideas, or research results generated by a previous SBIR effort. AR, Tab 21, Agency-Level Protest at 14-15. Further, the protester claimed that the agency's use of SBIR authority was inappropriate because the requirement was for existing capabilities available from Digital Force and the commercial marketplace, and therefore the requirement should be competed. *Id.* at 15. According to Digital Force, SBIR phase III authority was not intended to apply to a scenario (like here) where competing technologies are available

[2] Digital Force also argued that the Air Force improperly failed to publish a notification of its sole-source justification to the GPE. AR, Tab 21, Agency-Level Protest at 18-19. The agency denied this protest ground, finding that it was not required to publish to the GPE a justification and approval document for actions related to an SBIR phase III award. AR, Tab 22, Agency-Level Protest Decision at 6-7. This protest ground is not included in the instant protest and therefore we do not address it further.

to meet the agency's need. *Id.* at 17. On September 23, the Air Force denied the agency-level protest. AR, Tab 22, Agency-Level Protest Decision at 7.

On October 3, Digital Force filed a protest with our Office, challenging the SBIR phase III solicitations issued to Clear Align and Anduril for the increment 1 TSS. COS at 23. In that protest, Digital Force challenged the Air Force's authority to procure the increment 1 TSS *via* an SBIR phase III award rather than a competitive acquisition. AR, Tab 23, First GAO Protest at 18-27. In response, the Air Force filed a notice of corrective action, stating that the agency would cancel the solicitations issued to Clear Align and Anduril, and issue a new solicitation that "more clearly addresses competition issues and best meets the needs of the Air Force." AR, Tab 26, Notice of Corrective Action at 2. On November 21, our Office dismissed the protest as academic. *Digital Force Techs., Inc.*, B-423029, Nov. 21, 2024 (unpublished decision).

As part of its corrective action, the Air Force canceled the solicitations issued to Clear Align and Anduril. COS at 24. The Air Force concluded that issuing a single SBIR phase III solicitation to Clear Align for the increment 1 TSS would address the identified competition concerns, as "there would not be any further confusion associated with the release of simultaneous sole source SBIR Phase III solicitations[.]" *Id.* at 25. On December 9, the Air Force decided to pursue the increment 1 TSS requirement *via* a single SBIR phase III solicitation issued to Clear Align. *Id.* On December 20, Clear Align submitted its proposal. *Id.* at 25-26.

On January 22, 2025, Digital Force requested a status update on the corrective action. AR, Tab 36, Email from Digital Force to Agency, Jan. 22, 2025. In response, the Air Force stated that it had canceled the solicitations issued to Clear Align and Anduril, reassessed its market research, and decided to issue a single SBIR phase III solicitation for the increment 1 TSS requirement. *Id.*, Email from Agency to Digital Force, Jan. 27, 2025. The agency subsequently confirmed that the new solicitation had been issued to Clear Align. *Id.*, Email from Agency to Digital Force, Jan. 30, 2025. The agency further stated that Clear Align's proposed solution derives from, extends, and completes work from two prior SBIR phase II awards; contract No. N68335-02-C-0404 and contract No. FA9453-08-C-0069. *Id.* The record reflects that no award has been made. AR, Tab 36, Email from Agency to Digital Force, Jan. 27, 2025; Memorandum of Law (MOL) at 6. On February 6, Digital Force filed the instant protest with our Office.

DISCUSSION

Digital Force challenges the Air Force's issuance of an SBIR phase III solicitation to Clear Align, arguing that the agency's requirement for an increment 1 TSS does not derive from, extend, or complete the relevant SBIR phase II efforts. The protester further argues that Clear Align is not eligible to receive an SBIR phase III award because the relevant SBIR phase II contracts were awarded to a firm called Computer Optics, not Clear Align, and Clear Align does not qualify as a successor-in-interest entity to Computer Optics. As relief, Digital Force requests the Air Force rescind the SBIR phase III solicitation and issue a competitive solicitation under which Digital Force can

compete. The Air Force defends its procurement on all grounds. As discussed below, we deny the protest.[3]

Contracting agencies have broad discretion to determine their needs and the best way to meet them. *Crewzers Fire Crew Transport, Inc.*, B-402530, B-402530.2, May 17, 2010, 2010 CPD ¶ 117 at 3. We have recognized this discretion with respect to the SBIR program, and in reviewing the propriety of a phase I or II SBIR award, we have found that our review is limited to determining whether the agency violated any applicable regulations or solicitation provisions or acted in bad faith. *Wang Electro-Opto Corp.*, B-418523, June 4, 2020, 2020 CPD ¶ 187 at 5; *U S Positioning Grp., LLC*, B-294027, June 21, 2004, 2004 CPD ¶ 133 at 3.

With respect to SBIR phase III, the SBIR statute and policy guidance provide relatively limited requirements to justify an award. The relevant portion of the statute states that the SBIR program will include, "where appropriate, a third phase for work that derives from, extends, or completes efforts made under prior funding agreements under the SBIR program in which commercial applications of SBIR-funded research or research and development are funded by non-Federal sources of capital or, for products or services intended for use by the Federal Government, by follow-on non-SBIR Federal funding awards[.]" 15 U.S.C. § 638(e)(4)(C). The statute further states that "[t]o the greatest extent practicable, Federal agencies . . . shall . . . issue, without further justification, Phase III awards relating to technology, including sole source awards, to the SBIR . . . award recipients that developed the technology. *Id.* § (r)(4).

The policy directive defines SBIR phase III work in a similar manner. SBIR/Small business Technology Transfer (STTR) Policy Directive (May 2023) § 4(c) ("Phase III refers to work that derives from, extends, or completes an effort made under prior SBIR/STTR Funding Agreements"). The policy directive clarifies that a federal agency may enter an SBIR phase III agreement at any time with an SBIR phase II awardee and explains that an SBIR phase III awardee may be a party that received an SBIR phase I or phase II award, been novated a phase I or phase II award, or is a successor-in-interest entity. *Id.*

Given these limited requirements and the significant discretion afforded to agencies in this area, the core issues we must resolve are whether the Air Force reasonably concluded that Clear Align's increment 1 TSS derives from, extends, or completes efforts made under prior SBIR awards and whether Clear Align qualifies as a successor in interest entity to Computer Optics, which completed the prior SBIR efforts. As discussed below, we deny the protest.

[3] Digital Force raises other collateral arguments. Although our decision does not address each argument raised, we have reviewed them all and find that none provide a basis to sustain the protest.

Eligibility for an SBIR Phase III Award

The protester first contends that the relevant authority requires the agency to define its SBIR phase III requirement to derive from, extend, or complete prior SBIR efforts and that here, the Air Force's requirement as described in the solicitation and market research documents does not derive from, extend, or complete prior SBIR efforts. Second, Digital Force contends that Clear Align's proposed increment 1 TSS is ineligible for an SBIR phase III award because it allegedly does not derive from, extend, or complete a prior SBIR effort.

Challenge to the Agency's Requirement

As stated above, the protester argues the agency's *requirement* must derive from, extend, or complete prior SBIR efforts, and that just because a proposed solution may derive from, extend, or complete a prior SBIR effort, that does not mean the requirements qualify for a SBIR phase III acquisition. Protest at 22-25; Comments at 4. In this context, the protester asserts that the solicitation states general requirements for an increment 1 TSS solution that were developed separately from and without reference to prior SBIR efforts. Protest at 24. As a result, Digital Force maintains that the requirements themselves do not derive from, extend, or complete a prior SBIR effort. In other words, Digital Force contends that the requirement as described by the agency--as opposed to the solution proposed by Clear Align--must show that it derives from, extends, or completes a prior SBIR effort.

The Air Force disagrees. As an initial note, the agency does not contest the protester's contention that its requirement does not derive from a prior SBIR effort. However, the agency asserts the protester incorrectly focuses the analysis on the agency's requirements rather than on the work to be acquired. COS at 28; MOL at 14. The Air Force argues that the SBIR statute and the SBIR/STTR policy directive require SBIR phase III awards to be for *work* that derives from, extends, or completes prior SBIR efforts, not for *requirements* that derive from, extend, or complete prior SBIR efforts. MOL at 14; *see* 15 U.S.C. § 638 (e)(4)(C) (phase III is "for work that derives from, extends, or completes efforts[.]"); SBIR/STTR Policy Directive (May 2023) § 4(c) ("Phase III refers to work that derives from, extends, or completes an effort"). As discussed below, we agree with the Air Force.

Our analysis begins with the interpretation of the relevant statute. *See Curtin Mar. Corp.*, B-417175.2, Mar. 29, 2019, 2019 CPD ¶ 117 at 9. In construing the statute, the 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. *PublicRelay*, B-421154, B-421154.2, Jan. 17, 2023, 2023 CPD ¶ 23 at 5. 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. *Id.* If the statutory language is clear and unambiguous, the inquiry ends with the plain meaning. *Id.* Our Office likewise applies the "plain meaning" rule of statutory interpretation. *Id.*

The SBIR statute explains that the SBIR program includes a phased structure including: "where appropriate, a third phase for 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). The statute further states that "[t]o the greatest extent practicable, Federal agencies . . . shall . . . consider an award under the SBIR program . . . to satisfy [relevant competition requirements]; and . . . issue, without further justification, Phase III awards relating to technology, including sole source awards, to the SBIR . . . award recipients that developed the technology." *Id.* § (r)(4).

While not a regulation, the SBIR/STTR policy directive provides interpretive guidance and states in relevant part:

> (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 (May 2023) § 4(c). 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).

Based on the authority and guidance cited above, we find that SBIR phase III unambiguously refers to the work to be acquired, not the agency's requirement. Indeed, the statute and the policy directive each expressly use the word "work" when explaining SBIR phase III; they do not mention the agency's requirement. 15 U.S.C. § 638(e)(4)(C); SBIR/STTR Policy Directive (May 2023) § 4(c). Therefore, we agree with the Air Force's interpretation of the SBIR phase III authority; a proper SBIR phase

III award is for *work* that derives from, extends, or completes a prior SBIR effort.[4] Accordingly, we deny the protest ground arguing that the Air Force improperly issued an SBIR phase III solicitation to Clear Align because the agency's *requirement* does not derive from, extend, or complete a prior SBIR effort. Digital Force's protest ground misapplies the relevant law and policy directive and therefore does not provide a basis to sustain the protest.[5]

Challenge to the Work to be Procured: Clear Align's Proposed Increment 1 TSS

Digital Force argues that the Air Force has not properly determined that Clear Align's proposed increment 1 TSS in fact derives from, extends, or completes the prior relevant SBIR phase II efforts. Protest at 27-31; Comments at 21-29, 32-38. First, the protester argues that Clear Align's increment 1 TSS does not qualify for an SBIR phase III award because the record does not demonstrate the required link between the prior SBIR efforts and the proposed increment 1 TSS. Protest at 28-29; Comments at 24-29. In support of this argument, the protester asserts that the Air Force did not review the prior SBIR phase II efforts to understand what was developed, nor did the Air Force review the proposed increment 1 TSS to ensure it derived from, extended, or completed those SBIR phase II efforts. Comments at 21-29. Second, Digital Force argues that the Air Force is improperly using SBIR phase III authority because only a single component of the system to be acquired could possibly derive from, extend, or complete the relevant prior SBIR efforts. Protest at 27-31; Comments at 32-38. Prior to discussing the arguments, for context, we provide a brief explanation of the solicitation and Clear Align's proposed increment 1 TSS.

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[4] We note that Digital Force recognizes this distinction in other areas of its pleadings. *See e.g.*, Comments at 21 ("The Air Force does not dispute that . . . the acquisition must involve 'work that derives from, extends, or completes efforts'").

[5] The protester's focus on the agency's requirements, as opposed to Clear Align's work, may be a distinction without a difference. In this regard, an agency's requirements are not necessarily irrelevant to the determination of whether a procurement can properly be awarded as an SBIR phase III. Indeed, in some cases we have analyzed the agency's requirements in SBIR phase III matters. *See, e.g.*, *Toyon Research Corporation*, B-409765, Aug. 5, 2014, 2014 CPD ¶ 235 (*Toyon*); *PublicRelay*, *supra*. In those cases, the protesters argued that the agency's requirements actually required the award of SBIR phase III agreements on sole-source bases to the respective protester, and therefore we necessarily focused our analysis on the agency's requirements. However, as explained above, the statute and policy directive clearly state that SBIR phase III refers to the work that will be performed. Therefore, while an agency's requirements may be relevant to the analysis of whether a procurement constitutes an SBIR phase III procurement, the requirements themselves do not need to derive from, extend, or complete a prior phase I or II effort in order for an agency to properly use SBIR phase III.

As noted above, the agency issued a solicitation to Clear Align requesting a proposal to deliver the TSS, "which shall contain SBIR-derived technology." AR, Tab 34, Solicitation at 5. The solicitation instructed Clear Align to submit three volumes. *Id.* As relevant here, the third volume had to contain "all information regarding Clear Align's SBIR-derived technology in its []-TSS solution." *Id.* at 8. This volume had to identify the SBIR-derived components and relevant SBIR awards, explain how the identified components derived from the relevant SBIR phase I or II awards, and include any test or production documentation associated with the relevant SBIR phase I or II awards. *Id.*

In its proposal, Clear Align stated that its proposed increment 1 TSS system is called the Mamba. AR, Tab 35, Clear Align Proposal at 4. Clear Align described the Mamba as a "turnkey" solution meeting all of the Air Force's operational and technical requirements as described in the SRD and statement of work. *Id.* The Mamba includes an image assessment sensor on a pan tilt unit based on Clear Align's Z 320 medium wave infrared (MWIR) camera. *Id.* According to Clear Align, the Z 320 MWIR camera implements technology from two prior SBIR efforts, SBIR topic No. N-01-016 and SBIR topic No. AF071-280, resulting in contract No. N68335-02-C-0404 and contract No. FA9453-08-C0069, respectively.[6] *Id.* at 103-104; *see also* COS at 31.

Under SBIR topic No. N01-016, Clear Align developed optical fabrication processes for infrared materials (specifically, germanium). AR, Tab 35, Clear Align Proposal at 104. Under this topic, optical polishing techniques were developed which enabled accurate polishing of large optical components. *Id.* Clear Align also developed optical coating removal processes, and optical coatings with increased optical efficiency and durability. *Id.*

Under SBIR topic No. AF071-280, Clear Align designed a broadband image optic using a high performance opto-mechanism design to receive information using a multi-band sensor. *Id.* at 105. Under this topic, engineering principles and designs were developed to allow smaller and more cost-effective optical systems to be designed and built which would maintain imaging performance over a wide temperature range. *Id.*

Clear Align's proposal stated that following its prior SBIR efforts, it continued to invest in zoom lens design and fabrication methods to further advance zoom lens technology to create higher-performance infrared zoom cameras. *Id.* at 107. Clear Align explained that its current generation of zoom cameras are high-definition systems that use small pixel pitch technology to offer image clarity and range performance. *Id.* The firm further stated that key design concepts from the prior SBIR efforts have been refined and are embedded into its current generation of cameras. *Id.* at 107.

[6] There is no dispute that the prior SBIR efforts were completed by Computer Optics, not Clear Align. However, for simplicity and because Clear Align was issued the solicitation as a successor-in-interest entity to Computer Optics, our discussion in this area references the prior SBIR efforts as completed by Clear Align.

Digital Force argues that Clear Align's proposed TSS solution does not qualify for an SBIR phase III award because it does not derive from, extend, or complete a prior SBIR effort and that the record does not support the Air Force's conclusion that an SBIR phase III award is proper. As previously noted, the Air Force issued the instant SBIR phase III solicitation to Clear Align based on two prior SBIR phase II efforts completed by a firm called Computer Optics, under a theory that Clear Align is a successor-in-interest entity to Computer Optics. COS at 31-34.

Digital Force argues the record does not support a conclusion that the Air Force reviewed the relevant SBIR phase II efforts before determining that Clear Align's proposed SBIR phase III increment 1 TSS derived from, extended, or completed those prior SBIR efforts. Comments at 21-24. Rather, Digital Force contends that the agency simply accepted--without any scrutiny--Clear Align's explanation in its proposal that its increment 1 TSS solution derives from, extends, or completes work from its prior SBIR efforts.

Digital Force also argues that the Air Force is improperly using SBIR phase III to acquire a system where only a single component of the system could possibly derive from, extend, or complete the relevant prior SBIR efforts--the Z 320 MWIR camera. Protest at 27-31; Comments at 32-38. The protester argues that even if the Z 320 MWIR camera qualifies as deriving from a prior SBIR effort (which it contests), the Air Force cannot properly use SBIR phase III authority to procure its entire TSS system where the only component of the system deriving from the SBIR program might be the Z 320 MWIR camera. Comments at 32.

In raising this challenge, Digital Force contends that Clear Align's increment 1 TSS is not an SBIR-derived product because it consists of several discrete components, many of which are commercially available off-the-shelf (COTS) items available from multiple sources, and that the only components provided by Clear Align itself are the Z 320 MWIR camera and an electro-optic camera. *Id.* at 32-33. For example, Digital Force highlights Clear Align's proposed use of COTS components in its overall system including a ruggedized laptop, a ruggedized tablet, radios, cables, ancillary equipment, and a lift mast. *Id.* at 33.

According to the protester, here, the Air Force is improperly using SBIR phase III authority to procure work (*i.e.*, the COTS items included in the TSS) which does not derive from, extend, or complete the prior SBIR effort. *Id.* at 34. As a hypothetical example to illustrate its point, Digital Force argues that under the Air Force's interpretation of the SBIR statute, a large defense contractor could purchase the rights to Clear Align's Z 320 MWIR camera, install the camera on a C-40 aircraft, and win an SBIR phase III award for the Air Force's C-40 fleet expansion program. *Id.* at 36-37 n.115.

The Air Force defends its procurement. MOL at 17-21. According to the agency, the record clearly demonstrates that the SBIR phase III solicitation was properly issued to

Clear Align for work that derives from, extends, or completes prior SBIR efforts. *Id.* at 18.

The Air Force notes that the SBIR statue describes the SBIR program as including a third phase for work that derives from, extends, or completes prior SBIR efforts, but argues that the statute does not "define or explain" the meaning of that language. *Id.* at 18. Based on the statutory language, the Air Force asserts that procuring agencies have broad discretion to assess how an underlying SBIR effort is "essential to the goal of a SBIR Phase III contract[,]" and that, contrary to the protest ground, nothing in the relevant authority suggests that "an entire solution or set of requirements must be wholly derived from the underlying effort." *Id.* at 20. Furthermore, the Air Force argues that the record contains sufficient documentation explaining how Clear Align's proposed increment 1 TSS was considered and how it was determined that SBIR phase III authority properly applies to the instant procurement. *Id.* at 21. As discussed below, we find no basis to sustain the protest.

With respect to an SBIR phase III award, our Office has previously found that to show one effort derives from, extends, or completes another, "it must be evident that the requirements for the second effort incorporated original concepts, findings, ideas, or research results that were generated in the first." *ASRC Federal Data Network Technologies, LLC*, B-418765, Aug. 28, 2020, 2020 CPD ¶ 339 at 6 (citing *Toyon* at 16 n.15; *see also PublicRelay*, *supra* at 9 n.7. As discussed more below, we find that the "original concepts, findings, ideas, or research results" language is not, however, the appropriate test for the instant protest given its posture. That is, here, we are examining whether proposed work derives from, extends, or completes prior SBIR efforts; we are not examining whether the agency's stated requirement derives from prior SBIR efforts.

Relying on the language in *Toyon* and *PublicRelay*, Digital Force argues that this procurement does not qualify for SBIR phase III because the agency's requirement does not incorporate original concepts, findings, ideas, or research results that were generated in Clear Align's prior SBIR phase II efforts. Protest at 23-27; Comments at 30-32. However, as explained above, SBIR phase III refers to work that derives from, extends, or completes efforts performed under prior SBIR phase I or II awards. An agency's requirements are not dispositive as to whether a procurement can utilize SBIR phase III.

Moreover, in *Toyon* and *PublicRelay*, our Office was analyzing protests arguing that the agency was required to award SBIR phase III agreements to the respective protesters. The protesters argued that they should have received sole-source awards because the agency sought contractors to perform requirements that the protesters argued were derived from the work the protesters had completed under prior SBIR efforts, or that the agency was requiring the contractors to extend or complete the work they had previously done. Accordingly, our focus was on whether the government's requirements were based on work previously done by the protesters.

In contrast, here, the agency is making a sole-source award to Clear Align for its proposed TSS solution, which is based on work Clear Align has proposed in order to meet the agency's operational requirement. In this context, the relevant question is whether that proposed solution derives from, extends, or completes efforts performed under the relevant SBIR phase II awards. Accordingly, we do not agree with the protester that the litmus test for determining whether this solicitation is properly issued using SBIR phase III is whether the agency's requirements incorporate original concepts, findings, ideas, or research results that were generated in prior SBIR phase I or II efforts.[7]

In this posture, and given the broad language used by the SBIR statute and the SBIR/STTR policy directive to describe SBIR phase III and the lack of a precise explanation as to what qualifies as work deriving from, extending, or completing a prior SBIR effort, we will review the record to determine whether the agency reasonably concluded that this procurement qualifies under SBIR phase III in a manner that is consistent with all applicable laws and regulations.[8]

As detailed above, the instant solicitation was issued to Clear Align following several months of market research. The contracting officer explains that in determining whether SBIR phase III authority could be used for the instant procurement, the agency concluded that Clear Align's increment 1 TSS constituted work deriving from two prior SBIR-funded efforts; contract No. N68335-02-C-0404 and contract No. FA9453-08-C-0069. COS at 28. As part of this analysis, the agency prepared an SBIR phase III determination and findings (D&F), and a commercial item D&F, on Clear Align's increment 1 TSS. AR, Tab 33, SBIR Phase III D&F; AR, Tab 32 Commercial Item D&F.

In the SBIR phase III D&F, the agency concluded that Clear Align's TSS derives from prior SBIR efforts and that Clear Align is therefore eligible for a sole-source contract

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[7] Moreover, we clarify that the test in *Toyon* represented one potential approach to determine whether a procurement qualifies under SBIR phase III when analyzing an agency's requirements. That is, whether those requirements incorporate original concepts, findings, ideas, or research results. We think such an approach provides a reasonable assessment of whether the agency intends to procure a solution from contractors that derives from, extends, or completes prior SBIR phase I or II efforts based on a review of the agency's requirements. Here, the analysis is focused on whether the agency reasonably concluded that Clear Align's proposed work--the TSS--derived from, extended, or completed efforts performed under prior SBIR awards.

[8] We note that the SBIR/STTR policy directive provides three "types of activit[ies]" that constitute SBIR phase III work, but no precise explanation. SBIR/STTR Policy Directive (May 2023) §§ 4(c)(1)(i)-(iii). For example, the policy directive lists as a type of activity constituting SBIR/STTR phase III work, "SBIR/STTR-derived products or services intended for use by the Federal Government, funded by non-SBIR/STTR sources of Federal funding." *Id.* § (4)(c)(1)(ii).

pursuant to 15 U.S.C. section 638(r)(4). AR, Tab 33, SBIR Phase III D&F at 4; *see* 15 U.S.C. § 638(r)(4) (stating that to the greatest extent practicable, federal agencies shall issue, without further justification, phase III awards relating to technology, including sole-source awards, to the SBIR award recipient that developed the technology). Included as attachments in the SBIR phase III D&F are copies of the prior SBIR efforts performed by Computer Optics, the firm subsequently acquired by Clear Align. AR, Tab 33, SBIR Phase III D&F at 165-194 (contract No. FA9453-08-C-0069), 221-264 (contract No. N68335-02-C-0404).

The SBIR phase III D&F memorialized the agency's consideration of the relevant SBIR phase II efforts and explained their relevance to the instant procurement. *Id.* at 2-4. First, the D&F explained that work performed under contract No. FA9453-08-C-0069 facilitated the development of engineering principles and designs that enabled a smaller and more cost-effective Z 320 MWIR camera system that will be provided in Clear Align's TSS. *Id.* at 2-3, 220. Second, the D&F explained that contract No. N68335-02-C-0404 resulted in three developments which were incorporated into Clear Align's TSS: accurate polishing of infrared materials, enhanced durability of optical anti-reflection infrared coatings, and optical fabrication of infrared components with challenging geometries and high levels of curvature. *Id.* at 4. The agency ultimately concluded that Clear Align's proposed TSS "directly benefits from the work performed under the two SBIR Phase II awards" because those prior SBIR efforts "enhanced the performance, manufacturability, and environmental resistance of the Z 320 MWIR camera[.]" *Id.*

In the commercial item D&F, the agency determined that Clear Align's increment 1 TSS met the definition of a commercial product with minor modifications. AR, Tab 32, Commercial Item D&F at 2. In reaching this conclusion, the agency found that Clear Align's TSS was assigned commercial part number VZ320HD-3000, the TSS included Clear Align's Z 320 MWIR camera, which has been commercialized since 2023, the Z 320 MWIR camera used for the TSS included a minor modification to meet size and weight requirements established in the agency's SRD, and that the minor modification did not alter the essential characteristics of the Z 320 MWIR camera. *Id.* at 2-3. The agency found that the SBIR-derived component of the TSS, the Z 320 MWIR camera, accounted for 32 percent of the total cost per TSS unit, and that the TSS included other major components that are COTS items. *Id.* at 3-4.

As discussed above, Digital Force argues that the Air Force unreasonably concluded (and insufficiently documented its conclusion) that Clear Align's solution qualified for an SBIR phase III award. The protester also argues that the agency is improperly using SBIR phase III authority to acquire a system largely composed of COTS components where only a single component of the system, the Z 320 MWIR camera, could have possibly derived from, extended, or completed the relevant prior SBIR efforts. Protest at 27-31; Comments at 21-29, 32-38. We have reviewed these challenges and find no basis to sustain the protest. Based on our review of the record, we decline to disturb the Air Force's conclusion that Clear Align's increment 1 TSS derives from, extends, or

completes prior SBIR efforts. The record shows that the agency reasonably concluded Clear Align's proposed solution derives from work developed under prior SBIR efforts.

Contrary to Digital Force's arguments, the record includes sufficient evidence and support showing how the Air Force reached its conclusion that the proposed increment 1 TSS derived from a prior SBIR effort. This includes copies of the prior SBIR contracts, which list the details of the work to be completed under those contracts, a copy of the SBIR phase III solicitation for the increment 1 TSS, a copy of Clear Align's proposed increment 1 TSS, an explanation of the SBIR-derived technology in Clear Align's proposed solution, and D&F documents evaluating the proposed increment 1 TSS against the prior SBIR efforts. AR, Tab 33, SBIR Phase III D&F at 1-4 (analysis), 165-194 (contract No. FA9453-08-C-0069), 221-264 (contract No. N68335-02-C-0404); AR, Tab 34, Solicitation; AR, Tab 35, Clear Align Proposal.

As previously discussed, the SBIR statute and policy directive set forth very limited requirements to justify an SBIR phase III solicitation or award. The record here contains ample documentation and evidentiary support showing how the Air Force reasonably concluded that Clear Align's proposed increment 1 TSS derives from the relevant prior SBIR phase II contracts.

To the extent that Digital Force criticizes the agency's review of the prior SBIR phase II efforts or its review of Clear Align's proposal, we find that such criticism amounts to disagreement with the agency's judgments which does not provide a basis to sustain this protest. *See MiMoCloud*, B-419482, Mar. 25, 2021, 2021 CPD ¶ 157 at 7. While the protester may wish the agency had done more independent research or analysis by going outside of the contents of Clear Align's proposal in some way, the protester cites no authority requiring such an effort.[9]

In addition, we find no basis to sustain the protester's argument that the agency is improperly using SBIR phase III to procure a system that is made up of COTS components and only a single component could qualify for an SBIR phase III award. In this regard, Digital Force points to no statue, regulation, or other legal authority stating that an agency may not use SBIR phase III authority to procure a system where only a component of the overall system derives from, extends, or completes a prior SBIR effort. Here, the agency is procuring a security system that requires, for example, surveillance capability, motion detection, video assessment, and sensing technologies, and Clear Align is providing within its overall system, an SBIR-derived camera. AR, Tab 34, Solicitation at 39; AR, Tab 35, Clear Align Proposal at 4. Thus, the SBIR-derived component is reasonably related to the overall objective of the system the agency seeks to procure. Accordingly, this procurement is not similar to Digital Force's hypothetical example and cautionary tale involving the Air Force's C-40 fleet expansion program.

[9] For example, Digital Force opines that the Air Force could have produced evidence that engineers "performed a technical analysis" of the Z 320 MWIR camera. Comments at 26.

In sum, there simply is no requirement in statute or the policy directive that the entirety of a phase III solution must be derived from prior SBIR efforts. As such, we find that the Air Force reasonably concluded Clear Align's proposed increment 1 TSS derived from the relevant SBIR phase II efforts, and that the record sufficiently supports the agency's conclusion. This protest ground is denied.

SBIR Phase III Successor-in-Interest Entities

Digital Force argues that Clear Align is not eligible to receive an SBIR phase III contract because Clear Align is not a proper successor-in-interest entity to Computer Optics, the firm that completed the prior SBIR phase II efforts. Protest at 20 n.61; Comments at 16-21. In this regard, Digital Force argues that Clear Align does not meet the definition of a successor-in-interest entity, as defined by the SBIR/STTR policy directive. Comments at 19-21. Digital Force alleges that the record does not support a conclusion that Clear Align acquired Computer Optics and that Clear Align's proposal misrepresents the merger of the relevant companies. *Id.* at 16-18. As discussed below, we deny the protest.[10]

Relevant here, the SBIR statue includes the following language:

> In general. In the case of a small business concern that is awarded a funding agreement for Phase II of an SBIR or STTR program, a Federal agency may enter into a Phase III agreement with that business concern for additional work to be performed during or after the Phase II period.
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> * * * * *
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> To the greatest extent practicable, Federal agencies . . . shall . . . 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.

[10] Digital Force also challenges the agency's reliance on the SBIR/STTR policy directive's guidance for successor-in-interest firms. Comments at 18-19. According to the protester, the SBIR/STTR policy directive conflicts with the SBIR statute, which, according to the protester, does not contemplate SBIR phase III awards to any business concern other than the concern that completed the prior SBIR effort. *Id.* (citing 15 U.S.C. § 638(r)(1)); *see* SBIR/STTR Policy Directive (May 2023) § 6(a)(5). We dismiss this protest ground as untimely. 4 C.F.R. § 21.2(a)(2). In the protest, Digital Force recognized the relevance of Clear Align's status as a successor-in-interest entity to Computer Optics but did not challenge the SBIR/STTR policy directive's guidance on success-in-interest firms as inconsistent with the SBIR statute. Protest at 20 n.61. Because the challenge appears for the first time in Digital Force's comments on the agency report, it is untimely. 4 C.F.R. § 21.2(a)(2).

15 U.S.C. §§ 638(r)(1), (4).

In implementing the SBIR statute, the SBIR/STTR policy directive explains that:

> An SBIR/STTR Awardee may include, and SBIR/STTR work may be performed by, those identified via a "novated" or "successor in interest" or similarly-revised Funding Agreement. For example, a Phase III Awardee may have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award (or received a revised Phase I or Phase II award if a grant or cooperative grant) or be a successor-in-interest entity.

SBIR/STTR Policy Directive (May 2023) § 6(a)(5).[11]

As previously discussed, the agency determined that Clear Align's proposed increment 1 TSS included work deriving from two prior SBIR efforts. *See* AR, Tab 35, Clear Align Proposal at 103-104; *see also* COS at 31. There is no dispute that these prior SBIR efforts were completed by Computer Optics. *See* AR, Tab 33, SBIR phase III D&F at 165 (showing contract No. FA9453-08-C-0069 issued to Computer Optics); *Id.* at 221 (showing contract No. N68335-02-C-0404 issued to Computer Optics). Accordingly, the question we must answer is whether Clear Align properly qualifies as an eligible SBIR phase III awardee on the theory that it is a successor-in-interest entity to Computer Optics.

Clear Align's proposal explained that Clear Align acquired the assets of Computer Optics on March 26, 2013. AR, Tab 35, Clear Align Proposal at 108. The proposal stated that all "intellectual property including, without limitation, patents, computer software, data, trademarks, trade secrets, know-how, processes, formulae, designs, drawings, and technical data were assigned to Clear Align, LLC at the closing of the sale." *Id.* Included as an attachment to the proposal was an excerpt of the asset purchase agreement entered into between Clear Align and Computer Optics.[12] *Id.* at 109-110.

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[11] When the SBA updated this language regarding a successor-in-interest, it stated that "[a]n entity may be considered a successor-in-interest, if it has secured the transfer of: (1) All the small business concern's assets; or (2) the entire portion of the assets involved in performing the award." Small Business Innovation Research Program and Small Business Technology Transfer Program Policy Directive, 85 Fed. Reg. 50062, 50063 (Aug., 17, 2020). However, we note that this language does not appear in the current version of the SBIR/STTR policy directive. In fact, the SBIR/STTR policy directive does not provide a definition of, or any examples of what qualifies as, a successor-in-interest entity. *See* SBIR/STTR Policy Directive (May 2023) § 6(a)(5).

[12] A full copy of the asset purchase agreement is included as part of the record. AR, Tab 33, SBIR phase III D&F at 195-216.

Relevant here, the asset purchase agreement referred to Clear Align as "Buyer," Computer Optics as "Seller," and stated that "Seller . . . owns and operates a high-tech optics business (the 'Business')." *Id.* at 109. The asset purchase agreement stated that "Buyer desires to purchase from Seller, and Seller desires to sell to Buyer, substantially all of the assets of Seller relating to the Business, and Buyer intends to thereafter operate the Business as a division of Buyer (the '*Computer Optics Division*')." *Id.* The asset purchase agreement further stated that:

> Seller shall sell and assign to Buyer, and buyer shall purchase and acquire from Seller, free and clear . . . the following assets[]:
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> * * * * *
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> all intellectual property used or usable in connection with the Business, including, without limitation, patents, computer software and data, trademarks, trade styles, trade secrets, know-how, processes, formulae, designs, drawings, technical data, domain names, websites, and the names "Computer Optics, Inc.", "Computer Optics", "IR Zoom", and "Hudson Machine" (and any variations thereof).

Id. at 109-110 (section 1.1).

In its SBIR phase III D&F, the Air Force recognized the "key SBIR-derived component included in Clear Align's proposed [increment 1 TSS] is the Z 320 [MWIR] camera[.]" AR, Tab 33, SBIR Phase III D&F at 2. The Air Force also recognized the relevant SBIR phase II awards were performed by Computer Optics. *Id.* at 2-3. Based on its review of the above referenced asset purchase agreement, the Air Force concluded that Clear Align was properly considered a successor-in-interest entity to Computer Optics because Clear Align had acquired the assets of Computer Optics, to include all of Computer Optics' intellectual property, and that Clear Align was eligible for an SBIR phase III award based on the prior SBIR efforts completed by Computer Optics. *Id.* at 2-4.

Digital Force challenges the agency's conclusion that Clear Align is an eligible SBIR phase III awardee under a successor-in-interest theory. Comments at 16-21. The protester raises multiple challenges in this regard but the gravamen is that Clear Align's proposal and the asset purchase agreement included in the record do not sufficiently establish that Clear Align acquired Computer Optics or the relevant SBIR phase II awards. *See id.* For example, Digital Force argues that Computer Optics still exists as a discrete business concern and therefore Clear Align could not have acquired Computer Optics. *Id.* at 17. As another example, Digital Force contends that the asset purchase agreement does not clearly define what intellectual property was conveyed from Computer Optics to Clear Align in the 2013 transaction because the agreement stated that Clear Align acquired intellectual property used in connection with "the Business" but did not specify which business. *Id.*

The Air Force argues that the record supports its conclusion that Clear Align is a successor-in-interest entity to Computer Optics for the purpose of SBIR phase III eligibility. Supp. COS at 2-4. The agency argues that the record shows Computer Optics "no longer exists as a separate entity, but began operating as a division under Clear Align upon completion of the Asset Purchase Agreement." *Id.* at 3. The agency further argues that Clear Align acquired substantially all of Computer Optics' assets relating to "the Business," which included all of Computer Optics' intellectual property. *Id.* at 3-4. The agency maintains that it properly reviewed and relied upon the asset purchase agreement executed between Clear Align and Computer Optics, and reasonably concluded that based on that agreement, Clear Align is a successor-in-interest entity to Computer Optics for the purpose of the instant SBIR phase III solicitation. *Id.* at 4.

Based on our review of the record, we agree with the Air Force. We find no basis to question the agency's conclusion that Clear Align is a proper successor-in-interest entity to Computer Optics. Here, the agency reasonably relied on Clear Align's proposal and the asset purchase agreement included in the proposal to find that Clear Align had acquired Computer Optics. The proposal states that Clear Align acquired Computer Optics on March 26, 2013, and that as part of this acquisition, Clear Align acquired all of Computer Optics' intellectual property. AR, Tab 35, Clear Align Proposal at 108. This assertion is supported by the contents of the asset purchase agreement. *See id.* at 109-110; *see also* AR, Tab 33, SBIR phase III D&F at 195-216 (complete copy of the asset purchase agreement).

While Digital Force disagrees that the agency properly recognized Clear Align as a successor-in-interest entity, it has not demonstrated that the agency acted unreasonably. Other than challenging the legal sufficiency of the asset purchase agreement, Digital Force provides no support for its contention that Computer Optics still exists as a discrete business concern or why this would disqualify Clear Align as a successor-in-interest even if it did. *See e.g.*, Comments at 17, 20; Resp. to Supp. Briefing at 5-7.

To the extent Digital Force contends that the asset purchase agreement did not specify from which business or intellectual property would be acquired, the protester attempts to introduce ambiguity where there is none. *Id.* at 7-10. The asset purchase agreement defined Computer Optics' "high-tech optics business" as "the Business." There is no other business referenced in the agreement or reason to believe that this definition did not encompass all of Computer Optics' business. Further, as detailed above, the asset purchase agreement stated that the "Buyer shall purchase and acquire from Seller . . . all intellectual property used or usable in connection with the Business[.]" AR, Tab 35, Clear Align Proposal at 109-110. Given that the asset agreement defined only one "Business," we have no reason to believe that "all intellectual property" did not include Computer Optic's intellectual property resulting from the prior SBIR efforts.

In sum, in accordance with the SBIR/STTR policy directive, we find that the Air Force properly issued the SBIR phase III solicitation for the increment 1 TSS to Clear Align as

the successor-in-interest entity to Computer Optics. SBIR/STTR Policy Directive (May 2023) § 6(a)(5). While Digital Force contests the Air Force's conclusion that the asset purchase agreement demonstrated Clear Align's acquisition of Computer Optics, the protester has not established that the agency's conclusion was erroneous or otherwise contrary to relevant law or regulation. Absent such a clear showing, we decline to sustain the protest on this basis.

The protest is denied.

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