UNITED STATES GOVERNMENT

GENERAL ACCOUNTING OFFICE

Memorandum

March 12, 1985

TO : Director, RCED - J. Dexter Peach

FROM : General Counsel - Harry R. Van Cleve
Harry R. Van Cleve

SUBJECT: Legal Questions Related to Implementation of the Small Business Innovation Development Act of 1982 - B-209790-O.M.

Your division is assessing the implementation of the Small Business Innovation Development Act of 1982, Pub. L. No. 97-219, 96 Stat. 217, which amended section 9 of the Small Business Act, 15 U.S.C. § 638 Code 005707). The Act establishes a Small Business Innovation Research (SBIR) program modeled after one established by the National Science Foundation. Agencies with extramural research or research and development (R&D) budgets over $100 million a year are required to reallocate a percentage of these budgets to fund the SBIR programs. Additionally, there is a separate requirement for agencies with budgets for research or R&D of over $20 million a year. They must establish goals for small business awards based on the preceding year's awards to small business.

Incident to the assessment, your staff asked a number of questions relating to the Act. A memorandum from Evaluator W.L. Jenkins, Jr. to Senior Attorney Stanley G. Feinstein, dated December 14, 1984, includes nine questions which are addressed below.

Question 1: "Should the 'budget' figures used to compute SBIR set-asides and agency 'goals' [as those terms are used in the law] be expenditures or obligations? (The set-aside provisions seem to indicate obligations while the goaling provisions seem to indicate expenditures)."

Answer: Although the term "expend" is used in the statute, if read in context, it is obligations rather than actual payments which are to be the basis for each program.

Section 9(f)(1) of the Small Business Act, as amended, requires a Federal agency with an extramural budget for research or R&D in excess of $100 million in fiscal year 1982 or thereafter, to "expend" in the subsequent fiscal year not less than a stated percentage of this budget with small business concerns in a SBIR program. Subsection (h) establishes, in essence, a separate program pursuant to which each Federal agency with a budget for research or R&D in excess of $20 million for any fiscal year beginning with 1983 must establish goals for funding agreements for research or R&D which are no less than the percentage of the agency's research or R&D budget "expended" under funding agreements with small business concerns in the immediately preceding fiscal year. The term "extramural budget" is defined in section 9(e)(1) as "the sum of the total obligations minus amounts obligated for such activities by employees of the agency in or through Government-owned, Government-operated facilities * * *."

As to the SBIR set-aside program, the requirement that at least a given percentage of the prior year's extramural budget must be expended in the program means that the appropriate percentage of last year's extramural research and R&D obligations must be obligated for SBIR in the current fiscal year. The definition of "extramural budget" as total obligations less in-house obligations clearly indicates that the SBIR requirements are to be based on obligations. In this context "expending" the budget simply means obligating the available appropriations. For example, in explaining the proposed program, the House Committee on Small Business used a chart showing the fiscal year 1982 estimate of agency R&D obligations upon which individual agency SBIR funding percentages would be based. (H.R. Rep. No. 349, Part I, 97th Cong., 1st Sess. 21 (1981).)

With respect to goaling, the statute requires an agency's goal to be based on the agency's prior year "budget expended under funding agreements with small business concerns * * *." The House Committee on Small Business referred to "funds awarded * * * to small businesses in the preceding fiscal year." (Report, id., at 24.) This and similar references as well as the wording used in the statute indicate that obligations were to be the basis for the goaling program. The agency would expend its "budget," appropriations available for obligation, by means of awards. There is no indication of an intention to base the goaling program on the actual payments made in a prior fiscal year as the result of previous awards.

Additionally, agencies with an SBIR program or a goaling program are required to annually report to the Small Business Administration (SBA) under section 9(i). The information to be submitted only deals with awards, the normal means by which funds are obligated. Actual payments are not reported. Cash disbursement or monetary expenditure information would be necessary to any program based on or measured by actual payments. Finally, it would be difficult, if not impossible, to predict actual expenditures when determining set-asides at the beginning of a fiscal year or to measure total prior year expenditures in time to set goals for the upcoming year.

Accordingly, the statutory requirements for affected agencies under both SBIR and the goaling programs may be determined by reference to obligations of appropriated funds rather than to payments made under past awards.

Question 2: "Is it legally permissible for Departments with several subordinate agencies to 'pool' the individual agencies' SBIR funds into a common account? (Transportation proposed this, but its OGC said that it could not do so.)"

Answer: Not if this results in an otherwise unauthorized transfer of appropriations. SBA's Policy Directive for SBIR states as follows:

> "Where not contrary to existing statutory requirements, each agency is authorized to establish financial procedures and financing mechanisms that it deems necessary to properly implement the SBIR, including, but not limited to, obligating funds solely on the basis of proposal merit without regard to the purpose for which funds were originally appropriated, and transferring assessed funds to a single account to facilitate financial management, reporting, and oversight." Paragraph 3a(3)(b), August 1, 1983. (Emphasis added.)

In a July 6, 1983 memorandum, the Deputy General Counsel of the Department of Transportation (DOT) considered a proposal under which a pool of funds would be created from set-asides of various DOT R&D appropriations. Under it, appropriations for one component of DOT might possibly be used to fund research projects totally unrelated to the component's statutory mission. The Deputy General Counsel, citing 31 U.S.C. § 628-1 (currently codified as 31 U.S.C. § 1532) and GAO decisions, concluded that the use of the SBIR "pool" does not provide authority to use funds for purposes other than those for which they were appropriated. We agree. In the absence of specific statutory authority to transfer funds between appropriations they are available only for the purposes for which they were made. See 36 Comp. Gen. 386 (1956). The 1982 amendment of the Small Business Act while mandating SBIR set-asides said nothing about "pooling" and granted no authority to transfer or change the uses of appropriated funds. (Within an appropriation account funds may normally be transferred or "reprogrammed" from one use to another.)

There is no objection to the sharing of certain costs or the use of common procedures unless this results in an otherwise unauthorized transfer of funds between or within appropriation accounts.

Question 3: "Does the provision in Section 9(f)(1) of the act limit the amount of the SBIR set-asides to exactly the stated percentages of an agency's extramural budget?"

Answer: No. Section 9(f)(1) of the Act mandates that the agency "shall expend not less than" a stated percentage in a particular fiscal year. This language clearly requires a minimum acceptable percentage without limiting additional SBIR set-asides. SBIR was established "to assist small business in obtaining a more equitable share of Federal R&D expenditures." (Report, id., at 20.) A ceiling on the small business set-asides would be inconsistent with the purpose for the program.

Section 9(f)(1) further contains a proviso that "a Federal agency shall not make available for the purpose of meeting the requirements of this subsection an amount of its extramural budget for basic research or research and development which exceeds the percentages specified herein." In his explanation of the proposed legislation to the House of Representatives, the Honorable John J. LaFalce, Chairman of the Subcommittee on General Oversight, Committee on Small Business, explained changes in the bill originally approved by the Committee, including this additional provision:

> "The Small Business Committee substitute recognizes the deeply felt concerns of the university and basic research communities that the United States basic research effort not be harmed by this bill. * * * We have included in our substitute a provision that caps that amount of money that can be used from the extramural budget for basic research at the percentages included in the Small Business Innovation Development Act to fund the SBIR program."
> 128 Cong. Rec. H3600 (daily ed. June 17, 1982).

The provision only deals with the types of projects that will be included under the minimum SBIR requirement. For example, if the SBIR minimum is one percent of the extramural budget, then basic research projects assigned to SBIR are not to exceed one percent of all extramural basic research projects.

Since the proviso also applies to R&D projects (as opposed to basic research), this means that the required awards are to be met from basic research projects and from R&D projects in the same proportion as those categories of research are reflected in an agency's total extramural budget. The intent appears to have been to preclude agencies from meeting their entire percentage requirement for SBIR from only one of the two research categories. But the proviso only relates to meeting the required SBIR minimum percentage of an agency's total extramural budget. It therefore would not prohibit SBIR awards in excess of the minimum requirement should an agency wish to make awards to small businesses in excess of the required percentages.

Question 4: "Is it permissible for agencies to apply an additional percentage (or 'tax') when computing SBIR set-asides to cover the administrative costs of the SBIR program?"

Answer: Yes. In connection with this question you have submitted a copy of proposed DOT Order 7000. It provides that, "in FY 84 through FY 88, an amount equal to 0.15% of the DOT extramural budget will be added to the percentages stated in the Act to cover the costs of administering the Program. * * * Any unused portion of SBIR administration funds will be used directly to fund SBIR contracts." (Para. 11.) (Emphasis added.) The proposed practice affords a way of funding the special administrative costs associated with SBIR implementation. This practice is permissible if the funds are otherwise available and it does not result in the unauthorized transfer of appropriations. The use of excess "taxed" funds for awards which might cause SBIR awards to exceed the minimum statutory requirement is also unobjectionable. See question 3 in this regard.

Question 5: "Does the act require agencies with extramural research or R&D budgets that exceed $100 million to have a goaling program in addition to an SBIR program?"

Answer: Yes. Section 9(h) of the Act states that the goaling program is "In addition to the requirements of subsection (f) * * *" and is applicable to "* * * each Federal agency which has a budget for research or research and development in excess of $20,000,000 * * *." In its section-by-section analysis the House Committee on Small Business Report stated that "Subsection (h) requires all Federal agencies with R. & D. budgets in excess of $20 million * * * to unilaterally establish goals for funding agreements * * *." Report, id., at 31.

The statute clearly states that the goaling program will be in addition to the SBIR program required by section 9(f) of the Act. The criterion for requiring a goaling program in an agency is whether it has a $20 million research or R&D budget. No exception is made for agencies which are also required to institute a separate SBIR program. Accordingly, agencies having a $20 million budget are included in subsection (h) s ambit without regard to their participation in SBIR.

Question 6: "Does the act authorize SBA to promulgate regulations for goaling as well as for SBIR programs? Do SBA's monitoring responsibilities also include goaling?"

Answer: No, to both questions. Under Section 9(j) of the Small Business Innovation Development Act, the SBA "* * * shall * * * issue policy directives for the general conduct of the SBIR programs within the Federal Government." Additionally, under section 9(b)(6) the SBA is "* * * to independently survey and monitor the operation of SBIR programs within participating Federal agencies." The Act also provides that "[E]ach Federal agency required * * * to have an SBIR program or to establish goals shall report annually to the Small Business Administration the number of awards pursuant to grants, contracts, or cooperative agreements over $10,000 in amount and the dollar value of all such awards, identifying SBIR awards and comparing the number and amount of such awards with awards to other than small business concerns." Section 9(i).

In explaining the proposed Small Business Innovation Development Act to the House of Representatives, Chairman LaFalce stated that the goaling provision would require all Federal agencies subject to this requirement "* * * to unilaterally establish goals for funding agreements for R. & D. for small business." 128 Cong. Rec. H3594 (daily ed. June 17, 1982). SBA was to have no special role in establishing the goals which are based on an agency's funding agreements with small business in the preceding fiscal year.

The Administrator of SBA has the authority to "* * * make such rules and regulations as he deems necessary to carry out the authority vested in him by or pursuant to this chapter [Aid to Small Business]." 15 U.S.C. § 634(b)(6). Under 15 U.S.C. § 638(c), SBA is authorized to make studies and recommendations to Government agencies regarding research and development. The annual report to SBA mandated by the Act includes information relevant to the goaling program, and is required of agencies who have the program.

Based on the foregoing, SBA's role in the goaling program appears limited to gathering information. Its regulatory authority is restricted to requirements relating to the annual report and to studies. There is no authority to establish policy directives or regulations for the agencies' handling of the goaling program. Consistent with this view, SBA has issued no policy directive prescribing goaling procedures for the affected agencies. The Act gives no specific authority to SBA to monitor the goaling program. However, the agency possesses the general authority to conduct studies relating to research and development. See 15 U.S.C. § 638(c).

Question 7: "Should an agency be required (or expected) to make up for a shortfall in its SBIR set-aside the following year? Conversely, should an agency receive credit against the following year's set-aside if it exceeds the current year's set-aside? Also, if an agency fails to meet its goal, should its goal the following year be lowered accordingly?"

Answer: An agency may be encouraged to make up its shortfall. It should not receive credit for exceeding the prior year's set-aside requirement. Failure to meet a goal should not result in a lessened goal for the next year as a matter of policy. However, the statute does not prohibit a goal reduction for this reason. Since the SBIR requirement is based on a stated percentage of the prior year's extramual research obligations, an agency is literally in compliance if it sets the current year's set-aside with response to the reduced obligations in the prior year.

Of course, if the requisite dollar amounts of awards is not made, then section 9(f)(1) is violated. There is no penalty for failure to meet the statutory requirement. If otherwise proper, an agency may in the next fiscal year mitigate the effects of the violation by making additional SBIR awards. An SBA directive that wherever possible a delinquent agency make up for the shortfall would be consistent with the purpose of the Small Business Innovation Development Act of 1982. However, there is no enforcement mechanism under which an agency could be required to make up the shortfall amount.

If an agency exceeds the amount of set-asides required by the statute for a given fiscal year, no credit should be afforded for the following fiscal year. The Act makes no provision for a reduction of the following year's set-aside. Accordingly, a failure to make the requisite awards, because of a prior year's credit, would nevertheless constitute a violation.

Section 9(h) establishes minimum goals for a fiscal year based on funding agreements with small business in the immediately preceding fiscal year. There is no penalty if the goal is not achieved. If an agency misses its goal, the failure to meet the goal might have the anomalous effect of allowing the goal to be reduced in the subsequent year. In short, an agency could reduce its future goals by not meeting the goals for earlier years since the statute does not preclude this kind of agency action. However, this would be inconsistent with the statutory purpose of encouraging additional awards to small businesses. Therefore, in our view, agencies that fail to meet a goal should not lower their goal for the next year, even though the statute does not provide that goals not be reduced because of a prior failure to meet an established goal.

Question 8: "Is it permissible to count SBIR awards when measuring compliance with an agency's goaling requirement?"

Answer: No. Section 9(h) which establishes the goaling program provides that it is "in addition to the requirements of subsection (f) [SBIR]." The final sentence of subsection (f) provides that: "Funding agreements with small business concerns for research or research and development which result from competitive or single source selections other than under a small business innovation research program shall not be counted as meeting any portion of the percentage requirements of this subsection."

It is clear that the 1982 amendment to the Small Business Act established the SBIR program and the goaling program as separate programs with differing requirements. There is no indication in the legislative history that an agency's goaling requirement would be lessened by its SBIR awards. According to the House Committee on Small Business (Report, page 4) "Money spent on the SBIR programs would not be counted as meeting each agency's small business research and R&D goals." This was explained subsequent to the bill's enactment on July 22, 1982, in Chairman LaFalce's statement which reads in part as follows:

> "The question has arisen--and it is a crucial question indeed--whether SBIR awards can be counted toward achieving the non-SBIR goals of agencies. The answer is clearly no. The intent of the act was to increase R&D awards to small business through the special provisions of SBIR programs. If agencies can count SBIR awards as part of their overall small business R&D awards, the result might very well be a shift from normal small business R&D awards to SBIR awards rather than a net addition as is

clearly the congressional intent." 128 Cong. Rec. H9821 (daily ed. December 14, 1982).

Question 9: "The act specifically excludes certain types of obligations by the Agency for International Development (AID) from the definition of 'extramural budget' and hence from the base used to compute SBIR set-asides. Should these same funds be excluded in computing AID's goaling requirement?"

Answer: No. Section 9(e)(1) defines the term "extramural budget" as "the sum of the total obligations minus amounts obligated for such activities by employees of the agency in or through Government-owned, Government-operated facilities, except that for the Agency for International Development it shall not include amounts obligated solely for general institutional support of international research centers or for grants to foreign countries." (Emphasis supplied.) As already discussed, the SBIR program is based on agencies' extramural research and R&D budgets. The goaling program established in a separate subsection is for research or R&D without reference to whether these activities are conducted extramurally or "in-house."

The House Committee on Foreign Affairs in its report on the proposed Small Business Innovation Development Act referred to research which was solely for general institutional support of international research centers and to the inclusion of R&D through host country contracts pursuant to grants to recipient countries, which were controlled by the recipient governments. Both of these cases were considered as not amenable to small business set-asides. The Committee noted that AID was already spending substantial amounts for procurement and contracting with small businesses. (H.R. Rep. No. 349, Part 5, 97th Cong., 2d Sess. 3 (1982)). The Committee report addressed itself only to the set-aside program. No objection was made to the goaling program which was included in the proposed Act.

On May 18, 1982, the Committee on Small Business of the House of Representatives adopted a substitute amendment of the bill which excluded AID international research centers and AID grants to foreign governments from the base against which the percentages for the SBIR program were to be applied. No reference was made to the goaling program in either regard. (See remarks of Chairman LaFalce, 128 Cong. Rec. H3595 (daily ed. June 17, 1982)). (At the same time the SBIR program was limited to extramural research and R&D.)

Accordingly, the AID exclusion applies only to the SBIR program and does not exclude the specially identified activities from AID's goaling base. Since goaling starts from a floor based on prior small business awards and AID in the past did not make awards of these two types to small businesses, extension of an exclusion similar to that contained in the SBIR program to goaling was unnecessary.

1. APPROPRIATIONS
   Availability
     Contracts
       Research and development
         Small Business Innovation Development Act
           Operational v. R&D activities

2. APPROPRIATIONS
   Availability
     Contracts
       Research an development
         Small Business Innivation Development Act
           Operational v. R&D activities

3. APPROPRIATIONS
   Availability
     Contracts
       Research and development
         Small Business Innovation Development Act
           Operational v. R&D activities

4. APPROPRIATIONS
   Availability
     Contracts
       Research and development
         Small Business Innovation Development Act
           Operational v. R&D activities

5. APPROPRIATIONS
   Availability
     Contracts
       Research and development
         Small Business Innovation Development Act
           Operational v. R&D activities

6. APPROPRIATIONS
   Availability
     Contracts
       Research and development
         Small Business Innovation Development Act
           Operational v. R&D activities

7.. APPROPRIATIONS
   Availability
     Contracts
       Research and development
         Small Business Innovation Development Act
           Operational v. R&D activities

con't on MS pg. # 267-A

B-209790-O.M. March 12, 1985

8. APPROPRIATIONS
   Availability
     Contracts
       Research and development
         Small Business Innovation Development Act
           Operational *v.* R&D activities

9. APPROPRIATIONS
   Availability
     Contracts
       Research and development
         Small Business Innovation Development Act
           Operational *v.* R&D activities