

A photograph of the U.S. Capitol building in Washington, D.C., taken at sunset. The building's iconic dome is illuminated from within, and the warm light of the setting sun creates a golden glow around the structure. The sky is a mix of soft pinks, oranges, and blues. The building's facade, with its many columns and arches, is clearly visible, and the American flag flies from a pole in front of the entrance. The foreground shows a wet, reflective surface that mirrors the building and the sky.

Presentation on SBIR Data

David Metzger, Esq.(Ret.)



AGENDA

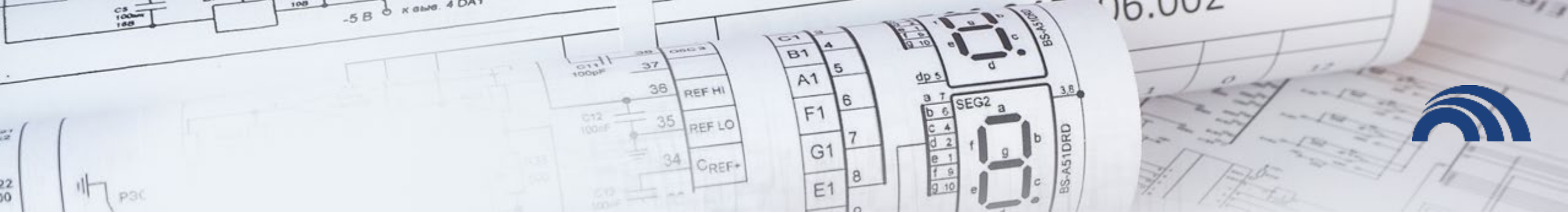
- What is SBIR Data?
- What is a government Phase III award?
- Why is protecting SBIR Data important?
- Does this only apply to DoD?
- How and when to mark SBIR Data?



What is SBIR Data?

- SBIR Data Rights grant the government a non-exclusive, royalty-free, paid-up, worldwide license to use SBIR Data, but it cannot disclose SBIR Data as long as the protection period remains in effect.
- Disclosure of the data by the government would provide competitor's free entry into the market the SBIR firm is trying to create, without an investment, effort or work.





Three essential attributes of SBIR/STTR Data

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

CFY20 SBIR/STTR Policy Directive

FY20 SBIR/STTR Policy Directive

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



Data Rights are a special type of Trade Secret



SBIR Data Rights in Phase I & Phase II

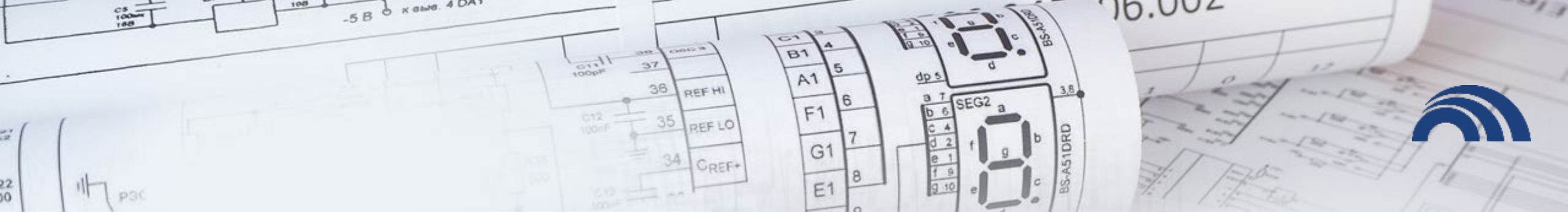


**PROTECTS BY NONDISCLOSURE
FUNDED WITH | SBIR/STTR \$
ACCORDED | SBIR Data Rights clause**

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

What is a Phase III Award?

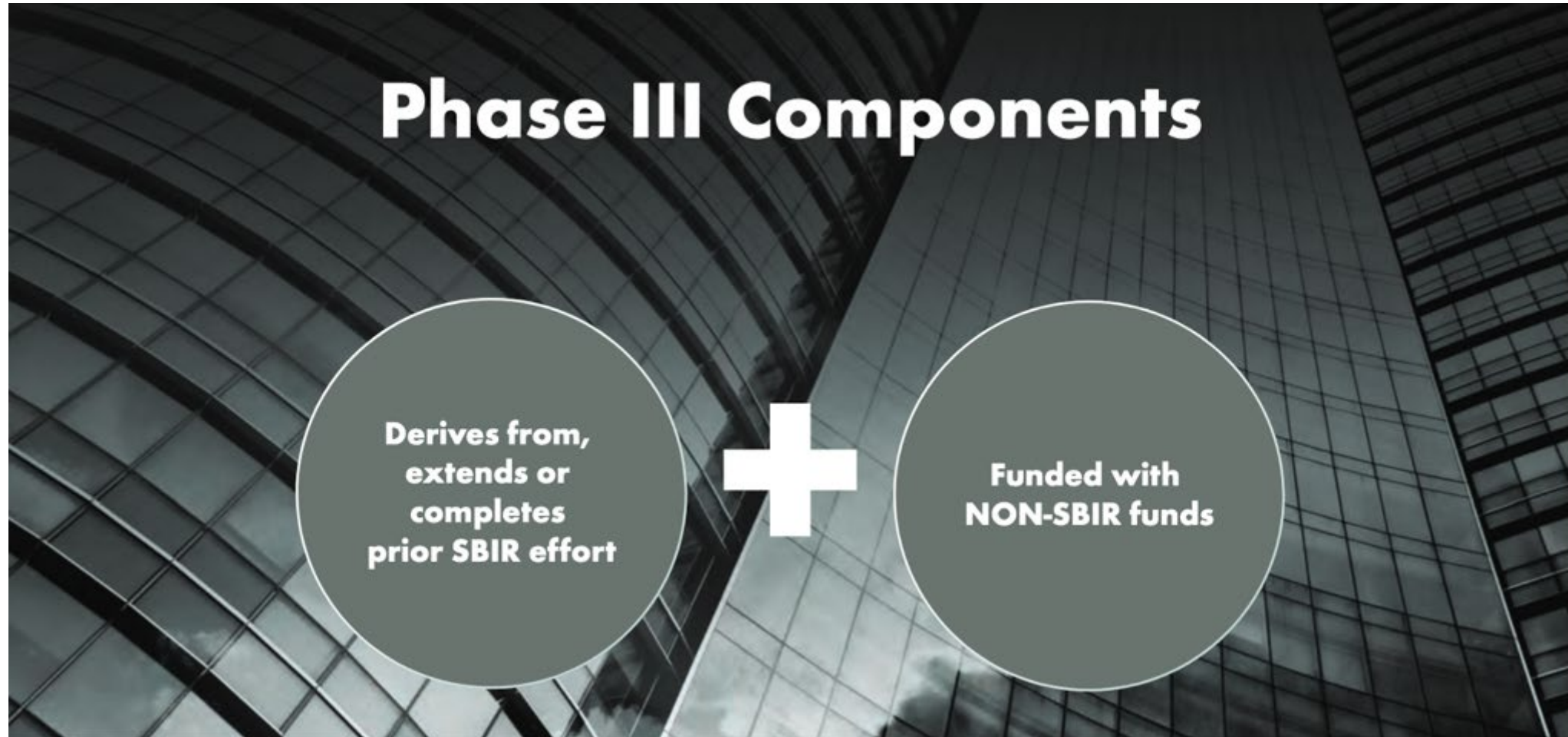




How is Phase III Defined?

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

What is a Phase III Award?



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

What Makes SBIR Data Rights Valuable?

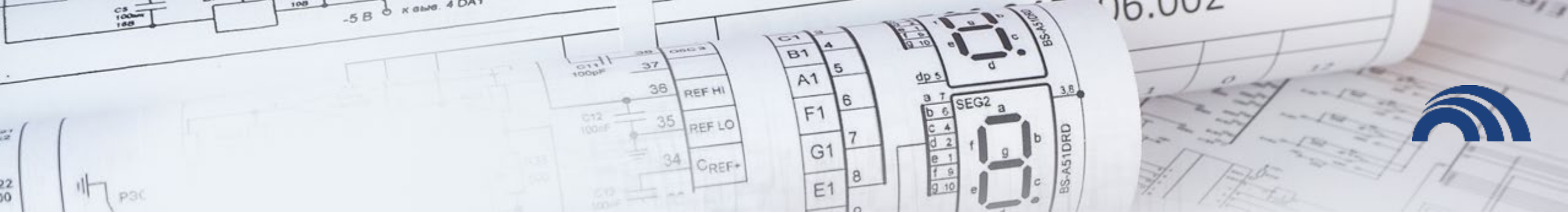
- **Phase III Status brings with it:**
 - The right to make awards without competition
 - Exemption from SBA size standards for a procurement
 - No limits on the dollar size of a Phase III procurement
 - A right to a Phase III mandate, by which the SBIR firm has a right to be awarded a future Phase III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



Government Phase III awards

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





Phase III Commercialization

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

Phase III Commercialization



- **Justification:** Commercializing work that **DERIVES FROM, EXTENDS OR COMPLETES** an effort performed under prior SBIR/STTR agreements, including:
 - Activity in the military or private sector
 - SBIR/STTR-derived products or services
 - Continuation of R&D
- **Participation**
 - SBIR/STTR funds **CANNOT** be used for Phase III contracts
 - Businesses awarded Phase I or II, or successor-in-interest firms are eligible to participate in Phase III
 - A successor-in-interest can occur
 - Through an acquisition, novation, or by assignment of the SBIR Rights and technology

Required Phase III Awards

- To the greatest extent practicable, agencies (or their GOCO facilities or FFRDCs or prime contractors) that pursue R/R&D or production of technology developed under SBIR/STTR **shall** issue Phase III awards relating to the technology, including award without competition awards, to the SBIR/STTR Awardee that developed the technology.
- Agencies must consider the practicality of pursuing the work with the Awardee through a direct follow-on award through market research to determine if firm is available, capable, and willing to perform the work.
- If pursuing Phase III is not possible, Agency must document the file and provide a copy of the decision, including rationale, to SBA (technology@sba.gov).
- If pursuing Phase III work with an entity other than the Phase I/II Awardee, Agency must notify SBA in writing prior to such an award and SBA may appeal a decision.



How to Mark SBIR Data

Three essential ingredients

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



SBIR/STTR Data Rights

***All Required**

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

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

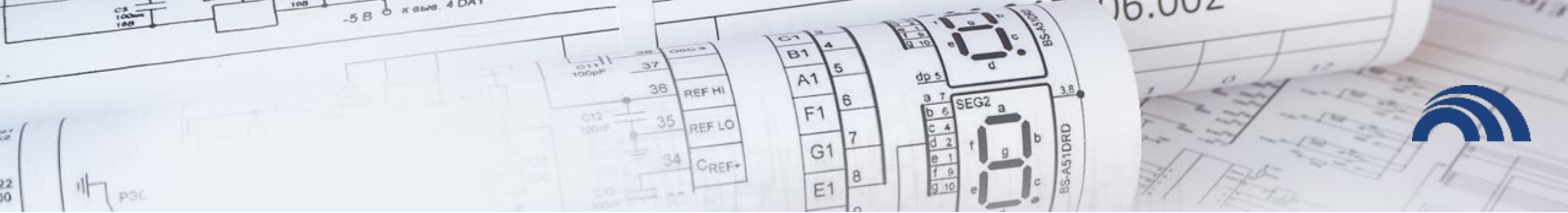


“Marking” SBIR/STTR data

Affixing the three-part legend to a document accurately and completely, in filled out form, is referred to as “marking” SBIR Data

- All agencies have now agreed to abandon the FAR and DFARS clauses and use SBA’s clause instead, which includes the three-part legend.
- DOD amended its DFARS clause effective March 17, 2020 to reflect the 20-year protection period and SBA’s new clause, and amended it again several times since—the *new* DFARS 252.227-7018 clause provides for the 20-year protection period—ensure the clause inserted in your funding agreement contains the 20-year protection period





What are the consequences of NOT marking SBIR data correctly?

- Failure to mark, or to mark SBIR Data inappropriately, gives the Government Unlimited Rights in the SBIR Data.
- With such rights, the Government can include this unmarked or inappropriately marked data in solicitations, compete it, disclose it directly to commercial firms, disclose it to the SBIR firm's competitors, and use it for any purpose, even to develop a commercial product from it and sell it, or have others do so.

Appropriate marking, turns the tables completely!



How to correctly mark SBIR Data?

Title Page

Quarterly Report

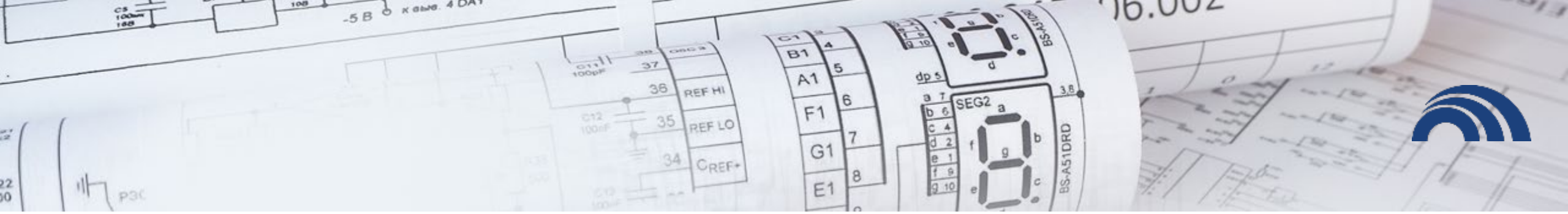
September 2021

Contract Number: XYZ2375
High Tech Corporation
October 2021

Title: SBIR/STTR Data Rights
Funding Agreement: 5555
Award Date: 9/28/21
SBIR/STTR Protection Period: 9/28/41
SBIR/STTR Awardee: High Tech Corporation
SBIR/STTR Awardee Address: 123 Maple Street,
Rochester, NY 14620

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

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



SBIR Marking Do's and Don'ts

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

Non-Disclosure Agreements

- Government personnel are covered by the Federal Trade Secrets Act (18 U.S.C. sec. 1905)
- Support services contractors have signed nondisclosure agreements with the Government
- Do not voluntarily disclose SBIR Data to a private sector person or entity without an NDA





Questions?

Thank-you

Please take a moment to complete a very short survey

<https://forms.office.com/r/EcQxcvu6qv>