U.S. GOVERNMENT ACCOUNTABILITY OFFICE
441 G St. N.W.
Washington, DC 20548
Comptroller General
of the United States

Decision

Matter of: ASRC Federal Data Network Technologies, LLC

File: B-418028; B-418028.2

Date: December 26, 2019

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John Sorrenti, Esq., and Christina Sklarew, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the agency's decision to make a small business innovation research (SBIR) phase III sole source award is sustained where the awardee is not eligible to receive SBIR phase III awards under the terms of the SBIR Program Policy Directive issued by the Small Business Administration.

DECISION

ASRC Federal Data Network Technologies, LLC (AFDNT), of McLean, Virginia, protests a small business innovation research (SBIR) phase III sole-source award to American Systems Corporation, of Chantilly, Virginia, by the Defense Health Agency (DHA). AFDNT contends that the agency's phase III award was improper because American Systems is not eligible to receive an SBIR phase III award; the award did not meet the definition of a phase III award because it did not derive from, extend, or complete a prior SBIR contract performed by American Systems; and the agency improperly awarded the contract as an undefinitized contract action.

We sustain 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. 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 certain 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 Theater Medical Information Program - Joint (TMIP-J) healthcare delivery system, which comprises multiple different systems and products that collect a variety of data related to the healthcare of service members. See Contracting Officer's Statement at 3-4. According to the agency, the TMIP-J "enhances the clinical care and information capture at all levels of care in [t]heater, transmits critical information to the [t]heater [c]ommander, the evacuation chain for combat and non-combat casualties and forges the theater links of the longitudinal health record to the [military healthcare system] and the Department of Veterans Affairs." Id. at 2. In short, the TMIP-J is a "system of systems" that supports the various branches of the Armed Forces by providing critical healthcare data and logistics for service members deployed around the world. See Hearing Transcript (Tr.) at 14:9-21:14.

The TMIP-J system is currently in sustainment, which means that the agency is simply maintaining the current capabilities of the system. Tr. at 17:8-12. Multiple contractors perform the sustainment contracts for the various TMIP-J systems; AFDNT is the sustainment contractor for two of the systems. Protest at 2. The agency explained that much of the TMIP-J system has not been updated in almost 20 years and many of the systems are becoming obsolete. Tr. at 128:4-10. The agency has had various problems with the TMIP-J system, including an inability to gather and easily share healthcare data. Id. at 24:1-30:13. As a result, DHA seeks to transform the TMIP-J system by modernizing or replacing its various systems to become a cutting edge healthcare information technology system that can seamlessly capture and transmit data around the world to all branches of the Armed Forces. Id. at 51:2-61:6; 143:16-144:8.

On September 20, 2019, the agency issued to American Systems an SBIR phase III basic ordering agreement (BOA) that is intended to "build on efforts that derive from, extend, or complete efforts that were generated under previous SBIR [p]hase I and II

work." Agency Report (AR) Tab 3, BOA No. HT003819G0001 at 6. The BOA explained that it would "support the identification technology and organizational modernization needs and will leverage [p]hase I and II SBIR technologies, processes, services, tools, and methodologies to fill existing and emerging gaps within all aspects of organizational and technological transformation that will allow the DHA and [Program Executive Office Defense Healthcare Management Systems] to position their organizations as industry leaders in the healthcare domain." Id.

Also on September 20, DHA issued to American Systems the first order under the BOA to "transform and support [the] TMIP-J platform."[1] AR, Tab 4, BOA Order, at 3. The order stated that it was a phase III SBIR award and that the "[w]ork effort performed must derive from [p]hase I and II topics to be delineated during definitization, to include, at a minimum, 'Automated Readiness Measurement System (ARMS) SBIR Topic N00-123', as certified to the Contracting Officer on 05 SEP 2019." Id. at 5. The order described the work as follows:

> The requirement is to 1) unify the architecture of the full complement of TMIP-J products and provide the suite as a fully centrally managed solution driven by outcomes rather [than] [g]overnment specification, 2) make any appropriate technology changes to reduce the resources and time required for deployment and implementation, especially to [n]aval platforms, 3) make any appropriate technology changes to simplify the transition of the system into routine long-term continuity of operations, and 4) make any appropriate technology changes to simplify and ease the "sunset" of end-of-life components of the suite. While the [g]overnment is seeking to radically evolve the platform as rapidly as possible, it cannot afford to let the systems be disconnected.
>
> The [c]ontractor shall evaluate the required outcomes, develop an approach to satisfy them within the provided constraints, and hold iterative bilateral discussions with the [g]overnment to describe its approach and provide a [p]erformance [w]ork [s]tatement that captures the mutually agreed upon approach prior to definitization.

Id.

The SBIR topic N00-123 identified in the order placed with American Systems refers to a different SBIR phase III BOA that was awarded to a company called DDL Omni Engineering LLC (DDL Omni) in September 2014. AR, Tab 34, BOA No. N68335-14-G-

[1] The order was issued as an undefinitized contract action (UCA), meaning that the contract terms, specifications, or price were not agreed upon before performance began. See Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 217.7401. A UCA must contain a definitization schedule that sets forth when any open terms of the UCA are to be definitized. Id. § 217.7404-3.

0057. DDL Omni's phase III BOA derived from or extended the work of prior SBIR phase I and II contracts that had been awarded to and fully performed by DDL Omni. Id. at 6. In December 2018, American Systems acquired DDL Omni and executed an assignment and assumption agreement that identified DDL Omni's contracts, including DDL Omni's phase III BOA, that were assigned to American Systems. AR, Tab 32, Assignment and Assumption Agreement at 1. On May 9, 2019, the government executed a novation agreement through which it recognized American Systems as the successor in interest of DDL Omni for certain identified contracts listed in an exhibit attached to the novation agreement. AR, Tab 33, Novation Agreement, at 2. That list of contracts included DDL Omni's phase III BOA and two orders issued under that BOA; it did not include either of the SBIR phase I or II contracts on which DDL Omni had completed performance. Id. at 3-5.

On September 9, 2019, AFDNT filed an agency-level protest challenging the agency's decision to make a sole-source phase III award for the transformation of the TMIP-J system.[2] Protest, exh. B. AFDNT argued, among other things, that the award did not meet the definition of an SBIR phase III award because it did not derive from, extend, or complete prior SBIR work. Id. On September 19, the agency denied AFDNT's protest. Protest, exh. C.

After the denial of its agency-level protest, AFDNT timely protested the sole-source SBIR phase III award to our Office. In its protest, AFDNT stated that it was unclear whether the agency had made the SBIR phase III award to American Systems or to DDL Omni.[3] Protest at 5-6. After the request to intervene identified the awardee as American Systems, AFDNT timely filed a supplemental protest that raised an additional protest ground asserting that American Systems was ineligible for award.

PRELIMINARY MATTERS

The agency argues that this protest should be dismissed because (1) GAO does not have jurisdiction over the agency's decision to make a noncompetitive SBIR phase III award; or (2) AFDNT is not an interested party. We reject both of these arguments and find that we have jurisdiction to hear the protest and that AFDNT is an interested party.

[2] The agency had previously informed AFDNT via email of its intent to modernize and transform the TMIP-J, including potentially utilizing an SBIR phase III award. Protest, exh. A. In response to this email, AFDNT submitted a letter of concern to the agency regarding this approach. Protest at 3. After learning that the agency intended to move forward with a sole-source SBIR phase III award, AFDNT converted its letter of concern to an agency-level protest. Id.

[3] The agency's denial of AFDNT's agency-level protest did not identify by name the recipient of the phase III award. See Protest, exh. C.

In arguing that GAO does not have jurisdiction, the agency relies on Complere Inc., B-406553, June 25, 2012, 2012 CPD ¶ 189, in which the protester challenged the agency's decision not to make a phase III award to the protester after it completed phase II of the SBIR program. GAO found that "we do not have jurisdiction to review an agency's decision declining to enter into a noncompetitive phase III funding agreement." Complere Inc., supra at 2. Based on this case, the agency argues that because this protest involves a noncompetitive SBIR phase III award, for which the agency is granted broad discretion when determining what entity should receive such awards, GAO does not have jurisdiction over this protest. Agency Post-Hearing Comments at 4. We disagree.

Our jurisdiction is set forth under the Competition in Contracting Act (CICA) and our Bid Protest Regulations, which provide that we review protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award of contracts for procurement of property or services. See 31 U.S.C. §§ 3551(1), 3552 (2006); 4 C.F.R § 21.1(a). Here, the SBIR statute and SBIR Program Policy Directive allow for a sole-source phase III award, but also specifically define what constitutes a phase III award and who is eligible to receive a phase III award. Therefore, when making a sole-source phase III award, an agency must comply with all relevant portions of the statute governing phase III of the SBIR program. AFDNT has challenged American Systems' eligibility for a phase III award and alleged that the award does not meet the statutory definition of a phase III award. In other words, AFDNT is challenging the agency's decision to make a phase III award, specifically whether that award complied with the express requirements of the SBIR statute and Policy Directive. We therefore find that the facts and allegations at issue in Complere Inc. are distinct from the facts and protest grounds at issue in this matter, and that we have jurisdiction over this protest to determine whether the agency complied with the applicable SBIR program requirements.

The agency also has argued throughout the protest that AFDNT is not an interested party because it has not performed an SBIR phase I or II contract and therefore is not eligible for award of a phase III contract. See Agency Post-Hearing Comments at 5-6.

An interested party is "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)(1). Here, AFDNT argues that the award to American Systems was improper because American Systems was ineligible to receive award, and because the award does not meet the statutory definition of a phase III award. AFDNT further asserts that it is able to perform the work that the agency seeks, and the agency should meet these requirements through a full and open competition. Thus, AFDNT is an interested party because it may be able to compete for an award, should the agency's phase III award be found improper.

While the agency has made vague references to "other" contractors that performed SBIR phase I or II work and that also would be eligible for a phase III award for this work if this protest were to be sustained, it has not identified those contractors or

provided any explanation of their prior SBIR work. See, e.g., Tr. 285:7-286:7. Thus, there is no basis in the record to conclude that the proposed work would have to remain within the SBIR program and that the agency would be required to award the work to a company that had received a prior phase I or II award. Accordingly, on the record and facts before us in this case, we find that AFDNT is an interested party to challenge the agency's decision to make a sole-source SBIR phase III award to American Systems.

DISCUSSION

AFDNT alleges that American Systems is ineligible for an SBIR phase III award under relevant provisions of the SBIR statute and the SBIR Program Policy Directive promulgated by the Small Business Administration (SBA). AFDNT also asserts that the award does not meet the statutory definition of a phase III award because the work does not derive from, extend, or complete any of American Systems' prior SBIR agreements; and that the agency improperly awarded the contract as a UCA. As explained below, we sustain the protest because we find that American Systems is ineligible to receive a phase III award; as a result, we need not address AFDNT's remaining two protest grounds.

As relevant to the protester's allegation that American Systems is ineligible, the SBIR statute states:

> To the greatest extent practicable, [f]ederal agencies and [f]ederal prime contractors shall . . . issue, without further justification, [p]hase III awards relating to technology, including sole source awards, to the SBIR . . . award recipients that developed the technology.

15 U.S.C. § 638(r)(4). Consistent with this language, the SBIR Program Policy Directive, issued by the SBA to provide guidance for the general conduct of the SBIR programs, states that agencies "shall issue Phase III awards relating to the technology, including sole source awards, to the [a]wardee that developed the technology under an SBIR . . . award, to the greatest extent practicable."[4] SBIR Policy Directive § 4(c)(7). The Policy Directive further states that "[i]f pursuing the [p]hase III work with the [a]wardee is found to be practicable, the agency must award a non-competitive contract to the firm." Id. § 4(c)(7)(ii).

[4] The Small Business Act requires the SBA to issue policy directives for the operation of the SBIR program. 15 U.S.C. § 638(j). Under this authority, the SBA has promulgated the SBIR Program Policy Directive through notice and comment rulemaking. See 84 Fed. Reg. 12794-849 (Apr. 2, 2019). The most recent version of the Policy Directive (dated May 2, 2019) was published in the Federal Register on April 2, 2019 and is available on the SBA's SBIR program website. See SBIR Program Policy Directive, https://www.sbir.gov/sites/default/files/SBIR-STTR_Policy_Directive_2019.pdf (last visited Dec. 16, 2019). Citations to the Policy Directive in this decision refer to the sections of the Directive itself, not the pages of the Federal Register.

Section 6(a)(5) of the Policy Directive provides that "[a]n SBIR . . . [a]wardee may include, and SBIR . . . work may be performed by, those identified via a 'novated' or 'successor in interest' or similarly-revised [f]unding [a]greement. For example, in order to receive a Phase III award, the [a]wardee must have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award."[5] Id. § 6(a)(5).

Based on the language from the statute and the Policy Directive quoted above, the protester argues that American Systems is ineligible for an SBIR phase III award because it has not performed, was not novated, and has not been recognized as a successor in interest to, an SBIR phase I or II award. Protester Post-Hearing Comments at 23-28. The protester asserts that the SBIR statute requires that sole-source phase III awards can be made only to the company that originally developed the technology, in this case, DDL Omni. Id. at 23-24. The protester further contends that the Policy Directive allows a phase III award to a company other than the one that originally developed the technology only when that company has been novated, or identified as a successor in interest to, a prior phase I or II award through a revised SBIR funding agreement. Id. at 24. The protester concludes that because American Systems has been novated only a prior phase III award, it does not meet the requirements set forth in the statute or Policy Directive, and is ineligible to receive a phase III award. Id.

The agency counters that by virtue of American Systems' acquisition of DDL Omni--the company that performed the SBIR phase I and II awards on which the novated phase III award is based--American Systems is the successor in interest to DDL Omni, and therefore is eligible to receive the phase III award under the Policy Directive. Agency Post-Hearing Comments at 7-8. The agency also contends that American Systems is eligible to receive a phase III award because it was novated DDL Omni's prior phase III award, and that novation of DDL Omni's prior phase I and II contracts was not required to make American Systems eligible for a phase III award. Id. at 6-9.

The agency's argument mirrors that made by the SBA, whose views our Office solicited and obtained because the protest raised legal questions regarding the SBIR program and the requirements of the SBA's SBIR Program Policy Directive. Specifically, the SBA argues that American Systems is eligible for award because of its acquisition of DDL Omni. In this regard, the SBA states that "a firm that owns all rights or interests in the work performed under an SBIR award, may be considered a successor-in-interest and receive a subsequent SBIR award without a prior novation, assuming the awardee meets all other eligibility requirements." SBA Comments at 6. The SBA also asserts

[5] A funding agreement is defined as "any contract, grant, or cooperative agreement entered into between any [f]ederal [a]gency and any [small business concern] for the performance of experimental, developmental, or research work, including products or services, funded in whole or in part by the [f]ederal [g]overnment." SBIR Policy Directive § 3(r).

that "[i]t is consistent with law, policy, and statutory intent, to permit a phase III award to a firm that has purchased all rights and interests in a small business awardee that received the phase I, phase II, or phase III SBIR awards. This is the case even when novation has not occurred, assuming all other eligibility requirements are met . . . ." Id. at 7. The agency argues that based on the SBA's comments, "there can be no remaining question as to American Systems' eligibility for the SBIR [p]hase III order." Agency Post-Hearing Comments at 6.

Our analysis begins with the interpretation of the relevant statute or regulation.[6] 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.

Here, we find that the plain language of the SBIR Policy Directive requires that in order to be eligible to receive a phase III award, a company has to have either performed, been novated, or been identified as a successor in interest to, a phase I or II award. The SBIR statute states that a phase III award must go to the "award recipients that developed the technology," but does not address a situation where a phase III award can be made to a company other than the one that received the original award and developed the technology. The Policy Directive, however, has identified specific circumstances for when this can occur.

As explained above, section 6(a)(5) of the Policy Directive states that an SBIR awardee may include "those identified via a 'novated' or 'successor in interest' or similarly-revised [f]unding [a]greement." SBIR Policy Directive § 6(a)(5). It then clearly explains that "in order to receive a Phase III award, the [a]wardee must have either received a prior Phase I or Phase II award or been novated a Phase I or Phase II award." Id. We find that the use of the word "must" in this sentence makes clear that receipt or novation of a phase I or II award is a requirement to establish eligibility of a company to receive a

[6] Because the SBIR Policy Directive is promulgated through notice and comment rulemaking, we find that it is akin to an agency regulation for the purposes of this analysis and therefore apply the same analysis of interpretation to the Policy Directive that we would apply to a regulation.

phase III award. If a company cannot show that it meets these requirements, then it would be ineligible to receive a phase III award.

The SBA and the agency argue that the phrase "for example" at beginning of the sentence stating the requirements for when a company is eligible to receive a phase III award shows that this is only one example, and "not an exclusive list of all scenarios where an SBIR award could be made to a firm other than the recipient of a prior phase award." SBA Comments at 6; see also Agency Post-Hearing Comments at 9. Based on the plain language of the entirety of section 6(a)(5), we disagree.

Section 6(a)(5) begins with a sentence stating that "[a]n SBIR . . . [a]wardee may include, and SBIR . . . work may be performed by, those identified via a 'novated' or 'successor in interest' or similarly-revised [f]unding [a]greement." Policy Directive § 6(a)(5). This initial sentence is not limited to a particular phase of the SBIR program and therefore addresses situations involving possible phase I, phase II, or phase III SBIR awardees. In other words, the sentence contemplates situations involving an SBIR awardee--or a company performing an SBIR award--that is identified via a novated, or successor in interest, or similarly-revised funding agreement for either phase I, II, or III.

The next sentence reads: "For example, in order to receive a [p]hase III award, the [a]wardee must have either received a prior [p]hase I or [p]hase II award or been novated a [p]hase I or [p]hase II award." Id. We find that the phrase "for example" presents an example using phase III--instead of phase I or II--of when there can be an SBIR awardee identified through the novation of a prior SBIR award. In this sense, the SBA's argument that the sentence "is not an exclusive list of all scenarios where an SBIR award could be made to a firm other than the recipient of a prior phase award," SBA Comments at 6, is correct because there could be other scenarios involving a phase I or II award. However, while the Policy Directive uses a phase III awardee as an example, it also sets forth specific eligibility requirements for a phase III awardee, i.e., a company must have either performed or been novated a prior phase I or II award. In this sense, the language in the Policy Directive is an exclusive list of when a company is eligible to receive a phase III award; the Policy Directive does not leave open the possibility that there are scenarios other than the one stated where a company could be eligible for a phase III award. Accordingly, we find that the plain language of section 6(a)(5) provides the exclusive and specific eligibility requirements to receive an SBIR phase III award.[7]

Based on this analysis, we reject as incorrect the agency's claim that American Systems is eligible for a phase III award because it is the successor in interest to DDL

[7] Our analysis might be different if section 6(a)(5) stated: "In order to receive a phase III award, the awardee must have, for example, either received a prior phase I or phase II award or been novated a phase I or phase II award." But this is not what the Policy Directive states.

Omni by virtue of its acquisition of that company. The Policy Directive is clear on the eligibility requirements for a phase III awardee, and it does not provide that a company should be considered a successor in interest for purposes of SBIR phase III eligibility simply by acquiring another company that previously had performed an SBIR phase I or II award. For these same reasons, we reject the SBA's claim that "[i]t is consistent with law, policy, and statutory intent, to permit a phase III award to a firm that has purchased all rights and interests in a small business awardee that received the phase I, phase II, or phase III SBIR awards . . . even when novation has not occurred." SBA Comments at 7. While our Office is required to give great deference to an agency's reasonable interpretation of its own regulation, it is also true that where the language of a regulation is plain on its face, and its meaning is clear, there is no reason to move beyond the plain meaning of the text. See Edmond Scientific Co., B-410179, B-410179.2, Nov. 12, 2014, 2014 CPD ¶ 336 at 7, n.9. Here, while the SBA may have intended this to be the policy, its interpretation is contradicted by the plain language of the Policy Directive and is therefore unreasonable.[8]

The agency and the SBA also argue that a phase III award can be based on having received or been novated a prior phase III award, and that American Systems is eligible to receive award because it was novated DDL Omni's prior SBIR phase III award. Agency Post-Hearing Comments at 6-9; SBA Comments at 6. In this regard, the agency and SBA point to section 4(c) of the Policy Directive, which generally defines and explains phase III work, and section 4(c)(5), which states that "[t]here is no limit on the time that may elapse between a phase I or phase II award and phase III award, or between a phase III award and any subsequent phase III award." SBIR Policy Directive §§ 4(c), 4(c)(5). Based on this language, the agency and the SBA argue that a phase III award based on a prior phase III award "is implied in section 4(c) . . . and explicitly discussed in section 4(c)(5)." SBA Comments at 6; see also Agency Post-Hearing Comments at 9. Here again, we find that this interpretation is not supported by the plain language of the Policy Directive and is therefore unreasonable.

Section 4(c) generally explains phase III of the SBIR program, stating that phase III "refers to work that derives from, extends, or completes an effort made under prior SBIR . . . [f]unding [a]greements" and that phase III work is typically for commercialization of SBIR research or technology. See Policy Directive § 4(c). The language in section 4(c)(5) explains that any amount of time can pass between a phase I or II award and a phase III award, or any other subsequent phase III award that is based on a prior phase I or II award. See id. § 4(c)(5). Indeed, the next two sentences in section 4(c)(5)--which both the agency and the SBA ignored in their arguments--state: "A [f]ederal [a]gency may enter into a [p]hase III SBIR…agreement at any time with a

[8] In fact, we are deferring to the SBA's interpretation of the SBIR program policy as reflected in the plain language of the most recent version of its own SBIR Program Policy Directive. To the extent the SBA suggests that the Policy Directive does not reflect the actual policy of the program, it should consider revising the Policy Directive.

[p]hase II awardee. Similarly, a [f]ederal [a]gency may enter into a [p]hase III SBIR . . . agreement at any time with a [p]hase I awardee." Id. These two sentences are entirely consistent with the language in section 6(a)(5) requiring a company to have either performed or been novated a phase I or II award to be eligible to receive a phase III award. They also clarify that a "subsequent phase III award" in section 4(c)(5) refers only to the timing of award, and not the eligibility of an awardee. Accordingly, we find nothing implicit or explicit in section 4(c) that allows for a phase III award to be made on the basis of having received or been novated only a prior phase III award. We therefore reject the SBA's and agency's argument that American Systems is eligible to receive this phase III award because it was novated a prior phase III award.[9]

In sum, as explained above, the order awarded to American Systems states that the work will derive from, extend, or complete efforts performed on a prior SBIR phase III award, which in turn derived from or extended phase I and II awards that DDL Omni had previously performed. The prior phase III award was novated to American Systems upon its acquisition of DDL Omni; however, the underlying phase I and II awards were never novated to American Systems. There is nothing in the record showing that American Systems performed a prior SBIR phase I or II award. Accordingly, based on the plain meaning of the Policy Directive, because American Systems never performed or was novated an SBIR phase I or II award, we find that it is ineligible to receive a phase III award.[10]

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[9] The agency also argues that there is a difference between a "FAR based novation" and a novation as contemplated by the Policy Directive, and that to establish successor eligibility under the SBIR program, a "FAR based novation" is not required. Agency Post-Hearing Comments at 8-9. The agency asserts that "[w]hile a FAR based novation governs the relationship between a contractor and the [g]overnment, the reference to a novation in the SBA Policy Directive refers to the relationship between private companies and the establishment of transfer, sale, or other funding agreement between entities." Id. at 8. We find no support for this argument. The Policy Directive states that an SBIR awardee may include a company identified "via a 'novated' . . . funding agreement." Policy Directive § 6(a)(5). The Policy Directive defines a funding agreement as a "contract . . . entered into between any [f]ederal [a]gency and any [small business concern]." Id. § 3(r). Thus, there is no basis to conclude that the reference to a novated funding agreement in the Policy Directive refers to the relationship between private companies, and thus no basis to conclude that this reference is any different than a "FAR based novation."

[10] The intervenor argues that DDL Omni's phase I and II contracts were either expressly or constructively novated to American Systems. Intervenor Post-Hearing Comments at 30-32. Intervenor relies on language in the novation agreement between the government and American Systems which states "the term 'contracts' as used in the [n]ovation [a]greement means those listed in an attached exhibit A and all purchase/delivery/task orders and modifications thereto made between the Government and DDL Omni before the effective date of the [a]greement," and argues that this language incorporates the prior phase I and II contracts into the novation. Id. at 31. We (continued...)

RECOMMENDATION

We recommend that the agency reevaluate its requirements and determine the best way to procure the services it needs to transform the TMIP-J system in a manner that is consistent with this decision and applicable law. We also recommend that the agency consult with the SBA to determine whether any revisions to the Policy Directive are necessary to more accurately reflect the policy and intent of the SBIR program regarding eligibility for phase III awardees. Finally, we recommend that AFDNT be reimbursed the costs of filing and pursuing its protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(d)(1). AFDNT should submit its certified claim, detailing the time expended and costs incurred, directly to the contracting agency within 60 days of receiving this decision. 4 C.F.R. § 21.8(f)(1).

The protest is sustained.

Thomas H. Armstrong
General Counsel

(...continued)
disagree. The language “all purchase/delivery/task orders and modifications thereto made between the Government and DDL Omni before the effective date of the [a]greement” clearly refers to orders issued under, and modifications to, the contracts listed in the attached exhibit; it does not sweep into the novation agreement the entire universe of contracts DDL Omni has ever performed. As explained above, the attached exhibit listed only DDL Omni’s prior phase III contract, and not the prior phase I or II contracts.