



TASC/TGIC Exchange Brief



Broadening Your Contracting Perspective

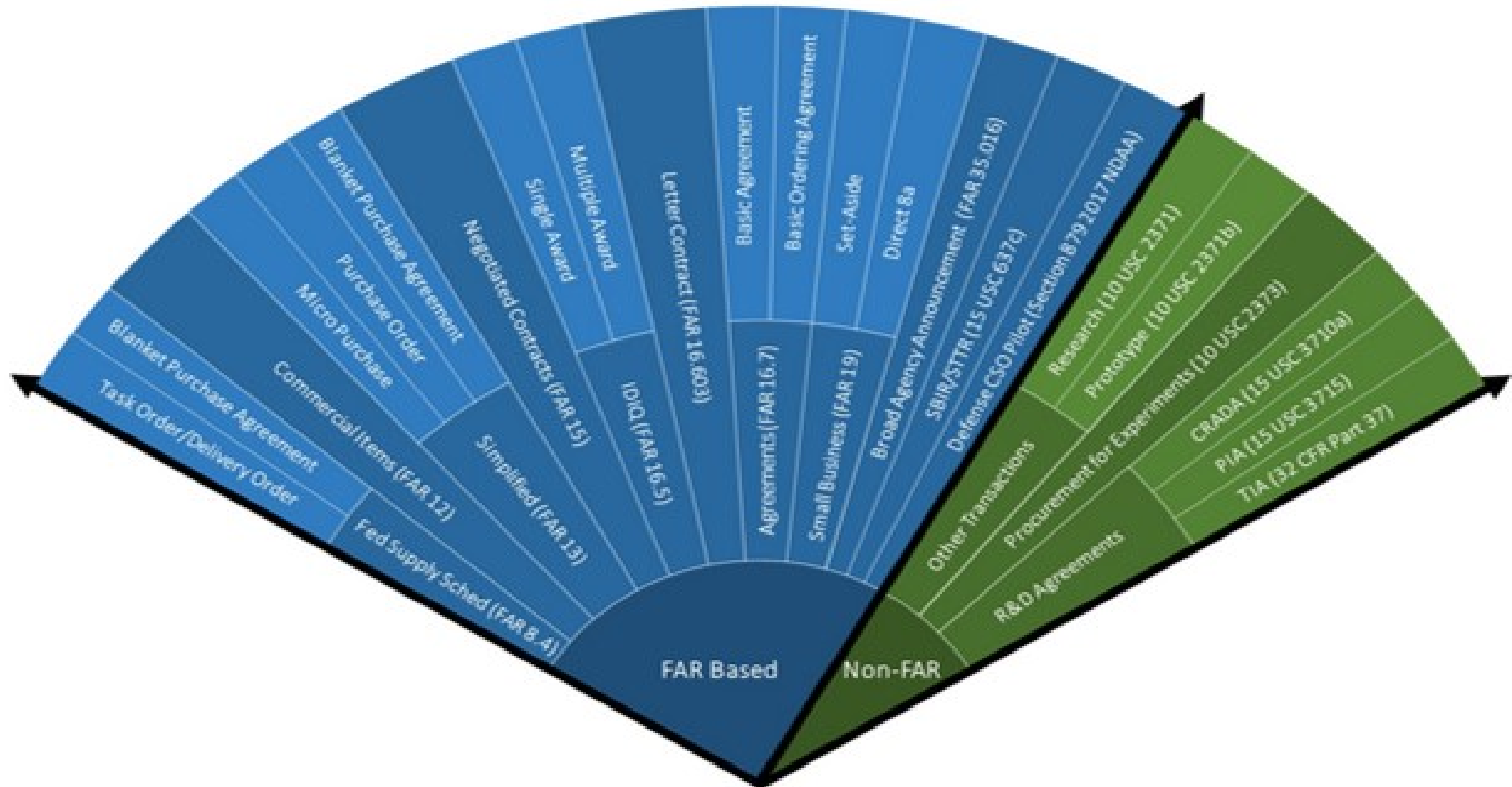
TOOLS ALREADY IN YOUR TOOLBOX YOU
MAY NOT HAVE MET YET

Agenda

Overview and discussion of various innovation-focused contracting vehicles (both FAR and non-FAR based) that already exist but are often misused, misunderstood, or underutilized. Includes:

- Other Transaction Agreements (OTAs)
- The Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs
- Cooperative Research and Development Agreement (CRADA)
- Partnership Intermediary Agreement (PIA)
- Other Innovative Contract Solutions

“Contracting Cone”



Small Business Innovation Research/ Small Business Technology Transfer

“Hey Government, you paid us to develop these innovations, why don’t you use them?”

Mr. David Metzger (ret. Arnold & Porter)

Other Transaction Agreements

Getting the latest from industry without
turning them off

Mr. Paul Hawkins (Reaves, Colley)

Mr. Ron Verostek

Other Transaction Agreements (OTAs)

An agreement (for research or prototype/production) entered into by the government that is not considered a “procurement” and is not FAR-based

Has existed in various forms since the 1950s

Seen as a vehicle that can both lead to more rapid innovation and attract contractors previously wary of involvement in the government space

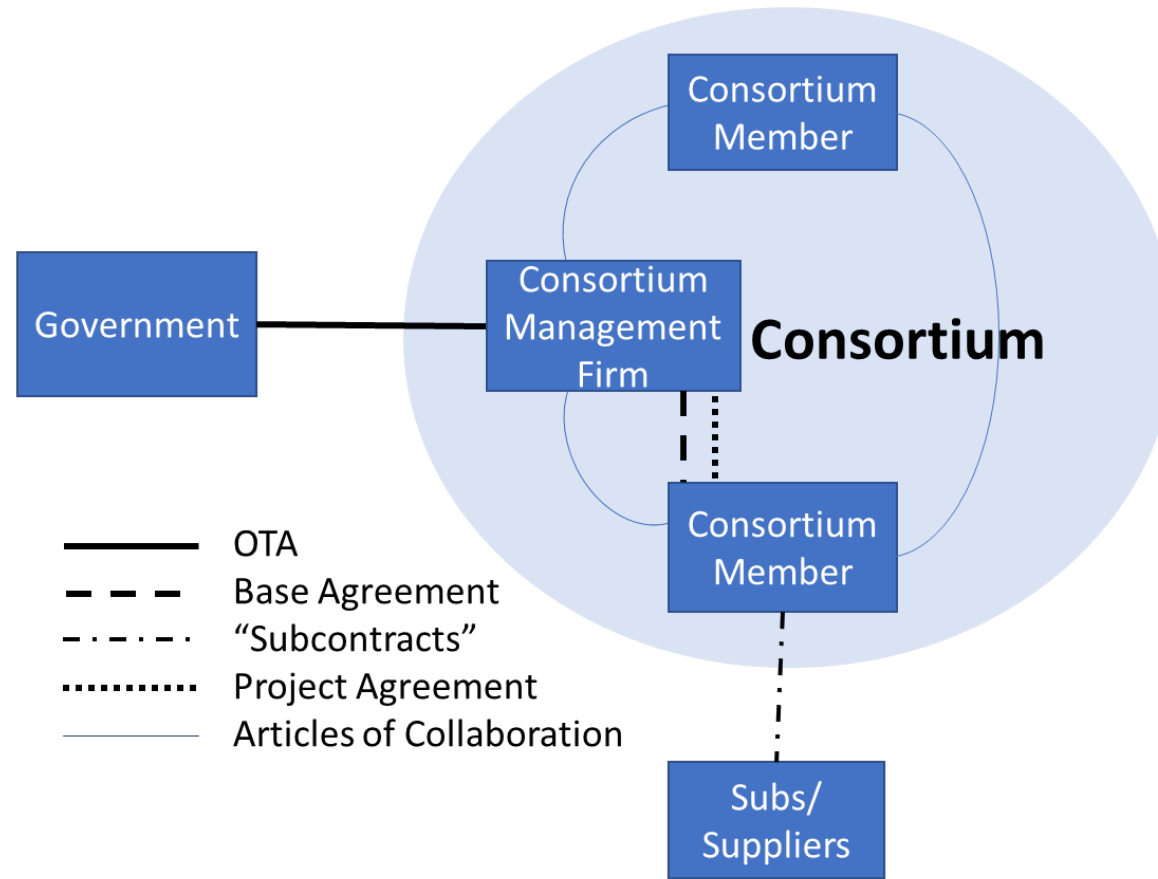
Current focus: DoD Prototype OTAs (10 U.S.C. § 2371b)

Typically involves the use of “consortiums”

Process includes:

WHITE PAPER/PROPOSAL → AWARD → PROTOTYPE → FOLLOW-ON PRODUCTION

Example OTA Consortium Arrangement



Statute/Regulation:	Applicable	Not Applicable
Bayh-Dole Act (patent rights in government procurements) and government data rights provisions		X
Buy American Act (“BAA”) and other related “buy America” statutes/regulations		X
Competition in Contracting Act (“CICA”)		X
Contract Disputes Act (“CDA”)		X
Cost Accounting Standards (“CAS”)		X
Export Controls (ITAR/EAR)	X	
False Claims Act (civil) (“FCA”)	X	
Federal Acquisition Regulation (“FAR”) and supplements (i.e. the Defense Federal Acquisition Regulation Supplement (“DFARS”))		X
Federal criminal statutes, including: <ul style="list-style-type: none"> False Claims False Statements Anti-Kickback Wire/mail fraud Gratuities/bribery 	X	
Freedom of Information Act (“FOIA”)	X	
Procurement Integrity Act	X	
Truthful Cost and Pricing Data Act (also known as “TINA”)		X
Tucker Act	X	

OTA/SBIR Experience/Lessons Learned

Phoenix Group of Virginia – SDVOSB CVE validated;

- Provide Services/Products to US Government, NATO ACT, Commercial Industry
- Revenue: 90% diverse professional services / 10% Products

OTA Phase II – US NAVY – PEO CARRIERS

- PROTOTYPE

SBIR Phase II – US AIR FORCE

- Energy Saving Devices

OTA

Worked concept with Navy customer beginning 2016

- Discussed with customer use of SBIR vs. OTA as vehicle

Introduced customer to CMG - Utilized CMG C5

Responded to call for white paper Apr 2017 w/i 10 days

- Aug 2017 White paper selected, included detailed templates to prepare for Request for Prototype Proposal (RPP)

Worked with customer on scope of work

Draft RPP received Nov 2017, responded w/i 10 days

Final RPP received Dec 2017, responded w/i 2 days

Awarded PPA May 2018

OTA

4-YEAR FFP CONTRACT – 3 PHASES

- Concept/requirements development -1yr, 5/2018 – 5/2019
- Demo/Prelim Evaluation – 2 yrs, 5/2019 – 5/2021
- Integrations Assessment/Enhancements, 1 Yr, 5/2021 – 5/2022

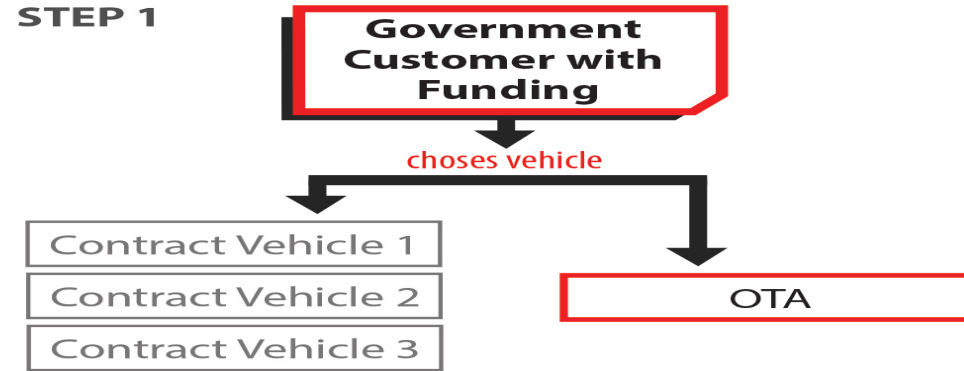
Prototype Project Agreement

Significant Portion – Phoenix Group 40%, sub performs 60%

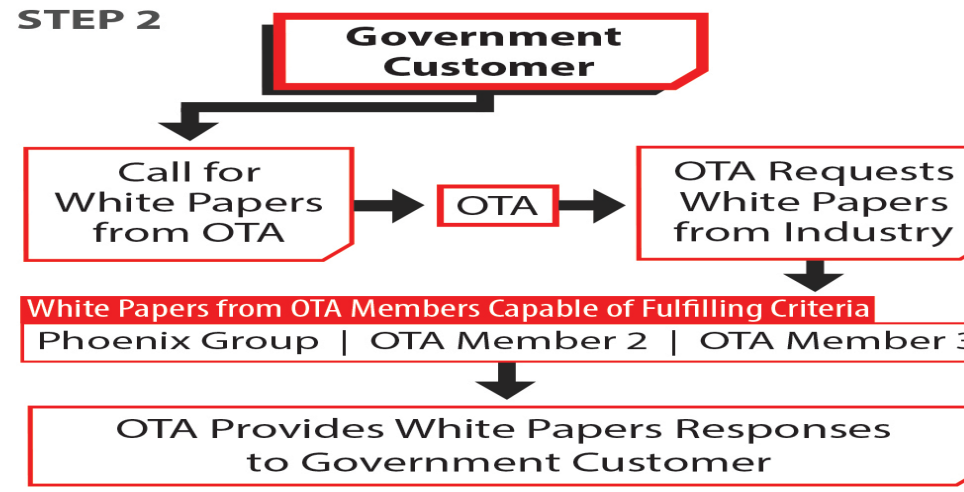
Payment by Milestones

OTA PROCESS

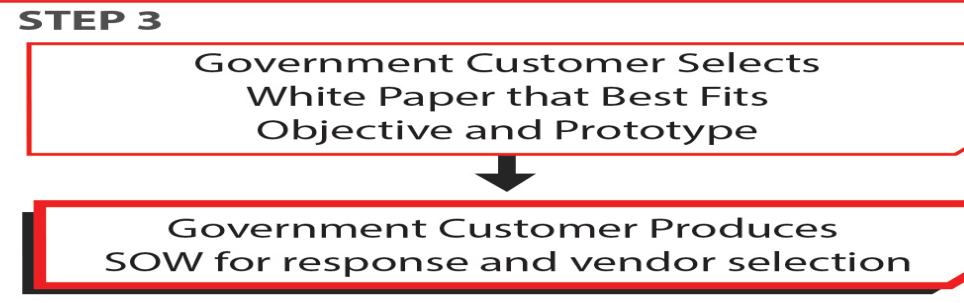
STEP 1



STEP 2



STEP 3



OTA Lessons Learned

- New process for customer – took longer than expected
 - Accustomed to traditional contracting process
 - Communications between customer and Consortium
 - Phase II communications greatly improved
 - Follow up with customer thru entire process
 - Ensure meetings include all decision makers and attend
- Negotiations after submission of final RPP
 - Detailed justification/data supporting SOW

OTA Lessons Learned

- Consortium priorities affected time to award
 - Learn key players and follow up continuously
- Contracting command priorities affected time to award
- Ceiling should include all expectations
- Include Follow on Production
- Multiple OTAs to choose from

SBIR/STTR Phases

Phase:	Timeframe:	Funding Level:	Purpose:
Phase I: Concept Development	6 months	\$150,000	“determine, insofar as possible, the scientific and technical merit and feasibility of ideas that appear to have commercial potential.”
Phase II: Prototype Development	24 months	\$1,000,000	“further develop work from Phase I that meets particular program needs and exhibits potential for commercial application”
Phase III: Commercialization	N/A	Unlimited	“where commercial applications of SBIR/STTR program-funded [research or research and development] are funded by non-Federal sources of capital; or where products, services or further research intended for use by the Federal Government are funded by non-SBIR/STTR sources of Federal funding.”

SBIR – Phoenix Group

AFWERX - Est. 2017. Catalyst for Innovations

- Open Topics introduced late 2018

Ph 1 proposal submission 10/2018, awarded 11/2018

- Energy Saving Devices – needed MOU for installation, produce video, marketing campaign

Ph II proposal submission 2/2019, awarded 3/2019

- WIP end date 8/2020, installation on AF Base

SBIR Lessons Learned

Ensure the AF Customer and Company submitting the Proposal understand the limits of the Contract and how the money will be used to execute the contract.

Maximize the full dollar amount of the Phase II Contract. Could have requested more funding by including additional products (KVAR, Nallyator, etc.).

AFWERX – Phase I weekly video conference calls and Phase II monthly video calls with SBIR Companies are very beneficial. Allow questions and answers provided immediately.

AFWERX wants to see success and full execution of contract.

Very responsive to calls and emails.

Video provided with Phase I Final Report has been distributed throughout the DoD.

Cooperative Research and Development Agreement

Collaborations for Research and Testing
Mr. Damien Walsh

Cooperative Research and Development Agreement (CRADA)

Authorizes federal labs to enter into agreements with other federal agencies, state/local gov't, industry, non-profits, and universities for licensing agreements for lab developed inventions or intellectual property to commercialize products or processes originating in federal labs

A CRADA is NOT a procurement or grant (15 U.S.C. § 3710)

Process can be highly adaptable and streamlined

Potential benefits for both federal and non-federal partner

Government people and resources but no funds

Partnership Intermediary Agreement

Government Contractors to Commercialize
and License Government Products

Mr. Damien Walsh

Partnership Intermediary Agreement (PIA)

Contract, agreement, or memorandum of understanding with non-profit partnership intermediary to engage academia and industry on behalf of government to accelerate tech transfer and licensing

Partnership intermediaries can function as objective third-party brokers between government and industry to increase opportunity for commercialization of new capability (10 U.S.C. § 2501)

Commonly used by government labs to increase likelihood of success in conducting cooperative or joint activities with small business firms and institutions of higher education to make use of technology-related assistance from a government lab

Other Innovation-focused Contract Solutions

Educational Partnership Agreements (10 U.S.C. § 2194)

Commercial Test Agreements (10 U.S.C. § 2539b)

Technical Information Exchanges: Product of the former USJFCOM to engage contractors

Resources

DoD OT Guide (November 2018):

[https://www.dau.edu/guidebooks/Shared%20Documents/Other%20Transactions%20\(OT\)%20Guide.pdf](https://www.dau.edu/guidebooks/Shared%20Documents/Other%20Transactions%20(OT)%20Guide.pdf)

SBIR/STTR Policy Directive (May 2, 2019):

https://www.sbir.gov/sites/default/files/SBIR-STTR_Policy_Directive_2019.pdf

DAU “Contracting Cone”: <https://aaf.dau.edu/contracting-cone/>

“While the Nation Slept:”, David Metzger, 2016, Mascot Books

TASC TGIC Address Outline

Hampton Roads Community College
Virginia Beach
January 14, 2019

I. SBIR Overview

A. Phase 1: Proving Feasibility

1. Reason why this phase is necessary—a historical view
2. A few tips for writing effective Phase I proposals
3. A few tips for government employees drafting Phase I contracts
4. Government: Keep deliverables to only two and no others—keep it simple
 - a. Proof of concept—aka Proof of Feasibility
 - b. Phase I Report Describing why feasibility has been proven

B. Phase II

1. Purpose: research and development
2. Enhancing the chance to receive a Phase II proposal
 - a. These awards are competitive—they compete for SBIR Program funds
 - b. Entrepreneurs—stay in touch with your technology USG champion(s)
3. Phase II amendments and additions are common
 - a. Phase II amendments funded with non-SBIR funds are Phase IIIs
 - b. Government: three tips to issuing Phase II contracts faster
 - i. Use model contracts
 - ii. Have the SBIR firm do a first draft of the SOW
 - iii. Justify the sole-source by citing the SBIR statute/Policy Directive
4. SBIR entrepreneurs
 - a. Cite as many applications to USG programs as you possibly can—there is no page limit to the Phase II proposal
 - b. This list will aid in identifying future contracts as Phase IIIs

C. Phase III: The most confusing, misunderstood but critical Phase

- a. SBA's Policy Directive describes this Phase in section 4 (c)

- i. A Phase III: “derives from, extends *or* completes prior SBIR effort and is funded with non-SBIR funds
- ii. A little history of this definition
- b. Entrepreneurs and Government personnel must know this section
- c. A few war stories where knowledge of this section won the battle
- d. Can a subcontract to a large firm be a Phase III?
- e. Can a firm bestow Phase III status on another firm? If yes, how?
- f. Even on a large firm? (Yes, by purchase of the SBIR firm or an asset purchase of an SBIR technology) (SBA size standards do not apply)
- g. By license? No. A license to use a technology cannot transfer SBIR status to that technology.
- h. Can the Government issue a Phase III SBIR but reserve for itself Unlimited Data Rights? (No.)

D. Recent Developments

1. The recent SBA SBIR Policy Directive, effective May 2, 2019, changed longstanding SBIR Data Rights in dramatic fashion
2. The changes:
 - a. Prior SBIR Data Rights protection periods were 4 years from the end of civilian funding agreements and 5 years from the end of military funding agreements
 - i. These SBIR Data protection periods could be extended indefinitely by virtue of the extension provision in the prior Directive—which extended SBIR Data Rights protection periods in all prior funding agreements in that technology line to four or five years after the latest SBIR funding agreement
 - ii. This extension provision had no limit—meaning protection periods could be continued into perpetuity (or forever) if the SBIR firm kept getting Phase II or III awards
 - iii. The May 2, 2019 Directive eliminated the extension provision
 - iv. In its place, it substituted a 20-year protection period *that started on the date of award* (instead of at the end of the funding agreement)

- v. Elimination of the extension provision does not conflict with any FAR or DFARS provision, and therefore, became effective on May 2, 2019
- vi. **However**, the 20-year provision **does conflict** with the four and five year protection periods set forth in the FAR SBIR clause (52.227-20) and the DFARS clause (252.227-7018)
- vii. SBA naively assumed that because its new Directive has the force of law, that it automatically overrode the FAR and DFARS clauses. **WRONG!!!**
- viii. So in the face of this mess SBA has created, how should Government and SBIR entrepreneurs proceed?
 - 1. Government personnel: incorporate the new clause by reference in Section H of every SBIR funding agreement issued on or after May 2, 2019
 - a. Cite it as: “SBIR clause, May 2, 2019 SBA SBIR Policy Directive, at Appendix I”
 - 2. SBIR entrepreneurs: do not accept an SBIR Phase I, II, or III funding agreement that does not incorporate the new SBIR clause in the new Directive—because the extension provision no longer exists, and you will be signing up for a fixed five-year protection period for military contracts
 - a. If the Government does not agree to this position, call SBA into the dispute to resolve it.
 - 3. Solution: SBA should pursue deletion of the FAR & DFARS clauses by the FAR/DAR Councils--send the new clause to all 11 SBIR agencies. Until then, chaos.
 - 4. Government personnel and entrepreneurs: do not wait for a change to the DFARS clause for military contracts (or the FAR clause)—that process could take 3-5 years