

Billing Code 7510-01

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1819, 1832, and 1852

RIN: 2700-

Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Contractor Re-certification of Program Compliance.

AGENCY: National Aeronautics and Space Administration

ACTION: Proposed Rule

SUMMARY: This is a proposed rule to amend the NASA FAR Supplement (NFS) to include a requirement for NASA's Small Business Innovation Research (SBIR) and the Small Business Technology Transfer (STTR) contractors to complete a re-certification of program compliance prior to final payment. This requirement is being established to facilitate the Government's ability to hold contractors accountable for compliance with federal statute, regulation, and program requirements as outlined in the Office of Inspector General's Management Alert Memorandum dated April 28, 2004. As part of its continuing effort to reduce the paperwork and respondent burden, NASA invites the general public and other Federal agencies to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995 (Public Law 104-13, 44 U.S.C. 3506(c)(2)(A)).

DATES: Comments should be submitted on or before (Insert 60 days from Federal Register Publication Date) to be considered in formulation of the final rule.

ADDRESSES: Interested parties may submit comments, identified by RIN number

2700-xxxx via the Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments. Comments may also be submitted to Marilyn J. Seppi, NASA, Office of Procurement, Contract Management Division (Code HK), Washington, D.C. 20546. Comments can also be submitted by e-mail to: Marilyn.Seppi-1@nasa.gov

Comments on the information collection should be directed to Ms. Kathy Shaeffer, Mail Suite 6M70, National Aeronautics and Space Administration, Washington, DC 20546-0001, 202-358-1230, email: Kathleen.shaeffer-1@nasa.gov

FOR FURTHER INFORMATION CONTACT: Marilyn J. Seppi, NASA, Office of Procurement, Contract Management Division (Code HK); (703) 553-2551; e-mail: Marilyn.Seppi-1@nasa.gov

Requests for additional information regarding the information collection should be directed to Ms. Kathy Shaeffer, Acting NASA Reports Officer, NASA Headquarters, 300 E. Street SW, Mail Suite 6M70, Washington, DC 20546, (202) 358-1230, Kathleen.shaeffer-1@nasa.gov.

SUPPLEMENTARY INFORMATION:

A. Background

The NASA FAR Supplement at 1832.12 requires that all research and development contracts under the SBIR and STTR Programs include the clause at 1852.232-83, Conditions for Final Payment. This clause provides direction to the contractor regarding completion and submission of a recertification requirement prior to and as a condition of final payment. Currently, under the SBIR/STTR Programs the contractor is only required to certify at the time of proposal submission that the proposing entity has or has not received federal funding for essentially equivalent work. The proposed new clause will require a post-award certification by the small business concern (SBC) for program compliance as a condition and prior to final payment. This change proposes a new clause in 1852.232-83 for use in all SBIR Phase I, SBIR Phase II, and STTR contracts.

In addition the NASA FAR Supplement at 1819.73 requires the clauses at 1852.219-80 -- Limitation on Subcontracting – SBIR Phase I; 1852.219-81 -- Limitation on Subcontracting – SBIR Phase II; and 1852.219-82 -- Limitation on Subcontracting – STTR in the respective SBIR and STTR contracts to delineate the subcontracting limitations necessary for contract performance. Also, the NASA FAR Supplement at 1819.73 requires the clauses at 1852.219-83 – Limitation of the Principal Investigator-SBIR Program and 1852.219-84 – Limitation of the Principal Investigator-STTR Program respectively, to delineate the employment of the principal investigator which is necessary for monitoring contract performance.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

This proposed rule is not expected to have a significant economic impact on a substantial number of small entities with the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601. *et seq.*, because the proposed recertification prior to final payment to awardees is merely an update of the representations and certifications submitted at the time of proposal submission in accordance with Small Business Administrations (SBA's) SBIR Program Directive.

C. Paperwork Reduction Act

1. Abstract

NASA is requesting OMB approval for the new collection that will be created by the proposed amendment to the NASA FAR Supplement requiring SBIR/STTR contractors to recertify program compliance prior to final payment.

2. Method of Collection

The NASA contract clause will require inclusion of the information as part of contractors' final payment invoice requests.

3. Data

Title: Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Contractor Re-certification of Program Compliance.

Collection of Information: The Certification Required Prior to Final Payment.

The public burden for obtaining recertification from the SBIR/STTR contracts is estimated annually to be 242 hours with an average annual cost of \$12,100 for each SBIR/STTR

Program year. The estimated burden has been calculated as follows:

Certification (1 required per contract).....	484
Hours per certification.....	X 0.50 (30 minutes)
Certification Burden.....	242 hours
Average Hourly Rate.....	\$50
Average Annual Cost.....	\$12,100

The estimated number of certifications shown above is based upon the average total number of NASA's SBIR and STTR-related contracts awards for FY-2004, FY-2003, and FY-2002. However, no real cost is associated with SBIR/STTR contractors because the costs associated with this type of administrative work is part of the cost of doing business and usually found in the companies' direct or indirect expense rates and therefore included in their contract price. This estimate reflects the combined paperwork clearance request the Agency is submitting to OMB.

List of Subjects in 48 CFR 1832, 1819, and 1852

Government Procurement

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Assistant Administrator for Procurement

Accordingly, 48 CFR Parts 1819 and 1852 are amended as follows:

1. The authority citation for 48 CFR Parts 1832, 1819, and 1852 continues to read as follows:

Authority: 42 U.S.C. 2473(c)(1)

PART 1819 – SMALL BUSINESS PROGRAMS

2. Section 1819 is amended by adding Subpart 1819.73 to read as follows:

1819.73 - - Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs.

1819.7301 Scope of Subpart.

The Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs were established and issued under the authority of The Small Business Act codified at 15 U.S.C. 631 as amended and the Small Business Innovation Development Act of 1982 (P.L. 97-219), codified with amendments, at 15 U.S.C. 638. The Small Business Act requires that the Small Business Administration issue SBIR and STTR Program Policy Directives for the general conduct of the SBIR/STTR Programs within the Federal Government. The statutory purpose of the SBIR Program is to strengthen the role of innovative small business concerns (SBCs) in federally-funded research or research and development (R/R&D). Specific program purposes are to: stimulate technological innovation; use small business to meet Federal R/R&D needs; foster and encourage participation by socially and economically disadvantaged SBCs, and by SBCs that are 51 percent owned and controlled by women, in technological innovation; and increase private sector commercialization of innovations derived from Federal R/R&D, thereby increasing competition, productivity and economic growth. Federal agencies participating in the SBIR/STTR Programs (SBIR/STTR agencies) are obligated to follow the guidance provided by this Policy Directive. NASA is required to ensure its policies, regulations, and guidance on the SBIR/STTR Programs are consistent with SBA's Policy Directive. Contracting Officers are required to insert the applicable clauses identified in 1819.7302 in all SBIR and STTR contracts.

1819.7302 NASA contract clauses and solicitation provisions.

(a) Contracting Officers shall insert the clause at 1852.219-80 Limitation on Subcontracting – SBIR Phase I Program, in all Phase I contracts awarded under the Small

Business Innovation Research (SBIR) Program established pursuant to Pub. L. 97-219 (the Small Business Innovation Development Act of 1982).

(b) Contracting Officers shall insert the clause at 1852.219-81 Limitation on Subcontracting – SBIR Phase II Program, in all Phase II contracts awarded under the Small Business Innovation Research (SBIR) Program established pursuant to Pub. L. 97-219 (the Small Business Innovation Development Act of 1982).

(c) Contracting Officers shall insert the clause at 1852.219-82 Limitation on Subcontracting – STTR Program, in all contracts awarded under the Small Business Technology Transfer (STTR) Program established pursuant to Pub. L. 97-219 (the Small Business Innovation Development Act of 1982).

(d) Contracting Officers shall insert the clause at 1852.219-83 Limitation of the Principal Investigator – SBIR Program, in all contracts awarded under the Small Business Innovation Research (SBIR) Program established pursuant to Pub. L. 97-219 (the Small Business Innovation Development Act of 1982).

(e) Contracting Officers shall insert the clause at 1852.219-84 Limitation on Subcontracting – STTR Program, in all contracts awarded under the Small Business Technology Transfer (STTR) Program established pursuant to Pub. L. 97-219 (the Small Business Innovation Development Act of 1982).

PART 1832 - CONTRACT FINANCING

3. Section 1832.12 -- Final Payment under SBIR and STTR Contracts, is added to read as follows:

1832.1200 – Final Payment under SBIR and STTR Contracts.

1832.1210 Contract Clause.

Contracting Officers shall insert the clause at 1852.232-83, Conditions for Final Payment – SBIR and STTR Contracts, in all Phase I and Phase II contracts awarded under the Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs established pursuant to Pub. L. 97-219 (the Small Business Innovation Development Act of 1982). The clause is limited to use solely in contracts awarded under the SBIR/STTR Programs.

PART 1852 – SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 1852.232-83 is added to read as follows:

1852.232-83 Conditions for Final Payment - SBIR and STTR Contracts.

As prescribed in 1832.1200 insert the following clause in all SBIR and STTR solicitations and contracts.

Conditions for Final Payment - SBIR and STTR Contracts

(Month/Year - Date)

As a condition for final payment under this contract, the Contractor shall provide the following certifications as part of its final payment invoice request:

During performance of this contract --

1. Essentially equivalent work performed under this contract has not been proposed for funding to another Federal agency;
2. No other Federal funding award has been received for essentially equivalent work performed under this contract;
3. Deliverable items submitted under this contract have not been submitted as deliverable items under another Federal funding award;
4. For SBIR contracts: The subcontracting limitation set forth in this contract was not exceeded except as approved in writing by the Contracting Officer on (insert date of approval or modification number.);
5. For STTR contracts: The subcontracting limitation set forth in this contract was not exceeded;
6. For SBIR contracts: The primary employment of the principal investigator (PI) identified in this SBIR contract was with the Contractor, except as approved in writing by the Contracting Officer on (insert date of approval or modification number.); and
7. For STTR contracts: The primary employment of the principal investigator (PI) identified in this STTR contract was the SBC/contractor or the research institution (RI). The PI identified in the STTR contract was considered key in the performance of this contract and may not have been employed by the Contractor/SBC. However, the Contractor/SBC did exercise primary management direction and control over the PI and was overall responsible for the PI's performance under this contract. Any substitutions of this individual were approved in writing by the Contracting Officer on (insert date of approval or modification number.).

I understand that the willful provision of false information or concealing a material fact in this representation is a criminal offense under Title 18 U.S. Code, Section 1001, False Statements, as well as Title 18 U.S. Code, Section 287, False Claims.

(End of Clause)

5. Section 1852.219-80 is added to read as follows:

1852.219-80 Limitation on Subcontracting – SBIR Phase I

As prescribed in 1819.7202 (a) insert the following clause in all SBIR Phase I contracts.

Limitation on Subcontracting – SBIR Phase I

(Month/Year - DATE)

The Contractor shall perform a minimum of two-thirds of the research and/or analytical effort (total contract price less profit) conducted under this contract. Any deviation from this requirement must be approved in advance and in writing by the Contracting Officer.

(End of Clause)

6. Section 1852.219-81 is added to read as follows:

1852.219-81 Limitation on Subcontracting - SBIR Phase II

As prescribed in 1819-7202 (b) insert the following clause in all SBIR contracts.

Limitation on Subcontracting - SBIR Phase II

(Month/Year) (DATE)

The Contractor shall perform a minimum of one-half of the research and/or analytical effort (total contract price less profit) conducted under this contract. Any deviation from this requirement must be approved in advance and in writing by the Contracting Officer. Since the selection of R&D contractors is substantially based on the best scientific and technological sources, it is important that the contractor not subcontract technical or scientific work without the contracting officer's advance approval.

(End of Clause)

7. Section 1852.219-82 is added to read as follows:

1852.219-82 Limitation on Subcontracting– STTR Program

As prescribed in 1819-7202 (c) insert the following clause in all SBIR and STTR solicitations and contracts.

**Limitation on Subcontracting – STTR Program
(Month/Year) (DATE)**

The Contractor (small business concern (SBC)) shall perform a minimum of 40% of the work under this contract (total contract price including cost sharing, if any, less profit if any). A minimum of 30% of the work under this contract shall be performed by the research institution (RI). Since the selection of R&D contractors is substantially based on the best scientific and technological sources, it is important that the contractor not subcontract technical or scientific work without the contracting officer's advance approval.

(End of Clause)

8. Section 1852.219-83 is added to read as follows:

1852.219-83 Limitation of the Principal Investigator-SBIR Program OR Principal Investigator - Primary Employment-SBIR Program.

As prescribed in 1819-7302(d) insert the following clause in all SBIR solicitations and contracts.

**Limitation of the Principal Investigator-SBIR Program
(Month/Year - DATE)**

The primary employment of the principal investigator shall be with the small business concern (SBC)/contractor during the conduct of this contract. Primary employment means that more than one-half of the principal investigator's time is spent in the employ of the contractor/SBC. This precludes full-time employment with another organization. Deviations from these requirements must be approved in advance and in writing by the contracting officer and are not subject to a change in the firm-fixed price of the contract. The PI for this contract is (insert name).

(End of Clause)

9. Section 1852.219-84 is added to read as follows:

1852.219-84 Limitation of the Principal Investigator-STTR Program.

As prescribed in 1819-7302 (e) insert the following clause in all STTR solicitations and contracts.

**Limitation of the Principal Investigator-STTR Program
(DATE)**

The primary employment of the principal investigator (PI) identified in this STTR contract is with the small business concern (SBC)/contractor or the research institution (RI). Primary employment means that more than one-half of the principal investigator's time is spent in the employ of the contractor/SBC or RI.

The principal investigator (PI) is considered to be key personnel in the performance of this contract and may not have been employed by the contractor/SBC. The contractor/SBC whether or not the employer of the PI shall exercise primary management direction and control over the PI and be overall responsible for the PI's performance under this contract. Deviations from these requirements must be approved in advance and in writing by the contracting officer and are not subject to a change in the firm-fixed price of the contract. The PI for this contract is (insert name).

(End of Clause)