Legislative Updates / SBIR Reauthorization

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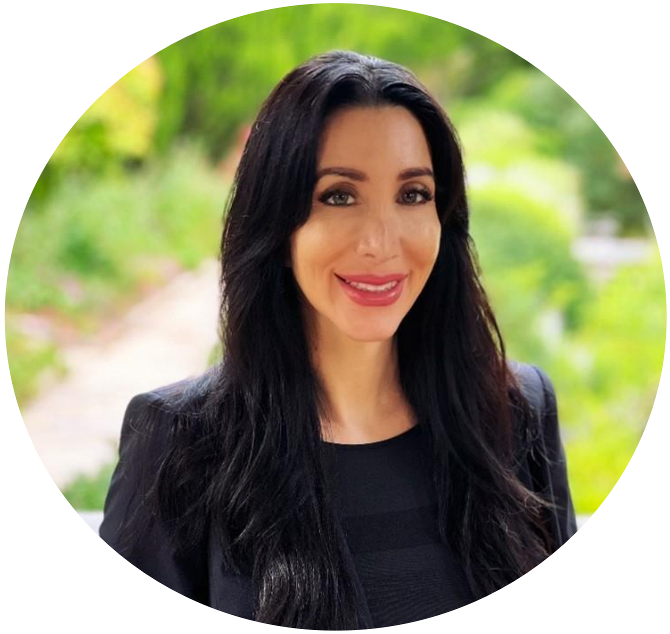

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SBIR Workshop Legislative Update: What’s Happening Inside the Beltway

Key Points

- Continuing Resolution Expiration on 16 December
- Inflationary Impacts
- FY23 NDAA Provisions that may impact your businesses
- SBIR Reauthorization
- Q&A

Appropriations for FY23

- The current Continuing Resolution expires at midnight on Friday
- Appropriators worked over the weekend to negotiate the omnibus. Progress made, but no bill yet. Additional CR possible, at least until 23 December as no vote scheduled this week
- Current negotiations are focused on the non-defense spending
- Under the current CR we are operating at flat FY22 funding levels that hadn't accounted for inflation
- There is incentive in the Senate with the two top appropriators, Patrick Leahy (D-Vt.) and Richard Shelby (R-Ala.) retiring this year to reach a funding deal before the end of their final session

Continuing Resolutions and Inflation

- There is talk of a possible year-long CR if a deal cannot be made
- A clean CR avoids a government shutdown, but will likely have few anomalies.
- Inflation hit a 40-year high, this means a CR under FY22 is close to sequestration numbers
- NDIA calculates the Pentagon will lose up to $6 billion of its buying power per month if defense bill increases, authorized in the FY2023 NDAA, are not passed
- Economic Price Adjustment Guidance from DoD provides some relief for certain contracts, at the contracting officer’s discretion

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Continuing Resolutions and Inflation Continued

- Sec. 822 of the FY23 NDAA provides additional relief for firm fixed price contracts, if the contractor or subcontractor will ***lose*** money based on the current terms of their contract. This provision is subject to specific appropriations which have not been made

- This language stemmed from an amendment NDIA worked on with our Tri-association partners to get inflation relief into the Senate's NDAA amendments

- NDIA continues to inform congressional offices and committees on the negative impacts to industry caused by starting new FYs under CRs

- The Tri-Association, which includes NDIA, AIA, and PSC are collaborating with DoD to find ways to lessen the burden on industry. Tri-Association leadership met with Pentagon leads this fall to discuss ways for the Department to expend funds at a faster rate and make additional adjustments for inflation

Status of Legislative Process:
James M. Inhofe National Defense Authorization Act for Fiscal Year 2023(H.R. 7776)

- House – Passed the negotiated FY 2023 NDAA on 8 Dec (350-80)
- Senate – For the second year in a row the Senate did not pass its own version of the bill. Concessions were included in the House version
  - Awaiting Senate's vote. Expected prior to the holiday recess
- Total authorization is $858 billion over FY22 defense levels and $45 billion more than the President's Budget request (prior to inflation and Ukraine support)

NDIA Priority Issues in the NDAA

- Sec. 805. Treatment Of Certain Clauses Implementing Executive Orders (EO)
  - This was a legislative priority for NDIA to ensure changes from an EO trigger the changes clause and "*shall be treated as a change directed by the contracting officer pursuant to, and subject to, the Changes clause of the underlying contract, order, or other transaction*."

*Not included in the final NDAA was the Senate provision to limit progress payments. (Senate version Sec. 827. Progress Payment Incentive Pilot)

NDIA Priority Issues in the NDAA– Inflation

- Sec. 822 . Temporary Authority to Modify Contracts to Provide Extraordinary Relief Due to Inflation Impacts (S. 5812)
  - Amends 50 USC 1431, to allow DoD to use funds *specifically provided by an appropriations Act for said purpose* to modify contracts when,
    - Due solely to inflation, the cost to a prime contractor to perform on a contract is greater than the price of that contract
    - A prime contractor may submit a request to modify a contract when, due solely to inflation, the cost to a subcontractor to perform is greater than the price of that subcontract
    - A prime contractor must certify that it will flow to the subcontractor the remittance made by DoD
  - Contract modifications pursuant to the temporary authority may only cover the actual cost of performing the contract or subcontract (including indirect costs)
  - The authority expires December 31, 2023

- Sec. 1003. Annual Report on Budgetary Effects on Inflation (S. 1002; H.R. *ISI*)
  - Requires DoD, within 30 days of submission of the President’s Budget, to provide a report to the defense committees on actual and anticipated effects of inflation
  - Requires DoD, within 60 days of the mid-year budget review, to brief the defense committees on inflation, to include requests for equitable adjustment, economic price adjustment clauses exercised, and bilateral contract modifications to include an EPA

NDIA Priority Issues in the NDAA–Restricting Sources for Semiconductors

- Sec. 5949. Prohibition on Certain Semiconductor Products and Services (S. 5871)
    - Prohibits federal agencies from
        - Acquiring or contracting for electronic parts, products, or services that include covered semiconductors from named Chinese companies
        - Contracting with an entity to procure or obtain electronic parts or products that use any electronic parts or products that include covered semiconductor products or services (applies only to critical systems)
    - The prohibition takes effect five years from enactment
        - Systems with prohibited semiconductors are grandfathered in for the life of the product in which they are embedded
        - The Federal Acquisition Regulatory Council shall issue regulations implementing the prohibition within three years of enactment, to include
            - Flowdown requirement for prime contractors
            - Requiring contractors to certify non-use of, and detect and avoiding using covered semiconductor products or services; and rework or take corrective action to remedy the inclusion of covered semiconductors products or services
    - Waivers can be issued
        - By specified Secretaries if it is in “the critical national security interests” of the U.S.
        - By the head of an agency, under certain circumstances, renewable waivers may be granted
        - Within 30 days of granting a waiver, the relevant agency must submit a report to Congress, along with a written justification
    - A contractor is not subject to civil liability or a determination of not being a responsible contractor if it takes comprehensive and documentable efforts to remove covered semiconductors from the Federal supply

NDIA Priority Issues in the NDAA– Buy Allies

- Sec. 852. Modifying Miscellaneous Limitations on Procurement of Non-Domestic Goods (S. 842)
  - Amends 10 USC 4864, requiring DoD to periodically review the limitations on procuring specified items, and submit to the defense committees a determination of whether such limitations should be continued, modified, or terminated
    - 10 USC 4864 limits certain procurements to domestic or NTIB sources

- Sec. 851. Modifying the National Technology and Industrial Base (S. 845, H.R. 859G)
  - Amends 10 USC 4801 by adding New Zealand to the NTIB
  - All *Five Eyes* countries are now in the NTIB

NDIA Priority Issues in the NDAA—Small Business

- Sec. 876. Report on Transition to Phase III for SBIR and STTR (H.R. 859J)
  - Requires DoD to develop metrics to assess the effectiveness of the SBIR and STTR programs in “meeting the mission needs” of DoD
  - Requires DoD to brief the defense committees within six months and 1 year of enactment
- Sec. 856. Codifying Mentor-Protégé (S. 862, H.R. 854)
  - Transfers section 831 of the FY1991 NDAA (Mentor-Protégé) to the legislative text of 10 USC 4902
  - Amends the program (for agreements executed after enactment), including
    - Lowering the threshold award to the mentor firm from $100 to $25 million,
    - Increasing the standard maximum program period from two to three years, and
    - Establishing a 5-year pilot where a protégé firm may receive up to 25% reimbursement for which the mentor firm is eligible
  - Requires DoD to track data and conduct an independent review of the program every three years
  - *House Committee Report – Requires DoD to brief HASC by March 1, 2023, on implementing the Defense Business Board recommendations on the program*

Small Business – Provisions Not Adopted

- Senate
  - Sec. 861. Modifying the Defense Research and Development Rapid Innovation Program
    - Would have amended 10 USC 4061 and established a five-year pilot program incentivizing trusted private capital to invest in domestic small or nontraditional defense businesses
    - *See H. 229B – Modernization provisions not adopted*

- House
  - Sec. 859K. Extending Participation in 8(A) Programs
  - Sec. 816. Competition Requirements for Purchases from Federal Prison Industries
  - Sec. 859B. Price Evaluation Preferences for HUBZone Small Businesses
  - Sec. 859D. Modifying the Nonmanufacturer Rule
  - Sec. 869. Raising Contract Thresholds for Certain Small Businesses

SBIR/STTR Reauthorization

- *SBIR and STTR Extension Act of 2022 (P.L. 117-183)*
  - Extends the authority of the programs from September 30, 2022, to September 30, 2025
  - Requires agencies to implement a program assessing security risks presented by small businesses and requires contractors, prior to award, to disclose ties to various countries, with a focus on China, Russia, North Korea, and Iran
  - Limits the number of Phase I and Phase II awards an entity may receive if the entity does not meet certain performance standards
  - Requires GAO to report on entities that received more than 50 Phase II awards in specified 10-year period

SBIR/STTR Reauthorization. Increased Minimum Performance Standards for Experienced Firms

Progress to Phase II - Increased Performance Standards for More Experienced Firms

- This new Phase I to Phase II transition standard applies to firms that have won more than 50 Phase I awards during the five fiscal years preceding the most recent year.
  - These firms must double their transition rate. The current minimum standard applies to firms with more than 20 Phase I awards and requires a minimum transition rate of 1 Phase II award per 4 Phase I awards.
  - Firms with more than 50 awards, as detailed above, will now be required to meet an average of at least 2 Phase II awards per 4 Phase I awards.

Progress to Phase III - Tier one applies to firms that have won more than 50 Phase II awards during the ten fiscal years preceding the two most recent.

- The performance standard would increase by 150% and require an average of $250,000 of sales and/or investments per Phase II award received during the covered period.
  - The current standard is an average of $100,000 for firms that have won more than 15 Phase II awards during the covered period.
  - This Act codifies the current practice that sales and/or investments shall result from awards within the covered period.

Tier two applies to firms that have won more than 100 Phase II awards during the ten fiscal years preceding the two most recent.

  - The standard would increase by 350% and require an average of $450,000 of sales and/or investments per Phase II award received during the covered period.
  - The current standard is an average of $100,000 for firms that have won more than 15 Phase II awards during the covered period. This Act codifies the current practice that sales and/or investments shall result from awards within the covered period.

SBIR Increased Minimum Performance Standards Consequences, Documentation, and Waivers

- Consequence of Failure to Meet Standard. If a firm does meet an increased performance standard, it may not receive more than 20 Phase I or Direct to Phase II awards at each agency in the following year
  - An agency may implement more restrictive limitations on the number of Phase I or Direct to Phase II awards.
  - Patents for Increased Standards. Unlike the existing minimum performance standard that allows firms to use sales and investments or patents to meet the commercialization standard, patents may not be used under the increased commercialization standards
- Documentation. A small business that is subject to the increased minimum performance standards for Progress to Phase III commercialization shall submit supporting documentation to SBA to verify reported sales associated with their SBIR and STTR awards during the covered period; the requirement relates to the covered sales that the small business reports to SBA as helping to meet the standards. The sales do not include federal transactions because those can be verified through the federal database. The small business must provide documentation for such sales going back five fiscal years
- Waiver. SBA may grant a waiver for a topic that is critical to an agency’s mission or relates to national security. The Administration shall implement the increased minimum performance standards not later than April 1, 2023 (the Fiscal Year 2023 benchmark assessment)
- Termination. The increased minimum performance standards will terminate on September 30, 2025

Q&A

- Please ask any questions here that may benefit the group to hear the answer
- If you have something specific to your company, please email me at kmatory@ndia.org
- NDIA National is happy to support federal issues with our Small Business Division. NDIA's New England Chapter is a great resource for engaging on local issues
- Thank you for the opportunity to speak with you.