



TUTORIAL 22

What is the Difference Between a Consultant and a Subcontractor?

Subcontractors and consultants can be important contributors to a Phase I Department of Energy (DOE) Small Business Innovation Research/Small Business Technology Transfer (SBIR/STTR) project. They can bring expertise to the project not found among the employees of the applicant small business, and subcontractors can also provide sophisticated facilities and equipment that the applicant could not otherwise access or afford. But what is the difference between a consultant and a subcontractor?





Consultants

VS



Subcontractors

WHAT IS A SUBCONTRACT?

Before defining the difference, let's clarify what relationship may have with the SBIR/STTR applicant small business. Both consultants and subcontractors will be under a subcontract, which is defined in the DOE Funding Opportunity Announcement (FOA) as "*any agreement, other than one involving an employer-employee relationship, entered into by the primary recipient of a federal government grant, calling for supplies or services required solely for the performance of the original grant award.*" In other words, if a third party, either an individual or entity, is contributing to another small business's SBIR/ STTR proposal, then the agreement to do so is referred to as a subcontract. This means that either a subcontractor or a consultant will have a subcontract with the applicant small business.

CONSULTANTS

To differentiate a consultant from a subcontractor, let's first look at DOE's definition of a consultant provided in the FOA. ***A consultant is generally an individual who is not using any institutional or organizational facilities and is acting as a direct agent. The individual usually bills by the hour, submitting invoices. Invoices occasionally include additional direct expenses incurred. Consultants are normally subject matter experts and are not directly supervised by the awardee.***

In DOE's Instructions for Completing a DOE SBIR/STTR Phase I Grant Application,

DOE defines a consultant as "*An individual who provides professional advice or services for a fee, but normally not as an employee of the engaging party... Consultants may also include firms that provide paid professional advice or services.*" This suggests several common characteristics of consultants: they are usually individuals, they typically are not part of a larger company, and they provide advice and services.

SUBCONTRACTORS

In contrast, subcontractors tend to be organizations, ranging from universities and Federal laboratories to Fortune 100 companies to other small businesses. In addition, their scope tends to be broader according to DOE: "... providing technical expertise, facilities, or equipment."

Therefore, in general, consultants are individuals and subcontractors are organizations or entities, and consultants tend to be limited to providers of services and advice, while subcontractors can provide a broader array of resources for an SBIR/STTR project.

However, this is not a hard and fast distinction. Note the use of "generally," "normally," "occasionally" and "usually" in the DOE definitions of a consultant, and the statement that "Consultants may also include firms ..."



CHOOSING ONE OVER THE OTHER

There appears to be some flexibility in whether the third party on an SBIR/STTR subcontract could be treated as a consultant or a subcontractor. Are there reasons to prefer one over the other, if there is a choice?

Yes, there are, for several reasons:

1. If it's an STTR project, then the applicant small business must team with a non-profit subcontractor. This subcontractor is known as the research institution (RI), and typically is a university or Federal laboratory. A consultant could not serve as the RI on an STTR. Put another way, the university could be the RI on your STTR project, but one of its professors acting as an independent consultant in their free time could not.
2. With SBIR applications, bringing a university faculty member onto your project as a consultant may reduce the time, cost and administrative burden associated with making him or her part of your team.
3. Bringing a university or Federal laboratory staff member onto your team as a consultant may avoid some of the intellectual property (IP) issues that can arise if the university or lab is made a subcontractor on the project. However, this is not always the case—some such institutions require, through their employment agreements, that any IP created by their staff members belongs to the institution, even if the staffer created it in their "personal time."
4. Having a well-known institution or company as a subcontractor can elevate the credibility and prestige of the small company applicant in ways that may not be possible if just an individual joins the team as a consultant. The exception to this is when that individual is well known and respected in his/her own right.
5. Having a large subcontractor, such as a university or large corporation, may discourage potential IP infringers that do not want to create a legal issue with a large player that has substantial resources for litigation.

In a Phase I SBIR project, the applicant small business can subcontract up to 33% of the research effort. Remembering that a subcontract can be with a

DOE does not allow an individual on an SBIR/STTR project to wear multiple hats.



consultant and/or a subcontractor, this means the applicant has considerable latitude about who it brings onto its Phase I proposal and project. On an STTR project, requirements are more restrictive: the applicant must subcontract at least 30% of the research to the RI, a non-profit subcontractor. The applicant itself must perform at least 40% of the research—this leaves a difference of 30% of the research that the applicant can do itself, subcontract to the RI, or award to a consultant or additional subcontractor.

A DOE STTR project also provides greater flexibility regarding the place of employment of the principal investigator (PI). Whereas the PI must be primarily employed by the small business applicant in an SBIR, it is possible for him/her to be primarily employed by the RI on a DOE STTR project. However, a key word here is "employed"; in neither an SBIR nor an STTR can the PI be a consultant, subcontractor, or anything other than an employee.

FINAL OBSERVATIONS

In closing, here are some final observations ... First, the role of subcontractors and consultants in a Phase I DOE SBIR/STTR project must be clearly defined and described in the work plan in the project narrative portion of the grants.gov application. DOE also expects each subawardee to be clearly identified and defined in the proposal as a subcontractor or consultant.