



ITAR and EAR Requirements Under Small Business Innovation Research (SBIR) Contracts

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Companies involved in Small Business Innovation Research (“SBIR”) and Small Business Technology Transfer (“STTR”) contracts often are subject to requirements under the International Traffic In Arms Regulations (“ITAR”) and the Export Administration Regulations (“EAR”) for products, technologies and software developed under their contracts.

These requirements frequently apply during the early stages in designing, developing and testing products and related software and technical data under these programs. In addition, as companies begin the all-important process of commercializing their products developed under the programs, it is critically important to identify the export jurisdiction and classification of the products –ie, if they are subject to ITAR and/or EAR and the legal requirements that will apply in the sales of the products.

This is a fundamental step in bringing a product to the commercial marketplace – both you and your customers will want to know if the product is subject to export control restrictions for sales both in the U.S. and overseas.

In some cases the SBIR contract documents state if the item being developed is ITAR- or EAR-controlled. However if the contract is silent this does not mean that the items developed are not subject to these controls. Rather, it is up to the company developing the product to determine the ITAR and EAR requirements that will apply.

The stakes are high – violations of ITAR and EAR can result in penalties of up to \$1 million in fines and 20 years imprisonment per violation.

Requirements that may apply under ITAR or EAR include the following:

- Requirement to obtain licenses prior to disclosing controlled technical data and software to foreign persons in the U.S. and overseas, including to employees of your own company;
- Requirement to adopt internal controls within your company for the storing, transmission and use of ITAR-controlled technical data and EAR-controlled technology, including controls within your company’s data system;
- Requirement to obtain export licenses prior to exporting controlled products;
- Registration with the State Department for ITAR-controlled items;
- Requirement to obtain Technical Assistance Agreements (TAAs) authorized by the State

Department for the performance of “defense services” related to ITAR-controlled items;

- Restrictions on reexports of controlled items in foreign countries and use of controlled items as components in the manufacture of new products overseas;
- Requirement to obtain import licenses for the temporary import of ITAR-controlled items;
- Requirement to obtain State Department authorization for engaging in “brokering activities” related to ITAR-controlled items, including for defense articles manufactured overseas and for activities performed overseas by your company’s foreign subsidiaries^[1]
- Requirement to file reports with the State Department for the payment of sales commissions, fees and/or political contributions in connection with the sale of ITAR-controlled products or services that meet the requirements of ITAR Part 130;
- Restrictions on entering transactions involving ITAR-controlled items with persons who have been debarred or who are deemed “ineligible” under the provisions of ITAR §120.1(c)(2)^[2]
- Restrictions on entering transactions involving ITAR-controlled items with countries listed in ITAR §126.1 (referred to as the “§126.1 Proscribed Countries”)^[3] and
- Requirement to maintain records in accordance with the ITAR recordkeeping requirements at 22 CFR §122.5.

While some of these requirements may apply in exporting products, many requirements may apply in purely domestic activities as well.

I have prepared a video tutorial that provides an overview of ITAR and EAR for companies involved in the SBIR and STTR programs. In this presentation I explain the basic requirements under ITAR and EAR as they apply to companies involved in SBIR and STTR activities, and steps to take to reduce potential legal liability. The video is available at the link below:

VIDEO TUTORIAL: [ITAR and EAR Requirements in SBIR Programs](#)

I hope you find this helpful in your work in the SBIR/STTR programs.

Please note: This article and the video presentation referenced herein contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. They are not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel. For more information, please visit our website at www.williamsmullen.com or contact Thomas B. McVey, 202.293.8118 or tmcvey@williamsmullen.com.

^[1] Parties engaged in “brokering activities” as defined in ITAR §129.2(b) are also subject to registration, reporting and recordkeeping requirements under ITAR Part 129.

^[2] ITAR §120.1(c)(2) provides as follows: Persons who have been convicted of violating the U.S. criminal statutes enumerated in §120.27, who have been debarred pursuant to part 127 or 128 of this subchapter, who are subject to indictment or are otherwise charged (e.g., charged by criminal information in lieu of indictment) with violating the U.S. criminal statutes enumerated in §120.27, who are ineligible to contract with or to receive a license or other form of authorization to import defense articles or defense services from any agency of the U.S. Government, who are ineligible to receive an

export license or other approval from any other agency of the U.S. Government, or who are subject to a Department of State policy of denial, suspension, or revocation under §126.7(a) of this subchapter, are generally ineligible to be involved in activities regulated under the subchapter.

[3] In addition, if a person knows or has reason to know of a proposed, final or actual sale, export or other transfer of ITAR-controlled items involving the Section 126.1 Proscribed Countries they are required to immediately inform the Directorate of Defense Trade Controls of such event.

Related People

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