



## Other Transaction Authorities

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Peter advises government contractors and commercial businesses on a broad range of federal procurement matters. He is adept at navigating issues related to eligibility for, and continued participation in, small business programs such as SBA's 8(a) BD, SDVOSB, WOSB, and HUBZone programs and the VA's VetBiz VIP program. He represents clients in actions before OHA, GAO, and ODRA. He also counsels federal contractors on FAR and small business regulation compliance, which includes auditing clients for potential size and affiliation issues.

# About PilieroMazza

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PilieroMazza—a business law firm—serves as a strategic partner to government contractors and commercial businesses from across the United States in numerous industries.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translate into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Business & Corporate
- Business Succession Planning
- Corporate and Organizational Governance
- Cybersecurity & Data Privacy
- Debt Financing
- Employee Incentive and Bonus Plans
- False Claims Act
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Labor & Employment for Government Contractors
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Private Equity & Venture Capital

# A Brief History

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- NASA first granted authority in 1958
- Rolled out to five other departments over the next several decades
  - DOD, DOE, HHS, DHS, DOT
- DARPA granted authority in 1989; expanded to all DOD in 1991

# Agencies Authorized to Use OTA

<b>Department of Defense (DOD)</b>	<b>10 U.S.C. § 2371</b>
<b>Department of Energy (DOE)</b>	<b>42 U.S.C. § 7256</b>
<b>Advanced Research Projects Agency-Energy (ARPA-E)</b>	<b>42 U.S.C. § 16538</b>
<b>Department of Health and Human Services (HHS)</b>	<b>42 U.S.C. § 247d-7e</b>
<b>National Institutes of Health (NIH) (certain programs)</b>	<b>42 U.S.C. § 285b-3; 42 U.S.C. § 284n; 42 U.S.C. § 287a; Consolidated Appropriations Act, 2015, Pub. L No. 113-235, div. G, title II, § 213,128 Stat. 2487</b>
<b>Department of Homeland Security (DHS) (expired end of FY17)</b>	<b>6 U.S.C. § 391</b>
<b>Domestic Nuclear Detection Office (DNDO)</b>	<b>6 U.S.C. § 596</b>
<b>Transportation Security Administration (TSA)</b>	<b>49 U.S.C. § 114(m)</b>
<b>Department of Transportation (DOT)</b>	<b>49 U.S.C. § 5312</b>
<b>Federal Aviation Administration (FAA)</b>	<b>49 U.S.C. § 106(l)</b>
<b>National Aeronautics and Space Administration (NASA)</b>	<b>51 U.S.C. § 20113(e)</b>

# DOD Other Transaction Authority

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- For “basic, applied, and advanced research projects” and “prototype projects”
- Expansion of “prototype projects” and authority made permanent in 2016 NDAA
  - Prototype projects that are directly relevant to enhancing the mission effectiveness of military personnel and the supporting platforms, systems, components, or materials proposed to be acquired or developed by DOD
  - Prototype projects that are directly relevant to improvement of platforms, systems, components, or materials in use by the armed forces
- Prototype project authority dollar thresholds doubled in 2018 NDAA

# Conditions for Prototype Project OTA – At Least One Must Be Met

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1. There is at least one nonprofit research institution or “nontraditional defense contractor” participating to a “significant” extent in the prototype project
  - A “nontraditional defense contractor” is an entity that is not currently performing and has not, for at least the one-year period preceding the solicitation of sources by DOD for the transaction, performed any contract or subcontract for DOD that is subject to full coverage under the cost accounting standards

# Conditions for Prototype Project OTA – At Least One Must Be Met

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2. All significant participants in the transaction other than the government are small businesses (as defined by the Small Business Act) or nontraditional defense contractors
3. At least one third of the total cost of the prototype project is to be paid out of funds provided by sources other than the government

# Conditions for Prototype Project OTA – At Least One Must Be Met

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4. The senior procurement executive for the agency determines in writing that exceptional circumstances justify the use of a transaction that provides for innovative business arrangements or structures that would not be feasible or appropriate under a contract or would provide an opportunity to expand the defense supply base in a manner that would not be practical or feasible under a contract

# “Significant” Participation

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- Supplying a new key technology or product
- Accomplishing a significant amount of the effort
- Causing a material reduction in cost or schedule
- Causing an increase in performance

# Amounts Counted for Purposes of 1/3 Test

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- General rule: amounts counted for the purposes “funds provided by sources other than government” do not include costs that were incurred before the date on which the OT agreement becomes effective

# Amounts Counted for Purposes of 1/3 Test

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- However, costs that were incurred for a prototype project by a party after the beginning of negotiations resulting in an OT agreement with respect to the project before the date on which the transaction becomes effective may be counted if the official responsible for entering into the OT agreement determines in writing that:
  - the party incurred the costs in anticipation of entering into the OT agreement; **AND**
  - it was appropriate for the party to incur the costs before the OT agreement became effective in order to ensure the successful implementation of the OT agreement

# How Are OT Agreements Different from Traditional Contracts?

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- Not subject to FAR or DFARS
- Not subject to CICA
  - But “to the maximum extent practicable, competitive procedures shall be used”
- Not subject to other procurement statutes, like Procurement Integrity Act
- Very common for consortia to pursue and enter OT agreements
- May be subject to protests BUT must show the agency strayed from the applicable OTA statute

# How Are OT Agreements Similar to Traditional Contracts?

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- Competitive procedures?
- In writing
- Participant has obligations to the government
- Besides consortia, entities entering other transaction agreements can be a single company, joint venture, prime contractor with subcontractors or partnership

# Benefits of OTA for Contractors

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- Standard IP provisions and protections in traditional contracting mechanisms do not have to be included in an other transaction agreement
- Agencies do not have to require entities to meet cost accounting standards or use accounting systems that adhere to these standards
- Minimal competition
- Low to no risk of protest
- Faster procurement

# How Do Consortia Work?

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- Membership application (online)
- Sign membership agreement
- Pay membership fee
- Consortium manager(s) issues calls for white papers/proposals
- Government evaluates responses and makes award selection

# Sample List of Consortia

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- Consortium for Command, Control, and Communications in Cyberspace (C5) – Capabilities / Command, Control, Communications, Computers, Intelligence, Surveillance and Reconnaissance and cyber technology
- System of Systems Consortium (SOSSEC, Inc.) – open systems architecture, C4ISR information sharing information systems
- Consortium for Energy, Environment, and Demilitarization (CEED)
- Defense Mobility Enterprise/National Advanced Mobility Consortium (NAMC) – Ground vehicle systems and component technologies

# Sample List of Consortia

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- DOD Ordnance Technology Consortium/National Armaments Consortium – Armament and ordnance technologies
- Vertical Lift Consortium (VLC) – Vertical lift technologies
- National Spectrum Consortium (NSC) – Military and commercial access to and use of the electromagnetic spectrum
- Medical Technology Enterprise Consortium (MTEC) – Biomedical technology
- Medical CBRN Defense Consortium (MCDC) – Medical solutions to counter chemical, biological, radiological, and nuclear threats

# Sample Consortium Membership Agreement

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- System of Systems Consortium (SOSSEC, Inc.)
- Annual membership fee: \$500
- General membership meeting at least once a year
- Board of Directors governs all business affairs
- Data rights defined in the OTA
- Export controls
- Voluntary withdrawal – 14 day advance notice
- Term = 5 years, automatic renewal

# Questions?

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