



GW Law Faculty Publications & Other Works

Faculty Scholarship

2014

Prizes! Innovating, Risk Shifting, and Avoiding Contracts and Grants

Steven L. Schooner

George Washington University Law School, sschooner@law.gwu.edu

Nathaniel E. Castellano

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications



Part of the [Law Commons](#)

Recommended Citation

The Public Manager, page 33 (Winter 2014), Forum on "Acquisition: Short-Term Tactics and Long-Term Change"

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

Prizes! Innovating, Risk Shifting, and Avoiding Contracts and Grants

by Steven L. Schooner and Nathaniel E. Castellano

From Columbus's brash proposal to discover an Atlantic route to the East Indies, Lewis and Clark's epic cross-country expedition to the Pacific Coast, to the Space Race that first landed humans on the moon, government institutions have inspired transformational quests and pioneering endeavors that slashed the Gordian Knots of their time.

While innovation occurs constantly—incentivized by familiar devices such as patents, research grants, public procurement, and tax deductions—some barriers prove so stubborn that they demand a different type of incentive, a more dramatic and exciting gesture: a prize.

As early as 1567, European sovereigns offered prizes for solving the vexing problem of accurately determining a ship's longitude at sea. This culminated with the British Longitude Prize of 1714, brought to modern attention by Dava Sobel's bestselling 1995 book, *Longitude, The True Story of a Lone Genius Who Solved the Greatest Scientific Problem of His Time*.

America Competes

Today, prizes have become the darling of the Obama administration. Exploiting their renewed popularity and seemingly unlimited potential, President Obama formally encouraged federal agencies to adopt prize contests in his 2009 Strategy for American Innovation.

Soon after, Congress passed the America COMPETES Reauthorization Act of 2010, authorizing all federal agencies to conduct prize contests. By mid-2014, the federal government had sponsored some 350 prizes, prompting Professor Steve Kelman of Harvard's Kennedy School of Government to pronounce that prize contests were "one of the single largest changes in government management in the last decade."

It's no surprise that public managers find prizes more attractive than contracts and grants. Government managers focused on achieving agency missions in an era of

scarce resources crave flexible vehicles that are less subject to scrutiny. Indeed, we are reminded of the explosion of "other transactions authority" activity during the 1990's acquisition reform efforts.

Shifting the Risk

Prizes differ from contracts and grants because they shift the risk of failure (meaning, the risk that effort will be expended with no compensation) to contestants. The government only awards prizes if and when the government receives the solution it asks for. Rather than agreeing to reimburse the private sector for effort expended in advancing the state of the art, the government only pays for success.

Unlike the conventional vehicles they tend to replace—contracts and grants, which are awarded before the government receives what it asks for—the delay in awarding the prize until after the contest plays out allows a potentially innumerable number of contestants to compete and leverages the "theater" of the contest. This provides the government with two distinct advantages not found in other innovation-incentivizing techniques.

First, the ability to include diverse contestants from unlimited disciplines, who can introduce novel solutions to traditional problems, greatly enhances the likelihood of overcoming seemingly impenetrable performance barriers.

History bolsters this theory. John Harrison, who solved the centuries-old problem of calculating a ship's longitude at sea, was a self-taught clock-maker, not a navigator. Napoleon's 1795 Food Preservation Prize champion, Nicolas Appert, who created the modern practice of canning, was a confectioner.

Spurring Private-Sector Interest

The second advantage of prizes is that the very nature of public competition spurs private-sector interest. Innovators invest their time and energy competing in contests hoping to reap significant financial rewards, but also

FORUM:

pursuing the priceless imprimatur of success. Winning a high-profile government contest garners public attention of the type that few innovators could attract or afford through other means.

The winner of the Goldcorp Challenge conceded that, while the prize barely covered their expenses, “It would have taken [our company] years to get the recognition in North America that this [single] project gave us overnight.”

Yet the benefits of prizes do not come without cost. Allowing more contestants to participate means that, for every winner, there are vast numbers of disappointed contestants. Given the nature of the research and development process, those disappointed contestants will usually have invested far more in the contests than they would expend developing a bid or proposal when seeking a government contract or grant.

And the Loser Is ...

History confirms that not all disappointed and empty-handed contestants walk away quietly. Indeed, the enduring legacy of the Longitude Prize was the dramatic decades-long dispute between John Harrison, his heirs, and the Longitude Board. Unfortunately, amidst the current euphoria for prizes, nothing suggests that the government has anticipated prize contest disputes, let alone provided a straightforward means for contestants to obtain judicial review, or any form of due process, to resolve those disputes.

It did not take long for modern-day equivalents to the Longitude Prize dispute to appear, albeit on a more modest scale. In April 2013, the Federal Trade Commission (FTC) split a \$50,000 prize between two contestants in its Robocall Challenge, which sought effective tools to block automated telephone marketing calls.

When David Frankel’s entrepreneurial invention failed to win the prize, Frankel contested the FTC’s decision. Dissatisfied with the FTC’s responsiveness, Frankel filed a bid protest at the Government Accountability Office (GAO). When GAO dismissed his challenge for lack of jurisdiction, Frankel then brought suit in the U.S. Court of Federal Claims. More than a year after the contest’s conclusion, the court permitted the litigation to proceed.

Prize contests come in so many different variations that the outcome of the Robocall Challenge litigation will not remove the potential for inefficient jurisdictional litigation to arise from other contests. By failing to waive its sovereign immunity or designate a dispute resolution

forum, the government burdens its own lawyers with defending its right to deny contestants due process, while saddling disappointed contestants with the onus of finding an adjudicatory forum with jurisdiction, not to mention the uncertainty of not knowing what, if any, due process might be available.

For now, disappointed contestants may attempt to bring claims in any number of fora—federal district courts, the Court of Federal Claims, agency boards of contract appeals, or the GAO—before the merits of their claims are acknowledged. At best, this will waste the government’s and the private sector’s time, energy, and money. At worst, hiding the jurisdictional ball may dis-incentivize future participation in prize contests.

We applaud the trail-blazing government officials willing to experiment with prize contests to solve vexing problems in an expeditious, cost-effective manner. Nonetheless, the government must employ prizes—and consume private sector resources—responsibly.

Sovereign status does not entitle the government to act arbitrarily or capriciously. For now, contest-sponsoring agencies should respect the private sector’s valuable intellectual capacity and scarce resources and incorporate dispute resolution clauses into their competition guidelines. If the government continues to bury its head in the sand, contestants play the government’s game at their own risk.

Steven L. Schooner is the Nash and Cibinic Professor of government procurement law at The George Washington University Law School. He is a director of the Procurement Round Table. He acknowledges Seymour Herman for his continued support of government procurement law research. Contact him at sschooner@law.gwu.edu.

Nathaniel E. Castellano is a third-year student at The George Washington University Law School and a member of the George Washington Law Review. Contact him at necastellano@law.gwu.edu.