

Eyes on the Prize, Head in the Sand: Filling the Due Process Vacuum in Federally Administered Contests

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Introduction: The Next Gold Rush of Innovation?

From Columbus' brash proposal to discover an Atlantic route to the East Indies and Lewis and Clark's epic cross-country expedition to the Pacific Coast, to the Space Race that first landed humans on the moon, sovereigns have inspired transformational quests and pioneered endeavors that slashed the Gordian Knots of their time. While innovation occurs constantly, incentivized by familiar devices like patents, research grants, public procurement, and tax incentives, some barriers (whether scientific, technical, or conceptual) prove so stubborn that they demand a different type of tool, a more dramatic and exciting gesture: a prize.¹

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¹ See Michael Abramowicz, *Perfecting Patent Prizes*, 56 VAND. L. REV. 115, 116–19 (2003). For recent academic discussions of prize contests, see *id.* at 211–35; Stuart M. Benjamin & Art K. Rai, *Fixing Innovation Policy: A Structural Perspective*, 77 GEO. WASH. L. REV. 1, 56–80 (2008); Daniel J. Hemel & Lisa Larrimore Ouellette, *Beyond the Patents-Prizes Debate*, 92 TEX. L. REV. 303, 317–19 (2013); Saul Levmore, *The Impending iPrize Revolution in Intellectual Property Law*, 93 B.U. L. REV. 139, 151–54 (2013); Jonathan R. Siegel, *Law and Longitude*, 84 TUL. L. REV. 1, 6–27 (2009).

Prizes—the more genteel term for “bounties”—are not new:² in 1714, the British government, craving a method for accurately determining a ship’s longitude at sea, offered the Longitude Prize, incentivizing John Harrison to invent the modern-day chronometer.³ In 1791, the French Chemical Industry took off after Nicolas LeBlanc claimed a 2,400 Livre prize offered by King Louis XVI for developing a commercially viable artificial process to produce Alkali.⁴ In 1861, the aptly (if inartfully) named Confederate Prize for Inventions that Sink or Destroy Union Ships spurred the deployment of the *H.L. Hunley*, heralded as the first submarine to sink a warship in combat.⁵ In 1927, Charles Lindbergh seized the \$25,000 Orteig Prize, in the now legendary “Spirit of St. Louis,” by completing the first nonstop flight from New York to Paris.⁶ More recently, SpaceShipOne’s 2004 re-entry into earth’s atmosphere,

² For a detailed compilation of historical and modern prizes, see generally KNOWLEDGE ECOLOGY INT’L, SELECTED INNOVATION PRIZES AND REWARD PROGRAMS (2008), http://keionline.org/misc-docs/research_notes/kei_rn_2008_1.pdf [hereinafter KEI COMPILATION].

³ See generally RICHARD DUNN & REBEKAH HIGGITT, SHIPS, CLOCKS, & STARS: THE QUEST FOR LONGITUDE (2014); DAVA SOBEL, LONGITUDE: THE TRUE STORY OF A LONE GENIUS WHO SOLVED THE GREATEST SCIENTIFIC PROBLEM OF HIS TIME (1995); Siegel, *supra* note 1; KEI COMPILATION, *supra* note 2, at 35.

As early as 1567, European sovereigns offered prizes for a solution to the vexing problem of accurately determining a ship’s longitude at sea. See DUNN & HIGGITT, *supra* note 3, at 36. Heavily travelled channels subjected ships and their fortunes to risk of pirates; but without a means to determine longitude, leaving those familiar channels risked crashes on unexpected shores at night or becoming lost at sea. *Id.* at 16–19. An accurate method of keeping time aboard a ship would solve the longitude problem, but no extant timepiece could maintain accuracy in harsh sea conditions. *Id.* at 57–63. Longitude could also be derived from the moon’s placement in the stars, but no one at the time had mapped the moon’s motion across the heavens. *Id.* at 51–57.

In 1714, reacting to public outcry following a particularly tragic crash, the British Parliament commissioned the Longitude Board to award a small fortune to whomever solved the riddle. *Id.* at 32–39. John Harrison, a self-taught clockmaker, eventually created five timepieces, all of which accurately predicted longitude at sea. *Id.* at 77–92, 121. Despite his ingenuity, the board deemed that his performance fell short of the Longitude Act’s requirements and refused to award the full prize value. *Id.* at 121–22. Not until 1773, almost sixty years after the competition began, did Parliament intervene and resolve the dispute. *Id.* In October 2014, the authors enjoyed the opportunity to visit the UK’s National Maritime Museum’s exhibit marking the tercentenary of the Longitude Act of 1714, *Ships, Clocks & Stars: The Quest for Longitude*, in Greenwich. See *Ships, Clocks & Stars: The Quest for Longitude*, ROYAL MUSEUMS GREENWICH, <http://www.rmg.co.uk/whats-on/events/ships-clocks-stars> (last visited Jan. 17, 2015).

⁴ KEI COMPILATION, *supra* note 2, at 44.

⁵ *Id.* at 45–46.

⁶ *Id.* at 12. Remarkably, two books about Lindbergh and his exploits ultimately won the Pulitzer Prize (for Biography and Autobiography, of course, not innovation). See *Biography or Autobiography*, THE PULITZER PRIZES, <http://www.pulitzer.org/bycat/Biography-or-Auto->

earning the privately sponsored \$10 million Ansari X-Prize,⁷ appears to have kick-started the modern era of prizes.⁸

Unlike the conventional, heavily regulated,⁹ cumbersome, scandal-laden, and oft-criticized vehicles they tend to replace (i.e., government contracts and grants), prizes shift risk to the private sector and provide access to previously untapped innovative talent.¹⁰ Unlike traditional, bilateral research and development (“R&D”) contracts, where the government typically chooses a single (or very small number of) business partner(s) *in anticipation of* performance, prizes engage a theoretically infinite number of contestants who are only rewarded *if and when* one or more contestants satisfy the contest criteria.¹¹

biography (last visited Jan. 17, 2015) (citing A. SCOTT BERG, LINDBERGH (1998); CHARLES A. LINDBERGH & REEVE LINDBERGH, *THE SPIRIT OF ST. LOUIS* (1953)).

⁷ See KEI COMPILATION, *supra* note 2, at 13; ANSARI XPRIZE, <http://ansari.xprize.org/> (last visited Jan. 17, 2015).

⁸ Joseph Lampel, Pushkar P. Jha & Ajay Bhalla, *Test-Driving the Future: How Design Competitions Are Changing Innovation*, 26 ACADEMY OF MGMT PERSPECTIVE 71 (May, 2012):

Design competitions ... are an increasingly popular tool for purposes that range from fast-tracking nascent technologies to focusing entrepreneurial attention on pressing social needs. ... The current generation of design competitions, while still focused on solving problems and pushing technological frontiers, has overcome [prior limitations such as “fragmented entrepreneurial fields and diffused communities of knowledge”] through the transformative impact of open innovation, crowdsourcing systems, and powerful Internet platforms.”

⁹ Federal government *contracts* are regulated by the notoriously complex Federal Acquisition Regulations (“FAR”) found in title 48 of the Code of Federal Regulations (“C.F.R.”), see 48 C.F.R. § 1.101 (2013), and available online in an official version at www.acquisition.gov/far. The government commenced the process of consolidating the wildly diverse and disaggregated universe of federal *grant* regulations with the recent introduction of the Office of Management and Budget (“OMB”) Super Circular. Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards; Final Rule, 78 Fed. Reg. 78,590 (Dec. 26, 2013) (to be codified at 2 C.F.R. Chapter I, and Chapter II, Parts 200, 215, 220, 225, and 230), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30465.pdf>.

¹⁰ See generally 2009 Strategy for American Innovation, *infra* note 18.

¹¹ Government contracting is not the only area where current public innovation policy creates perverse R&D incentives, and prizes are believed to be the solution:

The current system of financing research and development (“R&D”) for new medicines is deeply flawed by the impact of high prices on access to medicine, the wasteful spending on marketing and R&D for medically unimportant products, and the lack of investment in areas of greatest public interest and need. It can and should be replaced with something better....

Reforming the way we pay for R&D on new medicines involves a simple but powerful idea. Rather than give drug developers the exclusive rights to sell products, the government would award innovators money: large monetary “prizes” tied to the actual impact of the invention on improvements in health care outcomes that successful products actually deliver.

Contests shift the risk of failure (i.e., the risk that effort will be expended with no compensation) to the contestants. Rather than agreeing to reimburse the private sector for effort expended in advancing the state of the art,¹² the Government only pays for success.¹³ At the same time, deploying innumerable independent research initiatives—compared to preselecting one or a handful—is a double-edged sword, as it increases the odds that the government will gain exposure to novel approaches to traditionally vexing problems.¹⁴

Moreover, the unique nature of public competition spurs private sector interest in these innovation-inducing contests.¹⁵ Innovators invest their time and energy competing in contests not only in the hope of reaping significant financial rewards, but also seeking the priceless imprimatur that accompanies success.¹⁶ Winning a high-profile government contest showers public attention of the type that marketing agencies can only promise (but likely not deliver)

James Love, & Tim Hubbard, *The Big Idea: Prizes To Stimulate R&D for New Medicines*, 82 CHICAGO-KENT L. REV. 1519, 1520 (2007), available at <http://studentorgs.kentlaw.iit.edu/cklawreview/wp-content/uploads/sites/3/vol82no3/Love.pdf>.

¹² The FAR explains that:

Unlike contracts for supplies and services, most [research and development] contracts are directed toward objectives for which the work or methods cannot be precisely described in advance. *It is difficult to judge the probabilities of success or required effort for technical approaches, some of which offer little or no early assurance of full success.*

48 C.F.R. § 35.002 (emphasis added).

¹³ Brad Rourke, *Promoting Innovation: Prizes, Challenges and Open Grantmaking*, THE CASE FOUND. 6 (Aug. 23, 2010), <http://casefoundation.org/wp-content/uploads/2014/11/PromotingInnovation.pdf>.

¹⁴ See *infra* Part I.A.

¹⁵ “Some experts view the non-compensation portion of prizes as important, and sometimes more important, than the potential financial reward.” Deborah D. Stine, Congressional Research Service, *Federally Funded Innovation Inducement Prizes 2* (2009) (employing the terms “inducement prizes” or “innovation inducement prizes”), at <http://www.fas.org/sgp/crs/misc/R40677.pdf>. Also, it is important to distinguish the prize competitions discussed here from, among other things: (1) drawings, lotteries, or games of chance; and (2) recognition prizes, which span a diverse spectrum from, e.g., the Academy Awards (motion pictures), <http://oscar.go.com/>; the Nobel Prizes in Chemistry, Economic Sciences, Literature, Peace, Physics, and Physiology or Medicine, <http://www.nobelprize.org/>; or the nascent (and, apparently, expanding) Breakthrough Prizes (“The Breakthrough Prize in Fundamental Physics was founded in 2012 by Yuri Milner to recognize those individuals who have made profound contributions to human knowledge. It is open to all physicists—theoretical, mathematical, experimental—working on the deepest mysteries of the Universe.”), <https://breakthrough-prize.org/>. For further discussion as to the distinction between incentive and recognition prizes, see *infra* note 50.

¹⁶ The euphoric investments made by prize contestants competing for the status and publicity associated with winning is analogous, albeit imperfectly, to the immense, arguably

and few firms could afford.¹⁷ Exploiting the renewed popularity and seemingly unlimited potential of prizes, President Obama formally encouraged federal agencies to adopt prize contests in his 2009 Strategy for American Innovation.¹⁸ Soon after, Congress passed the America COMPETES Reauthorization Act of 2010 (“COMPETES II” or “The Act”),¹⁹ authorizing all federal agencies to conduct prize contests.²⁰

Within two years, fifty-eight agencies sponsored over two hundred contests.²¹ According to a recent Deloitte report, which provides extensive guidance for utilizing and developing prize contests with a unique focus on the public sector, by mid-2014, the federal government sponsored some 350 prizes.²² Professor Steve Kelman of Harvard’s Kennedy School of Government promptly described prize contests as “one of the single largest changes in government management in the last decade.”²³

Despite the euphoria, a reality check is in order: the benefits of prize contests come at a cost, and not all contests generate success stories.²⁴ For every ebullient prizewinner, contests breed potentially unlimited losers, many of whom invested heavily in their efforts.²⁵ “Losers”—many of whom suggested

irrational, private sector investments made to win the coveted Baldrige Award. *See generally* David A. Garvin, *How the Baldrige Award Really Works*, 69 HARV. BUS. REV. 80 (1991).

¹⁷ *See infra* notes 54–55.

¹⁸ EXEC. OFFICE OF THE PRESIDENT, NAT’L ECON. COUNCIL & OFFICE OF SCI. & TECH. POLICY, A STRATEGY FOR AMERICAN INNOVATION: DRIVING TOWARDS SUSTAINABLE GROWTH AND QUALITY JOBS 17 (2009), <http://www.whitehouse.gov/sites/default/files/microsites/ostp/innovation-whitepaper.pdf> [hereinafter 2009 STRATEGY FOR AMERICAN INNOVATION]; *see also* OFFICE OF SCI. & TECH. POLICY, IMPLEMENTATION OF FEDERAL PRIZE AUTHORITY: PROGRESS REPORT 4 (2012), http://www.nasa.gov/sites/default/files/files/competes_report_on_prizes_final.pdf [hereinafter 2012 OSTP PROGRESS REPORT].

¹⁹ America COMPETES Reauthorization Act of 2010, Pub. L. No. 111-358, § 105(a), 124 Stat. 3982, 3989 (2011) (codified at 15 U.S.C. § 3719(b) (2012)); *see also* 2012 OSTP PROGRESS REPORT, *supra* note 18.

²⁰ *See* 15 U.S.C. § 3719(b) (2012); *see also* 2012 OSTP PROGRESS REPORT, *supra* note 18.

²¹ Richard W. Walker, *What 205 Prize Challenges Have Taught Government Agencies*, BREAKING GOV’T (Sept. 10, 2012, 9:01 AM), <http://breakinggov.com/2012/09/10/what-205-prize-challenges-have-taught-government-agencies/>.

²² *See* JESSE GOLDHAMMER ET AL., DELOITTE CONSULTING LLP, THE CRAFT OF INCENTIVE PRIZE DESIGN: LESSONS FROM THE PUBLIC SECTOR 2, 6 (2014), *available at* <http://dupress.com/articles/the-craft-of-incentive-prize-design/>.

²³ Steve Kelman, *Government Contests Come of Age*, FCW (July 11, 2014, 12:02 PM), <http://fcw.com/blogs/lectern/2014/07/kelman-challenges-come-of-age.aspx>.

²⁴ *See* DUNN & HIGGITT, *supra* note 3, at 121–22.

²⁵ “Society may find the aftermath of competition, that is the presence of losers, to be unacceptable.” B.J. Nalebuff & J.E. Stiglitz, *Prizes and Incentives: Towards a General Theory of Compensation and Competition*, 4 BELL J. OF ECONOMICS 21, 40 (1983).

excellent solutions—feel unfairly judged, wronged, and even cheated by their government, and—particularly when their disappointment cannot be objectively explained or justified—do not always leave the field quietly. In addition to the chronometer, the historically enduring legacy of the eponymous Longitude Prize was the dispute between John Harrison and the Longitude Board.²⁶ Although Harrison's invention accurately predicted longitude at sea, the Longitude Board, which administered the contest, never awarded Harrison the contest's prize.²⁷ A decades-long drama followed, wherein Harrison (and his heirs) accused the Board of bias, conflict of interest, and wrongfully withholding the prize despite Harrison's satisfaction of the legislative requirements.²⁸ History forgotten is doomed to repeat itself.²⁹ Unfortunately, amidst the current euphoria, there is no evidence that the U.S. government has anticipated prize contest disputes, let alone provided an obvious, well-defined, or straightforward means for contestants to obtain judicial or administrative review or, more broadly, 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

²⁶ See Siegel, *supra* note 1, at 117.

²⁷ See *id.* at 24–27.

²⁸ See *id.* at 17–26.

²⁹ Or, in other words: "Those who cannot remember the past are condemned to repeat it." GEORGE SANTAYANA, 7 *THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS: INTRODUCTION AND REASON IN COMMON SENSE* 172 (Marianne S. Wokeck & Martin A. Coleman eds., MIT Press ed. 2011) (1905). In honor of the Longitude Act of 1714's tercentenary, NESTA ("an innovation charity with a mission to help people and organisations bring great ideas to life") and UK Innovate are launching the Longitude Prize 2014, which is a £10 million prize fund to help solve one of the greatest issues of our time. See *About Us: The History*, LONGITUDE PRIZE 2014, <http://www.longitudeprize.org/history>; NESTA, <http://www.nesta.org.uk/> (last visited Jan. 31, 2015); see also *Inclusive Technology Prize*, NESTA, <http://www.nesta.org.uk/project/inclusive-technology-prize> (last visited Jan. 17, 2015). The public submitted topical suggestions and ultimately voted to select antibiotics as the prize theme: "The challenge for Longitude Prize 2014 will be set to create a cheap, accurate, rapid and easy-to-use point of care test kit for bacterial infections." *The Challenge*, LONGITUDE PRIZE 2014, <http://www.longitudeprize.org/challenge/antibiotics>. The contest guidelines, disclosed in November 2014, proved disappointing. The guidelines permit anyone with a disagreement regarding the process to "contact the Longitude Prize ... [at which time the board] will respond to [the] enquiry within seven working days. If [that] response is unsatisfactory[, the board] will provide ... further information about how .. [to] escalate [the] appeal." In other words, the the modern-era LongitudeCommission acknowledged that disputes may arise, but, nonetheless, failed to incorporate a practical and credible dispute resolution mechanism into its procedures. See *Prize Rules*, LONGITUDE PRIZE 2014 (Nov. 2014), http://www.nesta.org.uk/sites/default/files/longitude_prize_rules_v11.pdf.

in its Robocall Challenge, which sought effective tools to block annoying, automated telephone calls.³⁰ When David Frankel's entrepreneurial invention failed to win the prize,³¹ Frankel contested the FTC's decision.³² After the FTC (allegedly) rebuffed Frankel's request for scoring details comparing his submission to the winner, Frankel filed a Freedom of Information Act ("FOIA") request. The FTC (again, allegedly) provided him with some limited scoring data and an agency contact who (again, allegedly) was somewhat willing to hear and respond to Frankel's concerns.³³ Dissatisfied with the FTC's responsiveness, Frankel filed a bid protest at the Government Accountability Office ("GAO").³⁴ When the GAO dismissed his challenge for lack of jurisdiction,³⁵ Frankel brought suit in the U.S. Court of Federal Claims ("COFC"),³⁶ where, a year later, Judge Allegra recently denied the Government's motion to dismiss for lack of jurisdiction.³⁷

Regardless of the ultimate outcome of Frankel's efforts, prize contests come in so many different variations that the outcome of the Robocall Challenge dispute will not alleviate the need for voluminous and inefficient jurisdictional litigation of disputes that arise from other contests.³⁸ By failing to waive its sovereign immunity or designate a dispute resolution forum, the government burdens its own lawyers with inefficient litigation, while saddling disappointed contestants with the onus of finding a forum with jurisdiction, not to mention the uncertainty of not knowing what, if any, due process might be available. Accordingly, this article considers avenues that disappointed contestants might travel to obtain jurisdiction in a forum that can provide meaningful review of disputes arising from federally administered prize contests. In the current environment, disappointed contestants may attempt to bring claims in up to three different forums before the merits of their claims are reached.³⁹ At best, this uncertainty will create unnecessary and inefficient threshold litigation

³⁰ See Press Release, Fed. Trade Comm'n, FTC Announces Robocall Challenge Winners (Apr. 2, 2013), <http://www.ftc.gov/news-events/press-releases/2013/04/ftc-announces-robocall-challenge-winners>; see also Steve Kelman, *Procurement Contests Get Their Due*, FCW (Jan. 27, 2014, 9:54 AM), <http://fcw.com/blogs/lectern/2014/01/challenge.gov-award.aspx>.

³¹ See Complaint at Ex. 6, 2–3, Frankel v. United States, 118 Fed. Cl. 332 (2014) (No. 13-546).

³² *Id.* at Ex. 6, 2.

³³ See *id.* at Ex. 6, 3.

³⁴ See David Frankel, B-408319, 2013 CPD ¶ 144, at *1 (Comp. Gen. June 7, 2013); see generally 4 C.F.R. § 21.1 (2012) (codifying regulations for filing a GAO protest).

³⁵ Frankel, 2013 CPD ¶ 144, at *2.

³⁶ Complaint at 1, Frankel v. United States, 118 Fed. Cl. 332 (2014) (No. 13-546).

³⁷ Frankel, 118 Fed. Cl. at 336.

³⁸ See, e.g., *infra* note 118.

³⁹ See *infra* Part II.

before the merits of a contest dispute can be resolved. At worst, hiding the jurisdictional ball may dissuade future participation in prize contests. The government should alleviate the need for this uncertain, expensive, and inefficient litigation by anticipating disputes and preemptively clarifying where and how those disputes will be resolved.

Accordingly, Part I of this Article sets the stage, introducing prizes as increasingly popular tools for incentivizing innovative behavior and summarizing the nascent, but dramatic proliferation of federally administered prize contests.⁴⁰ Part II details at least four potential legal characterizations that contestants may be able to use to shoehorn their claims within one of three federal government waivers of sovereign immunity, albeit with uncertain odds.⁴¹ Part III calls upon Congress and agencies to avoid forcing disappointed contestants to litigate over jurisdiction by proactively deciding and disclosing where and how prize contest disputes will be resolved.⁴²

I. The Promise of Prize Contests: Panacea or Shiny New Object Syndrome?

In an era of constrained resources and gridlocked government,⁴³ the promise of prize contests shines like a beacon in a storm. The potential of prize contests to break through technological barriers appears so compelling that

⁴⁰ See *infra* Part I.

⁴¹ See *infra* Part II.

⁴² See *infra* Part III.

⁴³ "Frustration with the current state of American government is widespread . . . Public appraisal of government in general and Congress in particular plumbs new depths. The public and the media agree that the current Congress is 'the worst ever.'" Morris P. Fiorina, *Gridlock is Bad. The Alternative is Worse*, WASH. POST BLOG (Feb. 25, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/02/25/gridlock-is-bad-the-alternative-is-worse/>. "America has been pretty much stuck in neutral for the past few years, as Republicans used their gains in the 2010 elections to prevent Barack Obama from pushing any of the major items on his agenda through Congress." M.S., *Political Gridlock: Intransigence is Good Strategy*, ECONOMIST BLOG (Mar. 20, 2014, 23:00), <http://www.economist.com/blogs/democracyinamerica/2014/03/political-gridlock>.

The 16-day shutdown itself has already led to the biggest plunge in consumer confidence since the collapse of Lehman Brothers in 2008. . . .

The gridlock also had ripple effects on many industries that rely on the federal government in one way or another. . . .

Concerns about the United States as a borrower may have a much longer and deeper effect than the shutdown[.]

Annie Lowrey, Nathaniel Popper & Nelson D. Schwartz, *Gridlock Has Cost U.S. Billions, and the Meter Is Still Running*, N.Y. TIMES, Oct. 17, 2013, at A1, available at <http://www.nytimes.com/2013/10/17/us/politics/gridlock-has-cost-us-billions-and-the-meter-is-still-running.html>.

President Obama and Congress are actively promoting their use. We hope the government fully exploits this initiative's capacity, but we cannot ignore the enormous risks to the private sector associated with the government's nascent prize regime. Unlike many of the more quotidian innovation-incentivizing tools available to governments,⁴⁴ prizes are unique because they involve an *ex post* value transfer; contestants do not receive the prize unless and until they win the competition.⁴⁵

A. Prize Contests: Unique Innovation-Incentivizing Tools

While prizes are not the most widely used or the most familiar method of incentivizing innovation, they come from a long, rich, and fascinating tradition. As the introduction's anecdotes reveal, governments utilized prizes as early as the mid-16th century.⁴⁶ Yet, more often than prizes, governments use patents, research grants, procurement, and tax benefits to incentivize innovation.⁴⁷ Each of these tools transfers value in return for innovative behavior, but each does so in a different way.⁴⁸

In a prize contest, the contest sponsor offers a predetermined award⁴⁹ to the contestant who successfully solves a problem in satisfaction of specific, predetermined criteria.⁵⁰ Prizes and patents are awarded *ex post*, while procure-

nytimes.com/2013/10/17/business/economy/high-cost-to-the-economy-from-the-fiscal-impasse.html?r=0.

⁴⁴ See LUCIANO KAY, *MANAGING INNOVATION PRIZES IN GOVERNMENT* 27 (2011); MCKINSEY & CO., "AND THE WINNER IS...": CAPTURING THE PROMISE OF PHILANTHROPIC PRIZES 33 (2009).

⁴⁵ See Hemel & Ouellette, *supra* note 1, at 308; Rourke, *supra* note 13.

⁴⁶ The earliest prize contest identified in the KEI Compilation is the 1567 Spanish Longitude Prize. KEI COMPILATION, *supra* note 2, at 35. Academic discussion about relative benefits of prizes compared to other innovation policies dates back at least to the nineteenth century. Hemel & Ouellette, *supra* note 1, at 305.

⁴⁷ See Hemel & Ouellette, *supra* note 1, at 311, 319.

⁴⁸ See generally *id.* at 315–23 (categorizing the differences between patent, prizes, grants, and R&D tax benefits).

⁴⁹ Not surprisingly, full funding is required before announcing the competition. See 15 U.S.C. § 3719(m)(2)(3) (2012). Fiscal law experts may be intrigued, however, by the flexibility of funding sources permitted by Congress:

Support for a prize competition . . . , including financial support for the design and administration of a prize or funds for a monetary prize purse, may consist of Federal appropriated funds and *funds provided by the private sector* for such cash prizes. [Also, t]he . . . agency may accept *funds from other Federal agencies* to support such competitions.

§ 3719(m)(1) (emphasis added).

⁵⁰ See KAY, *supra* note 44, at 10, 14. Prize contests typically utilize *incentive prizes*, as opposed to *recognition prizes* such as the Nobel and Pulitzer Prizes. Recognition prizes award

ment contracts (including R&D contracts), grants, and R&D tax benefits are awarded *ex ante*.⁵¹ Except for the difference in the timing of award transfer (or payment), prizes are more similar to government contracts than the other innovation-incentivizing-methods. Government contract and prize contest solicitations articulate specific, typically objective criteria for what their participants must accomplish,⁵² so the Government knows exactly what it is paying for.⁵³ In contrast, patents, grants, and tax benefits have more vague requirements,⁵⁴ so it is never clear exactly what, if any, innovation the government will incentivize. Comparing prizes with government contracts reveals the two benefits and one disadvantage that *ex post* value transfer creates for prize contests.

One signature benefit that prize contests offer derives from the non-monetary incentives that spur individual participants to invest more in the competition than they would devote to traditional government contracts, because the theater of the contest plays out in the public eye through the entire R&D process.⁵⁵ The theater associated with the prize contest invokes and exploits the prestige of winning, which may serve to attract investors and establish recognition for leadership in the field.⁵⁶ For example, the winner of the Goldcorp Challenge reported that, although the value of the prize barely

past behavior, whereas incentive prizes seek to spur future behavior. Distinguishing between recognition prizes and incentive prizes is important, but there are many variations within both categories. See MCKINSEY & CO., *supra* note 44, at 18 (identifying six different types of prizes). The America COMPETES Reauthorization Act of 2010 (“COMPETES II Act”) expressly identifies three types of contests and includes a catch-all provision for new types of contest structures. 15 U.S.C. § 3719(c)(1)(4) (2012). Not all prizes are easily characterized, for example, see Garvin, *supra* note 16, at 81.

⁵¹ See Hemel & Ouellette, *supra* note 1, at 308; Clayton Stallbaumer, *From Longitude to Altitude: Inducement Prize Contests as Instruments of Public Policy in Science and Technology*, 2006 U. ILL. J.L. TECH. & POL’Y 117, 120–22 (2006).

⁵² See generally 48 C.F.R. § 14.201-2(b) (requiring specifications for sealed bidding procurements to include details of the goods or services needed); § 15.204-2(b) (requiring description of goods or services needed for negotiated procurements); 2 C.F.R. § 200.203(c) (1) (2014) (requiring agencies to provide a “full programmatic description” of all grant opportunities prior to accepting applications).

⁵³ See JOHN CIBINIC, JR., RALPH C. NASH, JR. & CHRISTOPHER R. YUKINS, *FORMATION OF GOVERNMENT CONTRACTS* 502, 527–28 (4th ed. 2011) (describing requirements that government contracts must include clear, unambiguous, and complete statements of work so that bidders can accurately estimate their costs when bidding); MCKINSEY & CO., *supra* note 44, at 54–56 (describing the importance of clear and objective criteria in prize contests).

⁵⁴ See Hemel & Ouellette, *supra* note 1, at 328 (recognizing the comparative differences between innovation policy devices that provide specific criteria and those that are more broad).

⁵⁵ See MCKINSEY & CO., *supra* note 44, at 26.

⁵⁶ See *id.*

covered their expenses, “it would have taken [our company] years to get the recognition in North America that this [single] project gave us overnight.”⁵⁷ SpaceX, the 2004 winner of the XPrize competition,⁵⁸ quickly morphed from an upstart, relatively unknown rival into a feared maverick, capturing a significant market share from the well-established aerospace industry titans. NASA’s recent decision to award contracts to *both* Boeing and SpaceX for the development of the Space Taxi program⁵⁹ offers potent evidence that prize contest success is a powerful accelerant to reduce barriers to entry in even the most well-defended markets.

In contrast, government contractors are awarded a contract based on their proposals, and only then do they attempt to *perform* the contract, so publicity available from competing for the contract, if any, is relatively insignificant in comparison.⁶⁰ In a classic cost-reimbursement R&D contract, once the government accepts a proposal and awards the contract, the government is obligated to pay for the contractor’s effort, regardless of whether that effort proves successful. Contractor and grantee incentives are further diminished in comparison when taking into account that the government frequently caps profits, and many grants are awarded on a pure cost-reimbursement basis, providing no profit at all.⁶¹ Moreover, by delaying its prize award until

⁵⁷ *Id.* (alterations in original).

⁵⁸ See *supra* note 7.

⁵⁹ See Andy Pasztor, *Boeing and SpaceX NASA Space-Taxi Project*, WALL ST. J., Sept. 17, 2014, at B3, available at <http://online.wsj.com/articles/boeing-and-spacex-share-6-8-billion-in-nasa-space-taxi-contracts-1410904245>; James Dean, *Boeing, SpaceX win NASA contracts to fly crews*, USA TODAY (Sept. 16, 2014), <http://www.usatoday.com/story/tech/2014/09/16/nasa-space-station-crew-capsule-announcement/15722729/>. In April 2014, SpaceX filed a complaint at the COFC alleging, in effect, that the Air Force used a pricing scheme that shut SpaceX and other maverick competitors out of the competition for military satellite launch contracts against a Lockheed-Boeing joint venture. See Andrew Zajac, *Musk’s SpaceX Challenges Lockheed-Boeing Monopoly*, BLOOMBERG (Apr. 29, 2014), <http://www.bloomberg.com/news/2014-04-28/elon-musk-challenges-lockheed-boeing-rocket-monopoly.html>.

⁶⁰ See CIBINIC, NASH & YUKINS, *FORMATION*, *supra* note 53, at 412 (discussing the need to affirmatively determine that a contractor is capable of performance prior to award of a government contract).

⁶¹ See generally 2 C.F.R. § 200.400(g) (2014) (stating as a matter of general policy for cost principles in federal grant awards that grantees “may not earn or keep any profit resulting from Federal financial assistance, unless expressly authorized by the terms and conditions of the Federal award”); 48 C.F.R. § 15.404-4(c)(4)(i) (2013) (citing 10 U.S.C. § 2306(d) (2012); 41 U.S.C. § 3905 (2012)) (generally referencing the statutory limit on contractor profits in cost reimbursement contracts).

after the contest criteria are satisfied, the government can spur and sustain competition throughout the duration of R&D, production, and testing.⁶²

Non-monetary incentives explain, in part, the seemingly irrational investment levels that contests generate in relation to their purse size.⁶³ For example, \$100 million dollars was collectively invested to win the \$10 million dollar Ansari X-Prize.⁶⁴ In effect, the contest tips contestants' cost-benefit scales towards making investment decisions that favor society (at least in the view of the contest sponsor). Innovators unwilling to sell their ideas to the government for a certain dollar value (here, the prize award), might consider it cost-effective to do so once non-monetary values are accounted for.⁶⁵

A similar and complementary advantage of *ex post* award is that prize contests tend to "employ" many more contestants than traditional procurements (most of which, ultimately, are awarded to a single contractor). Unlike in a traditional procurement,⁶⁶ there is no need to filter out contestants lacking relevant experience or proposing a novel approach.⁶⁷ Therefore, the prize contest shifts risks to the contestants: each contestant assumes the risk that effort (and potential failure) will not be compensated.⁶⁸ Unlike in a traditional government R&D contract, where the government pays its contractors throughout the process, the government enjoys potential savings or superior return on

⁶² The ability of contests to foster the benefits of competition has long been recognized by economists:

[T]here is a distinct role for competition—real competition, in the sense the word is normally used, not the peculiar static sense in which much of neoclassical economics has come to use the term—in situations where there is imperfect information about the difficulties associated with different tasks, where it is prohibitively costly to observe inputs directly, and where it is difficult to measure the outputs with precision. The advantage of competitive systems is that they have greater flexibility and greater adaptability to change the environment than do other forms of compensation.

Nalebuff & Stiglitz, *Prizes and Incentives*, *supra* note 25, at 40–41.

⁶³ Alan MacCormack et al., *Spurring Innovation Through Competitions*, 55 MIT SLOAN MGMT. REV. 25, 26–27 (2013).

⁶⁴ MCKINSEY & CO., *supra* note 44, at 25.

⁶⁵ *See id.* at 19.

⁶⁶ CIBINIC, NASH & YUKINS, FORMATION, *supra* note 53, at 704, 708 (noting that past performance evaluation is required and explaining that past performance is used as an evaluation of the risk that a contractor will not be able to perform as promised); JOHN CIBINIC, JR., RALPH C. NASH, JR. & JAMES F. NAGLE, ADMINISTRATION OF GOVERNMENT CONTRACTS 886 (4th ed. 2006) (discussing the significant time and expense incurred by the Government when a contract is terminated due to contractor default).

⁶⁷ *See* 2012 OSTP PROGRESS REPORT, *supra* note 18, at 79; MCKINSEY & CO., *supra* note 44, at 23–24; Rourke, *supra* note 13, at 5.

⁶⁸ *See* MCKINSEY & CO., *supra* note 44, at 25–26.

investment in a prize contest, where most of the contestants performing R&D will not be compensated at all.

The government is well aware of the economic benefits of prize contests, which seem particularly attractive in the current environment of sequestration and shrinking budgets. In President Obama's 2011 Strategy for American Innovation, he explained that:

[P]rizes have a number of advantages over traditional grants and contracts. Prizes allow the sponsor to set an ambitious goal without selecting the team or approach that is most likely to succeed, to increase the number and diversity of minds tackling tough problems, to pay only for results, and *to stimulate private-sector investment that is many times greater than the cash value of the prize.*⁶⁹

The White House's Office of Science and Technology Policy ("OSTP") echoed this sentiment in its 2013 annual review of federal agency implementation of prizes:

Prizes . . . tap the top talent and best ideas wherever they lie, sourcing breakthroughs from a broad pool of both known and unknown sources of innovation in a given industry. *As solutions are delivered prior to payment, the government can benefit from these novel approaches without bearing high levels of risk.*⁷⁰

The reach of prize contests outside conventional contracting communities adds to the attraction. The ability to include diverse contestants from unrelated disciplines, who can introduce novel solutions to traditional problems, greatly enhances the likelihood of breaking through seemingly impenetrable performance barriers.⁷¹ Recent empirical research concludes that breakthrough solutions are most likely to come from perspectives outside the scientific discipline of the problem at issue.⁷² Indeed, one study concluded that "[t]he further the focal problem was from the solvers' field of expertise, the more likely they were to solve it."⁷³

⁶⁹ NAT'L ECON. COUNCIL, COUNCIL OF ECON. ADVISERS & OFFICE OF SCI. & TECH. POLICY, A STRATEGY FOR AMERICAN INNOVATION: SECURING OUR ECONOMIC GROWTH AND PROSPERITY 12 (2011), <http://www.whitehouse.gov/sites/default/files/uploads/Innovation-Strategy.pdf> [hereinafter 2011 STRATEGY FOR AMERICAN INNOVATION] (emphasis added).

⁷⁰ OFFICE OF SCI. & TECH. POLICY, IMPLEMENTATION OF FEDERAL PRIZE AUTHORITY: FISCAL YEAR 2012 PROGRESS REPORT 9 (2013), http://www.whitehouse.gov/sites/default/files/microsites/ostp/competes_prizesreport_dec-2013.pdf [hereinafter 2013 OSTP PROGRESS REPORT] (emphasis added).

⁷¹ See *supra* note 67.

⁷² See Lars Bo Jeppesen & Karim R. Lakhani, *Marginality and Problem-Solving Effectiveness in Broadcast Search*, 21 ORG. SCI. 1016, 1027–30 (2010).

⁷³ Karim R. Lakhani et. al., *The Value of Openness in Scientific Problem Solving* 9 (Harv. Bus. Sch., Working Paper No. 07-050, 2007), available at <http://www.hbswk.hbs.edu/item/5612.html>.

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.⁷⁴ Napoleon's 1795 Food Preservation Prize champion, Nicolas Appert, who invented the modern practice of canning, was a confectioner.⁷⁵ The Mapping Dark Matter Competition provided a more contemporary example of this phenomenon, when a glaciology PhD student crafted an algorithm—in less than one week—that out-performed state-of-the-art algorithms used by physicists.⁷⁶

In sum, *ex post* award deploys a potentially vast number of diverse contestants, while reducing the government's risk, because it does not have to pay for any (or all) contestants' failure to satisfy the contest requirements.⁷⁷ The benefits of *ex post* award, however, do not come without cost. Allowing more contestants to participate means that for every prizewinner, there are more—often many more—disappointed contestants. Because the competition plays out publicly through the entire R&D process, those disappointed contestants have usually invested more in the contests than have disappointed bidders to a government contract, who only invest in developing initial proposals prior to award. Those disappointed and empty-handed contestants will not always walk away quietly. Given the recent explosive growth in federal agency use of prize competitions, this danger is particularly pressing. Unfortunately, this escalating exposure to private sector investment is not receiving sufficient attention.

B. Recent Proliferation of Federally Administered Prize Contests

After the 1927 Orteig Prize—in which Charles Lindbergh completed the first non-stop flight from New York to Paris to win the \$25,000 purse⁷⁸—use of incentive prize contests temporarily subsided.⁷⁹ Governments began to rely more on the patent system, and private institutions focused on recognition prizes like the Nobel and Pulitzer Prizes.⁸⁰ Prize contests remained dormant until the 1990s, when private organizations, most notably the X-Prize

⁷⁴ Rourke, *supra* note 13, at 5.

⁷⁵ *Id.*; KEI COMPILATION, *supra* note 2, at 67. Napoleon sponsored many prizes, and he deemed it critical to preserve the food necessary to feed his troops after invading a state that was unable or unwilling to provide rations. Appert heated, boiled, and sealed food in airtight jars (he used champagne bottles, the strongest readily available source of glass in France), largely the same method used today. KEI COMPILATION, *supra* note 2, at 67.

⁷⁶ See 2012 OSTP PROGRESS REPORT, *supra* note 18, at 9.

⁷⁷ See MCKINSEY & CO., *supra* note 44, at 19.

⁷⁸ See KEI COMPILATION, *supra* note 2, at 12.

⁷⁹ See *id.* at 5; MCKINSEY & CO., *supra* note 44, at 16.

⁸⁰ See MCKINSEY & CO., *supra* note 44, at 16.

Foundation,⁸¹ began using contests again and generating impressive results.⁸² Some federal agencies with independent statutory authority followed suit.⁸³

Hoping to exploit this trend, President Obama formally encouraged federal agencies to use prize contests in his 2009 Strategy for American Innovation.⁸⁴ Accordingly, in 2010, the Office of Management and Budget (“OMB”) issued a guidance memorandum providing practical and legal advice to agencies using prizes.⁸⁵ That same year, the GSA launched *Challenge.gov*, a central database where agencies can advertise prize contests.⁸⁶

Up to that point, agencies lacking direct statutory authority to conduct prize contests had to navigate carefully and find legal authority to do so.⁸⁷ That changed on January 4, 2011, when President Obama signed the COMPETES II Act.⁸⁸ The Act authorizes all federal agencies to conduct prize contests,⁸⁹ without eliminating any of the previous authority agencies may have had for doing so.⁹⁰ As a result, prize activity in federal agencies is booming: in the first four months after the GSA launched *Challenge.gov*, over twenty-five execu-

⁸¹ See *id.* at 16–18.

⁸² See *id.* NASA and the Defense Advanced Research Projects Agency (“DARPA”) are lauded for their early adoption of prize contests. See 2012 OSTP PROGRESS REPORT, *supra* note 18, at 10–12.

⁸³ See 2012 OSTP PROGRESS REPORT, *supra* note 18, at 14; see also KAY, *supra* note 44, at 13.

⁸⁴ 2009 STRATEGY FOR AMERICAN INNOVATION, *supra* note 18, at 17; 2012 OSTP PROGRESS REPORT, *supra* note 18, at 6.

⁸⁵ Memorandum from Jeffrey Zients, Deputy Dir. for Mgmt., Office of Mgmt. & Budget, Guidance on the Use of Challenges and Prizes to Promote Open Gov’t (Mar. 8, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-11.pdf [hereinafter OMB Guidance Memo]; see also 2012 OSTP PROGRESS REPORT, *supra* note 18, at 6.

⁸⁶ 2012 OSTP PROGRESS REPORT, *supra* note 18; see also KAY, *supra* note 44, at 8. For a general description and assessment of Challenge.gov, see KEVIN DESOUZA, CHALLENGE.GOV: USING COMPETITIONS TO SPUR INNOVATION (2012).

⁸⁷ The OMB Guidance Memo detailed five different potential legal authorizations to conduct prize contests, among them: the Necessary Expense doctrine; Other Transactions Authority; or grant, procurement, or cooperative agreement authority. See OMB Guidance Memo, *supra* note 85, at 1, 58.

⁸⁸ The Act adds § 24 to the Stevenson-Wydler Technology Innovation Act of 1980. 15 U.S.C. § 3719 (2012); see also 2012 OSTP PROGRESS REPORT, *supra* note 18.

⁸⁹ 15 U.S.C. § 3719(b) (2012).

⁹⁰ Memorandum from Boris Bershteyn, Gen. Counsel, & Steven VanRoekel, Fed. Chief Info. Officer, Office of Mgmt. & Budget, Prize Authority in the America COMPETES Reauthorization Act 1, 5 (Sept. 2012), available at https://cio.gov/wp-content/uploads/downloads/2012/09/Prize_Authority_in_the_America_COMPETES_Reauthorization_Act.pdf [hereinafter Prize Authority Guidance].

tive agencies launched sixty competitions.⁹¹ By mid-2014, federal agencies conducted over 350 competitions,⁹² and *Challenge.gov* was the only federal winner of the annual Innovations in American Government award.⁹³

The surge of federally administered prize contests opened the door for plentiful administrative guidance and academic debate on the relative benefits of prizes compared to other innovation tools and how agencies ought to administer their competitions.⁹⁴ Yet no administrative guidance appears to address the issue of where and how prize contest disputes will be resolved.⁹⁵

II. Space Abhors a Vacuum: The Nascent Prize Regime Begs Some Form of Due Process

By design, every prize contest has the potential to produce a vast number of disappointed contestants.⁹⁶ Each disappointed contestant will have invested time and money throughout an entire R&D, testing, and evaluation process.

⁹¹ 2011 STRATEGY FOR AMERICAN INNOVATION, *supra* note 69, at 12.

⁹² See GOLDHAMMER, *supra* note 22, at 6. Readers should understand that, while growth of federally administered prize contest has been explosive, the value of those prizes is merely a drop in the bucket when compared to the enormous annual expenditure of contracts or grants, which has averaged in excess of \$1 trillion per year over the last six fiscal years. See *Total Federal Spending*, USASPENDING.GOV, http://www.usaspending.gov/trends?trnedstrendreport=default&viewreport=yes&maj_contracting_agency_t=&pop_cd_t=&vendor_state_t=&vendor_cd_t=&psc_cat_t&tab=Graph+View&Gox=Go (last visited Aug. 10, 2014). Although the GAO recently criticized the accuracy of the data on USASpending.gov, that data is constantly being updated, and the website remains the most accessible public source of federal spending information. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-14-476, DATA TRANSPARENCY: OVERSIGHT NEEDED TO ADDRESS UNDERREPORTING AND INCONSISTENCIES ON FEDERAL AWARD WEBSITE 18 (2014).

⁹³ Kelman, *Procurement Contests Get Their Due*, *supra* note 30.

⁹⁴ See *supra* note 1; see also KAY, *supra* note 44, at 28–29; MacCormack et al., *supra* note 63, at 30–32; McKINSEY & CO., *supra* note 44, at 35–69; Rourke, *supra* note 13, at 78; Stallbaumer, *supra* note 51, at 149–58.

⁹⁵ Despite our focus on oversight and review of contests in this article, we do not mean to suggest that this is the only potential concern with this vehicle. “Concerns about prizes are that they may inhibit the exchange of information among researchers and innovators due to the very nature of competitions, be challenging to design and finance, and result in duplicative work which may not be the best use of limited intellectual and financial resources.” Stine, *Federally Funded Innovation Inducement Prizes*, *supra* note 15 at un-paginated Summary.

⁹⁶ This article focuses primarily on disputes arising from a contestant’s claimed right to “the prize,” as opposed to the myriad of other rights that a contestant could claim during the life of a contest. For example, the authors could envision a scenario where the government properly awards a prize to a rightful winner, but also finds value (and wishes to exploit the ideas) in a number of other contestants’ entries. Those contestants, without defending their

Disappointed contestants who feel that the government evaluators failed to recognize their genius, improperly assessed their submission, were biased against them or their approach, or just generally wronged or even cheated them, will want their day in court. Obtaining judicial review of a federally sponsored prize contest entails litigation against the U.S. Government,⁹⁷ which requires contestants to craft a claim⁹⁸ that fits within one of the many anachronistic and piecemeal waivers of federal sovereign immunity, each of which provides a slightly different range of remedies.⁹⁹ To make matters more complicated, there are many different types of prize contests¹⁰⁰ deriving from multiple legal authorizations.¹⁰¹ Variation among prizes means they will not all fit within the same waiver of sovereign immunity, which potentially places disappointed contestants from different contests in different forums.

Disappointed contestants may attempt to bring claims in up to three different forums, and even then it remains unclear if they will find a forum with jurisdiction to resolve their prize contest dispute on the merits. This stands in striking contrast to the way that challenges or protests are handled with regard to government contract awards, where every disappointed offeror, provided standing and timeliness requirements are satisfied, can bring a claim in *any*

right to the actual contest prize, may have a valid claim to compensation arising from the Government's use of their entry.

⁹⁷ See *infra* note 106.

⁹⁸ We use the term "claim" broadly, to include equitable or injunctive relief, and, specifically, more broadly than the term is used in government contracts disputes. See, e.g., 48 C.F.R. § 52.233-1(c), citing 41 U.S.C. § 7103: "Claim" . . . means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain. . . ."

⁹⁹ See Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 521 (2003); Steven L. Schooner & Erin Siuda-Pfeffer, *Post-Katrina Reconstruction Liability: Exposing the Inferior Risk-Bearer*, 43 HARV. J. ON LEGIS. 287, 289 n.8 (2006). Compare John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 836775 n.24 (1995), quoting Roger C. Cramton, *Non-Statutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH. L. REV. 387, 419 (1970) ("No scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years."), and generally criticizing the doctrine), and KENNETH CULP DAVIS, 3 ADMINISTRATIVE LAW TREATISE § 25.01 (1958) ("[N]early every commentator who considers the subject vigorously asserts that the doctrine of sovereign immunity must go."), with Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1561 (1992) ("Despite the disadvantages, however, the need to preserve the ability of future generations to fashion policy responsive to contemporary majoritarian concerns plausibly justifies immunity.").

¹⁰⁰ See *supra* note 50.

¹⁰¹ See OMB Guidance Memo, *supra* note 85, at 5–8.

and all of three different adjudicative forums.¹⁰² There is not even a clear means for disappointed contestants to receive scoring information after the prize is awarded: Frankel's initial request was denied, and he ultimately filed a FOIA request for the little information he got, which did not include an evaluation of his own submission.¹⁰³ Compared to sophisticated, negotiated government contracts, where unsuccessful offerors are guaranteed informational "debriefings" within days of the award announcement,¹⁰⁴ disappointed prize contestants are seemingly deprived of any meaningful feedback despite their investment of significant resources and intellectual capital. All of this complex, costly, and inefficient threshold litigation and information gathering could be avoided if Congress would definitively state where and how prize contest disputes are to be resolved.¹⁰⁵ Unless and until Congress does so, agencies sponsoring contests should anticipate disputes and proactively incorporate dispute resolution clauses into competition rules.

An agency's decision to award a prize in a federally administered prize contests may fit into one of four different legal characterizations depending on the authorization used to conduct the prize and the rules of the contest.¹⁰⁶

¹⁰² Disappointed offerors contesting the award of a federal procurement contract can elect to protest the award at the agency level, at the GAO, and at the Court of Federal Claims. There are no administrative exhaustion requirements to prevent a contractor from going straight to the GAO or the Court of Federal Claims. *See generally* 48 C.F.R. §§ 33.103–33.105 (detailing procedures for protests at the agency level, the GAO, and the COFC).

¹⁰³ According to Frankel, after the FTC announced the winners, he immediately requested the scoring details for his own submission and for the winners. The FTC's initial response was that "feedback and scoring details are not given on high volume challenges[.]" Complaint at Ex. 6, 23, *Frankel v. United States*, 118 Fed. Cl. 332 (2014) (No. 13-546). In response to Frankel's subsequent FOIA request, the FTC provided scoring information on the seven finalists (out of over 800 applicants). *See id.* at 34.

¹⁰⁴ *See generally* 48 C.F.R. §§ 15.505–15.506 (providing detailed guidelines for pre- and post-award debriefings given to disappointed offerors in negotiated contracts).

¹⁰⁵ *See Krent, supra* note 99, at 1538–39.

¹⁰⁶ These legal characterizations employed to obtain jurisdiction to litigate *against the federal government* are not relevant to prize contests sponsored and administered by private organizations. This is critical, because some agencies outsource their contest administration to a private organization. In that scenario, we could envision disputes between the contestants and the private contractor, at which point sovereign immunity would become irrelevant. Privately sponsored prizes, such as any X-Prize, are not within the purview of this analysis. Readers may be interested to learn that standard X-Prize contest guidelines do not provide a means of appealing the judges' final decision: "The Judging Panel will have the sole and absolute discretion to select the Prize recipients. The decisions of the Judging Panel are final, binding, and are not subject to challenge." Nokia Sensing XChallenge Competition Summary, at 8, http://sensing.xprize.org/sites/default/files/nokia_sensing_guidelines-v6.pdf. Although, other XPrize contest guidelines are less absolute: "The Judging Panel will review

Each characterization potentially allows for some form of review of a prize contest dispute in one of three forums. The first of the four characterizations is a standard administrative law claim brought in a U.S. District Court seeking an equitable remedy for agency violation of the Administrative Procedure Act ("APA").¹⁰⁷ The second and third options involve a common law-based breach of contract claim seeking monetary damages at the U.S. Court of Federal Claims.¹⁰⁸ The fourth characterization is a federal procurement law-

assessments to certify results and to make the final decision regarding the prize award." See Global Learning XPrize Contest Guidelines, at 21, http://learning.stage2.xprize.org/sites/default/files/global_learning_xprize_proposed_guidelines_v1.pdf. But see the common approach employed in other types of contests (drawings, photography contests, etc.), which offer an arbitral review. See, e.g., LG Lifeband 5K Challenge, <http://runkeeper.com/challenge/termservice/lg>; Google Photography Prize Official Rules, <http://www.google.com/landing/photographyprize/terms.html>; Contest Rules for Great Park Neighborhoods Pumpkin Glow Sculpture Contest, <http://pumpkinglowgpn.com/sculpture-contest-rules/>.

¹⁰⁷ Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (codified as amended at 5 U.S.C. §§ 551-59, 701-06 (2012)).

¹⁰⁸ The COFC's jurisdiction to resolve monetary claims for *breach of contract* comes from the Tucker Act, 28 U.S.C. § 1491 (2012). U.S. district courts technically have jurisdiction to resolve monetary claims for breach of contract against the government under the aptly nicknamed Little Tucker Act, *id.* § 1346. Because money damages in district court are limited to \$10,000, *id.* § 1346(a)(2), contractors rarely find it worth litigating in a federal court. Because it fails to offer a meaningful remedy, this article ignores Little Tucker Act jurisdiction. As explained, a contestant could not receive an equitable remedy for an APA violation in addition to monetary damages for breach of contract. See *infra* note 118.

We recognize that the Armed Services and Civilian Boards of Contract Appeals ("ASBCA" and "CBCA," or, collectively, the "BCAs") also have jurisdiction to resolve government contract disputes pursuant to the Contract Disputes Act of 1978 (codified at 41 U.S.C. §§ 7102, 7104(a), 7105(e)(1)(A)(B) (2012)). While it is conceivable that a disappointed contestant *could* bring a claim at one of the BCAs, we believe that the strict procedural and jurisdictional requirements at the boards make such a claim very unlikely to succeed. Specifically, we expect that the absence of a contracting officer ("CO") in prize contests makes fulfilling the jurisdictional prerequisites challenging, if not impossible. See § 7105(e)(1)(A)(B); 48 C.F.R. §§ 1.602, 33.206, 33.210-33.212. Moreover, while the COFC may be willing to find that prize contests create a contract, the BCAs, like the GAO, typically prove more conventional, and, accordingly, much less inclined to innovate with jurisdictional issues. See, e.g., *Engage Learning, Inc. v. Salazar*, 660 F.3d 1346, 1348, 1353 (Fed. Cir. 2011), *vacating* *Engage Learning, Inc. v. Dep't of the Interior*, CBCA 1165, 12-1 BCA ¶ 34,960 (finding that the CBCA had too narrowly interpreted its own jurisdiction by dismissing plaintiff's CDA claim for lack of subject matter jurisdiction where plaintiff *alleged*, but did not *prove*, the existence of an express or implied-in-fact contract with the government); Michael J. Schaengold, T. Michael Guiffre & Elizabeth M. Gill, *Choice of Forum for Federal Government Contract Bid Protests*, 18 FED. CIR. B.J. 243, 275 (2009) ("Although the GAO has broad authority to decide bid protests, the GAO has set forth . . . specific examples of protests that it will dismiss without consideration.").

based bid protest against the award of a procurement contract at either the GAO or COFC.¹⁰⁹

We address these characterizations or approaches below in an attempt to handicap a disappointed contestant's likelihood of establishing jurisdiction, obtaining meaningful review of an agency's administration of a prize contest, and the potential for achieving a meaningful remedy.¹¹⁰ Our sense remains that the broadest imaginable judicial review may constitute overkill, providing an unnecessarily potent, yet sadly inefficient, dose of due process. We also recognize that—absent Congressional or legislative solution—contestants may ultimately assert that poorly managed contests involve the unconstitutional deprivation of their liberty interests without due process,¹¹¹ but we hope that more pragmatic avenues become available to frustrated contestants.

¹⁰⁹ The GAO's jurisdiction is pursuant to the Competition in Contracting Act ("CICA"). 31 U.S.C. § 3551 *et seq.* (1988); CIBINIC, NASH & YUKINS, FORMATION, *supra* note 53, at 1688. The COFC's jurisdiction over disappointed offeror matters (bid protest), as opposed to contract disputes, derives from the Tucker Act. *See* 28 U.S.C. § 1491(b)(1) (2012); CIBINIC, NASH & YUKINS, FORMATION, *supra* note 53, at 1763.

¹¹⁰ We concede that we have not yet divined the optimal organizational or analytical rubric for presenting this menu. Although it may appear that we began with a hierarchy of fora, our aspiration was to prioritize causes of action and their potential efficacy. Ultimately, we fear that—absent Congressional or Executive attention to the issue—clarity will evolve slowly, through trial and error (and appeal). The end result—driven in large part by unpredictable nuances of early movers, such as the *pro se* Frankel—is unlikely to prove superior to a carefully considered legislative or regulatory solution.

¹¹¹ For example, we could envision an analogy to the "de facto debarment cases," where the Government's failure to appropriately evaluate a government contractor's submission may constitute a violation of the contractor's constitutional due process rights. *See Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953, 963-64 (D.C. Cir. 1980) (finding that the Government's determination that plaintiff lacked integrity and was therefore not eligible for award effectively foreclosed plaintiff's ability to take advantage of other government employment opportunities and put plaintiff out of business, amounting to an unconstitutional deprivation of plaintiff's liberty without due process.) While *Old Dominion* is informative, we cannot help but wonder if the D.C. Circuit would have asserted jurisdiction if the matter originally presented itself today, given the change in its jurisdiction over bid protests. *See infra* note 214. Moreover, the extent to which constitutional due process is required in any given situation remains notoriously and understandably vague, yet we could envision success in any number of imaginable scenarios. *See generally* *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (quoting *Cafeteria & Restaurant Workers Union, etc. v. McElroy*, 367 U.S. 886, 895 (1961)) ("consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action") (holding that a welfare recipient is entitled to a pre-termination evidentiary hearing).

A. Administrative Law and the Federal District Courts

For many attorneys, the most intuitive way to seek redress for damaging agency action is to bring a federal administrative law claim that the agency violated the APA.¹¹² Section 702 of the APA broadly waives sovereign immunity for claims brought in any U.S. District Court¹¹³ by a “person suffering legal wrong because of an agency action.”¹¹⁴ The lack of qualifying criteria in the APA makes it the most likely of the three characterizations to accommodate disappointed contestants from any given prize contest. But, the APA only provides compensation “other than money damages,”¹¹⁵ which may not be enough to make most disappointed contestants whole.

The APA does not grant any substantive rights; it is only a general waiver of sovereign immunity for harms done “within the meaning of a relevant statute.”¹¹⁶ Disappointed contestants will have to identify exactly which right the agency violated, which will most likely be the statute or regulation that provides the agency with legal authorization to conduct the contest. The only limitation this poses to the availability of APA review is that the underlying

¹¹² See, e.g., Siegel, *supra* note 1, at 27–29 (framing the Longitude Prize dispute in the administrative law context and revisiting the historical judgment against the Longitude Board as a thought experiment of how the matter might be resolved today).

¹¹³ 5 U.S.C. § 702 (2012).

¹¹⁴ *Id.* § 702. The growth and evolution of the administrative state led to the creation of a broad range of property rights which cannot be deprived without some amount of due process. See note 111, *supra*. “[T]he new property’ refers to the development of economically valuable interests that are of vital importance to the holders of those interests, but that do not come within the traditional definition of ‘property.’” Charles A. Reich, *The New Property After 25 Years*, 24 U. SAN FRANCISCO L. REV. 223, 225 (1990); Charles A. Reich, *The New Property*, 73 YALE L. J. 733, 787 (1964) (“[I]t is time to reconsider the theories under which new forms of wealth are regulated, and by which governmental power over them is measured We cannot safely entrust our livelihood and our rights to the discretion of authorities, examiners, boards of control, character committees, regents, or license commissioners.”). We do not suggest an obvious, compelling analogy between prize contests academic tenure. Nonetheless, see, e.g., *Perry v. Sindermann*, 408 U.S. 593 (“allegation that the college had a de facto tenure policy, arising from rules and understandings officially promulgated and fostered, entitled him to an opportunity of proving the legitimacy of his claim to job tenure”); *Board of Regents v. Roth*, 408 U.S. 564 (“The Fourteenth Amendment does not require opportunity for a hearing prior to the nonrenewal of a non-tenured state teacher’s contract, unless he can show that the nonrenewal deprived him of an interest in ‘liberty’ or that he had a ‘property’ interest in continued employment, despite the lack of tenure or a formal contract.”).

¹¹⁵ See *id.*

¹¹⁶ See *id.*

statute itself may preclude APA review.¹¹⁷ For example, if the agency specifically conducted its contest pursuant to procurement authority, the APA claim would likely be dismissed because U.S. District Courts do not have jurisdiction to resolve procurement contract disputes, or, for that matter, any breach of contract claim against the government.¹¹⁸ Alternatively, if Congress designated a specific forum for prize contest disputes, then that would effectively eliminate the possibility of APA review in U.S. District Courts.¹¹⁹

Even if there is jurisdiction for APA review, it may not always provide an adequate remedy, because only equitable, non-monetary remedies are allowed.¹²⁰ The APA only provides “other than money damages,”¹²¹ which may not be enough to make most disappointed contestants whole. Contestants, of course, will prioritize potential remedies—money, public recognition, or consequential damages (an admittedly unlikely result)—differently. And we expect that many disappointed contestants would be satisfied with potential non-monetary remedies. In most cases, that equitable remedy will be requiring the agency to correct any errors the court finds in the contest administration process. But re-evaluating the submissions only helps the rare disappointed contestant who would have won but for the agency wrongdoing.

Of course, re-evaluation could lead to ultimate prize award. Still, some competitors might perceive a monetary judgment of the prize amount as a

¹¹⁷ See *id.*; see also C. Stanley Dees, *The Future of the Contract Disputes Act: Is It Time to Roll Back Sovereign Immunity?*, 28 PUB. CONT. L.J. 545, 550 (1999) (explaining that the broad waiver in the first sentence of § 702 is limited by the last sentence of § 702, which says no review is available “if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought” (citing 5 U.S.C. § 702)).

¹¹⁸ The APA only waives sovereign immunity for “other than money damages,” and does not allow a remedy that is expressly or impliedly forbidden by another statute. 5 U.S.C. § 702; see also Dees, *The Future*, *supra* note 117, at 549–50. These two limitations effectively preclude review of a prize contest under the APA if the government can successfully characterize that contest as a contract with the government, because the Tucker Act is held to impliedly forbid specific performance of a government contract, leaving only money damages, which the APA will not allow. See Dees, *The Future*, *supra* note 117, at 557 (“[I]t is fair to say that specific performance is generally unavailable as a contract remedy.”); Richard H. Seamon, *Separation of Powers and the Separate Treatment of Contract Claims Against the Federal Government for Specific Performance*, 43 VILL. L. REV. 155, 157–58 (1998) (noting that all but one federal circuit courts recognize that the Tucker Act impliedly forbids specific performance of government contracts).

¹¹⁹ See 5 U.S.C. § 703.

¹²⁰ See § 702.

¹²¹ *Id.*

hollow victory, to the extent they invested¹²² more in preparing their submission than the dollar value of the prize.¹²³ Thus, it is possible that a monetary remedy—with the full prize value being awarded—will not make a contestant whole, in the conventional sense of expectation damages.¹²⁴ In any event, in order to receive costs of preparing a contest submission, which might, in a conventional contract case, be described as either reliance damages or incidental damages (or both),¹²⁵ disappointed contestants must characterize their dispute as the common law breach of an implied-in-fact contract to consider submissions fairly or as a bid protest of the improper award of a procurement contract.

Whereas the District Courts could only provide prize contestants equitable relief, the GAO and COFC would be able to provide bid and proposal costs. This is the typical remedy for a breach of contract with the government, and the next two sections will demonstrate the different ways that a prize contest can be characterized as a contract with the government. A government con-

¹²² Equitable relief conceivably could entitle a disappointed contestant to remedies that result in receiving the full value of the prize. First, the agency could reevaluate the submissions in accordance with the court's order and determine that the disappointed contestant was the rightful winner. Second, and more interestingly, the court could determine that the disappointed contestant *should* have won and order the agency to specifically perform by awarding the prize value. Ordering an agency to transfer the dollar-value of the prize might appear, on its face, to violate the APA ban on money damages. But *Bowen v. Massachusetts*, 487 U.S. 879, 895, 900 (1988), potentially opens the door to this result. See generally Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 618–27 (2003) (describing the *Bowen* holding and criticizing it for blurring the lines between the Tucker Act and the APA); C. Stanley Dees, *The Executive Branch as Penelope: Preserving the Tapestry of Sovereign-Immunity Waivers for Suits Against the United States*, 71 GEO. WASH. L. REV. 708, 711–13 (2003) (acknowledging the potential for the Court's holding to allow money remedies in the case of specific performance, but concluding that providing claimants with quick and meaningful remedies is more important than preserving the distinction between Tucker Act claims for money damages and APA claims for equitable relief). For a more recent accounting of how lower courts are interpreting *Bowen*, see S. Jay Plager, *Money and Power: Observations on the Jurisdiction of the U.S. Court of Federal Claims*, 17 FED. CIR. B.J. 371, 373–74 (2008) (describing recent decisions that could limit the ability of a district court to use the *Bowen* holding to award money damages via specific performance).

¹²³ See MacCormack et al., *supra* note 63, at 26.

¹²⁴ Restatement (Second) of Contracts § 347, cmt a (1981) (emphasis added) (“Contract damages are ordinarily based on the injured party’s expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been had the contract been performed.”).

¹²⁵ Restatement (Second) of Contracts §§ 347(b), 349.

tractor would see bid and proposal costs as a significant limitation compared to the value of the contract, because the value of the contract is likely to be exponentially more valuable than the cost of preparing a proposal for the contract. For a prize contestant, however, the cost of creating a submission is equal to at least the full value of R&D, and often much more. Of the three remaining claims potentially available to prize contestants—breach of express contract, breach of implied contract, and the bid protest of a procurement contract award—only the express and implied-in-fact contract characterizations will allow disappointed contestants, who cannot prove that they should have won the contest but for the agency action, to recover the cost of preparing their submissions.¹²⁶

B. Breach of Contract and the U.S. Court of Federal Claims

The second and third potential characterizations of prize contests utilize the common law theory of breach of contract. Prize contests can be characterized as both express and implied contracts with the government. Pursuant to the amended § 1491(a) of the Tucker Act, the COFC today exercises jurisdiction to resolve monetary claims against the government arising from, among other things, breach of express and implied-in-fact contracts.¹²⁷ Despite decades of experience, however, the COFC has not evolved into the dominant or preferred forum for these matters, and our intent here is not to recommend this as an exclusive or primary option. Nonetheless, given the natural analogy between prizes and contracts and the court's accumulated experience, it makes sense to consider the COFC as a potential home for these matters.¹²⁸ To be

¹²⁶ As explained above, the APA bar to money damages means that the only contestants who could benefit from APA review are those that will win the prize if the agency is either forced to reevaluate submissions or specifically perform by awarding the prize value directly. *See supra* note 122 and accompanying text. Bid protest jurisdiction requires a protester to be prejudiced, that is, that the protester “must demonstrate some probability that it would have received the award.” RALPH C. NASH, JR., KAREN R. O'BRIEN-DEBAKEY & STEVEN L. SCHOONER, *THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT* 388 (4th ed. 2007).

¹²⁷ 28 U.S.C. § 1491(a)(1) (2012).

¹²⁸ For a lively debate as to the effectiveness of the COFC compared to other judicial forums, including U.S. District Courts and the GAO (and litigant preferences for alternative fora, specifically the GAO and, in disputes, the agency boards of contract appeals), compare Steven L. Schooner, *The Future: Scrutinizing the Empirical Case for the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714, 753–57 figs. 11 & 12 (2003) (graphically demonstrating that, over a five-year period, the GAO received more than twenty bid protests for each filing in the COFC), with Loren A. Smith, *Why a Court of Federal Claims?*, 71 GEO. WASH. L. REV. 773, 781–84 (2003); *see also infra* note 205.

clear, however, as a threshold matter, the COFC does not have jurisdiction to resolve the APA-based claim described in the previous section.¹²⁹

For disappointed contestants seeking judicial review, so far only the breach of express contract claim has provided any degree of success. COFC Judge Allegra denied the Department of Justice's ("DOJ") motion to dismiss for lack of jurisdiction, finding that the FTC Robocall challenge created a contract between Frankel and the government, therefore vesting the COFC with jurisdiction pursuant to § 1491(a) of the Tucker Act.¹³⁰ The court accepted Frankel's view that "the competition constituted a unilateral contract which was accepted by plaintiff when he submitted an entry in the competition."¹³¹ Unlike the GAO, discussed below, Judge Allegra found no difficulty concluding that the FTC contest satisfied the familiar offer and acceptance requirements of contract formation:¹³²

The offer of a prize for the performance of a specified act in a contest . . . constitutes the first part of the normal offer-acceptance consideration equation for the formation of an enforceable contract. By competing in the contest, a competit[or] accepts the offer; by performing the specified act required for winning the contest, he provides the necessary consideration.¹³³

Judge Allegra relied on the Supreme Court's analysis in *Robertson v. United States*,¹³⁴ where a composer won a prize for the best unpublished symphonic work written by a native-born composer.¹³⁵ In holding that the prize money was taxable as gross income, the Supreme Court opined that "payment of a prize to a winner of a contest is the discharge of a contractual obligation. The acceptance by the contestants of the offer tendered by the sponsor of the contest creates an enforceable contract."¹³⁶ Of course, Judge Allegra's opinion does not bind the other COFC judges, who, as a group, have not hesitated to sustain divergent lines of precedent within the court.¹³⁷

In addition to the express contract argument relied on by Judge Allegra, prize contests might also be characterized as implied contracts. The breach of implied contract claim is based on the premise that, by soliciting and

¹²⁹ "It is well-settled that this court does not have jurisdiction to hear cases [challenging agency action] under the APA." *Lawrence Battelle, Inc. v. United States*, 117 Fed. Cl. 579, 585 (2014) (citing *Martinez v. United States*, 333 F.3d 1295, 1313 (Fed. Cir. 2003) (en banc)).

¹³⁰ See *Frankel v. United States*, 118 Fed. Cl. 332, 335–36 (2014).

¹³¹ *Id.* at 335.

¹³² See *id.* at 336.

¹³³ *Id.* at 335 (quoting *Lucas v. United States*, 25 Cl. Ct. 298, 304 (1992) (quoting *Nat'l Amateur Bowlers, Inc. v. Tassos*, 715 F. Supp. 323, 325 (D. Kan. 1989))).

¹³⁴ 343 U.S. 711 (1952).

¹³⁵ *Id.* at 711–12.

¹³⁶ *Id.* at 713.

¹³⁷ See *infra* note 165.

receiving contestants' submissions, the government enters into an implied contract to review those submissions fairly.¹³⁸ If such an implied contract is found to exist, the COFC will review the agency's evaluation of submission for arbitrary and capricious action.¹³⁹ To prove the existence of an implied-in-fact contract, disappointed contestants must evidence mutual assent through offer and acceptance, consideration, and enough definiteness for the agreement to be enforced.¹⁴⁰

The premise is that the agency makes an offer to all eligible contestants by advertising the contest and publishing its rules in the Federal Register.¹⁴¹ The offer is not to enter a bilateral contract by providing a promise to perform; instead, the advertisement impliedly offers a unilateral contract, where the agency agrees to evaluate submissions fairly in return for the contestants' performance.¹⁴² In this context, performance means investing time and effort into creating and entering an eligible, but not necessarily winning, submission. The offer is accepted, and the contract simultaneously formed, as soon as the contestant adequately performs by submitting an eligible entry to the agency. If the agency's offer stipulates any specifications for how acceptance

¹³⁸ "[I]t is an implied condition of every request for offers that each of them will be fairly and honestly considered." *Cont'l Bus. Enters., Inc. v. U.S.*, 452 F.2d 1016, 1019 (Ct. Cl. 1971). "This implied-in-fact contract between the government and bidders on the underlying contract requires the government to fully and fairly consider all bids submitted in accordance with the invitation for bids." *Hawpe Const., Inc. v. United States*, 46 Fed. Cl. 571, 577–78 (2000), *aff'd*, 10 F. App'x 957 (Fed. Cir. 2001).

¹³⁹ See *Hawpe*, 46 Fed. Cl. at 578.

¹⁴⁰ See *City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990) ("An implied-in-fact contract requires findings of: 1) mutuality of intent to contract; 2) consideration; and, 3) lack of ambiguity in offer and acceptance."). When the United States is a party to the contract, there is a fourth requirement that the government representative had actual authority to bind the government in the contract. *Id.*

¹⁴¹ See 15 U.S.C. § 3719(e)–(f) (2012). The COMPETES II Act requires not only that "[t]he head of an agency shall widely advertise each prize competition to encourage broad participation[,] but also that specific information be published in the Federal Register, including "(1) the subject of the competition; (2) the rules for being eligible to participate . . . ; (3) the process for participants to register . . . ; (4) the amount of the prize; and (5) the basis on which a winner will be selected." *Id.*

¹⁴² See *Roberson v. United States*, 115 Fed. Cl. 234, 242 (2014). "Consideration may consist of a performance or of a return promise. Consideration by way of performance may be a specified act of forbearance, or any one of several specified acts or forbearances of which the offeree is given the choice, or such conduct as will produce a specified result." RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. d (1981).

must be made, then no contract is formed unless submissions fully comply with those instructions.¹⁴³

Most prize contests provide both parties with consideration and are sufficiently definite to be enforced. The consideration the agency receives is the contestants' participation in the contest, a potential solution to the problem the contest is intended to solve, and any intellectual property rights transferred by submission. The consideration for the contestant is the opportunity to participate in the contest and potentially win the prize.¹⁴⁴ The contract is definite enough to be enforced¹⁴⁵ as long as the rules state how submissions must be received in order to be eligible, how the agency will evaluate proposals, and the value of the prize.¹⁴⁶ The agency breaches the contract by treating compliant submissions in a way that is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law or the publicly promulgated contest rules.¹⁴⁷

Jurisdiction to bring a breach of contract claim against the Government evaporates if there is no contract. The DOJ, which vigorously defends against all jurisdictional incursions against the government's sovereign immunity, will almost certainly argue that entering a prize submission is not adequate to bind

¹⁴³ "If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract." § 60. For example, the COFC recently dismissed a challenge to a prize contest for lack of jurisdiction after finding that no contract was formed because the contest rules required submissions be made electronically, but the disappointed contestant only sent a hard copy. See *Roberson*, 115 Fed. Cl. at 242. *Roberson* does not suggest that the court lacks jurisdiction over *any* prize contest dispute. On the one hand, suing for breach of implied contract requires fairly sophisticated legal arguments, which the Plaintiff in *Roberson*, proceeding *pro se* from Georgia state prison, may not fully have understood. See *id.* at 237–38, 240. More importantly, *Roberson* reminds contestants that they cannot form an implied contract of fair consideration with the government unless they fully comply with contest rules. See *id.* at 242.

¹⁴⁴ See *Frankel v. United States*, 118 Fed. Cl. 332, 335 (2014) (citing 7 WILLISTON ON CONTRACTS § 16:6 (4th ed. 2014)). Of course, in its classical form, consideration entailed a benefit to the promisor *or* a detriment to the promisee, whereas the modern form simply requires a bargained-for exchange. RESTATEMENT (SECOND) OF CONTRACTS § 71(1) cmt. a (1981).

¹⁴⁵ "[A]n offer . . . cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain. . . . The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981).

¹⁴⁶ Contests conducted pursuant to the COMPETES II Act will meet these requirements. See *supra* note 141.

¹⁴⁷ "To establish that the government breached its implied-in-fact contract, the plaintiff must show that the government's behavior was arbitrary and capricious." *Crux Computer Corp. v. United States*, 24 Cl. Ct. 223, 225 (1991).

the Government to an implied contract to fairly consider that submission.¹⁴⁸ In *Motorola, Inc. v. United States*¹⁴⁹ the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") raised the standard for forming an implied contract of fair consideration, stipulating that the government is only bound when it solicits and receives information that is binding on the submitting party, as opposed to non-binding responses to, for example, government Requests For Information ("RFI").¹⁵⁰

Most, if not all, prize contests satisfy the *Motorola* standard for forming an implied contract of fair consideration. In fact, most prize submissions provide the government even more substance than a formal bid, which entails merely a

¹⁴⁸ "[T]he Department of Justice . . . aggressively advocat[es] the doctrine of sovereign immunity to deny rights and remedies to contractors." Dees, *The Future*, *supra* note 117, at 556.

¹⁴⁹ 988 F.2d 113 (Fed. Cir. 1993).

¹⁵⁰ See *id.* at 116. The court opined:

The court cannot go along with the contention that Motorola's responses to Government requests for information gave rise to an implied contract. . . .

Government requests for information and responses from prospective bidders are not the equivalents of offer and acceptance. Such exchanges are not carried on with an expectation to presently affect legal relations.

Id. at 115–16.

Instead of interpreting the affirmed COFC opinion in *Motorola* as a strict requirement that a formal bid is required to create an implied-in-fact contract of fair consideration, the opinion is better understood as only overturning the holdings in *Magnavox Electronic Systems Co. v. United States*, 26 Cl. Ct. 1373, 1377–78 (1992), and *Standard Manufacturing Co. v. United States*, 7 Cl. Ct. 54, 59 (1984), which bound the government to an implied contract after receiving only non-binding responses to RFI. See *Comm'n Constr. Servs., Inc. v. United States*, 116 Fed. Cl. 233, 260 n.13 (2014). The court explained:

[Plaintiff] misconstrues *Motorola* to establish a general principle that submission of a proposal is always required to establish the implied-in-fact contract necessary for § 1491(a) pre-award protest jurisdiction. While the trial court . . . did articulate that principle, the Federal Circuit, using limiting language in its affirmance, did not adopt the trial court's reasoning wholesale.

Id. In *Motorola*, the COFC distinguished an RFI response (merely the submission of *information*) from a bid; submission of a bid empowers the government to *accept the offer* and bind the offeror to the terms in the bid. 988 F.2d at 116.

Even if the COFC intended to restrict the formation of implied contracts of fair consideration to situations where formal bids are submitted, the Federal Circuit did not affirm it in that respect, and has since refused to do so. The Federal Circuit stated that no implied contract was formed because Motorola had neither submitted a formal bid nor "*otherwise met its burden to show that an implied contract existed*" and affirmed the COFC opinion only "to the extent consistent with the above." *Id.* at 114 (emphasis added); see also *Comm'n Constr. Servs.*, 116 Fed. Cl. at 260. The Federal Circuit again declined to hold that only a formal bid creates an implied contract of fair consideration in *Emery Worldwide Airlines, Inc. v. United States*, 264 F.3d 1071, 1084 n.12 (Fed. Cir. 2001).

binding *promise* to perform, because the contestant's participation, submission, and transfer of intellectual property rights constitutes actual performance. The agency not only receives the actual submission, which could solve the problem deemed worthy of a contest, but also the intangible benefit of each contestant's participation in the contest. Every contestant that participates increases publicity and the competitiveness of the contests, drawing attention to contestants and encouraging them to invest more in their performance. But for the anticipated effort and participation of contestants that eventually lose, the prizewinner might not be sufficiently incentivized to invest in creating the winning solution.¹⁵¹

In contrast to APA claims and bid protests which allow equitable relief, the COFC can only provide monetary damages to remedy the government's breach of contract, regardless of whether that contract is express or implied.¹⁵² In most cases, damages are equal to the cost of preparing the information or proposal submitted.¹⁵³ In the context of a prize contest dispute, damages would likely amount to the cost of preparing the contest entry. A major advantage of bringing a breach of contract claim under the Tucker Act, as opposed to bringing an APA claim or a procurement bid protest, is that the Tucker Act contains no requirement that contestants prove that they would have won but for the agency wrongdoing.¹⁵⁴ Instead, disappointed contestants need only show that the agency breached its contract by not following the rules set out in the contest guidelines, or breached its implied contract by evaluating submissions arbitrarily and capriciously.¹⁵⁵

The breach of contract claims, however, will only provide monetary damages, not equitable relief. If a disappointed contestant seeks an equitable remedy and the costs of preparing a submission, then it will have to successfully characterize its dispute as a bid protest of the improper award of a procurement contract. Procurement contract bid protest jurisdiction appears far narrower than the APA and Tucker Act claims discussed above; therefore, fewer prizes are likely to fit within this last potential characterization. While both equitable and money-damages are available in a bid protest, only prejudiced disappointed

¹⁵¹ See *supra* Part I.A. (discussing the importance of contestants' participation for the success of the contest enterprise).

¹⁵² See *Massie v. United States*, 226 F.3d 1318, 1321 (Fed. Cir. 2000); *FAS Support Servs., LLC v. United States*, 93 Fed. Cl. 687, 694 (2010).

¹⁵³ "A breach of the contract will generally entail return of bid preparation or proposal costs." *Crux Computer Corp. v. United States*, 24 Cl. Ct. 223, 225 (1991).

¹⁵⁴ See *supra* note 126.

¹⁵⁵ See *supra* note 147.

contestants who can show they probably would have won but for the agency wrongdoing are entitled to review.¹⁵⁶

C. Procurement Contract Bid Protest: The Quasi-Judicial Option

Compared to the APA and contract claims, bid protests are probably the least familiar to most attorneys outside the government contracts bar. The GAO and COFC exercise different statutory authority to resolve bid protests,¹⁵⁷ employ different procedural rules,¹⁵⁸ and generate their own independent lines of precedent;¹⁵⁹ but the basic substantive legal requirement for obtaining bid protest jurisdiction is fundamentally the same: the protest must arise from the formation of a contract with a federal agency¹⁶⁰ for the procurement of property or services.¹⁶¹

The GAO dismissed David Frankel's protest against the FTC's Robocall Challenge for lack of jurisdiction, finding that the competition did not create a contract.¹⁶² COFC Judge Allegra granted the DOJ's motion to dismiss Frankel's bid protest claim, finding that, although the FTC Challenge created a contract, that contract was not in connection with a procurement.¹⁶³ The GAO and COFC opinions offer case studies to show how future contest disputes may be analyzed. Due to the variation in statutory authority and rules among different prize contests, neither the GAO nor the COFC opinions in Frankel's dispute preclude future litigation over these forums' jurisdiction to resolve other prize contest disputes. This is particularly true at the COFC,

¹⁵⁶ See *supra* note 126.

¹⁵⁷ See *supra* note 109.

¹⁵⁸ GAO protests at the GAO are governed by 4 C.F.R. § 21 (2012). See also 48 C.F.R. § 33.104. COFC protests are governed by Rules of Court of Federal Claims. § 33.105.

¹⁵⁹ COFC and GAO precedent do not bind the other forum. *CIBINIC, NASH & YUKINS, FORMATION*, *supra* note 53, at 1802. The GAO follows its own precedent, while the Federal Circuit and the U.S. Supreme Court bind the COFC. *Id.* at 1807–08. The COFC can overturn a decision made by GAO, but the GAO will not hear a case that has been decided by, or is currently pending at, another court of competent jurisdiction. *Id.* at 1804, 1806.

¹⁶⁰ Both the GAO and COFC bid protest jurisdiction are limited to procurements by federal agencies as defined by 40 U.S.C. § 472, which basically includes all federal executive agencies that operate with appropriated funds. See *id.* at 1688, 1763–64.

¹⁶¹ See *id.* at 1688, 1765.

¹⁶² See David Frankel, B-408319, 2013 CPD ¶ 144, at *3 (Comp. Gen. June 7, 2013).

¹⁶³ Frankel v. United States, 118 Fed. Cl. 332, 337 (2014),

where cases are randomly assigned to one of sixteen judges,¹⁶⁴ and those judges frequently disagree with each other as to matters of law.¹⁶⁵

The GAO and COFC have concurrent jurisdiction to resolve bid protests arising from the formation of procurement contracts¹⁶⁶ with federal agencies.¹⁶⁷ In dismissing Frankel's protest for lack of an underlying contract, the GAO focused only on the first sentence of the definition of "contract,"¹⁶⁸ which requires "a mutually binding legal relationship obligating the seller to furnish the supplies or services . . . and the buyer to pay for them."¹⁶⁹ The Robocall Challenge rules stipulated that by submitting proposals contestants would retain all intellectual property but give the government a limited license to use the proprietary information for three years.¹⁷⁰ Despite the \$50,000 prize value and the non-monetary value of participating in the contest, the GAO determined that contestants participated without any expectation of remuneration.¹⁷¹ Despite the three-year license to use proprietary information in submissions, the GAO concluded that the contest rules gave the agency no enforceable right to obtain anything.¹⁷² According to the GAO, no contract was formed because there was no duty for the sellers (contestants) to furnish anything and no duty for the buyer (the agency) to pay.¹⁷³

¹⁶⁴ See FED. CL. R. 40.1(a); CIBINIC, NASH & NAGLE, ADMINISTRATION, *supra* note 66, at 1324.

¹⁶⁵ CIBINIC, NASH & NAGLE, ADMINISTRATION, *supra* note 66, at 1324. "[T]here is . . . a lack of uniformity among the judges of the COFC themselves because, under their rules, unlike the judges on the Court of Appeals, judges are not bound by their own precedents or by each other's decisions." The Honorable S. Jay Plager, *Abolish the Court of Federal Claims? A Question of Democratic Principle*, 71 GEO. WASH. L. REV. 791, 794 (2003). "[W]e share the frustration of those who complain that, all too often, the luck of the draw at the Court of Federal Claims significantly affects a case's outcome." Steven L. Schooner, *Postscript III: Challenging an Override of a Protest Stay*, 26 NASH & CIBINIC REP. ¶ 25 (2012).

¹⁶⁶ FAR 2.101 defines "contract" as:

[A] mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them. *It includes all types of commitments that obligate the Government to an expenditure of appropriated funds* In addition to bilateral instruments, contracts include . . . orders, . . . under which the contract becomes effective by written acceptance or performance.

48 C.F.R. § 2.101 (emphasis added).

¹⁶⁷ See *supra* note 109.

¹⁶⁸ See David Frankel, B-408319, 2013 CPD ¶ 144, at *2 (Comp. Gen. June 7, 2013); Ralph C. Nash, *Dateline August 2013*, 27 NASH & CIBINIC REP. ¶ 113 (2013).

¹⁶⁹ 48 C.F.R. § 2.101.

¹⁷⁰ Frankel, 2013 CPD ¶ 144, at *2-3.

¹⁷¹ See *id.* at *3; *supra* note 30.

¹⁷² Frankel, 2013 CPD ¶ 144, at *3.

¹⁷³ See *id.*

Emeritus Professor Ralph C. Nash, Jr. immediately recognized that GAO overlooked the second sentence of the Federal Acquisition Regulation (“FAR”) definition of “contract,”¹⁷⁴ which broadly includes “all types of commitments that obligate the Government to an expenditure of appropriated funds.”¹⁷⁵ The Robocall Challenge was administered under the COMPETES II Act, which requires prize money to be properly appropriated and that the prize obligated the FTC to expend \$50,000 to the winner of the contest. Therefore, as Nash points out, it seems that a contract was formed within the definition of FAR 2.101.¹⁷⁶

As a matter of basic contract law principles, it is difficult to deny that the Robocall Challenge and similarly structured contests are contracts, albeit unilateral contracts. The Second Restatement of Contracts explicitly suggests that contests are a type of contract:

An offer may create separate powers of acceptance in an unlimited number of persons Where one acceptor only is to be selected, various methods of selection are possible: for example, “first come, first served” . . . , the highest bidder . . . , or *the winner of a contest*.¹⁷⁷

Contestants invest time and money into creating a submission, participate publicly in the theater of the contest, and often give the government rights to their intellectual property.¹⁷⁸ The contestants labor not for nothing, as the GAO seems to suggest, but in consideration of the non-monetary benefits of participating and the opportunity to win the value of the prize. The agency creates an offer upon publishing an advertisement of the contest and its rules, and the contestant accepts by entering an eligible submission in accordance with any procedural requirements in the offer. This type of unilateral contract does not resemble a typical bid protest scenario arising out of the formation of bilateral government contracts. But FAR 2.101 expressly includes unilateral contracts within its scope: “[i]n addition to bilateral instruments, contracts include . . . orders, . . . under which the contract becomes effective by written acceptance or performance.”¹⁷⁹

As detailed in the previous section, COFC Judge Allegra had no difficulty finding that the Robocall challenge created an enforceable contract. Even so, finding a contract is only half the battle; indeed, Judge Allegra dismissed Frankel’s bid protest after concluding that the contract created by the FTC

¹⁷⁴ See Nash, *Dateline August 2013*, *supra* note 168.

¹⁷⁵ 48 C.F.R. § 2.101.

¹⁷⁶ See Nash, *Dateline August 2013*, *supra* note 168.

¹⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS § 29 cmt. b (1981) (emphasis added).

¹⁷⁸ See KAY, *supra* note 44, at 20–21.

¹⁷⁹ 48 C.F.R. § 2.101.

Challenge was not conducted in connection with a procurement.¹⁸⁰ Unfortunately, the court provided little by way of explanation for its conclusion:

But is plaintiff entitled to the injunctive relief he seeks under the bid protest provisions of 28 U.S.C. § 1491(b)(2)? The court thinks not.

Section 1491(b)(1) provides, in pertinent part, that an “interested party [may object] to a solicitation . . . for bids or proposals for a proposed contract” or to “any alleged violation of statute or regulation *in connection with a procurement or proposed procurement*.” (Emphasis added). The Federal Circuit has construed the bolded phrase to “signify the act of obtaining or acquiring something, in the context of acquiring goods or services.” . . . In *Resource Conservation Group*, the Federal Circuit, after reviewing the legislative history of the statute in question, rejected the argument that section 1491(b)(1) grants this court protest jurisdiction over non-procurement disputes (there a dispute over a lease of government property). . . . Consistent with these rulings, in *Lucas*, 25 Cl. Ct. at 307, which also involved a contest, this court opined “competing in a contest and winning the same may well serve to create a contract, but such a contract does not constitute [a] procurement.”

Based upon these cases, the court finds that the Contest in question was not a “procurement” within the meaning of 28 U.S.C. § 1491(b)(1) and thus that plaintiff is unable to obtain the injunctive relief that is available under 28 U.S.C. § 1491(b)(2).¹⁸¹

¹⁸⁰ *Frankel v. United States*, 118 Fed. Cl. 332, 336–37 (2014).

¹⁸¹ *Id.* (alterations in original) (internal citations omitted). *Lucas v. United States*, 25 Cl. Ct. 298 (1992), on which the court relies both to find that a contract was formed in the FTC Robocall Contest, as well as to conclude that the contract was not in connection with a procurement, is not as compelling of an authority when considered with context. Indeed, *Lucas* is really not a prize contest dispute at all, as the plaintiff won the prize and received the full award, but then disputed the agency’s compliance with an alleged additional contractual obligation. In this sense, *Lucas* is a garden-variety breach of contract claim. *Lucas* concerned a dispute arising out of a contest to design a Korean War memorial on the National Mall. *Id.* at 300. The plaintiff won the contest and the sponsoring agency paid the full prize value. *Id.* at 304. The breach of contract claim concerned whether the contest created a *further* contractual obligation for the agency to eventually build the memorial according to plaintiff’s winning design—plaintiff alleged that the agency changed the design so much that it constituted a breach of the unilateral contract created by the contest guidelines. *Id.* at 304–05. The language quoted in *Frankel*, stating that a contest creates a contract, but not a procurement, is made in the context of dismissing the agency’s argument that the Claims Court lacked jurisdiction because the prize contest fell within the Court’s Contract Disputes Act jurisdiction. *Id.* at 307. Moreover, in *Lucas*, the government conceded liability on breach of contract and moved for summary judgment for failure to state a claim upon which relief could be granted due to lack of damages, because the plaintiff already had received the full prize value and only claimed damages associated with not having its design turned into a memorial. The court never actually held that a contract was formed, nor did it affirmatively designate whether or why it had jurisdiction over the claim; instead, the court granted defendant’s motion to dismiss for failure to state a claim on which relief could be granted. *Id.* at 309–10, 312.

Even if prize contests create a contract within the definition of FAR 2.101, the GAO and COFC will lack jurisdiction unless the transaction involves a contract for the procurement of property or services.¹⁸² In other words, in order for a disappointed contestant to successfully use a bid protest to obtain judicial review, the prize must be susceptible to being characterized as a procurement. “Procurement”¹⁸³ refers to “the acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease.”¹⁸⁴ Judge Allegra’s opinion denying Frankel bid protest jurisdiction offered limited analysis regarding why the FTC Challenge was not a procurement of either property or services, and Frankel, acting *pro se*, was ill-suited to craft precedent-making analysis. We think a more sophisticated litigant might more effectively press the point.

Two arguments suggest that prize contests are procurements for property or services. One depends upon contestants’ submissions giving the government rights to the contestants’ intellectual property. If the agency obtains a full ownership interest in the intellectual property submitted,¹⁸⁵ that appears comparable to a routine procurement of intellectual property.¹⁸⁶ Even if the government obtains only a lease to use that proprietary information in return for the opportunity to win the prize value,¹⁸⁷ such a lease of intellectual property

¹⁸² See CIBINIC, NASH & YUKINS, FORMATION, *supra* note 53, at 1691, 1763. The GAO’s jurisdiction is limited strictly to contracting actions for the “procurement of property or services.” 31 U.S.C. § 3551 (1988). The COFC has slightly broader jurisdiction over all protests “in connection with procurement.” 28 U.S.C. § 1491(b) (2012).

¹⁸³ In many contexts, procurement, acquisition, and contracting mean the same thing, referring to the Government’s purchasing powers and practices. Although the term procurement is used in articulating the bid protest jurisdiction at both the GAO and COFC, see *supra* note 182, the FAR defines procurement by reference to the definition of acquisition. 48 C.F.R. § 2.101 (defining “[p]rocurement” as “see ‘acquisition’”).

¹⁸⁴ 48 C.F.R. § 2.101.

¹⁸⁵ The COMPETES II Act prohibits the government from obtaining an interest in intellectual property rights developed by a contest participant without written consent of the contestant. The government may negotiate a license for the use of participants’ intellectual property. 15 U.S.C. § 3719(j)(1) (2012).

¹⁸⁶ Government acquisition of intellectual property is regularly treated as procurement of property. See generally RALPH C. NASH, JR. & LEONARD RAWICZ, INTELLECTUAL PROPERTY IN GOVERNMENT CONTRACTS 825–26 (6th ed. 2008) (explaining the complexities of government “procurement of technical information” and introducing the applicable procurement regulations).

¹⁸⁷ The COMPETES II Act authorizes the government to negotiate a license for the use of participants’ intellectual property. 15 U.S.C. § 3719(j)(2).

appears to fall within the umbrella of a procurement for property,¹⁸⁸ because the definition of procurement encompasses leases:¹⁸⁹ both the GAO and the COFC hold that the lease of real property is a procurement of property, subject to bid protest jurisdiction.¹⁹⁰ If the government takes no interest in the intellectual property, however, the contest seems analogous to an RFI or general market research, where the government seeks information without making any enforceable obligation to provide compensation for information received.

In the alternative, it seems reasonable to conclude that a prize contest is a form of contract in which the agency procures the *service* of laboring to create a submission for the agency to consider in furtherance of its statutory missions. The agency not only receives the actual submission, which may very well solve the problem deemed worthy of the contest, but also the intangible benefit of each contestant's participation in the contest. A contest that requires public displays, testing, and competition—such as the DARPA Grand Challenges, where teams developed automated vehicles and then gathered to race their submissions¹⁹¹—certainly “directly engages the time and effort” of a contestant “whose primary purpose is to perform an identifiable task,” in satisfaction of the FAR’s definition of service.¹⁹²

Whether or not any given contest can be characterized as a procurement contract depends on the legal authorization used to conduct the contest. Just as a contest conducted pursuant to procurement authority is precluded from APA review,¹⁹³ other forms of authorization might preclude review of the prize under procurement law. For example, if a prize contest is conducted pursuant

¹⁸⁸ Professor Nash expressed his agreement with this conclusion. Email from Ralph C. Nash to author (Feb. 13, 2014) (on file with authors).

¹⁸⁹ See 48 C.F.R. § 2.101 at 21, 33 (“Procurement”; “Acquisition”).

¹⁹⁰ See *Forman v. United States*, 767 F.2d 875, 878–79 (Fed. Cir. 1985) (explaining that acquiring an existing leasehold in real property is not an acquisition, but that entering into a new lease of real property is); *Roth-Radcliffe Co.*, B-213872, 84-1 CPD ¶ 589, at *1 (Comp. Gen. June 1, 1984) (discussing agency decision to solicit proposals for lease of real property); see also Nash, *Dateline August 2013*, *supra* note 168 (“GAO has taken protest jurisdiction over leases of real property in numerous cases.”).

¹⁹¹ See KEI COMPILATION, *supra* note 2, at 35; Sebastian Thrun et al., *Stanley: The Robot that Won the DARPA Grand Challenge*, 23 J. OF FIELD ROBOTICS 661, 662–63 (2006).

¹⁹² The FAR defines service contract as “a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply.” CIBINIC, NASH & YUKINS, FORMATION, *supra* note 53, at 6 (citing 48 C.F.R. § 37.101).

¹⁹³ See *supra* note 118.

to an agency's authority to award grants, that may preclude obtaining review through a bid protest because grants are, by definition, not procurements.¹⁹⁴

For disappointed contestants, the primary benefit of characterizing prize award disputes as a bid protest is that equitable remedies (e.g., an injunction) and limited monetary remedies (the costs of preparing a contest submission and, far less frequently, attorney's fees) are available.¹⁹⁵ Unlike the breach of contract characterizations under the Tucker Act, which could provide all disappointed contestants with submission preparation costs, both the GAO and COFC have a jurisdictional requirement of prejudice, meaning disappointed contestants must show that but for the agency wrongdoing they probably would have won.¹⁹⁶

Although bid protests at the GAO and COFC provide the most helpful remedies, they are also the most limited of the four potential jurisdictional grants that prize contests may fall into. Even if a particular prize contest can be accurately characterized as a contract with a federal agency for the procurement of property or services, actually making that characterization requires fairly sophisticated legal arguments. Implied contract and APA-based claims are considerably broader, but neither guarantees a complete remedy. Further, because COFC and U.S. District Court judges from different districts are not bound to defer to each other's decisions, there is no way to predict how each contest dispute in those forums will be handled. Instead of leaving disappointed contestants on their own to wade through this jurisdictional uncertainty, the government should definitively state where and how prize contest disputes are to be resolved.

¹⁹⁴ See 48 C.F.R. § 2.101 ("Contracts do not include grants and cooperative agreements covered by 31 U.S.C. §§ 6301 *et seq.*").

¹⁹⁵ CIBINIC, NASH & YUKINS, FORMATION, *supra* note 53, at 1741–44, 1746, 1755, 1791–94. GAO is empowered to award the disappointed offeror's bid and proposal preparation costs and, in certain circumstances, the costs of bringing a protest, including limited attorney's (and expert and consultant) fees. 4 C.F.R. § 21.8(d)(1), (d)(2) (2012). The COFC may only award attorney's fees to *small business* protestors, pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (2012); *see also* CIBINIC, NASH & YUKINS, FORMATION, *supra* note 53, at 1797. It is conceivable that an executive agency administrative tribunal, analogous to the agency boards of contract appeals, might also be empowered to award attorney's fees to small business contestants pursuant to 5 U.S.C. § 504. *See* 5 U.S.C. § 504(b)(1)(A)–(B) (2012). Of course, individual entrepreneurs and researchers would typically qualify as small businesses. *See generally* 48 C.F.R. § 19.102 (2013); 13 C.F.R. §§ 121 *et seq.* (2014). The U.S. Small Business Administration ("SBA") establishes small business size standards by industry, organized by North American Industry Classification System ("NAICS") codes. *Table of Small Business Size Standards*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/content/table-small-business-size-standards> (last visited Jan. 17, 2015).

¹⁹⁶ CIBINIC, NASH & YUKINS, FORMATION, *supra* note 53, at 1735, 1787; *see supra* note 126.

III. Supplementing Administrative Efficiency with Accountability and Transparency: Contest Sponsors Should Anticipate Prize Disputes and Provide Appropriate Due Process

Prizes come in so many variations that finding a forum with jurisdiction over the disputes they create is more likely to generate nonproductive jurisdictional litigation than to provide meaningful relief or any significant semblance of review.¹⁹⁷ Little value is derived from the delays experienced, and the massive expenditures borne, by early claimants' attempts to determine where to litigate.¹⁹⁸ "Nothing is more wasteful than litigation about where

¹⁹⁷ Protesters who fail to obtain relief from the GAO may subsequently bring the same claim at the COFC; the GAO decision is not binding, but it is included in the record. *See* CIBINIC, NASH & YUKINS, FORMATION, *supra* note 53, at 1802, 1804. Conversely, GAO will not hear a case after the COFC has ruled on it, and the GAO will dismiss any claim that has also been brought in another court of competent jurisdiction. *Id.* at 1802. It is possible to bring certain (non-protest) claims at the COFC and then a U.S. District Court, but plaintiffs must be careful to file at the COFC first. 28 U.S.C. § 1500 (2012); *see* Emily S. Bremer & Jonathan R. Siegel, *Clearing the Path to Justice: The Need to Reform 28 U.S.C. § 1500*, 65 ALA. L. REV. 1, 4 (2013).

¹⁹⁸ The Spent Nuclear Fuel ("SNF") cases offer a glaring example of the costs of Congress and agencies establishing a meaningful program, but not preemptively establishing how disputes arising from that program will be resolved. After Congress passed the Nuclear Waste Policy Act of 1982, the Department of Energy ("DOE") made agreements for private nuclear facilities to temporarily store SNF with the understanding that DOE would eventually step in to dispose of the waste. *See* Lawrence Flint, *Shaping Nuclear Waste Policy at the Juncture of Federal and State Law*, 28 B.C. ENVTL. AFF. L. REV. 163, 169 (2000). DOE backed out of its obligations, and, in 1997, several facilities brought massive claims against the government seeking more than \$50 billion. *See id.* at 174; DEP'T OF JUSTICE, CIVIL DIVISION, FY 2011 PERFORMANCE BUDGET CONGRESSIONAL SUBMISSION 29 (2010), <http://www.justice.gov/sites/default/files/jmd/legacy/2014/01/27/fy11-civ-justification.pdf> [hereinafter DOJ 2011 BUDGET]. One COFC judge took jurisdiction over the claim, and another COFC judge dismissed for lack of jurisdiction. *See* Flint, *supra* note 198, at 175. The Federal Circuit reviewed the cases together and affirmed the COFC's jurisdiction. *See id.* at 176. The D.C. Circuit dismissed a separate suit seeking equitable relief for lack of jurisdiction. *See id.* The Supreme Court declined to grant certiorari of the D.C. Circuit's dismissal in 2000, finally ending the jurisdictional debate three years after the first SNF suit was initiated. *See id.* at 177. DOJ budget documents indicate that the government spent in excess of \$10 million per year litigating these cases, DOJ 2011 BUDGET, *supra* note 198; and, as of 2011, "nearly \$170 million defending DOE in these lawsuits," Kimberly Reome & Krista Haley, *Spent Nuclear Fuel and the U.S. Response to Fukushima*, ABA (Nov. 21, 2011), <http://apps.americanbar.org/litigation/committees/energy/articles/fall2011-spent-nuclear-fuel.html>.

to litigate, particularly when the options are all courts within the same legal system that will apply the same law.”¹⁹⁹

These inefficiencies are exacerbated by the DOJ’s mandate-driven reputation for relentlessly disputing threshold issues like jurisdiction. It is shortsighted at best—and, at worst, disrespectful of the private sector’s resources—to encourage agencies to sponsor prize competitions without prospectively planning for where and how disputes will be resolved.²⁰⁰ Although critics of the government’s bid protest regime remain, and there is plenty of room to debate how waivers of sovereign immunity should be executed,²⁰¹ maintaining a credible bid protest regime has become a globally accepted standard in government contracting for good reason:²⁰² contractors competing for the government’s business are in a unique position to enforce rules that prevent their competi-

¹⁹⁹ *Bowen*, 487 U.S. at 930 (Scalia, J., dissenting).

²⁰⁰ See *supra* note 148.

²⁰¹ Critics of the government’s bid protest regime complain that these exceptional federal waivers of sovereign immunity are unnecessary and inefficient because, *inter alia*, they generate increased transaction costs, bureaucratic anxiety, and mission-paralyzing delays. We join those who believe these well-trodden, oft-hysterical critiques have been largely and consistently refuted. For an empirical analysis of the costs and benefits of the U.S. bid protest system, see Daniel I. Gordon, *Bid Protests: The Costs are Real, But the Benefits Outweigh Them*, 42 PUB. CONT. L.J. 489, 501–10 (2013). The author explains:

[T]he costs that bid protests impose on the acquisition system are often misunderstood and therefore overstated, in terms of the frequency of protests, the length of time that they last, and the risk that an agency’s choice of contractor will be overturned in the process. Moreover, the benefits of the protest system may not be fully appreciated, as is the fact that the United States is required by its international trade agreements to have a protest system.

Id. at 510; see also Daniel I. Gordon, *Dissecting GAO’s Bid Protest ‘Effectiveness Rate’*, 56 GOV’T. CONTRACTOR ¶ 25 (2014).

²⁰² See World Trade Organization, Revised Agreement on Government Procurement, Article XVIII, at 23–24, available at http://www.wto.org/english/docs_e/legal_e/rev-gpr-94_01_e.pdf; see also Robert D. Anderson, William E. Kovacic & Anna Caroline Müller, *Ensuring Integrity and Competition in Public Procurement Markets: A Dual Challenge for Good Governance*, in THE WTO REGIME ON GOVERNMENT PROCUREMENT: CHALLENGE AND REFORM 681, 681–718 (Sue Arrowsmith & Robert D. Anderson, eds., 2011) (discussing the means through which competition in public procurement markets is promoted); THE WORLD BANK, *Attachment 1: Elements that Constitute a Well Functioning Public Procurement System*, in COUNTRY PROCUREMENT ASSESSMENT REPORTS 13 (2002), available at <http://siteresources.worldbank.org/PROCUREMENT/Resources/cpar.pdf> (“Robust mechanisms for enforcement . . . include the right to . . . a bidder complaints review mechanism . . .”); Collin D. Swan, *Lessons From Across the Pond: Comparable Approaches to Balancing Contractual Efficiency and Accountability in the U.S. Bid Protest and European Procurement Review Systems*, 43 PUB. CONT. L.J. 29, 30 (2013) (“[M]any procurement systems around the world have

tors from gaining an unfair advantage.²⁰³ Regarding those incentives, prize contests participants are similarly situated to government contractors, and no sound basis demonstrates that prize contestants should be less able to protect themselves from arbitrary, capricious, or, at worst, corrupt, agency action.

Congress, the creator and tailor of waivers of sovereign immunity, could explicitly eliminate the possibility of judicial review or mandate exactly where²⁰⁴ and how such judicial review will occur.²⁰⁵ Allowing agencies to consume valuable private sector resources and dole out prize money without the possibility of independent review is unwise. Unfettered prize authority counters the intent of the prize program by dis-incentivizing participation.²⁰⁶ Without the possibility of convenient and meaningful review, prospective contestants

implemented procedures that allow unsuccessful tenderers . . . to challenge procurements they believe were awarded unlawfully.”).

²⁰³ See Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627, 684–85 (2001) (“[P]rotests and disputes serve to correct hopefully rare incidents of (at best) inadvertent or (at worst) illegal, arbitrary, or capricious agency action. . . . [C]ontractors long have played a vital role in monitoring most aspects of the procurement cycle.”).

²⁰⁴ Despite occasionally identifying strategic and practical differences that disappointed contestants should consider, advice on which of the three forums is most capable of resolving prize disputes is beyond the scope of this article. Practitioners may wish to begin with Schaengold, Guiffre & Gill, *supra* note 108. For a discussion on the GAO’s success as a forum for resolving bid protests, see Gordon, *Bid Protests*, *supra* note 202; Schooner, *Fear of Oversight*, *supra* note 204, at 681, 691. For insight into the effectiveness of the COFC as a judicial forum, see *supra* note 128. For those curious as to whether the Federal Circuit’s right of review of COFC decisions can bring conformity to the disaggregated nature of COFC opinions, see Schooner, *A Random Walk: The Federal Circuit’s 2010 Government Contracts Decisions*, 60 AM. U. L. REV. 1067, 1067–68 (2011) (“Despite the large number of potentially precedential opinions issued by . . . the Federal Circuit . . . , the government contracts cases . . . lack significant volume, thematic coherence, or dramatic impact.”); see also Paul R. Gugliuzza, *The Federal Circuit As a Federal Court*, 54 WM. & MARY L. REV. 1791, 1802 (2013) (“It is not clear whether the Federal Circuit has brought uniformity, quality, or efficiency to patent law.”); Sapna Kumar, *The Accidental Agency?*, 65 FLA. L. REV. 229, 233 (2013) (“[T]he Federal Circuit needs the power to create binding bright-line rules. But the Supreme Court has repeatedly rejected the use of these rules, thereby reducing the lower court’s ability to provide uniformity in patent law.”).

²⁰⁵ Krent, *supra* note 99, at 1538 (“Congress in essence monitors its own conduct by determining when waiver is appropriate.”).

²⁰⁶ Indeed, one of the earliest waivers of sovereign immunity was meant to quell contractor concerns that they could not seek a remedy in court for government wrongdoing. For an extensive discussion of sovereign immunity applied to government contracts, see Seamon, *supra* note 118, at 160.

cannot be expected to invest significant resources into a prize contest, particularly if the contest rules require them to forfeit intellectual property rights.²⁰⁷

While Congress should waive some of the sovereign's immunity, that waiver need not be unlimited in scope.²⁰⁸ Judicial review increases the administrative costs of contests,²⁰⁹ and the government expends the cost of administering prize contests to purchase solutions, not lawsuits. Congress should only allow judicial review of prize contests to the extent that litigation-related costs do not outweigh the benefits conferred by the prize contest system as a whole.²¹⁰

Indeed, wide-ranging federal court judicial review of prize contest disputes may not prove necessary or prudent. Accordingly, we advocate only for sufficient due process to provide systemic transparency, encourage participation by wary contestants, and maintain credible oversight of agency expenditures of federal dollars.²¹¹ For example, Frankel's depiction of the FTC's response to his initial request for submission evaluations after the Robocall Challenge, was, in essence, that the FTC received over 800 contest submissions and

²⁰⁷ See Krent, *supra* note 99, at 1564–65 (“Congress first waived the executive branch’s immunity from contract suit prior to the Civil War. . . . The waiver was viewed as indispensable . . . , for without it, qualified private contractors might not undertake government projects and the government could not obtain the goods and services it needed at affordable prices.”).

²⁰⁸ Even in the government contracts realm, where Congress recognized the need to waive immunity to some degree, that waiver is not complete:

Despite the United States general waiver of immunity from suit for breach of contract . . . , Congress and the courts have directed that special contract rules apply to the government, allowing it to escape the full consequences of a breach in many settings. The government generally need not pay full damages upon terminating a contract for its convenience, nor need it usually pay damages when a sovereign act of government interferes with the private contractor’s performance of a government contract.

Krent, *supra* note 99, at 1565–66.

²⁰⁹ Abramowicz, *supra* note 1, at 208 (noting that whether the litigation costs associated with allowing judicial review of prize contest are worthwhile “depends on the benefits litigation offers—for example, in improving the accuracy of the prize system, in preventing excessive rewards based on faulty data, or even in assuring the due process rights of prize applicants”).

²¹⁰ See *id.* (“[T]he costs of such litigation, including both the cost to the parties and the cost to the executive and judicial branches, are social costs that offset any benefits of the prize system.”). Each of the fora that we discuss has experience managing this issue, and we are confident they can analogize and apply that experience in this context. See, e.g., 4 C.F.R. § 21.0(a)(1): “Interested party means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.”

²¹¹ GAO, for the most part, has maintained its statutory mandate of offering expeditious, efficient, and independent review of a high volume of agency procurement decisions. See 31 U.S.C. § 3554(a)(1) (2012); Schaengold, Guiffre & Gill, *supra* note 108, at 297.

does not provide feedback for high-volume contests.²¹² We do not belittle the administrative burden of potentially providing all 800-plus contestants with the documented evaluations of every submission. That burden would almost certainly justify some limitation of due process compared to the process given to the relatively few disappointed government contractors in a bid protest. We do not argue that disappointed prize contestants be given the same due process as government contractors, only that Congress and prize-sponsoring agencies recognize the need for *some* due process for prize contestants, and clearly state the nature of that process *before* the contest instead of leaving it up to the courts to determine after the fact.²¹³

Unless and until Congress acts, agencies should anticipate disputes and proactively incorporate dispute resolution clauses into competition rules. There is no guarantee that the clause will be controlling in future litigation, but giving the parties an expectation of review at the outset will help encourage participation and quell contestant fear of unreviewable agency decisions.

²¹² See Complaint at Ex. 6, 3–4, *Frankel v. United States*, 118 Fed. Cl. 332 (2014) (No. 13-546).

²¹³ While we assert that Congress and prize-sponsoring agencies are better suited than courts to tailor appropriate due process for prize contestants, we concede that any attempt to do so will likely be a work in progress, evolving as experience reveals the most efficient means of prize contests dispute resolution. History leaves no doubt that any attempt to provide relief will eventually be revised. The bid protest process at GAO has been amended many times. See generally Alex D. Tomaszczuk & John E. Jensen, *The Adjudicatory Arm of Congress—The GAO's Sixty-Year Role in Deciding Government Contract Bid Protests Comes Under Renewed Attack by the Department of Justice*, 29 HARV. J. ON LEGIS. 399, 402–03 (generally summarizing evolving nature of GAO bid protests and noting that GAO itself recognized that its initial bid protests powers stemmed from dubious statutory authority).

The courts and Congress have tweaked the government's waiver of immunity for contract-related claims brought in district courts several times as well. In 1940, the Supreme Court held that disappointed bidders lacked standing to sue the government in federal court, because procurement law "was not enacted for the protection of sellers and confers no enforceable rights upon prospective bidders." *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 125–26 (1940). Six years later, the APA permitted judicial review of final executive agency action, but it was not until 1970 that the D.C. Circuit interpreted the APA to provide judicial resolution of bid protests. See *Scanwell Labs., Inc. v. Shaffer*, 424 F.2d 859, 865, 869 (D.C. Cir. 1970). Shortly after, with the Sunset provision of the Administrative Dispute Resolution Act of 1996 ("ADRA"), Pub. L. No. 104-320, §12(d), 110 Stat. 3870, 3874–75, noted in 28 U.S.C. § 1491 (2012), Congress removed federal court jurisdiction to resolve bid protests and consolidated bid protests into the GAO and the COFC. See generally Steven L. Schooner, *Watching the Sunset: Anticipating GAO's Study of Concurrent Bid Protest Jurisdiction in the COFC and the District Courts*, 42 GOV'T. CONTRACTOR ¶ 108 (2000).

Conclusion: Do the Right Thing²¹⁴

The federal government's burgeoning use of prize contests as a low-cost, entrepreneurial alternative to government contracts and grants is one of the most significant and exciting, yet inevitably destabilizing, public policy developments of the decade. We cannot wait to see the potentially groundbreaking, if not paradigm-shifting, technological solutions ultimately spawned by the use of these powerful innovation-incentivizing tools. That said, the administrative law community cannot suppress its concern with the risks inherent in what is obviously a not fully matured federally administered prize regime. Whether a rush to deploy this powerful tool without considering how much due process competitors deserve and how they might obtain meaningful review of agency prize awards will derail the prize regime's momentum remains to be seen.

Experience teaches us that the government's failure to provide a meaningful avenue for judicial review of prize contests is a recipe for disaster. Despite their best intentions, government officials will make mistakes—and unchecked authority to spend private sector resources without oversight creates an unnecessary, unwarranted, and unacceptable opportunity for abuse of power.²¹⁵ Concurrently, the potential for a theoretically infinite number of disappointed prize contestants to flood federal district courts, the COFC, and the GAO with complicated disputes and inevitable jurisdictional quandaries is too real a threat to ignore. Absent Congressional intervention, the judiciary might take decades of litigation to sort out, in a piece-meal fashion, a rubric for contestants to obtain judicial review. Until then, the lack of due process potentially serves as a powerful disincentive for the most talented prospective contestants—once they lose confidence in the system—to continue to compete, thereby diluting the government's access to innovators. Moreover, the form of judicial review that is ultimately fashioned by the courts may prove too cumbersome to be practical. Unlike the courts, Congress and prize-sponsoring agencies have flexibility to stipulate a broad array of due process protections for disappointed contestants, which could keep a vast majority, if not all, prize contest disputes out of the already over-burdened court system.

²¹⁴ With apologies to Spike Lee. *DO THE RIGHT THING* (Universal Pictures 1989).

²¹⁵ We think it not only reasonable, but prudent to ask: "Who watches the watchmen?" From the Latin, "quis custodiet ipsos custodes?" See *JUVENAL, SATIRE VI* at 95:347–48, in *THE SIXTEEN SATIRES OF JUVENAL* (S.H. Jeves trans., 1885); *JUVENAL, SATIRE VI* at 84:347–48, in *THE SATIRES OF JUVENAL* (T.H.S. Escott trans., 1869). Today, however, many associate the phrase with the ground-breaking comic book series, later converted into a best-selling graphic novel, *ALAN MOORE & DAVE GIBBONS, WATCHMEN* (1987), and the fan-boy screen adaptation, *WATCHMEN* (Warner Bros. Pictures 2009). See *DAVE KLOCK, HOW TO READ SUPERHERO COMICS AND WHY* 62 (2002).

We applaud the path-breaking government officials willing to experiment with prize contests to help solve the government's most vexing problems in an effort to serve the public in a cost-effective manner as expeditiously as possible. Nonetheless, the sovereign must use prizes responsibly.²¹⁶ By design, effective prize competitions create losers, not all of whom will—or, indeed, should—walk away quietly. Currently, obtaining meaningful review of a federally administered prize contest requires uncertain, inefficient, and non-productive jurisdictional litigation. The Government can, and should, preemptively stipulate where and how independent, objective, and credible adjudicatory bodies (whether judicial or quasi-judicial) will resolve prize contest disputes. Ideally, Congress will act. Until Congress does so, contest-sponsoring agencies should respect the private sector's resources and incorporate dispute resolution clauses into their competition guidelines and, if necessary, establish and staff credible, independent fora. For now, as the Government buries its head in the sand, contestants play the government's game at their own risk.

²¹⁶ "With great power comes great responsibility." SPIDER-MAN (Columbia Pictures 2002).

