

## Federal COVID-19 'Prize' Opportunities Come With Pitfalls

By **Daniel Wilson**

*Law360 (June 16, 2020, 8:27 PM EDT)* -- The government's practice of crowdsourcing solutions for pressing problems has been increasingly used during the coronavirus pandemic, but the so-called prize challenges used to solicit the private sector's help come with pitfalls such as one-sided risks and limited protest opportunities.

During the pandemic, several federal agencies have turned to procurement prize contests, or "challenges" in government terminology, to try to help address the crisis. The U.S. Department of Defense, for example, launched two challenges in March and April to try to find new, low-cost ventilator designs.

Rather than seeking a particular solution to an issue or need, prize challenges present a problem or issue and ask for a broad range of potential solutions. The strategy helps the government draw in ideas from both inside and outside its usual contractor base, and it helps innovators gain publicity and profits.

However, the risk of a prize competition effectively falls entirely on the parties proposing solutions to the government's problems, experts say, with no obligation for an agency to award a prize if it decides the proposed solutions don't meet its needs, even if contestants spend considerable time, effort and money on developing solutions they think fit the government's criteria.

Businesses may also be potentially giving up data rights as part of the conditions of winning a prize, which may make the financial incentive less attractive.

"If you come up with some brilliant idea, and submit it to an agency to get a \$5,000 cash prize but in doing so in any way impact your ability to patent that invention or necessarily give license rights to the government, that can be a barrier to some of these companies really wanting to fully disclose their ideas for the government," said Tina Reynolds, co-chair of Morrison & Foerster LLP's government contracts practice. "Giving too much information to the government without the protections you would have in the normal contracting process is ... a potential downside for the contest participants."

More than 100 federal agencies have used nearly 1,000 prize challenges to help solve problems since the Obama administration began promoting the use of "high-risk, high-reward" tools such as prize challenges in a 2009 innovation strategy document, according to the government's challenge.gov portal maintained by the U.S. General Services Administration.

"It's a way to incentivize innovation that I think is completely unique," said Nathan Castellano, an Arnold & Porter associate who has co-written several articles on federal prize challenges. "Cooperative agreements, grants, other transaction agreements — all of those tools still end up looking like a normal contract between the government and a pre-selected private party. With prizes, you crowdsource the effort from the entire country, if not the globe."

Competition can be fierce, with high-profile challenges attracting many interested parties for only a few awards, or sometimes just one award. For example, one of the DOD's recent ventilator challenges, the "hack-a-vent" challenge from March, drew 172 proposals in just a week, with only five designs ultimately chosen for further development.

And for those contestants who fail to win despite investing significantly in a challenge, the scope to dispute a prize award is limited by parameters set out by the Federal Circuit in 2016.

The circuit court ruled in *Frankel v. U.S.*, a dispute over the Federal Trade Commission's rejection of a contestant's proposal to block robocalls, that although there is a contract formed when a contestant enters into a federal competition, it is not a procurement contract that can be the subject of a bid protest.

Instead, the court said, prize challenges fall under the common law of contracts, requiring the disappointed bidder to show fraud, intentional misconduct, bad faith or "gross mistake." The decision narrowed the scope of available remedies for unsuccessful contestants, Castellano said.

"The Federal Circuit struck a balance between providing judicial review for disappointed contestants and limiting the potential theories of liability," he said.

On the upside, contestants find out quickly whether they've won or lost a prize challenge, whereas many federal acquisition programs can drag on for months or years, particularly if there are bid protests involved. Even the lengthiest prize challenges are open for only a few months, and winners are chosen soon after a challenge ends.

Also, companies who haven't previously done business with the government can use a prize challenge to "dip their toe in the water a little bit," Reynolds said, without the binding acquisition regulations and other requirements that come along with a formal contract.

For solo inventors and small businesses in particular, the amount of money offered in a prize challenge can be significant. Although the median prize purse for federal challenges in fiscal 2018 — the most recent year for which figures are available — was \$75,000, the maximum prize available that year was \$20 million, according to [challenge.gov](http://challenge.gov). Agencies also have the legal authority to issue awards up to \$50 million.

Despite the risks involved in prize challenges, the ability to draw in potential solutions from well outside the government's traditional contracting base, such as "garage players" or teams of college students, has made prize challenges the "most significant innovation in government contracting in the last decade," said Steven Kelman, a professor of public management at Harvard University's John F. Kennedy School of Government and former senior federal procurement official.

"You don't have to write a proposal, you don't have to know the rules of government contracting, you just have to be willing to stand up and do something," he said. "So from the point of view of bringing in

some new players, new blood into federal contracting, this is a great idea."

Prize challenges also fit with a desire often expressed by government acquisition officials for more performance-based contracting, tying payment more explicitly to outcome.

"A challenge is the ultimate version of that — being paid is completely contingent on accomplishing something," Kelman said.

--Editing by Aaron Pelc.