

Problem

- In 2012, some applicants resolved their contention by mutually agreeing to participate in private auctions where the auction price (which in some cases was the second highest bid amount) was equally divided by the “losing” bidders (minus an administrative fee for the auction provider).
 - Some applicants that applied for multiple TLDs (called “Portfolio Applicants”) leveraged funds from private auctions “lost” for financial positioning in the resolution of other contention sets
 - While there is not unanimous agreement that this is problematic, there is community concern about the practice of applying for top-level domains with the purpose of financial gain, including from the ICANN Board. This includes the utilization of proceeds from lost auctions towards future auctions.
- In the future, if there are no impediments put into place, both former 2012 applicants (as well as potential new applicants) aware of what took place in 2012, would likely leverage past actions in future rounds.
 - With no changes expected to the refund structure and the known possibility to gain financially from participating in private auctions even while losing, the risk profile for submitting an application appears reduced
 - If the risk is reduced, there is likely to be more applications submitted, with some of those being of a speculative nature

While there is not unanimous agreement that private auctions are problematic, the WG has considered several options/factors that address the perceived problem. The WG considered two options that focused on sealed bid auctions, with the primary differences residing in the timing of submitting the bids.

Options Presented

- Option 1: Submission of bid at application submission. Once the contention sets are established, only the application with the highest bid is evaluated (this would require significant changes to the processing of applications as carried out in the 2012 round).
- Option 2: Submission of bid prior to reveal day. Contention sets are established, but applicants are only provided the number of applications in the set, but not the applying entities. After all bids are submitted, the identify of entities in contention sets would be revealed and applicants could participate in various forms of private resolution (perhaps including private auctions). The assumption is that all applications are evaluated, as well as other application procedures.

In both of these options, the identities of the contention set members are not revealed at the time of bid submission, which is assumed to greatly reduce the ability of applicants to participate in private auctions. However, submitting with less information makes it more difficult for applicants to bid strategically.

Several elements can be layered on top of these options, or potentially, as standalone elements:

- Add Terms & Conditions that bar private auctions
- Add provisions to the Registry Agreement that introduce punitive measures if the registry was found to have taken part in private auctions.

Proposal

- Add T&Cs warning applicants that:
 - They shall not submit applications for the purpose of financially benefitting from the resolution of contention sets
 - They shall not participate in the resolution of contention sets where non-winning applicants receive financial benefit to lose.
 - The above rules shall not prohibit applicants from creating partnerships or other forms of joint ventures that would allow two or more applicants within a contention set to jointly run and/or operate the applied for string if that joint venture ultimately is otherwise qualified to operate and administer the registry in accordance with the rules set out in the then-current Applicant Guidebook.
- No additional changes would need to be made to the application/evaluation/objection processes.
- Applicants are permitted to resolve contention sets as laid out in the T&Cs
- Auctions of last resort are strictly a single round and via sealed bid.
- A PIC is incorporated into the registry agreement to capture the requirements from the T&Cs. The punitive measures could include the potential loss of the registry as well as a bar on participation in any future rounds (both for the individuals as well as the entities (and their affiliated) involved).

Analysis:

- Goals achieved:
 - Reduces the benefits of collusion
 - Reduces “bidding wars”
 - Reduces profiteering and speculative applications
 - Gains efficiencies in the contention resolution as a result of the simplified auction process
 - It does not necessarily encourage new entrants, but it reduces the likelihood of speculative applications, which in turn makes it easier for applicants that are seeking to run a registry
 - Allows creativity in resolving private resolution
 - Addresses Board guidance
- Additional benefits:
 - Provides applicants in contention sets far greater information to bid strategically.
- No real impact on
 - Transparency
 - Predictability
 - Efficiencies beyond auction process

The operative word here is “reduces.” While there may be creative and unscrupulous applicants that can find ways to circumvent the rules, the rules will serve as a deterrent on the front end and the contractual provisions will provide some teeth after delegation. Setting the threshold for success at 100% makes it impossible to see value in any proposal.