

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 presented on 4 May

- 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.

Hybrid Proposal 2+ for discussion on 7 May

Overview:

- Ensure that the then-current Applicant Guidebook (AGB) reflects that applicants will be permitted to create 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 AGB.
 - All partnerships or other joint ventures created after the submission of applications must follow the Application Change processes set forth in Section XX and shall be considered material changes and may require re-evaluation of some or all of the new resulting application.
 - This also includes a new public comment period on the changes as well as a new period to file objections; provided however, objections during this new period must be of the type that arise due to the changing circumstances of the application and not merely the type of objection that could have been filed against one or all of the applications in the contention set during the initial objection filing period.
- Add T&Cs warning applicants that they may not participate in any of the following activities (Prohibited Application Activities):
 - 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.
- **Once the application submission period closes, the string similarity evaluation for all applied-for strings must be completed prior to any application information being shared.**
- Applicants in contention sets will be informed of the number of other applications in their contention set, but no other information regarding the other applications will be shared. Any applicants that wish to compete for their applied-for string must submit a sealed bid for each relevant application.
 - [Any form of deposit needed? If so, when and how much? At the time the bid is submitted, or similar to the 2012 practice of just prior to conducting the auction of last resort? Does 10% still make sense?]
- Only after all sealed bids are received or the window to submit bids closes, publicly available information will be published (i.e., reveal day), including the composition of contention sets. Applicants may participate in various forms of private resolution as permissible in the AGB, including joint ventures.

- All applications are evaluated and subject to other application procedures (e.g., Initial Evaluation, Extended Evaluation, Objections, GAC Early Warning/Advice, Community Priority Evaluation). Some of these procedures may affect the composition of contention sets.
 - To the extent any contention sets are expanded, by having other applications added (e.g., String Confusion Objections, appeals to the String Similarity evaluation), all applicants (including both the existing members of the contention set as well as the new members) will be allowed, but are not required, to submit a new sealed bid.
 - To the extent any contention sets are shrunk, by having other applications removed from the process (e.g., withdrawal, losing objections, failing evaluation, losing in CPE, etc.), applicants will NOT be allowed to adjust their sealed bids. [One exception here could be if a subset of applicants in the contention set form a JV]
- Auctions of last resort will take place after all other evaluation procedures, objections, etc. similar to the 2012 round. In addition, the auction of last resort cannot occur if one or more of the applications in the contention set is involved in an active appeal or ICANN Accountability mechanism.
 - Applicants in the contention set will be informed of the date of the auction. [Depending on the outcome of the deposit discussion, the deposit might be collected at this stage]
 - On the auction date, the applicant that submitted the highest sealed bid amount pays the second-highest bid amount.
 - Once payment is received, the applicant may proceed to the Transition to Delegation.
- Incorporate a mandatory contractual warranty/representation that the Registry Operator did not participate in any of the Prohibited Application Activities into the registry agreement. [Punitive measures to be discussed]

Benefits:

- Reduces the benefits of collusion
- Reduces “bidding wars”
- Reduces profiteering and speculative applications
- 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
- Applicants have some information to make an informed bid
- Does not require significant changes to existing processes

Outstanding Discussion Items:

- What are the punitive measures for those found to participate in Prohibited Application Activities?
 - Potential loss of the registry
 - Bar on participation in any future rounds (both for the individuals as well as the entities (and their affiliated) involved)
 - Financial penalties
 - Other?

- If a joint venture is formed, how is the bid of the joint venture handled?
 - Participants can choose which of the original bids to put forward
 - Joint venture can submit a new bid (as well as other members of the contention set?)
- Are there additional types of private resolution that should be explicitly allowed/disallowed?
- To the extent a multiplier is agreed upon (e.g., in the Applicant Support discussion), how might that impact the auction process?