

## Topic 35: Auctions: Mechanisms of Last Resort / Private Resolution of Contention Sets

### a. Recommendations and/or implementation guidelines

Affirmation with Modification 35.1: Implementation Guideline F from 2007 states: “If there is contention for strings, applicants may: i) resolve contention between them within a pre-established timeframe ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement a process will be put in place to enable efficient resolution of contention and; iii) the ICANN Board may be used to make a final decision, using advice from staff and expert panels.”

The Working Group affirms this Implementation Guideline with the following changes in italicized text: “If there is contention for strings, applicants may: i) resolve contention between them within a pre-established timeframe *in accordance with the Applicant Guidebook and supporting documents* ii) if there is no mutual agreement, a claim to support a community by one party will be a reason to award priority to that application. If there is no such claim, and no mutual agreement, *contention will be resolved through an ICANN Auction of Last Resort* and; iii) the ICANN Board *may use expert panels to make Community Priority Evaluation determinations.*”

The revision to part i) specifies that any private resolution of contention must be in accordance with the Application Guidebook and supporting documents, including the Application Change request process and Terms and Conditions. Adjustments in the text of ii) and iii) describe in greater specificity program elements as they were implemented in the 2012 round, which will carry over into subsequent rounds.

Recommendation 35.2: Consistent with the Application Change processes set forth under Topic 20: Application Change Requests, the Applicant Guidebook (AGB) must reflect that applicants will be permitted to creatively resolve contention sets in a multitude of manners, including but not limited to business combinations or other forms of joint ventures and private resolutions (including private auctions).

- All private resolutions reached by means of forming business combinations or other joint ventures resulting in the withdrawal of one or more applications are subject to the Application Change processes set forth under Topic 20: Application Change Requests.
- Any materially modified application resulting from a private resolution will be subject to 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 the surviving application or the withdrawn applications in the contention set during the initial objection filing period.

- All contention sets resolved through private resolution shall adhere to the transparency requirements set forth in the Contention Resolution Transparency Requirements in the relevant recommendation.

Recommendation 35.3: Applications must be submitted with a bona fide (“good faith”) intention to operate the gTLD. Applicants must affirmatively attest to a bona fide intention to operate the gTLD clause for all applications that they submit.

- Evaluators and ICANN must be able to ask clarifying questions to any applicant it believes may not be submitting an application with a bona fide intention. Evaluators and ICANN shall use, but are not limited to, the “Factors” described below in their consideration of whether an application was submitted absent bona fide intention. These “Factors” will be taken into consideration and weighed against all of other facts and circumstances surrounding the impacted applicants and applications. The existence of any one or all of the “Factors” may not themselves be conclusive of an application made lacking a bona fide use intent.
- Applicants may mark portions of any such responses as “confidential” if the responses include proprietary business information.

The Working Group discussed the following potential non-exhaustive list of “Factors” that ICANN may consider in determining whether an application was submitted with a bona fide (“good faith”) intention to operate the gTLD. Note that potential alternatives and additional language suggested by some Working Group members are included in brackets:

- If an applicant applies for [four] [five] or more strings that are within contention sets and participates in private auctions for more than fifty percent (50%) of those strings for which the losing bidder(s) receive the proceeds from the successful bidder, and the applicant loses each of the private auctions, this may be a factor considered by ICANN in determining lack of bona fide intention to operate the gTLD for each of those applications.
- Possible alternatives to the above bullet point:
  - [If an applicant participates in six or more private auctions and fifty percent (50%) or greater of its contention strings produce a financial windfall from losing.]
  - [If an applicant receives financial proceeds from losing greater than 49% of its total number of contention set applications that are resolved through private auctions.]
  - [If an applicant: a. Has six or more applications in contention sets; and b. 50% or more of the contention sets are resolved in private auctions; and c. 50% or more of the private auctions produce a financial windfall to the applicant.]
  - [If an applicant applies for 5 or more strings that are within contention sets and participated in 3 private auctions for which the applicant is the losing bidder and receives proceeds from the successful bidder it MUST send to the evaluators a detailed reconciliation statement of its auction fund receipts and expenditure immediately on completion of its final contention set resolution. In addition this may be considered a factor by the

evaluators and ICANN in determining lack of bona fide intention to operate the gTLD for all of its applications and in doing so might stop all its applications from continuing to delegation.]

- If an applicant's string is not delegated into the root within two (2) years of the Effective Date of the Registry Agreement, this may be a factor considered by ICANN in determining lack of bona fide intention to operate the gTLD for that applicant.
- If an applicant is awarded a top-level domain and [sells or assigns] [attempts to sell] the TLD (separate and apart from a sale of all or substantially all of its non-TLD related assets) within (1) year, this may be a factor considered by ICANN in determining lack of bona fide intention to operate the gTLD for that applicant.
- [If an applicant with multiple applications resolves contention sets by means other than private auctions and does not win any TLDs.]

Consideration of whether an application was submitted with a bona fide intention to operate the gTLD must be determined by considering all of the facts and circumstances surrounding the impacted applicants and applications. The above factors may be considered by ICANN in determining such intent provided that there are no other credible explanations for the existence of those Factors.

**Recommendation 35.4:** ICANN Auctions of Last Resort must be conducted using the second-price auction method, consistent with following rules and procedural steps.

- Once the application submission period closes, the String Similarity Evaluation for all applied-for strings must be completed prior to any application information being revealed to anyone other than the evaluators and ICANN Org.
- At the end of the String Similarity Evaluation period, 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. All applicants must submit a sealed bid for each relevant application ("Last Resort Sealed Bids"). Any applicant that does not submit a sealed bid at this time will be deemed to submit a bid of zero.
- Only after the window to submit Last Resort Bids closes, non-confidential information submitted by applicants in their applications will be published (i.e., "Reveal Day"), including the composition of contention sets and the nature of the applications, (e.g., Community Based Applications, .Brand Applications, etc.). Beginning on Reveal Day, applicants may participate in various forms of private resolution, subject to the Contention Resolution Transparency Requirements set forth herein.
- All applications shall be evaluated and are 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 Last Resort 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, Community Priority Evaluation identifying only community-based applications which prevailed, etc.), applicants will NOT be allowed to adjust their sealed bids. However, in the event of a partial resolution of a contention set through the formation of a business combination or joint venture and the corresponding withdrawal of one or more applications, the remaining application AND each of the other existing applications in the contention set will be allowed, but are not required, to submit a new Last Resort Sealed Bid.
  - ICANN Auctions of Last Resort shall only take place after all other evaluation procedures, objections, etc., similar to the 2012 round. In addition, the ICANN 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 or is in a new public comment period or reevaluation due to private resolution.
    - Applicants in the contention set must be informed of the date of the ICANN Auction of Last Resort.
    - Deposits for the ICANN Auction of Last Resort will be collected a fixed amount of time prior to the auction being conducted.
    - On the ICANN Auction of Last Resort date, the applicant that submitted the highest Last Resort Sealed Bid amount pays the second-highest bid amount.
    - Once payment is received within the specified time period, the applicant may proceed to the Transition to Delegation.
    - Non-payment within the specified time period will result in disqualification of the applicant.

**Recommendation 35.5:** Applicants resolving string contention must adhere to the Contention Resolution Transparency Requirements as detailed below. Applicants disclosing relevant information will be subject to the Protections for Disclosing Applicants as detailed below.

#### **Contention Resolution Transparency Requirements**

- **For Private Auction or Bidding Process / ICANN Auction of Last Resort:** In the case of a private auction or an ICANN Auction of Last Resort, all parties in interest<sup>240</sup> to any agreements relating to participation of the applicant in the

<sup>240</sup> A party in interest is a person or entity who will benefit from the transaction even if the one participating in the transaction is someone else. This includes, but is not limited to any person or entity that has more than a *de minimus* ownership interest in an applicant, or who will be in a position to actually or potentially control the operation of an Applicant.

private auction or ICANN Auction of Last Resort must be disclosed to ICANN within 72 hours of resolution and ICANN must, in turn, publish the same within 72 hours of receipt. This includes:

- A list of the real party or parties in interest in each applicant or application, including a complete disclosure of the identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant;
  - List the names and contact information<sup>241</sup> of any party holding 15% or more direct or indirect ownership of each applicant or application, whether voting or nonvoting, including the specific amount of the interest or percentage held;
  - List the names and contact information<sup>242</sup> of all officers, directors, and other controlling interests in the applicant and/or the application
  - The amount paid (or payable) by the winner of the auction;
  - The beneficiary(ies) of the proceeds of the bidding process and the respective distribution amounts; and
  - The beneficiary(ies) of the proceeds of the bidding process and the
  - The value of the Applicant Support bidding credits or multiplier used, if applicable.<sup>243</sup>
- **For Other Forms of Private Resolution:** Where contention sets are privately resolved through a mechanism other than a private auction, the following must be disclosed:
    - The fact that the contention set (or part of a contention set), has been resolved privately (and the names of the parties involved)
    - Which applications are being withdrawn (if applicable);
    - Which applications are being maintained (if applicable);
    - If there will be a change in ownership of the applicant, or any changes to the officers, Directors, key personnel, etc. along with the corresponding information.
    - All material information regarding any changes to information contained in the original application(s)(if any).

In the event that any arrangements to resolve string contention results in any material changes to the surviving application, such changes must be submitted through the Application Change process set forth under Topic 20: Application Change Requests.

### **Protections for Disclosing Applicants**

<sup>241</sup> Contact Information will be subject to the same publication rules as contact information is treated in the application process.

<sup>242</sup> Same as above.

<sup>243</sup> We assume that Applicant Support bidding credits or multipliers would only be used in cases where the resolution sets were decided by an ICANN Auction of Last Resort, however, we note that it is theoretically possible that such credits or multipliers could be used during a private auction if all parties in the private auction agreed.

- Except as otherwise set forth in the transparency requirements above, no participant in any private resolution process shall be required to disclose any proprietary information such as trade secrets, business plans, financial records, or personal information of officers and directors unless such information is otherwise required as part of a normal TLD application.
- The information obtained from the contention resolution process may not be used by ICANN for any purpose other than as necessary to evaluate the application, evaluate the New gTLD Program, or to otherwise comply with applicable law.

### **b. Deliberations and rationale for recommendations and/or implementation guidelines**

Rationale for Affirmation with Modification 35.1: The Working Group believes that Implementation Guideline F from 2007 should still apply, but has made several amendments to ensure that IG F is clear and up-to-date. The text is modified to indicate that private resolution of contention sets must be in accordance with the Applicant Guidebook and supporting documents. This revision aligns the text with the recommendation in this section to update the Applicant Guidebook to allow private resolution, and accompanying requirements. The text is further modified to more specifically describe program elements that were developed during implementation of the 2012 round after the policy was written, and which will carry forward to subsequent rounds.

The Working Group discussed a number of possible alternatives to ICANN Auctions of Last Resort for resolving contention sets, as detailed in the Supplemental Initial Report.<sup>244</sup> In examining the benefits and drawbacks of these alternatives and the different perspectives provided in public comment, the Working Group did not come to any agreement that there is a better option that would be widely supported by the community. Therefore, the Working Group affirms the use of ICANN Auctions of Last Resort as a method of last resort to resolve contention sets, though per Recommendation 35.4, the mechanism for conducting those auctions shall be different.

Rationale for Recommendations 35.2 and 35.3: The Working Group reviewed that in the 2012 application round, some applicants resolved contention by mutually agreeing to participate in private auctions where the auction price 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 the private auctions they “lost” for financial positioning in the resolution of other contention sets. While not all Working Group members agree that private auctions are problematic, the Working Group noted that significant concerns have been raised within the

---

<sup>244</sup> See <https://gns0.icann.org/sites/default/files/file/field-file-attach/supplemental-report-01nov18-en.pdf>



community and by the ICANN Board<sup>245</sup> about the practice of applying for top-level domains with the purpose of financial gain. This includes the utilization of proceeds from lost auctions towards future auctions.

The Working Group further considered that in the future, former 2012 applicants and potential new applicants will be aware that certain parties benefited from losing private auctions in the 2012 round, which will therefore become an incentive for potential applicants to submit applications for purposes other than to operate a gTLD.

Some in the Working Group's looked at the guidance from the ICANN Board in a more granular fashion, parsing out the Board concerns about applicants submitting an applicant with no intent to operate the gTLD, versus the practice of participating in private auctions, and versus the practice of leveraging financial gains in one private auction to resolve other contention sets.

The Working Group has elected to primarily target concerns about an applicant submitting an application with no intent to operate the gTLD. The group believes that requiring all applicants to agree to a clause that there is a bona fide intention to operate the gTLD for each and every application will mitigate this concern. The Working Group has also included a non-exhaustive list of potential "Factors" intended to help identify when an application may have been submitted without a bona fide intention to operate the gTLD. Those potential "Factors" are assumed to serve as the basis for enforcement of the bona fide intention clause.

By requiring all applicants to agree to the bona fide intention clause, some in the Working Group believe that the Board's primary concerns are mitigated and that private resolutions (including private auctions) as a mechanism to resolve string contention, can be permitted. The Working Group also believes that other creative mechanisms to resolve string contention should be permitted, such as business combinations and joint ventures, and these elements must be included in the Applicant Guidebook. As with any material changes to applications, any applications amended as a result of creative string contention resolution must be subject to the Application Change request process. In addition,

---

<sup>245</sup> In its public comment on the Working Groups Initial Report, the ICANN Board stated: ". . . the Board believes that applications should not be submitted as a means to engage in private auctions, including for the purpose of using private auctions as a method of financing their other applications. This not only increases the workload on processing but puts undue financial pressure on other applicants who have business plans and financing based on their intention to execute the plan described in the application. In particular, we are concerned about how gaming for the purpose of financing other applications, or with no intent to operate the gTLD as stated in the application, can be reconciled with ICANN's Commitments and Core Values." See <https://mm.icann.org/pipermail/comments-gtld-subsequent-procedures-initial-03jul18/attachments/20180926/a3fc7066/2018-09-26CherineChalabytoCLOandJeffNeumanBoardCommentonSubproInitialReport2-0001.pdf>. The Board made additional comments in line with this statement in response to the Supplemental Initial Report. See <https://mm.icann.org/pipermail/comments-new-gtld-subsequent-procedures-supp-initial-30oct18/attachments/20181218/b5e51bfa/2018-12-18CherineChalabytoCherylLangdon-OrrandJeffNeuman-0001.pdf>

because the underlying entity may be changing, the Working Group believes that allowing additional opportunity for objections is warranted.

Finally, some in the Working Group remain concerned that the practice of leveraging financial gains in one private auction to resolve other contention sets has not been addressed adequately. A proposal was put forward by these members that would require sealed bids for private auctions to be submitted at the same time. Some in the Working Group believe that this proposal would prevent the rolling of funds from one auction to another. The Working Group did not move forward with this proposal.

**Rationale for Recommendation 35.4:** The Working Group believes that second-price, sealed bid auctions are preferable to the ascending bid auctions used in the 2012 round ICANN Auctions of Last Resort. Some believe that this method eliminates collusion and bid rigging and is the preferred method used by governments to allocate critical resources. Further, some believe that bidders are forced to value the TLD in absolute terms and second price auctions reduce the risk of “bidding wars” that can occur in ascending bid auctions.

In its deliberations, the Working Group considered a number of possible options, which are included on the group’s [Wiki](#). In some cases, the options combined measures related to mitigating the submission of applications lacking bona fide intention, eliminating private auctions altogether, and the mechanism of last resort. The preference for a second-price, sealed bid auction mechanism was however a constant throughout the majority of the Working Group’s deliberations on the topic.

Some in the Working Group have argued that requiring submission of sealed bids for ICANN Auctions of Last Resort before the identity of other applicants is known fails to recognize that the value of a TLD to an applicant may be different depending on who the other potential owners of the TLD are and that applicants should know all the facts available when determining what is an appropriate level to bid.

After carefully considering the pros and cons of each option, the Working Group provided the relevant recommendation and details about timing of bids, how the evaluation process should be conducted, and how the auction process should be conducted.

**Rationale for Recommendation 35.5:** By requiring all applicants to agree to the bona fide intention clause, some in the Working Group believe that the Board’s primary concerns are mitigated and that private resolutions (including private auctions) as a mechanism to resolve string contention, should be permitted. However, some others in the Working Group still believe that private auctions (and similar private resolution mechanisms) may be a cause for concern, and believe that data must be collected to help determine in the future if a problem exists. These disclosure requirements serve as a requirement for some Working Group members to agree to allowing private resolutions, including private auctions. As such, the Working Group is requiring that when applicants resolve string contention, they must adhere to the Contention Resolution Transparency Requirements as



detailed in the recommendation. To address concerns about the disclosure of such information, the Working Group also agreed on Protections for Disclosing Applicants, also included in the recommendation.

Some Working Group members believe that only requiring that “all material information regarding any changes to information contained in the original application(s)(if any)” is inadequate and should extend to, “all material terms of any arrangement.” This more expansive language was discussed by the Working Group as an alternative, however other Working Group members strongly oppose this view and point out that in many of the Working Group’s discussions it has recognised the value of allowing greater flexibility to Applicants to resolve conflicts outside of formal processes. From this perspective, terms of settlement/resolution may often be highly commercially sensitive, particularly where this might involve the resolution of a contention resolving an applicant’s brand. In this view, requiring such disclosure would counteract the Working Group’s intent to support amicable conflict resolution. Further, members with this viewpoint maintain that applicants resolving contention by means of private resolution should not be required to disclose any more information than is required of any other applicant for a TLD.

**c. New issues raised in deliberations since publication of the Initial Report, if applicable.**

The Working Group did conduct significant deliberations since the publication of the Supplemental Initial Report that included these subjects, but they are primarily captured in section (b) above.

In considering the bona fide intention clause, the Working Group discussed examples of what would constitute a lack of bona fide intention and included a non-exhaustive list of potential indicative “Factors,” though it believes identifying additional examples is helpful. The Working Group also discussed what the punitive measures should be if an application is found to have been submitted lacking a bona fide intention and discussed the potential loss of the registry, barring participation in any future rounds (both for the individuals as well as the entities (and their affiliates) involved), or financial penalties. In this respect, the Working Group discussed the timing of when such factors may be identified (e.g., likely after private auctions have taken place) and how that may impact potential punitive measures.

The Working Group noted that the GAC Communiqué for the ICANN68 Virtual Policy Forum<sup>246</sup> included discussion of some GAC members’ views on private auctions. The Working Group reviewed this Communiqué as part of its deliberations.

**d. Dependencies/relationships with other areas of this report or external efforts**

---

<sup>246</sup> <https://gac.icann.org/content/Migrated/icann68-gac-communique>

- Additional discussion of requirements and processes associated with application changes is included under Topic 20: Application Change Requests
- Topic 17: Applicant Support includes recommendations regarding a bid credit, multiplier, or similar mechanism that will apply to bids submitted by applicants that qualify for Applicant Support who participate in an ICANN Auction of Last Resort.
- Discussion of Terms & Condition and associated recommendations are included under Topic 18: Terms & Conditions.

## 2.10 Deliberations and Recommendations: Contracting

### Topic 36: Base Registry Agreement

#### a. Recommendations and/or implementation guidelines

Affirmation 36.1: The Working Group affirms the following recommendations and implementation guidelines from the 2007 policy:

- Principle F: “A set of operational criteria must be set out in contractual conditions in the registry agreement to ensure compliance with ICANN policies.”
- Recommendation 10: “There must be a base contract provided to applicants at the beginning of the application process.”
- Recommendation 14: “The initial registry agreement term must be of a commercially reasonable length.”
- Recommendation 15: “There must be a renewal expectancy.”
- Recommendation 16: “Registries must apply existing Consensus Policies and adopt new Consensus Policies as they are approved.”
- Implementation Guideline J: “The base contract should balance market certainty and flexibility for ICANN to accommodate a rapidly changing marketplace.”
- Implementation Guideline K: “ICANN should take a consistent approach to the establishment of registry fees.”

Affirmation 36.2: The Working Group affirms the current practice of maintaining a single base Registry Agreement with “Specifications.”

Recommendation 36.3: There must be a clearer, structured, and efficient method to apply for, negotiate, and obtain exemptions to certain provisions of the base Registry Agreement, subject to public notice and comment. This allows ICANN org to consider unique aspects of registry operators and TLD strings, as well as provides ICANN org the ability to accommodate a rapidly changing marketplace.