UPDATE & CONSULTATION ON
New gTLD Subsequent Procedures
Consensus Building on Recommendations

AUCTIONS, PRIVATE RESOLUTION OF CONTENTION SETS (v01)

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Key Issues in Subsequent Procedures

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

Background

For 2012 round:

❖ 1,930 applications

❖ Total contention sets = 234

❖ Contentions sets resolved via ICANN Auction = 16

❖ Contentions sets resolved privately 215 (>91%)

❖ Based on 2012 applicants' input, private resolution through various means – including private auctions – was common, although no public stats available.

❖ Private resolution was not a formal part of PDP for 2012 round so no PR or policy guidance; private auction process was not created until after applications were submitted.

Key Issues

Unintended consequence: in private auctions, majority of proceeds collected went to losing parties in auction – concern on gaming / purposely losing in certain private auctions to collect portion of proceeds then leverage that for private auctions of other higher priority applications.

• Gaming or abuse of private auction -- Board expressed concern, so did ALAC.

• Legality of private auctions still in question

How to mitigate against unintended consequence?

What is the New gTLD Subsequent Procedures ("SubPro")?

o The set of rules and mechanisms applicable to the next round for New gTLDs i.e. they DO NOT apply to legacy TLDs, ccTLDs, or delegated new gTLDs or those still unresolved from the 2012 application round

o "An update" to the 2012 Round rules and mechanisms

Review of existing positions on Auctions & Private Resolutions

ALAC STATEMENT has said:

On Auctions

- Strongly opposed retention of regular highest-bid auction process as mechanism of last resort to resolve contention sets.
- Propose ICANN Community explore introduction of a multiplier-enhanced Vickrey auction
- Strongly advocate for more guidance and resources to help applicants get out of contention sets voluntarily, thus avoiding going to auctions
- Modified Vickrey auctions should be conducted by ICANN-appointed auction service providers

On Private Resolutions

- Does not support total ban of all forms of private resolutions
- But strongly against forms of private resolutions which result in a 'losing' applicant gaining or being promised a financial benefit in return for withdrawing their application in a contention set, including and especially private auctions.

COMPETITION, CONSUMER CHOICE & TRUST (CCT) RECOMMENDATIONS

- None

Notes on Auctions & Private Resolutions from 9 Sep CPWG Call

- No consensus to ban private resolutions (no full-proof way to eliminate private auctions), so more feasible to focus on some guardrails and need for 'reporting'

  To note under Topic 20 Application Change Requests –

    o *Applicants will be permitted to creatively resolve contention sets including via business combinations or JV and private resolutions (including private auctions)*

    o *Any materially modified resulting from above will be subject to re-evaluation (likely), new public comment period and objection period (to allow for objections due to changing circumstances of application)*

- It is said that applications must be submitted with a bona fide ("good faith") intention to operate the gTLD – affirmative attestation

    o But how to determine real good faith or lack of good faith just from attestation?

    o What happens if lack of good faith is "seen"?

- ICANN must collect data on all forms of private resolution - to enable data-driven policy recommendation for subsequent rounds

Notes on Auctions & Private Resolutions from 9 Sep CPWG Call

- Possibly switch to "sealed bid auctions" rather than Vickrey auction per se, to allow limited flexibility on when bid are to be submitted although:
  - o Bids must be submitted early in the process to lock them in based on "calculated maximum exposure" - this indirectly helps level playing field for single string applicants / applicants vying for Applicant Support
  - o Bids must be submitted without revealing identities of applicants in contention set (with proviso)*
  - o Concept of winner paying second highest bid amount to stay
- Evaluation process to (somehow) prioritize string similarity evaluation first in order to establish if (direct) contention sets arise – then allow any applicant informed of contention set placement, an opportunity to withdraw or submit bid
  - o Idea is to limit need for further lengthy/costly evaluations only for applications that wish to proceed
- Benefit of multiplier for bids (or "bid credits") submitted by applicants that qualify for Applicant Support – details to be fleshed out in implementation
- *(Proviso) May be inevitable that identities of applicants vying for Applicant Support be revealed ahead since evaluation by SARP may need to happen before string similarity evaluation – to be examined further in implementation but applicant that qualifies for AS not likely to be prejudiced
- ICANN should monitor and must collect data on all auctions, whether ICANN auctions or private auctions – to enable data-driven policy recommendation for subsequent rounds

Summary of SubPro Recommendations/Implementation Guidance

SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

<u>Affirmation with Modification 35.1</u>:
- Implementation Guideline F from 2007, "If there is contention for strings, applicants may:

  (i) resolve contention between them within a pre-established timeframe *in accordance with the AGB 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*."

Note:

(i)   private resolution of contention sets must follow AGB and supporting documents, the Applicant Change request process and Terms and Conditions.

(ii) & (iii) greater specificity for implementation of ICANN Auctions and CPE as what took place for 2012 round, to carry over into subsequent rounds.

<u>Recommendation 35.2 (Private Resolutions)</u>: Consistent with the Application Change process per Topic 20 Application Change Requests, AGB must reflect that applicants be permitted to creatively resolve contention sets including via business combinations or JV and private resolutions (including private auctions)

- All private resolutions reached by means of forming business combinations or other JVs resulting in the withdrawal of 1 or more applications are subject to the Application Change processes per Topic 20

- Any materially modified application resulting from above will be subject to re-evaluation (likely), new public comment period and objection period (to allow for objections due to changing circumstances of application

- All contention sets resolved through private resolution shall adhere to the <u>Contention Resolution Transparency Requirements</u>

<u>Recommendation 35.3:</u> Applicants resolving string contention must adhere to Contention Resolution Transparency Requirements. Applicants disclosing relevant information will be subject to Protections.

Summary of SubPro Recommendations/Implementation Guidance

CONTENTION RESOLUTION TRANSPARENCY REQUIREMENTS

For Private Auction or Bidding Process / ICANN Auction of Last Resort:
- All parties in interest to any agreements relating to participation of the application in the private auction or ICANN Auction must be disclosed to ICANN within 72 hours of resolution and ICANN must, in turn, publish the same within 72 hours of receipt – including:
  - ❏ A list of real party/parties in interest in each applicant or application, including a complete disclosure of identity and relationship of those persons or entities directly or indirectly owning or controlling (or both) the applicant
  - ❏ List the names and contact information of any party holding 15% or more direct or indirect ownership in each applicant/application, whether voting or non-voting, including specific amount of interest or % held
  - ❏ List the names and contact information of all officers, directors and other controlling interests in the applicant and/or application
  - ❏ The amount paid (or payable) by winner of auction
  - ❏ The beneficiary(ies) of the proceeds of bidding process and respective distribution amounts
  - ❏ The value of the Applicant Support bidding credits or multiplier used, if applicable

For Other Forms of Private Resolution:
- To disclose:
  - ❏ The fact that the contention set (or part thereof) has bee resolved privately (and name of 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 applicant, or any changes to the officers, Directors, key personnel etc along with corres. Info.
  - ❏ All material information regarding any changes to info. Contained in the original application(s) (if any)

For any arrangements resulting in material changes to surviving application – changes must be submitted through the Application Change process.

Protections for Disclosing Applicants:
- Except where stated, no participant in any private resolution process shall be required to disclose any proprietary info. such as trade secrets, business plans, financial records or personal info. of officers and directors unless such info is otherwise required as part of a normal TLD application
- The info obtained from 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.

Summary of SubPro Recommendations/Implementation Guidance

SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

<u>Recommendation 35.3</u>: Applications must be submitted with a bona fide ("good faith") intention to operate the gTLD – affirmative attestation
- Evaluators and ICANN must be able to ask clarifying questions to any applicant it believes is not submitting with bona fide intention, using "factors" weighed against all other facts / circumstances on impacted applicants/applications
- Applicants may mark portions of any such responses as "confidential" if the responses include proprietary business information

"Factors" include/could be:
- ❑ If applicant applies for x (eg 4 or 5) more strings that falls into contention sets and goes into private auctions for > 50% of those strings for which the losing bidder(s) receive proceeds from successful bidder and applicant loses each of the private auctions – is a factor for "lack of bona fide"
- ❑ If applicant's string is not delegated into the root within 2 years of RA Effective Date
- ❑ If applicant is awarded the gTLD and sells or assigns (other than sale of all or substantially all of its non-TLD related assets) within 1 year
- ❑ [If applicant with multiple applications resolve contention sets by means other than private auctions and does not win any TLDs]

Unresolved

- Factors are necessarily subjective, but no way around it

- No punitive measures against applicant found to have lack of bona fide intent; did discuss but no agreement to:
  - ❑ Potential loss of registry
  - ❑ Barring participation in future rounds (both for the individuals as well as the entities (and affiliates)
  - ❑ Financial penalties

- Timing of when "Factors" and how they may impact potential punitive measures

Summary of SubPro Recommendations/Implementation Guidance

SUMMARY OF AFFIRMATIONS, RECOMMENDATIONS & IMPLEMENTATION GUIDANCE

Recommendation 35.4 (ICANN Auctions): ICANN Auctions of Last Resort must be conducted using the **second-price auction method**, consistent with:

- Once 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 evaluators and ICANN Org

- After String Similarity Evaluation period ends, applicants in contention sets to be informed of number of applications in their contention set only – no other information shared.

- All applicants in contention sets must submit a "Last Resort Sealed Bid" for each relevant application. Any applicant that does not do this will deemed to submit a bid of zero.

- "Reveal Day" (non-confidential information published) happens after window to submit Last Resort Sealed Bids has closed – including composition of contention sets and nature of applications

- Beginning on Reveal Day, applicants may participate in various forms of private resolution subject to **Contention Resolution Transparency Requirements**

- All applications shall be evaluated, subjected to other procedures (eg. Initial Evaluation, Extended Evaluation, Objections, GAC Early Warning/Advice, CPE). Some of these will affect the composition of contention sets.
  - ❏ If contention set is expanded, all affected applicants will be allowed, but not required, to submit a new Last Resort Sealed Bid.
  - ❏ If contention set is shrunk through removal from process, applicants will not be allowed to adjust their sealed bids unless it is due to partial resolution by business combination/JV, then the remaining application and other existing applications will be allowed, but not required, to submit a new Last Resort Sealed Bid.

- Shall only take place after all other evaluation procedures, objections, etc, similar to the 2012 round. Plus, cannot occur if 1 or more 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 contention set must be informed of date of ICANN Auction of Last Resort
  - ❏ Deposits will be collected a fixed amount of time prior to conduct of auction
  - ❏ On auction date, applicant that submitted the highest bid amount pays the second-highest bid amount
  - ❏ Once payment is received with specified time, applicant may proceed to Transition to Delegation
  - ❏ Non-payment within specified time will result in disqualification of applicant

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