

Minority Statement on Recommendation 35

Executive summary

As drafted, the recommendations allow for private resolutions of contention sets including private auctions. While not opposed to private resolution, we are opposed to the use of private auctions as a contention resolution option due to the risk to ICANN, the harm to single TLD applicants and the potential for gaming of the new gTLD program for profit. The recommendations in the final report are a mix of overly complex disclosures and attestations that needlessly complicate the program to allow for private auctions. And they will not work. The only way to prevent a repeat of the activity from the 2012 round is to ban private auctions.

Basis for Objection

The recommendations as written are a good faith effort by leadership to try and craft a compromise solution that addresses the concerns of a wide variety of interests. Despite several comments from the community opposing private auctions, a small but vocal group in with Working Group (WG) protested the ban on private auctions that was in a previous leadership proposal. To mitigate the concerns expressed about private auctions, a series of Bona Fide requirements were developed, and a sealed bid auction was proposed for ICANN Auctions of Last Resort. Some additional disclosure requirements were also included.

The phrase “It’s a good deal when everyone is a little unhappy” comes to mind but in this case, it is not about being happy or unhappy, it is about developing sound policy recommendations and this proposal fails that test.

The inclusion of private auctions poses institutional risks to ICANN. Knowing that the process will repeat itself and tens of millions of dollars will change hands outside of ICANN oversight, despite ICANN being responsible for the execution of this program, will only open ICANN up to external criticism that it is not exercising appropriate oversight. As we saw with the proposed .ORG transaction, when money and ICANN are in play, the spotlight will shine brightly on ICANN. That will continue going forward.

In correspondence dated September 2018¹ and December 2018² and the ICANN Board asked the Working Group to address two concerns. 1) applications submitted for the sole purpose of receiving a payout for losing private auctions. 2) gaming for the purposes of financing other applications.

¹ <https://www.icann.org/en/system/files/correspondence/chalaby-to-langdon-orr-neuman-26sep18-en.pdf>

² <https://www.icann.org/en/system/files/correspondence/chalaby-to-langdon-orr-neuman-18dec18-en.pdf>

The Final Report attempts to address these concerns through “Bona Fide Commitments.” Despite great effort and even greater complexity, these commitments are unenforceable and open to gaming and do not effectively stop the practices identified by the Board. Comments³ from the community point out the problem with such a solution.

- Article 19 - "We welcome the work of the Working Group on this topic, but object to Recommendation 35.2, which facilitates private resolution through private auctions. We believe that private resolution of contention sets would limit transparency and scrutiny of the management of the DNS. The standard that applicants submit "...bona fide ("good faith") intentions..." is too vague to ensure that all applicants regulate their conduct in a precise manner. We thus recommend that private resolutions be disallowed, so that every contention has a chance for public input from all interested parties. "
- Business Constituency - "While applicants should transparently declare whether they intend to operate the registry, or whether they anticipate selling some of their pending applications to others (as the BC previously commented), the BC cautions against the proposed criteria against which “bona fide” intentions may be measured (e.g., the applicant “loses” 50% of private auctions it enters into). Such criteria call for subjective interpretation and could be gamed themselves by others with an interest in the contended-for string or an interest in an auction loss windfall (by attempting to influence those interpreting applicant intentions). It is conceivable that an applicant with a number of auction losses simply doesn’t possess the resources necessary to compete financially for the string, and did not anticipate the auction scenario at application time. Subjective interpretations in circumstances such as these tend to detract from, rather than contribute to, predictability.
- ALAC – “The ALAC remains concerned about efforts to “game” the application process, in part, through the use of private auctions. We disagree with the SubPro WG recommendation to allow them and believe that attempts to determine “good faith” will ultimately be little more than window dressing.” “While we think that the concept of a bona fide intention is noble, we do not believe it is feasible to adopt because challenges with the level of subjectiveness involved in each of the identified factors are just too difficult to overcome, and will likely render the concept not worthwhile to implement, especially if no penalties apply to any party found to have shown a lack of bona fide intent.”
- Swiss Government OFCOM - "While we acknowledges that, in an attempt to reduce potential gaming, the PDP WG recommendations include the need for applications

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<https://docs.google.com/spreadsheets/d/1kmZRLAsW6wITyQ8LA3KhOQzU1UABL9zCPWw39Yc9IB8/edit#gid=1091535370>

to be submitted with a “bona fide” intention to operate a TLD, we recommend further discussion on how this intention will be ensured and implemented and notes that punitive measures for non compliance or submission of a bona fide intention are not identified. We express concerns on whether the bona fide intention and Contention Resolution Transparency Requirements sufficiently answer the ICANN Board concerns relative to the permission of private resolutions (including auctions) as a mechanism to resolve string contention.

- GAC - "While the GAC acknowledges that, in an attempt to reduce potential gaming, the PDP WG recommendation 35.3 includes the need for applications to be submitted with a “bona fide” intention to operate a TLD, the GAC recommends further discussion on how this intention will be ensured and implemented, and notes that punitive measures for non compliance or submission of a “bona fide” intention are not sufficiently defined. The GAC expresses concerns on whether the “bona fide” intention and Contention Resolution Transparency Requirements sufficiently answer the ICANN Board concerns relative to the permission of private resolutions (including auctions) as a mechanism to resolve string contention.
- Christa Taylor (individual) – “While Bona Fide intent has the best of intentions, it’s unlikely to solve the real issue.”

The method prescribed by the WG to address the concerns with private auctions simply will not work.

Another area where this recommendation fails is in its lack of responsiveness to pointed questions from the ICANN Board⁴ submitted as part of their response to the Final report. Specific to Auctions the Board asks:

“The Board encourages the PDP WG to provide a rationale why the resolution of contention sets should not be conducted in a way such that any net proceeds would benefit the global Internet community rather than other competing applicants.”

“The Board notes that if “private” resolutions will be allowed or encouraged in subsequent procedures, the PDP WG is requested to provide a rationale for why these private processes should only partially be brought into the program rather than be kept outside of the program or be brought into the program.

Despite one proponent of private auctions suggesting the “ICANN Board of putting its thumb on the scale⁵” by providing input and feedback, most members of the Working Group found the input from the Board valuable. Unfortunately, the Final Report as submitted to the Council does not address either of these questions (there is an effort

⁴ <https://www.icann.org/en/system/files/correspondence/botterman-to-langdon-orr-neuman-30sep20-en.pdf>

⁵ <http://www.circleid.com/posts/20200612-thumb-on-the-scales/>

underway for a small group to respond to the Board on all their questions, but it has not begun, and it is unclear if it will be included in the Final Report of the Working Group when that is voted on by the GNSO Council).

The first time the community saw the Final Recommendations on Auctions was when the Final report was published for comment on August 20, 2020. They not only provided feedback on the ineffectiveness of the Bona Fide requirements, but they clearly opposed private auctions going forward⁶.

- Non-Commercial Stakeholder Group - "...we support the move to set aside private actions." "Private auctions should simply be banned, and other solutions such as Vickrey auctions and "sealed bid, second price auctions" through the ICANN-run auction process should be adopted for the fairness and integrity of the auction process."
- Business Constituency - "As we said in 2018, the BC recommends that private auctions be eliminated."
- At-Large Advisory Committee – "The ALAC remains concerned about efforts to "game" the application process, in part, through the use of private auctions." "The ALAC implore the working group to revisit the prohibition of private auctions and implement a true Vickrey auction solution."
- GAC - Regarding Auctions of Last resort, the GAC reaffirms its view that they should not be used in contentions between commercial and non-commercial applications, and reiterates that private auctions should be strongly disincentivized."

Unfortunately, when it came time to consider these comments they were classified by leaderships as "Discussed/considered" and summarily dismissed.

If this proposal does move forward, the IRT and the ICANN Board should consider the following changes:

- Private auctions should be prohibited, and contention sets should be settled by an ICANN Auction of Last Resort as conducted in the 2012 round. There should be a period for contention resolution without auctions and if successful, appropriate disclosures regarding the resolution should be made to ICANN. This eliminates the complexity inherent in this proposal and places ICANN in the proper oversight position.
- If ICANN or the IRT deems that private auctions will be allowed, they should be overseen by ICANN, not by a private provider and a web of NDAs. Lack of information really hampered this working group. Coincidentally, the only

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<https://docs.google.com/spreadsheets/d/1kmZRLAsW6wITyQ8LA3KhOQzU1UABL9zCPWw39Yc9IB8/edit#gid=1091535370>

auction provider who agreed to speak with the group suggested the ICANN Auction of Last resort implemented using the Vickrey method as the best method for settling contention sets.

If either of these processes had been in place for the 2012 round, this working group and the larger community would have had the data it needed to do a proper assessment of what worked and what did not. In addition, having ICANN oversee both processes will ensure integrity and transparency, and allows ICANN to appropriately exercise its authority over the delegation of new gTLDs.

ICANN cannot have a repeat of 2012 practices.

As many have pointed out during our deliberations, we could not have known in 2012 about the cottage industry of private auctions that would blossom with so many contention sets. We could not have anticipated that the largest new gTLD applicant/operator would bring their own auction provider to the table to settle these contention sets. We could have not known that tens of millions (if not more) would change hands during these auctions. We do not know the true extent of the private auction activity in 2012 because these transactions were cloaked in NDAs which even prevented auction providers from assisting the WG with its assessment of the 2012 round.

But having seen what happened last round, we do know that unless ICANN prohibits this behavior, it will repeat itself. And we will see a repeat of headlines like this.

Amazon sold rights to .box gTLD for \$3 million⁷

Donuts spends \$50 million on new gTLD auctions⁸

Minds + Machines pockets \$1.68 from three more auction losses⁹

Minds + Machines nets \$8.4 million from auctions, .Cloud and .Book settled¹⁰

Minds + Machines Gets Another \$4.4 Million From Losing New gTLD Auctions¹¹

TLDH raises \$5 million from gTLD auctions¹²

Six private new gTLD auctions raise \$9m¹³

⁷ <http://domainincite.com/26007-amazon-sold-rights-to-box-gtld-for-3-million>

⁸ <http://domainincite.com/16882-donuts-spends-50-million-on-new-gtld-auctions>

⁹ <https://domainnamewire.com/2015/03/06/minds-machines-tld-losses/>

¹⁰ <https://domainnamewire.com/2014/11/10/minds-machines-auctions-cloud/>

¹¹ <https://onlinedomain.com/2014/12/03/domain-extensions/new-gtlds/minds-machines-gets-another-4-4-million-from-losing-new-gtld-auctions/>

¹² <http://domainincite.com/14876-tldh-raises-5-million-from-gtld-auctions>

¹³ <http://domainincite.com/13323-six-private-new-gtld-auctions-raise-9m>

Donuts buys out rival .place gTLD applicant¹⁴

Second private auction nets \$1.2m per gTLD¹⁵

Respectfully submitted on January 18, 2021

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¹⁴ <http://domainincite.com/16317-donuts-buys-out-rival-place-gtld-applicant>

¹⁵ <http://domainincite.com/14182-second-private-auction-nets-1-2m-per-gtld>