4.2 Auction: Mechanism of Last Resort

4.2.1 Introduction

Auction was the mechanism of last resort to resolve contention if applicants could not resolve contention amongst themselves or through CPE. This section of the Program Implementation Review report discusses the following aspects of ICANN-facilitated auctions:

- Auction Rules
- Auction Process and Administration

4.2.2 Relevant Guidance

The following guidance is relevant to the topic of Auction and will be discussed in further detail in Sections 4.2.3 and 4.2.4 of this report:

- GNSO Recommendation 9: "There must be a clear and pre-published application process using objective and measurable criteria."[256]
- GNSO Implementation Guideline F:

  If there is contention for strings, applicants may:

  iv. resolve contention between them within a pre-established timeframe

  v. 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;

  vi. the ICANN Board may be used to make a final decision, using advice from staff and expert panels.

- GNSO Implementation Guideline I: "An applicant granted a TLD string must use it within a fixed timeframe which will be specified in the application process."
- Applicant Guidebook, Module 1: Introduction to the gTLD Application Process[257]
- Applicant Guidebook, Section 4.3: Auction: Mechanism of Last Resort

4.2.3 Background

The AGB anticipated that most contention sets would either self-resolve or be resolved through CPE (see Section 4.1: Community Priority Evaluation of this report): "It is expected that most cases of

[256] ICANN. (8 August 2007) ICANN Generic Names Supporting Organization Final Report Introduction of New Generic Top-Level Domains, Part A. Retrieved from http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm

[257] ICANN. (4 June 2012) gTLD Applicant Guidebook Version 2012-06-04. Retrieved from http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf

contention will be resolved by the community priority evaluation or through voluntary agreement among the involved applicants."[258] That is, ICANN intended auctions to be the resolution "mechanism of last resort."

After conducting an open procurement process, ICANN selected the auction firm, Power Auctions, LLC, to facilitate the auctions.[259] Power Auctions was a leader on auction thought and design, helping ICANN to adhere to GNSO Implementation Guideline F, wherein an "efficient resolution of contention" was called for should there be no mutual agreement or resolution via community claim. Power Auctions also supported the development and design of both the direct and indirect auction processes as well as the implementation rules governing the auctions.

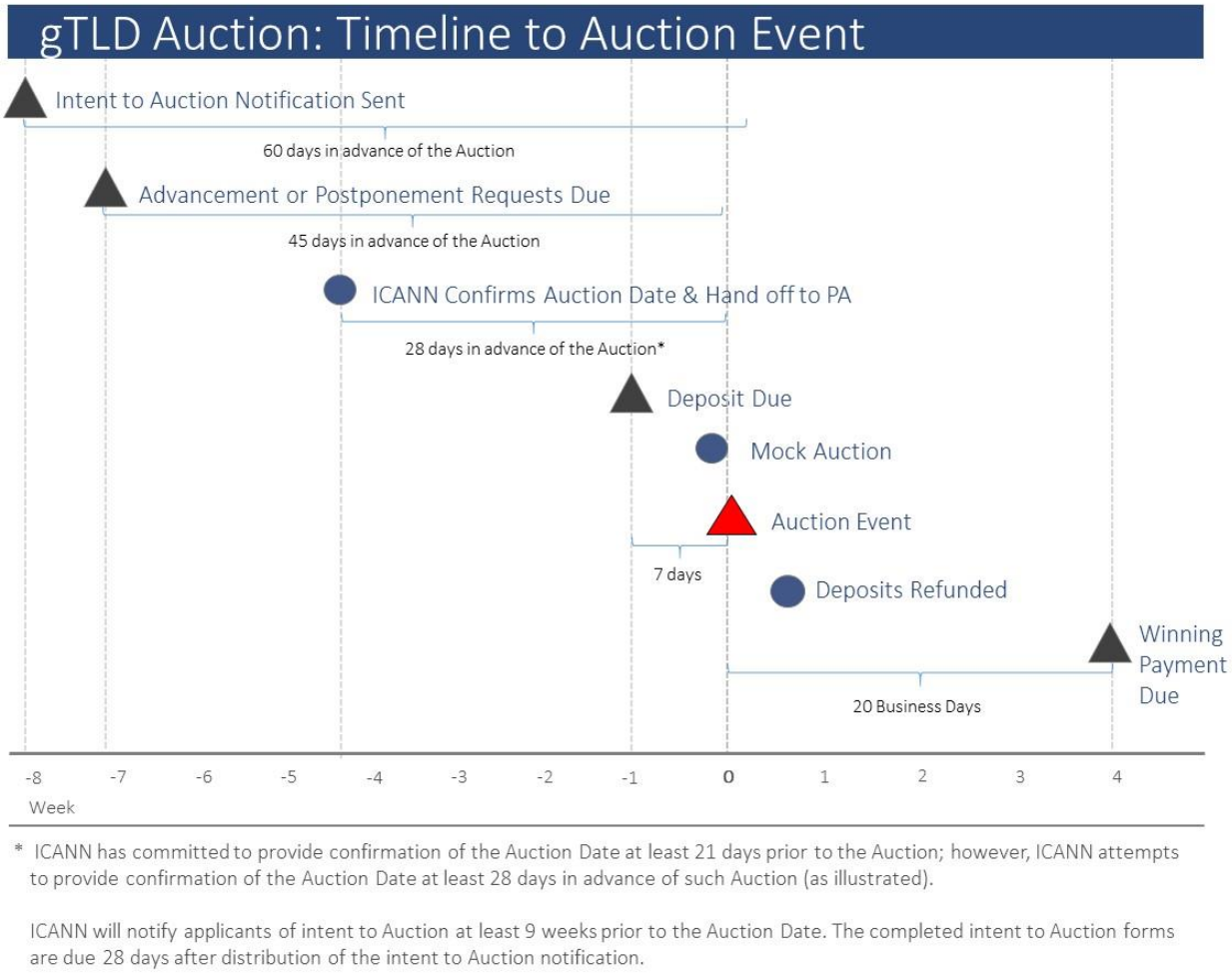
If a contention set had not been resolved after each application had completed the previous phases of the Program, essentially AGB Modules 2, 3, and Section 4.2, the contention set was scheduled for an auction to resolve the contention set. The auction process started with ICANN assessing a contention set's eligibility for an auction and then scheduling the eligible contention set for an auction date. For a contention set to be eligible for an auction, each application in the contention set had to have completed evaluation, resolved any objections and applicable GAC Advice, and completed CPE if any community-based applicants were members of the set. An Intent to Auction notification was sent to each member of the contention set, alerting them that an auction to resolve their string contention set had been scheduled and providing a set of forms to be completed within a stated time period to be eligible to participate in the auction. The Intent to Auction notifications were sent at least two months prior to the scheduled auction date to allow for 1) a contention set to self-resolve before an auction takes place, and 2) the required forms to be completed. To participate in the auction, applicants were required to agree to abide by the Auction Rules and Bidder Agreement with the auction provider. Additionally, they were required to submit a bidding deposit by a specified time period in advance of the auction. The auction then took place according to the Auction Rules. Once the winner(s) was/were determined, they were required to pay their winning fee and move onto the next phase of the Program, Contracting (see Section 5.1: Contracting of this report). The applicants that did not prevail did not proceed further in the Program and were able to withdraw their applications, receiving a partial refund of their application fee.

[258] ICANN. gTLD Applicant Guidebook Version 2012-06-04, Section 4.3: Auction: Mechanism of Last Resort. Retrieved from http://newgtlds.icann.org/en/applicants/agb/guidebook-full-04jun12-en.pdf

[259] For information on the vendor selection process as well as the agreement between ICANN and Power Auctions, LLC, please see: http://newgtlds.icann.org/en/applicants/auctions/summary-vendor-selection-10mar14-en.pdf

Figure 4.2.i illustrates the Auctions process and timelines:

Figure 4.2.i: New gTLD Auction Timeline



Applicants in contention were encouraged to resolve the contention amongst themselves and were able to do so up to seven days prior to the date of the auction. Being sent to auction did not prohibit self-resolution or require the set to utilize the auction to resolve the contention; rather, it created a deadline for self-resolution which facilitated many sets to resolve. As pointed out in the introduction to Chapter 4: Contention Resolution of this report, as of 31 July 2015, only 13 sets (out of 206 resolved) have resolved by way of an ICANN auction.

4.2.4 Assessment

4.2.4.1 AUCTION RULES

The AGB defined auction procedures for those contention sets that did not come to mutual agreement or resolve through CPE. These procedures called for an ascending-clock auction which utilized a second price method and defined where the auction should take place (online), how the auction rounds should be structured, the various terms associated with the auction (e.g., proxy and exit bids), and provided various auction outcome scenarios to help illustrate the process. In general, the AGB focused on facilitating auctions for direct contention, though it did define and discuss indirect contention in Section 4.1.1 "Identification of Contention Sets."[260] These procedures provided the basis for operationalizing the auction process.

From these procedures, the auction service provider developed the New gTLD Auction Rules, with versions for both direct contention sets[261] and sets containing indirect contention.[262] These rules acted as a detailed guide for applicants to facilitate auctions and included insight into eligibility, scheduling considerations, preparation procedures, deposits, bidding limits, bidding procedures, the conclusion of auctions, and payments and refunds.

The direct contention Auction Rules were posted for public comment in late 2013[263] with the final version published in March 2014.[264,265] Because of the very small number of indirect contention sets (five of the total 233) and the anticipated complexity involved in developing the rules, ICANN and the auction service provider deferred developing the rules for indirect contention until after the direct contention Auction Rules had been established. The indirect contention Auction Rules were posted for public comment in December 2014,[266] and the final version was published in February 2015.[267] The complexity associated with auction design for indirect contention sets as well as less definition in the AGB required both additional time and cost on the part of ICANN, the auction service provider, and the community for drafting and finalization.

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[260] An example of indirect contention would be: Application A is in direct contention with Application B. Application B is in direct contention with Application C. Applications A and C are only in indirect contention with each other. See AGB Section 4.1.1 for more information and examples of indirect contention.
[261] ICANN. (14 May 2014) Annex 1 to Resolution 2014.05.14.NG02. Retrieved from http://newgtlds.icann.org/en/applicants/auctions/rules-03nov14-en.pdf
[262] ICANN. (14 November 2014) Public Comment: New gTLD Auction Rules for Indirect Contention. Retrieved from https://www.icann.org/public-comments/new-gtld-auctions-indirect-contention-2014-11-14-en
[263] ICANN. New gTLD Auction Rules. Retrieved from https://www.icann.org/public-comments/new-gtld-auction-rules-2013-12-17-en
[264] Power Auctions LLC. (3 April 2014) Auction Rules for New gTLD. Retrieved from http://newgtlds.icann.org/en/applicants/auctions/rules-03apr14-en.pdf.
[265] Power Auctions LLC. (3 November 2014) Auction Rules for New gTLD. Retrieved from http://newgtlds.icann.org/en/applicants/auctions/rules-03nov14-en.pdf
[266] ICANN. (14 November 2014) Public Comment: New gTLD Auction Rules for Indirect Contention. Retrieved from https://www.icann.org/public-comments/new-gtld-auctions-indirect-contention-2014-11-14-en
[267] ICANN. (24 February 2015) Auction Rules for New gTLDs: Indirect Contentions Edition Version. Retrieved from http://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf

For both sets of rules, comments were considered and incorporated if they were in line with the AGB. By engaging in public consultation for the development of the Auction Rules, ICANN was able to ensure transparency in the development process and achieved predictability in process execution.

The rules ensured that bidder information, including bidding limits, remained confidential and that all participants adhered to anti-collusion restrictions.

The auction service provider facilitated the auctions in accordance with these rules, and ICANN has not received comments or complaints stating otherwise.

4.2.4.2 AUCTION PROCESS AND ADMINISTRATION

One of the advantages of ascending clock auctions was that multiple contention sets could be resolved simultaneously in a single auction event. ICANN published the first auction schedule on 19 March 2014.[268] There were 10 auction events scheduled over a 10-month period beginning in June 2014, with the last auction event initially scheduled for March 2015. ICANN updated the schedule on a monthly basis to reflect any changes since the previous publication of the schedule.

When ICANN published the initial auction schedule in March 2014, it simultaneously sent intent to auction notifications to all 106 contention sets which had been scheduled for one of the 10 auctions between June 2014 and March 2015. These 106 contention sets accounted for 306 applications in contention. All applicants who received the intent to auction notification were required to submit the required forms within 28 days of receipt of the notification. For several multi-application applicants, this meant completing a significant amount of paperwork within a 28-day period. There may have been some inefficiencies incurred by applicants as a result of having to complete the auction paper work well in advance of the actual auction. However, early scheduling of all contention sets for auction allowed applicants to start working toward self-resolution and ensured that applicants would be ready for auction if the need arose. The process also allowed applicants to request a postponement of the auction date. Postponements were designed to facilitate self-resolution. Thus, ICANN required that all members of the contention set agree to the postponement, and ICANN specified a deadline for when postponement requests must have been received.

As of 31 July 2015, of the 151 contention sets scheduled for auction, 58 requested postponement based on mutual consensus amongst all members of the contention set. This high number of postponement requests created additional need for ICANN to manage requests and to update auction schedules; it also extended the timeline of the contention resolution phase of the Program. However, the granting of postponements facilitated the self-resolution of contention sets. As of 31 July 2015, 93% of contention sets that elected to postpone their auction date self-resolved prior to the new auction date.

The process also helped to ensure that financial information was secure. ICANN had, for example, no knowledge of bidding deposit amounts either before or after the auction took place. Deposits were

[268] ICANN. (20 July 2015) New gTLD Program Auctions: News & Views. Retrieved from http://newgtlds.icann.org/en/applicants/auctions

submitted directly to an escrow account established for the bidder, and the auction service provider coordinated with the escrow provider to ensure the funds were received and the applicant was eligible to participate in the auction.

Both ICANN and the auction service provider worked to provide an easy-to-use and clear auction system that ensured that applicants were prepared to participate in an auction. Various training materials including a manual and videos were provided to applicants, and for those who were slated for an upcoming auction, the auction service provider facilitated practice auctions (referred to as "mock auctions") in advance of each official auction.

Per Section 4.3 of the AGB, the auction process should be self-funded. Additionally, "[a]ny proceeds from auctions will be reserved and earmarked until the uses of funds are determined. Funds must be used in a manner that supports directly ICANN's Mission and Core Values and also allows ICANN to maintain its not for profit status."

The contract with the auction service provider stipulated fees for auctions which were confirmed then canceled, as well as a 4% commission fee for auctions conducted.[269] ICANN took care to minimize costs associated with the operation of auctions by balancing the time that applicants would have to self-resolve with the time required by the auction provider to prepare for the Auction of Last Resort. The cancelation fee covered the work and time required by the auction service provider in preparing the auction. ICANN minimized these fees by confirming each auction with the auction service provider as close as possible to the time when the auction service provider needed to begin its preparation work (at least 21 days prior to the auction). However, because ICANN was not aware of when or if contention sets would self-resolve, it was sometimes necessary to proceed with the process and confirm the auction. ICANN considered whether it should begin the "quiet period" (the period which prevented applications from continuing to work towards self-resolution of the contention set) at the same time that it committed the minimum fees to the auction provider. However, it was ultimately decided that incurring some cancelation fees would be reasonable if it maximized the amount of time available for applicants to resolve contention without an ICANN-facilitated auction.

To further support cost minimization, when auction cancelation fees began to accumulate, ICANN initiated dialogue with the New gTLD Applicant Group (NTAG) to better educate them on the structure of ICANN's agreement with the auction service provider and how best to avoid cancelation fees by resolving contention sets in advance of the formal auction date confirmation from ICANN. This dialogue with the community contributed to significant cost avoidance, on the order of several hundred thousand dollars. As of 31 July 2015, 5% of the total auction proceeds have been allocated towards payment of fees.

As 31 July 2015, 13 contention sets have completed an auction.[270] A total of USD 61.8 million has been collected from these auctions, resulting in net proceeds of USD 58.7 million.[271] These auction

[269] ICANN. (Updated 6 October 2015) Summary of Auction Development and Management Agreement: Retrieved from http://newgtlds.icann.org/en/applicants/auctions/summary-development-management-agreement-07oct14-en.pdf
[270] ICANN. New gTLD Auction Results. Retrieved from https://gtldresult.icann.org/application-result/applicationstatus/auctionresults
[271] ICANN. New gTLD Auction Proceeds. Retrieved from http://newgtlds.icann.org/en/applicants/auctions/proceeds

proceeds are segregated in a bank account separate from other ICANN and Program funds and are reserved and earmarked until the ICANN Board determines a plan for the appropriate use of the funds through consultation with the community.

4.2.5 Conclusion

The AGB defined auction as a mechanism of last resort and defined the basic auction process. To ensure that applicants had a clear understanding for how auctions would occur, more detailed procedures and rules for both direct contention sets and indirect contention sets were developed by the auction provider and subject to public comment. Additionally, applicants were provided with the opportunity to participate in mock auctions prior to their auction events, supporting their full understanding of the process and rules.

In support of encouraging auction only as a "mechanism of last resort," the auction process encouraged self-resolution among applicants. Auctions were scheduled once contention sets became eligible for auction, which defined a timeline for applicants to decide whether to self-resolve. Auction postponements were also permitted and frequently requested, in support of providing applicants with sufficient time to self-resolve if desired.

In this round, auctions were implemented in a manner that supported fairness, predictability, effectiveness, and efficiency. Should auctions be included in the next application round, ICANN could replicate this process with minimal preparation.