1.1 Auctions: Mechanism of Last Resort

a.   *What is the relevant policy and/or implementation guidance (if any)?*

Implementation Guideline F: 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.

b.   *How was it implemented in the 2012 round of the New gTLD Program?*

Implementation Guideline F spoke more about the alternatives to auctions of last resort and did not reference auctions specifically. However, research was completed by the Implementation Team (a collection of staff members supporting the policy development process)[1][2] and guidance was sought from auction experts about how auctions could be used to make clear and binding decisions. Auctions were anticipated to be used to resolve contention and further, expert advice was expected in implementing the mechanism.

Along with the first draft of the Applicant Guidebook, ICANN published an Explanatory Memorandum[3] that examined the different mechanisms of last resort that could be used to resolve a contention set. This included the use of comparative evaluations, chance and auctions. The paper concluded for a variety of reasons that auctions should be used as a last resort in resolving contention setc. Although there were a large number of changes to the Applicant Guidebook between that first version and the final version, the use of auctions as a last resort to resolve contention sets did not change.

That said, it was hoped that parties involved in string contention would be able to come to a voluntary agreement to resolve the contention prior to being forced into an auction conducted by ICANN (or its designee). However, there were a number of obstacles that were put into place (some intentional, others unintentional) that prevented parties from reaching mutual agreement. The settlement between parties was expected to result in the withdrawal of all but one application for the string. In addition, applicants were precluded from making material changes

---

[1] See Implementation Team working document from 5 December 2006 here:
https://gnso.icann.org/sites/default/files/filefield_6371/gnso-pdp-dec05-staffmemo-14nov06.pdf
[2] See Implementation Team working document from 19 June 2007 here:
https://gnso.icann.org/sites/default/files/filefield_6410/pdp-dec05-staffmemo-19-jun-07.pdf
[3] https://archive.icann.org/en/topics/new-gtlds/string-contention-22oct08-en.pdf

to their applications, which prevented many types of voluntary arrangements (such as the creation of a joint venture) which would have been the natural result of a mutual agreement. The ability to create a joint venture is explored in greater detail in section [1.4], Change Requests. In practice, settlement between parties was often completed through a mechanism called private auctions, as described in greater detail in section [1.2], Auctions: Use of Private Auctions. A more detailed description of the implementation and rules around Auctions: Mechanism of Last Resort can be found in section 4.3 of the Applicant Guidebook.

After an open procurement process, Power Auctions was selected as the vendor to perform auctions of last resort. Auction procedures were based on an ascending-clock auction methodology and New gTLD Auction Rules[4] were developed to supplement the guidance provided in the Application Guidebook.

The auction process was self-funded, with proceeds from completed auctions covering expenses due to the provider. Any proceeds in excess of expenses were set aside until the Cross-Community Working Group on New gTLD Auction Proceeds[5] determines how the funds should be utilized. As of the writing of this report, ten auctions of last resort have been completed with net proceeds of over $233 million USD[6].

This topic was not specifically identified for review in the Final Issue Report, but the Working Group believes it is important to give the topic some consideration.

c. *What are the preliminary recommendations and/or implementation guidelines?*

- Many in the Working Group believes that auctions as a last resort should remain in place within the program.
- However, there should be additional options for applicants to voluntarily resolve contention sets by mutual agreement before being forced into an auction of last resort. The Working Group focused mainly on allowing applicants to change certain elements of their applications as a potential way to resolve contention sets earlier in the process (Please see recommendations in section [1.4] of this report on Change Requests, which discuss aspects like changes to the applied-for string and forming a joint venture).

d. *What are the options under consideration, along with the associated benefits / drawbacks?*

None identified at this time.

---

[4] See New gTLD Auction Rules here: https://newgtlds.icann.org/en/applicants/auctions/rules-03nov14-en.pdf and here for Indirect Contention: https://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf
[5] See the CCWG Wiki page here: https://community.icann.org/x/yJXDAw
[6] See the New gTLD Auction Proceeds page here: https://newgtlds.icann.org/en/applicants/auctions/proceeds

e. What specific questions are the PDP WG seeking feedback on?

Some participants in the Working Group believe that auctions of last resort are unfair and reward only those with the most amount of money rather than those that may best operate the TLD in the public interest. In addition, they believe that auctions discriminate against applicants in the developing world who may not have the resources to complete in an auction. Is there any merit in the above arguments? Why or Why not?

- Should other aspects (e.g., non-financial) be introduced to make auctions of last resort more "fair"? One mechanism that has been mentioned is to consider auction bids from an entity in the Global South as double or triple that of the same bid from an entity not from the Global South. For example, a bid of $100 from an entity in the Global South could be comparable to a bid of $200 from a bidder on the same string that was not from the Global South. Why or why not?
- What, if any, other measures should the Working Group consider to enhance "fairness"?
- Some participants in the Working Group believe that auctions of last resort should be eliminated and replaced with a comparative evaluation process. For example, a request for proposals (RFP) process that advantages community-based applicants, minority-supported applicants, or other factors yet to be determined. Do you believe that a comparative evaluation process could replace auctions of last resort? Why or why not?

f. Deliberations

This topic was initially introduced on 25 June 2018 at ICANN62, during the Working Group's second face-to-face session, with further consideration during Working Group calls. The Working Group debated both the pros and cons, considered alternative options and brainstormed possible solutions/ideas to reduce the overall need for using methods of last resort.

The Working Group examined whether to continue the use of auctions or whether to eliminate their usage. Both sides drew upon the idea of fairness but each had a different approach to this concept. Those in support of keeping the auction processes argued that the mechanism is fair and provides an equal-opportunity method to resolve contention sets. Those opposed to auctions stated that auctions are not fair. From this perspective, auctions are too restrictive as they focus solely on financial means when they should be focused on principles of community and diversity in the TLD ecosystem.

Some Working Group members proposed alternatives to auctions of last resort. The Working Group discussed the possibility of having a request for proposals process that could be used to resolve contention sets. One proposal was put forward to establish criteria around diversity that could be used as a basis for awarding the TLD. For example, priority could be given to applicants applying for their first TLD, applicants that are more community-focused rather than commercially-focused, and minority-supported applicants. Another possible alternative discussed was the use of a lottery mechanism to select a "winner" in the contention set.

Working Group members raised additional considerations regarding proposed alternative models. One Working Group member stated that techniques for evaluating and selecting a "winner" should not involve evaluation of content as this has implications on the Principle of Freedom of Expression. The Working Group member also raised the concern that making decisions based on criteria like diversity or community-focus may not be within the scope of ICANN's mission and impinges on the Principle of Applicant Freedom of Expression.

One Working Group member provided the opinion that it is important for any successful applicant to have the resources to fund the marketing of the gTLD or it may not gain enough registrations to survive as a stand-alone gTLD. Another noted that there is a distinct difference between having funds to market a TLD and having the funds to win a multi-million-dollar auction and also fund a marketing program for the TLD. From this perspective, it should not be presumed that a substantial marketing budget is an absolute requirement or measurement of success, noting specific examples like communities that have built awareness among constituents throughout the application development.

The Working Group discussed the idea that if auctions are ultimately retained as a method of last resort for resolving contention, there could be opportunities to mitigate differences in economic and social conditions of applicants. For example, ICANN could look at different ways to structure the bidding process to take these factors into account, such as introducing a multiplier (e.g., bids could be considered double the actual amount, where an applicant bid of $10,000 USD is treated as $20,000 USD against others in the contention set) for certain string or applicant attributes.

The Working Group thought it might be beneficial to look at private methods for resolving contention prior to reaching a mechanism of last resort. One example provided was that two applicants in contention could be permitted to form a joint venture to operate a TLD together. Another example provided was that an applicant could change the applied for string if it was found to be in contention.

One Working Group member raised that if additional types of application changes are permitted for standard applications in subsequent procedures, it is important to consider the potential impact on community applications.

This line of discussion is closely connected to topic Application Change Requests, discussed in Section [1.4] below.

In further considering methods of resolving contention, it was suggested that contention sets could be disclosed earlier in the process, allowing applicants to make informed decisions before they have spent large sums of money in the application process. It was also suggested that applicants in contention could be given additional time to work together to try to privately resolve the string contention.

g. Are there other activities in the community that may serve as a dependency or future input to this topic?

None identified at this time.

1.2 Auctions: Use of Private Auctions

   a. What is the relevant policy and/or implementation guidance (if any)?

Implementation Guideline F: 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.

   b. How was it implemented in the 2012 round of the New gTLD Program?

Applicants resolving their contention sets via private auctions was not a formal part of the 2012 round of the New gTLD Program. Accordingly, there were no policy recommendations or policy guidance on the subject.

It was envisioned that the majority of contention sets would be resolved by the parties involved, rather than relying on Auctions of Last Resort. For the 2012 round, this was indeed the case, with over 90% of contention sets being self-resolved. The Applicant Guidebook did not specify how self-resolution should occur, though applicants were prevented from replacing the applicant with a joint venture or changing the applied-for TLD. Applicants were encouraged to resolve contention sets in a manner that did not result in material changes to the remaining applicant.

There are not public statistics on how many contention sets were resolved by way of private auction. However, it is understood that it was not an uncommon occurrence. In private auctions, the majority of the proceeds collected went to the losing parties in the auction. Some have asserted that applicants involved in numerous contention sets have purposely lost in certain private auctions, collected their portion of the proceeds, and then leveraged those funds for private auctions of higher priority. There is a fear amongst some that in future new gTLD procedures, applicants may submit applications for the purpose of collecting funds in private auctions.

   c. What are the preliminary recommendations and/or implementation guidelines?

   ● The Working Group is concerned about the use of private auctions in subsequent rounds of new gTLD applications. More specifically, they are concerned that there will be some applicants that apply for new gTLD strings for the sole purpose of being a "loser" in a contention set resolved via a private auction for which the applicant would receive compensation greater than the application fee. Thus, many Working Group members are

generally opposed to the usage of private auctions to resolve string contention in future new gTLD procedures. Therefore, the Working Group recommends that measures should be put into place to prevent their occurrence in the future.

● Implementation Guidance: The Applicant Guidebook and program Terms & Conditions should be amended to state that resolution of string contention via private auction is disallowed. Further, the future base Registry Agreement should include a provision that states that if a registry operator is shown to have taken part in a private auction for their given string, it may result in having that TLD taken away from them.

d. What are the options under consideration, along with the associated benefits / drawbacks?

None identified at this time.

e. What specific questions are the PDP WG seeking feedback on?

● Do you believe private auctions should be continued in the future? If so, should the funds be distributed amongst the remaining applicants within the auction or in some other method i.e. charity, ICANN, etc? If so, what methods are most appropriate?

● The Working Group believes that prohibitions in the Applicant Guidebook, Terms & Conditions, and in the Registry Agreement are the best way to prevent private auctions in the future. In other words, participation in a private auction will result in a cancellation of your application (if discovered during the application process) or forfeiture of your TLD (if it is discovered after the TLD is awarded). Do you agree? Do you believe other suggested mechanisms (e.g., increasing application fees), may be more effective, or could be used in tandem?

● Some believe that if an application fee for a TLD were high enough, it would deter applicants from applying for TLDs with the intent of going to a private auction. Do you believe that increasing application fees will have that effect? Why or why not? If you agree, at what amount would application fees need to be set at to deter applicants from applying for TLDs with the intent of going to auction (e.g., rough estimate or instead, criteria by which an amount could be established)?

f. Deliberations

This topic was initially discussed on 25 June 2018 at ICANN62 during the Working Group's second face-to-face session and was later considered further in Working Group discussions.

The Working Group discussed the purpose and impact of private auctions. One challenge to fully understanding how and why private auctions occured in the 2012 round, as well as the impact of these auctions, is that these mechanisms were, by nature, private. Some Working Group members considered private auctions to be a form of "gaming" the system, signalling that they believed it was a defect in the program. With the process of private auctions in the 2012 round not known ahead of time, there was less chance of "gaming." With the process and

potential benefits now known, the Working Group anticipated that there could be a sizeable increase in applications for the sole purpose of participating in private auctions.

In terms of potential consequences of private auctions, it was noted that if an applicant is forced to spend a significant amount of money to win a private auction, it may weaken their financial position to operate a TLD, and therefore private auctions could have an impact on stability.

Working Group members considered whether there could be a means to require that all auctions occur in public. Some Working Group members suggested that it would be difficult to prevent auctions from going "underground." One member proposed that the Applicant Guidebook or Terms & Conditions could state that private auctions are not permitted. The Registry Agreement could state that a TLD could be taken away from a registry if it was found that the registry participated in private auction. This threat alone could deter the practice of private auctions.

The Working Group explored other possible means of discouraging private auctions in subsequent procedures. The Working Group discussed whether raising application fees could reduce the number of private auctions that take place. Some noted that while higher fees may discourage auctions, they would also have an impact on the ability of legitimate applicants to apply for TLDs. Others pointed out that a higher fee may not even discourage auctions because the windfall from losing auctions is potentially significant relative to the cost of the increased fee.

Some indicated that the intent of an applicant could be inferred by reviewing the volume of TLDs applied for, with the idea that an applicant with a few TLDs are less likely to be applying with the intention of entering into private auctions versus applicants who may apply for a portfolio of TLDs.

One Working Group member suggested that the Working Group may want to do additional research on ways that private auctions are discouraged in other industries to extract lessons learned.

Members of the Working Group seemed to support the idea of only allowing public auctions with the resulting funds to be used to support gTLD related activities such as Universal Acceptance, Applicant Support, maintenance fees, etc. Along the same lines, if the financial benefit of private auctions is eliminated by having the funds donated to a charity instead of another applicant it would again, eliminate the financial incentive and help ensure that applicants apply for TLDs for legitimate purposes. However, it was noted that enforcing this requirement would be challenging.

The Working Group discussed that another way to reduce the number of private auctions could be to encourage those in contention sets to resolve contention by other means. This idea of encouraging resolution of contention before it reaches auction, private or last resort, is similar to that noted in section [1.1] of this report on auctions of last resort. For example, one WG member suggested that allowing joint ventures in cases of contention could reduce the pressure to

resolve contention through private auctions. This line of discussion is closely connected to the topic of Application Change Requests, discussed in Section [1.4] below.

    g. Are there other activities in the community that may serve as a dependency or future input to this topic?

None identified at this time.