

Auction funds and the New gTLD Support Program¹

While this recommendation attempts to remain within the bounds defined in the first milestone report² produced by the Joint AC SO WG on support for new gTLD Applicants based on its original charter and attempts to remain consistent with the recommendations made in the second milestone report recently issued by the JAS WG, it may deviate from these reports in some respects and may go beyond the chartered constraints of the JAS Working Group.

This comment concerns the footnote from section 4.3 of the April 2011 version of the Applicant Guidebook.

¹The purpose of an auction is to resolve contention in a clear, objective manner. Proceeds from auctions will be reserved and earmarked until the uses of the proceeds are determined. It is planned that costs of the new gTLD program will offset by fees, so any funds coming from a last resort contention resolution mechanism such as auctions would result (after paying for the auction process) in additional funding. Therefore, consideration of a last resort contention mechanism should include the uses of funds. Funds must be earmarked separately and used in a manner that supports directly ICANN's Mission and Core Values and also maintains its not for profit status.

Possible uses include formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater Internet community, such as grants to support new gTLD applications or registry operators from communities in subsequent gTLD rounds, the creation of an ICANN-administered/community-based fund for specific projects for the benefit of the Internet community, the creation of a registry continuity fund for the protection of registrants (ensuring that funds would be in place to support the operation of a gTLD registry until a successor could be found), or establishment of a security fund to expand use of secure protocols, conduct research, and support standards development organizations in accordance with ICANN's security and stability mission.

Further detail on the potential uses of funds will be provided with updated Applicant Guidebook materials.

This footnote indicates that discussion of this issue is still open and is still subject to resolution before the release of the final guidebook. This personal comment recommends a process by which these funds can be allocated to resolve some of the

¹ It should be noted that the author of this comment is no longer a member of the JAS WG, did not participate in developing milestone report 2, and that the WG is not responsible for this recommendation.

² <http://icann.org/en/topics/new-gtlds/jas-milestone-report-11nov10-en.pdf>

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pending issues involved in fee reduction for applicants who meet the JAS WG's eligibility criteria.

Fee Reductions

The GAC advice to the Board states³:

GAC looks forward to the final JAS WG report. The report will need to propose sustainable mechanisms for implementation within a deadline that ensures the introduction of new gTLDs is inclusive. "propose 70% fees reduction for developing country applicants and free for least developed countries .⁴"

The recently published JAS WG Milestone 2 reports discussed various financial remedies in sections 4.1 including:

- Waive the program Development Costs for selected applicants (\$26 000 USD)
- Reduce contingency Costs (\$60 000 USD)

These reductions, if made would correspond to 46% of the fee. Further, in the JAS WG report there is a recommendation that any applicant should have at least \$45,000 of the fee, which corresponds to 45% of the balance of the fee after the recommended fee waiver, or 24% of the total \$185000 USD fee. The requirement for applicants to assume responsibility for at least 24% of the fee is in the range advised by the GAC for applicants from developing economies. It is noted that this is not an explicit recommendation of the JAS report, just a calculation based on some of their recommendations.

In order to accommodate an applicant providing only 24% of the application fee, further reduction would need to be taken from the base cost of \$100 000 USD.

The recommendation I am making is that the ICANN Board propose meeting the GAC concern for fair access to the application process by reducing the fees by 76% for all applicants who meet the conditions established by the JAS WG as eligibility criteria for financial assistance.

Concerns

Two main concerns have been expressed with providing partial fee waivers, one by the Board, and one by the GNSO Council:

- The ICANN Board has expressed concern about a method of meeting the GNSO requirement that the program be self-funding if the fees are reduced or waived.
- The GNSO council has indicated a concern that any fee reduction program may be gamed.

³ http://gac.icann.org/system/files/20110412_GAC_comments_on_the_Board_response_to_the_GAC_scorecard_0.pdf

⁴ Presuming parallel construction, I read the second condition in scorecard issue 10.1 as: 'free for least developed country applicants'. While it is clear that the GAC advises that funding should not be limited to non-governmental entities in scorecard issue 10.6, as recommended by the JAS, it is my assumption that in this paragraph 'free for least developed countries' is not making that argument. This comment does not attempt to address scorecard issue 10.6.

Self funding Requirement

In terms of funding the new gTLD program, there are two aspects:

- Cash flow for the application process
- Final accounting to match the established budget

In terms of the cash flow for processing applications, the ICANN Staff budget figures show that \$99000 USD of each fee paid is needed for processing an application. If each JAS WG eligible applicant is required to provide \$45000 USD of the fee as determined by the JAS WG recommendations, then the balance of the immediate application costs would be \$54000 USD. The recommendation I am making is that this balance can be covered by short-term usage of the contingency fees paid by a single non-JAS eligible applicant; i.e. an applicant paying the full fee. This means that half of the applicants could, theoretically, be processed as JAS eligible partial fee waiver applicants without affecting the cash flow of the application process. No one, however, expects that half of the applicants would be eligible for a partial fee waiver; an optimistic estimate would be that 10-20% of the applications might be able to meet the JAS WG eligibility and that would be a surprise as the eligibility conditions are rather narrow.

This, of course, leaves a deficit in the longer-term contingency fund. The assumption is that the full measure of contingency fees would need to be available before contingency costs start to accrue in the later phases of the program. The proposal is that auction funds, once they are available, would be used to cover the reallocated funds as well as the \$86000 USD deficit in the fees paid by JAS WG eligible applicants. This means that for every JAS WG eligible application, \$140000 USD would be taken from the auction proceeds as they become available.

While there may be some risk to the risk contingency fund in this process, it is a relatively small one as there is a near certainty of some significant auctions and if one assumes that 90% of applications will be full price applications, then out of the 500 applications budgeted by ICANN, 450 would pay the full fee and the contingency fund, after the reallocation to the application process, would still consist of \$24 Million USD⁵. Even if 20% of 500 applications were JAS WG eligible, 400 applications would pay the full fee and the contingency fund, after the short-term reallocation to the application process, before auction replenishment would be equal to \$18 Million USD. Likewise, the development costs, at 10% JAS WG eligible applications, would see a 'reimbursement' of \$11.7 Million USD whereas at 20% JAS WG eligible applications, would see a 'reimbursement' of \$ 10.4 Million USD before the deposit of proceeds obtained from the auctions.

It does appear that with this proposal there should be enough money coming in to ICANN in the short term to cover ICANN expenses, and with use of expected auction proceeds to make up the difference,

⁵ This, and the next, are approximate calculations and assume that \$60,000 USD would be reallocated to the application process and not \$54000 USD per JAS WG eligible applicant.

the ICANN coffers would be indeed be filled and the new gTLD program would pay for itself when the final project accounting was done as required by the GNSO Policy recommendations⁶.

Preventing Gaming

The GNSO Council is rightly concerned about the possibility that such a fee waiver program would be prone to gaming. Experience has shown that if there is a loophole to be exploited for profit, someone in the ICANN community will find a way to do so.

The proposal put forward by the JAS WG recommends that a parallel process be setup to determine eligibility based on the guidelines they have provided in their milestone report. While the JAS WG proposal is not explicit on this point, a Fee Waiver Application Panel could be setup to review applications for the partial fee waivers. One method by which this could happen is that applicants for partial fee waiver would be required to post an application for fee reduction simultaneous with creating their TAS registration and paying their \$5000 USD TAS fee. They would present all of the necessary documentation to the Fee Waiver Application Panel at the time of applying the partial fee waiver. The Fee Waiver Application Panel would be responsible for reviewing the applications for partial fee waiver before the beginning of the initial evaluation period. In those cases where the application for fee reduction was rejected, the applicant could receive a refund of their TAS application fee.

In order to make sure that the Fee Waiver Application Panel does not get fooled and allow any gaming, it should be composed of volunteers from ICANN community who are knowledgeable on gTLD processes, gaming patterns and development country needs and capabilities. The recommendation is that the process used to establishing AOC review panels be used to staff this Fee Waiver Application Panel coming from the diversity of ICANN community participants. Any expenses required by this panel for its operations should be covered by the contingency portion of the fees paid and repaid using auction fees.

Other Considerations

- There are several instances where additional costs might apply to applicants, for example, auction, objections, extended evaluation, comparative evaluation. In the event the applicant that has been granted a fee reduction has additional expenses, these extra costs should be provided by funding from other funding resources. ICANN will provide to the global community a web page that lists entities offering different kinds of pro-bono assistance and financial aid. The same page will list entities that are seeking assistance and have been granted fee waivers.
- In the case applicants are successful in the evaluation process and have the TLD approved, the on-going \$25,000 fee to ICANN should be waived for the first 3 years.

⁶ This argument takes as given the appropriateness of including recovery of development costs and legal contingency costs as part of the application cost which the GNSO required be program neutral. There are many who would not accept this assumption, but that argument has not prevailed in any discussions to date.

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- As stated in the footnote in the Applicant Guidebook, investigations should be held on creating a foundation or fund to handle any auction funds that are not used in the manner described in this comment. Additionally, funds could be obtained from other fundraising opportunities such as the auction of single character second level domain names, or from donations from, e.g. the incumbent gTLD and ccTLD registrars and registries⁷. In the case that such a fund or foundation can be setup in time to provide further funding opportunities for applicants in the later stages of the process, this should be documented at a later stage. A recommendation is for the Board to set up a planning committee, at the same time as the approval for the new gTLD program is approved, to investigate the various possibilities for funds and/or foundation and after consultation with the community to make recommendations on how to handle any funds obtained from auctions due to contention sets conflicts or due to auctions of other rare critical internet resources.

⁷ Various registrars and registries from both the gNSO and the ccNSO have made statements that if there were a way to donate that could be gamed, they would be interested in helping. A well-formed fund or foundation could provide an opportunity for such generosity.