



14 January 2014

Re: New gTLD Auction Rules

We appreciate the opportunity to comment on ICANN's (updated) New gTLD Auction Rules.

In its Buenos Aires Communiqué, the GAC requested "a briefing on the public policy implications of holding auctions to resolve string contention (including community applications)." We note in this respect that where a community-based applicant successfully passes Community Priority Evaluation, that applicant would trump all non-community applications – thus obviating the need for an auction with any non-community-based applicants – in the relevant contention set. (All applicants had the discretion whether to apply as a standard or community application.)

More generally, applicant agnostic [ascending clock](#) auctions have been contemplated since AGB v1 (and were contemplated in the Final GNSO Report on the Introduction of New gTLDs).

Still, if some applicants may prefer other means to resolve contention, whether through alternate auction models or otherwise, we appreciate that (where impacted applicants agree) ICANN has encouraged (private) resolution of contention prior to an ICANN Auction of Last Resort, without restricting the means impacted applicants consider appropriate (AGB § 4.1.3). Indeed, a number of contention sets are presently being successfully resolved by auctions or private arrangements.

To the extent some applicants now take issue with the AGB auction rules and call for ICANN to undertake a subjective assessment amongst otherwise equally-competing non-community applicants or to apply new auction processes/rules (ostensibly in the name of competition or diversity), we question whether such approach would expose ICANN's New gTLD Program to unnecessary risk or delay by inappropriately discriminating against certain applicants and prejudging the merits of a range of new market opportunities. Moreover, such approach would contradict ICANN's deliberate decision to score only technical and financial application answers.¹

Indirect Contention

ICANN will be aware that the current Auction Rules, and draft auction schedule, refer only to *direct* contention sets. However, as has been [pointed out](#), a number of contention sets will need to be augmented to address *indirect* contention. In fairness to applicants potentially implicated in indirect contention sets, and to avoid still further delay, we urge ICANN to give appropriate priority to indirect contention rules and auction scheduling prior to issuing the first *Intent to Auction* notice. This includes e.g., outstanding String Confusion Objections and related Reconsideration Requests.

¹ In this regard, ICANN conspicuously avoided an inherently subjective analysis of proposed TLD mission/purpose used in earlier TLD rounds; it's then CEO rejected suggestions to place "artificial limitations on today's New gTLD Program." See, www.icann.org/en/correspondence/beckstrom-to-leibowitz-10jan12-en.pdf. It is also important to recall that in some cases, the unscored portions of an application (including Question 18 concerning the TLD mission/purpose) may have been intentionally narrowly construed by applicants *inter alia* to preserve proprietary commercial intentions.

Timing

Clarity on how far in advance of an Auction ICANN intends to distribute Intent to Auction notices would be greatly appreciated, in particular as this triggers bidding deposit timelines.

Auction Participation

The following textual changes may be required in Sections 8 and 9:

- *Section 8:* “To be eligible to receive an Intent to Auction notice from ICANN, requirements a-d e below must be met.”
- *Section 8:* “For a Contention Set to be scheduled for Auction, each applied-for gTLD in the Contention Set must also meet requirement e f below, except as provided in clause 9:”
- *Section 9:* “the Contention Set may proceed to Auction if all members of the Contention Set waive requirement e f in clause 8 by submitting a request to proceed to auction...”

Processing of Bids after a Round

Notwithstanding the suggestion that quasi-random number generators are used in spectrum auctions, and that applicants might “self-remedy” the possibility of a tie in a Tie-Breaking Round via bids down to the cent, we respectfully propose that ICANN give due consideration to a second Tie-Breaking Round – however unlikely its necessity or utility may appear at first instance.

Payments, Defaults and Penalties

We propose the following suggestion at paragraph 57:

“Any Winner from whom the net balance owed of the Winning Price(s) is not received within twenty (20) Business Days of the Close of the Auction for the Contention Set is subject to being declared in default. The Auction Manager, at its ~~sole~~ reasonable discretion, may delay the declaration of default for a brief period, but only if the Auction Manager determines in its ~~sole~~ reasonable discretion that receipt of full payment appears to be imminent.”

Executing the Registry Agreement

In August 2013, we raised the issue of an inconsistency in the AGB as to execution of the Registry Agreement after winning an auction. AGB § 5.4 allows all applicants 9 months to execute the RA; in contrast, AGB § 4.3.2 provides that an applicant prevailing at auction may be declared in default if they do not execute the RA within 90 days. In the interest of fairness, ICANN should clarify that AGB § 5.4 prevails, and that all applicants will be given the same 9 months to execute the RA.

Thank you for considering our suggestions; please do not hesitate to contact us if we can be of assistance.

Yours sincerely,

/s/

Brian Beckham
Head of Legal Policy
Valideus