



Donuts thanks the ICANN Board and Staff for their hard work on furthering the Auction Rules ("Rules") and the Bidder Agreement ("Agreement") for the auctions of last resort to resolve string contention. We appreciate the progress made over the past few months and look forward to final resolution of these issues.

Overall, we generally support the current draft Rules and Agreement, as they reflect the requirements of the Applicant Guidebook (AGB) and would result in a fair and efficient means to resolve string contention sets that remain unresolved by the applicants. We note that some commenters—in a blatant attempt to change auction methodology to suit their business interests—already have argued that ICANN should not follow the requirements of the AGB, instead of following the rules agreed upon by the community and relied upon by applicants. Such suggestions are inappropriate and accordingly we will not comment further on their specifics.

We also make the following specific comments on the proposed Rules and Agreement:

1. Auction Schedule -- ICANN now proposes to complete in one year an auction schedule with ten auction sessions of approximately twenty contention sets. ICANN previously supported a rule whereby applicant organizations may, but would not be forced to, participate in more than five auctions in any one round. ICANN's stated intention was not to overwhelm any one bidder and risk causing an issue with the sanctity of the auction, thereby causing liability issues and other problems. Some members of the community argued that if Donuts took that limitation to an extreme, we could then delay the auction process by years. The record is abundantly clear that we have been longstanding and outspoken advocates *reducing* delays in processing and approving new TLD applications and delegations. As such, we never have had any intention of delaying resolution of string contention and support ICANN's above-referenced schedule, even though we have anywhere between 10-17 TLDs scheduled in each round.

The ICANN proposal gives to applicants something many have sought throughout the New TLD program: an acceptable level of certainty and predictability at each stage of the process. Knowing approximately when a contention set will go to auction, if it is not already resolved, is of great benefit to all applicants.

2. Postponements and Advancements -- ICANN has proposed that if all applicants in a contention set agree, they could request one auction postponement of up to 90 days. We think such an option should not be limited to a single request. If all members of a contention set would like a second postponement in order to finalize a private agreement, ICANN should not prohibit or discourage such efforts by mandating only one postponement. Similarly, if an entire contention set agrees to "pull forward," or advance a set from a later round to an earlier round, these sets should be permitted to fill any open slots in an earlier round (perhaps resulting from private resolution or postponement of other contention sets). In other words, contention sets should be advanced based on request of the applicants in that set and not just based on draw number or an ICANN mandate.

3. Bid Round Timing -- the Rules should be clear that bid rounds may be no shorter than 20 minutes. Bid rounds are mentioned in the AGB as being in the 20-45 minute range. We can understand why a round may be longer (e.g., it may occur at the end of an auction day), but there should be no reason why a round is shorter than 20 minutes.

4. Auctioneer Discretion -- Under the proposal, bid increments may be set solely at the discretion of the auctioneer and could be changed at any time. Similarly, the timing of a round may be changed at the auctioneer's discretion. We support some curb on the discretion of the auctioneer to make substantive changes without the consent of the parties to the auction. The auctioneer, in its discretion, should announce the bid increments and bid round timing in advance and should maintain both absent exigent circumstances or the agreement of all members of the contention set.

5. ICANN Discretion -- ICANN reserves the right in Section 7.6 of the Agreement to unilaterally change the bidder rules in its sole discretion, for any reason, up to the Deposit Deadline (one week before the auction is to be held). We do not believe this discretion is warranted or appropriate. After the Rules are approved, any proposed changes, at a minimum, should be announced publicly at least 30 days in advance of any auction, and should be for good cause based on some exigent circumstance.

6. Indemnification -- Section 4.2 of the proposed bidder agreement requires applicants to release and indemnify the auctioneer for losses and attorneys fees for anything that arises from or related to the auction. This is unacceptably over-broad. Why should applicants indemnify the auctioneer for something applicants didn't do? What if the auctioneer's software used in an auction is the subject of an infringement case? What if the auctioneer performs its duties in a negligent manner? What if ICANN sues the auctioneer—should the auctioneer seek indemnification from applicants? This provision must be rewritten in a balanced way. Any indemnification obligations from applicants must be limited to the actual conduct of the applicant.

While ICANN has progressed with regard to the auction of last resort for "direct contention sets," we call on ICANN to complete its work on rules covering the limited number of "indirect contention sets" as well. These TLDs should not be held up due to their status and the auctions of indirect sets should proceed contemporaneously with auctions of direct sets.

Finally, we call on ICANN to start the community process to determine the allocation of auctions funds received by ICANN. This process should be kicked off no later than the Singapore meeting.