Your name: Jim Prendergast

Auctions: Mechanisms of Last Resort & Private Resolution of Contention Sets (Including Private Auction)

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| **Issue** | **Applicable text (please quote directly)** | **Number and name of applicable report section** | **Cannot live with rationale** | **Proposed changes (taking into account whether others would be able to live with them)** |
|  | The revision to part i) specifies that any private resolution of contention must be in accordance with the Application Guidebook and supporting documents, including the Application Change request process. Adjustments in the text of ii) and iii) describe in greater specificity program elements as they were implemented in the 2012 round, which will carry over into subsequent rounds. | Section a. Recommendations and/or implementation guidelines, third paragraph | We’ve made several updates to what will be included in the Ts&Cs regarding disclosure and this should be referenced here.  | The revision to part i) specifies that any private resolution of contention must be in accordance with the Application Guidebook and supporting documents, including the Application Change request process and Terms and Conditions. Adjustments in the text of ii) and iii) describe in greater specificity program elements as they were implemented in the 2012 round, which will carry over into subsequent rounds. |
|  | All private resolutions reached by means of forming business combinations or other joint ventures resulting in the withdrawal of one or more applications are likely to result in material changes to the surviving application and to the extent they do, must follow the Application Change processes set forth under Topic 20 as all material changes require; material changes may require reevaluation of some or all of the new resulting application. | Recommendation xx (Rationale 2), first bullet | Material changes may not always be the result in a private resolution settlement. The terms of a business combination may not meet the requirements for terms of “material changes”. Also, the use of the words “likely” and “to the extent they do” don’t present a value add to this statement. They actually introduce an opportunity for applicants to subjectively determine if they must follow the application change process | Strikethrough – All private resolutions reached by means of forming business combinations or other joint ventures resulting in the withdrawal of one or more applications ~~are likely to result in material changes to the surviving application and to the extent they do,~~ must follow the Application Change processes set forth under Topic 20 as all material changes require; material changes may require reevaluation of some or all of the new resulting application. |
|  | Evaluators must be able to ask clarifying questions to any applicant it believes may not be submitting an application with a bona fide intent. Evaluators shall use, but are not limited to, the “Factors” described below in their consideration of whether an application was submitted absent bona fide intent. These “Factors” will be taken into consideration and weighed against all of other facts and circumstances surrounding the impacted Applicants and Applications. The existence of any one or all of the “Factors” may not themselves be conclusive of an application made lacking a bona fide use intent. | Recommendation xx (Rationale 2), first bullet | Referencing the “Factors”, each of these factors are post-evaluation or post-delegation. Requiring the evaluators to consider these factors to determine bona fide intent is pointless and irrelevant. These factors, as written, are suited for ICANN’s consideration post-evaluation/ delegation.Need consistency in the document as to who should consider these factors. At a minimum, ICANN should be involved in the process from the beginning, not just outside evaluators. | Evaluators and ICANN must be able to ask clarifying questions to any applicant it believes may not be submitting an application with a bona fide intent. Evaluators and ICANN shall use, but are not limited to, the “Factors” described below in their consideration of whether an application was submitted absent bona fide intent. These “Factors” will be taken into consideration and weighed against all of other facts and circumstances surrounding the impacted Applicants and Applications. The existence of any one or all of the “Factors” may not themselves be conclusive of an application made lacking a bona fide use intent. |
|  | Applicants may mark portions of any such responses as “confidential” if the responses include proprietary business information and such portions will not be shared or communicated by the Evaluator. | Recommendation xx (Rationale 2), second bullet | Similar to my previous point, evaluators are temporary hires. Once the evaluators are done evaluating, what information does ICANN have in order to be able to enforce bona fide intent long-term? If the “Factors” are a suspicion that the applicant didn’t meet that intent, and the evaluators are gone, who is going to raise that concern if ICANN hasn’t seen those concerns. | Strikethrough – Applicants may mark portions of any such responses as “confidential” if the responses include proprietary business information ~~and such portions will not be shared or communicated by the Evaluator.~~ |
|  | To the extent any contention sets are expanded, by having other applications added (e.g., String Confusion Objections, appeals to the String Similarity evaluation), all applicants (including both the existing members of the contention set as well as the new members) will be allowed, but are not required, to submit a new Last Resort Sealed Bid. | Recommendation xx (Rationale 3): Fourth bullet, first inset bullet | As I have pointed out, the proposal as written falls short in addressing Board concerns with gaming. The submission of new bids providesmore gaming incentives. While waiting for the string confusion objections to come through on this contention set, the applicant could be losing other contention sets in the meantime and building up a bigger bid for this set. Instead of preventing this behavior, allowing new bid submissions actually expands the opportunity for this activity.  | Eliminate the opportunity for new bids and force partie to rely on previously submitted bids. |
|  | By requiring all applicants to agree to the bona fide use clause, the Working Group believes that the Board’s primary concerns are mitigated and that private resolutions (including private auctions) as a mechanism to resolve string contention, can be permitted. | Rationale for Recommendations xx and xx (Rationale 2), Fifth Paragraph | There wasn’t broad agreement in the WG that this effort fully mitigated concerns.  | By requiring all applicants to agree to the bona fide use clause, some of the Working Group believes that the Board’s primary concerns are mitigated and that private resolutions (including private auctions) as a mechanism to resolve string contention, can be permitted. |
|  | Finally, some in the Working Group remain concerned that the practice of leveraging financial gains in one private auction to resolve other contention sets has not been addressed adequately. | Rationale for Recommendations xx and xx (Rationale 2), Fifth Paragraph | I think its important to mention the group considered sealed bid proposal as a viable solution to this practice but could not reach agreement.  | Add to end of paragraph the following language – A proposal that would have required sealed bids for private auctions submitted at the same time, which would have prevented the rolling of funds from one auction to another, was discussed but agreement was not possible. |
|  | By requiring all applicants to agree to the bona fide use clause, the Working Group believes that the Board’s primary concerns are mitigated and that private resolutions (including private auctions) as a mechanism to resolve string contention, can be permitted. However, some in the Working Group still believe that private auctions (and similar private resolution mechanisms) may be a cause for concern, and believe that data must be collected to help determine in the future if a problem exists. | Rationale for Implementation Guidance xx (Rationale 4): First paragraph | There wasn’t broad agreement in the WG that this effort fully mitigated concerns. | By requiring all applicants to agree to the bona fide use clause, some inthe Working Group believes that the Board’s primary concerns are mitigated and that private resolutions (including private auctions) as a mechanism to resolve string contention, can be permitted. However, others in the Working Group still believe that private auctions (and similar private resolution mechanisms) may be a cause for concern, and believe that data must be collected to help determine in the future if a problem exists. |
|  | Adding a bullet | d. Dependencies/relationships with other areas of this report or external effortsSecond bullet | Need reference here to Ts&Cs (and the Topic) that will be updated as a result of the WG’s deliberations.  | Add – Terms and Conditions governing application submission |