



Mr. Akram Atallah  
President, Generic Domains Division  
Internet Corporation for Assigned Names & Numbers  
12025 East Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

30 August 2013

**Re: ICANN New gTLD Auctions**

Dear Mr. Atallah,

In light of ICANN's recent confirmation that new gTLD auctions are presently scheduled to begin in mid-October, and in anticipation of forthcoming information from ICANN in this regard, we would like to highlight for your attention a number of questions/concerns regarding the auction process that may be shared by a range of applicants. In particular we are writing to seek clarity from you to ensure that all eligible applicants have sufficient time to make any necessary preparations.

**Where applicants may need to obtain high-level approval on deposit and auction sums reaching well into the millions of dollars, commercially-reasonable advance notice of any ICANN requirements is essential.**

We would be grateful if ICANN could respond to the following questions and concerns in relation to the auction process, mechanics, and timing:

1. Section 4.3.1.2 of the Applicant Guidebook (AGB) states that a bidding deposit is required from all auction participants, and that the bidding deposit will equal either 10% of an applicant-imposed bidding limit, or (if opted for) a specified amount to provide applicants with an uncapped bidding option. In order to prevent a scenario where ICANN would unintentionally create an inequity amongst applicants across or within contention sets, or would inappropriately pre-determine the value of a particular string prior to auction, we would appreciate clarity on ICANN's proposed methodology for determining the amount of deposit required for applicants electing the uncapped bidding option, which would presumably not vary from string to string.
2. Please also confirm that where the AGB states that applicants "may be given the option" to provide a specified deposit for uncapped bidding authority, ICANN would automatically grant, or at least not unreasonably withhold approval of such option.
3. If an applicant considers that ICANN's determination as to the deposit amount required for uncapped bidding authority is unrealistic, can ICANN confirm that it will allow applicants to still elect the 10% bidding deposit?
4. Will ICANN provide applicants with an invoice for their bidding deposit (which is often required in order to secure internal approval for large expenditures)?

5. We would appreciate ICANN's confirmation that it will not publicize – even amongst applicants in a particular contention set – the deposit amounts it has received (whether for individual strings, or in the aggregate) prior to an auction commencing as this could have a prejudicial effect on auction strategies and outcomes.
6. While respecting confidentiality of deposit amounts, where applicants have not elected the uncapped bidding option, how does ICANN propose to proceed in the event it would receive identical deposits – which would correspond to identical auction limits, in order to prevent a potential impasse?
7. Applicants may need to make a series of dynamic auction decisions on the basis of eventualities in multiple concurrent auctions (i.e., they may adjust what they are willing to spend in real-time, and may not be able to tie up an as-yet unknown amount for uncapped bidding authority). Again, while respecting confidentiality of deposit amounts, where applicants have not elected the uncapped bidding option, in recognition of the fact that it may be necessary to revisit auction strategies in real-time, what opportunities does ICANN propose to provide applicants for bidding authority beyond the auction cap corresponding to the 10% deposit-related auction limit?
8. Can ICANN confirm that, where applicable, it will use commercially-reasonable best efforts to return any unused bidding deposits in full to applicants, and the exact timing for applicants to receive such a refund?
9. When does ICANN anticipate publishing the bidding agreement? It is important that this be provided to applicants as soon as possible, and well in advance of any auctions.
10. Section 4.3.2 of the AGB states that “the winning bidder in any auction will be required to pay the full amount of the final price within 20 business days of the end of the auction.” As applicants may not be inclined or indeed able to tie up significant sums (reaching into multi millions of dollars), and success at auction can only be determined after the fact, it may be difficult to motivate immediate payment of full auction payments. We therefore believe it would be appropriate for ICANN to grant a winning applicant a reasonable time extension if they can clearly demonstrate good faith efforts to make payment in full (e.g., by providing evidence that instructions have been sent from the applicant to its financial institution).
11. Section 4.3.2 of the AGB states that “any winning bidder...retains the obligation to execute the required registry agreement within 90 days of the end of the auction.” However, as ICANN is aware, the AGB permits applicants nine months to negotiate the Registry Agreement. We would therefore welcome ICANN's confirmation that these contract terms control, and that in the interests of equity, applicants winning at auction – and relying in good faith on the Registry Agreement's terms – retain the reasonable right and ability to negotiate the contract, should they so choose, as per the contract terms.
12. As ICANN is aware, many applicants are publicly-listed companies with shareholder obligations, while others may be subject to laws which restrict or prohibit funds flowing to certain jurisdictions. As such, the ability of applicants to participate in an auction may be contingent on transparency in ICANN's plans for auction proceeds. Therefore we would appreciate ICANN's confirmation that any determination as to how auction proceeds will be used (whether subject to future “community input”) will respect applicable law.

13. The AGB states that “the bidding deposit must be transmitted by wire transfer to a specified bank account specified by ICANN or its auction provider at a major international bank.” As applicants are being asked to entrust millions of dollars in bidding deposits to an as-yet unknown third party, insurance and liability are serious concerns. We would therefore be grateful for clarity from ICANN on the precise location such funds would be held, and as to the entity to which applicants will be entrusting their funds (if not ICANN) including due diligence conducted, as well as commercially-appropriate assurances as to funds held.
14. Can ICANN confirm that applicants will be given reasonable time to transfer auction deposits? ICANN cannot reasonably expect applicants to deposit significant sums of money in an account with less than 30 days’ notice. Many companies simply cannot process such amounts internally in 10 days (as was required under ICANN’s new gTLD Dispute Resolution Procedure).
15. Will the account in which auction funds are placed be in escrow, or will it be interest bearing? If interest bearing, who will receive the interest?
16. The AGB provides guidance on the postponement of auctions only where two or more community applications are left in a contention set following successful completion of ICANN’s Community Priority Evaluation. We would appreciate ICANN’s confirmation that it will allow parties in a contention set (whether standard or community applicants) to request a reasonable postponement (e.g., 60-90 days) to their scheduled ICANN auction for good-faith settlement discussions.

Thank you for your time and consideration; we look forward to ICANN’s timely response to these questions and concerns.

Yours sincerely,

/s/

Brian Beckham  
Head of Legal Policy  
Valideus

cc: ICANN New gTLD Applicant Group (NTAG)