ICANN

Draft Applicant Guidebook, v2
Module 4

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

18 February 2009

Module 4

String Contention Procedures

This module describes situations in which contention over applied-for gTLD strings occurs, and the two methods available to applicants for resolving such contention cases.

4.1   String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or

2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in string confusion, called contending strings. If either situation 1 or 2 above occurs, such applications will proceed to contention resolution through either comparative evaluation or an auction, both of which are described in this module. A group of applications for contending strings is referred to as a contention set.

For a full description of considerations relating to string contention procedures, see the explanatory memorandum at http://www.icann.org/en/topics/new-gtlds/string-contention-18feb09-en.pdf.

4.1.1   Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. (In this Applicant Guidebook, "similar" means strings so similar that it is probable that detrimental user confusion would result if the two similar gTLDs are delegated into the root zone.) Contention sets are identified during Initial Evaluation from review of all applied-for TLD strings. ICANN will publish contention sets by the close of the Initial Evaluation period.

Applications for identical gTLD strings will be automatically assigned to a contention set. For example, if Applicant A and Applicant B both apply for .TLDSTRING, they will be identified as being in a contention set. Such testing for identical strings also takes into consideration the code point variants listed in any relevant language reference table.

The String Similarity Examiners will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Confusion Review described in subsection 2.1.1.1 of Module 2 is the identification of contention sets among applications that have direct or indirect contention relationships with one another.

Two strings are in **direct contention** if they are identical or so similar that there is a probability of user confusion if both were to be delegated as TLDs in the root zone. More than two applicants might be represented in a direct contention situation: if four different applicants applied for the same gTLD string, they would all be in direct contention with one another.

Two strings are in **indirect contention** if they are both in direct contention with a third string, but not with one another. Direct and indirect contention is explained in greater detail in the example that follows.

In Figure 4-1, Strings A and B are an example of direct contention. Strings C and G are an example of indirect contention. C and G both contend with B, but not with one another. The figure as a whole is one contention set. A contention set consists of all applications that are linked by string contention to one another, directly or indirectly.
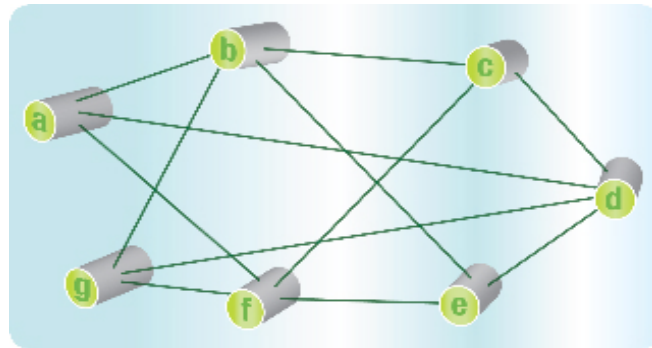
Figure 4-1 – This diagram represents one contention set, featuring both directly and indirectly contending strings.

While contention sets are determined during Initial Evaluation, the final configuration of the contention sets can only be established once the evaluation and dispute resolution process steps have concluded. This is because any application excluded through those steps might modify a contention set identified earlier. A contention set may be split it into two sets or it may be eliminated altogether as a result of an Extended Evaluation or dispute resolution proceeding.

Refer to Figure 4-2: In contention set 1, applications D and G are eliminated. Application A is the only remaining application, so there is no contention left to resolve.

In contention set 2, all applications successfully complete Extended Evaluation and Dispute Resolution, so the original contention set remains to be resolved.

In contention set 3, application F is eliminated. Since application F was in direct contention with E and J, but E and J are not in contention with one other, the original contention set splits into two sets: one containing E and K in direct contention, and one containing I and J.
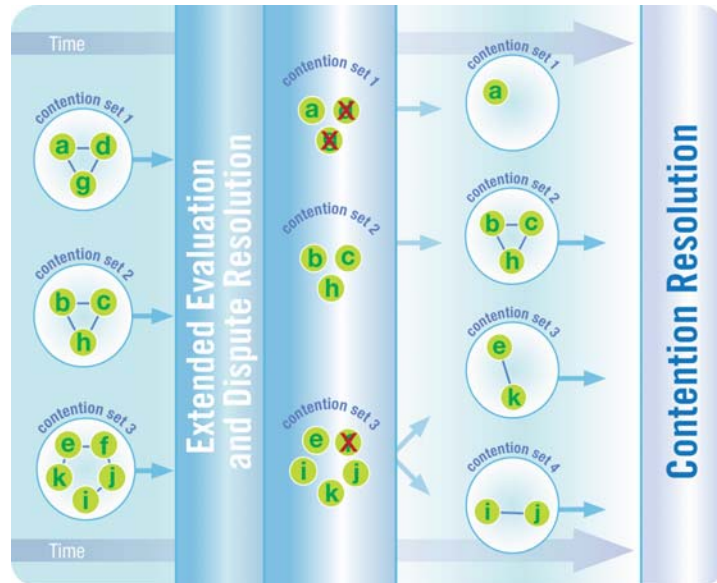
Figure 4-2 – Resolution of string contention cannot begin until all applicants within a contention set have completed all applicable previous stages.

The remaining contention cases must then be resolved through comparative evaluation or other means, depending on the circumstances. In this process, ICANN addresses each contention set to achieve an unambiguous resolution.

As described elsewhere in this document, cases of contention might be resolved by comparative evaluation or some agreement of the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

4.1.2   Impact of Dispute Resolution Proceedings on Contention Sets

If an applicant files a string confusion objection against another applicant (refer to Module 3), and the panel does find that string confusion exists (that is, finds in favor of the objector), the two applicants will be placed in direct contention with each other. Thus, the outcome of a dispute resolution proceeding based on a string confusion objection would result in a new contention set structure for the relevant applications.

4.1.3   Self-Resolution of String Contention

Applicants that are identified as being in contention may elect to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications. An applicant may not resolve string contention by selecting a new string or by replacing itself with a joint venture. It is understood that joint ventures may result from self-resolution of string contention by applicants. However, material changes in applications (for example, combinations of applicants to resolve contention) will require re-evaluation. This might require additional fees or evaluation in a subsequent application round. Applicants are encouraged to resolve contention by combining in a way that does not materially affect the surviving application.

4.1.4   Possible Contention Resolution Outcomes

An application that has successfully completed all previous stages and is no longer part of a contention set due to changes within the contention set (as described in subsection 4.1.1) or self-resolution by applicants in the contention set (as described in subsection 4.1.3) may proceed to the next stage.

An application that prevails in a contention resolution procedure, either comparative evaluation or auction, may proceed to the next stage.

In some cases, an applicant who is not the outright winner of a string contention resolution process can still proceed. This situation is explained in the following paragraphs.

 If the strings within a given contention set are all identical, the applications are in direct contention with each other and there can only be one winner that proceeds to the next step.

However, where there are both direct and indirect contention situations within a set, more than one string may survive the resolution.

For example, consider a case where string A is in contention with B, and B is in contention with C, but C is not

in contention with A. If A wins the contention, B is eliminated but C can go on since C is not in direct contention with the winner and both strings can coexist in the DNS without risk for confusion.

4.2 Comparative Evaluation

Comparative evaluation will only occur if a community-based applicant has selected this option in its application. Comparative evaluation can begin once all applicants in the contention set have completed all previous stages of the process.

The comparative evaluation is an independent analysis. Scores received in the applicant reviews are not carried forward to the comparative evaluation. Each applicant participating in the comparative evaluation begins with a score of zero.

4.2.1 Eligibility for Comparative Evaluation

As described in subsection 1.2.2 of Module 1, all applicants are required to identify whether their application type is:

• Community-based; or

• Open.

Only community-based applicants may elect a comparative evaluation. If there is contention for strings, a claim to support a community by one party will be a reason to award priority to that application. If one community-based applicant within a contention set makes this election, all other community-based applicants in the same contention set will be part of the comparative evaluation.

Applicants designating their applications as community-based will also be asked to respond to a set of questions in the application form that would provide relevant information if a comparative evaluation occurs.

Before the comparative evaluation begins, all community-based applicants in the contention set may be asked to provide additional information relevant to the comparative evaluation. Additionally, the community-based applicants will be required to submit a deposit to cover the cost of the comparative evaluation. The deposit will be refunded to applicants that score 14 or higher.

4.2.2   *Comparative Evaluation Procedure*

Comparative evaluations for each contention set will be performed by a comparative evaluation provider appointed by ICANN to review applications for contending gTLD strings. The provider's charter is to determine whether one of the community-based applications clearly and demonstrably have the support of the specified community. Open applicants within the contention set, if any, will not participate in the comparative evaluation.

If a single community-based applicant is found to meet the criteria (see subsection 4.2.3 below) for succeeding in the comparative evaluation, that applicant will be declared to prevail in the comparative evaluation and may proceed with its application. If more than one community-based applicant is found to meet the criteria, this will be resolved as follows:

- In the case where the applicants are in <u>indirect contention</u> with one another (see subsection 4.1.1), they will both be allowed to proceed to the next stage.

- In the case where the applicants are in <u>direct contention</u> with one another and have named the same community in their applications, one applicant will be granted priority if it has clearly demonstrated that it represents a majority and significantly larger share of the community. If no applicant has made such a demonstration, the applicants will proceed to an auction.

- In the case where the applicants are in <u>direct contention</u> with one another and have named different communities in their applications, the contention will be resolved through an auction among these applicants.

If none of the community-based applicants are found to meet the criteria, then all of the parties in the contention set (both open and community-based applicants) will proceed to an auction.

4.2.3   *Comparative Evaluation Criteria*

A panel appointed by the comparative evaluation provider will review and score the one or more community-

based applicants who elected comparative evaluation against four criteria as follows:

Criteria #1: Nexus between Proposed String and Community

		Score		
4	3	2	1	0
String is strongly associated with the community or community institution and has no other significant associations.	String is clearly associated with the community but also has other associations.	String is relevant to the community but also has other well-known associations.	The string, although relevant to the community, primarily has wider associations.	The nexus between string and community does not fulfill the requirement for scoring 1.

In detail, the nexus between string and community will be given:

- a score from 3, for strong association with the community, to 0, for insufficient association with the community.

- a score of 1 for absence of other associations to the string, i.e., the string is unique to this community, and a score of 0 if the string is known to also be a label for other communities.

Criteria #2: Dedicated Registration Policies

		Score		
4	3	2	1	0
Registration eligibility is strictly limited to members of the pre-established community identified in the application. Registration policies also include name selection and other requirements consistent with	Registration eligibility is predominantly available to members of the pre-established community identified in the application, and also permits people or groups formally associated with the community to register.	Registration eligibility is predominantly available to members of the pre-established community identified in the application, and also permits people or groups informally associated	Registration eligibility is encouraged or facilitated for members of the pre-established community identified in the application, and also permits others to register. Policies include only	The registration policies do not fulfill the requirement for scoring 1

Score				
4	3	2	1	0
the articulated scope and community-based nature of the TLD. Proposed policies include specific enforcement measures including investigation practices, penalties, takedown procedures and appeal mechanisms.	Policies include most elements for a high score but one element is missing.	with the community to register. Policies include some elements for the high score but more than one element is missing.	one of the elements for high score.	

In detail, the registration policies will be given:

- A score from 2 for eligibility restricted to community members, to 0 for a largely unrestricted approach to eligibility.

- A score of 1 for clear rules concerning name selection and other requirements for registered names of relevance to the community addressed, and a score of 0 for absence of rules concerning name selection and other requirements for registered names, or rules that are insufficient or lack relevance.

- A score of 1 for satisfactory enforcement measures and a score of 0 for absence of enforcement measures or measures that are insufficient.

Criteria #3: Community Establishment

		Score		
4	3	2	1	0
Clearly identified, organized, and pre-established community of considerable size and longevity.	The community addressed fulfills all but one of the requirements for a high score.	The community addressed fulfills more than one of the requirements for a high s core, but fails on two or more requirements.	The community addressed fulfills only one of the requirements for a high score.	The community addressed does not fulfill any of the requirements for a high score.

In detail, the community establishment will be given:

- a score from 2, for a clearly identified, organized, and pre-established community, to 0 for a community lacking clear identification, organization, and establishment history.

- a score from 2 for a community of considerable size and longevity, to 0 for a community of very limited size and longevity.

Criteria #4: Community Endorsement

		Score		
4	3	2	1	0
Application from, or endorsement by, a recognized community institution, or application endorsed by member organizations.	Endorsement by most groups with apparent relevance, but unclear if the whole community is supportive.	Endorsement by groups with apparent relevance, but also some opposition from groups with apparent relevance.	Assorted endorsements from groups of unknown relevance, but also clear opposition from groups with apparent relevance.	Limited endorsement by groups of unknown relevance, Strong opposition from groups with apparent relevance.

In detail, the community endorsement will be given:

- a score from 2 for clear and documented support, to 0 for no or limited endorsement of uncertain relevance.

- a score of 2 for no opposition of relevance, to 0 for strong and relevant opposition.

Scoring – An applicant must score at least 14 points to be declared a winner in a comparative evaluation. If no applicant scores 14 or more, there is no clear winner. If only one applicant scores 14 or more, that applicant will be declared the winner.

If more than one applicant scores 14 or more, all will be declared winners and the contention will be resolved according to the procedure described in subsection 4.2.2.

Following the comparative evaluation, ICANN will review the results and reconfigure the contention set as needed. The same procedure will occur for remaining contention sets involving any community-based application that has elected comparative evaluation. If no community-based applicant that has elected comparative evaluation is left in the contention set, any applications remaining in contention will proceed to an auction. Applications with no remaining contention will proceed toward delegation.

4.3   Auction: Mechanism of Last Resort[1]

It is expected that most cases of contention will be resolved by the two-phased comparative evaluation, or agreement of the parties. Auction is a tie-breaker method for resolving string contention among the applicants within a contention set, if the contention has not been resolved by other means.

In practice, ICANN expects that most contention cases will be resolved through other means before reaching the auction stage. There is a possibility that significant funding will accrue to ICANN as a result of one or more auctions. [2]

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[1] This information is included to provide implementation details for public comment.

[2] The 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

4.3.1 Auction Procedures

This section provides applicants an informal introduction to the practicalities of participation in an ascending-clock auction. It is intended only as a general introduction and is only preliminary. If conflict arises between this section and the auction rules issued prior to commencement of any auction proceedings, the auction rules will prevail.

All auctions will be conducted over the Internet, with participants placing their bids remotely using a web-based software system designed especially for auction. The auction software system will be compatible with current versions of most prevalent browsers, and will not require the local installation of any additional software.

Auction participants ("bidders") will receive instructions for access to the online auction site. Access to the site will be password-protected and bids will be encrypted through SSL. If a bidder temporarily loses connection to the Internet, that bidder may be permitted to submit its bids in a given auction round by fax, according to procedures described in the auction rules. The auctions will generally be conducted to conclude quickly, ideally in a single day.

The auction will be carried out in a series of auction rounds, as illustrated in Figure 4-3. The sequence of events is as follows:

1. For each auction round, the auctioneer will announce in advance: (1) the start-of-round price, (2) the end-of-round price, and (3) the starting and ending times of the auction round. In the first auction round, the start-of-round price for all bidders in the auction will be USD 0. In later auction rounds, the start-of-round price will be its end-of-round price from the previous auction round.

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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 the proposed budget for the new gTLD process and updated Applicant Guidebook materials.
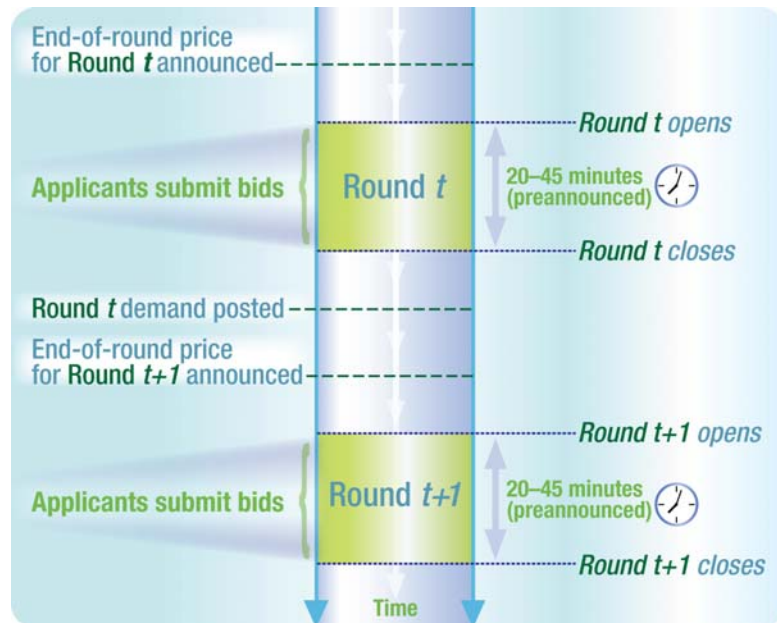
Figure 4-3 – Sequence of events during an ascending-clock auction.

2. During each auction round, bidders will be required to submit a bid or bids representing their willingness to pay within the range of intermediate prices between the start-of-round and end-of-round prices. In this way a bidder indicates its willingness to stay in the auction at all prices through and including the end-of-auction round price, or its wish to exit the auction at a price less than the end-of-auction round price, called the exit bid.

3. Exit is irrevocable. If a bidder exited the auction in a previous auction round, the bidder is not permitted to re-enter in the current auction round.

4. Bidders may submit their bid or bids at any time during the auction round.

5. Only bids that comply with all aspects of the auction rules will be considered valid. If more than one valid bid is submitted by a given bidder within the time limit of the auction round, the auctioneer will treat the last valid submitted bid as the actual bid.

6. At the end of each auction round, bids become the bidders' legally-binding offers to secure the winning slot at prices up to the respective bid amounts, subject to closure of the auction in accordance with the auction

rules. In later auction rounds, bids may be used to exit from the auction at subsequent higher prices.

7. After each auction round, the auctioneer will disclose the aggregate number of bidders remaining in the auction at the end-of-round prices for the auction round, and will announce the prices and times for the next auction round.

- Each bid should consist of a single price associated with the application, and such price must be greater than or equal to the start-of-round price.

- If the bid amount is strictly less than the end-of-round price, then the bid is treated as an exit bid at the specified amount, and it signifies the bidder's binding commitment to pay up to the bid amount if its application is approved.

- If the bid amount is greater than or equal to the end-of-round price, then the bid signifies that the bidder wishes to remain in the auction at all prices in the current auction round, and it signifies the bidder's binding commitment to pay up to the end-of-round price if its application is approved. Following such bid, the application cannot be eliminated within the current auction round.

- To the extent that the bid amount exceeds the end-of-round price, then the bid is also treated as a proxy bid to be carried forward to the next auction round. The bidder will be permitted to change the proxy bid amount in the next auction round, and the amount of the proxy bid will not constrain the bidder's ability to submit any valid bid amount in the next auction round.

- No bidder is permitted to submit a bid for any application for which an exit bid was received in a prior auction round.

- If no valid bid is submitted within a given auction round for an application that remains in the auction, then the bid amount is taken to be the

amount of the proxy bid, if any, carried forward from the previous auction round or, if none, the bid is taken to be an exit bid at the start-of-round price for the current auction round.

8. This process continues, with the auctioneer increasing the price range for each given TLD string in each auction round, until there is one remaining bidder at the end-of-round price. After an auction round in which this condition is satisfied, the auction concludes and the auctioneer determines the clearing price. The last remaining application is deemed the successful application, and the associated bidder is obligated to pay the clearing price.

Figure 4-4 illustrates how an auction for five contending applications might progress.
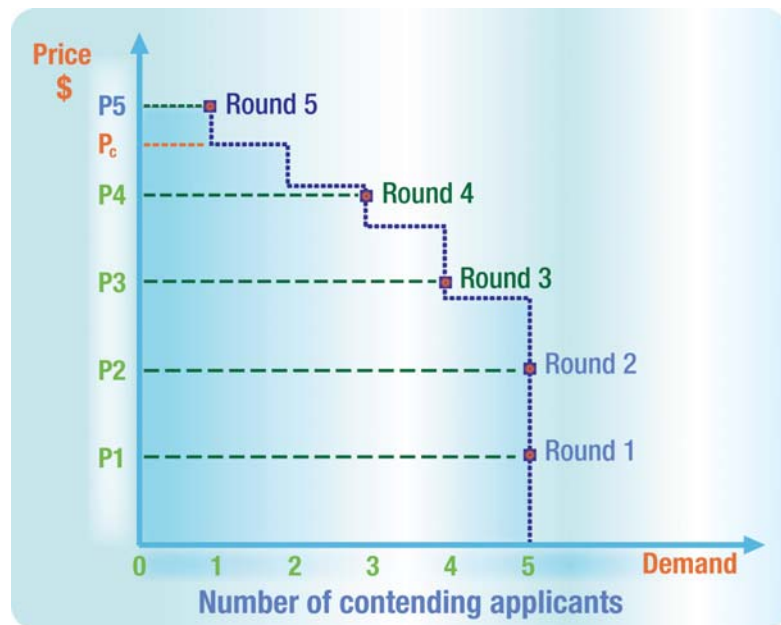

Figure 4-4 – Example of an auction for five mutually-contending applications.

•   Before the first auction round, the auctioneer announces the end-of-round price P_1.

•   During Auction round 1, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least P_1. Since the aggregate demand

exceeds one, the auction proceeds to Auction round 2. The auctioneer discloses that five contending applications remained at P_1 and announces the end-of-round price P_2.

- During Auction round 2, a bid is submitted for each application. In Figure 4-4, all five bidders submit bids of at least P_2. The auctioneer discloses that five contending applications remained at P_2 and announces the end-of-round price P_3.

- During Auction round 3, one of the bidders submits an exit bid at slightly below P_3, while the other four bidders submit bids of at least P_3. The auctioneer discloses that four contending applications remained at P_3 and announces the end-of-round price P_4.

- During Auction round 4, one of the bidders submits an exit bid midway between P_3 and P_4, while the other three remaining bidders submit bids of at least P_4. The auctioneer discloses that three contending applications remained at P_4 and announces the end-of-auction round price P_5.

- During Auction round 5, one of the bidders submits an exit bid at slightly above P_4, and one of the bidders submits an exit bid at P_c midway between P_4 and P_5. The final bidder submits a bid greater than P_c. Since the aggregate demand at P_5 does not exceed one, the auction concludes in Auction round 5. The application associated with the highest bid in Auction round 5 is deemed the successful application. The clearing price is P_c, as this is the lowest price at which aggregate demand can be met.

To the extent possible, auctions to resolve multiple string contention situations may be conducted simultaneously.

4.3.1.1   Currency

For bids to be comparable, all bids in the auction will be submitted in any integer (whole) number of US dollars.

4.3.1.2   Fees

A bidding deposit will be required of applicants participating in the auction, in an amount to be determined.

All deposits from nondefaulting losing bidders will be returned following the close of the auction.

4.3.2   Winning Bid Payments

Any applicant that participates in an auction will be required to sign a bidder agreement that acknowledges its rights and responsibilities in the auction, including that its bids are legally binding commitments to pay the amount bid if it wins; that is, if its application is approved, and to enter into the prescribed registry agreement with ICANN— together with a specified penalty for defaulting on its bid.

The winning bidder in any auction will be required to pay the full amount of the final price within 10 business days of the end of the auction. Payment is to be made by wire transfer to the same international bank account as the bidding deposit, and the applicant's bidding deposit will be credited toward the final price.

Any winning bidder for whom the full amount of the final price is not received within 10 business days of the end of an auction is subject to being declared in default. At their sole discretion, ICANN and its auction provider may delay the declaration of default for a brief period, but only if they are convinced that receipt of full payment is imminent.

4.3.3   Post-Default Procedures

Once declared in default, the winning bidder is subject to immediate forfeiture of its position in the auction and assessment of default penalties. After a winning bidder is declared in default, the remaining bidders will receive an offer to have their applications accepted, one at a time, in descending order of their exit bids. In this way, the next bidder would be declared the winner subject to payment of its last bid price.

Each bidder that is offered the relevant gTLD will be given a specified period—typically, four business days—to respond as to whether it wants the gTLD. A bidder who responds in the affirmative will have 10 business days to submit its full payment.

The penalty for defaulting on a winning bid will be the greater of the following: (1) 10% of the defaulting bid, or (2) the amount by which the defaulting bid exceeds the bid amount that ICANN is ultimately paid by an applicant for the identical or similar contending gTLD string.

Default penalties will be charged against any defaulting applicant's bidding deposit before the associated bidding deposit is returned and, to the extent that the default penalty exceeds the associated bidding deposit, the defaulting applicant will also be liable for the additional amount.

4.4 Contention Resolution and Contract Execution

An applicant that has been declared the winner of a contention resolution process will proceed by entering into contract execution step. (Refer to section 5.1 of Module 5.)

If the winner of the contention resolution has not executed a contract within 90 days of the decision, ICANN has the right to extend an offer to the runner-up applicant to proceed with its application. For example, in a comparative evaluation, the applicant with the second-highest score (if equal to or greater than fourteen, might be selected to proceed toward delegation. (Refer to Module 5.) Similarly, in an auction, another applicant who would be considered the runner-up applicant might proceed toward delegation. This offer is at ICANN's option only. The runner-up applicant in a contention resolution process has no automatic right to an applied-for gTLD string if the first place winner does not execute a contract within a specified time.

DRAFT - New gTLD Program - String Contention

ICANN

Application/Admin Check

Applicant begins application process

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If applicant is community based, must choose whether it elects comparative evaluation in the event of string contention

→

Applicant completes application process in TLD Application System (TAS)

→

ICANN publishes list of all applications

Initial Evaluation (IE) String Review

Algorithm run by ICANN for all applied-for gTLDs against all other applied-for gTLDs

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String Similarity Examiners use algorithm results and expertise to group similar and identical strings into Contention Sets

IE + EE + Dispute Res

IE, Extended Evaluation (EE), and Dispute Resolution continue. Some applications may not pass certain elements of the review process, *which may alter the contention sets.*

String Contention

Is the applied-for gTLD in a contention set?

— YES → Are applicants with contending strings able to self-resolve contention?

— YES (top) →

— NO → Have one or more Community-Based Applicant(s) (CBA) elected Comparative Evaluation?

— YES → CBA(s) enters Comparative Evaluation → Does one clear winner emerge?

— NO → Applicants with contending strings participate in auction: One or more parties proceed to next stage

— NO (from contention set) →

Does one clear winner emerge? — NO → Applicants with contending strings participate in auction — YES →

Transition to Delegation

Applicant enters Transition to Delegation phase