



PUBLIC NOTICE

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April 15, 2004

REVISED INVENTORY AND AUCTION START DATE FOR FM BROADCAST CONSTRUCTION PERMITS

Auction Rescheduled for November 3, 2004

COMMENT SOUGHT ON RESERVE PRICES OR MINIMUM OPENING BIDS AND OTHER AUCTION PROCEDURES

Report No. AUC-04-37-I (Auction No. 37)

By this Public Notice, the Wireless Telecommunications Bureau (“WTB”) and the Media Bureau (“MB”) (collectively referred to as the “Bureaus”) reschedule the postponed FM Broadcast auction (“Auction No. 37”) for November 3, 2004, and seek comment on previously announced procedures for Auction No. 37. Also by this Public Notice, we announce the revised auction inventory for Auction No. 37. As discussed in greater detail herein, Auction No. 37 will be composed of 290 construction permits in the FM broadcast service as listed in Attachment A.

Specifically, Attachment A lists vacant FM allotments, reflecting FM channels assigned to the Table of FM Allotments, 47 C.F.R. § 73.202(b), pursuant to the Commission’s established rulemaking procedures, designated for use in the indicated community. Pursuant to the policies established in the *Broadcast First Report and Order*, applicants may apply for any vacant FM allotment, as specified in Attachment A; applicants specifying the same FM allotment will be considered mutually exclusive and, thus, the construction permit for the FM allotment will be awarded by competitive bidding procedures.¹ The reference coordinates for each vacant FM allotment are also listed in Attachment A.²

¹ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses, *First Report and Order* in MM Docket No. 97-234, GC Docket No. 92-52 and GEN Docket No. 90-264, 13 FCC Rcd 15920, 15961, 15974-15975 (1998) (“*Broadcast First Report and Order*”), on recon., *Memorandum Opinion and Order*, 14 FCC Rcd 8724 (1999), on further recon., *Memorandum Opinion and Order*, 14 FCC Rcd 14521(1999).

² With regard to the FM service, in the *Broadcast First Report and Order*, the Commission gave applicants the opportunity to submit a set of preferred site coordinates as an alternative to the reference coordinates for the vacant FM allotment upon which they intend to bid. Detailed instructions for specifying preferred site coordinates will be given in a future Public Notice announcing the terms and conditions of Auction No. 37, which will provide

I. Background

Auction No. 37 was originally scheduled to commence February 21, 2001, but was subsequently postponed.³ In the *Report and Order in Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, the Commission adopted new procedures to select among applicants competing for noncommercial educational (“NCE”) reserved channels.⁴ The Commission also concluded that it would use competitive bidding to select among competing applications for nonreserved channels even if NCE applicants are among the competitors.⁵ Several parties, including National Public Radio, sought judicial review of this decision in the U.S. Court of Appeals for the D.C. Circuit. In *National Public Radio, Inc. et al. v. F.C.C.*, the court of appeals vacated the portion of the *NCE Report and Order* that required NCE applicants for authorizations in the nonreserved spectrum to participate in auctions with mutually exclusive commercial applicants.⁶ In light of *NPR*, the Commission postponed Auction No. 37 while it formulated its response to the court’s decision.⁷

In the *NCE Second Report and Order*, the Commission established new policies and procedures for licensing nonreserved broadcast spectrum in response to *NPR*. Pursuant to a *Public Notice* released September 30, 2003, the Media Bureau opened a window to permit NCE reservation showings for certain vacant FM allotments.⁸ The *Public Notice* established a November 21, 2003, deadline for filing petitions for rulemaking to amend the FM Table of Allotments to reserve FM channels.⁹ By the reservation filing

guidelines for completing FCC Form 175 and exhibits. See *Broadcast First Report and Order*, 13 FCC Rcd at 15974 and n.153.

³ The original February 21, 2000, date for Auction No. 37 was postponed to May 9, 2001, in the Public Notice announcing the minimum opening bids and auction procedures. “Auction Notice and Filing Requirements for FM Broadcast Construction Permits; Auction Rescheduled from February 21, 2001 to May 9, 2001; Minimum Opening Bids and Other Procedural Issues,” *Public Notice*, 16 FCC Rcd 928 (WTB/MMB 2001) (“*2001 Auction No. 37 Procedures Public Notice*”). The May 9, 2001, commencement date was postponed until December 5, 2001, in a March 7, 2001, Public Notice. “Auction for FM Broadcast Construction Permits Postponed until December 5, 2001,” *Public Notice*, 16 FCC Rcd 5850 (WTB/MMB 2001). The December 5, 2001, commencement date was postponed indefinitely in the *September 2001 Postponement Public Notice*. “FM Auction No. 37 Postponed,” *Public Notice*, 16 FCC Rcd 16479 (WTB/MMB 2001) (“*September 2001 Postponement Public Notice*”).

⁴ *Reexamination of the Comparative Standards for Noncommercial Educational Applicants*, MM Docket 95-31, *Notice of Proposed Rulemaking*, 10 FCC Rcd 2877 (1995); *Further Notice of Proposed Rulemaking*, 13 FCC Rcd 21167 (1998); *Report and Order*, 15 FCC Rcd 7386 (2000) (“*NCE Report and Order*”); *Memorandum Opinion and Order*, 16 FCC Rcd 5074 (2001) (“*NCE MO&O*”); *Second Report and Order*, 18 FCC Rcd 6691 (2003) (“*NCE Second Report and Order*”). Petitions for reconsideration of the *NCE Second Report and Order* are pending with the Commission. See “Petitions for Reconsideration and Clarification of Action in Rulemaking Proceeding,” *Public Notice*, Report No. 2614 (rel. July 1, 2003).

⁵ *NCE Report and Order*, 15 FCC Rcd at 7433 ¶ 111. In the *NCE Report and Order*, the Commission also adopted comparative standards to select among competing applicants for NCE broadcast stations on channels reserved for their exclusive use, and relaxed the standards for reserving a nonreserved FM channel for NCE use. The newly adopted comparative standards to select among competing applicants for NCE broadcast stations have not yet been implemented because they also have been challenged in court. See *American Family Association, Inc. et al. v. F.C.C.*, appeal docketed, Case No. 00-1310 (D.C. Cir. July 14, 2000).

⁶ *National Public Radio, Inc. et al. v. FCC*, 254 F.3d 226 (D.C. Cir. 2001) (“*NPR*”).

⁷ See *September 2001 Postponement Public Notice*, 16 FCC Rcd 16479.

⁸ “Media Bureau Opens Window to Permit Noncommercial Educational Reservation Showings for Certain Vacant FM Allotments,” *Public Notice*, 18 FCC Rcd 19600 (MB 2003).

⁹ See 47 C.F.R. § 73.202(b).

deadline, 129 Petitions for Rulemaking had been filed, including petitions to reserve 60 vacant FM allotments previously scheduled to be included in Auction No. 37.

In Attachment A to the *2001 Auction No. 37 Procedures Public Notice*, the Bureaus listed 351 FM allotments for which construction permits would be auctioned. The Bureaus subsequently added and removed certain allotments from the Auction No. 37 inventory,¹⁰ and the resulting FM allotments, minus those for which Petitions for Rulemaking requesting reservation as NCE channels have been filed, will comprise the inventory for Auction No. 37. Therefore, Auction No. 37 will consist of 290 construction permits in the FM broadcast service for stations throughout the United States and Guam. These construction permits are for vacant FM allotments, reflecting FM channels assigned to the Table of FM Allotments, 47 C.F.R. § 73.202(b).¹¹

The Balanced Budget Act of 1997 requires the Commission to “ensure that, in the scheduling of any competitive bidding under this subsection, an adequate period is allowed . . . before issuance of bidding rules, to permit notice and comment on proposed auction procedures”¹² Consistent with the provisions of the Balanced Budget Act and to ensure that potential bidders have adequate time to familiarize themselves with the specific rules that will govern the day-to-day conduct of an auction, the Commission directed the WTB, under its existing delegated authority,¹³ to seek comment on a variety of auction-specific procedures prior to the start of each auction.¹⁴ Before Auction No. 37 was postponed, on

¹⁰ See, e.g., “Auction of Additional FM Broadcast Construction Permits To Be Included In Auction No. 37 Scheduled For February 21, 2001,” *Public Notice*, 15 FCC Rcd 25486 (WTB/MMB 2000) (“*Auction No. 37 Additional Comment Public Notice*”); *2001 Auction No. 37 Procedures Public Notice*, 16 FCC Rcd 928; “Removal of FM Broadcast Construction Permit from Auction No. 37,” *Public Notice*, 16 FCC Rcd 2522 (WTB/MMB January 30, 2001) (removing Channel 252C3 at Long Beach, NC, FM 190, from the Auction No. 37 inventory); “Removal of FM Broadcast Construction Permit from Auction No. 37,” *Public Notice*, 16 FCC Rcd 4627 (WTB/MMB February 22, 2001) (removing Channel 254A at Laramie, WY, FM 350, from the Auction No. 37 inventory).

¹¹ When two or more short-form applications (FCC Form 175) are accepted for filing within an MX Group, mutual exclusivity exists for auction purposes. *Broadcast First Report and Order*, 13 FCC Rcd at 15978-80, ¶¶ 149-154. See also Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-252, *Second Report and Order*, 9 FCC Rcd 2348, 2376, ¶ 165 (1994). Once mutual exclusivity exists for auction purposes, even if only one applicant within an MX Group submits an upfront payment, that applicant is required to submit a bid in order to obtain the construction permit. Any applicant that submits a short-form application that is accepted, but fails to timely submit an upfront payment, will retain its place in the MX Group but, having purchased no bidding eligibility, will not be eligible to bid.

¹² Section 3002(a)(E)(i), Balanced Budget Act of 1997, Pub. L. 105-33, 111 Stat. 251 (1997), amending Section 309(j) of the Communications Act, 47 U.S.C. § 309(j) (“Balanced Budget Act”).

¹³ See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, WT Docket No. 97-82, *Order, Memorandum Opinion and Order, and Notice of Proposed Rule Making*, 12 FCC Rcd 5686, 5697, ¶ 16 (1997) (“*Part 1 Order*”) (“We also clarify that pursuant to Section 0.131 of our rules, the Chief, Wireless Telecommunications Bureau, has delegated authority to implement all of the Commission's rules pertaining to auctions procedures”).

¹⁴ See Amendment of Part 1 of the Commission's Rules – Competitive Bidding Procedures, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, 4660-4685 MHz, WT Docket No. 97-82, ET Docket No. 94-32, *Third Report and Order and Second Further Notice of Proposed Rule Making*, 13 FCC Rcd 374, 448, ¶ 124 (1998) (“*Part 1 Third Report and Order*”). The Commission directed the WTB to seek comment on specific mechanisms related to day-to-day auction conduct including, for example, the structure of bidding rounds and stages, establishment of minimum opening bids or reserve prices, minimum acceptable bids, initial maximum eligibility for each bidder, activity requirements for each stage of the auction, activity rule waivers, criteria for determining reductions in eligibility, information regarding bid withdrawal and bid removal, stopping rules, and information relating to auction delay, suspension or cancellation. *Id.* at ¶ 125. See also *Broadcast First Report and Order*, 13 FCC Rcd at 15967-15968. (Consistent with the Part 1 rules, the Commission delegated authority to the

September 25, 2000, the Bureaus released a public notice¹⁵ seeking comment on the establishment of reserve prices and/or minimum opening bids and procedures for Auction No. 37, in accordance with the Balanced Budget Act of 1997.¹⁶ On September 29, 2000, the Bureaus released a second Public Notice, adding eight additional vacant FM allotments to the auction inventory and seeking comment on auction procedures and minimum opening bids with respect to the additional allotments.¹⁷ The Bureaus received twenty comments and three reply comments in response to the *2000 Auction No. 37 Comment Public Notice* and the *Auction No. 37 Additional Comment Public Notice*. Following this round of comments, on January 19, 2001, the Bureaus released the *2001 Auction No. 37 Procedures Public Notice*,¹⁸ in which the Bureaus, *inter alia*, reduced the minimum opening bids for the Auction No. 37 construction permits and set forth the procedures to be followed in Auction No. 37. We take this opportunity to seek comment again on the following issues related to Auction No. 37.

II. Auction Structure

A. Simultaneous Multiple Round Auction Design

We propose to award all construction permits included in Auction No. 37 in a single stage, simultaneous multiple round auction. As described further below, this methodology offers every construction permit for bid at the same time with successive bidding rounds in which bidders may place bids. We seek comment on this proposal.¹⁹

B. Upfront Payments and Bidding Eligibility

The Bureaus have delegated authority and discretion to determine an appropriate upfront payment for each FM construction permit being auctioned, taking into account such factors as the efficiency of the auction process and the potential value of spectrum.²⁰ As described further below, the upfront payment is a refundable deposit made by each bidder to determine and establish eligibility to bid on FM construction permits. Upfront payments related to the specific spectrum subject to auction protect against frivolous or insincere bidding and provide the Commission with a source of funds from which to collect payments owed at the close of the auction.²¹ With these guidelines in mind for Auction No. 37, as well as comments received in response to the *2000 Auction 37 Comment Public Notice* and *Auction No. 37*

Mass Media Bureau [now Media Bureau] to seek comment on and establish an appropriate auction design methodology prior to the start of each broadcast auction).

¹⁵ “FM Broadcast Auction Scheduled for February 21, 2001; Comment Sought on Reserve Prices or Minimum Opening Bids and Other Auction Procedural Issues,” *Public Notice*, 15 FCC Rcd 18081 (WTB/MMB 2000) (“*2000 Auction No. 37 Comment Public Notice*”).

¹⁶ Section 3002(a), Balanced Budget Act, 47 U.S.C. §309(j)(4)(F). The Commission's authority to establish a reserve price or minimum opening bid is set forth in 47 C.F.R. § 1.2104 (c) and (d).

¹⁷ See *Auction No. 37 Additional Comment Public Notice*, 15 FCC Rcd 25486. Because the market numbers were revised to reflect the addition of these eight vacant FM allotments, the Attachment A in the *Auction No. 37 Additional Comment Public Notice* superseded the Attachment A in the *2000 Auction No. 37 Comment Public Notice*.

¹⁸ *2001 Auction No. 37 Procedures Public Notice*, 16 FCC Rcd 928.

¹⁹ See Implementation of Section 309(j) of the Communications Act – Competitive Bidding, PP Docket No. 93-253, *Second Report and Order*, 9 FCC Rcd 2348, 2378-79, ¶¶ 171-176 (1994) (“*Second Report and Order*”) for a general discussion of competitive bidding design.

²⁰ See *Broadcast First Report and Order*, 13 FCC Rcd at 15971, ¶ 134.

²¹ See *Second Report and Order*, 9 FCC Rcd 2348, 2378-79, ¶¶ 171-176 (1994).

Additional Comment Public Notice, we propose to make the upfront payments equal to the minimum opening bids, which, as described in Section III.B, below, are established based on various factors related to the efficiency of the auction and the potential value of the spectrum. The specific upfront payment for each FM construction permit is set forth in Attachment A. We seek comment on this proposal.

We further propose that the amount of the upfront payment submitted by a bidder will determine the maximum number of bidding units on which a bidder may place bids. This limit is a bidder's initial eligibility. Each FM construction permit is assigned a specific number of bidding units equal to the upfront payment listed in Attachment A, on a bidding unit per dollar basis. This number does not change as prices rise during the auction. Rather, a bidder may place bids on multiple construction permits as long as the total number of bidding units associated with those construction permits does not exceed the bidder's current eligibility. Eligibility cannot be increased during the auction. In order to bid on a construction permit, qualified bidders must have an eligibility level that meets the number of bidding units assigned to that construction permit. Thus, in calculating its upfront payment amount, an applicant must determine the **maximum** number of bidding units it may wish to bid on (or hold high bids on) in any single round, and submit an upfront payment covering that number of bidding units. We seek comment on this proposal.

C. Activity Rules

In order to ensure that the auction closes within a reasonable period of time, an activity rule requires bidders to bid actively throughout the auction, rather than wait until late in the auction before participating. Bidders are required to be active on a specific percentage of their current eligibility during each round of the auction. A bidder that does not satisfy the activity rule will either lose bidding eligibility in the next round or must use an activity rule waiver (if any remain).

We propose a single stage auction with the following activity requirement: In each round of the auction, a bidder desiring to maintain its current eligibility is required to be active on construction permits representing one hundred (100) percent of its current bidding eligibility. A bidder's activity will be the sum of the bidding units associated with the construction permits upon which it places a bid during the current round and the bidding units associated with the construction permits upon which it is the standing high bidder. Failure to maintain the requisite activity level will result in the use of an activity rule waiver, if any remain, or a reduction in the bidder's eligibility, possibly eliminating the bidder from further bidding in the auction. We seek comment on this proposal.

D. Activity Rule Waivers and Reducing Eligibility

Use of an activity rule waiver preserves the bidder's current bidding eligibility despite the bidder's activity in the current round being below the required minimum level. An activity rule waiver applies to an entire round of bidding and not to a particular construction permit. Activity rule waivers can be either proactive or automatic and are principally a mechanism for auction participants to avoid the loss of bidding eligibility in the event that exigent circumstances prevent them from placing a bid in a particular round.

The FCC Automated Auction System assumes that bidders with insufficient activity would prefer to use an activity rule waiver (if available) rather than lose bidding eligibility. Therefore, the system will automatically apply a waiver (known as an "automatic waiver") at the end of any bidding period where a bidder's activity level is below the minimum required, unless (1) the bidder has no more activity rule waivers available; or (2) the bidder overrides the automatic application of a waiver by reducing eligibility, thereby meeting the minimum requirements. **If a bidder has no waivers remaining and does not satisfy the required activity level, its current eligibility will be permanently reduced, possibly eliminating the bidder from further bidding in the auction.**

A bidder that is eligible to bid on more than one construction permit and has insufficient activity may wish to reduce its bidding eligibility rather than use an activity rule waiver. If so, the bidder must affirmatively override the automatic waiver mechanism during the bidding period by using the reduce eligibility function in the bidding system. In this case, the bidder's eligibility is permanently reduced to bring the bidder into compliance with the activity rules as described above; that is, the bidder's eligibility will be reduced to equal its current activity. Once eligibility has been reduced, a bidder will not be permitted to regain its lost bidding eligibility.

A bidder may proactively use an activity rule waiver as a means to keep the auction open without placing a bid. If a bidder submits a proactive waiver (using the proactive waiver function in the bidding system) during a bidding period in which no bids or withdrawals are submitted, the auction will remain open and the bidder's eligibility will be preserved. An automatic waiver invoked in a round in which there are no new bids or withdrawals will not keep the auction open. The submission of a proactive waiver cannot occur after a bid has been submitted in a round and will preclude a bidder from placing any bids later in that round. **Note: Once a proactive waiver is submitted during a round, that waiver cannot be unsubmitted.**

We propose that each bidder in Auction No. 37 be provided with five activity rule waivers that may be used at the bidder's discretion during the course of the auction as set forth above. We seek comment on this proposal.

E. Information Relating to Auction Delay, Suspension or Cancellation

For Auction No. 37, we propose that, by public notice or by announcement during the auction, the Bureaus may delay, suspend or cancel the auction in the event of natural disaster, technical obstacle, evidence of an auction security breach, unlawful bidding activity, administrative or weather necessity, or for any other reason that affects the fair and efficient conduct of competitive bidding.²² In such cases, the Bureaus, in their sole discretion, may elect to resume the auction starting from the beginning of the current round, resume the auction starting from some previous round, or cancel the auction in its entirety. Network interruption may cause the Bureaus to delay or suspend the auction. We emphasize that exercise of this authority is solely within the discretion of the Bureaus, and its use is not intended to be a substitute for situations in which bidders may wish to apply their activity rule waivers. We seek comment on this proposal.

III. Bidding Procedures

A. Round Structure

The Commission will conduct Auction No. 37 over the Internet. Telephonic bidding will also be available. As a contingency plan, the FCC Wide Area Network will be available as well. The telephone number through which the backup FCC Wide Area Network may be accessed will be announced in a later public notice. Full information regarding how to establish such a connection will be provided in the public notice announcing details of auction procedures.

In the *2001 Auction No. 37 Procedures Public Notice*, the Bureaus announced that auction participants could place bids either by telephone or electronically by purchasing remote bidding software from the Commission. Bidders will still be able to place bids telephonically or electronically. However, the Commission's remote bidding software has been replaced by an Internet bidding system. The new

²² See 47 C.F.R. § 1.2104(i).

bidding system does not require the purchase of software; however, it does require distribution of registration materials to each applicant's contact person. These materials include the confidential bidder identification number (BIN) and the SecurID cards, both of which are required to place bids.

The initial schedule of bidding rounds will be announced in a public notice to be released at least one week before the start of the auction, and will be included in the registration mailings. The simultaneous multiple round format will consist of sequential bidding rounds, each followed by the release of round results. Details regarding the location and format of round results will be included in the same public notice.

The Bureaus have the discretion to change the bidding schedule in order to foster an auction pace that reasonably balances speed with the bidders' need to study round results and adjust their bidding strategies. The Bureaus may increase or decrease the amount of time for the bidding rounds and review periods, or the number of rounds per day, depending upon the bidding activity level and other factors. We seek comment on this proposal.

B. Reserve Price or Minimum Opening Bid

The Balanced Budget Act calls upon the Commission to prescribe methods for establishing a reasonable reserve price or a minimum opening bid when FCC licenses or construction permits are subject to auction, unless the Commission determines that a reserve price or minimum bid is not in the public interest.²³ Consistent with this mandate, the Commission has directed the Bureaus to seek comment on the use of a minimum opening bid and/or reserve price prior to the start of each auction.²⁴

Normally, a reserve price is an absolute minimum price below which an item will not be sold in a given auction. Reserve prices can be either published or unpublished. A minimum opening bid, on the other hand, is the minimum bid price set at the beginning of the auction below which no bids are accepted. It is generally used to accelerate the competitive bidding process. Also, the auctioneer often has the discretion to lower the minimum opening bid amount later in the auction. It is also possible for the minimum opening bid and the reserve price to be the same amount.

In light of the Balanced Budget Act's requirements, as well as comments received in response to the *2000 Auction 37 Comment Public Notice* and *Auction No. 37 Additional Comment Public Notice*, the Bureaus propose to establish minimum opening bids for Auction No. 37. The Bureaus believe a minimum opening bid, which has been utilized in other broadcast auctions, is an effective bidding tool.²⁵

Specifically, for Auction No. 37, the proposed minimum opening bids were determined by taking into account various factors related to the efficiency of the auction and the potential value of the spectrum, including the type of service and class of facility offered, market size, population covered by the proposed

²³ See Balanced Budget Act, Section 3002(a). The Commission's authority to establish a reserve price or minimum opening bid is set forth in 47 C.F.R. § 1.2104(c) and (d).

²⁴ See *Broadcast First Report and Order*, 13 FCC Rcd at 15971, ¶ 134; *Part 1 Third Report and Order*, 13 FCC Rcd at 454-55, ¶ 141.

²⁵ See, e.g., "Closed Broadcast Auction – Notice and Filing Requirements for Auction of AM, FM, TV, LPTV and FM and TV Translator Construction Permits – Minimum Opening Bids and Other Procedural Issues," Auction No. 25, DA 99-1346, *Public Notice*, 14 FCC Rcd 10632 (1999); "Supplemental Closed Broadcast Auction – Notice and Filing Requirements for Auction of Certain AM, FM, LPTV and TV Broadcast Construction Permits – Minimum Opening Bids and Other Procedural Issues," Auction No. 28, DA 99-2958, *Public Notice* (rel. December 23, 1999).

FM broadcast facility, industry cash flow data and recent broadcast transactions. As noted above, the proposed minimum opening bids were reduced after reviewing comments received in response to the *2000 Auction 37 Comment Public Notice* and *Auction No. 37 Additional Comment Public Notice*.²⁶ The specific minimum opening bid for each construction permit available in Auction No. 37 is set forth in Attachment A of this Public Notice. We seek comment on this proposal.

If commenters believe that these minimum opening bids will result in unsold construction permits, or are not reasonable amounts, or should instead operate as reserve prices, they should explain why this is so, and comment on the desirability of an alternative approach. Commenters are advised to support their claims with valuation analyses and suggested reserve prices or minimum opening bid levels or formulas. We also seek comment on whether, consistent with the Balanced Budget Act, the public interest would be served by having no minimum opening bid or reserve price.

C. Minimum Acceptable Bids and Bid Increments

In each round, eligible bidders will be able to place bids on a given construction permit in any of nine different amounts.²⁷ The FCC Automated Auction System interface will list the nine acceptable bid amounts for each construction permit. Until a bid has been placed on a construction permit, the minimum acceptable bid for that construction permit will be equal to its minimum opening bid. In the rounds after a bid is placed on a construction permit, the minimum acceptable bid for that construction permit will be equal to the standing high bid plus the defined increment.

Once there is a standing high bid on a construction permit, the FCC Automated Auction System will calculate a minimum acceptable bid for that construction permit for the following round, as described below. The difference between the minimum acceptable bid and the standing high bid for each construction permit will define the **bid increment**. The nine acceptable bid amounts for each construction permit consist of the minimum acceptable bid (the standing high bid plus one bid increment) and additional amounts calculated using multiple bid increments (*i.e.*, the second bid amount equals the standing high bid plus two times the bid increment, the third bid amount equals the standing high bid plus three times the bid increment, etc.).

For Auction No. 37, we propose to use a 10 percent bid increment. This means that the minimum acceptable bid for a construction permit will be approximately 10 percent greater than the previous standing high bid received on the construction permit. The minimum acceptable bid amount will be calculated by multiplying the standing high bid times one plus the increment percentage — *i.e.*, (standing high bid) * (1.10). We will round the result using our standard rounding procedure for minimum acceptable bid calculations: results above \$10,000 are rounded to the nearest \$1,000; results below \$10,000 but above \$1,000 are rounded to the nearest \$100; and results below \$1,000 are rounded to the nearest \$10.

As stated above, until a bid has been placed on a construction permit, the minimum acceptable bid for that construction permit will be equal to its minimum opening bid. The additional bid amounts are calculated using the difference between the minimum opening bid times one plus the percentage increment, rounded as described above, and the minimum opening bid. That is, the increment used to calculate additional bid amounts = (minimum opening bid)(1 + percentage increment){rounded} - (minimum opening bid). Therefore, when the percentage increment equals 0.1 (*i.e.*, 10%), the first additional bid amount will be

²⁶ *2001 Auction No. 37 Procedures Public Notice*, 16 FCC Rcd at 953-54, 961-68.

²⁷ Bidders must have sufficient eligibility to place a bid on the particular construction permit. *See* Section II.B. (“Upfront Payments and Bidding Eligibility”), *supra*.

approximately ten percent higher than the minimum opening bid; the second, twenty percent higher; the third, thirty percent higher; etc.

The Bureaus retain the discretion to change the minimum acceptable bids and bid increments if they determine that circumstances so dictate. The Bureaus will do so by announcement in the FCC Automated Auction System. We seek comment on these proposals.

D. High Bids

At the end of a bidding round, a high bid for each construction permit will be determined based on the highest gross bid amount received for the construction permit. The Internet bidding system does not allow the Commission to determine the relative order in which bids are placed during a round. Because of this, in the event of identical high bids on a construction permit in a given round (*i.e.*, tied bids), a Sybase® SQL pseudo-random number generator will be used to assign a random number to each bid. The tied bid having the highest random number will become the standing high bid. If the auction were to end with no higher bids being placed for that construction permit, the winning bidder would be the one that placed the selected high bid. However, the remaining bidders, as well as the high bidder, can submit higher bids in subsequent rounds. If any bids are received on the construction permit in a subsequent round, the high bid again will be determined by the highest gross bid amount received for the construction permit. We seek comment on this proposal.

A high bid will remain the high bid until there is a higher bid on the same construction permit at the close of a subsequent round. A high bid from a previous round is sometimes referred to as a “standing high bid.” Bidders are reminded that standing high bids are counted as activity for purposes of the activity rule.²⁸

E. Information Regarding Bid Withdrawal and Bid Removal

For Auction No. 37, we propose the following bid removal and bid withdrawal procedures. Before the close of a bidding period, a bidder has the option of removing any bid placed in that round. By removing selected bids in the bidding system, a bidder may effectively “unsubmit” any bid placed within that round. A bidder removing a bid placed in the same round is not subject to a withdrawal payment. Once a round closes, a bidder may no longer remove a bid.

A high bidder may withdraw standing high bids from previous rounds using the withdraw function in the bidding system. A high bidder that withdraws its standing high bid from a previous round is subject to the bid withdrawal payment provisions of the Commission rules.²⁹ We seek comment on these bid removal and bid withdrawal procedures.

In the *Part 1 Third Report and Order*, the Commission explained that allowing bid withdrawals facilitates efficient aggregation of licenses and the pursuit of efficient backup strategies as information becomes available during the course of an auction. The Commission noted, however, that in some instances bidders may seek to withdraw bids for improper reasons. The Bureaus, therefore, have the discretion, in managing the auction, to limit the number of withdrawals to prevent any bidding abuses. The Commission stated that the Bureaus should assertively exercise their discretion, consider limiting the

²⁸ See Section II.C. “Activity Rules,” *supra*.

²⁹ See 47 C.F.R. § 1.2104(g); 1.2109.

number of rounds in which bidders may withdraw bids, and prevent bidders from bidding on a particular market if the Bureaus find that a bidder is abusing the Commission's bid withdrawal procedures.³⁰

Applying this reasoning, we propose to limit each bidder in Auction No. 37 to withdraw standing high bids in no more than two rounds during the course of the auction. To permit a bidder to withdraw bids in more than two rounds would likely encourage insincere bidding or the use of withdrawals for anti-competitive strategic purposes. The two rounds in which withdrawals are utilized will be at the bidder's discretion; withdrawals otherwise must be in accordance with the Commission's rules. There is no limit on the number of standing high bids that may be withdrawn in either of the rounds in which withdrawals are utilized. Withdrawals will remain subject to the bid withdrawal payment provisions specified in the Commission's rules. We seek comment on these proposals.

F. Stopping Rule

The Bureaus have the discretion “to establish stopping rules before or during multiple round auctions in order to terminate the auction within a reasonable time.”³¹ For Auction No. 37, the Bureaus propose to employ a simultaneous stopping rule approach. A simultaneous stopping rule means that all construction permits remain available for bidding until bidding closes simultaneously on all construction permits.

Bidding will close simultaneously on all construction permits after the first round in which no new bids, proactive waivers or withdrawals are received. Thus, unless circumstances dictate otherwise, bidding would remain open on all construction permits until bidding stops on every permit.

However, the Bureaus propose to retain the discretion to exercise any of the following options during Auction No. 37:

1. Utilize a modified version of the simultaneous stopping rule. The modified stopping rule would close the auction for all construction permits after the first round in which no bidder submits a proactive waiver, withdrawal, or a new bid on any construction permit on which it is not the standing high bidder. Thus, absent any other bidding activity, a bidder placing a new bid on a construction permit for which it is the standing high bidder would not keep the auction open under this modified stopping rule.
2. Keep the auction open even if no new bids or proactive waivers are submitted and no previous high bids are withdrawn. In this event, the effect will be the same as if a bidder had submitted a proactive waiver. The activity rule, therefore, will apply as usual and a bidder with insufficient activity will either lose bidding eligibility or use a remaining activity rule waiver.
3. Declare that the auction will end after a specified number of additional rounds (“special stopping rule”). If the Bureaus invoke this special stopping rule, it will accept bids in the specified final round(s) only for construction permits on which the high bid increased in at least one of a specified preceding number of rounds.

The Bureaus propose to exercise these options only in certain circumstances, for example, where the auction is proceeding very slowly, there is minimal overall bidding activity, or it appears likely that the auction will not close within a reasonable period of time. Before exercising these options, the Bureaus are likely to attempt to increase the pace of the auction by, for example, increasing the number of bidding rounds per day, and/or increasing the amount of the minimum bid increments for the limited number of

³⁰ *Part 1 Third Report and Order*, 13 FCC Rcd at 460, ¶ 150.

³¹ 47 C.F.R. § 1.2104(e).

construction permits where there is still a high level of bidding activity. We seek comment on these proposals.

IV. Due Diligence

Potential bidders are solely responsible for investigating and evaluating all technical and market place factors that may have a bearing on the value of the broadcast facilities in this auction. **The FCC makes no representations or warranties about the use of this spectrum for particular services. Applicants should be aware that an FCC auction represents an opportunity to become an FCC permittee in the broadcast service, subject to certain conditions and regulations. An FCC auction does not constitute an endorsement by the FCC of any particular service, technology, or product, nor does an FCC construction permit or license constitute a guarantee of business success.** Applicants should perform their individual due diligence before proceeding as they would with any new business venture. In particular, potential bidders are strongly encouraged to review all underlying Commission orders, such as the specific *Report and Order* amending the FM Table of Allotments and allotting the FM channel(s) on which they plan to bid.³² *Reports and Orders* adopted in FM allotment rulemaking proceedings often include anomalies such as site restrictions or expense reimbursement requirements.³³ Additionally, potential bidders should perform technical analyses sufficient to assure them that, should they prevail in competitive bidding for a given FM construction permit, they will be able to build and operate facilities that will fully comply with the Commission's technical and legal requirements.

Potential bidders are strongly encouraged to conduct their own research prior to Auction No. 37 in order to determine the existence of pending proceedings that might affect their decisions regarding participation in the auction. Participants in Auction No. 37 are strongly encouraged to continue such research during the auction.

V. Dates and Deadlines

The auction is scheduled to begin on November 3, 2004. In the public notice announcing the auction procedures, we will announce the following additional pre-auction dates and deadlines:

- Auction Seminar
- Short-Form Application (FCC Form 175) Filing Window Opens
- Short-Form Application (FCC Form 175) Filing Window Deadline
- Upfront Payments (via wire transfer)
- Mock Auction

After bidding has ended, the Commission will issue a public notice declaring the auction closed and identifying winning bidders, down payments, final payments, and any withdrawn bid payments due.

Within ten business days after release of the auction closing notice, each winning bidder must submit sufficient funds (in addition to its upfront payment) to bring its total amount of money on deposit with the Commission for Auction No. 37 to 20 percent of the net amount of its winning bids (gross bids less any applicable bidding credits). In addition, by the same deadline, all bidders must pay any bid withdrawal payments due under 47 C.F.R. § 1.2104(g).

³² See 47 C.F.R. § 73.202.

³³ See, e.g., *Charlotte Amalie, Frederiksted, and Christiansted, U.S. Virgin Islands*, 19 FCC Rcd 30 (MB 2004); *Cheyenne, Wyoming and Gering, Nebraska*, 15 FCC Rcd 7528 (MMB 2000); *Circleville, Ohio*, 9 F.C.C.2d 159 (1967).

WTB now employs a final payment deadline different from that announced in the *2001 Procedures Public Notice*.³⁴ Consistent with current practice, for Auction No. 37, the Bureaus are considering requiring each winning bidder to submit the balance of the net amount of its winning bids within 10 business days after the deadline for submitting down payments.

VI. Conclusion

Comments are due on or before May 6, 2004, and reply comments are due on or before May 13, 2004. Because of the disruption of regular mail and other deliveries in Washington, DC, the Bureaus require that all comments and reply comments be filed electronically. Comments and reply comments must be sent by electronic mail to the following address: auction37@fcc.gov.³⁵ The electronic mail containing the comments or reply comments must include a subject or caption referring to Auction No. 37 Comments and the name of the commenting party. The Bureaus request that parties format any attachments to electronic mail as Adobe® Acrobat® (pdf) or Microsoft® Word documents. Copies of comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Information Center, Room CY-A257, 445 12th Street, SW, Washington, DC 20554.

In addition, the Bureaus request that commenters fax a courtesy copy of their comments and reply comments to the attention of Kathryn Garland at (717) 338-2850.

This proceeding has been designated as a “permit-but-disclose” proceeding in accordance with the Commission’s *ex parte* rules.³⁶ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.³⁷ Other rules pertaining to oral and written *ex parte* presentations in permit-but-disclose proceedings are set forth in Section 1.1206(b) of the Commission’s rules.³⁸

³⁴ See, e.g., “Auction of Licenses in the Multichannel Video Distribution and Data Service rescheduled for January 14, 2004, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures,” *Public Notice*, 18 FCC Rcd 17553 (2003); “Auction of 900 MHz Specialized Mobile Radio Service Licenses Scheduled for February 11, 2004, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures,” *Public Notice*, 18 FCC Rcd 21176 (2003); “Auction of 24 GHz Service Licenses Scheduled for July 28, 2004, Notice and Filing Requirements, Minimum Opening Bids, Upfront Payments and Other Auction Procedures,” *Public Notice*, DA 04-633 (rel. March 12, 2004).

³⁵ Comments and reply comments in response to this Public Notice may not be filed using the Commission’s Electronic Comment Filing System, which is used for the Commission’s docketed rule making proceedings.

³⁶ 47 C.F.R. §§ 1.1200(a), 1.1206.

³⁷ 47 C.F.R. § 1.1206(b).

³⁸ *Id.*

For further information concerning this proceeding, contact:

Auctions and Spectrum Access Division, WTB:

For legal questions: Kenneth Burnley at (202) 418-0660

For general auction questions: Jeff Crooks at (202) 418-0660 or Linda Sanderson at (717) 338-2851

Audio Division, MB:

For legal and service rule questions: Lisa Scanlan or Tom Nessinger at (202) 418-2700

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