

ALERT

Summary of Competitive Bidding Procedures for Auctions 101 (28 GHz) and 102 (24 GHz)

April 23, 2018

The Federal Communications Commission (FCC or Commission) released a Public Notice seeking comment on bidding procedures for auctioning 5,986 Upper Microwave Flexible Use Service (UMFUS) licenses in the 27.5-28.35 GHz (28 GHz) and 24.25-24.45 and 24.75-25.25 GHz (24 GHz) bands (collectively, the UMFUS bands). The FCC proposes to hold separate auctions for the 28 GHz and 24 GHz bands. The 28 GHz band auction, designated as Auction 101, would begin November 14, 2018. The 24 GHz band auction, designated as Auction 102, would begin after the conclusion of bidding in Auction 101. Comments responding to the Public Notice are due May 9, 2018, and reply comments are due May 23, 2018.

Interested parties should carefully consider the potential effects of proposed deadlines for Auctions 101 and 102. Opening the filing window for Auction 102 before the close of Auction 101, for example, would expedite the conclusion of Auction 102, but at a cost of an extended quiet period for applicants in either auction. Overlapping deadlines may also affect when the FCC releases auction results and bidder information after the close of Auction 101 and, consequently, influence upfront payment decisions and bidding strategy for those participating in Auction 102.

Licenses to be Offered in Auctions 101 and 102

UMFUS spectrum made available through Auctions 101 and 102 will be licensed on an unpaired basis and by geographic area. (¶¶ 1, 3). A complete list of offered licenses can be found [here](#).

Authors

Ari Meltzer
Partner
202.719.7467
ameltzer@wiley.law

Practice Areas

Telecom, Media & Technology
Wireless

Auction 101

The FCC will auction 3,074 county-based licenses in the 28 GHz band. The spectrum will be licensed as two 425 megahertz blocks: 27.500-27.925 GHz and 27.925-28.350 GHz. (¶ 2).

Auction 102

The FCC will auction 2,912 PEA-based licenses in the 24 GHz band. The 24.25-24.45 GHz band will be licensed as two 100 megahertz blocks, and the 24.75-25.25 GHz band will be licensed as five 100 megahertz blocks. (¶ 3).

Incumbent Operations

Parties interested in participating in either auction should consider their obligation to share spectrum with existing operators upon receiving a UMFUS license. Incumbents continue to operate in 1,695 full counties and 2 partial counties in the 28 GHz band, and in 9 PEAs in the 24 GHz band. Obligations to enable shared use between UMFUS licensees and incumbent licensees are described in the FCC's *2016 Spectrum Frontiers Order* and *2017 Spectrum Frontiers Order*.

Application and Bidding Process: Implementation of Part 1 Rules for Auctions 101 and 102

A. Separate Auction Application and Bidding Processes

The FCC seeks comment on its proposal to separately auction the 28 GHz and 24 GHz band licenses. The agency proposes to begin bidding in Auction 101 on November 14, 2018. Bidding in Auction 102 would begin after the close of bidding in Auction 101. (¶ 11).

The agency proposes to use separate application and bidding procedures for Auctions 101 and 102 to accommodate differences between the 28 GHz and 24 GHz band licenses. Specifically, the FCC proposes to use the standard Specialized Mobile Radio (SMR) service auction format for Auction 101, and a clock auction format (like that used in the forward auction portion of the Broadcast Incentive Auction) for Auction 102. (¶ 12).

The FCC asks whether it should accept applications to participate in Auction 101 and/or 102 during separate filing windows, and seeks comment on whether the filing window for Auction 102 should occur prior to the close of bidding in Auction 101. (¶¶ 12-14). Notably, if the filing window for Auction 102 opens before the close of Auction 101, applicants in both Auctions 101 and 102 would be subject to overlapping quiet periods. Delaying the Auction 102 filing window would give applicants an opportunity to talk between the two auctions. However, it may also delay the start of bidding in Auction 102.

B. Information Procedures During the Auction Process

To conceal bidder identities, the Commission proposes to withhold the following information until after bidding has closed: (i) the licenses or license areas that an applicant selects for bidding in its auction application (FCC Form 175); (ii) the amount of any upfront payment made by or on behalf of an applicant for Auction 101

or 102; (iii) any applicant's bidding eligibility, and (iv) any other bidding-related information that might reveal the identity of the bidder placing a bid. (§ 15). Bidders would be able to view their eligibility status before and during the auction via the FCC's Auction Bidding System. (§ 17).

The FCC proposes, after each round of bidding in Auction 101, to disclose the amount of each bid placed and whether a bid was withdrawn (if withdrawals are permitted). (§ 16). In Auction 102, the Commission proposes to disclose the supply, aggregate demand, price of the last completed round, and price for the next round for each category of license in each geographic area. (*Id.*).

The Commission seeks comment on whether, if the Auction 102 application window occurs before the close of Auction 101, it should continue to withhold bidder identification information until after bidding has closed in both auctions. (§ 19). The agency asks commenters to discuss the potential effects of these two approaches on participation and competition. If the Auction 102 application window occurs after the close of Auction 101, the FCC proposes to apply the limited information procedures to each auction separately, and make non-public information relating to Auction 101 available after the close of that auction and before the application filing window for Auction 102. (§ 19).

C. Application of Prohibition of Certain Communications

Section 1.2105(c)(1) of the FCC's rules prohibits applicants from discussing bids or bidding strategies, or negotiating settlement agreements between the short-form application filing deadline and the down payment deadline. The Commission observes that, if the short-form filing window for Auction 102 occurs before the down payment deadline for Auction 101, entities participating in either auction would be applicants during overlapping periods. The FCC therefore proposes to apply Section 1.2105(c)(1) across both auctions—prohibiting an applicant in either auction from communicating bids or bidding strategies to any applicant in either Auction 101 or 102. (§ 22).

If the Auction 102 application window occurs after the close of Auction 101, the FCC proposes to apply Section 1.2105(c)(1) to each auction separately, and use each auction's post-auction down payment deadline to determine when the prohibition ends for applicants in that auction. (§ 23).

D. Application Requirements and Certifications Relating to Joint Bidding and Other Agreements

Part 1 of the FCC's rules generally prohibit joint bidding and similar bidding arrangements by two or more nationwide providers, or one nationwide and one or more non-nationwide providers, where any party is an applicant for the auction. For purposes of implementing these rules in Auctions 101 and 102, the Commission proposes to identify AT&T, Sprint, T-Mobile, and Verizon Wireless as "nationwide providers." (§ 26).

If the Auction 102 application window occurs before the close of Auction 101, the FCC proposes to prohibit joint bidding arrangements among applicants participating in either Auctions 101 or 102. (§ 28). If the Auction 102 application window occurs after the close of Auction 101, the FCC proposes to apply the prohibition separately to the specific licenses in each auction. (*Id.*).

E. Bidding Credit Caps

The FCC seeks comment on establishing reasonable caps on the total amount of bidding credits that an eligible small business or rural service provider may be awarded for either Auction 101 or 102. (§ 29). The agency proposes a \$25 million cap in each auction for eligible small businesses, and a \$10 million cap in each auction for eligible rural service providers. (§§ 32, 33). To create parity among eligible small businesses and rural service providers competing in smaller markets, the FCC proposes a \$10 million cap on the overall amount of bidding credits that any winning small business bidder may apply to winning licenses in markets with a population of 500,000 or less. (§ 33).

The *2016 Spectrum Frontiers Order* establishes small business and rural service provider eligibility criteria for purposes of Auctions 101 and 102.

Proposed Bidding Procedures

A. Auction 101: 28 GHz

Simultaneous Multiple-Round Auction Design

The FCC proposes to use the standard SMR auction format for Auction 101. Under this format, all licenses are available for bid simultaneously, and the auction remains open until bidding has stopped on every license. (§ 42).

Bidding Rounds

The FCC proposes to have sequential bidding rounds, releasing results at the end of each round. The initial bidding schedule and information on viewing round results will be made available by public notice. (§ 43). Bids may be placed online using the FCC's auction bidding system or by telephone through a dedicated auction bidder line. (§ 44).

The FCC seeks comment on its proposal to provide the Wireless Telecommunications Bureau (WTB or Bureau) with discretion to change the bidding schedule—including the amount of time for bidding rounds, the amount of time between rounds, and the number of rounds per day—depending upon bidding activity and other factors. (§ 45).

Stopping Rule

The FCC has discretion to establish stopping rules to complete the auction within a reasonable time. The Commission proposes to employ a simultaneous stopping rule approach for Auction 101. Under this approach, bidding will close on all licenses after the first round in which no bidder submits any new bids, applies a proactive waiver, or withdraws any provisionally winning bids (if bid withdrawals are permitted). (§ 46).

In addition, the FCC proposes to provide the WTB with discretion to exercise any of the following modified stopping options:

1. The auction would close for all licenses after the first round in which no bidder applies a waiver, withdraws a provisionally winning bid (if withdrawals are permitted), or places any new bid on a license for which it is not the provisionally winning bidder;
2. The auction would close for all licenses after the first round in which no bidder applies a waiver, withdraws a provisionally winning bid (if withdrawals are permitted), or places any new bid on a license that already has a provisionally winning bid;
3. The auction would close using a modified version of the simultaneous stopping rule that combines Option 1 and Option 2 above;
4. The auction would close after a specified number of additional rounds to be announced by the WTB; or
5. The auction would remain open even if no bidder places any new bid, applies a waiver, or withdraws any provisionally winning bids (if withdrawals are permitted). A bidder with insufficient activity will lose bidding eligibility or use a waiver. (§ 47).

The FCC proposes that WTB exercise these options only in certain circumstances, such as where the auction is proceeding at an unusual pace, there is minimal bidding activity, or it appears the auction will not close within a reasonable period or will close prematurely. (§ 48).

Information Relating to Auction Delay, Suspension, or Cancellation

The FCC proposes to provide the WTB with authority to delay, suspend, or cancel bidding for any reason that affects the fair and efficient conduct of competitive bidding. The WTB would notify participants by public notice and/or through the FCC's Auction Bidding System. The Bureau would also have sole discretion to resume the auction starting from the beginning of the current round, the beginning of a previous round, or cancel the auction in its entirety. (§ 49).

Upfront Payments and Bidding Eligibility

The Commission seeks comment on its proposal to require applicants to submit upfront payments based on \$0.001 per megahertz of bandwidth per population (per "MHz-pop") as a prerequisite to becoming a qualified bidder. (§ 50). The agency proposes that the amount of the upfront payment will determine the applicant's initial bidding eligibility—assigning one bidding unit per dollar of upfront payment. (§ 51). The number of bidding units for a given license is fixed and would not change during the auction as prices change. Bidders may not increase their eligibility during the auction. However, they may maintain or decrease their eligibility. (*Id.*).

Activity Rule

The FCC proposes to adopt activity requirements to ensure that the auction closes within a reasonable period. Bidders would be required to actively bid on a certain percentage of their current bidding eligibility during each round of the auction. Failure to maintain the requisite activity level would result in the use of an activity rule waiver or a reduction in bidding eligibility for the next round. (§ 53).

Specifically, the Commission proposes to divide the auction in two stages with separate activity requirements. In Stage One, the FCC proposes to require bidders to actively bid on at least 80% of their current bidding eligibility. In Stage Two, the FCC proposes to require bidders to actively bid on 95% of their current bidding eligibility. If a bidder fails to meet the activity requirement, its reduced eligibility for the next round will be calculated by multiplying the bidder's current round activity by five-fourths (5/4) during Stage One and twenty-nineteenths (20/19) during Stage Two. (§ 55).

The WTB would have discretion to advance the auction to the next stage, as well as discretion to change the activity requirements during the auction. (§§ 54, 56). The FCC seeks comment on these proposed activity requirements.

Activity Rule Waivers and Reducing Eligibility

When a bidder's activity is below the required threshold, the Commission proposes to allow bidders to preserve their current level of eligibility through an activity rule waiver. (§ 57). The FCC proposes to provide each bidder with three activity rule waivers and seeks comment on this proposal. (§ 58).

If a bidder has no waivers remaining and does not satisfy the required activity level, the Commission proposes that its current eligibility would be permanently reduced. (§ 59). A bidder with insufficient activity may voluntarily reduce its bidding eligibility rather than use an activity rule waiver. However, a bidder cannot regain its lost bidding eligibility once reduced. (*Id.*).

To keep the auction open and preserve eligibility, the FCC proposes to allow bidders to proactively use their activity rule waivers. An automatic waiver applied retroactively in a round in which there is no new bid, no bid withdrawal (if bid withdrawals are permitted), or no proactive waiver would not keep the auction open. (§ 60).

Reserve Price or Minimum Opening Bids

The FCC proposes to establish minimum opening bid amounts on a license-by-license basis using a \$0.002 per MHz-pop calculation. The Commission seeks comment on these minimum opening bid amounts, which are listed in Attachment A. (§ 63).

Bid Amounts

The Commission asks for comment on its proposal to allow an eligible bidder to select a bid from up to nine different amounts listed on the FCC's Auction Bidding System for each license. (§ 66). This will include a minimum acceptable bid amount and additional bid amounts determined by various factors such as the bid activity from the prior round. (§§ 67-69). The FCC proposes to allow the WTB to change the minimum acceptable bid amounts, the additional bid amounts, the number of acceptable bid amounts, and the

parameters of the formulas used to calculate bid amounts at its discretion and on a license-by-license basis. (§ 70).

Provisionally Winning Bids

At the end of each round, the FCC's Auction Bidding System will determine a provisionally winning bid for each license. If identical high bid amounts are submitted, the system will random select one of the tied bids to be the provisionally winning bidder. A provisionally winning bid remains as such until there is a higher bid on the same license, the bid is withdrawn (if bid withdrawals are permitted), or the auction closes, in which case the provisionally winning bid becomes the final winning bid. (§§ 72-73).

Bid Removal and Bid Withdrawal

The FCC asks whether it should permit bid removals (removing the bid before the close of the round) and/or withdrawals (withdrawing a provisionally winning bid after the close of the round) in Auction 101. The FCC proposes to permit both bid removal and bid withdrawal, but would limit bid withdrawal to no more than two rounds. Bid withdrawals would also be subject to a penalty. (§§ 76, 78).

B. Auction 102: 24 GHz

Clock Auction Design

The Commission asks for feedback on its proposal to use an ascending clock auction approach for Auction 102. Under this approach, the first phase of the auction will consist of successive clock bidding rounds for generic license blocks in specific geographic areas, and the second phase will consist of bidding rounds for frequency-specific license assignments. (§ 80).

For the clock phase, there will be (i) two blocks of spectrum between 24.25-24.45 GHz, and (ii) five blocks between 24.75-25.25 GHz. The FCC proposes, for some PEAs, to include two additional bidding categories for spectrum blocks with less than the full 100 megahertz due to the relocation of incumbent licensees. (§ 80). The WTB would announce prices for blocks in each category in each geographic area, and qualified bidders would submit bids for the number of blocks they seek. (§ 81). The price for each license category would increase each round until the total demand in each category does not exceed the supply of available blocks. Bidders remaining at the end of the clock phase would be deemed winning bidders. (§ 82).

The FCC seeks comment on this proposal, as well as alternative approaches, to auction 24 GHz band licenses. (§ 84).

Determining Categories of Generic Blocks for Bidding

The 24 GHz band will be licensed in 100 megahertz blocks in each of 416 PEAS, with the lower 24.25-24.45 GHz band licensed as two 100 megahertz blocks (Category L) and the upper 24.75-25.25 GHz band licensed as five 100 megahertz blocks (Category U). The FCC proposes to add two additional categories to account for nine PEAs where there are blocks with less than the full 100 megahertz of spectrum due to incumbent

operations (Category LI and Category UI). (§ 86). The Commission seeks comment on these category designations. (§ 87).

Bidding Rounds

The FCC proposes to have sequential bidding rounds, releasing results at the end of each round. The initial bidding schedule and information on viewing round results will be made available by public notice. (§ 88). Bids may be placed online using the FCC's auction bidding system or by telephone through a dedicated auction bidder line. (§ 89).

The FCC seeks comment on its proposal to provide the WTB discretion to change the bidding schedule depending upon bidding activity and other factors. This would include discretion over the amount of time for bidding rounds or the number of rounds per day. (§ 90).

Stopping Rule

The Commission seeks comment on its proposal to adopt a simultaneous stopping rule. Under this approach, bidding in the clock phase would end after the first round in which there is no excess demand in any category in any PEA. (§ 91).

Information Relating to Auction Delay, Suspension, or Cancellation

The FCC proposes to provide the WTB with authority to delay, suspend, or cancel bidding for any reason that affects the fair and efficient conduct of competitive bidding. The WTB would notify participants by public notice and/or through the FCC auction bidding system. The Bureau would also have sole discretion to resume the auction from the beginning of the current round, the beginning of a previous round, or cancel the auction in its entirety. (§ 92).

Upfront Payments and Bidder Eligibility

The Commission proposes to require applicants to submit upfront payments based on \$0.001 per MHz-pop as a prerequisite to becoming a qualified bidder. (§ 93). The upfront payment amount would determine the applicant's initial bidding eligibility. The Commission would assign one bidding unit per dollar of upfront payment, as well as assign a specific number of bidding units for a single generic block of spectrum in each PEA. (§ 94). To facilitate bidding across categories, the generic Category L and Category U blocks in a PEA will be assigned the same number of bidding units. Category LI and Category UI blocks in a PEA will be assigned proportionally fewer bidding units than the 100 megahertz blocks. (*Id.*). Bidders may not increase their eligibility during the auction; they may only maintain or decrease their eligibility. (§ 95).

To allow applicants participating in both Auctions 101 and 102 to consider the licenses they won in Auction 101 when determining its upfront payment for Auction 102, the Commission proposes to set a deadline for Auction 102 upfront payments that occurs after bidding in Auction 101 concludes. (§ 96).

Activity Rule, Activity Rule Waivers, and Reducing Eligibility

The FCC seeks comment on its activity rule, activity rule waiver, and reducing eligibility proposals in Auction 102. To maintain eligibility, the Commission proposes to require bidders to actively bid between 92 and 97 percent of their bidding eligibility in all regular clock rounds. If the activity rule is not met, the Commission would automatically reduce the bidder's eligibility. (§ 98).

The Commission proposes not to provide activity rule waivers for Auction 102, because the clock auction design depends upon identifying the point at which supply equals demand to determine winning bidders and final prices. (§ 101).

Acceptable Bids

The FCC asks for comment on its proposal to establish minimum opening bid amounts, which would be calculated based on \$0.002 per MHz-pop. (§§ 103-104). The agency proposes to incrementally increase the clock price for each subsequent round by a fixed percentage, initially between 5% and 15%. The WTB may change the bid increase amounts on a PEA-by-PEA or category-by-category basis based on bidding activity. (§§ 107-108).

To accelerate the clock phase without running the risk of overshooting the market clearing price, the Commission proposes to allow bidders to make intra-round bids in lieu of clock price bids. Bidders would select a price between the previous round's price and the new clock price and the quantity of blocks it demands, if the price for blocks in the category should increase beyond that price. (§§ 109-110).

Reducing Demand, Bid Types, and Bid Processing

The Commission seeks comment on its proposed clock phase bidding procedures. The agency proposes not to allow bidders to reduce the quantity of blocks it demands, if the reduction will result in aggregate demand falling below the available supply of blocks in the category. (§ 111). The FCC proposes to process bids in ascending order of price point (*i.e.*, the percentage of the bidding interval for the round) after each round. (§ 114).

To facilitate bidding for multiple blocks in a PEA, the Commission proposes to allow bidders to make simple bids (bids indicating the desired quantity of licenses in a category at either the clock price or an intra-round price) and switch bids (bids that apply interchangeably to L Category and U Category licenses within the same PEA). (§ 116).

The FCC proposes to stop increasing the clock price for a given category in a PEA when aggregate demand no longer exceeds the available supply. (§ 115). When processing bids in order of ascending price point, the FCC will save unfulfilled or partially fulfilled bids in a queue to be considered later during bid processing for that round. The FCC's Auction Bidding System, however, will not carry over unfulfilled bid requests to the next round. (§ 119).

The Commission proposes not to adopt any package bidding procedures, finding that applicants can express their preferences for specific frequency blocks in the license assignment phase. (§ 121).

Winning Bids in the Clock Phase

The FCC proposes that bidders still expressing demand for blocks in a category in a PEA at the time the stopping rule is met will be deemed winning bidders. Winning bidders will be assigned specific frequencies in the assignment phase. (§ 123).

Bid Removal and Bid Withdrawal

The Commission proposes to allow removal of a bid before the close of the round. Because there are no provisionally winning bids in a clock auction, bid withdrawal is not applicable. (§ 124).

Assignment Phase

The FCC asks for comment on its proposed assignment phase procedures, which are intended to give winning bidders from the clock phase an opportunity to bid for particular frequencies within a category. The Commission proposes making the assignment phase voluntary and commits to assigning contiguous blocks of spectrum to bidders winning multiple blocks in a category in a PEA, even without participating in the assignment phase. (§ 126).

The Commission proposes to sequence assignment rounds to help bidders winning multiple blocks of licenses to obtain contiguous blocks of spectrum across adjacent PEAs, starting with the top 40 PEAs. (§§ 128-129). The agency proposes to then conduct a series of assignment rounds for each Regional Economic Area Grouping (REAG). (§ 129).

In each assignment round, the Commission proposes that the bidder assign a price to one or more preferred frequency assignments. This price would represent the maximum amount the bidder is willing to pay, in addition to the base price established in the clock phase for the generic blocks, for the frequency-specific licenses. (§ 131).

The FCC would use an “optimization approach” to determine the winning frequency assignment for each category in each assignment round that maximizes the sum of bid amounts among all assignments that satisfy the contiguity requirements. (§ 132).

Post-Auction Payments

Interim Withdrawal Payment Percentage

If bid withdrawals are permitted in Auction 101, the FCC proposes that the withdrawing bidder pay a penalty equal to the difference between the amount of the withdrawn bid and the amount of the winning bid in the same or a subsequent auction. In cases where the final withdrawal payment cannot be calculated, the FCC proposes to assess an interim bid withdrawal payment of 15% of the withdrawn bid. (§§ 134-135).

Additional Default Payment Percentage

The FCC proposes to assess winning bidders that default or are disqualified after the close of the auction a penalty equal to (i) the difference between the amount of the bidder's winning bid and the amount of the winning bid in a subsequent auction, and (ii) 15% of the defaulter's bid or of the subsequent winning bid, whichever is less. (§ 136).

Tutorial and Additional Information for Applicants

The FCC intends to provide additional information on the bidding system, including online tutorials, for applicants in Auctions 101 and 102. Once posted, additional information will be available at <https://www.fcc.gov/auction/101-102>.

For further information on these issues, please contact one of the attorneys listed on this alert.