

ALERT

Summary of Incentive Auction Bidding Procedures for Auction 103 (Upper 37 GHz, 39 GHz, and 47 GHz bands)

July 16, 2019

The Federal Communications Commission (FCC or Commission) released a Public Notice establishing application and bidding procedures for auctioning Upper Microwave Flexible Use Service (UMFUS) licenses in the 37.6-38.6 GHz (Upper 37 GHz), 38.6-40 GHz (39 GHz), and 47.2-48.2 GHz (47 GHz) bands. The auction, designated as Auction 103, is scheduled to begin December 10, 2019.

Licenses to be Offered

The FCC will offer UMFUS licenses for all available spectrum in the Upper 37 GHz, 39 GHz, and 47 GHz bands. Each license will authorize operations in a 100-megahertz block of spectrum licensed by Partial Economic Area (PEA) service area. The Commission will offer 3,400 megahertz of spectrum in total at auction—1,000 megahertz in the Upper 37 GHz band and 1,400 megahertz in the adjacent 39 GHz band (for a combined 2,400 megahertz of contiguous spectrum), and 1,000 megahertz in the 47 GHz band. (¶ 6).

The Commission will auction up to 34 licenses in each PEA. The final number of licenses available at auction will depend on incumbent licensees in the 39 GHz band, which had to decide by July 15 whether to (a) accept modified licenses to conform to the new band plan or (b) surrender their licenses in exchange for a portion of auction proceeds and the opportunity to bid on new licenses in Auction 103. The FCC will issue a public notice prior to the short-form application deadline announcing the specific number of licenses

Authors

Edgar Class
Partner
202.719.7504
eclass@wiley.law
Ari Meltzer
Partner
202.719.7467
ameltzer@wiley.law

Practice Areas

Media
Telecom, Media & Technology
Wireless

available in each PEA. (§ 7).

Auction Specifics

Auction 103 is scheduled to begin December 10, 2019. (§§ 10-11). The following dates and deadlines have been set:

Auction Application Tutorial Available
(via Internet)

August 2, 2019

Short-Form Application (FCC Form 175) Filing Window Opens

August 26, 2019; 12:00 pm Eastern Time (ET)

Short-Form Application (FCC Form 175) Filing Window Deadline

September 9, 2019; 6:00 pm ET

Upfront Payments (via wire transfer)

October 22, 2019; 6:00 pm ET

Bidding Tutorial Available (via Internet)

No later than November 19, 2019

Mock Auction

Starting week of December 2, 2019

Bidding Begins in Auction 103

December 10, 2019

Application Procedures

A. Short-Form Applications

Those seeking to participate in Auction 103 must file a short-form application (FCC Form 175, Application to Participate in an FCC Auction) electronically via the Auction Application System by 6:00 pm ET on September 9, 2019. If an applicant fails to make the required certifications in its short-form application by the filing deadline, its application will be deemed unacceptable for filing and cannot be corrected after the filing deadline. (§§ 14-15, 17).

A party may not submit more than one short-form application for Auction 103. The FCC generally only allows parties to participate in an auction through a single bidding entity, and it will generally not allow entities controlled by the same party or set of parties to file separate applications. (§§ 18-19).

39 GHz band incumbent licensees may only submit a short-form application to participate in Auction 103 if the party submitted an “Initial Commitment” to relinquish its existing 39 GHz band licenses in exchange for an incentive payment. Incumbent licensees participating in the auction that want to offset their gross winning bids by their incentive payment must file both FCC Form 175 (Application to Participate in an FCC Auction) and FCC Form 175-A (Incumbent 39 GHz Licensee Short-Form Application). (§ 20).

The FCC will issue a public notice announcing the status of applications. The FCC will identify qualified bidders by public notice at least 10 days prior to the mock auction. (§ 21).

Parties that submit a short-form application will be subject to a “quiet period” for the duration of Auction 103. The quiet period begins 6:00 p.m. ET on September 9, 2019 (the deadline for filing short-form applications) and ends on the auction’s down payment deadline, which will be after the auction closes on a date the FCC announces in a future public notice. (§§ 14, 45). For 39 GHz band incumbents making an Initial Commitment, the quiet period began at the FCC Form 175-A filing deadline on July 15, 2019. (§ 45).

B. License Area Selection

Applicants must identify from a list of available PEAs on its FCC Form 175 all license areas on which they may want to bid. Applicants cannot modify their PEA selections after the application filing deadline, and the FCC’s Auction Bidding System will not accept bids for blocks in PEAs that were not selected on the applicant’s FCC Form 175. (§ 23).

C. Disclosure of Agreements and Bidding Arrangements

Applicants must identify in FCC Form 175 any partnerships, joint ventures, consortia or other agreements of any kind concerning Auction 103 licenses. This includes any agreements that address or communicate directly or indirectly bids, bid prices, bidding strategies, or post-auction market structure. (§ 24).

Applicants must also disclose agreements made in principle prior to the application filing deadline, even if the agreement is not in writing. However, if the parties have not agreed in principle by the FCC Form 175 filing deadline, they should not make a disclosure. (§ 25).

All winning bidders will be required to disclose in their post-auction application (FCC Form 601) the specific terms, conditions, and parties involved in any agreement related to Auction 103 licenses entered prior to the time bidding was completed. (§ 31).

D. Ownership Disclosure Requirements

Applicants must disclose in FCC Form 175 information regarding the real party- or parties-in-interest in the applicant, as well as individuals or entities with 10% or more direct or indirect ownership. (§ 32).

E. Foreign Ownership Disclosure Requirements

Applicants must disclose any foreign ownership information in FCC Form 175. Parties with foreign ownership exceeding the limits provided in Section 310(b) of the Communications Act must file a petition for declaratory ruling to participate in Auction 103 prior to the short-form filing deadline. (§ 34).

F. Provisions for Small Businesses and Rural Service Providers

Designated entity bidding credits will be available to eligible small business or rural service provider bidding applicants winning licenses. Bidding credits are not cumulative. Eligible applicants may claim either a small business bidding credit or a rural service provider bidding credit, but not both. Applicants must certify eligibility in FCC Form 175. (§ 70. *See also* 47 C.F.R. § 1.2110).

Incumbents bidding in the auction and claiming a bidding credit will receive a bidding discount only on winning bid amounts that exceed any incentive payment received by the incumbent. (§ 72).

Small Business Bidding Credit

The FCC will use a two-tiered approach for awarding small business bidding credits. *First*, bidders with attributed average annual gross revenues less than \$55 million for the preceding 3 years are eligible to receive a 15% discount on their winning bids. *Second*, bidders with attributed average annual gross revenues less than \$20 million for the preceding 3 years are eligible to receive a 25% discount on their winning bids. Small business bidding credits are not cumulative. Applicants may receive either the 15% or 25% bidding credit on its winning bid, but not both. (§§ 73, 75).

Rural Service Provider Bidding Credit

Eligible rural service providers may request a 15% discount on their winning bids. To be eligible for a rural service provider bidding credit, an applicant must:

- be a service provider that is in the business of providing commercial communications services and, together with its controlling interests, affiliates, and the affiliate of its controlling interests, have fewer than 250,000 combined wireless, wireline, broadband, and cable subscribers; and
- serve predominately rural areas, defined as counties with a population density of 100 or fewer persons per square mile. (§ 77).

Caps on Bidding Credits

Total bidding credit discounts are capped at \$25 million for each eligible small business and \$10 million for each eligible rural service provider. To create parity in smaller markets, no designated entity bidder can obtain more than \$10 million in bidding credit discounts in total for licenses won in markets with a population

of 500,000 or less. (§ 79).

G. Former and Current Defaulters

Current defaulters or delinquents (*i.e.*, when it, any of its affiliates, any of its controlling interests, or any of the affiliates of its controlling interests, are in default on any payment for any Commission construction permit or license, or are delinquent on any non-tax debt owed to any federal agency as of the filing deadline for auction applications) are not eligible to participate in Auction 103. (§ 91).

Former delinquents may participate, if they submit an upfront payment that is 50% more than would otherwise be necessary. (*Id.*).

More information on the rules for defaulters is available in Section 1.2105 of the FCC's rules. (See *also* §§ 92-95).

H. Optional Applicant Status Identification

Applicants owned by women or members of minority groups as defined in Section 1.2110(c)(3), or rural telephone companies as defined in Section 1.2110(c)(4), may identify this information in FCC Form 175 to assist the Commission in monitoring the participation of various groups in its auctions. (§ 96).

I. Modifications to FCC Form 175

Applicants may only make minor modifications after the initial FCC Form 175 filing deadline. Examples of minor modifications include the deletion or addition of authorized bidders and changes to contact information. The FCC will not permit major modifications (*e.g.*, change of PEA selection, ownership changes, or claimed eligibility changes) after the deadline. (§ 97).

Additional information on modifying FCC Form 175 is available in Section 1.2105 of the Commission's rules and paragraphs 99-105 of the *Public Notice*.

Preparing for Bidding in Auction 103

Bidder Education

The Commission will make educational information available to would-be participants on the Auction 103 webpage. This will include information on the pre-bidding processes, including how to complete short-form applications and how to use the online bidding system ahead of the mock auction. All education materials, once posted, will be available at www.fcc.gov/auction/103. (§§ 116-18).

A. Upfront Payments

Applicants must submit upfront payments and complete FCC Form 159 (the FCC Remittance Advice Form) before 6:00 p.m. ET on October 22, 2019. Detailed instructions for completing upfront payments for Auction 103 are available in paragraphs 127-34 of the *Public Notice*.

Applicants must make an upfront payment sufficient to obtain bidding eligibility (*i.e.*, the maximum number of bidding units a bidder may place in any single round) on all generic blocks on which it intends to bid. Applicants cannot increase bidding eligibility after the upfront payment deadline and should therefore submit an upfront payment amount that will cover the maximum number of bidding units it may wish to place in a single round. (§§ 137, 140).

Upfront payments for a generic block in a PEA will be based on \$0.00025 per weighted MHz-pop for PEAs 1-50, \$0.00005 per weighted MHz-pop for PEAs 51-100, and \$0.000025 per weighted MHz-pop in other PEAs, or \$250 per generic block in a PEA, whichever is greater. The upfront payment amounts are approximately one-fourth the minimum opening bid amounts. (§ 139).

The FCC has assigned each generic block in a PEA a specific number of bidding units equal to one bidding unit per \$10 of the upfront payment. The number of bidding units for a generic block in a PEA is fixed and does not change throughout the auction, even as prices change. (§ 140).

Applicants that are former defaulters must calculate upfront payments by multiplying its intended number of bidding units by 1.5. (§ 141. *See also supra* "Former and Current Defaulters").

B. Auction Registration

The FCC will automatically register all qualified bidders for Auction 103, and it will mail registration information and SecurID tokens for bid placement to the contact address listed on FCC Form 175. (§§ 142-44).

C. Remote Electronic Bidding via the FCC Auction Bidding System

Bidders may participate in Auction 103 online using the FCC's Auction Bidding System. Each bidder must have a SecurID token to place a bid. Bidders that have not received their SecurID token by 12:00 p.m. on November 27, 2019 should call the Auctions Hotline at 717-338-2868. (§§ 144, 145-47).

D. Mock Auction

The FCC will conduct a mock auction for all qualified bidders during the week of December 2, 2019. Details regarding the mock auction will be announced in the public notice announcing Auction 103 qualified bidders. After the clock auction phase concludes, the Commission will hold a separate mock auction for the assignment phase open to qualified bidders that won generic blocks in the clock phase. (§§ 148-49).

Bidding in Auction 103

A. Auction Structure

Auction 103 will be an ascending clock auction with two phases. In phase 1, the "clock phase," bidders will identify the number of generic license blocks it wants and in which category and PEA. In phase 2, the "assignment phase," winning clock-phase bidders will have an opportunity to bid for their preferred combinations of frequency-specific licenses for their clock-phase winnings. (§ 153).

In the clock phase, the FCC will auction two categories of generic blocks in all PEAs: Category M/N in 37.6-40 GHz and Category P in 47.2-48.2 GHz. Category M/N will comprise 24 blocks made up of 10 blocks in the Upper 37 GHz band (Blocks M1-M10) and 14 blocks in the 39 GHz band (Blocks N1-N14). Category P will comprise 10 blocks in the 47 GHz band (Blocks P1-P10). The FCC will announce final auction inventory on August 23, 2019, after the Initial Commitments deadline. (§ 155).

The final clock phase price for a generic license block in Category M/N in a given PEA will determine the incentive payment associated with 100 megahertz of relinquished spectrum rights by an incumbent in that PEA. Incumbents relinquishing a partial payment will receive an incentive payment pro-rated based on the weighted MHz-pops associated with its relinquished rights relative to the full number of weighted MHz-pops in the PEA. (§§ 164-65).

The FCC will determine the net revenue requirement based on the minimum amount required to cover incentive payments to incumbents. It will consider only clock phase bids to determine whether the requirement is met. If the net revenue requirement has not been met by the time bidding stops in the clock phase, the auction will end, and the Commission will not assign any licenses. (§§ 167, 170).

The FCC will apply its simultaneous stopping rule for the clock phase of Auction 103. All categories of blocks in all PEAs will remain available for bidding until the bidding stops on every category in every PEA. The FCC will announce the supply, aggregate demand, posted price of the prior round, and clock price for the next round after each round of the clock phase. Bidder-specific information will not be disclosed until after Auction 103 concludes. Bidders, however, will have access to additional information related to their own bidding and bid eligibility through the online bidding system. (§§ 177, 179-80).

B. Clock Phase Bid Collection and Bid Processing Procedures

The clock phase will consist of a series of rounds with bidding conducted simultaneously for all available spectrum blocks. The clock price for a category of generic blocks will increase each round, if aggregate demand exceeds the number of blocks available in the category. Clock phase rounds will continue until, for all categories of blocks in all geographic areas, the number of blocks demanded does not exceed the supply of available blocks. Bidders indicating demand in a category in a PEA at the final clock phase price will be winning bidders. (§§ 185-187).

Bidders must commit between 90% and 100% of their bidding eligibility in all clock rounds, as determined by the Commission. The FCC has set the initial activity requirement at 95%. The Commission will reduce bidder eligibility for those that do not meet the activity level requirement. (§§ 188-90).

The FCC will establish minimum opening bid amounts based on 100 megahertz of bandwidth and license area population (*i.e.*, MHz-Pops). (§§ 196-97. *See also supra* "Upfront Payments"). After each round, the FCC will announce via its Bidding System the clock price for the next round. The price will be based on a fixed percentage increment increase (between 5% and 20%) to the posted price for the prior round. The Commission has set the initial increment at 10%. (§§ 198-99).

Bidders have the option to place intra-round bids by indicating a price greater than the previous round's posted price and the new clock price. (§§ 200-01). Bidders also have the option to bid for multiple blocks in a bidding category in a PEA and may submit bids for multiple PEAs. (§ 206).

Bidders can choose from one of two bid types: "simple bid" or "switch bid." A simple bid is a bid for a specified quantity of licenses in a category in a specified PEA. Simple bids may be either at the clock price or an intra-round price. They may also be applied partially, if demand exceeds the bidder's bidding eligibility for the round. A switch bid allows the bidder to request to move its demand for a quantity of licenses from the M/N category to the P category (or vice versa) within the same PEA. A switch bid can be applied partially, but an increase in one category will be matched by a proportionate decrease in the other. (§ 211).

Bidders may also withdraw any bids placed in a round before the close of that round. Withdrawn bids will not count towards a bidder's activity requirement. (§ 204).

Bidders holding processed demand in a category in a PEA when the stopping rule is met become winning bidders, assuming the net revenue requirement has been satisfied. Winning bidders will be assigned frequency-specific licenses in the assignment phase. (§ 216).

C. Information Procedures During the Auction Process

The FCC will withhold the following information until after bidding in Auction 103 has closed: (1) the license areas that an applicant selects for bidding in its short-form application, (2) the amount of any upfront payment made by or on behalf of an applicant, (3) the applicant's bidding eligibility, if applicable, and (4) any other bidding-related information that might reveal the identity of the bidder placing a bid. (§ 35).

Under the Commission's limited information or "anonymous bidding" procedures, the FCC will make public the supply, aggregate demand, and price at the end of each round of bidding for each category of license in each geographic area. It will also disclose the price for the next round. The Commission will not disclose bidder identities and net bid amounts (which would reflect bidding credits or incentive payments), however, until after the close of bidding. (§ 37).

Bidders will have access to additional information related to their own bidding and bid eligibility throughout the auction via the Commission's bidding system. (§ 38).

D. Prohibited Communications and Compliance with Antitrust Laws

FCC rules prohibit applicants from communicating or disclosing to each other or to any nationwide provider that is not an applicant (or if the applicant is a nationwide provider, to any non-nationwide provider that is not an applicant) any information related to bids or bidding strategies – including post-auction market structure – or discussing settlement agreements during the quiet period. The quiet period begins at the FCC Form 175 filing deadline or, for 39 GHz band incumbents making an Initial Commitment, the FCC Form 175-A filing deadline and runs until after the down payment deadline, which will be after the close of bidding on a date the FCC announces in a future public notice. (§§ 14, 41).

Additional information on the scope of prohibited communications and prohibited joint bidding agreements is available in Section 1.2105(c) of the FCC's rules. (See *also* ¶¶ 41-68).

E. Assignment Phase Bid Collection and Bid Processing Procedures

In the assignment phase, winning bidders have the option to bid for preferred combinations of frequency-specific licenses. They will do so by indicating, through sealed bid, the maximum price the bidder is willing to pay for each specific frequency assignment in addition to the final price established in the clock phase for the generic blocks. (¶ 218). Bidders will submit separate bids for frequency preferences for blocks won in Category M/N and Category P. (¶ 227).

Participation in the assignment phase is voluntary. Winning clock phase bidders will receive frequency assignments, and bidders winning multiple blocks in a category in a PEA will be assigned contiguous blocks of licenses, even without bidding in the assignment phase. (¶ 219).

The FCC will assign rounds for the largest markets first and starting with a separate assignment round for each of the top 20 PEAs sequentially. Next, the Commission will conduct assignment rounds for the remaining PEAs within each Regional Economic Area Grouping (REAG) in descending order of PEA population. (¶ 222). The agency will group non-top 20 PEAs within a region into a single market for assignment purposes where the same entities are assigned the same number of blocks in each category. (¶ 223). Bidding for different REAGs will happen simultaneously. (¶ 224).

A bidder's final net total payment includes (1) the sum of final clock phase prices across all licenses that it won, (2) its assignment payments across all assignment phase markets, and (3) any incentive payments accruing to the bidder. The FCC will apply any claimed bidding credits to the total net payment obligations. (¶¶ 230-31).

F. Calculating Individual License Prices

The FCC will separately calculate a per-license price for each license in case needed for future FCC action (e.g., cases involving unjust enrichment). The Commission will determine both a net and gross price for each license, taking into consideration assignment payments and bidding credit discounts. (¶¶ 232-33).

Post Auction Procedures

A. Down Payments

Winning bidders must submit down payments to the FCC within 10 business days after the release of the public notice announcing the close of Auction 103. Down payments, which can include amounts provided already as part of upfront payments to the Commission, must be at least 20% of the net amount of final winning bids. (¶ 237).

B. Final Payments

Winning bidders must submit the remaining balance to the Commission within 10 business days after the deadline for submitting down payments. (§ 238).

C. Long-Form Application (FCC Form 601)

Winning bidders must file FCC Form 601, the post-auction or “long-form” application, within 10 business days after release of the auction closing public notice. Winning bidders claiming a small business bidding credit or a rural service provider bidding credit must demonstrate eligibility in FCC Form 601. Winning bidders organized under a bidding consortium must comply with post-auction application procedures in Section 1.2107 of the FCC’s rules. The Commission will provide additional filing instructions to winning bidders in its auction closing public notice. (§§ 239-41).

D. Ownership Disclosure Information Report (FCC Form 602)

Winning bidders must disclose ownership information by submitting FCC Form 602 together with its FCC Form 601 post-auction application within 10 business days after the release of the auction closing public notice. Winning bidders that already have an FCC Form 602 on file may certify in its FCC Form 601 application that the information remains complete and accurate instead of filing a new report. (§§ 242-43).

E. Tribal Lands Bidding Credit

Eligible winning bidders may apply the tribal lands bidding credit in addition to, and separate from, the small business or rural service provider credits for which they may apply. Winning bidders that intend to use their license(s) to serve unserved or underserved federally recognized tribal lands should apply for the tribal lands bidding credit after the auction as part of its FCC Form 601 post-auction application. They will then have 180 days from the close of the post-auction application filing window to select the specific tribal lands to be served and provide required tribal government certifications. (§§ 254-46).

F. Default and Disqualification

Winning bidders that do not meet the down payment or final payment deadlines, or fail to timely file a long-form application, are liable for default payments pursuant to Section 1.2104(g)(2) of the FCC’s rules. In addition, the FCC has the discretion to re-auction the licenses or offer them to the next highest bidders at their final bid amounts. It may also declare such winning bidders and their principals ineligible to bid in future auctions or revoke any existing authorizations, if the default or disqualification involves gross misconduct, misrepresentation, or bad faith. (§§ 247, 250).

G. Refund of Remaining Upfront Payment Balance

The FCC will return all refunds of upfront payment balances to the payer of record identified on FCC Form 159, unless the payer submits written instructions otherwise. It generally takes up to 2 weeks to process refunds. (§§ 251-52).