New gTLD Program Terms & Conditions for Next Round ASP & RSP Evaluation Program

Update #15-v2 to At-Large CPWG
Discussion for Public Comment Proceeding

Justine Chew
ALAC Representative to the SubPro IRT

7 August 2024

Agenda

- Public Comment Proceeding
  - On Proposed Language on **Terms and Conditions** for
    - New gTLD Program: **Next Round Applicant Support Program (ASP)**
    - New gTLD Program: **Registry Service Provider Evaluation Program (RSP)**
  - https://community.icann.org/pages/viewpage.action?pageId=357105879
  - 30 days: 23 Jul – **23 Aug 2024** (no extensions)

- Should ALAC submit a comment?

Timetable

- If an ALAC statement is recommended
  - **8-9 Aug:** Start draft statement and circulate link, include portions not discussed in 7 Aug presentation, open for comments
  - **14 Aug:** Present final draft statement
  - **16 – 21 Aug:** ALAC Vote
  - **22 Aug:** Submit public comment

Should ALAC submit a comment?

- Consider:

	ASP	RSP	Issue	Clarify	Omission	Amend
1	✓		Prevent abuse of intent	?		
2	✓		Refining language			?
3	✓		Confidentiality obligations	?	?	
4	✓	✓	Treatment of Rights, obligations	?	?	
5	✓	✓	Term, Typographical errors, Formatting	?		?

1. ASP – Preventing abuse of but not impede ASP Intent [1]

- **CONTEXT : Applicable criteria at ASP Application Stage**

ASP s 4.2 Public Responsibility Due Diligence

Criterion 2: Applicant is not affiliated with an existing gTLD Registry Operator and/or another prospective gTLD applicant in the next round **that would not meet the ASP criteria.**

Note that a relationship with a back-end Registry Service Provider (RSP) is expected and permissible; the RSP cannot have control over the ASP applicant entity, per the definition of “affiliate”.

ASP s 4.3 Financial Need

The applying entity must **not be majority (more than 50%) owned or controlled** (defined in Section 4.2 Criterion 2 indicator) **by an entity that does not meet the Financial Need criteria**.

Implications: To ensure ASP applicant is an entity deserving of support and NOT majority owned or controlled by existing RO or “rich entity”

1. ASP – Preventing abuse of but not impede ASP Intent $_2$

- **CONTEXT :**

  "**Affiliate**" means a person or entity that, directly or indirectly, through one or more intermediaries, or in combination with one or more other persons or entities, controls, is controlled by, or is under common control with, the person or entity specified, and "control" (including the terms "controlled by" and "under common control with") means the possession, directly or indirectly, of the power to direct or cause the direction of the management or policies of a person or entity, whether through the ownership of securities, as trustee or executor, by serving as an employee or a member of a board of directors or equivalent governing body, by contract, by credit arrangement or otherwise."

1. ASP – Preventing abuse of but not impede ASP Intent 3

- Compare proposed text, implications, intention

T&Cs

Clause 4: "The ASP is not intended to provide support to applying entities that were created by, are affiliated with existing gTLD Registry Operators or prospective applicants to the New gTLD Program that would not meet the criteria of the ASP, or have sufficient ongoing funding or investment from other sources at the time this Application is submitted or when ICANN proposes to delegate the new gTLD."."

Stages	(1) At ASP application submission	(2) Post ASP evaluation results → ASP qualification est.	(3) At string application submission	(4) Throughout String evaluation	(5) String application approval → string delegation	(6) Post gTLD delegation, year 4 to year 7
Implications	• Does "prospective applicants" mean any entity? • Ensures ASP applicant IS NOT majority owned or controlled by existing RO or "rich entity"					
Intention	Ensures ASP applicant IS NOT majority owned or controlled by existing RO or "rich entity"					

Poll for Issue 1 – Q1

Clause 4: "The ASP is not intended to provide support to applying entities that were created by, are affiliated with existing gTLD Registry Operators or prospective applicants to the New gTLD Program that would not meet the criteria of the ASP, or have sufficient ongoing funding or investment from other sources at the time this Application is submitted or when ICANN proposes to delegate the new gTLD."

Q1. Do you agree that there is a gap between "at the time this Application is submitted" and "or when ICANN proposes to delegate the new gTLD" which should be addressed?

- Yes
- No
- Unsure / abstain

1. ASP – Preventing abuse of but not impede ASP Intent 4

- Compare proposed text, implications, intention

T&Cs

Clause 4: "The ASP is not intended to provide support to applying entities that were created by, are affiliated with existing gTLD Registry Operators or prospective applicants to the New gTLD Program that would not meet the criteria of the ASP, or have sufficient ongoing funding or investment from other sources at the time this Application is submitted or when ICANN proposes to delegate the new gTLD."."

Stages	(1) At ASP application submission	(2) Post ASP evaluation results → ASP qualification est.	(3) At string application submission	(4) Throughout String evaluation	(5) String application approval → string delegation	(6) Post gTLD delegation, year 4 to year 7
Implications	• Does "prospective applicants" mean any entity? • Ensures ASP applicant IS NOT majority owned or controlled by existing RO or "rich entity"	• ASP qualifier has to now boost its financial position & operational capability to apply for string.	• ASP qualifier may have had change in shareholding when applying for string.	 • Terms & conditions and procedure for Application Change Requests apply?		
Intention	Ensures ASP applicant IS NOT majority owned or controlled by existing RO or "rich entity"	ASP applicant should still NOT be majority owned or controlled by existing RO or "rich entity"	ASP qualifier should still NOT be majority owned or controlled by existing RO or "rich entity"	ASP qualifier should still NOT be majority owned or controlled by existing RO or "rich entity"		

Poll for Issue 1 – Q2

Clause 4: "The ASP is not intended to provide support to applying entities that were created by, are affiliated with existing gTLD Registry Operators or prospective applicants to the New gTLD Program that would not meet the criteria of the ASP, or have sufficient ongoing funding or investment from other sources at the time this Application is submitted or when ICANN proposes to delegate the new gTLD."

(Assuming Q1 was answered in the affirmative)

Q2. Do you agree that the SAME INTENTION should apply during the identified gap"?

- Yes – need to ensure ASP applicant is NOT majority owned or controlled by existing RO or "rich entity" at the time this Application is submitted UP TO when ICANN proposes to delegate the new gTLD."
- No
- Unsure / abstain

1. ASP – Preventing abuse of but not impede ASP Intent 6

Context : SubPro Implementation Guidance 17.17 (modified)

Supported applicants that progress to delegation will be restricted from assigning the Registry Agreement or from any Change of Control **for a period of three years**. Assignments that become necessary for the following reasons shall be permitted:

- Assignments due to the TLD being unable to meet its financial obligations and unable to secure financing or restructure operations to carry out operations in the short-term
- Assignments due to death or retirement of a majority shareholder
- Assignments due to EBERO
- **Assignments to affiliates or subsidiaries**
- Assignments required by competition authorities

All assignments after such time shall be governed under the then-current Registry Agreement standard provisions; provided that any Assignment or Change of Control after the third (3rd) year, but prior to the seventh (7th) year, shall require the applicant to repay the full amount of financial support received through the ASP Program, including application fees and any bid credit, multiplier, or related benefits, plus an additional ten percent (10%).

1. ASP – Preventing abuse of but not impede ASP Intent 7

- Compare proposed text, implications, intention

T&Cs

Clause 4: "The ASP is not intended to provide support to applying entities that were created by, are affiliated with existing gTLD Registry Operators or prospective applicants to the New gTLD Program that would not meet the criteria of the ASP, or have sufficient ongoing funding or investment from other sources at the time this Application is submitted or when ICANN proposes to delegate the new gTLD."."

Stages	(1) At ASP application submission	(2) Post ASP evaluation results → ASP qualification est.	(3) At string application submission	(4) Throughout String evaluation	(5) String application approval → proposed gTLD delegation +3 yrs	(6) Post gTLD delegation, year 4 to year 7
Implications	• Does "prospective applicants" mean any entity? • Ensures ASP applicant IS NOT majority owned or controlled by existing RO or "rich entity"	• ASP qualifier has to now boost its financial position & operational capability to apply for string.	• ASP qualifier may have had change in shareholding when applying for string.	 • Terms & conditions and procedure for Application Change Requests apply?	• SubPro IG 17.17 Cannot assign RA or have Change of Control with 5 exceptions, including: Assignments to affiliates or subsidiaries?	• SubPro IG 17.17 Assignment gov. by standard RA terms but required to repay full amount of financial support + additional 10%
Intention	Ensures ASP applicant IS NOT majority owned or controlled by existing RO or "rich entity"	ASP applicant should still NOT be majority owned or controlled by existing RO or "rich entity"	ASP qualifier should still NOT be majority owned or controlled by existing RO or "rich entity"	ASP qualifier should still NOT be majority owned or controlled by existing RO or "rich entity"	Prevents abuse of intent of ASP via majority ownership or control by existing RO or "rich entity"	Prevents abuse of intent of ASP – can change majority ownership or control but penalty applies

Poll for Issue 1 – Q3

Clause 4: "The ASP is not intended to provide support to applying entities that were created by, are affiliated with existing gTLD Registry Operators or prospective applicants to the New gTLD Program that would not meet the criteria of the ASP, or have sufficient ongoing funding or investment from other sources at the time this Application is submitted or when ICANN proposes to delegate the new gTLD."

(Assuming Q1 & Q2 were answered in the affirmative)

Q3. Do you agree that the "restrictions" under IG 17.17 should be regarded as Terms & Conditions?

- Yes – all of what's in IG 17.17 should be part of T&C Clause 4
- No – it's enough that the first part is a T&C and the second part is a restriction
- Unsure / abstain

2. ASP – Language on Chances for Securing ASP

- **T&Cs Clause 3**
  - Applicant also acknowledges that the final Applicant Guidebook for the New gTLD Program ~~are~~ **is** still being determined and that qualifying for applicant support through the Application Support Program will ~~not~~ **neither** be considered an endorsement of the Applicant's ultimate New gTLD application ~~and will not increase the chances~~ **nor assures** ~~that~~ such Applicant ~~will be~~ **of being** ultimately qualified or eligible for a New gTLD or awarded a new gTLD.

  - Furthermore, Applicant acknowledges that being awarded financial or other support pursuant to the Applicant Support Program in no way ~~increases (or decreases) the Applicant's chances of~~ **assures** the Applicant of being able to satisfy the criteria established by the New gTLD Program to operate a New gTLD.

3. ASP – Confidentiality obligations toward applicants

⊙ T&Cs Clause 7

TERMS & CONDITIONS	CONSIDERATIONS
• ICANN given permission to use Applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's Application and any action taken by ICANN related thereto.	• ASP Handbook does not state any information that will be kept confidential. • Should ICANN and the ICANN Affiliated Parties be obligated to keep all or some details of an ASP Applicant confidential, including the name of Applicant? • If yes, until when? • What about need for transparency?
• ICANN authorized to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with this Application, including evaluations, analyses and any other materials prepared in connection with the evaluation of this Application; provided, however, that information will not be disclosed or published to the extent that the Handbook expressly states that such information will be kept confidential, except as required by law or judicial process.	
• Access to confidential information shall be limited to those individuals and entities who need access to complete the review process, including individuals within ICANN and any third parties conducting application evaluations or providing dispute resolution or challenge/appeals services.	
• Except for information afforded confidential treatment, Applicant understands and acknowledges that ICANN does not and will not keep the remaining portions of this Application or materials submitted with this Application confidential.	

Poll for Issue 3 – Q4

Clause 7:

- **ICANN can use Applicant's name in ICANN's public announcements**
- **…. including evaluations, analyses and any other materials prepared in connection with the evaluation of this (ASP) Application; provided, however, that information will not be disclosed or published to the extent that the Handbook expressly states that such information will be kept confidential, …**

Q4. Do you agree there is a need to clarify what Applicant details ICANN and the ICANN Affiliated Parties should be obligated to keep confidential?

- Yes, but up to the ASP application window is closed.
- Yes, but only until evaluation result of each ASP application is determined.
- No, not at all.

4. ASP & RSP – Treatment of rights, obligations

- **T&Cs Clause 10**
  - Text from 2012 AGB removed altogether.
  - Propose re-instating:
    - Applicant understands and agrees that Applicant will not acquire any rights in connection with any new gTLD that Applicant intends to apply for and that Applicant's rights are solely in respect of this Application as set out in the Handbook.
    - Applicant may not resell, assign, or transfer any of Applicant's rights or obligations in connection with this Application.

Poll for Issue 4 – Q5

Q5. Do you agree that these disclaimers, treatment of rights or obligations should be reinstated?

- Yes
- No
- Unsure / abstain

5. ASP & RSP – Clarification, Typos, Formatting

	TERMS & CONDITIONS	PROPOSED ACTION
1	If prior to the delegation of a new gTLD ICANN determines, in its sole discretion, that the Applicant's financial conditions have changed and the Applicant would not have qualified for the financial and non-financial support under the Applicant Support Program, then (a) at ICANN's request the Applicant will pay ICANN the full gTLD evaluation fee promptly upon request, or (b) ICANN may reject the Application without any liability or recourse to the Applicant.	**Clarify**: Is (b) meant to be the consequence of non-compliance of (a); OR Are we saying that ICANN can do (b) without first having to make a request under (a)?
2	Applicant shall indemnify, defend, and hold harmless ICANN and any ICANN affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, (collectively, the "ICANN Affiliated Parties")….	**Clarify**: Who are ICANN affiliates?
3.	• Extra "the"; • "is" instead of "are"	**Amend**: General typo error corrections
4.	Applicant agrees to comply with all applicable laws and regulations, including those economic, financial, and trade restrictions imposed, administered or enforced by the U.S. government, including but not limited to those administered by the Office of Foreign Assets Control (OFAC) of the U.S. Department of the Treasury ("Economic Sanctions").	**Formatting**: Add URL link for OFAC