

Issues List re: ICANN 29 August Draft of Naming Function Agreement

**A. ITEMS NEEDING CWG INPUT**

No.	Issue (Section number)	Sidley 27 July Draft / “Paul Kane” Comments	ICANN 10 August Draft (including 17 August ICANN Footnote Comments) / 17 August Replies to “Paul Kane” Comments	Sidley Comments	ICANN’s Comments re: 8/29 Draft
A1.	U.S. Presence (4.2)	<i>Paul Kane Comment:</i> This Section requires the Contractor to perform the IANA Naming Function in the US and to demonstrate that all primary operations and systems will remain within the US. Is additional flexibility needed for remote personnel with operational responsibilities outside the US?	<i>ICANN Response to Paul Kane Comment:</i> The language of “primary operations” does not preclude the possibility of remote employees or support. The flexibility is already present, and no further modifications are needed.	CWG to confirm whether it is comfortable with ICANN’s reply and Section 4.2 as is.	This is an open discussion item with the CWG. ICANN has recommended no changes. Need CWG to confirm.
A2.	Services in Conformance with Technical Norms (4.4(d))	Contractor shall . . . provide service to its customers in conformance with prevailing technical norms <i>as identified to Contractor by the ccTLD registries or other customers, as applicable.</i>	Deleted “ <i>as identified to Contractor by the ccTLD registries or other customers, as applicable.</i> ”  <i>ICANN Footnote Comment:</i> Deleted prescriptive text that defined who set prevailing technical norms because it is impossible to name all of the	The language in our draft was based on Annex C of the CWG proposal.  Appropriate CWG experts to consider whether ICANN’s deletion is acceptable.	This was not flagged by ccTLD operators after review of Naming Function Agreement. Need CWG to confirm that this is not an issue and can be removed from list

			customers/communities that contribute to setting the technical norms. For example, technical norms are also established and set by standards bodies, which may not be customers of the IANA Naming Services.		Technical norms are set by a broader group than just PTI customers. Sidley’s proposed wording is too limiting.
A3	Responsibility and Respect for Stakeholders	<b><i>Paul Kane Comment:</i></b> <i>References to the GAC 2005 ccTLD Principles being preceded by “where applicable in accordance with Section 1.3 thereof”.</i>	<b><i>ICANN Response to Paul Kane:</i></b> We’d like to understand more about the need for specific reference to Section 1.3. We are interested in accommodating this request, but need a bit more information.	Appropriate CWG experts to provide more information regarding the need for the specific reference to Section 1.3 with respect to the GAC 2005 ccTLD Principles, in response to ICANN’s request.	The edit made “where applicable, in accordance with Section 1.3 thereof, the 2005 Governmental Advisory Committee Principles and Guidelines for the Delegation and Administration of Country Code Top Level Domains (“ <b>GAC 2005 ccTLD Principles</b> ”)” is in response to a request from some ccTLD registry operators.  ICANN was provided an explanation that 1.3 makes clear that the GAC principles are guiding – not binding – and its application is dependent upon each Registry accepting the principles.

					<p>1.3 states: “1.3. These principles are intended as a guide to the relationships between Governments, their ccTLD and ICANN. They are not intended to be binding and need both Governments and Registries voluntarily to agree to apply them within their legal framework. If either the Government or the Registry decide not to adopt the principles, this cannot be held against the Registry, and the Registry still has a valid existence.”,</p> <p>There have been opposing views raised on this issue by some GAC participants in the CWG.</p> <p>ICANN does not have a position on whether this clause should be included or removed. There needs to be clear guidance to PTI on what it is expected to perform. If there is any question as to what policies</p>
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					<p>or principles are applicable, PTI must not be in the position of making that determination on its own. ICANN would expect PTI to seek clarification from ICANN as to how to remain in compliance with the Agreement.</p> <p>Need direction from the CWG regarding whether there should be specific reference to Section 1.3 of the 2005 GAC ccTLD Principles.</p>
A4.	<p>Inspection of All Deliverables and Reports Before Publication (4.10(a))</p>	<p><b><i>Paul Kane Comment:</i></b> Is the prohibition on publication of posting of reports and other deliverables practical? As a minimum, PTI should be permitted to post ordinary, scheduled reports in pre-approved formats without ICANN review?</p>	<p>PTI will be under contract with ICANN to perform to all required specifications. Failures of PTI in delivering the proper reports or deliverables are imputed to ICANN and could serve as the basis for challenging the existence of PTI or ICANN's continued role in contracting with an IFO. This prohibition is practical and easily workable, for example, through the agreement upon templates for reporting, just as recommended.</p>		<p>Specific reference to templates made. Need confirmation from the CWG that item can be considered closed with this edit.</p>

A5.	Performance Exclusions (5.3(a))	<p>Contractor may not change or implement the established methods associated with the performance of the IANA Naming Function without consulting all Interested and Affected Parties and obtaining prior approval of ICANN.</p> <p><i>Paul Kane comments:</i> this section prohibits the Contractor from modifying the zone file or associated information without written authorization from ICANN. While that may make sense for some things (adding/deleting gTLDs, e.g.) it can be - and in the past has been - interpreted to prevent routine changes such as the addition of a new name server by an existing TLD operator. This would obviously be very problematic.</p>	<p>Deleted.</p> <p><b>ICANN Footnote Comment:</b> Language suggested by CWG counsel is inconsistent with the policy development process and the authority of ICANN/PTI. PTI does not make policy (as made clear earlier in this Agreement) and is not in a position to change policy. If the intent of the suggested revision was to prevent PTI from changing its practices used to carry out a policy, then the suggested revisions would lead to micromanaging PTI’s day-to-day operations.</p> <p><b>ICANN response to Paul Kane Comment:</b> The intent of this provision is to prevent PTI from performing the Root Zone Maintainer role. Upon review, ICANN is considering replacing this clause with language stating “PTI is not authorized to perform the root zone maintainer services as defined in the RZMA unless authorized by ICANN.” This would also require defining the RZMA within the Naming Functions Agreement.</p>	Appropriate CWG experts to provide input.	<p>Language has been modified to make clear the intent of the clause, which is that PTI shall not perform the root zone maintainer function unless authorized by ICANN.</p> <p>Need confirmation from the CWG that item can be considered closed with this edit.</p>
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A6.	Transparency (6.1(c))	<p><b>Paul Kane Comment:</b> This section permits the PTI to redact Board minutes containing material that “is subject to a legal obligation that the Contractor maintains its confidentiality.” There have been recent examples where these kind of confidentiality provisions in ICANN’s contracts with its vendors and consultant prevented community access to information about consultant payments, etc. Is there a way to minimize these kind of redactions?</p>	<p><b>ICANN Response to Paul Kane Comment:</b> The language that is included here is to address circumstances such as sensitive delegation-related items that customers have the current expectations to maintain as confidential, sensitive employment matters, items that would impair PTI’s negotiating stance (such as maximum financial authorizations for leases or high dollar value contracts requiring PTI Board approval). This is similar to how ICANN maintains its Board minutes. The general transparency concerns raised in this comment are separate issues. There is nothing in the CWG-Stewardship proposal that requires information that is currently understood by customers of the IANA functions as confidential to be treated in a different fashion by virtue of the transition.</p>	<p>CWG to advise as to whether they are comfortable with ICANN’s response and with Section 6.1 with our proposed addition of 6.1(d): “Set forth in any agreements between Contractor and third-party vendors that the existence of such agreement, the counterparty, and the fees paid will not be maintained as confidential information.” For consideration as to whether that standard should apply to ICANN as well.</p>	<p>As discussed, the proposed new text by Sidley in 6.1.d is not appropriate to add at this time, as it does not reflect current practice and the CWG Proposal did not specify this change to contracting practices. The general topic of transparency is under discussion in the CCWG-Accountability’s Work Stream 2.</p> <p>ICANN has added a commitment that PTI will be held to the same transparency standards as required under the ICANN Bylaws, so as not to remove any obligations as a result of the development of PTI. As a result, the transparency outcomes developed in WS2 will also be made applicable to ICANN. The contracting issue has been specifically identified as a topic for consideration there.</p>
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					Need confirmation from the CWG that item can be considered closed with this edit.
A7.	Complaint Process / Mediation (8.1)	<p>Footnote to consider whether the reference to “a customer”, with respect to ability to request mediation, should be changed to “a significantly interested party” based on Annex C of the CWG Proposal which states that the decisions of Contractor shall be appealable by significantly interested parties.</p> <p>Also, footnote re: Annex I of the CWG Proposal which states that “If the issue is not addressed, the complainant (direct customer), IFO or the ICANN Ombudsman may request mediation,” and the ICANN Bylaws which refer to “The availability of the IRP as a point of escalation for claims of PTI’s failure to meet defined service level expectations,” without a limit on IRP availability.</p>	Footnotes deleted.	<p>Section 4.3 of the ICANN Bylaws states that the IRP mechanism shall be available to direct customers.</p> <p>Since Annex I of the CWG Proposal states that the complainant (direct customer), IFO or the ICANN Ombudsman may request mediation, we suggest that Section 8.1 is revised to reflect such rights of IFO or the ICANN Ombudsman.</p>	<p>8.1.a is a description of the existing IANA Customer Service Complaint and Resolution process (<a href="http://www.iana.org/help/escalation-procedure">http://www.iana.org/help/escalation-procedure</a>), which the CWG has adopted for naming customers as reflected in Phase 1 of Annex I to the CWG proposal. This process is open to anyone and so the suggested addition by Sidley to 8.1.a is not consistent with the CWG proposal.</p> <p>In Phase 2, the CWG proposal does say that the IFO, customer, or Ombudsman may initiate mediation. ICANN would like to bring this up to the CWG for discussion because it is unclear why the Ombudsman – a place for neutral dispute</p>

					resolution over issues of fairness – would be able to initiate mediation or what the Ombudsman’s ongoing role in that mediation is expected to be.
A8.	Costs (10.1(c))	<i>Paul Kane Comment:</i> This section appears to introduce the concept of user fees for IANA Naming Function Services. How would this work, and are there adequate constraints on ICANN’s ability to approve and PTI’s ability to impose such fees?	<i>ICANN Response to Paul Kane Comment:</i> Section 10.1 continues the longstanding limitation that, in the event there is a determination that fees will be charged for the performance of the IANA functions, those fees must be based on the actual costs incurred. This limitation on fees is also included in the ICANN Bylaws at 16.3(a)(vi), identifying that this is a material provision in the naming function agreement that cannot be modified if a majority of the ccNSO council and GNSO council reject such a modification. This concept is carried over from B.2 of the current IANA Functions Contract, and was contemplated in Annex S of the CWG Proposal.	Deleted <i>and value of the resources utilized</i> , to avoid ambiguity that fees could be something more than costs incurred.	“ <i>and value of the resources utilized</i> ” text has been deleted as suggested.  Need confirmation from the CWG that item can be considered closed with this edit.
A9.	Requests for Information (4.5; 12.3)	Any person materially affected by an action of Contractor may request information related to any such action, except that	Deleted section 12.3 but retained the “subject to Section 12.3” language in Section 4.5.  <i>ICANN Footnote Comment /</i>	Section 12.3 was included in recommended language in Annex C of the CWG proposal.  Consider as an alternative: “Contractor acknowledges that	Suggested language incorporated into agreement.  Need confirmation from



		<p>Contractor may redact such documents and information in certain cases. (12.3)</p> <p><b><i>Paul Kane Comment:</i></b> ICANN’s draft deletes Section 12.3 (Request for Information).</p> <p><b><i>Paul Kane Comment:</i></b> Section 4.5 has an internal reference to Section 12.3, but that section has been deleted.</p>	<p><b><i>ICANN Response to Paul Kane Comment:</i></b> The prior section 12.3 was added by external counsel to the CWG. There was no discussion by the CWG Counsel as to how this requirement was related to the CWG Proposal. As discussed within the CCWG-Accountability process, there is no inherent right to inspection that goes beyond directors or the member. Within the CCWG-Accountability process, there was agreement to give to the Empowered Community the ability to inspect ICANN books and records in specified circumstances. The CWG-Stewardship’s contingencies did not include this right of inspection for PTI or any contingency on ICANN’s DIDP process. Given the specific and unique operational role of PTI, language as proposed by external counsel should not be dropped in as an afterthought. Access to the limited, technically related records that will exist within PTI should be carefully considered and constructed, including with the affirmative participation of the customers and impacted parties.</p> <p><b><i>ICANN Response to Paul Kane</i></b></p>	<p>it is obligated to cooperate with the dispute resolution, IFRT (as defined in ICANN’s Bylaws) review and related escalation procedures in ICANN and Contractor’s Bylaws and to produce documents and information in accordance with those procedures.”</p> <p>Appropriate CWG experts to provide input.</p>	<p>the CWG that item can be considered closed.</p>
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			<i>Comment:</i> The reference in Section 4.5 should be updated to Article XII (Confidentiality).		
A10.	Baseline Requirements for DNSSEC in the Authoritative Root Zone (Annex A, SOW, Section 4)	Footnote to confirm whether Section C.2.9.2.f from the NTIA Contract is adequately covered (with appropriate updates).	Footnote deleted.	Appropriate CWG experts to provide input.  Reinsert footnote.	ICANN's CTO has confirmed that the language as recommended is appropriate.  Need confirmation from the CWG that item can be considered closed.