

Issues List re: ICANN 12 August Draft of Services Agreement

Issue (Section number)	ICANN 12 August Draft	Sidley Comments	CWG Input
Definition of IANA Services (Recitals; 4.1)	References to “Internet domain name functions” and “IANA functions” without definitions.	These references should be changed to a defined term IANA Services that is consistent with such definition in the IPR agreements.	
No violation of law rep (2.1; 2.2)	Each party reps that the execution, delivery and performance of the Agreement does not violate <i>in any material respect</i> any applicable law.	Consider deleting materiality qualifier.	
Manner of Performance (3.3(b))	ICANN may make changes in the manner of performing Services and may suspend or terminate the provision of one or more Services to the extent it makes similar changes in performing, suspending or terminating similar services for itself.	Should be revised to only apply to modifications to the manner of performing the Services and not permit unilateral suspension or termination of one or more Services.	
Vacating of Facilities (4.2)	PTI will vacate the Facilities immediately upon termination or expiration of the applicable underlying lease.	Add that ICANN should give PTI notice of an imminent expiration or termination so PTI can prepare to vacate.	
Costs (5.1)	<p>The costs and expenses to be allocated to PTI for the Services are the actual costs (on a fully allocated basis) incurred, and of the resources utilized, by ICANN in connection with the provision of such Services.</p> <p>ICANN to provide PTI with a quarterly invoice detailing the Services provided and the reimbursement amounts payable pursuant to Section 5.1. Payment to be due on the 30th day following receipt of the invoice.</p>	<p>Specify that it is the value as reasonably determined by ICANN. Add that it will be inclusive of taxes.</p> <p>Consider whether these costs should be lined up with the budget process since ICANN has to provide the funding necessary for PTI to pay for these services.</p>	
Personnel (6.1(a))	<p>Services to be performed by employees and contractors of ICANN who perform equivalent services for ICANN.</p> <p>ICANN is not obligated to make a Service available to the extent that it would unreasonably interfere with the performance of similar services for ICANN or otherwise unreasonably burden ICANN.</p>	<p>Consider if any employees should be full time dedicated to PTI, and if so, that should be specified. Consider also if only employees, rather than independent contractors of ICANN should be performing the Services.</p> <p>Recommend deleting this language. Services are important part of overall obligations and should not be of lesser priority.</p>	
Employee Transition (6.3(a))	Following the Employee Transition Date, PTI may offer full-time PTI Personnel employment with PTI on terms and conditions mutually agreed between ICANN and PTI.	As is typical with transitions of employees, include obligation on ICANN to terminate the employment of the offered employees in connection with PTI’s offers of employment, so as to facilitate their acceptance of PTI offers.	
Records and Information (7.1; 7.2)	All records, books and files maintained by ICANN by reason of its performance of Services to be transferred to PTI upon termination of the Agreement.	Also, to specify that ICANN shall keep accurate and complete records and accounts with respect to the performance of Services, including, the date and number	

Issue (Section number)	ICANN 12 August Draft	Sidley Comments	CWG Input
	<p>If a Party needs information of the other Party to satisfy a governmental reporting obligations, the Party shall promptly furnish to the other Party such information as may be required as promptly as practicable.</p>	<p>of hours worked, the hourly or other rate that applies with a description of the Services rendered during that time, receipts for approved out of pocket expenses over \$25, costs for procurement or use of materials, labor, effort, third party tools and supplies used in delivering the Services and evidence of all pass-through costs.</p> <p>Provide PTI with audit rights for those records, on reasonable advance notice. PTI to be responsible for such audit costs unless the audit discloses that ICANN overbilled PTI by 5% or more.</p> <p>To be specified that the furnishing of information to satisfy governmental reporting obligations is at the expense of the requesting party.</p>	
Confidentiality	--	<p>Confidentiality provision to be added. Injunctive relief to be available for breaches of confidentiality. Also, to provide for return or destruction of confidential information upon termination or expiration of the Agreement.</p>	
Security and Data Protection	--	<p>ICANN to develop and maintain certain organizational security measures and a written disaster recovery program; ICANN to protect PTI's confidential information with at least the same technical and organizational security measures and level of care which it protects its own confidential information of a like kind, and in accordance with certain standards.</p> <p>ICANN to notify PTI immediately of data security incidents, etc. and shall cooperate with PTI concerning the investigation and other remedial measures.</p> <p>ICANN to represent, warrant and covenant that during its performance of the Services it will maintain technical and organizational security measures sufficient to protect PTI's confidential information from unauthorized access or disclosure.</p>	
Indemnification	--	<p>Mutual indemnification for third party claims for: (i) personal injury (including death) or property damage arising out of such party's negligence or willful misconduct; (ii) violation of any law, rule or regulation; and (iii) breach of the Agreement.</p>	
Termination by ICANN (8.2(b))	<p>ICANN may terminate on 30 days notice, except that if PTI is an affiliate of ICANN at such time, such termination will not be effective until PTI has obtained alternative services for the Services.</p>	<p>Discuss. ICANN should not be able to terminate and force PTI to find new qualified technical people. If ICANN wishes to terminate, there should be an employee transition process in place for the transition of employees</p>	

Issue (Section number)	ICANN 12 August Draft	Sidley Comments	CWG Input
		from ICANN to PTI.	
Termination for Breach (8.2(c))	Either party may terminate (provided they are not in material breach of the Agreement) on 30 days' notice upon the other party's material breach.	Only PTI should be able to terminate for material breach by ICANN, and PTI should be able to do so regardless of whether or not PTI is in material breach, since PTI's only material obligation under the Agreement is payment to ICANN out of funds received from ICANN. ICANN's ability to sue for payment is a sufficient remedy if PTI breaches its obligation to pay. And this should never happen since PTI is dependent on ICANN for its budget.	
Subcontracting (9.5(a))	PTI may not subcontract.	Consider if ICANN should also be restricted from subcontracting.	
Dispute Resolution (9.6)	--	Consider requiring consultation among the parties and internal escalation of negotiations before a party may sue over a dispute.	
Force Majeure (9.8)	ICANN is relieved from performance of Services to the extent impracticable due to causes outside the reasonable control of ICANN, including fire, flood, etc., <i>the termination of employment of any employee or other labor trouble, any Law, demand or other requirement of any governmental entity . . . or to the extent the performance of such Services would require ICANN to violate any applicable laws, rules or regulations or would result in the breach of any agreement with any third party.</i>	<p>List of force majeure events should be revised to be fire, flood, etc., or other similar causes outside of ICANN's reasonable control.</p> <p>“Termination of employment of any employee or other labor trouble, any Law, demand or other requirement of any governmental entity,” and “or to the extent the performance of such Services would require the ICANN to violate any applicable laws, rules or regulations or would result in the breach of any agreement with any third party” should be removed.</p> <p>Should specify that ICANN is only given relief from performance of the Services for impracticability due to the events described, if such impracticability could not have been prevented by reasonable precautions.</p> <p>Should also specify that:</p> <ul style="list-style-type: none"> • ICANN will promptly given PTI notice of any such event in reasonable detail; • performance is only excused so long as ICANN is using commercially reasonable efforts to recommence performance whenever and to whatever extent possible; and • if such an event continues to prevent, hinder, or delay performance of Services for 30 days, PTI may terminate the Agreement in whole or part. 	
Relationship of the Parties	--	Add clause stating that the relationship of the parties for purposes of this Agreement is independent contractors, notwithstanding that they are affiliates.	
Schedule A Services		DT-O or another CWG team should review for proper scope.	