



Comments and Questions Concerning ICANN Draft RFP Materials

Submitted by VeriSign, Inc.
May 13, 2002

I. Introduction

VeriSign, Inc. ("VeriSign") submits these questions and comments concerning the draft .org RFP materials posted on ICANN's web site.

II. General

A. Comments

None

B. Questions

1. How does ICANN intend to accomplish the goals of preserving the stability of the Internet, obtaining meaningful participation by international non-profit organizations, and differentiating the .org TLD from commercial TLDs within the specified timeframe for the RFP process, especially during a period in which ICANN is undergoing significant structural reforms?
2. What measures will ICANN take to preserve the integrity of the proposal process?
3. What measures will ICANN take to ensure that all proposals are evaluated on a fair and impartial basis?
4. Under what circumstances, if any, will ICANN permit offerors to amend their proposals?

5. Does ICANN intend to conduct discussions with offerors after their submission of proposals, and if so, under what circumstances?
6. If ICANN intends to conduct discussions with offerors after their submission of proposals, what measures will ICANN take to ensure the confidentiality of proposal materials and the integrity of the proposal process?
7. What procedures will ICANN use to clarify any questions it may have with regard to specific proposals?
8. How will ICANN introduce changes to the RFP process or materials resulting from ICANN's ongoing evolution and reform process. *See draft .org Registry Agreement* ("The terms of this skeleton agreement may be adjusted by ICANN to reflect results of ICANN's ongoing evolution and reform process.")?
9. Recognizing the limited resources available to many non-profit organizations, will such organizations have adequate time and opportunity to respond to any changes that ICANN may make to the RFP materials?

III. ICANN .org Application Transmittal Form

A. Comments

None.

B. Questions

1. Section B.7.
 - a. Please confirm that this section does not purport to authorize ICANN to disclose any documentation or other information that has been accorded confidential treatment pursuant to the Statement of Requested Confidential Treatment of Materials Submitted and any other applicable procedures.
 - b. Please confirm that Section B7.2 does not purport to authorize ICANN to take steps that are not reasonably necessary to evaluate information in a fair and impartial manner.
 - c. Please confirm that Section B7.3 does not purport to authorize ICANN to engage in oral or ex parte communications with

offerors or their agents or representatives concerning the RFP materials to the competitive detriment of other offerors.

2. Section B.8.

- a. Please confirm that this section is not intended to waive claims against ICANN for disclosing documentation or other information that has been accorded confidential treatment pursuant the Statement of Requested Confidential Treatment of Materials Submitted and any other applicable procedures. To the extent that Section B.8 does purport to disclaim such liability or responsibility, we suggest that the language of this provision be changed to recognize ICANN's obligation to comply with its confidentiality requirements.
- b. Please confirm that the consideration supporting the requested waiver of liability is ICANN's review of the application in accordance with its published criteria and procedures.

3. Section B.9. See comments in Section VI, below.

4. Section B.11.

- a. Please confirm that Section B.11 does not purport to disclaim ICANN's liability or responsibility for evaluating proposals in accordance with its published criteria and procedures. To the extent that Section B.11 does purport to disclaim such liability or responsibility, we suggest that the language of this provision be changed to recognize ICANN's obligation to conduct its evaluation of proposals in accordance with published criteria and procedures.
- b. Please confirm that Section B.11 does not purport to disclaim ICANN's liability or responsibility for fraudulent, collusive, or illegal activity. To the extent that Section B.11 does purport to disclaim such liability or responsibility, we suggest that the language of this provision be changed to recognize ICANN's obligation to refrain from fraudulent, collusive or illegal activity in conducting its evaluation of proposals.

5. Section B.13.

- a. Please confirm that Sections B13.1 and B13.2 do not purport to disclaim ICANN's liability or responsibility for evaluating proposals in accordance with its published criteria and procedures. To the extent these sections do purport to disclaim

such liability or responsibility, we suggest that the language be changed to recognize ICANN's obligation to conduct its evaluation of proposals in accordance with published criteria and procedures.

- b. Please confirm that Sections B13.1 and B13.2 do not purport to disclaim ICANN's liability or responsibility for fraudulent, collusive, or illegal activity. To the extent that these sections do purport to disclaim such liability or responsibility, we suggest that the language of this provision be changed to recognize ICANN's obligation to refrain from fraudulent, collusive or illegal activity in conducting its evaluation of proposals.

IV. .org Proposal Form

A. Comments

None.

B. Questions

1. Section C12.
 - a. What specific criteria will ICANN apply in determining whether its general goal of encouraging competition at the registry level has been satisfied?
 - b. What data will ICANN rely upon in determining whether its goal of encouraging competition at the registry level has been satisfied?
 - c. What weight will ICANN give to the goal of encouraging competition at the registry level as compared with other goals, including the need to preserve a stable, well-functioning .org registry, the type, quality and cost of the registry services proposed and the other criteria set forth by ICANN?
2. Section C13. See questions posed in Section IV.B.1, above.
3. Sections C30 through C33. See questions posed in Section IV.B.1, above.

V. Fitness Disclosure

A. Comments

None.

B. Questions

None.

VI. Statement of Requested Confidential Treatment of Materials Submitted

A. Comments

1. We suggest that ICANN reconsider its strong admonition to “avoid, or at least to minimize, requests for confidential treatment of material in applications or submitted in connection with Applications.” *Statement of Requested Confidential Treatment of Materials Submitted* § I, at 1. It is not reasonable to expect offerors to publicly disclose proprietary information in which the offeror may have invested significant time and resources developing. The public disclosure of such information would significantly devalue the offeror’s investment in such information. Depending on the nature of the information, public disclosure could also increase security risks. A more liberal approach to the confidential treatment of proprietary information would also help protect the integrity of the solicitation process.

B. Questions

None.

VII. Reassignment of .org Top-Level Domain: Criteria for Assessing Proposals

A. Comments

The draft *Reassignment of .org Top-Level Domain: Criteria for Assessing Proposals* reflects a good start in the important effort to set forth criteria for any future re-delegation of the .org registry. While it is comprehensive, and in some areas quite detailed, it does suffer, however, from five important problems:

- 1) While the language of the criteria listed in some cases includes considerable detail, the overall approach to the description of criteria is uneven and in most cases so vague that no offeror could clearly understand exactly what they are supposed to be proposing against. This vagueness will cause several problems:
 - ICANN management will be uncertain of exactly how to interpret criteria and, particularly when more than one person is involved in the evaluation, run the risk

of interpreting or defining one or more of the criterion differently among the various proposals.

- Prospective offerors will not be able to clearly understand the criteria, potentially scaring some prospective offerors away from a vague bid document and causing offerors to guess differently on the meaning of various criteria.
- Offerors who are not selected may well feel that, since the criteria were never described with clarity, the evaluation process was probably capricious and perhaps discriminatory.
- The offeror who is selected may well find that the actual conditions of the agreement are not consistent with what they thought they would be since the selected offeror relied on the published criteria to decide if they were interested in the contract and under what terms.

Nearly all of these ambiguities can be avoided by a careful effort to define with precision the minimum requirements of each criterion and the optimal conditions for each criterion and then assign a numerical weight to each factor that brings the achievement of that criterion from minimal to optimal. This technique --the specification of minimal and optimal condition and the explicit explanation of how proposals can move upward-- is common in important open bids. While it adds to the complexity of the preparation of the RFP at the beginning, the added effort up front is overwhelmingly offset by improvements and cost reductions in the evaluation process and in benefits to the overall credibility of the process.

2) Although the draft sets forth a fairly comprehensive list of potential criteria (11 in all), it nowhere gives prospective offerors any idea how important any criterion is to the overall evaluation. This vagueness on the weight attached to each criterion will result in several problems, similar to those cited above:

- ICANN management will have no guidance on how to weight the factors, risking uneven interpretations
- Prospective offerors will guess differently on the relative importance of each criterion (Is each criterion exactly 9%? Are they listed in backward order of importance?, etc.)
- Offerors who are not selected may well feel that they can prove that their proposal was superior on what they presumed to be the most important criterion, leading them to conclude that the evaluation process was capricious or discriminatory.
- The offeror who is selected may well find that the conditions of the contract are different from what they had understood them to be under the RFP.
- Competition is not served if offerors are not given any idea of the relative values of the stated criteria.

The common remedy for this vagueness on the relative importance of each criterion is, not surprisingly, the same as for the remedy for the vagueness of factors within each criterion that would move the evaluation from minimal to optimal: specify the conditions with some exactness and apply a numerical weight to them. In this way, all prospective

offerors would have an equal idea of the exact importance of each criterion and would be able to make an informed judgment on whether or not they wish to bid and if so, how the proposal should be structured.

3) The identification of the eleven criteria, perhaps because of their vagueness, seem to overlap and repeat considerably. This may be because the language used to describe each criterion is vague and general enough to permit a reasonable reader to read different criterion and understand the same matter to have been presented again in slightly different terms or it may be because there is intended to be a genuine difference between each of the eleven criterion, but the average reader cannot figure out what it is. Either way, much greater clarity is needed and it seems highly likely that far fewer than eleven criteria are actually intended. For example, the differences between criteria numbered 5 and 6 are not clear, as with the differences between criteria numbered 1, 7, 8 and 11.

4) Perhaps most importantly, the draft list of criteria -- however vaguely written-- do not appear to be consistent with the policy recommendations of the DNSO Names Council and seem to include new considerations that have no basis under ICANN's procedures. We have no way of understanding the origin or justification of criteria that are being proposed if they are not derived directly from the Names Council's recommendations, other than those required of ICANN by law or government regulation. It is clear, however, that any such non-legally-required criteria that are not a direct result of Names Council recommendations should require an overwhelming justification, presumably on the grounds that the factors only emerged after the Names Council had completed its work. In particular, criteria numbered 3, 4, 7, and 11 --although they are vaguely worded-- seem to have no foundation in either the Names Council recommendations or requirements under the law. To the extent that that is the case, these criteria should be either deleted or modified to make them consistent with the Names Council recommendations.

5) The RFP does not purport to contain a statement of all evaluation criteria that ICANN will use in making an award, as indicated by the following statement: "ICANN expects that additional considerations in the evaluation and selection of proposals may be suggested by analysis and comparison of the proposals received." Undisclosed evaluation criteria tend to dilute the legitimacy and integrity of the proposal process. Such undisclosed criteria also undermine the goal of ensuring equal and intelligent competition.

B. Questions

1. What is the relative importance or weighting of each criterion?
2. Within each criterion, what are the important considerations that will be used in determining a proposal's rating?

3. What is the relative importance or weighting of whether the offeror is a non-profit or for profit entity? All things being equal, will a non-profit offeror receive more favorable consideration than a for profit offeror?
4. Will a proposal offered by a non-profit organization having no specific mission relating to serving as the .org registry operator receive more or less favorable consideration than a non-profit organization having such a specific mission?
5. Why did ICANN depart from the policy recommendations of the DNSO Names Council with respect to the appropriate criteria for evaluating proposals?
6. What are ICANN's policy and legal foundations for departing from the recommendations of the DNSO Names Council?
7. What are ICANN's factual foundations for departing from the recommendations of the DNSO Names Council?
8. What are the differences between criteria 5 and 6?
9. What are the differences between criteria 1,7,8 and 11?
10. If after reviewing the initial proposals ICANN elects to use evaluation criteria not previously disclosed to offerors, will ICANN amend the RFP materials accordingly and give offerors the opportunity to submit revised proposals?

VIII. .org Registry Agreement

A. Comments

None.

B. Questions

1. Section 1.16.
 - a. Why is the definition of "Registry Services" different from the definition of that term as set forth in the current .org Registry Agreement with VeriSign, Inc.?
 - b. Section 1.16 states that "[i]n determining whether a service is integral to the operation of the Registry TLD, consideration will be given to the extent to which the Registry Operator has

been materially advantaged in providing the service by its designation as such under this Agreement.” Why is this a consideration and what is the relationship between whether a service is integral to the operation of the Registry TLD and the advantage a Registry Operator may enjoy in providing a service by virtue of its position?

- c. What is ICANN’s interest in controlling or influencing services which the Registry Operator has been materially advantaged in providing by virtue of its designation as such under the agreement?

IX. Conclusion

VeriSign’s comments and questions are submitted solely in reference to the materials posted by ICANN relating to the .org RFP process and are not intended to address any other subject matter. VeriSign submits these comments and questions solely in its capacity as an interested party in the .org RFP process, and not in its capacity as the incumbent registry operator for the .org TLD. Nothing herein should be construed to waive, release, or modify any rights or remedies to which it may otherwise be entitled.