

COPY

1 Jeffrey A. LeVee (State Bar No. 125863)
2 Sean W. Jaquez (State Bar No. 223132)
3 Samantha S. Eisner (State Bar No. 230344)
4 JONES DAY
5 555 South Flower Street
6 Fiftieth Floor
7 Los Angeles, CA 90071-2300
8 Telephone: (213) 489-3939
9 Facsimile: (213) 243-2539

CONFIDENTIAL COPY
001872006
John L. Segal
By: [Signature]

6 Attorneys for Defendants
7 INTERNET CORPORATION FOR ASSIGNED
8 NAMES AND NUMBERS and erroneously named
9 INTERNET ASSIGNED NUMBERS AUTHORITY

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 COUNTY OF LOS ANGELES

12 C. ITOH MIDDLE EAST E.C. (Bahrain)
13 through the real party in interest, NATIONAL
14 UNION FIRE INSURANCE COMPANY OF
15 PITTSBURGH, PA.,

16 Plaintiff,

17 v.

18 INTERNET CORPORATION FOR
19 ASSIGNED NAMES AND NUMBERS,
20 INTERNET ASSIGNED NUMBERS
21 AUTHORITY, the PEOPLE'S REPUBLIC
22 OF THE CONGO, and THE CONGOLESE
23 REDEMPTION FUND,,

24 Defendants.

CASE NO. SC090220

Assigned for all purposes to
Honorable John L. Segal

**SUPPLEMENTAL REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
DEMURRER BY DEFENDANT
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS
AND ERRONEOUSLY-NAMED
DEFENDANT INTERNET
ASSIGNED NUMBERS
AUTHORITY; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF SAMANTHA S.
EISNER**

[Reply in Support of Demurrer and Reply
in Support of Request for Judicial Notice
filed concurrently herewith; Compendium
of Non-California Authorities and
[Proposed] Order lodged herewith]

Complaint Filed: June 28, 2006

1 Pursuant to Evidence Code sections 452 and 453 and Civil Procedure Code
2 section 430.30(a), Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”)
3 and erroneously-named Defendant Internet Assigned Numbers Authority (“IANA”) hereby
4 respectfully request that, in considering ICANN’s and IANA’s Demurrer, the Court take judicial
5 notice of the following documents:

6 (A) **IANA Functions Purchase Order** between U.S. Department of
7 Commerce and Internet Corporation for Assigned Names and
8 Numbers, dated October 1, 2006 (hereinafter “IANA Contract”),
9 *available at*,
10 <http://www.ntia.doc.gov/ntiahome/domainname/iana.htm>.
11 [Exhibit A to the Declaration of Samantha Eisner, dated October
12 27, 2006 (“Eisner Decl.”)];

13 (B) **DOC Reply To Opposition To Motion To Dismiss And For
14 Summary Judgment And Cross-Motion For Summary
15 Judgment In ICM Registry v. U.S. Dept. of Commerce, Case
16 No. 06-0949 (D.D.C.)**, dated October 16, 2006 [Eisner Decl.,
17 Ex. B];

18 (C) **IANA Reports about ccTLDs**, *available at*,
19 <http://www.iana.org/reports/cctld-reports.htm>. [Eisner Decl., Ex.
20 C];

21 (D) **IANA Reports on Redlegation of Top-Level Domains**,
22 *available at*, [http://www.iana.org/reports/gd-report-
23 24jul2006.html](http://www.iana.org/reports/gd-report-24jul2006.html) (.gd IANA Report, dated July 2006);
24 <http://www.iana.org/reports/ma-report-24jul2006.html> (.ma
25 IANA Report, dated July 2006); [http://www.iana.org/reports/cx-
26 report-07mar06.pdf](http://www.iana.org/reports/cx-report-07mar06.pdf). (.cx IANA Report, dated March 2006).
27 [Eisner Decl., Ex. D.]
28

29 These documents are official acts of an administrative agency of the United States, court
30 records, or facts that are not reasonably subject to dispute and are capable of immediate and
31 accurate of determination. Accordingly, they may be properly considered in connection with the
32 Court’s consideration of ICANN’s and IANA’s Demurrer.

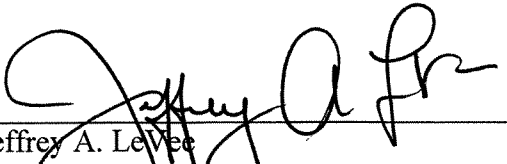
33 This Request is based upon this Notice of Request and Request, the accompanying
34 Memorandum of Points and Authorities set forth below, the accompanying declaration of
35 Samantha S. Eisner attached hereto, the exhibits attached hereto, and upon such other matters
36

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

and argument as may be presented to the Court at or prior to the hearing on this Supplemental Request and on the Demurrer to which this Request relates.

Dated: October 27, 2006

JONES DAY

By: 
Jeffrey A. LeVee

Attorneys for Defendants
INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS
AND ERRONEOUSLY NAMED
INTERNET ASSIGNED NUMBERS
AUTHORITY

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 In considering a demurrer, a court may consider facts that are properly the subject of
3 judicial notice. Cal. Civ. Proc. Code § 430.30(a); Cal. Evid. Code §§ 452-454.

4 Here, the Court may take judicial notice of the “[o]fficial acts of the legislative, executive,
5 and judicial departments of the United States.” Cal. Evid. Code § 452(c). Exhibit A (IANA
6 Functions Purchase Order, dated October 1, 2006), attached to the Declaration of Samantha S.
7 Eisner (“Eisner Decl.”), is an agreement between the United States Department of Commerce
8 (“DOC”) and ICANN. This government contract is a proper subject for judicial notice. *E. H.*
9 *Morrill Co. v. State*, 65 Cal. 2d 787, 794 (1967) (“The trial court was bound to notice judicially
10 the provisions of the contract [between defendant and the United States government] and in
11 considering the complaint to read the pleading as if the contract were set out in full therein.
12 [brackets in original; citations omitted.]”); *Lungren v. Community Redevelopment Agency*, 56 Cal.
13 App. 4th 868, 871 (1997) (taking judicial notice of a redevelopment agency’s agreement with an
14 Indian tribe); *Pacific Gas & Electric Co. v. Dame Constr. Co.*, 191 Cal. App. 3d 233, 242 n.4
15 (1987) (taking judicial notice, under Evidence Code § 452(c), of agreements approved by
16 administrative agency and noting that these documents “more than meet the statute’s requirement
17 of reliability”); *Mendez v. Pacific Gas and Electric Co.* 155 Cal. App. 2d 192, 195 (1953) (taking
18 judicial notice of contract between an electric company and the federal government).

19 The Court may also take judicial notice of Exhibit B (Department of Commerce’s Reply
20 Memorandum filed in *ICM Registry v. U.S. Department of Commerce*, Case No. 06-0949,
21 pending in the U.S. District Court for the District of Columbia) attached to the Eisner Declaration
22 pursuant to Evidence Code section 452, subsection (d). Under Section 452(d) judicial notice may
23 be taken of “[r]ecords of . . . any court of record of the United States.” *See also Farris v.*
24 *Fireman’s Fund Ins. Co.*, 119 Cal. App. 4th 671, 676 n.1 (2004) (taking judicial notice of
25 pleadings and exhibits filed in a petition for writ of mandate); *PG&E Corp. v. Public Utilities*
26 *Com’n*, 118 Cal. App. 4th 1174, 1191 n.14, 1220 n.38 (2004) (taking judicial notice of a
27 bankruptcy petition and complaints); *City of Hawthorne ex rel. Wohlner v. H&C Disposal Co.*,
28 109 Cal. App. 4th 1668, 1678 (2003) (taking judicial notice of complaints); *Roddenberry v.*

1 *Roddenberry*, 44 Cal. App. 4th 634, 667 n.24 (1996) (taking judicial notice of a petition to
2 probate court for the purpose of illustrating the ongoing nature of a business). This Reply brief is
3 therefore a proper subject of judicial notice.

4 The remaining Exhibits to the Eisner Declaration are also proper subjects for judicial
5 notice. Under Evidence Code section 452(h), a court may judicially notice “[f]acts and
6 propositions that are not reasonably subject to dispute and are capable of immediate and accurate
7 determination by resort to sources of reasonable indisputable accuracy.” The IANA Reports,
8 attached at Exhibits C-D, meet both of these requirements.

9 First, each exhibit is publicly available on the web site of the source of each document.
10 Courts routinely take judicial notice of the existence and contents of web sites pursuant to Section
11 452(h). *E.g.*, *Moehring v. Thomas*, 126 Cal. App. 4th 1515, 1524 n.5 (2005) (taking judicial
12 notice of documents on U.S. Dept. of Agriculture Forest Service’s web site); *In re White*, 121 Cal.
13 App. 4th 1453, 1469 n.14 (2004) (taking judicial notice of documents on State Bar official web
14 site); *Gentry v. eBay, Inc.*, 99 Cal. App. 4th 816, 821 n.1, 822-24 (2002) (taking judicial notice of
15 eBay’s web site and granting demurrer); *Walt Rankin & Assocs., Inc. v. City of Murrieta*, 84 Cal.
16 App. 4th 605, 623-624 n.12 (2000) (taking judicial notice of Insurance Commissioner’s web site);
17 *see Cairns v. Franklin Mint Co.*, 107 F. Supp. 2d 1212, 1216 (C.D. Cal. 2000) (“Although not
18 submitted by the parties, the Court takes judicial notice of the following pages on the Warhol
19 Museum’s internet site which sells posters and other products featuring Warhol’s work”). The
20 Court can visit the web sites referenced and immediately and accurately determine that such
21 documents are, in fact, in existence and discuss the matter alleged.

22 Each of these Exhibits also represents facts and propositions that are not reasonably
23 subject to dispute. Exhibits C and D are located on the IANA web site. Exhibit C contains a
24 listing of reports of all instances of ccTLD redelegations since February 1999. From this listing,
25 ICANN offers three exemplars of IANA Redlegation Reports (Exhibit D), each of which follow
26 the ICP-1 process for redelegation. That the ICP-1 procedure is detailed in each document is
27 apparent from looking only at the face of each document. As such, the documents contained at
28 Exhibits C and D are proper subjects of judicial notice.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

ICANN respectfully requests this Court to take judicial notice of the above-identified documents, attached to the Eisner Declaration as Exhibits A-D, and consider these materials when deciding upon the Demurrer to Plaintiff's Complaint.

Dated: October 27, 2006

JONES DAY

By: 

Jeffrey A. LeVee

Attorneys for Defendants
INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS AND ERRONEOUSLY
NAMED INTERNET ASSIGNED NUMBERS
AUTHORITY

**DECLARATION OF S.
EISNER ISO SUPP. RJN**

DECLARATION OF SAMANTHA S. EISNER

I, Samantha S. Eisner declare:

1. I am an attorney duly licensed to practice in the State of California, and an associate of the law firm of Jones Day, attorneys of record for Defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) and erroneously-named Defendant Internet Assigned Numbers Authority (“IANA”) (collectively, “ICANN”).

2. I make this Declaration in support of ICANN’s Supplemental Request for Judicial Notice In Support of Demurrer to Plaintiff’s Complaint.

3. I make this Declaration based on my own personal knowledge, and if called as a witness, I would testify competently to each of the following facts.

4. True and correct copies of the documents that this Court has been asked to take judicial notice of are attached as follows:

Exhibit A: IANA Functions Purchase Order between U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, dated October 1, 2006, *available at*, <http://www.ntia.doc.gov/ntiahome/domainname/iana.htm>.

Exhibit B: DOC Reply To Opposition To Motion To Dismiss And For Summary Judgment And Cross-Motion For Summary Judgment In *ICM Registry v. U.S. Dept. of Commerce*, Case No. 06-0949 (D.D.C.), dated October 16, 2006.

Exhibit C: IANA Reports about ccTLDs, *available at*, <http://www.iana.org/reports/cctld-reports.htm>.

Exhibit D: IANA Reports on Redefinition of Top-Level Domains, *available at*, <http://www.iana.org/reports/gd-report-24jul2006.html> (.gd IANA Report, dated July 2006); <http://www.iana.org/reports/ma-report-24jul2006.html> (.ma IANA Report, dated July 2006); <http://www.iana.org/reports/cx-report-07mar06.pdf>. (.cx IANA Report, dated March 2006).

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct.

Executed this 27th day of October, 2006 in Los Angeles, California.

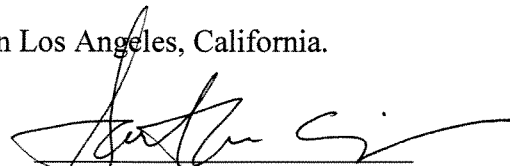

Samantha S. Eisner

EXHIBIT A

| | | | | |
|---|--|---|--|--------------------|
| AWARD / CONTRACT | | 1. This Contract is a rated order under OPAS (15 CFR 350) | Rating | Page 1 of Pages 32 |
| 2. Contract (Proc. Incl. Ident.) No. SA130106CNC048 | | 3. Effective Date Aug 11, 2006 | 4. Requisition / Purchase Request / Project No. NTIA/12-6-0269 | |
| 5. Issued By US Department of Commerce CAS, OS Business Solutions Team 1401 Constitution Ave, NW Room 6521 Washington, DC 20230 Carol Silverman CXS 202-482-5543 csilverman@dcc.gov | | Code SA1301 | 8. Administered By (If other than Item) Code SA1301 See Item 5 | |

| | | | |
|--|--|--|---|
| 7. Name and address of Contractor (No., Street, City, State and Zip Code) INTERNET CORPORATION FOR ASSIGNED NAMES 4675 ADMIRALTY WAY, STE 330 MARINA DEL REY CA 902926648 | | Vendor ID: 00000428 DUNS: 045511487 CEC: Cage Code: 4A4S9 TIN: 954712218 | 8. Delivery <input type="checkbox"/> FOB Origin <input type="checkbox"/> Other (See below) |
| | | 9. Discount for prompt payment Net 30 | 10. SUBMIT INVOICES Item (4 copies unless otherwise specified) Address shown in: CAMS0007 |

| | | | |
|--|----------------|---|----------------|
| 11. Ship To / Mark For National Tel. and Info. Admin 1401 Constitution Ave, NW Room 4885, HCHB Washington, DC 20230 | Code: NTIA-HCH | 12. Payment will be made by NOAA NPA HQ/TR - Route: OFA232 Bldg. CXXI - Station 2133 20020 Century Blvd Germantown, MD 20874-1143 | Code: CAMS0007 |
| 13. Authority for using other than full and open competition <input type="checkbox"/> 10 U.S.C 2304C() <input type="checkbox"/> 41 U.S.C. 253 (C)() | | 14. Accounting and Appropriation Data | |


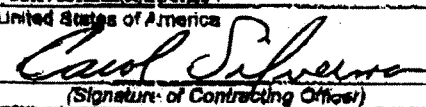
| 15A ITEM NO. | 15B SUPPLIES/SERVICES | 15C QUANTITY | 15D UNIT | 15E UNIT PRICE | 15F AMOUNT |
|-----------------|---|-----------------|-------------|-------------------|---------------|
| | The Contractor shall provide the services in accordance with the terms, conditions, and prices described herein. The Contractor's proposal, dated August 2, 2006, is hereby incorporated by reference. | | | | |

15G. TOTAL AMOUNT OF CONTRACT US\$ 0.00

| Sec. | Description | Pages | (x) | Sec. | Description | Pages |
|-----------------------|--------------------------------------|-------|-----|--|--|-------|
| Part I - The Schedule | | | | Part II - Contract Clauses | | |
| A | Solicitation/Contract | | | I | Contracts Clauses | 12-26 |
| B | Supplies or Services and Prices/Cost | 2-3 | | Part III - List of Documents, Exhibits and other attach. | | |
| C | Description/Specs/Work Statement | 3-6 | | J | List of Attachments | 26 |
| D | Packaging and Marking | 6-7 | | Part IV - Representations and Instructions | | |
| E | Inspection and Acceptance | 7 | | K | Representations, Certifications and other statements of Offerors | |
| F | Deliveries or Performance | 7-9 | | L | Insura., Convs and Notices to Offerors | |
| G | Contract Administration Data | 9 | | M | Evaluation factors for Award | |
| H | Special Contract Requirements | 9-12 | | | | |

Contracting Officer will complete item 17 or 18 as applicable

| | |
|--|--|
| 17. <input checked="" type="checkbox"/> CONTRACTOR'S NEGOTIATED AGREEMENT (Contractor is required to sign this document and return 3 copies to issuing office.) Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligation of the parties to this contract shall be subject to and governed by the following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, representations, certifications, and specifications, as are attached or incorporated by reference herein. (Attached are listed herein.) | 18. <input type="checkbox"/> AWARD (Contractor is not required to sign this document.) Your offer on Solicitation number _____ including the additions or changes made by you which additions or changes are set forth above, is hereby accepted as to the items listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary. |
|--|--|

| | |
|---|--|
| 19A. Name and Title of Signer (Type or Print) Kurt J. Fritz, Vice President, Business Operations | 20A. Name of Contracting Officer Carol Silverman 202-482-5543 csilverman@dcc.gov |
| 19B. Name of Contractor By  (Signature of person authorized to sign) | 20B. United States of America By  (Signature of Contracting Officer) |
| 19C. Date Signed 11 August 2006 | 20C. Date Signed 8/14/06 |

Supplies or Services and Prices/Costs

| * Item No. | Supplies/Services | Quantity | Unit | Unit Price | Amount |
|------------|---|----------|------|------------|--------|
| 0001 | <p>BASE YEAR - October 1, 2006 - September 30, 2007</p> <p>The Contractor shall provide the services necessary for the operation of the Internet Assigned Numbers Authority (IANA) in accordance with the attached statement of work.</p> | 1 | JB | 0.00 | 0.00 |
| 0002 | <p>OPTION YEAR 1 - October 1, 2007 - September 30, 2008</p> <p>The Contractor shall provide the services necessary for the operation of the Internet Assigned Numbers Authority (IANA) in accordance with the attached statement of work.</p> | 1 | JB | 0.00 | 0.00 |
| 0003 | <p>OPTION YEAR 2 - October 1, 2008 - September 30, 2009</p> <p>The Contractor shall provide the services necessary for the operation of the Internet Assigned Numbers Authority (IANA) in accordance with the attached statement of work.</p> | 1 | JB | 0.00 | 0.00 |
| 0004 | <p>OPTION YEAR 3 - October 1, 2009 - September 30, 2010</p> <p>The Contractor shall provide the services necessary for the operation of the Internet Assigned Numbers Authority (IANA) in accordance with the attached statement of work.</p> | 1 | JB | 0.00 | 0.00 |
| 0005 | <p>OPTION YEAR 4 - October 1, 2010 - September 30, 2011</p> <p>The Contractor shall provide the services necessary for the operation of the Internet Assigned Numbers Authority (IANA) in accordance with the attached statement of work.</p> | 1 | JB | 0.00 | 0.00 |

SECTION B - SUPPLIES OR SERVICES AND PRICES/COSTS

B.1 CONTRACT TYPE

- (a) This is a cost contract.
- (b) In accordance with Federal Acquisition Regulation (FAR) 16.302(a), a cost contract is a cost-reimbursement contract in which the contractor receives no fee.
- (c) The cost principles established in the Office of Management and Budget (OMB) Circular A-122 shall apply to this contract. OMB Circular A-122 may be retrieved from the following url:

www.whitehouse.gov/omb/circulars/a122/a122.html

- (d) The requirements identified in the statement of work shall be performed by the Contractor at no cost to the United States Government. If the Contractor intends on establishing and collecting fees from third parties (*i.e.*, other than the Government) for the functions performed under this contract, the Contractor shall notify the Contracting Officer in writing at least sixty days prior to the fee being applied and provide documentation which identifies the rationale for the fee, the parties to be charged, and the cost basis for the fee in accordance with OMB Circular A-122 and FAR clause 52.215-2, Audit and Records – Negotiations, Alternate II. The Contracting Officer shall approve any fee in writing prior to the Contractor imposing the fee.

At the time of purchase order award, the estimated value of this purchase order is less than \$10,000.

B.2 PERIOD OF PERFORMANCE (CAR 1352.215-70)(MAR 2000)

- (a) The period of performance of this contract is for a Base Year that commences on October 1, 2006 to September 30, 2007.
- (b) This contract contains four option years of twelve months each. The Government may exercise the option year through the issuance of a unilateral modification. The exercise of an option year will be in compliance with FAR 52.217-9. The Government is not obligated to the Option Years in the contract unless a modification is issued by the Contracting Officer exercising the option year.
- (c) The four option periods that may be exercised are as follows:

| <u>Period</u> | <u>Duration</u> |
|-------------------|---------------------------------------|
| Option Period I | October 1, 2007 to September 30, 2008 |
| Option Period II | October 1, 2008 to September 30, 2009 |
| Option Period III | October 1, 2009 to September 30, 2010 |
| Option Period IV | October 1, 2010 to September 30, 2011 |

SECTION C - DESCRIPTION/SPECIFICATIONS/STATEMENT OF WORK

C. 1352.211-70 STATEMENT OF WORK/SPECIFICATIONS (MARCH 2000)

The Contractor shall furnish the necessary personnel, material, equipment, services and facilities to perform the following the Statement of Work/Specifications

C.1. BACKGROUND

- C.1.1 The U.S. Department of Commerce (DoC), National Telecommunications and Information Administration (NTIA) has initiated this agreement to maintain the continuity and stability of services related to certain interdependent Internet technical management functions, known collectively as the Internet Assigned Numbers Authority (IANA).
- C.1.2 Initially, these interdependent technical functions were performed on behalf of the Government under a contract between the Defense Advanced Research Projects Agency (DARPA) and the University of Southern California (USC), as part of a research project known as the Terranode Network Technology (TNT). As the TNT project neared completion and the DARPA/USC contract neared expiration in 1999, the Government recognized the need for the continued performance of the IANA functions as vital to the stability and correct functioning of the Internet. On December 24, 1998, USC entered into a transition agreement with the Internet Corporation for Assigned Names and Numbers (ICANN) under which ICANN secured directly from USC, all necessary resources, including key personnel, intellectual property, and computer facility access critical to the continued performance of the IANA functions. Having assumed these key resources (as well as other responsibilities associated with privatization of the Internet domain name system), ICANN was uniquely positioned to undertake performance of these functions. On February 8, 2000, March 21, 2001, and then on March 13, 2003, the DoC entered into an agreement with ICANN to perform the IANA functions. In connection with its work under these agreements, ICANN has developed and maintained close, constructive working relationships with a variety of interested parties, including Internet standards development organizations and technical bodies.
- C.1.3 The Government acknowledges that data submitted by applicants in connection with the IANA function is confidential information. To the extent permitted by law, the Government shall accord any data submitted by applicants in connection with the IANA functions with the same degree of care as it uses to protect its own confidential information, but not less than reasonable care, to prevent the unauthorized use, disclosure or publication of confidential information. In providing data that is subject to such a confidentiality obligation to the Government, the Contractor shall advise the Government of that obligation.

C.2 CONTRACTOR REQUIREMENTS

- C.2.1 The Contractor must perform the required services for this purchase order as a prime Contractor, not as an agent or subcontractor. The Contractor must possess and maintain through the performance of this acquisition a physical address within the United States. The Government reserves the right to inspect the premises, systems, and processes of all security and operational components used for the performance of these requirements.
- C.2.2 The Contractor shall furnish the necessary personnel, material, equipment, services, and facilities to perform the following requirements without any cost to the Government. On or after the effective date of this purchase order, the Contractor may establish and collect fees from third parties (*i.e.*, other than the Government) for the functions performed under this purchase order, provided the fee levels are approved by the Contracting Officer before going into effect, which approval shall not be withheld unreasonably and provided the fee levels are fair and equitable and provided the aggregate fees charged during the term of this purchase order do not exceed the cost of providing the requirements of this purchase order. The Government will review the Contractor's accounting data at anytime fees are charged to verify that the above conditions are being met.
- C.2.2.1 DoC NTIA has a requirement for a Contractor to maintain the operation of the Internet by performing the IANA functions. In performance of this purchase order, the Contractor shall furnish the necessary personnel, material, equipment, services, and facilities (except as otherwise specified), to perform the following IANA requirements.

- C.2.2.1.1 Coordinate the assignment of technical protocol parameters - - This function involves the review and assignment of unique values to various parameters (*e.g.*, operation codes, port numbers, object identifiers, protocol numbers) used in various Internet protocols. This function also includes the dissemination of the listings of assigned parameters through various means (including on-line publication) and the review of technical documents for consistency with assigned values.
- C.2.2.1.2 Perform administrative functions associated with root management - - This function addresses facilitation and coordination of the root zone of the domain name system, with 24 hour-a-day/7 days-a-week coverage. It includes receiving requests for and making routine updates of the country code top level domain (ccTLD) contact (including technical and administrative contacts) and nameserver information. This function also includes receiving delegation and redelegation requests, investigating the circumstances pertinent to those requests, and making recommendations and reporting actions undertaken in connection with processing such requests. All requests, collectively referred to as "IANA root management requests," must be processed promptly and efficiently, and in accordance with processing metrics set forth in Section J - Appendix A. These processing metrics will be posted prominently on Contractor's website. Contractor shall develop and implement a process no later than January 30, 2007, for consulting with the relevant governments and ccTLD managers to encourage greater efficiency and responsiveness to these entities in processing ccTLD requests, consistent with the processing metrics.
- C.2.2.1.3 Allocate Internet Numbering Resources - - This function involves overall responsibility for allocated and unallocated IPv4 and IPv6 address space and Autonomous System Number space. It includes the responsibility for delegation of IP address blocks to regional registries for routine allocation, typically through downstream providers, to Internet end-users within the regions served by those registries. This function also includes reservation and direct allocation of space for special purposes, such as multicast addressing, addresses for private networks as described in RFC 1918, and globally specified applications.
- C.2.2.1.4 Other services - - The Contractor shall perform other IANA functions and implement modifications in performance of the IANA functions as needed upon mutual agreement of the parties.
- C.2.3 Secure Systems -- Computing and communications systems operated by the Contractor shall be installed and operated in accordance with best business and security practices. The Contractor shall implement authenticated communications between it and its customers when carrying out all IANA requirements. Such practices and configuration of all systems shall be documented.
- C.2.4 Secure Data -- The Contractor shall ensure the authentication, integrity, and reliability of the data in performing the IANA requirements, including the data relevant to DNS, root zone file, and IP address allocation.
- C.2.5 Computer Security Plan -- A Computer Security Plan is required. The plan shall be developed and implemented no later than December 1, 2006, and updated annually. The plan shall be delivered to the Government upon request.
- C.2.6 Director of Security -- The Contractor shall designate a Director of Security who shall be responsible for ensuring technical and physical security measures, such as personnel access controls. The name of the Director of Security shall be provided to the Government prior to contract award. The Contracting Officer's Technical Representative (COTR) shall also be notified and consulted in advance when there are personnel changes in this position.

C.3 REPORTING REQUIREMENTS

- C.3.1 Monthly Performance Progress Report -- The Contractor shall prepare and submit to the Contracting Officer and COTR a performance progress report every month (no later than 15 calendar days following the end of each month) that contains statistical and narrative information on the performance of the IANA functions (*i.e.*, assignment of technical protocol parameters; administrative functions associated with root zone management; and allocation of internet numbering resources) during the previous 30-day period. The report shall include a narrative summary of the work performed for each of the functions, and shall include the tables set forth in Section J - Appendix B, completed by the Contractor with appropriate details and particularity. The report shall also describe major events, problems encountered, and any projected significant changes, if any, related to the performance of Section C.2.
- C.3.2 Audit Data -- The Contractor shall generate and retain security process audit record data for one year and provide an annual audit report to the Contracting Officer and the COTR. Specific audit record data will be provided to the Contracting Officer and COTR upon request. All root operations shall be included in the audit, and records on modifications to the root zone file shall be retained for a period of at least one year.
- C.3.3 Final Report -- The Contractor shall prepare and submit a final report on the performance of the IANA functions that documents standard operating procedures, including a description of the techniques, methods, software, and tools employed in the performance of the IANA functions. This report shall be submitted to the Contracting Officer and the COTR no later than 30 days after expiration of the purchase order.

C.4 PERFORMANCE EXCLUSIONS

- C.4.1 This purchase order, in itself, does not authorize modifications, additions, or deletions to the root zone file or associated information. (This purchase order does not alter root system responsibilities as set forth in Amendment 11 of the Cooperative Agreement NCR-9218742 between the DoC and VeriSign, Inc.)
- C.4.2 This purchase order, in itself, does not authorize the Contractor to make material changes in established methods associated with the performance of the IANA functions. Changes in the established methods associated with the performance of the IANA functions may be implemented only upon mutual agreement of the parties.
- C.4.3 The performance of the functions under this contract, including the development of recommendations in connection with changes that constitute delegations and redelegations, shall not be, in any manner, predicated or conditioned on the existence or entry into any contract, agreement or negotiation between the Contractor and any party requesting such changes or any other third-party.

SECTION D - PACKAGING AND MARKING

D.1 MARKING DELIVERABLES (CAR 1352.247-72) (MAR 2000)

The contract number shall be placed on or adjacent to all exterior mailing or shipping labels of deliverable items called for by the contract, except for reports.

D.2 IDENTIFYING NOTATION AFFIXED TO CONTRACT DELIVERABLES

Unless otherwise specified, all documents prepared and submitted by the Contractor to the Government under this contract shall include the following information on the cover page of each document:

- (a) Name and business address of the Contractor
- (b) Contract number
- (c) Name and office location of the Contracting Officer's Technical Representative
- (d) Title of report.
- (e) Date of report.

SECTION E - INSPECTION AND ACCEPTANCE

E.1 CLAUSES INCORPORATED BY REFERENCE (FAR 52.252-2)(FEB 1998)

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this address:

WWW.ARNET.GOV

FEDERAL ACQUISITION REGULATION (48 CFR CHAPTER 1) CLAUSES

| <u>CLAUSE NUMBER</u> | <u>DATE</u> | <u>TITLE</u> |
|----------------------|-------------|---|
| 52.246-3 | MAY 2001 | INSPECTION OF SUPPLIES - COST REIMBURSEMENT |
| 52.246-5 | APR 1984 | INSPECTION OF SERVICES - COST REIMBURSEMENT |

E.2 INSPECTION AND ACCEPTANCE

| <u>CAR Clause Number</u> | <u>Title</u> | <u>Date</u> |
|--------------------------|---------------------------|-------------|
| 1352.246-70 | Inspection and Acceptance | March 2000 |

Final inspection and acceptance of all work performed, reports, and other deliverables will be performed by the Contracting Officer's Technical Representative identified in Section G.2 at the following location:

National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Room 4701
Washington, D.C. 20230

SECTION F - DELIVERIES OR PERFORMANCE

F.1 CLAUSES INCORPORATED BY REFERENCE (FAR 52.252-2)(FEB 1998)

SA1301-06-CN-0048

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this/these address(es):

WWW.ARNET.GOV/FAR

FEDERAL ACQUISITION REGULATION (48 CFR CHAPTER 1) CLAUSES

| <u>CLAUSE NUMBER</u> | <u>DATE</u> | <u>TITLE</u> |
|----------------------|-------------|---|
| 52.242-15 | AUG 1989 | STOP WORK ORDER |
| 52.247 | APR 1984 | F.O.B. DESTINATION, WITHIN CONSIGNEE'S PREMISES |

F.2 PERIOD OF PERFORMANCE

The period of performance is set forth in Section B.2 of the contract.

F.3 PLACE OF PERFORMANCE

All work shall be performed by the Contractor at the Contractor's facility.

F.4 DISTRIBUTION OF DELIVERABLES

The Contractor shall submit copies of all deliverables specified below as follows:

| | |
|---------------------|--------|
| COTR | 1 Copy |
| Contracting Officer | 1 Copy |

F.5 DELIVERABLES

The Contractor shall provide the following deliverables in accordance with (IAW) Section C.3 of this contract:

| Deliverable | Due Date |
|---|---|
| 1. Performance Progress Reports IAW Section C.3.1 | Monthly, no later than 15 calendar days following the end of each month |
| 2. Audit Report IAW Section C.3.2 | Annual |
| 3. Final Report IAW Section C.3.3 | 30 days after expiration of the contract |

F.6 GOVERNMENT RIGHTS TO DELIVERABLES

All deliverables provided under this task order become the property of the U.S. Government.

F.7 GOVERNMENT REVIEW OF DELIVERABLES

The Government shall review deliverables and determine acceptability. Any deficiencies shall be corrected by the Contractor and resubmitted to the Government within seven (7) workdays after notification.

F.8 REQUIRED DELIVERABLES

SA1301-06-CN-0048

The Contractor shall transmit all deliverables so that the deliverables are received by the parties listed above on or before the indicated due dates.

SECTION G - CONTRACT ADMINISTRATION DATA

G.1 CONTRACTING OFFICER'S AUTHORITY (CAR 1352.201-70) (MAR 2000)

The Contracting Officer is the only person authorized to make or approve any changes in any of the requirements of this contract and notwithstanding any provisions contained elsewhere in this contract, the said authority remains solely in the Contracting Officer. In the event the Contractor makes any changes at the direction of any person other than the Contracting Officer, the change will be considered to have been made without authority and no adjustment will be made in the contract terms and conditions, including price.

G.2 DESIGNATION OF CONTRACTING OFFICER'S TECHNICAL REPRESENTATIVE (CAR 1352.201-71) (MAR 2000)

(a) Ms. Cathy Handley is hereby designated as the Contracting Officer's Technical Representative (COTR). The COTR may be changed at any time by the Government without prior notice to the Contractor by a unilateral modification to the contract. The COTR is located at:

COTR Address: National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue, N.W.
Room 4701
Washington, D.C. 20230
Phone: (202) 482-1866
E-mail: chandley@ntia.doc.gov

The responsibilities and limitations of the COTR are as follows:

(b) The COTR is responsible for the technical aspects of the project and serves as technical liaison with the Contractor. The COTR is also responsible for the final inspection and acceptance of all reports and such other responsibilities as may be specified in the contract.

(c) The COTR is not authorized to make any commitments or otherwise obligate the Government or authorize any changes, which affect the contract price, terms, or conditions. Any contractor requests for changes shall be referred to the Contracting Officer. No such changes shall be made without the expressed prior authorization of the Contracting Officer.

(d) The COTR is responsible for: receiving all deliverables; inspecting and accepting supplies or services provided hereunder in accordance with the terms and conditions of this contract; providing direction to the contractor, which clarifies the contract effort, fills in details or otherwise serves to accomplish the contractual Scope of Work; evaluating performance; and certifying all invoices/vouchers for acceptance of the supplies or services furnished for payment prior to forwarding to the Contracting Officer.

SECTION H - SPECIAL CONTRACT REQUIREMENTS

H.1 PRINTING (CAR 1352.208-70) (MAR 2000)

SA1301-06-CN-0048

Unless otherwise specified in this contract, the Contractor shall not engage in, or subcontract for, any printing (as that term is defined in Title 1 of the Government Printing and Binding Regulations in effect on the effective date of this contract) in connection with performing under this contract. Provided, however, that performing a requirement under this contract involving the duplicating of less than 5,000 units of only one page, or less than 25,000 units in the aggregate of multiple pages, such pages not exceeding a maximum image size of 10 and 3/4 inches by 14 and 1/4 inches, will not be deemed printing.

H.2 ORGANIZATIONAL CONFLICT OF INTEREST (CAR 1352.209-71) (MAR 2000)

(a) The Contractor warrants that, to the best of the Contractor's knowledge and belief, there are no relevant facts or circumstances which would give rise to an organizational conflict of interest, as defined in FAR Subpart 9.5, or that the Contractor has disclosed all such relevant information.

(b) The Contractor agrees that if an actual or potential organizational conflict of interest is discovered after award, the Contractor will make a full disclosure in writing to the Contracting Officer. This disclosure shall include a description of actions which the Contractor has taken or proposes to take, after consultation with the Contracting Officer, to avoid, mitigate, or neutralize the actual or potential conflict.

(c) Remedies - The Contracting Officer may terminate this contract for convenience, in whole or in part, if it deems such termination necessary to avoid an organizational conflict of interest. If the Contractor was aware of a potential organizational conflict of interest prior to award or discovered an actual or potential conflict after award and did not disclose or misrepresented relevant information to the Contracting Officer, the Government may terminate the contract for default, debar the Contractor for Government contracting, or pursue such other remedies as may be permitted by law or this contract.

(d) The Contractor further agrees to insert provisions which shall conform substantially to the language of this clause, including the paragraph (d), in any subcontract or consultant agreement hereunder.

H.3 RESTRICTIONS AGAINST DISCLOSURE (CAR 1352.209-72)(MAR 2000)

(a) The Contractor agrees, in the performance of this contract, to keep the information furnished by the Government and designated by the Contracting Officer or Contracting Officer's Technical Representative in the strictest confidence. The Contractor also agrees not to publish or otherwise divulge such information in whole or in part, in any manner or form, nor to authorize or permit others to do so, taking such reasonable measures as are necessary to restrict access to such information while in the Contractor's possession, to those employees needing such information to perform the work provided herein, i.e., on a need to know basis. The Contractor agrees to immediately notify the Contracting Officer in writing in the event that the Contractor determines or has reason to suspect a breach of this requirement.

(b) The Contractor agrees that it will not disclose any information described in subsection (a) of this Section to any persons or individual unless prior written approval is obtained from the Contracting Officer. The Contractor agrees to insert the substance of this clause in any consultant agreement or subcontract hereunder.

H.4 COMPLIANCE WITH LAWS (CAR 1352.209-73)(MAR 2000)

The Contractor shall comply with all applicable laws and rules and regulations having the force of law which deal with or relate to performance hereunder or the employment by the Contractor of its employees.

H.5 DUPLICATION OF EFFORT (CAR 1352.231-70) (MAR 2000)

SA1301-06-CN-0048

The Contractor hereby certifies that costs for work to be performed under this contract and any subcontract hereunder are not duplicative of any costs charged against any other Government contract, subcontract, or other Government source. The Contractor agrees to advise the Contracting Officer, in writing, of any other Government contract or subcontract it has performed or is performing which involves work directly related to the purpose of this contract. The Contractor also certifies and agrees that any and all work performed under this contract shall be directly and exclusively for the use and benefit of the Government, and not incidental to any other work, pursuit, research, or purpose of the Contractor, whose responsibility it will be to account for it accordingly.

H.6 HARMLESS FROM LIABILITY (CAR 1352.233-71)(MAR 2000)

The Contractor shall hold and save the Government, its officers, agents, and employees harmless from liability of any nature or kind, including costs and expenses to which they may be subject, for or on account of any or all suits or damages of any character whatsoever resulting from injuries or damages sustained by any person or persons or property by virtue of performance of this contract, arising or resulting in whole or in part from the fault, negligence, wrongful act or wrongful omission of the Contractor, or any subcontractor, their employees, and agents.

H.7 REGULATORY NOTICE (CAR 1352.252-70)(MAR 2000)

Contractors are advised that certain provisions and clauses, identified with the Commerce Acquisition Regulation (CAR) notation for identification purposes, have not yet been incorporated into the CAR. However, all of these items are binding for this acquisition and will eventually be contained in the CAR at Part 13 of Title 48 of the Code of Federal Regulations.

H.8 CONTRACTOR IDENTIFICATION RESPONSIBILITIES

(a) All Contractor personnel attending meetings, answering Government telephones, and working in other situations where their Contractor status is not obvious to third parties, are required to identify themselves as such to avoid creating an impression in the minds of the public that they are Government officials.

(b) All documents or reports produced by the Contractor shall be suitably marked as Contractor products or that Contractor participation is appropriately identified.

H.9 NOTICE REQUIREMENT

The Contractor agrees that it will immediately inform the Contracting Officer and the Contracting Officer's Technical Representative in the event that the Contractor's Chairman of the Board of Directors initiates any investigation by an independent auditor of potential corporate insolvency.

H.10 CERTIFICATION REGARDING TERRORIST FINANCING IMPLEMENTING EXECUTIVE ORDER 13224

(a) By signing and submitting this application, the prospective Contractor provides the certification set out below:

- (1) The Contractor, to the best of its current knowledge, did not provide, within the previous ten years, and will take all reasonable steps to ensure that it does not and will not knowingly provide, material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist acts, as that term is defined in Executive Order 13224.

(2) Before providing any material support or resources to an individual or entity, the Contractor will consider all information about that individual or entity of which it is aware and all public information that is reasonably available to it or of which it should be aware.

(3) The Contractor also will implement reasonable monitoring and oversight procedures to safeguard against assistance being diverted to support terrorist activity.

(b) For the purposes of this certification, the Contractor's obligations under paragraph "a" are not applicable to the procurement of goods and/or services by the Contractor that are acquired in the ordinary course of business through contract or purchase, *e.g.*, utilities, rents, office supplies, gasoline, unless the Contractor has reason to believe that a vendor or supplier of such goods and services commits, attempts to commit, advocates, facilitates or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist acts.

(c) This certification is an express term and condition of any agreement issued as a result of this application, and any violation of it shall be grounds for unilateral termination of the agreement by DoC prior to the end of its term.

PART II - CONTRACT CLAUSES
SECTION I - CONTRACT CLAUSES

I.1 CLAUSES INCORPORATED BY REFERENCE (52.252-2) (JUN 1998)

This contract incorporates one or more clauses by reference, with the same force and effect as if they were given in full text. Upon request, the Contracting Officer will make their full text available. Also, the full text of a clause may be accessed electronically at this/these address(es):

HTTP://WWW.ARNETH.GOV/FAR

| <u>CLAUSE NUMBER</u> | <u>DATE</u> | <u>TITLE</u> |
|----------------------|-------------|--|
| 52.204-07 | OCT 2003 | CENTRAL CONTRACTOR REGISTRATION |
| 52.209-06 | JAN 2005 | PROTECTING THE GOVERNMENT'S INTEREST WHEN SUBCONTRACTING WITH CONTRACTORS DEBARRED, SUSPENDED, OR PROPOSED FOR DEBARMENT |
| 52.215-08 | OCT 1997 | ORDER OF PRECEDENCE - UNIFORM CONTRACT FORMAT |
| 52.216-07 | DEC 2002 | ALLOWABLE COST AND PAYMENT [REFERENCE TO Subpart 31.2 is substituted with Subpart 31.7] |
| 52.219-08 | MAY 2004 | UTILIZATION OF SMALL BUSINESS CONCERNS |
| 52.222-03 | JUN 2003 | CONVICT LABOR |
| 52.222-21 | FEB 1999 | PROHIBITION OF SEGREGATED FACILITIES |
| 52.222-26 | APR 2002 | EQUAL OPPORTUNITY |
| 52.222-35 | DEC 2001 | EQUAL OPPORTUNITY FOR SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA, AND OTHER ELIGIBLE VETERANS |
| 52.222-36 | JUN 1998 | AFFIRMATIVE ACTION FOR WORKERS WITH DISABILITIES |
| 52.222-37 | DEC 2001 | EMPLOYMENT REPORTS ON SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA, AND OTHER ELIGIBLE VETERANS |
| 52.222-39 | APR 2006 | COMBATING TRAFFICKING IN PERSONS |

SA1301-06-CN-0048

| | | |
|-----------|-----------|--|
| 52.223-06 | MAY 2001 | DRUG-FREE WORKPLACE |
| 52.225-13 | DEC 2003 | RESTRICTIONS ON CERTAIN FOREIGN PURCHASES |
| 52.227-01 | JUL 1995 | AUTHORIZATION AND CONSENT |
| 52.227-02 | AUG 1996 | NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT |
| 52.227-03 | APR 1984 | PATENT INDEMNITY |
| 52.227-14 | JUN 1987 | RIGHTS IN DATA-GENERAL, ALTERNATES I, II, III, IV |
| 52.232-20 | APR 1984 | LIMITATION OF COST |
| 52.232-23 | JAN 1986 | ASSIGNMENT OF CLAIMS |
| 52.232-25 | OCT 2003 | PROMPT PAYMENT |
| 52.232-33 | OCT 2003 | PAYMENT BY ELECTRONIC FUNDS TRANSFER--CENTRAL CONTRACTOR REGISTRATION |
| 52.233-01 | JULY 2002 | DISPUTES, ALTERNATE I |
| 52.233-03 | AUG 1996 | PROTEST AFTER AWARD--ALTERNATE I (JUNE 1985) |
| 52.233-04 | OCT 2004 | APPLICABLE LAW FOR BREACH OF CONTRACT CLAIM |
| 52.237.03 | JAN 1991 | CONTINUITY OF SERVICES |
| 52.239-01 | AUG 1996 | PRIVACY OR SECURITY SAFEGUARDS |
| 52.242-01 | APR 1984 | NOTICE OF INTENT TO DISALLOW COSTS |
| 52.242-04 | JAN 1997 | CERTIFICATION OF FINAL INDIRECT COSTS |
| 52.242-13 | JUL 1995 | BANKRUPTCY |
| 52.243-02 | AUG 1987 | CHANGES--COST-REIMBURSEMENT, ALTERNATE II (APR 1984) |
| 52.244-02 | AUG 1998 | SUBCONTRACTS |
| 52.244-06 | FEB 2006 | SUBCONTRACTS FOR COMMERCIAL ITEMS |
| 52.246-20 | MAY 2001 | WARRANTY OF SERVICES [The Contracting Officer shall give written notice of any defect or nonconformance to the Contractor within 120 days from the date of acceptance by the Government.] |
| 52.249-05 | SEPT 1996 | TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (EDUCATIONAL AND OTHER NONPROFIT INSTITUTIONS) |
| 52.249-14 | APR 1984 | EXCUSABLE DELAYS |
| 52.253-01 | JAN 1991 | COMPUTER GENERATED FORMS |

I.2 AUDIT AND RECORDS – NEGOTIATION, ALTERNATE II, (FAR 52.215-2)(JUNE 1999)

(a) As used in this clause, "records" includes books, documents, accounting procedures and practices, and other data, regardless of type and regardless of whether such items are in written form, in the form of computer data, or in any other form.

(b) Examination of costs. If this is a cost-reimbursement, incentive, time-and-materials, labor-hour, or price redeterminable contract, or any combination of these, the Contractor shall maintain and the Contracting Officer, or an authorized representative of the Contracting Officer, shall have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of this contract. This right of examination shall include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged in performing the contract.

(c) Cost or pricing data. If the Contractor has been required to submit cost or pricing data in connection with any pricing action relating to this contract, the Contracting Officer, or an authorized representative of the Contracting

Officer, in order to evaluate the accuracy, completeness, and currency of the cost or pricing data, shall have the right to examine and audit all of the Contractor's records, including computations and projections, related to—

- (1) The proposal for the contract, subcontract, or modification;
- (2) The discussions conducted on the proposal(s), including those related to negotiating;
- (3) Pricing of the contract, subcontract, or modification;
- or
- (4) Performance of the contract, subcontract or modification.

(d) Comptroller General—(1) The Comptroller General of the United States, or an authorized representative, shall have access to and the right to examine any of the Contractor's directly pertinent records involving transactions related to this contract or a subcontract hereunder.

(2) This paragraph may not be construed to require the Contractor or subcontractor to create or maintain any record that the Contractor or subcontractor does not maintain in the ordinary course of business or pursuant to a provision of law.

(e) Reports. If the Contractor is required to furnish cost, funding, or performance reports, the Contracting Officer or an authorized representative of the Contracting Officer shall have the right to examine and audit the supporting records and materials, for the purpose of evaluating—

(1) The effectiveness of the Contractor's policies and procedures to produce data compatible with the objectives of these reports; and

(2) The data reported.

(f) Availability. The Contractor shall make available at its office at all reasonable times the records, materials, and other evidence described in paragraphs (a), (b), (c), (d), and (e) of this clause, for examination, audit, or reproduction, until 3 years after final payment under this contract or for any shorter period specified in Subpart 4.7, Contractor Records Retention, of the Federal Acquisition Regulation (FAR), or for any longer period required by statute or by other clauses of this contract. In addition—

(1) If this contract is completely or partially terminated, the Contractor shall make available the records relating to the work terminated until 3 years after any resulting final termination settlement; and

(2) The Contractor shall make available records relating to appeals under the Disputes clause or to litigation or the settlement of claims arising under or relating to this contract until such appeals, litigation, or claims are finally resolved.

(g) The Contractor shall insert a clause containing all the terms of this clause, including this paragraph (g), in all subcontracts under this contract that exceed the simplified acquisition threshold, and—

(1) That are cost-reimbursement, incentive, time-and-materials, labor-hour, or price-redeterminable type or any combination of these;

(2) For which cost or pricing data are required; or

(3) That requires the subcontractor to furnish reports as discussed in paragraph (e) of this clause.

The clause may be altered only as necessary to identify properly the contracting parties and the Contracting Officer under the Government prime contract.

SA1301-06-CN-0048

(h) The provisions of OMB Circular No. A-133, "Audits of States, Local Governments, and Nonprofit Organizations," apply to this contract.

I.3 COST CONTRACT – NO FEE, ALTERNATE IV (FAR 52.216-11)(APR 1984)

(a) The Government shall not pay the Contractor a fee for performing this contract.

I.4 OPTION TO EXTEND SERVICES (FAR 52.217-8) (NOV 1999)

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within 30 days.

I.5 OPTION TO EXTEND THE TERM OF THE CONTRACT (FAR 52.217-09) (MAR 2000)

(a) The Government may extend the term of this contract by written notice to the Contractor within 30 days prior to the expiration of the current performance period; provided, that the Government gives the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.

(b) If the Government exercises this option, the extended contract shall be considered to include this option clause.

(c) The total duration of this contract, including the exercise of any options under this clause, shall not exceed sixty-six (66) months.

I.6 PATENT RIGHTS – RETENTION BY THE CONTRACTOR (SHORT FORM) (FAR 52.227-11)(JUN 1997)

(a) Definitions. (1) "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under title 35 of the United States Code, or any novel variety of plant which is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.)

(2) "Made" when used in relation to any invention means the conception or first actual reduction to practice of such invention.

(3) "Nonprofit organization" means a university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

(4) "Practical application" means to manufacture, in the case of a composition of product; to practice, in the case of a process or method, or to operate, in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

(5) "Small business firm" means a small business concern as defined at section 2 of Pub. L. 85-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For

the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3-8 and 13 CFR 121.3-12, respectively, will be used.

(6) "Subject invention" means any invention of the contractor conceived or first actually reduced to practice in the performance of work under this contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) must also occur during the period of contract performance.

(b) Allocation of principal rights. The Contractor may retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Contractor retains title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) Invention disclosure, election of title, and filing of patent application by Contractor. (1) The Contractor will disclose each subject invention to the Federal agency within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters. The disclosure to the agency shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding to the extent known at the time of the disclosure, of the nature, purpose, operation, and the physical, chemical, biological or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale or public use of the invention and whether a manuscript describing the invention has been submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the agency, the Contractor will promptly notify the agency of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Contractor.

(2) The Contractor will elect in writing whether or not to retain title to any such invention by notifying the Federal agency within 2 years of disclosure to the Federal agency. However, in any case where publication, on sale or public use has initiated the 1-year statutory period wherein valid patent protection can still be obtained in the United States, the period for election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor will file its initial patent application on a subject invention to which it elects to retain title within 1 year after election of title or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Contractor will file patent applications in additional countries or international patent offices within either 10 months of the corresponding initial patent application or 6 months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure election, and filing under paragraphs (c)(1), (2), and (3) of this clause may, at the discretion of the agency, be granted.

(d) Conditions when the Government may obtain title. The Contractor will convey to the Federal agency, upon written request, title to any subject invention—

(1) If the Contractor fails to disclose or elect title to the subject invention within the times specified in paragraph (c) of this clause, or elects not to retain title; provided, that the agency may only request title within 60 days after learning of the failure of the Contractor to disclose or elect within the specified times.

(2) In those countries in which the Contractor fails to file patent applications within the times specified in paragraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of the Federal agency, the Contractor shall continue to retain title in that country.

(3) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(e) Minimum rights to Contractor and protection of the Contractor right to file. (1) The Contractor will retain a nonexclusive royalty-free license throughout the world in each subject invention to which the Government obtains title, except if the Contractor fails to disclose the invention within the times specified in paragraph (c) of this clause. The Contractor's license extends to its domestic subsidiary and affiliates, if any, within the corporate structure of which the Contractor is a party and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the Federal agency, except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(2) The Contractor's domestic license may be revoked or modified by the funding Federal agency to the extent necessary to achieve expeditious practical application of subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions at 37 CFR part 404 and agency licensing regulations (if any). This license will not be revoked in that field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the funding Federal agency to the extent the Contractor, its licensees, or the domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, the funding Federal agency will furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor will be allowed 30 days (or such other time as may be authorized by the funding Federal agency for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified. The Contractor has the right to appeal, in accordance with applicable regulations in 37 CFR part 404 and agency regulations, if any, concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of the license.

(f) Contractor action to protect the Government's interest. (1) The Contractor agrees to execute or to have executed and promptly deliver to the Federal agency all instruments necessary to—

- (i) Establish or confirm the rights the Government has throughout the world in those subject inventions to which the Contractor elects to retain title; and
- (ii) Convey title to the Federal agency when requested under paragraph (d) of this clause and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor each subject invention made under contract in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a

minimum, the information required by paragraph (c)(1) of this clause. The Contractor shall instruct such employees, through employee agreements or other suitable educational programs, on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Contractor will notify the Federal agency of any decisions not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office.

(4) The Contractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement, "This invention was made with Government support under (identify the contract) awarded by (identify the Federal agency). The Government has certain rights in the invention."

(g) Subcontracts. (1) The Contractor will include this clause, suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or domestic nonprofit organization. The subcontractor will retain all rights provided for the Contractor in this clause, and the Contractor will not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) The Contractor will include in all other subcontracts, regardless of tier, for experimental, developmental, or research work the patent rights clause required by Subpart 27.3.

(3) In the case of subcontracts, at any tier, the agency, subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Federal agency with respect to the matters covered by the clause; provided, however, that nothing in this paragraph is intended to confer any jurisdiction under the Contract Disputes Act in connection with proceedings under paragraph (j) of this clause.

(h) Reporting on utilization of subject inventions. The Contractor agrees to submit, on request, periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and such other data and information as the agency may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by the agency in connection with any march-in proceeding undertaken by the agency in accordance with paragraph (j) of this clause. As required by 35 U.S.C. 202(c)(5), the agency agrees it will not disclose such information to persons outside the Government without permission of the Contractor.

(i) Preference for United States industry. Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any product embodying the subject invention or produced through the use of the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by the Federal agency upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(j) March-in rights. The Contractor agrees that, with respect to any subject invention in which it has acquired title, the Federal agency has the right in accordance with the procedures in 37 CFR 401.6 and any supplemental

SA1301-06-CN-0048

regulations of the agency to require the Contractor, an assignee or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Contractor, assignee, or exclusive licensee refuses such a request the Federal agency has the right to grant such a license itself if the Federal agency determines that—

- (1) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;
- (2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;
- (3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or
- (4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) Special provisions for contracts with nonprofit organizations. If the Contractor is a nonprofit organization, it agrees that—

- (1) Rights to a subject invention in the United States may not be assigned without the approval of the Federal agency, except where such assignment is made to an organization which has as one of its primary functions the management of inventions; provided, that such assignee will be subject to the same provisions as the Contractor;
- (2) The Contractor will share royalties collected on a subject invention with the inventor, including Federal employee co-inventors (when the agency deems it appropriate) when the subject invention is assigned in accordance with 35 U.S.C. 202(e) and 37 CFR 401.10;
- (3) The balance of any royalties or income earned by the Contractor with respect to subject inventions, after payment of expenses (including payments to inventors) incidental to the administration of subject inventions will be utilized for the support of scientific research or education; and
- (4) It will make efforts that are reasonable under the circumstances to attract licensees of subject inventions that are small business firms, and that it will give a preference to a small business firm when licensing a subject invention if the Contractor determines that the small business firm has a plan or proposal for marketing the invention which, if executed, is equally as likely to bring the invention to practical application as any plans or proposals from applicants that are not small business firms; provided, that the Contractor is also satisfied that the small business firm has the capability and resources to carry out its plan or proposal. The decision whether to give a preference in any specific case will be at the discretion of the contractor. However, the Contractor agrees that the Secretary of Commerce may review the Contractor's licensing program and decisions regarding small business applicants, and the Contractor will negotiate changes to its licensing policies, procedures, or practices with the Secretary of Commerce when the Secretary's review discloses that the Contractor could take reasonable steps to more effectively implement the requirements of this paragraph (k)(4).

(l) Communications. [Complete according to agency instructions.] The Government reserves the right to establish procedures regarding communications after contract award. Such procedures shall be subject to the mutual agreement of the parties.

I.7 RIGHTS IN DATA – RETENTION BY THE CONTRACTOR (LONG FORM) (FAR 52.227-12)(JAN 1997)

(a) Definitions. "Invention" means any invention or discovery which is or may be patentable or otherwise protectable under Title 35 of the United States Code or any novel variety of plant that is or may be protectable under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.).

"Made" when used in relation to any invention means the conception or first actual reduction to practice of such invention.

"Nonprofit organization" means a domestic university or other institution of higher education or an organization of the type described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)) and exempt from taxation under section 501(a) of the Internal Revenue Code (26 U.S.C. 501(a)) or any nonprofit scientific or educational organization qualified under a state nonprofit organization statute.

"Practical application" means to manufacture in the case of a composition or product, to practice in the case of a process or method, or to operate in the case of a machine or system; and, in each case, under such conditions as to establish that the invention is being utilized and that its benefits are, to the extent permitted by law or Government regulations, available to the public on reasonable terms.

"Small business firm" means a small business concern as defined at section 2 of Pub. L. 85-536 (15 U.S.C. 632) and implementing regulations of the Administrator of the Small Business Administration. For the purpose of this clause, the size standards for small business concerns involved in Government procurement and subcontracting at 13 CFR 121.3-8 and 13 CFR 121.3-12, respectively, will be used.

"Subject invention" means any invention of the Contractor conceived or first actually reduced to practice in the performance of work under this contract; provided, that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) must also occur during the period of contract performance.

(b) Allocation of principal rights. The Contractor may elect to retain the entire right, title, and interest throughout the world to each subject invention subject to the provisions of this clause and 35 U.S.C. 203. With respect to any subject invention in which the Contractor elects to retain title, the Federal Government shall have a nonexclusive, nontransferable, irrevocable, paid-up license to practice or have practiced for or on behalf of the United States the subject invention throughout the world.

(c) Invention disclosure, election of title, and filing of patent applications by Contractor.

(1) The Contractor shall disclose each subject invention to the Contracting Officer within 2 months after the inventor discloses it in writing to Contractor personnel responsible for patent matters or within 6 months after the Contractor becomes aware that a subject invention has been made, whichever is earlier. The disclosure to the Contracting Officer shall be in the form of a written report and shall identify the contract under which the invention was made and the inventor(s). It shall be sufficiently complete in technical detail to convey a clear understanding, to the extent known at the time of the disclosure, of the nature, purpose, operation, and physical, chemical, biological, or electrical characteristics of the invention. The disclosure shall also identify any publication, on sale, or public use of the invention and whether a manuscript describing the invention has been

submitted for publication and, if so, whether it has been accepted for publication at the time of disclosure. In addition, after disclosure to the Contracting Officer, the Contractor shall promptly notify the Contracting Officer of the acceptance of any manuscript describing the invention for publication or of any on sale or public use planned by the Contractor.

(2) The Contractor shall elect in writing whether or not to retain title to any such invention by notifying the Federal agency at the time of disclosure or within 8 months of disclosure, as to those countries (including the United States) in which the Contractor will retain title; provided, that in any case where publication, on sale, or public use has initiated the 1-year statutory period wherein valid patent protection can still be obtained in the United States, the period of election of title may be shortened by the agency to a date that is no more than 60 days prior to the end of the statutory period.

(3) The Contractor shall file its initial patent application on an elected invention within 1 year after election or, if earlier, prior to the end of any statutory period wherein valid patent protection can be obtained in the United States after a publication, on sale, or public use. The Contractor shall file patent applications in additional countries (including the European Patent Office and under the Patent Cooperation Treaty) within either 10 months of the corresponding initial patent application or 6 months from the date permission is granted by the Commissioner of Patents and Trademarks to file foreign patent applications where such filing has been prohibited by a Secrecy Order.

(4) Requests for extension of the time for disclosure to the Contracting Officer, election, and filing may, at the discretion of the funding Federal agency, be granted, and will normally be granted unless the Contracting Officer has reason to believe that a particular extension would prejudice the Government's interest.

(d) Conditions when the Government may obtain title. The Contractor shall convey to the Federal agency, upon written request, title to any subject invention—

(1) If the Contractor elects not to retain title to a subject invention;

(2) If the Contractor fails to disclose or elect the subject invention within the times specified in paragraph (c) of this clause (the agency may only request title within 60 days after learning of the Contractor's failure to report or elect within the specified times);

(3) In those countries in which the Contractor fails to file patent applications within the time specified in paragraph (c) of this clause; provided, however, that if the Contractor has filed a patent application in a country after the times specified in paragraph (c) of this clause, but prior to its receipt of the written request of the Federal agency, the Contractor shall continue to retain title in that country; or

(4) In any country in which the Contractor decides not to continue the prosecution of any application for, to pay the maintenance fees on, or defend in reexamination or opposition proceeding on, a patent on a subject invention.

(e) Minimum rights to Contractor.

(1) The Contractor shall retain a nonexclusive, royalty-free license throughout the world in each subject invention to which the Government obtains title except if the Contractor fails to disclose the subject invention within the times specified in paragraph (c) of this clause. The Contractor's license extends to its domestic subsidiaries and affiliates, if any, within the corporate structure of which the Contractor is a part and includes the right to grant sublicenses of the same scope to the extent the Contractor was legally obligated to do so at the time the contract was awarded. The license is transferable only with the approval of the funding Federal agency

except when transferred to the successor of that part of the Contractor's business to which the invention pertains.

(2) The Contractor's domestic license may be revoked or modified by the funding Federal agency to the extent necessary to achieve expeditious practical application of the subject invention pursuant to an application for an exclusive license submitted in accordance with applicable provisions in the Federal Property Management Regulations and agency licensing regulations (if any). This license shall not be revoked in that field of use or the geographical areas in which the Contractor has achieved practical application and continues to make the benefits of the invention reasonably accessible to the public. The license in any foreign country may be revoked or modified at the discretion of the funding Federal agency to the extent the Contractor, its licensees, or its domestic subsidiaries or affiliates have failed to achieve practical application in that foreign country.

(3) Before revocation or modification of the license, the funding Federal agency shall furnish the Contractor a written notice of its intention to revoke or modify the license, and the Contractor shall be allowed 30 days (or such other time as may be authorized by the funding Federal agency for good cause shown by the Contractor) after the notice to show cause why the license should not be revoked or modified. The Contractor has the right to appeal, in accordance with applicable agency licensing regulations and 37 CFR 404 concerning the licensing of Government-owned inventions, any decision concerning the revocation or modification of its license.

(f) Contractor action to protect the Government's interest.

(1) The Contractor agrees to execute or to have executed and promptly deliver to the Federal agency all instruments necessary to—

(i) Establish or confirm the rights the Government has throughout the world in those subject inventions to which the Contractor elects to retain title; and

(ii) Convey title to the Federal agency when requested under paragraph (d) of this clause and paragraph (n)(2) of this clause, and to enable the Government to obtain patent protection throughout the world in that subject invention.

(2) The Contractor agrees to require, by written agreement, its employees, other than clerical and nontechnical employees, to disclose promptly in writing to personnel identified as responsible for the administration of patent matters and in a format suggested by the Contractor each subject invention made under contract in order that the Contractor can comply with the disclosure provisions of paragraph (c) of this clause, and to execute all papers necessary to file patent applications on subject inventions and to establish the Government's rights in the subject inventions. This disclosure format should require, as a minimum, the information required by paragraph (c)(1) of this clause. The Contractor shall instruct such employees through employee agreements or other suitable educational programs on the importance of reporting inventions in sufficient time to permit the filing of patent applications prior to U.S. or foreign statutory bars.

(3) The Contractor shall notify the Federal agency of any decision not to continue the prosecution of a patent application, pay maintenance fees, or defend in a reexamination or opposition proceeding on a patent, in any country, not less than 30 days before the expiration of the response period required by the relevant patent office.

(4) The Contractor agrees to include, within the specification of any United States patent application and any patent issuing thereon covering a subject invention, the following statement: "This invention was made with Government support under (identify the contract) awarded by (identify the Federal agency). The Government has certain rights in this invention."

(5) The Contractor shall establish and maintain active and effective procedures to assure that subject inventions are promptly identified and disclosed to Contractor personnel responsible for patent matters within 6 months of

conception and/or first actual reduction to practice, whichever occurs first in performance of work under this contract. These procedures shall include the maintenance of laboratory notebooks or equivalent records and other records as are reasonably necessary to document the conception and/or the first actual reduction to practice of subject inventions, and records that show that the procedures for identifying and disclosing the inventions are followed. Upon request, the Contractor shall furnish the Contracting Officer a description of such procedures for evaluation and for determination as to their effectiveness.

(6) The Contractor agrees, when licensing a subject invention, to arrange to avoid royalty charges on acquisitions involving Government funds, including funds derived through Military Assistance Program of the Government or otherwise derived through the Government, to refund any amounts received as royalty charges on the subject invention in acquisitions for, or on behalf of, the Government, and to provide for such refund in any instrument transferring rights in the invention to any party.

(7) The Contractor shall furnish the Contracting Officer the following:

(i) Interim reports every 12 months (or such longer period as may be specified by the Contracting Officer) from the date of the contract, listing subject inventions during that period and stating that all subject inventions have been disclosed or that there are no such inventions.

(ii) A final report, within 3 months after completion of the contracted work, listing all subject inventions or stating that there were no such inventions, and listing all subcontracts at any tier containing a patent rights clause or stating that there were no such subcontracts.

(8) The Contractor shall promptly notify the Contracting Officer in writing upon the award of any subcontract at any tier containing a patent rights clause by identifying the subcontractor, the applicable patent rights clause, the work to be performed under the subcontract, and the dates of award and estimated completion. Upon request of the Contracting Officer, the Contractor shall furnish a copy of such subcontract, and no more frequently than annually, a listing of the subcontracts that have been awarded.

(9) In the event of a refusal by a prospective subcontractor to accept one of the clauses in paragraph (g)(1) or (2) of this clause, the Contractor—

(i) Shall promptly submit a written notice to the Contracting Officer setting forth the subcontractor's reasons for such refusal and other pertinent information that may expedite disposition of the matter; and

(ii) Shall not proceed with such subcontracting without the written authorization of the Contracting Officer.

(10) The Contractor shall provide, upon request, the filing date, serial number and title, a copy of the patent application (including an English-language version if filed in a language other than English), and patent number and issue date for any subject invention for which the Contractor has retained title.

(11) Upon request, the Contractor shall furnish the Government an irrevocable power to inspect and make copies of the patent application file.

(g) Subcontracts.

(1) The Contractor shall include the clause at 52.227-11 of the Federal Acquisition Regulation (FAR), suitably modified to identify the parties, in all subcontracts, regardless of tier, for experimental, developmental, or research work to be performed by a small business firm or nonprofit organization. The subcontractor shall retain all rights provided for the Contractor in this clause, and the Contractor shall not, as part of the consideration for awarding the subcontract, obtain rights in the subcontractor's subject inventions.

(2) The Contractor shall include this clause (FAR 52.227-12) in all other subcontracts, regardless of tier, for experimental, developmental, or research work.

(3) In the case of subcontracts, at any tier, when the prime award with the Federal agency was a contract (but not a grant or cooperative agreement), the agency, subcontractor, and the Contractor agree that the mutual obligations of the parties created by this clause constitute a contract between the subcontractor and the Federal agency with respect to those matters covered by this clause.

(h) Reporting utilization of subject inventions. The Contractor agrees to submit on request periodic reports no more frequently than annually on the utilization of a subject invention or on efforts at obtaining such utilization that are being made by the Contractor or its licensees or assignees. Such reports shall include information regarding the status of development, date of first commercial sale or use, gross royalties received by the Contractor, and such other data and information as the agency may reasonably specify. The Contractor also agrees to provide additional reports as may be requested by the agency in connection with any march-in proceedings undertaken by the agency in accordance with paragraph (j) of this clause. To the extent data or information supplied under this paragraph is considered by the Contractor, its licensee or assignee to be privileged and confidential and is so marked, the agency agrees that, to the extent permitted by law, it shall not disclose such information to persons outside the Government.

(i) Preference for United States industry. Notwithstanding any other provision of this clause, the Contractor agrees that neither it nor any assignee will grant to any person the exclusive right to use or sell any subject invention in the United States unless such person agrees that any products embodying the subject invention will be manufactured substantially in the United States. However, in individual cases, the requirement for such an agreement may be waived by the Federal agency upon a showing by the Contractor or its assignee that reasonable but unsuccessful efforts have been made to grant licenses on similar terms to potential licensees that would be likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(j) March-in rights. The Contractor agrees that with respect to any subject invention in which it has acquired title, the Federal agency has the right in accordance with the procedures in FAR 27.304-1(g) to require the Contractor, an assignee, or exclusive licensee of a subject invention to grant a nonexclusive, partially exclusive, or exclusive license in any field of use to a responsible applicant or applicants, upon terms that are reasonable under the circumstances, and if the Contractor, assignee, or exclusive licensee refuses such a request, the Federal agency has the right to grant such a license itself if the Federal agency determines that—

(1) Such action is necessary because the Contractor or assignee has not taken, or is not expected to take within a reasonable time, effective steps to achieve practical application of the subject invention in such field of use;

(2) Such action is necessary to alleviate health or safety needs which are not reasonably satisfied by the Contractor, assignee, or their licensees;

(3) Such action is necessary to meet requirements for public use specified by Federal regulations and such requirements are not reasonably satisfied by the Contractor, assignee, or licensees; or

(4) Such action is necessary because the agreement required by paragraph (i) of this clause has not been obtained or waived or because a licensee of the exclusive right to use or sell any subject invention in the United States is in breach of such agreement.

(k) Special provisions for contracts with nonprofit organizations. [Reserved]

(l) Communications. [Complete according to agency instructions.]

(m) Other inventions. Nothing contained in this clause shall be deemed to grant to the Government any rights with respect to any invention other than a subject invention.

(n) Examination of records relating to inventions.

(1) The Contracting Officer or any authorized representative shall, until 3 years after final payment under this contract, have the right to examine any books (including laboratory notebooks), records, and documents of the Contractor relating to the conception or first reduction to practice of inventions in the same field of technology as the work under this contract to determine whether—

(i) Any such inventions are subject inventions;

(ii) The Contractor has established and maintains the procedures required by paragraphs (f)(2) and (f)(3) of this clause; and

(iii) The Contractor and its inventors have complied with the procedures.

(2) If the Contracting Officer determines that an inventor has not disclosed a subject invention to the Contractor in accordance with the procedures required by paragraph (f)(5) of this clause, the Contracting Officer may, within 60 days after the determination, request title in accordance with paragraphs (d)(2) and (d)(3) of this clause. However, if the Contractor establishes that the failure to disclose did not result from the Contractor's fault or negligence, the Contracting Officer shall not request title.

(3) If the Contracting Officer learns of an unreported Contractor invention which the Contracting Officer believes may be a subject invention, the Contractor may be required to disclose the invention to the agency for a determination of ownership rights.

(4) Any examination of records under this paragraph shall be subject to appropriate conditions to protect the confidentiality of the information involved.

(o) Withholding of payment (this paragraph does not apply to subcontracts).

(1) Any time before final payment under this contract, the Contracting Officer may, in the Government's interest, withhold payment until a reserve not exceeding \$50,000 or 5 percent of the amount of the contract, whichever is less, shall have been set aside if, in the Contracting Officer's opinion, the Contractor fails to—

(i) Establish, maintain, and follow effective procedures for identifying and disclosing subject inventions pursuant to paragraph (f)(5) of this clause;

(ii) Disclose any subject invention pursuant to paragraph (c)(1) of this clause;

(iii) Deliver acceptable interim reports pursuant to subdivision (f)(7)(i) of this clause; or

(iv) Provide the information regarding subcontracts pursuant to paragraph (f)(8) of this clause.

(2) Such reserve or balance shall be withheld until the Contracting Officer has determined that the Contractor has rectified whatever deficiencies exist and has delivered all reports, disclosures, and other information required by this clause.

(3) Final payment under this contract shall not be made before the Contractor delivers to the Contracting Officer all disclosures of subject inventions required by paragraph (c)(1) of this clause, an acceptable final report pursuant to subdivision (f)(7)(ii) of this clause, and all past due confirmatory instruments.

(4) The Contracting Officer may decrease or increase the sums withheld up to the maximum authorized above. No amount shall be withheld under this paragraph while the amount specified by this paragraph is being

withheld under other provisions of the contract. The withholding of any amount or the subsequent payment thereof shall not be construed as a waiver of any Government right.

I.8 RIGHTS IN DATA – EXISTING WORKS (FAR 52.227-18)(JUN 1087)

(a) Except as otherwise provided in this contract, the Contractor grants to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government, for all the material or subject matter called for under this contract, or for which this clause is specifically made applicable.

(b) The Contractor shall indemnify the Government and its officers, agents, and employees acting for the Government against any liability, including costs and expenses, incurred as the result of (1) the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication or use of any data furnished under this contract; or (2) any libelous or other unlawful matter contained in such data. The provisions of this paragraph do not apply unless the Government provides notice to the Contractor as soon as practicable of any claim or suit, affords the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense thereof, and obtains the Contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction; and do not apply to material furnished to the Contractor by the Government and incorporated in data to which this clause applies.

PART III - LIST OF DOCUMENTS, EXHIBITS, AND OTHER ATTACHMENTS

SECTION J - LIST OF ATTACHMENTS

J.1 ATTACHMENTS

The following documents are attached to this solicitation:

| <u>ATTACHMENT</u> | <u>Description</u> | <u>PAGE</u> |
|-------------------|--|-------------|
| Appendix A | Processing Metrics | |
| Appendix B | Monthly Performance Progress Report Tables | |

APPENDIX A - PROCESSING METRICS

PROCESS FOR IANA ROOT MANAGEMENT REQUESTS

Specific Steps to Process a Change Request

Request received by the Contractor -- The Contractor receives request to make changes to the root-zone and/or the authoritative WHOIS database. The *date of receipt* is the date upon which the Contractor receives a request, on a business day, during the hours of 9:00 am and 5:00 pm Pacific Time.

Confirmation of Receipt -- Within three (3) business days of the date of receipt, the Contractor shall send confirmation of receipt of the request and a transaction number to the Requester.

Contractor reviews request -- The submission is reviewed to determine the details of the changes requested. During this process, Contractor determines whether the request contains all of the information necessary to commence processing (complete request), or the request requires additional information or clarification from the Requester (incomplete request). If a request is complete, the Contractor shall commence *Request Processing*.

Notice of deficiency-- In the event that the request is deemed *incomplete*, the Contractor shall, within seven (7) calendar days of the date of receipt, provide to the Requester a notice of deficiency. This notice shall offer a detailed description of the deficiency(ies) in the request.

Deficiency cure-- A Requester must promptly cure any deficiency in a request. If a Requester fails to cure any deficiency in its request within fourteen (14) calendar days of the notice of deficiency, then the Contractor will deem the request closed. Multiple communications between the Requester and the Contractor may be necessary to ensure that deficiencies are clearly understood by all parties. Once the Contractor has determined that the Requester has cured the deficiency(ies), the Contractor shall deem the request complete and shall commence request processing.

Request Processing -- Within seven (7) calendar days of a request being deemed complete, Contractor shall send to Requester a notice of confirmation of requested changes. Requester shall provide confirmation of the requested changes within seven (7) calendar days of receipt of such notice from Contractor. If Contractor does not receive confirmation within seven (7) calendar days, Contractor shall send a second and final notice to Requester giving Requester an additional seven (7) calendar days to provide the required confirmation. If Requester fails to provide such confirmation after the second and final notice, then such request shall be deemed incomplete and shall be closed. Contractor shall deliver notification of the request closure to Requester within one (1) business day of closing the request. Contractor shall provide Requester with a grace period during which time if the Requester provides confirmation to Contractor within thirty (30) days of a request closure, the request shall be re-opened and processed as a completed and confirmed request. Within thirty (30) calendar days of the date that the request was deemed completed and confirmed, Contractor shall complete all processing and issue a report with a recommendation to the U.S. Department of Commerce regarding whether the proposed changes should be authorized.

APPENDIX B MONTHLY PERFORMANCE PROGRESS REPORT TABLES

| OVERVIEW OF ROOT MANAGEMENT REQUESTS | |
|--|--|
| TOTAL ROOT MANAGEMENT REQUESTS AT IANA | |
| Requests Pending at Beginning of Month | |
| Requests Received during this Month | |
| Total Requests Completed or Administratively Closed This Month | |
| Requests Completed from Prior Months | |
| Requests Completed from this Month | |
| Requests Administratively Closed | |
| Requests Pending at Close of this Month | |

| TYPES OF ROOT MANAGEMENT REQUESTS | |
|--|--|
| Nameserver Changes | |
| Administrative Contact Changes | |
| Technical Contact Changes | |
| Data Changes (<i>e.g.</i> , address, phone/fax number, URL for registration services) | |
| Requests for Redelelegation | |
| Root Server Changes | |
| TOTAL | |

Note: The total number of changes takes into account that one request may contain multiple changes. During this month, IANA received [insert number] requests with multiple changes.

| ROOT MANAGEMENT REQUESTS PENDING MORE THAN 30 DAYS | | | | | | |
|--|----------------|-----------------|------------------------|---|---|--|
| TLD | Request Number | Type of Request | Request Submitted Date | Last Contractor/Requestor Activity Date | Detailed Status and Activity towards Resolution | |
| | | | | | | |
| | | | | | | |
| | | | | | | |

| NAMESERVER, ADMINISTRATIVE AND TECHNICAL CONTACT, AND DATA CHANGES | | | | | | | | | | | | | | |
|--|----------------|----------------|----------------------------|------------------------------|----------------------------|------------------------------|---------------------|--------------------------------|---------------------|----------------------------------|-------------------------|--------------------|-------------------|------------------------------------|
| TLD | Request Number | Type of Change | Date of Receipt of Request | Date of Receipt Confirmation | Initial Review and Results | Date of Notice of Deficiency | Requestor Cure Date | Date of Requestor Confirmation | Request Closed Date | Date of Conclusion of Processing | Transmittal Date to DOC | Change in Database | Status of Request | Number of Days to Complete Request |
| | | | | | | | | | | | | | | |
| | | | | | | | | | | | | | | |

LEGEND FOR TYPE OF CHANGE ENTRIES: 1 - Nameserver Change; 2 - Administrative Contact Change; 3 - Technical Contact; 4 - Data Change; 5 - Redelegation

INSTRUCTIONS FOR COMPLETING DETAILED STATUS ENTRIES: Provide a detailed narrative of the current activity for each open change request and Contractor's proposed steps to process the subject request within the prescribed 30-day limit. These entries should also indicate possible complications that might arise in connection with processing that request, as well as Contractor's methods for addressing these issues.

| IPv4 UNICAST ADDRESS BLOCKS ALLOCATIONS | | | | |
|---|-------------------|----------|----------|--------------|
| Request Submitted | Request Completed | Duration | Registry | /8s Provided |
| | | | | |
| | | | | |

| IPv4 MULTICAST ASSIGNMENTS | | | |
|----------------------------|-------------------|----------|----------|
| Request Submitted | Request Completed | Duration | Registry |
| | | | |
| | | | |

| IPv6 UNICAST ADDRESS BLOCKS ALLOCATIONS | | | | |
|---|-------------------|----------|----------|---------|
| Request Submitted | Request Completed | Duration | Registry | Request |
| | | | | |
| | | | | |

| IPv6 MULTICAST ASSIGNMENTS | | | |
|----------------------------|-------------------|----------|-----------|
| Request Submitted | Request Completed | Duration | Addresses |
| | | | |
| | | | |

| AUTONOMOUS SYSTEM (AS) NUMBER ASSIGNMENTS | | | | |
|---|-------------------|----------|----------|--------|
| Request Submitted | Request Completed | Duration | Registry | Blocks |
| | | | | |
| | | | | |

EXHIBIT B

and (b)5.² Specifically, plaintiff contends that the defendants have “fail[ed] to pinpoint any specific aspect of their authority . . . that relates to .xxx or ICANN in a way that reflects decision-making protectable under FOIA’s exemptions.” Pl. Mem. at pp. 2-3.

As explained herein, to the extent that plaintiff suggests that the United States government has no public policy role to play regarding ICANN, Internet governance, or plaintiff’s application with ICANN to establish a .xxx top-level domain, plaintiff is completely wrong. As detailed in the publicly available agreements with ICANN that are cited in plaintiff’s motion, DOC has always maintained consultative, advisory, and oversight functions vis-a-vis ICANN, including the creation of top-level domains. Moreover, ICANN actively encourages international governmental involvement through its Governmental Advisory Committee (“GAC”), which permits the United States and other governments to provide advice to ICANN on matters of public policy. Additionally, DOS has the federal government’s lead role in implementing the foreign policy of the United States, and Internet governance is a subject of United States government foreign policy.

However, none of this is more than marginally relevant to this FOIA lawsuit. The FOIA does not require agencies to identify “any specific aspect of their authority,” *id.*, that led to the creation of a particular document, nor does it require agencies to identify “any specific aspect of their authority” that would permit withholding responsive information. Instead, the test under the FOIA is whether information is properly withheld under one of the FOIA exemptions. See 5 U.S.C. § 552(b).

² Plaintiff does not challenge the single document withheld in part by the DOC under FOIA Exemption 6. See Pl. Mem. at p. 15 n.19.

The DOC and DOS have withheld relatively limited amounts of information under FOIA Exemptions b(5), which protects information that would be subject to a discovery privilege in civil litigation, and Exemption b(4), which protects confidential business information. An examination of plaintiff's motion makes it clear that plaintiff misconstrues Exemption (b)(5) by suggesting that an agency must identify a specific authority that led to the creation of the underlying record whenever it invokes the exemption. In addition, plaintiff fails to explain why any of the government's withholdings fail to qualify under the proper criteria this exemption. Moreover, while plaintiff dismisses as "boilerplate" DOS's explanation of its withholdings under Exemption (b)(4), DOS's explanation clearly meets the D.C. Circuit's criteria for withholdings under this exemption. Finally, plaintiff is incorrect in suggesting that the DOC improperly dismissed plaintiff's appeal of a second, related FOIA request because it is apparent that plaintiff failed to exhaust its administrative remedies.

ARGUMENT

I. THE GOVERNMENT PROPERLY WITHHELD MATERIAL PURSUANT TO FOIA EXEMPTION (b)(5).

As explained in the government's motion for summary judgment, DOC and DOS withheld information under three privileges recognized by FOIA Exemption (b)(5) - - the deliberative process privilege, the attorney-client privilege, and the attorney work product doctrine. See Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss and For Summary Judgment ("D. Mem.") at pp. 17-41. The deliberative process privilege applies to all of the documents withheld under Exemption (b)(5), although some of the documents withheld by DOC also trigger the attorney-client privilege or the attorney work

product doctrine. D. Mem. at p. 22.

A. THE DEPARTMENTS OF COMMERCE AND STATE PROPERLY WITHHELD DELIBERATIVE, PREDECISIONAL MATERIAL PURSUANT TO FOIA EXEMPTION (b)(5).

1. The deliberative process privilege does not require agencies to identify the source of their authority for deliberations.

Plaintiff's primary argument against the government's assertion of the deliberative process privilege is not that the withholdings fail to satisfy the basic legal requirements for the privilege, namely that the documents are "predecisional" and "deliberative," Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975), but rather that the DOC and DOS did not identify the formulation of any legitimate agency policy to provide a basis for the privilege. See Pl. Mem. at pp. 23-35. Plaintiff describes the "overarching problem" with the government's Exemption 5 withholdings as "the murkiness with which the agencies describe their activities," particularly in reference to "decisions that ICANN must make, not those the government must – or even can – make." Pl. Mem. at pp. 22, 28. Thus, plaintiff generally does not question that the material the government seeks to protect precedes particular Government decisions and consists of opinions and recommendations regarding those decisions. Rather, plaintiff argues that the defendants' decisions to withhold material are somehow outside of the scope of the defendants' authority.

Contrary to plaintiff's assertions, the deliberative process privilege does not turn on an agency's ability to "pinpoint any specific aspect of their authority . . . that reflects decision-making protectable under FOIA's exemptions." Pl. Mem. at p. 3. The "ultimate aim" of the deliberative process privilege is simply to "prevent injury to the quality of agency decisions." Petroleum Info. Corp. v. Dep't of Interior, 976 F.2d 1429, 1433-34 (D.C. Cir. 1992) (quoting

NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 151 (1975)). The government is not aware of a single case (cited by plaintiff or otherwise) requiring agencies to identify the “specific aspect of their authority” that relates to the protected deliberations in order to invoke the privilege.³ Moreover, although courts may seek to identify “an agency decision or policy to which the document contributed,” e.g., Commonwealth of Puerto Rico v. Dep’t of Justice, 823 F.2d 574, 585 (D.C. Cir. 1987), the Supreme Court has cautioned that the deliberative process privilege does not necessarily require “an agency to identify a specific decision in connection with which a memorandum is prepared. Agencies are, and properly should be, engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process.” Sears, 421 U.S. 132, 153 n.18.⁴ It is for this reason that the

³ Rather, case law cited by plaintiff makes clear that courts expansively interpret agencies’ authority to conduct deliberations under the privilege:

Along the way to formulating a policy that is within its power to implement, an agency might legitimately identify and consider a host of alternatives, some within the agency’s power to effectuate and some without . . . Deeming internal discussions unprotected by the deliberative process privilege because, in retrospect, it appears that the agency was considering proposals that were beyond the scope of its authority to implement might well discourage the kind of frank and appropriate policymaking discussions that the privilege was meant to protect and promote. Nonetheless, we may assume for the sake of argument that the scope of an agency’s authority places some limits on the deliberate process privilege . . . Perhaps if . . . EPA staff members were to begin mapping out policy on something like school prayer, for example, then the privilege would not apply. We may likewise assume, looking to another line of cases that . . . [plaintiff-appellant] cites to us, that internal discussions about a course of agency action that would be nefarious, if not illegal, likewise would not be protected by the deliberative process privilege. Enviro Tech Int’l, Inc. v. U.S. Envtl. Protection Agency, 371 F.3d 370, 376 (7th Cir. 2004).

⁴ See also Balderrama v. Dep’t of Homeland Security, 2006 U.S. Dist. LEXIS 19421, * 22 (March 30, 2006) (Robertson, J.) (citing Sears and noting that “[t]he existence of Exemption 5-protected documents does not depend on the agency’s ability to identify a specific decision to

D.C. Circuit has held that “general guidelines are of limited utility” in defining the privilege, because “the deliberative process privilege is so dependent upon the individual document and the role it plays in the administrative process.” Puerto Rico, 823 F.2d at 585.

2. The DOC properly invoked the deliberative process privilege.

I. The decision-making processes at issue relate to policy matters within the authority of DOC.

Plaintiff states that the DOC has withheld material that was not related to decisions properly made by the DOC. Pl. Mem. at pp. 3, 22. However, contrary to plaintiff’s assertions, the DOC, through its National Telecommunications and Information Administration (“NTIA”), has official responsibilities with respect to ICANN and the creation of new domains such as .xxx. First, the United States government maintains policy control over and operational oversight responsibility for modifications to, and maintenance and dissemination of, the “authoritative root zone file.”⁵ The process for managing the authoritative root zone file is through two DOC legal agreements with outside parties: a contract and a cooperative agreement.⁶ Before any new domain can be established, the ICANN Board must not only approve its creation, but also must submit an official recommendation to NTIA to add the new domain to the authoritative root zone

which the documents relate”).

⁵ The authoritative root zone file is the highest level of the domain name system and contains the databases enabling an Internet address query to be routed to its proper destination. The authoritative root zone file is the master database from which copies are downloaded and disseminated through the Internet on a daily basis. A root zone file directs an address query to the proper top level domain zone file, which contains the location and other information about the numerous generic top level domains and country code top level domains. See Name.Space, Inc., v. Network Solutions, Inc., 202 F.3d 573 (2nd Cir. 2000).

⁶ These agreements are described in footnotes 7 and 8.

file.⁷ After the ICANN Board makes an official recommendation, NTIA must approve the recommendation and provide written direction to VeriSign, Inc. to modify the authoritative root zone file before the domain is live within the Internet domain name system.⁸

Second, the DOC has official responsibilities with respect to ICANN and its creation of new domains under a 1998 Memorandum of Understanding (“MOU”) with ICANN.⁹ NTIA is responsible for ensuring that ICANN fulfills its obligations under the MOU which, in part, consists of ensuring that the **process** for creating new domains is open and transparent, and accessible to the global internet community. For example, when ICANN was considering approval of the .xxx domain, ICANN’s obligations included, under MOU, Section V.C.8:

consideration and evaluation of . . . b. [t]he creation and implementation of selection criteria for new and existing TLD registries [.xxx would be such a registry], **including public explanation of the process, selection criteria, and the rationale for selection**

⁷ ICANN submits its recommendations with respect to modifications to the authoritative root zone file as one of its responsibilities under the Internet Assigned Numbers Authority (IANA) functions contract with the DOC. The terms of the contract make it clear that ICANN does not have the authority to authorize the changes. A copy of the IANA functions contract in effect at the time of the initiation of this litigation as well as the current contract are available on NTIA’s website at <http://www.ntia.doc.gov/ntiahome/domainname/iana.htm>.

⁸ DOC authorizes VeriSign to make changes to the authoritative root zone file pursuant to Amendment 11 to Cooperative Agreement NCR 92-18742. Amendment 11 is available on NTIA’s website at http://www.ntia.doc.gov/ntiahome/domainname/agreements/Amend11_052206.pdf. The Second Circuit has already found that the requirement in Amendment 11 that DOC provide written approval before any changes are made to the authoritative root zone file is not a prior restraint on free speech, and that any restrictions it imposes relate only to the time, place or manner of speech. See Name.Space, Inc., v. Network Solutions, Inc., 202 F.3d at 573.

⁹ On September 29, 2006, DOC and ICANN announced a three-year extension and amendment of the MOU. Under the terms of the amended MOU, ICANN remains committed to continue to build on existing processes for the introduction of new top level domains as well as improved transparency and accountability. The text of the extended agreement is available on NTIA’s website at <http://www.ntia.doc.gov/ntiahome/domainname/agreements/jpa/signedmou290906.pdf>.

decisions (emphasis added).

Under Section V.C.8., ICANN was obligated to “[d]efine and implement a predictable strategy for selecting new TLDs **using straightforward, transparent, and objective procedures**”

Pursuant to Section V.C.9, ICANN was obligated to “[c]ontinue to develop, to test, and to **implement appropriate mechanisms that foster informed participation in ICANN by the global Internet community**” (emphasis added). The foregoing obligations are reflected in the following language from an August 11, 2005 letter from Assistant Secretary Michael

Gallagher to Dr. Vinton Cerf, a member of the ICANN Board:

I am writing to urge the Board **to ensure that the concerns of all members of the Internet community on this issue have been adequately heard** and resolved before the Board takes action on this application . . . **I request that the Board will provide a proper process** and adequate additional time for these concerns to be voiced and addressed before any additional action takes place on this issue (emphasis added).

Third, the DOC plays an official role with respect to ICANN’s creation of new domains because the DOC accepted ICANN’s open invitation to national governments to serve on its Governmental Advisory Committee. The GAC is comprised of government representatives from around the world and “provide[s] advice to ICANN on issues of public policy.”¹⁰ Based on this advisory role, the DOC, in exercising its legitimate policymaking authority, is fully justified in deliberating on possible recommendations to the GAC related to ICANN’s creation of an .xxx domain, particularly as the recommendations concern the *process* for creating new domains. Based on these three DOC roles with respect to ICANN, contrary to plaintiff’s assertions, the DOC has ample authority to deliberate on possible courses of action to take if ICANN were to recommend the creation of the new .xxx domain and/or enter into a contract with ICM to operate

¹⁰ From ICANN’s website: www.icann.org/committees/gac/outreach-en-01oct01.htm.

the domain.

Plaintiff also suggests that the DOC's deliberations on how to respond to inquiries it received from members of the public and the press are not protected under the deliberative process privilege. Specifically, plaintiff states:

Nowhere . . . does the government explain how Commerce Department responses to such political concerns involve agency policy- or decision-making within the meaning of the deliberative process privilege. Pl. Mem. at p. 32.

However, in light of the broad scope of policy-making subject to protection under the deliberative process privilege,¹¹ the suggestion that the predecisional, deliberative communications made in the process of formulating DOC positions would not be protected is preposterous. Plaintiff fails to cite any case law support for this position, and defendants know of none. Indeed, the DOC and other Government agencies have Offices of Public Affairs which have the responsibility of responding to inquiries from the press and the public. To suggest that their predecisional, deliberative communications in formulating responses to such inquiries, even if they are "political" in nature, would not be protectable under the deliberative process privilege lacks any support in the case law.

- ii. The DOC did not waive the deliberative process privilege by disclosing documents to third parties.

Plaintiff states that it made an "extensive showing" in its administrative appeal that the DOC "appeared to have shared with outside parties - including ICANN and/or representatives of foreign governments - either information withheld from ICM, or enough information involving the subject matter thereof that might be sufficient to waive the deliberative process privilege."

¹¹ See supra n.3 (discussing Enviro-Tech Int's Inc., 371 F.3d at 370).

Pl. Mem. at p. 34. However, the DOC's July 13, 2006, decision on the administrative appeal states:

[a]lthough the documents you cite include references to countries, individuals, or entities outside the U.S. Government, none of the documents, including those portions we are withholding, were shared with such outside parties. Any e-mail addresses on the documents you reference that reveal the individuals who sent or received any of the withheld material are addresses of U.S. Government employees.

See Smith Dec., Exhibit 8, at p. 3.

In an attempt to support its argument, plaintiff points out that the DOC omitted from its Vaughn Index the names of individuals designated to receive only a "cc" of an e-mail. Plaintiff implies that the "cc" recipients might include parties outside the United States government. However, the "cc" addresses were omitted from the Smith Declaration and Vaughn index in the interest of economy and because they have not been withheld. In fact, defendants have released to plaintiff the e-mail addresses of all senders and recipients, including "cc" recipients of e-mails that have been withheld (in full or in part) solely under the deliberative process privilege. The senders and recipients of six e-mails withheld in their entirety under the attorney-client and deliberative process privileges (ACW2-ACW7) have not been released. See Smith Dec. at pp. 27-28. But the Vaughn Index description of these documents states: "The documents describe confidential communications among DOC lawyers and their DOC clients, which have not been disclosed outside of the attorney-client relationship." See id. at p. 26. The Supplemental Declaration of Kathy Smith ("Smith Supp. Dec."), which is attached hereto as Exhibit 1, confirms that none of the material at issue in the documents in this case has been disclosed to parties outside of the United States government. Smith Supp. Dec. ¶ 4.

3. The DOS properly invoked the deliberative process privilege.

Plaintiff dismisses the DOS deliberative process claims as “a litany of vague references to agency activity that fail to establish what deliberative process is involved and to tie the records to the purported decision-making at issue.” Pl. Mem. at p. 24. Further, plaintiff states that “obfuscation regarding the U.S. government’s role in the ICANN process” is a problem with the State Department’s withholdings, although it is “a problem that plagues [DOC’s] Exemption 5 claims more so than the State Department.” Pl. Mem. at p. 26. However, plaintiff’s arguments do not take into account DOS’s role in formulating foreign policy, nor do they rebut the document-by-document explanations for withholdings that DOS included in the Declaration of Margaret Grafeld. See D. Mem., Exhibit C: Grafeld Declaration (“Grafeld Dec.”).

i. The decision-making processes at issue in the documents withheld by DOS relate to policy matters within the authority of DOS.

The documents withheld by DOS under Exemption 5 in this case were generated in the course of DOS decision-making and policy-making activities. DOS is the agency primarily responsible for overseeing the foreign affairs and implementing the foreign policy of the United States.¹² It has statutory responsibility for “formulation, coordination, and oversight of foreign policy related to international communications and information policy,” including “primary authority for the conduct of foreign policy with respect to such telecommunications functions, including the determination of United States positions and the conduct of United States participation in negotiations with foreign governments and international bodies.” 22 U.S.C. § 2707. ICANN’s role in Internet management issues has been the subject of intense international

¹² See, e.g., 22 U.S.C. § 2656.

debate in the second half of 2005 and continuing into 2006. Although the United States government has advocated that ICANN continue in its role as technical manager of the Internet domain-name system ("DNS"), the European Union and others in the international community have suggested that ICANN is too closely connected to the United States government and have lobbied for ICANN's Internet management responsibilities to be turned over to a United Nations body or other multinational organization.¹³ ICANN's future role as DNS manager was a major agenda item at the United Nations World Summit on the Information Society ("WSIS") in Tunis, Tunisia, in November 2005 (where the Department of State led the United States delegation).¹⁴ The WSIS, in turn, spawned the creation of the "Internet Governance Forum" for multistakeholder dialogue on Internet public policy issues that will be convened by the United Nations Secretary General (in which the DOS will play a major part), and in which ICANN's proper role may again serve as a major source of discussion.¹⁵ Accordingly, ICANN's future role as a manager of Internet domain names and addresses, and the United States government's support of, and relationship with, ICANN continues to be the subject of Internet-related foreign policy discussions.

¹³ See, e.g., International Herald-Tribune, "Agreement allows U.S. to control Web names," (Nov. 17, 2005); Matt Moore, Associated Press, "Deal Reached on Managing the Internet" (Nov. 16, 2005); John Markoff, "Control the Internet? A Futile Pursuit, Some Say," The New York Times (Nov. 14, 2005); Mark Shiffrin and Avi Silberschatz, "Web of the Free," The New York Times (Oct. 23, 2005); The Department of State, U.S. Principles on the Internet's Domain Name and Addressing System (June 30, 2005), available at <http://www.state.gov/e/eb/rls/othr/2005/57995.htm>.

¹⁴ See, e.g., articles cited supra n.13.

¹⁵ See, e.g., <http://www.itu.int/ws/implementation/igf/index.html>.

- ii. DOS's responsive records are only peripherally related to plaintiff's FOIA request.

Had plaintiff's FOIA request truly been limited to documents identifying "what role [DOS] played, or could play, regarding ICM's pursuit of approval from [ICANN] to operate an '.xxx' domain on the world-wide web," Pl. Mem. at pp. 1-2, the DOS's search would have yielded few, if any, responsive documents. However, plaintiff's request was more broad - - it sought any records relating to ICANN's approval of the new .xxx sponsored top-level domain. See D. Mem. at p. 5. The vast majority of DOS records responsive to this request are press articles and other records related to ICANN compiled by DOS in support of its foreign policy responsibilities, described supra. In virtually all of these records, the .xxx domain-name issue appears in passing or as part of a larger discussion related to United States foreign policy with respect to ICANN. DOS released the vast majority of its records - - well over 1,000 pages of material - - without making any excisions or withholdings in order to facilitate the production of documents to plaintiff. See Grafeld Dec. ¶¶ 11, 31. DOS withheld 34 documents in part or in full under Exemption (b)(5) (the deliberative process privilege) and three documents in part under Exemption (b)(4). Grafeld Decl. ¶¶ 16, 18.¹⁶ As indicated in the Grafeld Declaration, DOS has withheld very little information relating to .xxx. In some of the documents excised by DOS, all information relating to .xxx has been released. Where information about .xxx has been withheld, it usually consists of a small section of a larger document reflecting deliberations on the appropriate foreign policy position that DOS should take regarding ICANN's role in Internet

¹⁶ DOS also referred five documents to the Department of Defense for that agency's direct reply to plaintiff, but those documents are not at issue here. See Pl. Mem. at 14 n.17. DOS referred a sixth document to the Department of Commerce, and that sixth document was covered by the Department of Commerce's Vaughn materials. See, e.g., Grafeld Decl. ¶ 13.

management.

- iii. None of plaintiff's arguments regarding the individual documents withheld by DOS have merit.

Although plaintiff's complaints regarding DOS's exemption (b)(5) withholdings are, for the most part, generalized, plaintiff singles out several DOS documents as examples of defective withholdings. See Pl. Mem. at pp. 24-27. The Declaration of Margaret Grafeld includes a document-by-document explanation of the Department's rationale for invoking exemption (b)(5). See Grafeld Dec. As explained infra, the Grafeld Declaration provides a ready explanation as to why the information withheld from each document identified by plaintiff is predecisional and deliberative.

Document L5: Because of the conditional nature of the document's description in the Grafeld Declaration, plaintiff argues that "the government does not even know what [the] document purports to be." Pl. Mem. at p. 24. However, Document L5 was described conditionally because, although those notes that are legible "reflect discussion of possible changes in the U.S. Government's relationship with the GAC," Grafeld Dec. ¶ 19, many of the notes in this document are "illegible."¹⁷ Document L-5 is clearly predecisional - - the decision being contemplated is a change to the United States government's relationship with the GAC. It is also deliberative because it consists of notes from a DOC-DOS meeting to discuss possible GAC changes. Due to their abbreviated and indistinct nature, the notes could be "subject to differing interpretations and therefore potentially misleading." Id.; see Jordan v. Dep't of Justice,

¹⁷ The GAC is an ICANN committee whose membership is "open to all national governments." It is the mechanism by which governments can "consider and provide advice on the activities of [ICANN] as they relate to the governments' concerns." See ICANN Bylaws, Article VII, Section 3(b), available at <http://www.icann.org/committees/gac>.

591 F.2d 753, 772-73 (D.C. Cir. 1978) (en banc) (deliberative process “protects the public from confusion that would result from premature exposure to discussions”).

Document L6A is a five-page internal DOS memorandum dated December 5, 2005, providing the author’s in-depth views on “the ICANN question.” See Grafeld Dec. ¶ 20. This document is prototypical “deliberative process” because it consists, in its entirety, of “suggestions or recommendations as to what agency policy should be” by analyzing foreign policy and other issues implicated by the U.S. Government’s relationship with ICANN. See Coastal States Gas Corp. v. Dep’t of Energy, 617 F.2d 854, 868 (D.C. Cir. 1980).

Documents E52, E57, E58, and E62 are various versions of a December 2005 memorandum to Deputy Secretary of State Robert Zoellick from the Assistant Secretary for Economic and Business Affairs entitled “ICANN/Internet Governance: Policy Challenges for 2006.” Grafeld Dec. ¶ 23.¹⁸ In an attempt to be forthcoming and to narrow the issues under dispute, the Grafeld Declaration described this multi-paged memorandum’s one reference to .xxx to show plaintiff that this document is only marginally related to plaintiff’s FOIA request.¹⁹

¹⁸ Documents L8A, E50, and E51 are drafts of another December 2005 memorandum between the same officials, this one titled “Policy Considerations for the Management of the Internet,” which was written “in response to six questions from the Deputy Secretary of State concerning the future relationship of the U.S. Government to ICANN.” Grafeld Dec. ¶ 21. Only one of the six questions discussed in this memorandum is responsive to plaintiff’s request. Id. Plaintiff asserts without discussion that “the principles that ICANN must apply” to approval of .xxx cannot be the subject of DOS “policy-making.” Pl. Mem. at p. 27. But the topic arose in the context of DOS deliberations on “the future relationship of the U.S. Government to ICANN,” which is indisputably a matter for DOS policy-making. Grafeld Dec. ¶ 21.

¹⁹ The memorandum includes but a single reference to “the .xxx issue,” and that single reference is “not related to approval of a .xxx TLD but rather commenting on the number of FOIA requests related to .xxx and a correspondingly increased scrutiny of ICANN.” Grafeld Dec. ¶ 23.

Leaving no good deed unpunished, plaintiff instead uses the .xxx reference to suggest, falsely, that the DOS has “all but admit[ted] that there is no deliberative process in play.” Pl. Mem. at p. 25. Instead, this memorandum is another example of a prototypical deliberative process - - it is an information memorandum between high-level officials at DOS describing “issues and policy decisions with respect to ICANN that are likely to arise in 2006.” Grafeld Dec. ¶ 23.²⁰

Similarly, Document E54 is a draft memorandum to the Assistant Secretary for Economic and Business Affairs commenting on a January 19, 2006 Wall Street Journal article on international attempts to build alternatives to the Internet.²¹ The memorandum was drafted in the context of the DOS’s ongoing role in managing the foreign policy aspects of the United States’ relationship with ICANN.²² Plaintiff is simply off the mark by suggesting (without citing any authority) that agency deliberations triggered by “public commentary on Internet governance” cannot qualify for the deliberative process privilege. Pl. Mem. at p. 26.

Documents E14, E20, E24, E31, and E32 are chains of e-mails which were released in large part to plaintiffs. Grafeld Dec. ¶¶ 26, 29. The context of the deliberations in these documents is clear from the portions of the documents released to plaintiff. Document E14 is a

²⁰ Plaintiff’s assertion that the Grafeld Declaration “does not reference policy-making at all” with respect to these documents is simply wrong. See Pl. Mem. at p. 26. The Grafeld Declaration identifies the title of the memorandum as “ICANN/Internet Governance: Policy Challenges for 2006” and it explains that the memorandum “endeavors to alert the Deputy Secretary to issues and policy decisions with respect to ICANN that are likely to arise in 2006.” Grafeld Dec. ¶ 23.

²¹ See Christopher Rhodes, “In Threat to Internet Clout, Some Are Starting Alternatives,” Wall St. Journal (Jan. 19, 2006) at A1.

²² Like many of the other documents retrieved by the DOS, Document E54 is only marginally related to plaintiff’s FOIA request and it contains only one brief reference to .xxx. See Grafeld Dec. ¶ 24.

series of e-mails dated October 21, 2005 which reports from a conference held in Brussels, Belgium, entitled "ICANN, WSIS, WGIG [the U.N. Working Group on Internet Governance]: Internet Governance at its Crossroads." The meeting involved discussions with European Union representatives regarding their proposal to change ICANN's role in Internet governance. The limited redacted elements of this e-mail, none of which are responsive to plaintiff's FOIA request, see Grafeld Decl. ¶ 26, protect internal United States government deliberations regarding the foreign policy implications of the ICANN-related positions advanced at this international meeting. Document E20 consists of a November 2005 New York Times article (released to plaintiff) discussing ICANN and entitled "Internet Governance." One sentence, reflecting internal DOS deliberations on responding to the article, has been redacted. Document E24 is a series of e-mails from November 2005 related to an Organization for Economic Cooperation and Development conference call on "some of the decisions made in Tunis [at the WSIS]." The only part of this e-mail chain that has been redacted is a single preparational e-mail between DOC and DOS officials who were participating in the call. See Grafeld Dec. ¶ 29. Documents E31 and E32 consists of a December 2005 Agence France-Presse report on the new ".eu" domain name. Two brief comments reflecting deliberations on the new .eu domain, .xxx, and ICANN have been excised. See Grafeld Dec. ¶ 26.

Document E59 is a two-page document draft memorandum on a meeting between DOS officials and a Japanese official. Grafeld Dec. ¶ 28. The only portion of the document responsive to plaintiff's request is a brief comment about the implications of the issue of .xxx in Japan. Id. The document is a draft memorandum, which by itself "goes to the merits of Exemption 5's predecisional and deliberative elements." Judicial Watch, Inc. v. FDA, 449 F.3d

141, 152 (D.C. Cir. 2006); see also Kidd v. Dep't of Justice, 362 F.Supp.2d 291, 295 (D.D.C. 2005) (“Draft documents, by their very nature, are typically predecisional and deliberative.”) (quoting Exxon Corp. v. Dep't of Energy, 585 F. Supp. 690, 698 (D.D.C. 1983)). Accordingly, the document has been withheld because “[r]elease of the document, to the extent the draft may be inaccurate or incomplete, could be misleading about what transpired at the meeting.” Grafeld Dec. ¶ 28.

Documents E36, E68, E69, and E70 are summaries of or commentaries on “White House high tech conference calls.” Grafeld Dec. ¶ 30. As is evident from the portions of the documents provided to plaintiff, these conference calls served as interagency fora for discussing and deliberating on current high tech policy issues. Each of these documents was carefully redacted to provide any reasonably segregable factual information to plaintiff. Id.

B. THE DEPARTMENT OF COMMERCE PROPERLY WITHHELD ATTORNEY WORK-PRODUCT MATERIAL PURSUANT TO EXEMPTION (b)(5).

Plaintiff asserts that the DOC failed to justify its assertion of the attorney work-product privilege because it neither specified any claim(s) it expected to be brought nor showed that litigation was foreseeable. Pl. Mem. at pp. 35-37.

1. Claims Anticipated by the DOC

ICM itself provided a roadmap to possible claims it would bring against the DOC in an October 7, 2005 letter and 14-page attachment entitled “Questions and Answers on the Proposed .XXX Top-Level Domain.” See Smith Supp. Dec., Exhibits A and B. The letter and attachment were sent as a follow-up to a meeting held at the DOC, among representatives of the DOC and ICM. See Smith Supp. Dec. ¶ 5. The attachment includes a section entitled “Misimpression #7:”

EVERYBODY KNOWS THAT THE DEPARTMENT OF COMMERCE HAS THE AUTHORITY TO INTERVENE IN THE ICANN PROCESS, INFLUENCE THE BOARD TO DELAY OR REJECT THE ICM CONTRACT, OR REFUSE TO DIRECT VERISIGN TO ADD .XXX TO THE AUTHORITATIVE ROOT.
(capitals and bold in original).

See id., Exhibit B at p. 11. ICM asserts that the intervention referenced in the heading could serve as the basis for a claim under the Administrative Procedure Act. Specifically, ICM indicated that:

This intervention . . . has significant implications for the Department of Commerce and ICANN under U.S. law, potentially subjecting both to the strictures of constitutional and statutory mandates, including those of the Administrative Procedure Act (“APA”).

Id. ICM also specified possible First Amendment grounds for an action against the DOC.²³

Specifically, ICM indicated:

U.S. government intervention that affects ICANN’s consideration of the .xxx domain proposal also raises important First Amendment questions . . . Here, there is no question but that the potentially expressive nature of TLDs would apply to the .xxx domain, but the First Amendment issue raised by U.S. Government intervention is even more fundamental. Creation of the .xxx domain directly implicates the constitutionally protected right of free association.

Id. at p. 13. Therefore, DOC properly anticipated Administrative Procedure Act and First Amendment claims.

2. Foreseeability of Litigation

In the Section of plaintiff’s motion entitled, “Apparent U.S. Government Interference

²³ The attachment includes other statements that indicate ICM’s potential willingness to challenge the legality of DOC’s actions, without mentioning specific claims:

A government decision not to direct Verisign to add a new domain approved by ICANN to the authoritative root unquestionably would constitute governmental action that would be subject to legal review. Id. at p. 12.

with ICANN's TLD Process," plaintiff appears to assert that the Government interfered with ICANN's TLD process when NTIA Assistant Secretary Gallagher sent an August 11, 2005 letter to Dr. Cerf, asking the ICANN Board to allow additional time before taking further action on the proposed .xxx TLD.²⁴ Pl. Mem. at pp. 7-9. Based upon the October 7, 2005 letter, this could be a possible trigger for First Amendment claims. Moreover, the Smith Supplemental Declaration indicates that after reviewing the letter, the declarant "believed it represented a threat of litigation against the DOC if ICM Registry were to be unsuccessful in obtaining the .xxx contract with ICANN." Smith Supp. Dec. ¶ 9. As of the date of filing of this Reply, ICM has been unsuccessful in obtaining the .xxx contract with ICANN.²⁵ Therefore, it is clear that litigation was foreseeable.

C. THE DEPARTMENT OF COMMERCE PROPERLY WITHHELD ATTORNEY-CLIENT MATERIAL PURSUANT TO EXEMPTION (b)(5).

Plaintiff makes essentially the same arguments against the DOC's assertion of the attorney-client privilege that it did against the DOC's assertion of the deliberative process privilege. In particular, plaintiff's fundamental objection to the DOC's assertion of the attorney-client privilege is that the matters as to which the DOC clients were seeking legal advice were not within DOC's authority, and thus not legitimate subjects about which DOC clients could ask DOC attorneys to provide legal advice. See Pl. Mem. at pp. 38-39. The fundamental flaw in this argument was demonstrated herein, in Section I(A)(2)(I), which explains that the DOC has

²⁴However, this letter was sent and made public *before* ICM sent the October 7, 2005 letter and attachment to the DOC. Thus, it is clear that the August 11, 2005 letter did not constitute interference in the ICANN process.

²⁵ See Pl. Mem. at pp. 5-9, 16-17.

official responsibilities related to ICANN and its creation of new domains. Therefore, the DOC is amply justified in deliberating on, and raising legal issues concerning, these matters.

Moreover, the argument in Section I(A)(2)(I) that the DOC did not waive the deliberative process privilege by disclosing any material to third parties is equally applicable to waiver of the attorney-client privilege. See Smith Supp. Dec. ¶ 4.

II. THE DEPARTMENT OF STATE PROPERLY WITHHELD MATERIAL PURSUANT TO FOIA EXEMPTION (b)(4).

DOS withheld Documents E8 and E71 in full and Document E2 in part under Exemption b(4), which protects information that is (a) commercial or financial, (b) obtained from a person,²⁶ and (c) privileged or confidential. See Public Citizen Health Research Group v. U.S. Food and Drug Admin., 704 F.2d 1280, 1290 (D.C. Cir. 1983); D. Mem. at pp. 15-17 and Grafeld Dec. ¶¶ 16, 25. Plaintiff disputes DOS's withholdings from all three documents. See Pl. Mem. at pp. 19-21.

However, plaintiff cannot seriously dispute that the information in question is "commercial" which, based on its "ordinary meaning," has been broadly interpreted to include any record in which the submitter has a "commercial interest."²⁷ In each case, the submitter had an obvious commercial interest in the information transmitted to DOS. The portions of

²⁶ Plaintiff apparently does not dispute that DOS obtained the information from "a person."

²⁷ Public Citizen Health Research Group v. U.S. Food and Drug Admin., 704 F.2d at 1290; see also Am. Airlines v. Nat'l Mediation Bd., 588 F.2d 863, 870 (2d Cir. 1978) (commercial information means "anything pertaining or relating to or dealing with commerce"); Critical Mass Energy Project v. NRC, 830 F.2d 278, 281 (D.C. Cir. 1987) (holding that "information may qualify as 'commercial' even if the provider's . . . interest in gathering, processing, and reporting the information is noncommercial").

Document E2 released to plaintiff indicate that the redacted information reflects the professional insights of the author, a consultant in the telecommunications industry, on ICANN and the WSIS.²⁸ Grafeld Dec. ¶ 25. Document E18 consists of information provided to WSIS and Internet governance provided by a source in a Washington, D.C. business organization. *Id.* Finally, Document E71, e-mail chains from two different ICANN personnel, consists of information related to ICANN, the GAC, and WSIS. *Id.*

Further, the information withheld is “confidential.” Under Exemption (b)(4), information “voluntarily” submitted to the government is considered “confidential” if it is not “customarily” disclosed to the public by the person from whom the information was obtained. Critical Mass Energy Project v. NRC, 975 F.2d at 878-79. Information “required” to be submitted to the government is considered “confidential” if its disclosure would be likely either “(1) to impair the Government’s ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained.” *Id.* Here, although the information withheld was provided voluntarily to DOS, it would qualify for withholding under even the more stringent test for “required” submissions because, in each case, the DOS has concluded that release of the information “could impair the future ability of U.S. officials to obtain information” from the particular source. *Id.* This statement is not “an entirely conclusory recitation of legal principle,” see Pl. Mem. at p. 20, it is a factual statement that reflects the sensitive nature of the information withheld.

²⁸ Moreover, all information responsive to plaintiff’s FOIA request from Document E2 (i.e., “all material related to .xxx”) was released to plaintiff. See Grafeld Decl. ¶ 25.

III. THE DEPARTMENT OF COMMERCE PROPERLY DISMISSED PLAINTIFF'S FOIA APPEAL DESIGNATED CRRIF 06-127.

Plaintiff concedes that its administrative appeal was filed late, but disputes that it was four days late as the Government argued in its Motion. Plaintiff argues that, in any case, the doctrine of exhaustion of administrative remedies does not preclude judicial review of the appeal. See P. Mem. at p. 41.

By letter dated January 19, 2006, plaintiff was informed that an appeal must be received within thirty calendar days of the denial letter. See Defendant's Statement of Material Facts Not in Genuine Dispute ¶ 2. Specifically, the DOC's FOIA regulations at 15 C.F.R. § 4.10(a) state:

a written appeal or an electronic appeal . . . must be received by the Office of General Counsel during normal business hours (8:30 a.m. to 5 p.m., Eastern Time, Monday through Friday), within thirty *calendar* days of the date of the written denial . . . Written or electronic appeals arriving after normal business hours will be deemed received on the next normal business day. (emphasis added).

By letter dated February 21, 2006, transmitted by e-mail and facsimile, through counsel, ICM appealed the initial determination. The letter arrived on February 21, 2006, by e-mail at 5:41 p.m., and by fax at 5:52 p.m. Therefore, it was deemed received on the next business day, February 22, 2006. However, the appeal was due on February 18, 2006, thirty calendar days from the January 19, 2006 letter. The appeal was received on February 22, 2006, thirty-four days from the date of the letter which, contrary to plaintiff's assertions, is *four* calendar days past the thirty-day limit established by 15 C.F.R. § 4.10(a).

These facts are quite similar to those in a recent case in which it was held that a FOIA appeal received by e-mail at 5:12 p.m., twelve minutes after the filing deadline, was late and that accordingly plaintiff had failed to exhaust administrative remedies. See Center for Biological

Diversity v. Gutierrez, No. Civ. A. 05-1045, 2006 WL 2329330 (D.D.C. August 10, 2006). The court in Center for Biological Diversity, cited two factors to consider in determining whether failure to exhaust precludes judicial review:

Although exhaustion of a FOIA request is not jurisdictional because the FOIA does not unequivocally make it so, still as a jurisprudential doctrine, failure to exhaust precludes judicial review if [1] the purposes of exhaustion and [2] the particular administrative scheme support such a bar.

Id., 2006 WL 2329330, at *8 (quoting Wilbur v. CIA, 355 F.3d 675, 677 (D.C. Cir. 2004)).

With regard to first factor, in Center for Biological Diversity, the Federal agency at issue (the DOC's National Marine Fisheries Service, or NFS),:

did not accept the tardy appeal; thus it has had no occasion to consider the very issue that the Center raises here: whether NFS properly invoked FOIA Exemption 6 to redact materials it released . . . *The exhaustion requirement exists to provide the agency 'an opportunity to exercise its discretion and expertise on the matter and to make a factual record to support its decision. . . To ignore that requirement here would frustrate this policy by 'cut[ting] off the agency's power to correct or rethink initial judgments or errors.'* (emphasis added) (internal quotations omitted).

Id. at *14. The court concluded:

that NFS set a legitimate deadline, the Center failed to meet that deadline, and NFS simply respected its regulations and declined to review the appeal. To now ignore that deadline would frustrate the purposes of exhaustion.

Id. at *9. The facts of this case compel the same conclusion - - granting plaintiff judicial review would frustrate the purposes of exhaustion.

With respect to the second factor, the Court stated that it is settled that "FOIA's administrative scheme 'favors treating failure to exhaust as a bar to judicial review.'" Id. *13 n.9 (citing Hidalgo, 344 F.3d 1256, 1259 (D.C. Cir. 2003)). Moreover, many agencies require that an administrative appeal be filed within the time limit specified in the agency's regulations in order

to satisfy the FOIA exhaustion requirement. Id. at *8 (citing Wilbur, 355 F.3d at 675).

Accordingly, the administrative scheme of the FOIA favors considering ICM's failure to exhaust by filing a timely appeal as a bar to judicial review.

ICM argues that Wilbur supports its assertion that filing a FOIA appeal late does not preclude judicial review of the appeal. However, the court in Center for Biological Diversity, distinguished Wilbur, observing that in the latter, the CIA accepted the late appeal, processed it, and issued a final decision upholding the agency's initial determination. In Center for Biological Diversity, as in the instant case, the agency did not accept the late appeal, much less process it and uphold the agency's initial determination. Center for Biological Diversity, at *14. Thus Wilbur fails to support ICM's assertion that filing a FOIA appeal late does not preclude judicial review of the appeal. Rather, both factors identified in Wilbur favor denying judicial review to ICM in CRRIF 06-127.

CONCLUSION

For the reasons explained herein, defendants respectfully request that the Court grant the government's Motion to Dismiss and for Summary Judgment and deny plaintiff's Cross-Motion for Summary Judgment.

26

Respectfully submitted,

/s/

JEFFREY A. TAYLOR, D.C. Bar # 498610
United States Attorney

/s/

RUDOLPH CONTRERAS, D.C. Bar # 434122
Assistant United States Attorney

/s/

MARIAN L. BORUM, D.C. Bar # 435409
Assistant United States Attorney
501 3rd Street, N.W., 4th Floor
Washington, D.C. 20530
(202) 514-6531
Counsel for Defendant

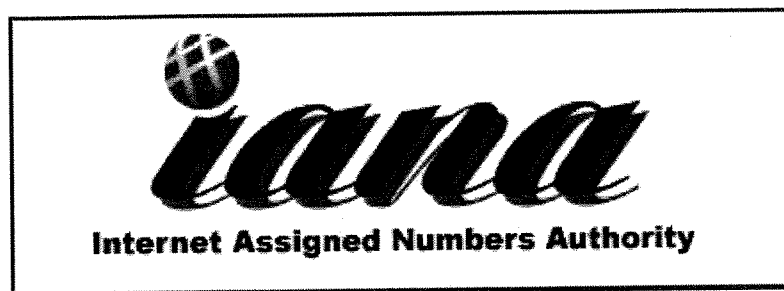
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2006, the foregoing was served upon counsel for plaintiff via the Court's ECF e-mail. I further certify that the signed original of this Reply shall be retained in the official case file.

/s/

MARIAN L. BORUM
ASSISTANT UNITED STATES ATTORNEY

EXHIBIT C



Dedicated to preserving the central coordinating functions of the global Internet for the public good.

IANA Reports about ccTLDs

- [Report on Redefinition of the .gd Top-Level Domain](#) (July 2006)
- [Report on Redefinition of the .ma Top-Level Domain](#) (July 2006)
- [Report on Redefinition of the .ax Top-Level Domain](#) (June 2006)
- [Report on Redefinition of the .cx Top-Level Domain](#) (January 2006)
- [Report on Redefinition of the .gs Top-Level Domain](#) (November 2005)
- [Report on Redefinition of the .tk Top-Level Domain](#) (October 2005)
- [Report on Redefinition of the .iq Top-Level Domain](#) (July 2005)
- [Report on Redefinition of the .kz Top-Level Domain](#) (July 2005)
- [Report on Redefinition of the .eu Top-Level Domain](#) (March 2005)
- [Report on Redefinition of the .fk Top-Level Domain](#) (January 2005)
- [Report on Redefinition of the .tl Top-Level Domain](#) (January 2005)
- [Report on Redefinition of the .fo Top-Level Domain](#) (November 2004)
- [Report on Redefinition of the .za Top-Level Domain](#) (November 2004)
- [Report on Redefinition of the .ly Top-Level Domain](#) (October 2004)
- [Report on Redefinition of the .es Top-Level Domain](#) (September 2004)
- [Report on Redefinition of the .ng Top-Level Domain](#) (10 June 2004)
- [Report on Redefinition of the .tf Top-Level Domain](#) (May 2004)
- [Report on Redefinition of the .ps Top-Level Domain](#) (April 2004)
- [Report on Redefinition of the .ht Top-Level Domain](#) (13 January 2004)
- [Request for Redefinition of .md Top-Level Domain](#) (22 October 2003)
- [Report on Redefinition of the .ky Top-Level Domain](#) (30 June 2003)
- [Report on Redefinition of the .pw Top-Level Domain](#) (30 June 2003)
- [Report on Redefinition of the .tj Top-Level Domain](#) (30 June 2003)
- [Report on Redefinition of the .tw Top-Level Domain](#) (29 May 2003)
- [Report on Redefinition of the .uz Top-Level Domain](#) (10 April 2003)
- [Report on Redefinition of the .af Top-Level Domain](#) (8 January 2003)
- [Report on Redefinition of the .ke Top-Level Domain](#) (20 December 2002)
- [Report on Redefinition of the .sd Top-Level Domain](#) (20 December 2002)
- [Report on Redefinition of the .la Top-Level Domain](#) (11 December 2002)

- Report on Redefinition of the .mw Top-Level Domain (12 August 2002)
- Report on Redefinition of the .bi Top-Level Domain (16 July 2002)
- Second Report on Request for Redefinition of the .jp Top-Level Domain (1 April 2002)
- Report on Request for Redefinition of the .jp Top-Level Domain (8 February 2002)
- Second Report on Request for Redefinition of the .au Top-Level Domain (19 November 2001)
- Report on Request for Redefinition of the .au Top-Level Domain (31 August 2001)
- Report on Deletion of the .zr Top-Level Domain (20 June 2001)
- Report on Request for Redefinition of the .ca Top-Level Domain (1 December 2000)
- Report on Request for Redefinition of the .ps Top-Level Domain (22 March 2000)
- Report on Request for Redefinition of the .pn Top-Level Domain (11 February 2000)

Please send comments on this web site to: webmaster@iana.org

Page Updated 21-Jun-2004

© 2004 The Internet Assigned Numbers Authority. All rights reserved.

EXHIBIT D



IANA Report on Redelegation of the .GD Top-Level Domain

The Internet Assigned Numbers Authority (IANA), as part of the administrative functions associated with management of the Domain Name System root, is responsible for receiving requests for delegation and redelegation of top-level domains, investigating the circumstances relevant to those requests, and reporting on the requests.

This report gives the findings and conclusions of the IANA on its investigation of a request for redelegation of .GD, the country-code top-level domain (ccTLD) for Grenada.

Factual and Procedural Background

Grenada is a Caribbean country with a population of approximately 90,000, forming the southern part of the Grenadines. The country is assigned the ISO 3166-1 alpha 2 code of "GD".

On 3 June 1992, IANA approved a request for the initial delegation of the .GD ccTLD. The assigned administrative and technical contacts were Loretta Simon and Felix Ramos respectively. The registration activities appear to have been undertaken by the University of Puerto Rico by Mr Ramos.

In May 2000, the IANA received a request to redelegate the .GD domain to the Government of Grenada, with technical support provided by Sean Jackson — the manager of AdamsNames, a registry services company. The motivation for the action was that the domain was not being operated in the national interest, and that the government wishes to commence an improved service.

This was followed by a protracted evaluation, which ultimately did not result in a delegation. According to IANA's research, this does not appear to be due to a defect in the application. The records support that it was due to delays caused by contractual negotiations, as well as complications caused by a simultaneous redelegation of another ccTLD, which involved a number of the same parties.

On 1 December 2005, a new redelegation request was lodged with IANA. This request, which is now under evaluation, seeks delegation of .GD to the National Telecommunications Regulatory Commission (NTRC). It is proposed that the Chairman of the NTRC, Dr Linus Spencer Thomas, fill the administrative contact role — with the technical contact role fulfilled by Amaryllis Investments Ltd.

IANA received a formal letter of government approval, dated 6 February 2006, from Gregory Bowen, the Minister of Agriculture, Lands, Forestry, Fisheries, Public Utilities and Energy. In that letter, it is noted that the National Telecommunications Regulatory Commission has been

appointed under the auspices of Act No. 31 of 2000.

In order to meet the technical competence requirements for redelegation, IANA ascertained that Amaryllis Investments is a wholly owned subsidiary of AdamsNames, a registry services provider. They have informed IANA that in practice, the domain will be operated by the AdamsNames organisation. AdamsNames is currently responsible for the operation of domains such as .MS, .TC, and .VG.

IANA attempted to contact the Administrative and Technical Contacts associated with the domain name to obtain their assent. Loretta Simon, the Administrative Contact, no longer works for the Supporting Organisation, appears unreachable, and is no longer involved in the day-to-day administration of the organisation. She did however instigate the original request for redelegation in 2000 to assign the domain to the government and AdamsNames, so it can be reasonably inferred that she was supportive in lieu of any additional responses.

The Technical Contact at the University of Puerto Rico consented to the reassignment as requested in response to questioning by IANA.

On 18 July 2006 the ICANN Board of Directors considered the request, and authorized the President of ICANN to move forward with the delegation of the .GD top-level domain to the National Telecommunications Regulatory Commission.

Evaluation

This report is being provided under the contract for performance of the IANA function between the United States Government and ICANN. Under that contract, ICANN performs the IANA function, which includes receiving delegation and redelegation requests concerning ccTLDs, investigating the circumstances pertinent to those requests, and issuing a report documenting IANA's findings.

In its role as investigator of delegation requests, IANA is guided by the practices summarized in:

- "Domain Name System Structure and Delegation" (RFC 1591). This document describes the practices relating to delegations at its publication in 1994.
- "Internet Domain Name System Structure and Delegation" (ICP-1). This document represents an ICANN-written update of the portions of RFC 1591 dealing with ccTLDs and reflects subsequent evolution of the policies followed by the IANA through May, 1999.
- "The Governmental Advisory Committee Principles for Delegation and Administration of ccTLDs" (GAC Principles). This document serve as "best practices" to guide governments in assuming proper roles with respect to the Internet's naming system.

In considering the delegation of a ccTLD, IANA seeks input from both the requesting party as well as from persons and/or organizations that may be significantly affected by the change in the top-level DNS hierarchy, particularly those within the nation or territory the ccTLD designates. As noted in ICP-1, the parties affected include the relevant government or public authority: "The desires of the government of a country with regard to delegation of a ccTLD are

taken very seriously. The IANA will make them a major consideration in any TLD delegation/transfer discussions."

Taking these three documents into consideration, the evaluation of a delegation request involves determining facts that relate to the applicant's capacity to meet the following criteria:

1. Operational and technical skills

- a. The prospective manager has the requisite skills to operate the TLD appropriately. (ICP-1 §a, RFC 1591 §3.5)
- b. There must be reliable, full-time IP connectivity to the nameservers and electronic mail connectivity to the operators; (ICP-1 §a; RFC 1591 §3.1)
- c. The manager must perform its duties in assigning domains and operating nameservers with technical competence (ICP-1 §d; RFC 1591 §3.5)

2. Operator in country

- a. The prospective manager supervises and operates the domain name from within the country represented by the TLD; (ICP-1 §a; RFC 1591 §3.1)
- b. The prospective administrative contact must reside in the country represented by the TLD. (ICP-1 §a; RFC 1591 §3.1)

3. Equitable treatment

- a. The prospective manager must be equitable and fair to all groups encompassed by the TLD that may request domain names (ICP-1 §c; RFC 1591 §3.3)

4. Community/Governmental support

- a. The prospective manager has the requisite authority to operate the TLD appropriately, with the desire of the government taken very seriously. (ICP-1 §a, GAC Principles)
- b. Significantly interest parties in the domain should agree that the prospective manager is the appropriate party to receive the delegation (ICP-1 §a; RFC 1591 §3.4)

In summary, the applicant's credentials as they relate to the enumerated criteria are:

• **Operational and technical skills.**

The operator will be AdamsNames, which has a well established history of performed ccTLD registry operations.

• **Operator in country.**

The supporting organisation is the National Telecommunications Regulatory Commission of Grenada, with the administrative contact as the Director of that organisation.

• **Equitable treatment.**

The applicant has made undertakings to IANA that registrations will be performed on a first-come first-served basis that is fair and equitable.

• **Community/Governmental support.**

The ICANN Government Advisory Committee Principles observes that the Internet's naming system is "a public resource ... administered in the public or common interest." In general, ICANN's GAC recognizes that each government has the ultimate responsibility within its territory for its national public policy objectives, however in the case of a redelegation, this may be tempered by ICANN's responsibility to ensure the Internet DNS continues to provide an effective and interoperable global naming system.

The Government has been the initiator of the request, and actively supports the reassignment. The Supporting Organisation is proposed to be an arm of the government, with day-to-day operation outsourced to a competent registry operator.

Based upon investigations and research, IANA believes the applicant has met the basic criteria to support the redelegation request, and the ability of the new operators to establish a fully functioning registry should improve the ability of the local Internet community to utilise the .GD domain.

Recommendation

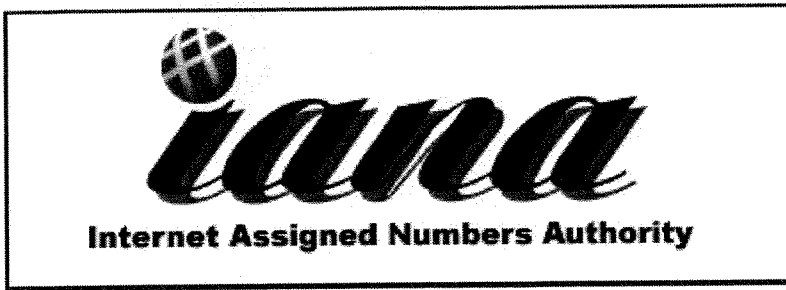
According to RFC 1591 and ICP-1, IANA needs to respect the ability for a local Internet community as well as local law and local government to make decisions about the operation of a TLD.

IANA therefore recommends that the .GD domain be redelegated to the National Telecommunications Regulatory Commission of Grenada as per their request.

Comments concerning the layout, construction and functionality of this site should be sent to webmaster@iana.org.

Page Updated 15-Aug-2006

©2006 The Internet Corporation for Assigned Names and Numbers. All rights reserved.



IANA Report on Redelegation of the .MA Top-Level Domain

The Internet Assigned Numbers Authority (IANA), as part of the administrative functions associated with management of the Domain Name System root, is responsible for receiving requests for delegation and redelegation of top-level domains, investigating the circumstances relevant to those requests, and reporting on the requests.

This report gives the findings and conclusions of the IANA on its investigation of a request for redelegation of .MA, the country-code top-level domain (ccTLD) for Morocco.

Factual and Procedural Background

Morocco is a North African country with a population of over 33 million people. It borders Algeria and Western Sahara, and has coastlines on both the Atlantic Ocean and Mediterranean Sea. The country is assigned the ISO 3166-1 alpha-2 code of "MA".

On 3 June 1992, IANA approved a request for the delegation of the .MA ccTLD. The assigned administrative and technical contact was Amine Mounier Alaoui of Ecole Mohammadia d'Ingenieurs. The Ecole Mohammadia d'Ingenieurs (EMI) is listed as the Supporting Organisation.

In 1995, the technical management of .MA was taken over by the national telephone provider, presently known as Itissalat Al Maghrib (IAM, literally Morocco Telecom). They continue this role today, whilst EMI plays no active role in the day-to-day management of .MA.

In the intervening period, IANA has conducted a number of routine changes to the nameserver data for .MA at the administrative/technical contact's request, most recently in August 2005.

In February 2005, Agence Nationale de Régementation des Télécommunications (ANRT), the national telecommunications regulator, launched an online consultation on the management of the .MA domain. The questions posed in the consultation covered the present management of .MA, the advantages of the current operator, the difficulties experienced with .MA, and both the short-term and long-term visions for .MA management.

ANRT summarised the main criticisms of the present .MA administration, as expressed in the submissions to the consultation, as: a lack of transparent rules and procedures; an absence of WHOIS service to obtain registrant details; the lack of reseller channels; the inability to appeal the registration of a domain; an absence of procedure to modify an existing registration; and a lack of neutrality having the dominant stakeholder in the telecom market operating the domain registry.

In November 2005, ANRT organised an Internet conference that received over 500 participants. These participants represented telecommunications providers, ISPs, the government, the private sector, and civil society. The discussion of .MA management was said to be a key theme for the meeting, with a number of speakers supporting action in line with the result of the online consultation.

On 12 May 2006, a redelegation request was lodged with IANA. It seeks the delegation of .MA to be transferred to ANRT. It is proposed that the Director General of ANRT be listed as both the administrative and technical contact for the domain. The present Director General of ANRT is Mohamed Benchaaboun.

IANA received a letter from the Moroccan Minister of Economic and General Affairs, Rachid Talbi El Alami, approving to the redelegation of .MA to ANRT. The letter notes "some weakness in the management of the Moroccan top level domain" and that the government "believe that [ANRT] is an appropriate entity for the redelegation of the management and administration of [.MA]".

Amine Mounir Alaoui, the current Administrative and Technical Contact, assented to the redelegation to ANRT, commenting that "ANRT recognises that the Internet naming system is a public resource in the sense that its functions must be administered in the public or common interest".

In response to the initial request and supporting documents, IANA enquired on the transition plan for moving operations from the current operator to the new operator.

IANA also requested further information on the 2005 community consultation project, to which ANRT responded by providing specific details on the consultation and the responses.

IANA's analysis of the community sentiment to the operation .MA noted that there was a weight of opinion that sought to have its operation vested in a not-for-profit organisation. IANA expressed concern to ANRT that the community outreach that the request for private sector led management did not align with the nature of the redelegation request.

In response, ANRT said that the government is being proactive to the underlying management concerns, and will ultimately transition to private sector management:

Given that the [local Internet] community has not started anything to resolve the actual management problems and improve the situation, ANRT responded positively to several requests to be the one to organise the community. [...] Once the whole .ma reform process is done [...], ANRT will invite the community of .ma users and assist it in establishing a not for profit entity that will take over the management of the .ma, in the manner of what is being done in other countries.

(Translated from the original French language document)

ANRT reiterated that it is constantly solicited by members of the local Internet community on .MA's management problems, and the organisation felt it was pressing to address the issue.

On 18 July 2006 the ICANN Board of Directors considered the request, and authorized the

President of ICANN to move forward with the delegation of the .MA top-level domain to ANRT.

Community Sentiment

As part of the redelegation process, IANA seeks to assess the community sentiment for or against the redelegation request.

Direct endorsements of the redelegation to ANRT were received from Association des Professionnels des Technologies de L'information (APEBI), and the Moroccan chapter of ISOC — Moroccan Internet Society.

The applicant provided IANA with details of the public consultation process they conducted in 2005. As noted, the analysis showed a cross-section of opinion, which predominantly was critical of the current operation, and provided views on how to proceed. IANA's analysis was that the community sentiment was aligned with the request, apart from the structure of the new supporting organisation. IANA sought clarification which resulted in an undertaking to further migrate operations toward private sector management.

IANA has received no communications in opposition to the change. Given the de facto operator of the domain is not the listed IANA contacts that are required to give consent under root zone management procedure, IANA specifically sought clarification from ANRT that IAM supported the request.

They responded that they will have an operational agreement with IAM for the interim period that will see IAM continue operating the registry until such time as ANRT has completed its policy review. At that stage, a call for tenders will be announced to identify a specialised operator that will operate the registry under the new rules.

Evaluation

This report is being provided under the contract for performance of the IANA function between the United States Government and ICANN. Under that contract, ICANN performs the IANA function, which includes receiving delegation and redelegation requests concerning ccTLDs, investigating the circumstances pertinent to those requests, and issuing a report documenting IANA's findings.

In its role as investigator of delegation requests, IANA is guided by the practices summarized in:

- "Domain Name System Structure and Delegation" (RFC 1591). This document describes the practices relating to delegations at its publication in 1994.
- "Internet Domain Name System Structure and Delegation" (ICP-1). This document represents an ICANN-written update of the portions of RFC 1591 dealing with ccTLDs and reflects subsequent evolution of the policies followed by the IANA through May, 1999.
- "The Governmental Advisory Committee Principles for Delegation and Administration of ccTLDs" (GAC Principles). This document serve as "best practices" to guide governments in assuming proper roles with respect to the Internet's naming system.

In considering the delegation of a ccTLD, IANA seeks input from both the requesting party as well as from persons and/or organizations that may be significantly affected by the change in the top-level DNS hierarchy, particularly those within the nation or territory the ccTLD designates. As noted in ICP-1, the parties affected include the relevant government or public authority: "The desires of the government of a country with regard to delegation of a ccTLD are taken very seriously. The IANA will make them a major consideration in any TLD delegation/transfer discussions."

Taking these three documents into consideration, the evaluation of a delegation request involves determining facts that relate to the applicant's capacity to meet the following criteria:

1. Operational and technical skills

- a. The prospective manager has the requisite skills to operate the TLD appropriately. (ICP-1 §a, RFC 1591 §3.5)
- b. There must be reliable, full-time IP connectivity to the nameservers and electronic mail connectivity to the operators; (ICP-1 §a; RFC 1591 §3.1)
- c. The manager must perform its duties in assigning domains and operating nameservers with technical competence (ICP-1 §d; RFC 1591 §3.5)

2. Operator in country

- a. The prospective manager supervises and operates the domain name from within the country represented by the TLD; (ICP-1 §a; RFC 1591 §3.1)
- b. The prospective administrative contact must reside in the country represented by the TLD. (ICP-1 §a; RFC 1591 §3.1)

3. Equitable treatment

- a. The prospective manager must be equitable and fair to all groups encompassed by the TLD that may request domain names (ICP-1 §c; RFC 1591 §3.3)

4. Community/Governmental support

- a. The prospective manager has the requisite authority to operate the TLD appropriately, with the desire of the government taken very seriously. (ICP-1 §a, GAC Principles)
- b. Significantly interest parties in the domain should agree that the prospective manager is the appropriate party to receive the delegation (ICP-1 §a; RFC 1591 §3.4)

Pertaining to the obligations described above, IANA believes that applicant has reasonably demonstrated a redelegation would be appropriate. In more detail, the applicant's credentials as they relate to the enumerated criteria are:

• **Operational and technical skills.**

ANRT has demonstrated a suitable interest in the policy and administrative aspects of operating .MA, and seems to have the engagement of various parties in the local Internet community. In the short term, operation will continue with the current registry operator, and ANRT will call for tenders to operate the registry function once domain policy has been revised.

• **Operator in country.**

The supporting organisation is the Moroccan telecommunications regulator, with the administrative contact as the Director General of that organisation.

- **Equitable treatment.**

The applicant has made undertakings to IANA that registrations will be performed on a first-come first-served basis that is fair and equitable.

- **Community/Governmental support.**

The ICANN Government Advisory Committee Principles observes that the Internet's naming system is "a public resource ... administered in the public or common interest." In general, ICANN's GAC recognizes that each government has the ultimate responsibility within its territory for its national public policy objectives, however in the case of a redelegation, this may be tempered by ICANN's responsibility to ensure the Internet DNS continues to provide an effective and interoperable global naming system.

The Government has been the initiator of the request, and actively supports the reassignment. The Supporting Organisation is proposed to be an arm of the government, with day-to-day operation outsourced to a competent registry operator.

Based upon investigations and research, IANA believes the applicant has predominantly met the basic criteria to support the redelegation request.

Recommendation

According to RFC 1591 and ICP-1, IANA needs to respect the ability for a local Internet community as well as local law and local government to make decisions about the operation of a TLD.

Through research, IANA has concluded this is a good faith exercise to introduce more accountability to the operation of .MA, that helps bring the management more in line with community views. The current operator does not contest the redelegation, and the community has expressed support for the change.

IANA therefore recommends that the .MA domain be redelegated to Agence Nationale de Régementation des Télécommunications of Morocco as per their request.

Comments concerning the layout, construction and functionality of this site should be sent to webmaster@iana.org.

Page Updated 15-Aug-2006

©2006 The Internet Corporation for Assigned Names and Numbers. All rights reserved.

IANA Report on Delegation of the .AX Top-Level Domain

The Internet Assigned Numbers Authority (IANA), as part of the administrative functions associated with management of the Domain Name System root, is responsible for receiving requests for delegation and redelegation of top-level domains, investigating the circumstances relevant to those requests, and reporting on the requests.

This report gives the findings and conclusions of the IANA on its investigation of a request for delegation of .AX, the country-code top-level domain (ccTLD) for Åland Islands – an autonomous province of Finland.

Factual and Procedural Background

On 3 February 2006 IANA received a request for the delegation of the .AX (Åland Islands) top-level domain. Åland Islands (pronounced “OH-land”) is an autonomous province of the country of Finland, representing a cluster of 6,500 islands located in the Baltic sea between the mainlands of Sweden and Finland. Its population of 26,200 inhabits 65 of the islands, and speak Swedish as their primary language.

As a sub-national entity of Finland, the Regional Government of Åland (*Ålands landskapsregering*) has to date maintained the domain ALAND.FI for provincial affairs since the Internet was first available in the province in approximately 1994. One of the services provided has been the operation of the domain registry supplying sub-domains of ALAND.FI. This registry service has allowed the province’s businesses, residents, and others with a legal connection to the province, to obtain these sub-domains.

In 2003, the domain name allocation policies for ALAND.FI registrations were aligned with the policies for the .FI domain. These policies are defined in the Finnish Domain Name Act of 2003.

On 13 January 2004, the ISO 3166 Maintenance Agency, which maintains the ISO 3166-1 country code list used by IANA as the definitive list of ccTLD names, issued a revision to their list that added the two letter code “AX” to represent the Åland Islands.

In reaction to this development, the Government of Finland passed a revision of the Domain Name Act, approved on 14 February 2006 that formally extended the policies that governed .FI to also cover the domain .AX.

The Regional Government of Åland and the Finnish Ministry of Transport and Communications first approached IANA in late 2005 to enquire as to the procedures for delegation of the .AX domain name. After initial consultations with IANA Staff, a formal delegation template was submitted to IANA on 3 February 2006. Supplemental

materials relating to the application were delivered throughout February and March, 2006.

The application requests the sponsoring organisation and administrative contact be the Regional Government of Åland, with technical services provided by Ålands Datakommunikation Ab.

IANA successfully completed pre-approval checks on the submitted contact and technical data at the end of March, 2006.

On 9 June 2006 the ICANN Board of Directors authorized the President of ICANN to move forward with the delegation of the .AX top-level domain to the Regional Government of Åland.

Evaluation

This report is being provided under the contract for performance of the IANA function between the United States Government and ICANN. Under that contract, ICANN performs the IANA function, which includes receiving delegation and redelegation requests concerning ccTLDs, investigating the circumstances pertinent to those requests, and issuing a report documenting IANA's findings.

In its role as investigator of delegation requests, IANA is guided by the practices summarized in:

- "Domain Name System Structure and Delegation" (RFC 1591). This document describes the practices relating to delegations at its publication in 1994. See <http://www.rfc-editor.org/rfc/rfc1591.txt>
- "Internet Domain Name System Structure and Delegation." (ICP-1). This document represents an ICANN-written update of the portions of RFC 1591 dealing with ccTLDs and reflects subsequent evolution of the policies followed by the IANA through May, 1999. See <http://www.icann.org/icp/icp1.htm>.
- The Governmental Advisory Committee Principles for Delegation and Administration of ccTLDs (GAC Principles). This document serve as "best practices" to guide governments in assuming proper roles with respect to the Internet's naming system. See <http://www.icann.org/committees/gac/gac-ccTldprinciples-23feb00.htm>.

In considering the delegation of a ccTLD, IANA seeks input from both the requesting party as well as from persons and/or organizations that may be significantly affected by the change in the top-level DNS hierarchy, particularly those within the nation or territory the ccTLD designates. As noted in ICP-1, the parties affected include the relevant government or public authority: "The desires of the government of a country

with regard to delegation of a ccTLD are taken very seriously. The IANA will make them a major consideration in any TLD delegation/transfer discussions."

Taking these three documents into consideration, the evaluation of a delegation request involves determining facts that relate to the applicant's capacity to meet the following criteria:

1. Operational and technical skills

- a. The prospective manager has the requisite skills to operate the TLD appropriately. (ICP-1 §a, RFC 1591 §3.5)
- b. There must be reliable, full-time IP connectivity to the nameservers and electronic mail connectivity to the operators; (ICP-1 §a; RFC 1591 §3.1)
- c. The manager must perform its duties in assigning domains and operating nameservers with technical competence (ICP-1 §d; RFC 1591 §3.5)

2. Operator in country

- a. The prospective manager supervises and operates the domain name from within the country represented by the TLD; (ICP-1 §a; RFC 1591 §3.1)
- b. The prospective administrative contact must reside in the country represented by the TLD. (ICP-1 §a; RFC 1591 §3.1)

3. Equitable treatment

- a. The prospective manager must be equitable and fair to all groups encompassed by the TLD that may request domain names (ICP-1 §c; RFC 1591 §3.3)

4. Community/Governmental support

- a. The prospective manager has the requisite authority to operate the TLD appropriately, with the desire of the government taken very seriously. (ICP-1 §a, GAC Principles)
- b. Significantly interested parties in the domain should agree that the prospective manager is the appropriate party to receive the delegation (ICP-1 §a; RFC 1591 §3.4)

Pertaining to these obligations described, IANA believes that the applicant has reasonably demonstrated a delegation would be appropriate. In more detail, the applicant's credentials as they relate to the enumerated criteria are:

- Operational and technical skills.

The successful operation of the existing ALAND.FI domain registry demonstrates that the applicant has experience with domain registry related issues.

IANA furthermore sought information on the capabilities and history of Ålands Datakommunikation Ab, and is satisfied it is sufficiently competent for its role.

- Operator in country.

As the operator is the provincial government, IANA is reasonably satisfied the operator is locally based.

- Equitable treatment.

The regulations for the domain are spelled out in Finnish law, and require the operator to give access to all parties that meet local presence obligations.

- Community/Governmental support.

The ICANN Government Advisory Committee Principles observes that the Internet's naming system is "a public resource ... administered in the public or common interest." In general, ICANN's GAC recognizes that each government has the ultimate responsibility within its territory for its national public policy objectives. However, in the case of a delegations and redelegations, this may be tempered by ICANN's responsibility to ensure the Internet DNS continues to provide an effective and interoperable global naming system.

The relevant governmental authority for Åland Internet affairs is the Government of Finland. The relevant government agency is the Ministry of Transport and Communications. The Director-General of the Ministry supplied a letter of endorsement to IANA in support of the application.

IANA also sought feedback from representative groups in the community, which demonstrates local support.

Based upon its investigations and research, IANA believes the applicant has demonstrated sufficient support for the delegation.

Conclusion

According to RFC 1591 and ICP-1, IANA needs to respect the ability for a local Internet community as well as local law and local government to make decisions about the operation of a TLD. Based upon our investigation, we recommend the domain .AX be introduced into the DNS root zone, and assigned to the Regional Government of Åland as per the application.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

PROOF OF SERVICE

I, Grace M. Salter, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Fiftieth Floor, Los Angeles, California 90071-2300. On October 27, 2006, I caused to be served a copy of the within document(s):

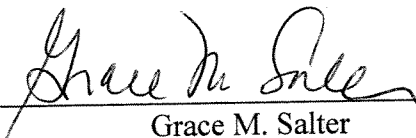
SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEMURRER TO COMPLAINT BY DEFENDANT INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS AND ERRONEOUSLY-NAMED DEFENDANT INTERNET ASSIGNED NUMBERS AUTHORITY; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF SAMANTHA S. EISNER

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth in the attached Service List.
- by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on October 27, 2006, at Los Angeles, California.



Grace M. Salter

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SERVICE LIST
C. ITOH MIDDLE EAST E.C. (Bahrain) v. INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, et al.
LOS ANGELES SUPERIOR COURT, CASE NO. SC090220

Robert A. Sacks, Esq. Via Hand Delivery
Edward E. Johnson, Esq.
Sullivan & Cromwell, LLP
1888 Century Park East
Suite 2100
Los Angeles CA 90067-1725
Phone: (310) 712-6600
Fax: (310) 712-8800

The People's Republic of the Congo Via U.S. Mail
Regie National Des Travaux Publics et de la Construction
B.P. 2073
Brazzaville
Republique Populaire du Congo

The Congolese Redemption Fund Via U.S. Mail
Regis National Des Travaux Publics et de la Construction
B.P. 2073
Brazzaville
Republique Populaire du Congo