

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-9
16 NOVEMBER 2018**

The Requestor, DotKids Foundation, seeks reconsideration of ICANN org’s response to the Requestor’s request, pursuant to the “Final Report of the Joint SO/AC New gTLD Applicant Support Working Group” (the JAS Final Report), for financial support to engage in the string contention resolution process for the .KID/.KIDS contention set.¹ Specifically, the Requestor claims that “ICANN’s premature rejection of the request stating that [ICANN org] is ‘unable to provide such financial assistance’ and that ‘additional funding past evaluations ... is currently out of scope’ goes against the community developed final report by the [JAS]....”² The Requestor also asserts that ICANN org’s decision goes “against ICANN’s core value to ascertain the global public interest.”³

I. Brief Summary.

In March 2010, the ICANN Board asked that community “stakeholders work through their [Supporting Organizations] SOs and [Advisory Committees] ACs and form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs.”⁴ In response, the Joint SO/AC New gTLD Applicant Support Working Group (JAS WG) was formed.⁵

On 13 September 2011, the JAS WG issued its Final Report “for consideration to the GNSO, ALAC, ICANN Board and ICANN community.”⁶ The JAS Final Report sets forth

¹ Reconsideration Request 18-9, § 2, at Pg. 1.

² Reconsideration Request 18-9, § 7, at Pg. 3.

³ Reconsideration Request 18-9, § 7, at Pg. 5

⁴ Resolution 2010.03.12.46 and 2010.03.12.47, available at <https://www.icann.org/resources/board-material/resolutions-2010-03-12-en>.

⁵ <http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>.

⁶ *Id.*

various recommendations regarding financial and non-financial assistance to “Support-Approved Candidates” in conjunction with the New gTLD Program.⁷

The Applicant Support Program (ASP) was subsequently developed as part of the New gTLD Program to help “ensur[e] worldwide accessibility to, and competition within,” the program by providing financial and non-financial assistance to qualifying New gTLD Applicants.⁸ The financial assistance portion of the ASP provided a limited number of qualifying applicants the opportunity to pay a reduced evaluation fee of USD \$47,000 instead of the full evaluation fee of USD \$185,000.⁹

The Requestor submitted a community-based application for .KIDS (DotKids Application), which was placed in a contention set with one other .KIDS application and an application for .KID. The Requestor applied for – and was awarded – financial assistance in the form of a reduced application fee pursuant to the ASP.¹⁰

The Requestor participated in Community Priority Evaluation (CPE) and did not prevail.¹¹ The Requestor thereafter filed two reconsideration requests (Reconsideration Request 16-6 and Reconsideration Request 17-5) relating to CPE; both were denied. An ICANN Auction to resolve the .KID/.KIDS contention set was scheduled for 10 October 2018.¹²

On 27 August 2018, the Requestor contacted ICANN org “looking to request financial support for engaging in the string contention resolution process.”¹³ On 29 August 2018, ICANN

⁷ *Id.*

⁸ Applicant Support Program Fact Sheet, <https://newgtlds.icann.org/en/applicants/candidate-support/applicant-support-fact-sheet-20feb12-en.pdf>. See also Applicant Support Program webpage, available at <https://newgtlds.icann.org/en/applicants/candidate-support>.

⁹ Applicant Support Program Update, 12 March 2013, <https://newgtlds.icann.org/en/applicants/candidate-support/sarp-results-12mar13-en.pdf>.

¹⁰ Applicant Support Program Update, 12 March 2013, <https://newgtlds.icann.org/en/applicants/candidate-support/sarp-results-12mar13-en.pdf>.

¹¹ <https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>.

¹² <https://newgtlds.icann.org/en/applicants/auctions/schedule-30jul18-en.pdf>.

¹³ Email from E. Chung to ICANN org, 27 August 2018, attached as Exh. A.

org denied the Requestor’s request, stating that “[p]roviding Applicant Support applications with additional funding past evaluations and specifically to fund a bidding deposit or accountability mechanisms is currently out of scope for this program.”¹⁴

On 21 September 2018, the Requestor submitted Reconsideration Request 18-9 (Request 18-9). The Requestor claims that ICANN org’s rejection of the Requestor’s request for additional financial support now for engaging in the contention resolution process violated the JAS Final Report and ICANN org’s core value to ascertain the global public interest.¹⁵

The BAMC has considered Request 18-9 and all relevant materials and recommends that the Board deny Request 18-9. ICANN org adhered to established policies and procedures in responding to the Requestor’s request for financial assistance for engaging in the string contention resolution process; and ICANN org did not violate its core values established in the Bylaws concerning the global public interest.

II. Facts.

A. Background Facts on the ASP.

In March 2010, as part of the New gTLD Program, the ICANN Board “request[ed] stakeholders to work through their [Supporting Organizations] SOs and [Advisory Committees] ACs, and form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs.”¹⁶ In response, the JAS WG was formed.¹⁷

On 20 June 2011, the ICANN Board resolved to implement

a program to ensure support for applicants from developing countries, with a form, structure and processes to be determined by the Board in consultation

¹⁴ Email from ICANN org to E. Chung, 29 August 2018, attached as Exh. A.

¹⁵ Request 18-9, § 7, at Pgs. 3, 5.

¹⁶ 12 March 2010 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2010-03-12-en>.

¹⁷ <http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>.

with stakeholders including: (a) consideration of the GAC recommendation for a fee waiver corresponding to 76 percent of the \$185,000 USD evaluation fee, (b) consideration of recommendations of the ALAC and GNSO as chartering organizations of the Joint Applicant Support (JAS) Working Group, (c) designation of a budget of up to \$2 million USD for seed funding, and creating opportunities for other parties to provide matching funds, and (d) the review of additional community feedback, advice from ALAC, and recommendations from the GNSO following their receipt of a Final Report from the JAS Working Group (requested in time to allow staff to develop an implementation plan for the Board's consideration at its October 2011 meeting in Dakar, Senegal), with the goal of having a sustainable applicant support system in place before the opening of the application window.¹⁸

On 13 September 2011, the JAS WG issued its Final Report “for consideration to the GNSO, ALAC, ICANN Board and ICANN community.”¹⁹ The JAS Final Report sets forth various recommendations regarding financial and non-financial support to be offered to “Support-Approved Candidates” in conjunction with the New gTLD Program.²⁰

On 28 October 2011, the ICANN Board resolved to take the JAS Final Report seriously and noted that a working group of Board members had been convened “to oversee the scoping and implementation of the recommendations arising out of [the JAS Final Report], as feasible.”²¹ The Board further resolved that “the President and CEO is expected to commence work immediately and provide a detailed plan for consideration.”²²

That work was undertaken with the oversight of the Board working group, whose work included discussions with a sub team appointed by the JAS WG.²³ The work resulted in two

¹⁸ 20 June 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-06-20-en>.

¹⁹ *Id.*

²⁰ *Id.*

²¹ 28 October 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-10-28-en#2>.

²² *Id.*

²³ ICANN Board Submission No. 2011-12-08-06, Applicant Support Program, included as part of Board Briefing Materials for 8 December 2011 Board Meeting, <https://www.icann.org/en/system/files/bm/briefing-materials-2-08dec11-en.pdf>, at Pg. 130 of 156; *see also* 8 December 2011 Board Meeting Minutes, <https://www.icann.org/resources/board-material/minutes-2011-12-08-en> (the JAS-appointed sub team “comprised of Avri Doria, Cintra Sooknana, Alan Greenberg, and Rafik Rammak”).

documents that describe a *Process* and *Criteria* for evaluating candidates for support and providing support where merited.²⁴

The ICANN Board thereafter “considered and discussed potential implementation models taking into account the current New gTLD Program development stage and timing.”²⁵

On 8 December 2011, the ICANN Board resolved to “direct[] staff to finalize the implementation plan in accordance with the proposed criteria and process for the launch of the Applicant Support Program in January 2012.”²⁶ In the Rationale accompanying the Board’s 8 December 2011 Resolution, the Board made clear its decision not to adopt all of the recommendations set forth in the JAS Final Report: “Note: This process does not follow all JAS recommendations.”²⁷

The *Process* and *Criteria* documents were posted for public comment and comments were received until 16 December 2011.²⁸ The comments received were summarized in a Report of Public Comments in early 2012.²⁹

The ASP was embodied in the *Process* and *Criteria* documents, and it limited the available financial support to a reduction in the application fee. Specifically, the *Process* document provided that “the Applicant Support Program will provide financial support in the form of a reduction of new gTLD program fees by \$138,000 for the selected applicants. Under

²⁴ ICANN Board Submission No. 2011-12-08-06, <https://www.icann.org/en/groups/board/documents/briefing-materials-2-08dec11-en.pdf>, at Pg. 130 of 156.

²⁵ *Id.* at Pg. 22 of 156.

²⁶ *Id.*

²⁷ Rationale for Resolutions 2011.12.08.01 – 2011.12.08.03, <https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1.1>.

²⁸ <https://www.icann.org/news/announcement-2011-10-13-en>.

²⁹ Report of Public Comments, <https://www.icann.org/en/system/files/files/report-comments-jas-final-report-02mar12-en.pdf>.

the regular process, applicants are required to pay \$185,000 as part of the normal application fee to be considered for receiving and managing the registry for a new gTLD.³⁰

On 12 January 2012, ICANN org launched the ASP.³¹ In the implementation of the ASP, ICANN took into account the public comments received, the timing of the launch of the New gTLD Program as well as the input from the JAS WG sub-group and the Board committee specially formed to guide the implementation details.³² The ASP consists of three elements: (1) access to community pro bono services for startup registries; (2) financial assistance to qualifying applicants; and (3) a seed fund set up by the ICANN Board to assist needy applicants.³³ Relevant here is the financial assistance portion of the program, which provided a limited number of qualifying applicants the opportunity to pay a reduced evaluation fee of USD \$47,000 instead of the full evaluation fee of USD \$185,000.³⁴

B. Background Facts on the Requestor's Application

The Requestor submitted a community-based application for .KIDS (DotKids Application), which was placed in a contention set with one other .KIDS application and an application for .KID.³⁵

The Requestor applied for financial assistance pursuant to the ASP. On 12 March 2013, ICANN org published an update on the ASP, identifying the Requestor as the only entity that

³⁰ ICANN Board Submission No. 2011-12-08-06, Applicant Support Process, included as part of Board Briefing Materials for 8 December 2011 Board Meeting, <https://www.icann.org/en/system/files/bm/briefing-materials-3-08dec11-en.pdf>, at Pg. 82 of 164. See also Report of Public Comments, <https://www.icann.org/en/system/files/files/report-comments-jas-final-report-02mar12-en.pdf>, at Pg. 3.

³¹ Applicant Support Program Fact Sheet, <https://newgtlds.icann.org/en/applicants/candidate-support/applicant-support-fact-sheet-20feb12-en.pdf>.

³² See Report of Public Comments, <https://www.icann.org/en/system/files/files/report-comments-jas-final-report-02mar12-en.pdf>, at Pg. 3.

³³ Applicant Support Program FAQ, <https://newgtlds.icann.org/en/applicants/candidate-support/faqs>.

³⁴ Applicant Support Program Update, 12 March 2013, <https://newgtlds.icann.org/en/applicants/candidate-support/sarp-results-12mar13-en.pdf>.

³⁵ The application for the .KID string was withdrawn on 5 October 2018. Accordingly, the contention set consists of the two applications for .KIDS. See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1320>; see also <https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/215>.

met the threshold criteria for financial assistance in the form of a reduced application fee of USD \$47,000.³⁶

The Requestor participated in CPE and did not prevail.³⁷

On 23 April 2016, the Requestor filed a reconsideration request, Request 16-6³⁸, challenging the CPE panel's report addressing the DotKids Application, and ICANN org's acceptance of that CPE report. The .KID/.KIDS contention set was placed on hold pending resolution of Request 16-6.

On 21 July 2016, the Board Governance Committee (BGC) denied Request 16-6.³⁹ The BGC found that the Requestor had not stated proper grounds for reconsideration.⁴⁰ The .KID/.KIDS contention set was taken off hold in July 2016 following resolution of Request 16-6.⁴¹

On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the "process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the Board's oversight of the New gTLD Program (the CPE Process Review).⁴² The BGC determined that the pending Reconsideration

³⁶ Applicant Support Program Update, 12 March 2013, <https://newgtlds.icann.org/en/applicants/candidate-support/sarp-results-12mar13-en.pdf>.

³⁷ <https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>.

³⁸ See Reconsideration Request 16-6, <https://www.icann.org/resources/pages/reconsideration-16-6-dotkids-request-2016-05-06-en>.

³⁹ See BGC Determination on Reconsideration Request 16-6, <https://www.icann.org/en/system/files/files/reconsideration-16-6-dotkids-bgc-21jul16-en.pdf>. Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en>.

⁴⁰ See *id.* at Pg. 19.

⁴¹ See Reconsideration Request 17-5, § 4, at Pg. 2, <https://www.icann.org/resources/pages/reconsideration-17-5-dotkids-request-2017-12-06-en>.

⁴² <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>

Requests regarding the CPE process would be placed on hold until the CPE Process Review was completed.⁴³ As the Requestor did not have a pending Reconsideration Request at the time, the DotKids Application was not placed on hold pending completion of the CPE Process Review.

On 2 October 2017, ICANN org invited the Requestor to an ICANN Auction for the .KID/.KIDS contention set.⁴⁴

On 6 December 2017, two days before the deadline to submit certain requested information for the ICANN Auction, the Requestor filed a reconsideration request, Request 17-5,⁴⁵ challenging ICANN org's decision to take the DotKids Application off hold before the CPE Process Review was completed.⁴⁶ The filing of Request 17-5 impacted the status of the .KID/.KIDS contention set, which was placed on hold pending resolution of Request 17-5, and which resulted in the postponement of the ICANN Auction of the .KID/.KIDS contention set.⁴⁷

On 13 December 2017, ICANN org published three reports on the CPE Process Review.⁴⁸ On 15 March 2018, the Board acknowledged and accepted the findings set forth in the reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move

⁴³ <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, *see* <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP) (withdrawn on 15 February 2018, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf>), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

⁴⁴ Attachment 1 to BAMC Recommendation on Reconsideration Request 17-5, at Pg. 3.

⁴⁵ *See* Reconsideration Request 17-5, <https://www.icann.org/resources/pages/reconsideration-17-5-dotkids-request-2017-12-06-en>.

⁴⁶ *Id.*

⁴⁷ Update on Application Status and Contention Sets, *available at* <https://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.

⁴⁸ *See* https://www.icann.org/news/announcement-2017-12-13-en?_prclt=HzlEs9ss.

forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.⁴⁹

On 13 May 2018, the ICANN Board denied Request 17-5 on the basis that the Requestor had received the relief requested and therefore Request 17-5 was moot.⁵⁰ The .KID/.KIDS contention set was taken off hold following resolution of Request 17-5 and an ICANN Auction to resolve the .KID/.KIDS contention set was scheduled for 10 October 2018.⁵¹

On 27 August 2018, the Requestor contacted ICANN org “looking to request financial support for engaging in the string contention resolution process⁵².... and for engaging in an appeal of the new gTLD program process through an appropriate ICANN accountability mechanism.”⁵³ On 29 August 2018, ICANN org responded, stating in relevant part that “[w]e are unable to provide such financial assistance. As you are aware, the Applicant Support Program was implemented and subsequently incorporated into the Applicant Guidebook. The program provided financial assistance that came in the form of a reduced evaluation fee of US\$47,000k in lieu of the full evaluation fee of US\$185,000. Providing Applicant Support applications with additional funding past evaluations and specifically to fund a bidding deposit or accountability mechanisms is currently out of scope for this program.”⁵⁴

On 21 September 2018, the Requestor filed Request 18-9. The Requestor claims that ICANN org contravened the JAS Final Report when it rejected the Requestor’s request for financial assistance for engaging in the string contention resolution process.⁵⁵ The Requestor

⁴⁹ <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

⁵⁰ See Approved Board Resolutions, Regular Meeting of the ICANN Board, 13 May 2018, <https://www.icann.org/resources/board-material/resolutions-2018-05-13-en#2.c>.

⁵¹ <https://newgtlds.icann.org/en/applicants/auctions/schedule-30jul18-en.pdf>.

⁵² Email from E. Chung to ICANN org, 27 August 2018, Case No. 00901527, attached as Exh. A.

⁵³ Email from E. Chung to ICANN org, 27 August 2018, Case No. 00901476, attached as Exh. B.

⁵⁴ Email from ICANN org to E. Chung, 29 August 2018, attached as Exh. A.

⁵⁵ Reconsideration Request 18-9, § 7, at Pg. 3. As noted above, in its correspondence to ICANN org, the Requestor sought financial support both “for engaging in the string contention resolution process and for engaging in an

also claims that this decision is contrary to ICANN org’s core value to ascertain the global public interest.⁵⁶

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-9 to the Ombudsman for consideration, and the Ombudsman recused himself.⁵⁷

The BAMC has considered Request 18-9 and all relevant materials and recommends that the Board deny Request 18-9 because ICANN org adhered to established policies and procedures in responding to the Requestor’s request for financial assistance for engaging in the string contention resolution process; and ICANN org did not violate its core values established in the Bylaws concerning the global public interest.

C. Relief Requested.

The Requestor asks the BAMC to “[t]o proceed to take the remainder of the JAS Final Report recommendations seriously, and to oversee the scoping and implementation of the remaining recommendations ... arising out of that Report, as feasible.”⁵⁸ The Requestor further asks that the BAMC “place the DotKids Foundation application on hold ... until such implementation process for financial assistance is complete and a [Support-Approved Candidate] can request and apply for them appropriately.”

III. Issues Presented.

The issues are as follows:

1. Whether ICANN org complied with established policies when responding to the

appeal of the new gTLD program process through an appropriate ICANN accountability mechanism.” *See* Exhs. A & B. In Request 18-9, the Requestor challenges only ICANN org’s rejection of the request as it relates to the string contention resolution process. *See generally* Reconsideration Request 18-9.

⁵⁶ Reconsideration Request 18-9, § 7, at Pg. 5.

⁵⁷ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Reconsideration Request 18-9, Pg. 1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-9-dotkids-ombudsman-action-04oct18-en.pdf>.

⁵⁸ Reconsideration Request 18-9, § 8, at Pg. 5.

Requestor's request for financial support for engaging in the string contention resolution process for the .KID/.KIDS contention set under the ASP; and

2. Whether ICANN org complied with its Core Values established in the Bylaws concerning ICANN org's commitment to ascertain the global public interest.⁵⁹

IV. The Relevant Standards for Reconsideration Requests.

Article 4, Section 4.2(a) and (c) of ICANN's Bylaws provide in relevant part that any entity may submit a request "for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board's or Staff's consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board's or staff's reliance on false or inaccurate relevant information."⁶⁰

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Reconsideration Request is sufficiently stated, the Reconsideration Request is sent to the Ombudsman for review and consideration.⁶¹ Where the Ombudsman has recused himself from the consideration of a Reconsideration Request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.⁶² Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC

⁵⁹ See generally, Reconsideration Request 18-9.

⁶⁰ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(a), (c).

⁶¹ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(k), (l).

⁶² ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁶³

On 1 October 2018, the BAMC determined that Request 18-9 is sufficiently stated and sent Request 18-9 to the Ombudsman for review and consideration.⁶⁴ The Ombudsman thereafter recused himself from this matter.⁶⁵ Accordingly, the BAMC has reviewed Request 18-9 and all relevant materials, and issues this Recommendation.

V. Analysis and Rationale.

A. ICANN Org Adhered to Established Policies and Procedures in Responding to the Requestor’s Request for Financial Assistance.

The Requestor claims that ICANN org’s “premature rejection of the request stating that [ICANN org] is ‘unable to provide such financial assistance’ and that ‘additional funding past evaluations ... is currently out of scope’ goes against the community developed final report by the [JAS]....”⁶⁶ Specifically, the Requestor claims that ICANN org was under “time pressure” when it considered the JAS Final Report, which caused the ICANN Board to only approve the JAS WG’s recommendation for a reduction in the application fee for qualified applicants and, correspondingly, the ICANN Board did “not consider[.]” other parts of the recommendations at that time.⁶⁷ The Requestor does not provide any evidence to support its claim that the ICANN Board did not consider the entire JAS Final Report in 2011, but nonetheless asserts that ICANN should “properly address the remainder of the JAS Final Report” before responding to the

⁶³ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(e)(vi), (q), (r).

⁶⁴ Ombudsman Action Regarding Reconsideration Request 18-9, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-9-dotkids-ombudsman-action-04oct18-en.pdf>.

⁶⁵ *Id.* at Pg. 1.

⁶⁶ Reconsideration Request 18-9, § 7, at Pg. 3.

⁶⁷ Reconsideration Request 18-9, § 7 at Pg. 4.

Requestor's request for financial support for engaging in the string contention resolution process.⁶⁸ The Requestor's claims do not support reconsideration.

Contrary to the Requestor's assertion, ICANN org *did* thoughtfully and fully consider all of the recommendations set forth in the JAS Final Report. The JAS issued its Final Report on 13 September 2011.⁶⁹ On 28 October 2011, the ICANN Board resolved to "seriously" consider the Final Report and convened a working group of Board members "to oversee the scoping and implementation of the recommendations arising out of [the JAS Final Report], as feasible."⁷⁰ The Board working group thereafter worked with a subgroup of community members appointed by the JAS WG to develop the *Process* and *Criteria* documents that set forth the scope and requirements of the ASP, which the Board then approved in December 2011.⁷¹

The fact that the ICANN Board did not adopt all of the JAS Final Report's recommendations when it approved the implementation plan in accordance with the *Process* and *Criteria* documents does not support the Requestor's view that ICANN org did not consider (and reject) the recommendations which were not implemented. As an initial matter, no policy or procedure required ICANN to adopt the recommendations set forth in the JAS Final Report in full. To the contrary, as noted in the JAS Final Report, the recommendations were only "submitted *for consideration* to the GNSO, ALAC, ICANN Board and ICANN community."⁷² It remained within the ICANN Board's discretion to determine which recommendations to implement, if any, and the ICANN Board resolved to do so only "as feasible."⁷³

⁶⁸ Reconsideration Request 18-9, § 7 at Pg. 4.

⁶⁹ *Id.*

⁷⁰ 28 October 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-10-28-en#2>.

⁷¹ 8 December 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1>.

⁷² JAS Final Report at I (emphasis added), <http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>.

⁷³ 28 October 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-10-28-en#2>.

The Requestor’s position also is contradicted by the plain language of the Board’s rationale supporting its resolution to “direct[] staff to finalize the implementation plan in accordance with the proposed *criteria* and *process*” documents.⁷⁴ Specifically, the Board made clear that it had determined *not* to adopt all of the recommendations set forth in the JAS Final Report, which clearly shows that the Board considered – and rejected – all recommendations not set forth in the implementation documents: “Note: This process does not follow all JAS recommendations.”⁷⁵ Instead, the Board, in its discretion, found it feasible and resolved to approve financial assistance in the form of a “fee reduction to \$47,000” for qualifying Applicant Support candidates.⁷⁶

In short, the only JAS recommendations the Board approved are those set forth in the *Process* and *Criteria* documents, which in turn defined the scope and requirements of the ASP. All other JAS WG recommendations were considered and not adopted. Because the ASP, as implemented, does not provide for financial assistance for the contention resolution process, ICANN org did not contravene any established policy or procedure when it denied the Requestor’s request for such support.

Nor does the Requestor identify any policy or procedure (because there is none) obligating ICANN to go back and reconsider, as part of the current New gTLD Program round, the JAS WG’s recommendations that were previously not adopted. To the contrary, the

⁷⁴ ICANN Board Submission No. 2011-12-08-06, Applicant Support Program, included as part of Board Briefing Materials for 8 December 2011 Board Meeting, <https://www.icann.org/en/system/files/bm/briefing-materials-2-08dec11-en.pdf>, at Pg. 22 of 156.

⁷⁵ 8 December 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1>.

⁷⁶ 8 December 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1>.

requirements of the ASP as set forth in the *Process* and *Criteria* documents were intended to be “very clear requirements that are the *final requirements* of the program for applicant support.”⁷⁷

Moreover, even if the ICANN Board previously neglected to consider all of the recommendations set forth in the JAS Final Report (which it did not), reconsideration still would be not warranted. The BAMC has reviewed the JAS Final Report and associated relevant materials, including comments made in response to the Request for Public Comment, and has confirmed that financial assistance in the form requested by the Requestor was never recommended by the JAS WG or otherwise. Thus, even if ICANN org were to “address the remainder of the JAS Final Report,” as the Requestor asks,⁷⁸ ICANN org would not find any recommendation in the JAS Final Report that financial support be made available for engaging in the contention resolution process.

The BAMC is not persuaded otherwise by the Requestor’s citation to three recommendations in the JAS Final Report.⁷⁹ Specifically, the Requestor relies on the JAS Final Report recommendations: (i) “to provide further funding opportunities for Support-Approved Candidates in the later stages of the process;” (ii) that “fees for Support-Approved Candidates be staggered;” and (iii) that “[f]urther adjustments to financial requirements might include, for example, a reduction in basic registry-service-related expenses through modifications to certain guidelines such as the continuity instrument or other adjustments.”⁸⁰ As the text of the JAS Final Report make clear, none of the recommendations quoted by the Requestor suggest a specific intent to make financial support available to assist in the contention resolution process.⁸¹

⁷⁷ 28 October 2011 Board Minutes (emphasis added), <https://www.icann.org/resources/board-material/minutes-2011-10-28-en#2>.

⁷⁸ Reconsideration Request 18-9, § 7 at Pg. 4.

⁷⁹ Reconsideration Request 18-9, § 7 at Pg. 4.

⁸⁰ Reconsideration Request 18-9, § 7 at Pgs. 4-5.

⁸¹ In addition, contrary to the Requestor’s assertion, ICANN org *did* implement that JAS Final Report’s recommendation that certain fees be staggered for qualifying Support-Approved Candidates. The *Process* document

The Requestor does not demonstrate otherwise, but instead merely quotes the three aforementioned recommendations from the JAS Final Report and then offers (by way of parenthetical) its own speculation that financial support for the contention resolution process could be one “example” of what the JAS WG intended.⁸² The Requestor’s view is not supported by any facts, and that view is inconsistent with the language in the JAS Final Report. Specifically, in the JAS Final Report, the JAS WG proposed a framework that required the Support-Approved Candidate to pay the full costs associated with string contention resolution: “If there is a string contention then the Application will go through normal ICANN channels *with the Applicant funding this additional step of the [Applicant Guidebook] AG.*”⁸³ Accordingly, reconsideration is not warranted.

Ultimately, no policy or procedure requires ICANN org to provide financial support for the Requestor to engage in the string contention resolution process for the .KID/.KIDS contention set. Accordingly, the BAMC recommends that Request 18-9 be denied.

B. ICANN Org Adhered to Its Core Values in Responding to the Requestor’s Request for Financial Assistance.

The Requestor makes a single passing reference to “ICANN’s core value to ascertain the global public interest,”⁸⁴ and claims that ICANN org has contravened this core value by denying the Requestor’s request for financial support to engage in the contention resolution process.⁸⁵

provides that “ICANN will seek to make additional aid to qualifying needy applicants such as translation services and staggered fees.” See <https://www.icann.org/en/system/files/bm/briefing-materials-3-08dec11-en.pdf> at Pg. 82 of 164.

⁸² Reconsideration Request 18-9, § 7 at Pgs. 4-5.

⁸³ JAS Final Report at 28, <http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>; see also JAS Second Milestone Report at 15, <https://archive.icann.org/en/topics/new-gtlds/jas-second-milestone-report-09may11-en.pdf>.

⁸⁴ Reconsideration Request 18-9, § 7 at Pg. 5.

⁸⁵ Reconsideration Request 18-9, § 7 at Pg. 5.

The Requestor's claims do not support reconsideration.

The cited Core Value provides, in full, the following:

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.⁸⁶

ICANN org's implementation of the ASP is the embodiment of this Core Value, not, as the Requestor claims, a contravention of it. To start, the Core Value to "seek[] and support broad, informed participation" via the multistakeholder model is illustrated in the ICANN Board's request, in March 2010, that stakeholders "work through their [Supporting Organizations] SOs and [Advisory Committees] ACs, and form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs."⁸⁷ The JAS Final Report, which the ICANN Board fully considered, was developed in response to ICANN's commitment to the multistakeholder model, and exemplifies ICANN's commitment to "ascertain the global public interest" as it concerns the New gTLD Program. Indeed, in resolving to consider the JAS Final Report, the Board noted that it "takes seriously the assertions of the ICANN community that applicant support will encourage diverse participation in the New gTLD Program and promote ICANN's goal of broadening the scope of the multi-stakeholder model."⁸⁸

Here, the Requestor appears to urge ICANN org to circumvent the established policy set forth in the requirements governing the ASP in a manner favorable to the Requestor, which undermines, rather than bolsters, the global public interest. ICANN org is committed to

⁸⁶ ICANN Bylaws, 18 June 2018, Art. 1, § 1.2(b)(ii).

⁸⁷ 12 March 2010 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2010-03-12-en>.

⁸⁸ <https://www.icann.org/resources/board-material/minutes-2011-10-28-en#2>.

diversity, operational stability, and non-discrimination, but it is not responsible for guaranteeing a gTLD for any specific applicant. Rather, ICANN org is committed to creating a process for evaluating and providing applicant support, and it applied that here. The Requestor's opinion does not demonstrate violation of that process, and does not support reconsideration.

VI. Recommendation.

The BAMC has considered the merits of Request 18-9, and, based on the foregoing, concludes that ICANN org did not violate ICANN's commitments, Core Values or established ICANN policy(ies) in its response to the Requestor's request for financial assistance for engaging in the string contention resolution process for the .KID/.KIDS contention set. Accordingly, the BAMC recommends that the Board deny Request 18-9.

Exhibit A

Sent via case: 00901475, 00901476, 00901527, 00901528 (sent in 4 times with exact same message)

From: Edmon Chung

Date: 27 August 2018

Subject: Request for Financial Support for later stages in the new gTLD process as a Support-Approved Candidate (string contention)

Dear ICANN,

As a Support-Approved Candidate (SAC), DotKids Foundation is looking to request financial support for engaging in the string contention resolution process.

Based on the Joint Applicant Support Working Group Final Report (<http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>), and the subsequent Board Resolutions on the matter, we understand that financial support for later stages in the new gTLD process is to be developed and provided.

We have not found further implementation details on the Applicant Support website (<https://newgtlds.icann.org/en/applicants/candidate-support>) at this moment. We would like to inquire how the implementation will be completed and how we could apply for such support.

Sincerely,
Edmon Chung

ICANN Response via case: 00901527

Date: 29 August 2018

Dear Edmon Chung,

Thank you for submitting the auction documentation through case 00899096 (Intent to Auction Notification for 1-1309-46695). We will review the submitted documents and revert back with any additional questions regarding the auction forms. Please note, we have received your requests for additional financial assistance through cases 00901527 and 00901528 regarding the string contention resolution process as well as the appeal of the New gTLD program process through an ICANN accountability mechanism.

We are unable to provide such financial assistance. As you are aware, the Applicant Support Program was implemented and subsequently incorporated into the Applicant Guidebook. The program provided financial assistance that came in the form of a reduced evaluation fee of US\$47,000k in lieu of the full evaluation fee of US\$185,000. Providing Applicant Support applications with additional funding past evaluations and specifically to fund a bidding deposit or accountability mechanisms is currently out of scope for this program.

Please keep in mind, per Section 4.1.3 of the Applicant Guidebook and as mentioned in previous communication, contention set members are encouraged to self-resolve the contention set amongst themselves.

Regards,
Justin Ho
New gTLD Operations Team

Exhibit B

Sent via case: 00901476

From: Edmon Chung

Date: 27 August 2018

Subject: Request for Financial Support for later stages in the new gTLD process as a Support-Approved Candidate (accountability mechanism)

Dear ICANN,

As a Support-Approved Candidate (SAC), DotKids Foundation is looking to request financial support for engaging in an appeal of the new gTLD program process through an appropriate ICANN accountability mechanism.

Based on the Joint Applicant Support Working Group Final Report (<http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>), and the subsequent Board Resolutions on the matter, we understand that financial and non-financial support for later stages in the new gTLD process is to be developed and provided.

We have not found further implementation details on the Applicant Support website (<https://newgtlds.icann.org/en/applicants/candidate-support>) at this moment. We would like to inquire how the implementation will be completed and how we could apply for such support.

Sincerely,
Edmon Chung

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We are unable to provide such financial assistance. As you are aware, the Applicant Support Program was implemented and subsequently incorporated into the Applicant Guidebook. The program provided financial assistance that came in the form of a reduced evaluation fee of US\$47,000k in lieu of the full evaluation fee of US\$185,000. Providing Applicant Support applications with additional funding past evaluations and specifically to fund a bidding deposit or accountability mechanisms is currently out of scope for this program.

Please keep in mind, per Section 4.1.3 of the Applicant Guidebook and as mentioned in previous communication, contention set members are encouraged to self-resolve the contention set amongst themselves.

Regards,
Justin Ho
New gTLD Operations Team