Response to the Recommendation of The Board Accountability Mechanisms Committee (BAMC) Reconsideration Request 18-9

We would like to start by emphasizing that the request is focused on asking the ICANN Board to reconsider parts of the Joint Applicant Support (JAS) Final Report which the ICANN Board has not yet considered previously, which in turn impacts the integrity of the new gTLD program itself and viability for needy applicants (i.e. Support-Approved Candidates), and therefore the global public interest as put forth in the intent of the new gTLD program.

More specifically:
1. The argument put forth by the Recommendation of the BAMC is simply wrong. That there was not discussion about how further support can be given to Support Approved Candidates does not therefore conclude that such support is precluded, in fact, the report specifically tasks ICANN to further study the matter and put in place such support.
2. The Reconsideration Request is not directly asking for funding support for the last-resort auction (although that may be a form), other forms of further support, if put in place can help directly the cause and make a significant difference. For example, while the further support may not be used for the Auction fees, if further support can be applied to reduced future ICANN fees or adjusted payment times, then such reduction can allow a Support Approved Candidate to raise some financing for it to enter into the auction process and have a stronger means (the Applicant Support) to support future payback of that financing.
3. Without some further support (e.g. in terms of fee reduction, adjustment, staggering or otherwise), the Applicant Support program simply does not make sense, because in order to satisfy the requirement, the applicant must show that it has no other sources of financing available, yet when a Support Approved Candidate is locked in a contention set, it does not have any further support from ICANN to allow it to leverage for further financing (even if such support is not directly against auction fees), then the Applicant Support program is at best a dysfunctional and cosmetic support for needy applicants in the new gTLD program.

This is the background of the Reconsideration Request. Of course it is a matter that affects DotKids Foundation's community application, but it is as a Support Approved Candidate (in general) that the reconsideration is sought.

Again, the reconsideration part is simply for the ICANN Board to initiate the process to consider the remaining parts of the JAS Final Report. If the result of such deliberations are that no further actions are to be taken, that should be provided clearly with the rationale for rejecting further financial support to Support Approved Candidates even when the pool of resources available allows for such allocation.

Without which, the Applicant Support Program is only superficial because it requires that a successful Applicant be sufficient needy and to show that it has already tried different avenues and unable to raise further financing, yet when there is contention, the program cannot even help the Support Approved Candidate to raise further financing to engage in that process. The Reconsideration Request is neither asking for such support directly, nor asking for financial support for engaging in the contention resolution process, the Reconsideration Request only asks that ICANN Board complete the consideration of further financing support for Support Approved Candidates as it sees fit and feasible, and hold the applications for those Support Approved Candidates such that once such further financing support are available, whatever they may be, it could then have an

impact to the Support Approved Candidate's ability to engage further in the process leveraging that support (even if it is indirect).

In particular response to the Recommendation of the BAMC:

"for the .KID/.KIDS contention set."
"a contention set with one other .KIDS application and an application for .KID"

The above information is no longer correct as one of the application has since withdrawn its application.

"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."

The statement does not draw any conclusions because neither does it support the view that ICANN Board has actually considered all of the recommendations. It is at best left open the question of whether they should be further considered. This Reconsideration Request is about asking that particular question.

"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.""

That is correct, the specific question raised by this Reconsideration Request is to ask if the ICANN board did determine that further support as considered by the JAS Final Report is not feasible.

"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.""

The argument put forth by the BAMC is flawed. That the Board resolution states that the particular process under consideration (i.e. the approved Applicant Support Program for the new gTLD application process) does not therefore mean that all JAS recommendations are forever not going to be further considered. Again, it at best leaves the question open. Therefore, it is not unreasonable to seek a clarification of whether the Board do intend to proceed with such considerations or not. At the heart of this Reconsideration Request is that question.

"very clear requirements that are the final requirements of the program for applicant support."

The BAMC appears to have conflated the issue. This pertains the requirements of becoming a Support Approved Applicant, and yes the final requirements have been established and has been applied. This Reconsideration Request is about how further support are to be provided and has an impact immediately to a Support Approved Applicant that has fulfilled the final requirements of the program for applicant support.

"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."

This is a false statement. The Reconsideration Request did not request any particular form of financial assistance. The Reconsideration Request specifically requested ICANN Board to reconsider its position on whether further support as included in the JAS Final Report should be further considered, studied and implemented and if not, why not (and why it is in the global public interest to do so). It may as well end up concluding that no further consideration is necessary, but all the current evidence (as put forward by the BAMC also) at best indicates that the issue is open. However, the BAMC seem to have pre-empted such discussion at all.

"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."

This is a wrong conclusion. Even if direct support for the contention resolution process is not available, the adjustment of other fees can have significant impact on the Support Approved Candidate's ability to raise funds for the contention resolution process. That is precisely why the Reconsideration Request asks that ICANN board reconsider its position so that the full JAS Final Report can be considered and if such fee adjustments are to be made, it will provide benefit that will materially affect a Support Approved Candidate's ability to leverage that to raise further funds for the contention resolution process. Therefore, to conclude that just because direct contribution might not be included even if such discussions were held is simply pre-empting the discussion itself, and pre-empting how other fee adjustments could in fact help the Support Approved Candidate at this critical juncture of the new gTLD program.

"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. The Requestor's view is not supported by any facts, and that view is inconsistent with the language in the JAS Final Report."

The conclusion is flawed. Just because the JAS Final Report did not contain specific mentioning of financial support for the contention resolution process does not mean that other financial support cannot impact the Support Approved Candidate's ability to raise and leverage further funding which could in turn support the contention resolution process. Concluding that any other further financial support will not help is simply wrong. As a Support Approved Candidate, the DotKids Foundation understands clearly that every bit counts. If a plan for further financial support is laid out based on the current resources and the JAS Final Report, there is material

difference and possibility that it may be able to much better meaningfully leverage that additional support which it knows it will be eligible later to leverage financing to engage in the contention resolution process.

That is why this Reconsideration Request is critical to the integrity of the Applicant Support Program and the new gTLD program as a whole in its stated goal to support needy applicants.