29 September 2019

Dear Erika and Ching,

Thank you for your emails of 30 July 2019 and 5 August 2019 requesting ICANN Board input on areas of work of the Cross-Community Working Group on New gTLD Auction Proceeds (CCWG-AP).

We are appreciative of the work of the CCWG on this important topic and welcome the opportunity to provide input and do so in the spirit of collaboration with the CCWG in producing its final report. As we approach this important milestone, the ICANN Board would like to reiterate the principles it provided to the CCWG-AP in May 30 2019. In reviewing the final submission to the ICANN Board, the Board will examine the proposals against these defined principles, including:

**Overarching Fiduciary Obligations and Responsibility for Funds**
- The ICANN Board remains responsible for all auction proceeds being appropriately disbursed, even if a third party runs part or all of the process of receiving, evaluating, or disbursing the auction proceeds.

**Board Due Diligence**
- The Board is responsible for acting as trustees of the organization's assets and exercising due diligence to oversee that whatever organization(s) is disbursing assets is well-managed and that its financial situation remains sound. Accordingly:
  - Proceeds should be allocated in tranches over a period of years to ensure the Board can continue to meet its fiduciary obligations;
  - The Board has not yet come to a position on whether larger amounts would require Board sign off.

**ICANN's Mission**
- The Board is responsible for making sure that ICANN's mission is observed at all points throughout the process, and any disbursement mechanism must have processes and procedures to ensure that auction proceeds are used in a manner that contributes directly to ICANN's mission.

**Effective and Efficient Process of Selection and Proposed Mechanism**
- The CCWG-AP should strive to keep costs associated with establishing or selecting a disbursement mechanism as low as possible. The disbursement mechanism selected should be simple, effective and efficient, with appropriate skills, expertise, and scale to minimize overhead, minimize risks, and maximize the impact of auction proceeds.

**Preservation of Resources and Use of Existing Expertise**
- The CCWG-AP should work to identify models and processes that uphold the preservation of existing resources, either external or internal, and should draw on existing expertise to the extent available.

**Global and Diversity Values**
- The mechanism selected should be able to evaluate proposals and make, administer, and monitor awards on a global basis in light of ICANN's global role and diversity values.
- As part of ICANN org's implementation, we expect the mechanism should be supported by a communications plan geared to broad dissemination of information on the existence of and parameters of the program.

**Evidenced-Based Processes and Procedures for Evaluation**
- The disbursement mechanism should have processes and procedures in place to evaluate and quantify the impact of awards using fit-to-purpose or evidence-based evaluation methodology.

**Accountability**
- The actors that run the mechanism, whether internal or external, should be accountable, and the proceeds should be disbursed to awardees consistent with a written timeline that establishes clear milestones/deliverables for release of project funding and establishes accountability for use/misuse of resources by grant recipients. This includes the ability to course correct or stop funding where issues arise.

**ICANN Monitoring and Evaluation**
- If part or all of the mechanism is external, ICANN should have an established process for monitoring and evaluating the functioning of the funding mechanism and measuring the effectiveness of funded projects.

**Transparency**
- Ensuring adequate/appropriate transparency to the ICANN community and the public on the process, decisions, and status of usage of the proceeds.

In response to the CCWG-AP's specific areas for input, the Board offers the following input:

Basketing of goals

The CCWG requested the Board's input on "whether it would be beneficial to recommend that auction proceeds are divided into segments and distributed to grant recipients in a series of "baskets," each "with a different programmatic focus" and if the Board sees any risks or has suggestions related to this approach.

The Board believes that the concept of "basketing" should be deferred. While "basketing" could be worthwhile as a tool to achieve specific goals and objectives that appear to be

underrepresented within the program, this should be considered in a review of the program, rather than as a limiting factor upon the first launch of applications. Seeing the initial range of applications and interest that comes in without the limitations of basketing will help identify and refine communications and outreach needs for future tranches. The Board also reiterates its recommendation, contained in its submission to the Draft Report Public Comment Period, that the CCWG continue to refine the Goal and Objectives in relation to ICANN's Mission.

Updates on Annex C and Annex D

The CCWG noted changes to Annex C (Guidance for Proposal Review and Selection) and Annex D (Examples of Projects) that have been made with input from ICANN Org in response to the Board's concerns outlined in its submission to the Draft Report Public Comment Period in October 2018 and asked if the Board is supportive of these specific changes and for any additional concerns.

The Board is supportive of the specific changes to Annex C and Annex D that were made in collaboration with ICANN org; however, as the CCWG is still in the process of updating its final report and this is an evolving process, the Board will rereview the full updated text of Annex C and Annex D once finalized.

In addition, the Board recommends the addition of the following bold language to the following line in Annex C:

"*Projects supportive of ICANN's communities' activities are encouraged**, in so far as these activities are different than those funded currently or in the past by ICANN Operational Budget.*"

The Board previously expressed its view that auction proceeds should not be used to fund and supplement ICANN's operations, including existing or terminated programs. Closely related, the Board feels that auction proceeds should not be used for any applicant's ordinary operations and that a project, that is within ICANN's mission, funded by auction proceeds that is intended to continue to operate into the future should be able to demonstrate that the program will be self-sustaining in the out years. So, for example, if an organization applies for funding to create a new program, the applicant should demonstrate that it will not be dependent future receipt of additional auction proceeds in order to maintain continued operations of the program.

Role of ICANN community

The Board understands that the CCWG continues to refine its thinking on the role of the ICANN community in the overall process moving forward. The Board believes that the community has an important role to play in this program. The CCWG's initial email request for input identified three different panels: an Independent Evaluation Panel; an Advisory Board; and a Program Evaluation Panel. We understand that these concepts are evolving and offer the following observations in response to the request for input:

First, we encourage the CCWG to begin by identifying areas where it sees a role for the community other than in reviews. For example, we believe that the community could contribute to the development of application materials and training materials for the independent panel that will review and act on specific applications.

Second, the Board wants to emphasize the importance of ensuring that the Evaluation Panel tasked with the review of applications must be completely independent. The Board has stressed since the outset of this work that the eventual mechanism must be free from not only actual conflicts of interest but also potential or even perceived conflicts of interests.

In line with the Board principles outlined above and with previous Board correspondence including the Board's 5 October 2018 letter and input to the draft report, this means two things:

- First, no member of the Evaluation Panel may have even the appearance of a conflict of interest with respect to any and all applications. It is imperative the Independent Evaluation Panel consists of individuals with grant-making expertise able to demonstrate independence over time. The Board does not believe that reliance on a recusal system is workable or appropriate, as this would undermine the panel's ability to provide a consistent view across all applications. Rather, each panelist should, to the maximum extent possible, be free of any potential conflict, however remote. In line with best practices for grant-making, recusal can be available, but the program should be designed, and panelists chosen, to eliminate the need to use this tool except in extraordinary and unforeseen situations.
- Second, the Evaluation Panel should also be independent of ICANN itself and its constituent parts, including the Board, ICANN org, and the Supporting Organizations and Advisory Committees that make up the ICANN community. As we have emphasized during CCWG meetings, in Board correspondence, and in subsequent CCWG documentation, neither the Board nor ICANN org will participate in the evaluation of individual applications, nor should any SO or AC be represented - directly or indirectly - on the Evaluation Panel itself. As indicated above; however, we do see an important role for the community outside of the actual evaluation and selection process.

For reference, we include previous communications on this item and note that this is included the Board's submission to the initial draft report:

30 May 2018:
"*We also suggest that the CCWG-AP might wish to consider the importance of independence in evaluations, such as through the use of an independent panel.*"

5 October 2018:
"*Regarding the evaluation of the applications, the Board notes that an independent panel is an important aspect that should be considered in the CCWG's recommendations. This panel should be independent and should have appropriate conflict of interest protections built in, in support of the fiduciary duties of ICANN's directors and officers. The independent panel would*

*assess applications and decide which applications will be successful in securing funding for that year's tranche. The independent character of the panel would need to be defined and proper controls will need to be put in place to guide the work of the panel (see below for some considerations). The panel's recommendations would be provided to the ICANN Board for approval of the slate of successful applicants for that year, and the approved slate would then be provided to the persons/entity responsible for distribution. As previously communicated, the Board will not be taking decisions on individual applications but will instead focus its consideration of the slate on whether the rules of the process were followed by the independent panel. The principles supporting the independent panel should also include consistency over time (i.e., the composition of the panel should always include some panelists of the previous year to build on their experience); and cost-effectiveness (i.e., to focus on the use of auction proceeds to support desired activities and goals, as opposed to administrative costs).*"

In relation to the two newly proposed panels - the Auction Proceeds Program Review Panel (APPRP) and Auction Proceeds Program Assessment Panel (APPAP), while the Board does not have the final details on either of these, the Board supports the need for reviews consistent with best practices in grant making, and reiterates the feedback included in our input to the Draft Initial Report: "*if a review indicates a need for fundamental changes to the mechanism or the purposes of the use of funds, those would be significant changes for which additional community input would be required.*"

That said; however, it is not clear to the Board that two separate panels are needed for this function. We encourage the CCWG to first focus on providing greater specificity about the scope and goals of the review(s) it feels are necessary, and from there it may be possible to better identify the expertise needed and the frequency upon which those reviews should be conducted. Identifying the goals of a review(s) will also provide additional clarity on the role of the community in those review(s). The Board encourages that the CCWG consider whether more standardized review mechanisms used to assess other grant-making programs would be appropriate here. Whatever final recommendations the CCWG makes in this regard will be evaluated by the Board in line with the principles reiterated above, and current plans could be seen at odds with these given the perceived complexities, additional resources, and burden on the community.

The CCWG specifically calls for the designation of the Organizational Effectiveness Committee (OEC) to charter a program assessment panel. The Board recommends that this be changed to through "*the ICANN Board, through a committee if appropriate.*"

On the topic of compensation, the Board anticipates that the Independent Panel will be operated as a professional engagement and compensation for service on the Panel is assumed. Within ICANN to date, community-comprised advisory panel/committees have not been compensated (apart from travel). While experts needed to support a community panel (e.g., lawyers, accountants, and other consultants) are generally compensated, the Board needs additional information from the CCWG on the intended scope, role, and time commitment in order to understand why compensation or honoraria is being considered for this function.

Mechanism C Questions

The CCWG Co-Chairs asked for feedback on the following:

"*Under Mechanism C, a new foundation would be established with a new Board that would have a narrowly-defined scope focused specifically on the foundation goals. Is the ICANN Board comfortable with such a role for a newly created foundation Board? And, if yes, what kind of safeguards would the Board want to put in place to ensure legal and fiduciary obligations of the ICANN Board will not be challenged in potential future conflicts*?"

As previously indicated, ICANN's Board and its Officers have specific fiduciary obligations with respect to the distribution of auction proceeds, no matter which mechanism is selected. Creation of a separate foundation would not modify or eliminate those obligations, nor would it eliminate potential challenges with respect to those obligations. To the extent the CCWG contemplates creation of a foundation in which ICANN is not involved - particularly, but not exclusively including decisions as to whether an application furthers ICANN's mission - that raises concerns similar to concerns raised with the prior Mechanism D, which envisioned the handing of proceeds over to a separate entity to be solely responsible for all parts of the evaluation and distribution. We have heard suggestion during the CCWG's deliberations that the renewed interest in a foundation is for the purposes of independence from ICANN Board and Org. However, the use of a foundation in this instance would be a mechanism that would require a separate entity, but would necessarily still be related to ICANN for the purposes of governance.

The creation of a foundation to administer the grant program should be evaluated against the efficiency and effectiveness principle cited above and, if a foundation is the recommended mechanism, it should be developed in accordance with best practices from related foundations designed to further a parent or supported entity's charitable mission. Any recommendation for a foundation should also provide details on what the foundation and its board are anticipated to do other than to administer the grant program in accordance with the principles and guidelines that the CCWG-AP is recommending. Is the foundation expected to have a differing strategic initiative other than to deliver the program as recommended by the CCWG-AP and approved by the ICANN Board?

In addition to the above considerations, the Board reiterates previous statements that proceeds will be distributed in tranches, regardless of which mechanism is implemented. If a foundation is the recommended approach, the proceeds would not be sent in their entirety to the foundation, and will be distributed in tranches.

Related to risk, and regardless of mechanism, the Board also refers back to its input to the initial report which states:

"*The Board welcomes the inclusion of consideration for risks in the proposal, as this is an integral part of the fiduciary duties of the Board (specifically the "duty of care"). The evaluation of risks associated with applications and grants is helpful. The Board would strongly suggest, as it will itself need to do, to also include explicitly the consideration of the risks associated with the mechanism(s) selected for evaluating grant applications and/or administering the program itself, such as the risk that decisions to allocate or not grants to applicants are challenged, or the risk that funds allocated to applicants are misused. Mitigation considerations could also feature in guidance to the implementation team.*"

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In addition to the above requested feedback, the Board reiterates previous feedback on a second Public Comment Period. In the Board's input to the Initial Report, the Board noted:

"*If the report changes significantly as a result of Public Comment, the Board would encourage a second period of Public Comment to make sure that the community and beyond have opportunities to comment on any material changes to the approach and options set forth in this draft before submission to the Chartering Organizations for adoption.*"

Given the changes under consideration by the group, particularly on the community involvement component and given the amount of proceeds at issue, it is important to take the additional time for further Public Comment.

We hope this input covers all requested items from the CCWG and is helpful in working towards a Final Report. Thank you for the opportunity to provide Board input at this important stage and we look forward to continued engagement on this effort.

Best wishes,

Becky Burr, Maarten Botterman
*ICANN Board Liaisons to CCWG-AP*