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TERMS OF REFERENCE FOR THE APPOINTMENT OF A SERVICE PROVIDER TO DRAFT A FILMS AND PUBLICATIONS AMENDMENT BILL

1. FPB BACKGROUND

The Film and Publication Board (FPB) is a state-owned media content regulation authority under the Department of Communications and Digital Technologies (DCDT). Its mandate is “to regulate the creation, production, possession and distribution of films, games and certain publications.” This mandate is guided by an act of parliament, Films and Publications Act, 1996 (Act No. 65 of 1996). The FPB regulates and registers content distributors, monitors compliance with the provision of the Act, investigate complaints and matters of non-compliance and adjudicate non-compliance through the enforcement committee.

Since its inception approximately 25 years ago, the FPB has had the responsibility of classifying films, games and certain publications in line with South African values and norms under the overarching application of the Bill of Rights. This approach has a distinct difference from the censorship regime used by the Apartheid government to advance the then state’s discriminatory and dehumanising political agenda. The role of the FPB has previously been regulating the distribution of content, which was easily identifiable. Films were either distributed via VHS, disc (DVD and Blu ray) and in cinema format, and games were likewise distributed in disc format whereas publications were in pre-packaged magazines and books. With developments in technology, content has moved to online streaming or digital platforms. Consumers, and particularly children, now can access content which may not have been appropriately classified and labelled through such online streaming and digital platforms. Such progress has necessitated the 2019 amendments to the FP Act which came into force on 01 March 2023 to address the following challenges:

- a) Align the definition of child pornography to the definition in terms of the Constitutional Court judgment in the case of *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC);
- b) Give effect to the constitutional amendments of section 16 (2)(a) as instructed by the Constitutional Court in *Print Media South Africa and Another v Minister of Home Affairs and Another* 2012 (6) SA 443 (CC);
- c) Decriminalize the online distribution of adult content on all platforms including digital platforms;
- d) Provide for the establishment of a co-regulation system that will allow for accreditation by the FPB of independent classification bodies to classify their own digital films, games and publications; and
- e) Provide for an effective penalty regime in support of, amongst others, the co-regulation approach.

The purpose of the amendments in the FP Act therefore was to close the regulatory gap that currently exists in the expanded market. Consumers, and children in particular, run a risk of exposure to harmful content which is distributed on online streaming and digital platforms. It is important to note that what is deemed to be harmful content may differ from one jurisdiction to the next. Harmful¹ content is a value laden concept and it is important for it to reflect the societal values and norms of that country. The amendments therefore extend the current rating system and content regulatory regime to digital and online content providing services. This enhances the protection of children and limit consumer concerns and confusion.

Notwithstanding the current legislative amendment, it became evident that regulating the online environment requires resilient and agile regulatory responses. The FPB developed a regulator of the future document which outline the shape required to position the FPB as the regulator of online content. Furthermore, it was evident that there were some grey areas which required further clarification to better regulate the industry and will require both policy and legislative changes. A situational analysis was conducted to guide various options to strengthen the FP Act. This document will serve as a base to draft the amendment for consideration by the policy department. It is on this basis that we seek services of a service provider to draft the Film and Publication Amendment Bill.

¹ The word “harmful” is defined in the FP Act to mean the causing emotional, psychological, or moral distress to a person, whether it be through a film, game, or publication through any on or offline medium, including through the internet and “harm” has the corresponding meaning.

2. SCOPE OF PROJECT

The scope of the project is to conduct the following:

- 2.1 Analyse and consider the amendment options proposed in the future regulator report and the situational analysis on legislative amendment options document; and
- 2.2 Draft the appropriate legislative provisions applicable to each proposal conveyed in both documents referred to above.

3. EXPECTED STRATEGIC DELIVERABLES

The successful service provider is expected to produce a draft amendment bill taking into consideration the scope outlined in paragraph 2 above.

4. DURATION OF THE PROJECT

The duration of this project is one week after date of signing of a contract by the successful service provider, subject to general conditions of the project, as spelled out in the Service Level Agreement.

5. EVALUATION CRITERIA

Bidders will be evaluated as follows:

- Gate 1 – Assessment of the technical experience
- Gate 2 – Functionality
- Gate 3 – Price and Preference Points

5.1. GATE 1- ASSESSMENT OF THE TECHNICAL EXPERIENCE

5.1.1. Bidders must submit a list of previous relevant work done in the prescribed template, attached to the terms of reference as Annexure A. Bidders will be disqualified from further evaluation if:

- The list is not submitted using the prescribed template, and
- Previous work done is not relevant to the scope of project detailed in paragraph 2.

5.2. GATE 2 – FUNCTIONALITY

Functional criteria	Weight	Applicable scores				
		1 Poor	2 Fair	3 Average	4 Good	5 Excellent
<p>Experience in drafting legislation, regulations, or bills.</p> <p>Company Experience (to be determined by inspection of reference letters) and/ or Project Leader experience (to be determined through the inspection of CVs) (whichever is longest)</p>	40	1 – 2 years	More than 2 – 4 years	More than 4-5 years	More than 5 -8 years	More than 8 years
<p>Reference Letters:</p> <p>Provide written reference letters of similar work previously done not older than 10 years. Letters must be on the letterhead of the client, signed and briefly describe the services which were rendered and relevant years of same service.</p>	40	N/A	1 letter	2 letters	3 – 4 letters	5 or more letters
<p>Project plan and methodology</p> <p>Clear plan on how the project scope will be delivered.</p>	20	N/A.	N/A.	Project plan and methodology – no timelines	Project plan and methodology – with timelines	4 referral letters submitted.

Minimum qualifying score = 70%. Bidders who meet the minimum score of 70% will be further evaluated in gate 3.

5.3. GATE: PRICE AND PREFERENTIAL POINTS

Price = 80

Specific goals (Refer to SBD 6.1) = 20