

**THE REPUBLIC OF UGANDA
PUBLIC PROCUREMENT AND DISPOSAL OF PUBLIC ASSETS APPEALS
TRIBUNAL**

APPLICATION NO. 30 OF 2021

BETWEEN

GAT CONSULTS LIMITED =====APPLICANT

AND

NATIONAL WATER AND SEWERAGE CORPORATION=====RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR
CONSTRUCTION WORKS FOR THE BUSHENYI WATER SUPPLY
AUGMENTATION PROJECT UNDER RESERVATION SCHEME UNDER
PROCUREMENT REFERENCE NUMBER NWSC-HQ/WORKS/20-
21/172146**

**BEFORE: FRANCIS GIMARA S.C, CHAIRPERSON; NELSON NERIMA;
THOMAS BROOKES ISANGA; GEOFFREY NUWAGIRA KAKIRA AND PAUL
KALUMBA, MEMBERS**

DECISION OF THE TRIBUNAL

A. BRIEF FACTS

1. On 11th May 2021, National Water & Sewerage Corporation (the Respondent/Entity) published an advert in the New Vision Newspaper inviting bidders for the construction works for the Bushenyi Water Supply augmentation project involving the augmentation of water production in Bushenyi through the construction of a new Water Treatment Plant on River Walugo in Kibatama under procurement reference number; NWSC-HQ/WORKS/20-21/172146.
2. Bidding was conducted under the open domestic bidding method contained in the PPDA Act 2003 under a reservation scheme as provided for under PPDA Act Sec 59B. A pre bid meeting was held on 27th May 2021 in Bushenyi attended by 4 firms. An addendum was subsequently issued by the Respondent on July 13, 2021 to all bidders.
3. By the deadline date for submission of bids on 6th August 2021 at 10.30 am, five bidders including the Applicant had submitted their bids. On 6th August 2021, the bid of GAT Consults Ltd (the Applicant) together with the bids of other 4 bidders were opened. At the bid opening, the Applicant's bid price read out was UGX 8,948,519,651 (Eight Billion Nine Hundred Forty Eight Million Five Hundred Nineteen Thousand Six Hundred Fifty One).
4. The evaluation of bids was conducted and on 31st August 2021, the Applicant was issued a notice of correction of errors showing the corrected bid price of UGX 9,357,389,651 (Nine Billion Three Hundred Fifty Seven Million Three Hundred Eighty Nine Thousand Six Hundred Fifty One).
5. On 18th October 2021, the Applicant received a letter from the Respondent requesting for clarification on the projects submitted. On

20th October 2021, the Applicant wrote a letter providing clarification requested for by the Respondent.

6. According to the evaluation report dated October 21, 2021, three bidders; Zhonghao Overseas Construction Engineering Co. Ltd and Plumb Base Uganda Ltd JV, GAT Consults Ltd and Updeals (U) Ltd passed the preliminary evaluation and were subjected to detailed commercial and technical evaluation. According to the evaluation report, GAT Consults Ltd and Updeals (U) Ltd failed at the detailed commercial and technical evaluation and the evaluation committee recommended Zhonghao Overseas Construction Engineering Co. Ltd and Plumb Base Uganda Ltd JV as the best-evaluated bidder and for award of contract at UGX 9,357,389,651 VAT inclusive. The best-evaluated bidder notice was issued on 26th October 2021 with an expiry date of 9th November 2021.

7. On 27th October 2021, the Applicant was issued a Notice of Best Evaluated Bidder dated 26th October 2021 showing M/s Zhonghao Overseas Construction Engineering Co. Ltd and Plumb Base Uganda Ltd JV as the best-evaluated bidder. The Notice of Best Evaluated Bidder indicates that the Applicant's bid was unsuccessful at the technical stage due to the following reasons:
 - The Bidder failed to present the required two (2) water supply projects within the last ten (10) years that have been successfully and substantially completed (at least 70 percent complete) and that are similar to the proposed works.

 - The bidder failed to demonstrate the required minimum experience in five (5) key activities i.e. (i) CRC conventional WTPs/units with capacity not less than 3,000m³/day (ii) Electromechanical installations for large water/wastewater treatment plants. (iii) Construction of water abstraction intake on a river, (iv) Laying of large diameter pipes (At least 3km of DN200 and above), (v) General WTP

- site works and layout on at least two (2) projects (the minimum required)
- The bidder's ESHS Management Plan omitted the required strategy for obtaining approvals prior to the start of relevant works such as opening a quarry or borrow pit and also lacked grievance redress mechanism
8. On 4th November 2021, the Applicant applied for administrative review to the Respondent's Accounting Officer, attached a cheque for payment of the prescribed administrative review fees, and requested for a copy of the evaluation report for purposes of review.
 9. On 8th November 2021, the Applicant received a letter dated 5th November 2021 from the Accounting Officer rejecting and returning the Applicant's cheque and advised the Applicant to use the payment methods prescribed in the letter.
 10. On 9th November 2021, the Applicant made a further attempt to make a payment of the prescribed fees. The Applicant sought and was issued with a payment cheque slip of UGX 5,000,000 from the Respondent.
 11. On 12th November 2021, the Applicant received the decision of the Accounting Officer rejecting the application.
 12. Being dissatisfied with the decision of the Respondent, the Applicant applied to this Tribunal for further review on 22nd November 2021.
 13. According to the procurement action file submitted to the Tribunal on 25th November 2021, the bid validity was extended from September 19, 2021 to February 19, 2021; The validity of the Applicant's and best evaluated bidder's Bid Security was also extended from July 21, 2021 to 4th March 2022 at 5:00pm.

B. APPLICATION TO THE TRIBUNAL

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1. The Applicant argued that the application for review before the Accounting Officer was filed within the statutory time limit.
2. The Applicant averred that under Section 89 (4) of the Public Procurement and Disposal of Public Assets Act (as amended), the Applicant was entitled to be availed a copy of the evaluation report as requested and that the denial of the evaluation report by the Respondent is in contravention of Articles 28, 41 and 42 of the Constitution of the Republic of Uganda that provide for a right to a fair hearing.
3. The Applicant stressed that the evaluation of the bids having reached the financial comparison stage, the Applicant's bid should not have been rejected by the evaluation committee for the reasons stated in the Notice of best-evaluated bidder which ought to have been advanced at the technical evaluation stage. That the rejection of the Applicant's bid was an afterthought and intended to unfairly kick out the Applicant from the process.
4. The Applicant averred that the projects submitted by the Applicant were of similar nature in terms of physical size, complexity, methods or technology. The projects needed to comply with any of the characteristics stated in the solicitation documents. That they did not need to comply with all characteristics, otherwise the bid would be restrictive and intended to favour a specific bidder which is contrary to the principles of procurement as provided under section 43 of the Public Procurement and Disposal of Public Assets Act.
5. The Applicant contended that after the correction of errors, the Applicant's bid price was at UGX 9,357,389,651 while the best-evaluated bidder was at UGX 9,751,633,133 giving a price difference of UGX. 394,343,482. The evaluation process having reached the financial comparison stage, and the Applicant having had the lowest priced bid, should have been declared the best evaluated bidder. This

would promote the principle of value for money as is provided for under Section 43 and 48 of the Public Procurement and Disposal of Public Assets Act.

6. The Applicant asserted that the information provided in the documents submitted in support of its bid was sufficient in respect of Management Strategies and Implementation Plans (MSIP) and Environmental Social and Management Plans (ESMP).
7. The Applicant further stated that M/s Zhonghao Overseas Construction Engineering Co. Ltd and Plumb Base Uganda Ltd JV which was declared the best-evaluated bidder should have been rejected at the preliminary stage as it was not qualified to participate in the procurement which was under the reservation scheme for local companies.
8. The Applicants prayed that the Tribunal grants the prayers sought in the application, sets aside the decision of the Accounting Officer of the Respondent and substitutes it with the orders sought in this application by the Applicant, declares the Applicant as the best evaluated bidder, that the contract be awarded to the Applicant, and costs to the Applicant.
9. The Applicant named National Water & Sewerage Corporation as the Respondent to the Application.

C. REPLY TO THE APPLICATION

1. The Respondent indicated that it would raise a preliminary objection stating that the application was filed for administrative review before the Accounting Officer without the payment of the prescribed fees and as such, the application for administrative review on the onset was wrongly placed before the entity for consideration. That the Applicant paid the fees on 9th November 2021 out of the statutory time limit.

2. The Respondent argued that the Applicant filed an application before the Accounting Officer without the payment of the requisite administrative review fees. The Respondent contended that no effective complaint for administrative review was lodged by the Applicant in conformance with Section 89(3) (a) of the Public Procurement and Disposal of Public Assets Act (as amended) in the absence of an accompanying payment prescribed by law. The submission of the complaint and the payment of the requisite fees are concurrent activities.
3. The Respondent averred that the Applicant is not entitled to the evaluation report requested for and that the denial of the same by the Respondent is not in contravention of the right to a fair hearing granted under the Constitution.
4. The Respondent argued that the application did not present any case of a manifest error requiring the Tribunal to interfere with the decision of the Respondent's Accounting Officer as no decision taken in the face of the record unnecessarily disadvantaged the Applicant.
5. The Respondent submitted that the Applicant did not demonstrate how similar its experience was with regard to the Instructions to Bidders and the statement of requirements. That the Environmental Social and Management Plan (ESMP) submitted by the Applicant did not outline strategies to manage risks as required.
6. The Respondent asserted that a procuring and disposing entity can only accept a bid which is compliant with the bidding document. That it is not enough to be the lowest priced bidder because the bid must also meet the requirements of the evaluation criteria contained in the bidding document.
7. That M/s Plumb Base Uganda Ltd pursuant to a Joint Venture Agreement with M/s Zhonghao Overseas Construction Engineering

Co. Ltd has a Joint Venture interest of 55% and is for all intents and purposes a national provider registered in Uganda and wholly owned and controlled by Ugandans. That the Joint Venture was registered in Uganda hence making it a national provider and able to participate under the Reservation Scheme. That even if Zhonghao Overseas Construction Engineering Co. Ltd is a foreign company, nothing precludes it from participating in the bidding process under open domestic bidding pursuant to section 253 of the Companies Act 2012.

8. The Respondent prayed that the Tribunal finds that the Respondent was fair, objective, transparent and rightly determined the best evaluated bidder. That at all material times, the Respondent acted in accordance with the law.
9. The Respondent contended that in the interest of justice and general public interest, the application be dismissed to allow the Respondent continue with the procurement process as the money may be diverted to other projects.

D THE ORAL HEARING

The Tribunal held an oral hearing on 10th December 2021 via zoom software. The appearances were as follows:

1. Mr Richard Mwembebezi represented the Applicant. Mr Mugizi Leonard a Director of the Applicant was present.
2. The Respondent was represented by Mr Aloysius Kaijuka. Eng. Johnson Amayo, Ms Craven Busingye, and Mr Martin Busulwa attended on behalf of the Respondent.
3. The Best Evaluated Bidder was represented by Mr Elvis Twenda. In attendance was Dick Muhwezi, the Managing Director of Plumbase and Mr Li Jimmy from Construction Engineering Co. Ltd

E. SUBMISSIONS

During the oral hearing, the Applicant and Respondent highlighted their written submissions and also provided clarifications to the Tribunal.

Applicant

1. The Applicant argued that the application for review before the Accounting Officer was filed within the statutory time limit.
2. The Applicant averred that under Section 89 (4) of the Public Procurement and Disposal of Public Assets Act (as amended), the Applicant was entitled to be availed a copy of the evaluation report as requested and that the denial of the evaluation report by the Respondent is in contravention of Articles 28, 41 and 42 of the Constitution of the Republic of Uganda that provide for a right to a fair hearing.
3. The Applicant stressed that the evaluation of the bids having reached the financial comparison stage, the Applicant's bid should not have been rejected by the evaluation committee for the reasons stated in the Notice of best-evaluated bidder which ought to have been advanced at the technical evaluation stage. The rejection of the Applicant's bid was an afterthought and intended to unfairly kick out the Applicant from the process.
4. The Applicant averred that the projects submitted by the Applicant were of similar nature in terms of physical size, complexity, methods or technology. The projects needed to comply with any of the characteristics stated in the solicitation documents and the two projects undertaken by the Applicant: Namwiwa Town Water Supply and Sanitation Facility and Mbulamuti Water Supply System were of a similar nature and they met these requirements.
5. The Applicant further stated that they did not need to comply with all characteristics, otherwise the bid would be restrictive and intended to favour a specific bidder which is contrary to the principles of
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procurement as provided under Section 43 of the Public Procurement and Disposal of Public Assets Act.

6. The Applicant further contended that after the correction of errors, the Applicant's bid price was at UGX. 9,357,389,651 while the best-evaluated bidder was at UGX 9,751,633,133 giving a price difference of UGX 394,343,482. The evaluation process having reached the financial comparison stage, and the Applicant having had the lowest priced bid, should have been declared the best evaluated bidder. This would promote the principle of value for money as is provided for under Section 43 and 48 of the Public Procurement and Disposal of Public Assets Act.
7. The Applicant asserted that the information provided in the documents submitted in support of its bid was sufficient in respect of Management Strategies and Implementation Plans (MSIP) and Environmental Social and Management Plans (ESMP).
8. The Applicant further stated that M/s Zhonghao Overseas Construction Engineering Co. Ltd and Plumb Base Uganda Ltd JV which was declared the best-evaluated bidder should have been rejected at the preliminary stage, as it was not qualified to participate in the procurement which was under the reservation scheme for local companies.
9. The Applicant stressed that the JV between Zhanghao Overseas and Plumb Base Uganda Ltd was intended to defeat the spirit of Section 50 of the Public Procurement and Disposal of Public Assets Act, and it should have been rejected at the preliminary stage.
10. The Applicants prayed that the Tribunal grants the prayers sought in the application, sets aside the decision of the Accounting Officer of the Respondent and substitutes it with the orders sought in this application by the Applicant, declares the Applicant as the best evaluated bidder, that the contract be awarded to the Applicant, and

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costs to the Applicant.

Respondent

1. The Respondent raised a preliminary objection stating that the application was filed for administrative review before the Accounting Officer without the payment of the prescribed fees and as such, the application for administrative review on the onset was wrongly placed before the entity for consideration. That the Applicant paid the fees on 9th November 2021 out of the statutory time limit.
2. The Respondent argued that the Applicant filed an application before the Accounting Officer without the payment of the requisite administrative review fees. The Respondent contended that no effective complaint for administrative review was lodged by the Applicant in conformance with Section 89(3) (a) of the Public Procurement and Disposal of Public Assets Act (as amended) in the absence of an accompanying payment prescribed by law. The submission of the complaint and the payment of the requisite fees are concurrent activities.
3. The Respondent averred that the Applicant is not entitled to the evaluation report requested for and that the denial of the same by the Respondent is not in contravention of the right to a fair hearing granted under the Constitution. The Respondent contended that the information provided in the Notice of Best Evaluated Bidder indicated the reasons for rejection of the bidder and the stage at which the bid was rejected. Therefore, there was no need to provide a separate report
4. The Respondent argued that the application did not present any case of a manifest error requiring the Tribunal to interfere with the decision of the Respondent's Accounting Officer as no decision taken in the face of the record prejudiced the Applicant.

5. The Respondent submitted that the Applicant did not demonstrate how similar its experience was with regard to the Instructions to Bidders and the statement of requirements. That the Environmental Social and Management Plan (ESMP) submitted by the Applicant did not outline strategies to manage risks as required.
6. The Respondent asserted that a procuring and disposing entity can only accept a bid which is compliant with the bidding document. That it is not enough to be the lowest priced bidder because the bid must also meet the requirements of the evaluation criteria contained in the bidding document.
7. That M/s Plumb Base Uganda Ltd pursuant to a Joint Venture Agreement with M/s Zhonghao Overseas Construction Engineering Co. Ltd has a Joint Venture interest of 55% and is for all intents and purposes a national provider registered in Uganda and wholly owned and controlled by Ugandans. That the Joint Venture was registered in Uganda hence making it a national provider and able to participate under the Reservation Scheme. That even if Zhonghao Overseas Construction Engineering Co. Ltd is a foreign company, nothing precludes it from participating in the bidding process under open domestic bidding.
8. The Respondent prayed that the Tribunal finds that the Respondent was fair, objective and rightly determined the best-evaluated bidder. That at all material times, the Respondent acted in accordance with the law.
9. The Respondent contended that in the interest of justice and general public interest, the application be dismissed to allow the Respondent continue with the procurement process as the money may be diverted to other projects.

Best Evaluated Bidder

1. The Best Evaluated Bidder associated itself with the submissions of the Respondent.
2. The Best Evaluated Bidder further stated that the JV is a local JV registered and this qualified it to bid under Ugandan Law.

F. RESOLUTION BY THE TRIBUNAL

Issues

We now revert to the substantive issues in this application:

- i. *Whether the application for administrative review to the Accounting Officer was made within time?*
- ii. *Whether the Applicant is entitled to the evaluation report requested in accordance with Section 89 (4) of the Public Procurement and Disposal of Public Assets Act?*
- iii. *Whether the Applicant's bid which had reached the financial comparison stages could be rejected for the reasons that should have been advanced at the technical evaluation stage?*
- iv. *Whether the projects submitted by the Applicant were of similar nature in terms of either physical size, complexity, methods or technology?*
- v. *Whether the information provided by the Applicant in the documents submitted in support of its bid was sufficient in respect Management Strategies and Implementation Plans (MSIP) and Environmental Social and Management Plans (ESMP)?*
- vi. *Whether the decision of the Evaluation Committee to declare M/s Zhonghao Overseas Construction Engineering Co. Ltd and Plumb Base Uganda Ltd JV as the best-evaluated bidder was against the principles of procurement and specifically promotion of value for money as provided for under section 43 and 48 of the Public Procurement and Disposal of Public Assets Act?*
- vii. *Whether M/s Zhonghao Overseas Construction Engineering Co. Ltd and Plumb Base Uganda Ltd JV qualifies to participate under a reservation scheme?*

- viii. *Whether the Applicant presented the best bid in comparison with the best-evaluated bidder and should be declared so?*
- ix. *What remedies are available to the Parties?*

Resolution of Issues Raised

Issue 1

Whether the application for administrative review to the Accounting Officer was made within time?

1. The Respondent raised a preliminary objection stating that the application was filed for administrative review before the Accounting Officer without the payment of the prescribed fees and as such, the application for administrative review on the onset was wrongly placed before the entity for consideration. That the Applicant paid the fees on 9th November 2021 out of the statutory time limit. The Applicant argued that the application for review before the Accounting Officer was filed within the statutory time limit.
2. **Section 89 (1) of the Public Procurement and Disposal of Public Assets Act, 2003** as amended states that a bidder who is aggrieved by a decision of a procuring and disposing entity may make a complaint to the Accounting Officer of the procuring and disposing entity.
3. **Section 89 (3) of the Public Procurement and Disposal of Public Assets Act, 2003** as amended states that:
A complaint against a procuring and disposing entity shall-
 - (a) *be in writing and shall be submitted to the Accounting Officer of the procuring and disposing entity on payment of the fees prescribed;*
 - (b) *be made within ten working days after the date the bidder first becomes aware or ought to have become aware of the circumstances that give rise to the complaint.*
4. Regulation 11 of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014* provides that the fees in the

second column of the Schedule to the Regulations shall be paid to a procuring and disposing entity, for the administrative review for a procurement or disposal of a value specified in the first column.

5. The PPDA Authority issued Circular No. 3 of 2015 on *Procedure for Administrative Review by the Accounting Officers*. The circular guided that on receipt of an application for Administrative Review, the Accounting Officer should advise the complainants on the required Administrative Review fees and where to pay the said fees.
6. We noted that the Applicant's Complaint to the Accounting Officer the Respondent dated November 4, 2021 was accompanied with a cheque. The Applicant went ahead and effected payment on 9th November 2021 through electronic transfer from Centenary Bank.
7. This Tribunal has been consistent on the principle that late payment of filing fees is not necessarily fatal, and that even actual non-payment of court fees has been held not to be fatal so long as the proper fees can be assessed and paid. See **VCON CONSTRUCTION LTD VS UGANDA DEVELOPMENT BANK, APPLICATION NO.22 OF 2021, SAMANGA ELCOMPLUS JV VS. UGANDA ELECTRICITY DISTRIBUTION COMPANY LIMITED, APPLICATION NO.17 OF 2021, KASOKOSO SERVICES LIMITED VS. JINJA SCHOOL OF NURSING AND MIDWIFERY, APPLICATION NO. 13 OF 2021**. In the said decisions, the Tribunal has relied on the Supreme Court decision in **LAWRENCE MUWANGA v STEPHEN KYEYUNE (Legal Representative of Christine Kisamba, deceased) SUPREME COURT CIVIL APPEAL NO. 12 of 2001**.
8. It is our finding that the conclusion of the Accounting Officer on non-payment or delayed payment of fees, with due respect, is erroneous. This is because payment of fees for purposes of an administrative review application under Section 89(3) (a) of the *Public Procurement*

and Disposal of Public Assets Act as amended by Act 15 of 2021 after the ten working days stated therein is not fatal.

9. Secondly, the Application was lodged on November 4, 2021 within the period of display of the Notice of Best Evaluated Bidder, when the bidder first became aware of the circumstances giving rise to the complaint, and consistent with Section 89(3)(a) of the *Public Procurement and Disposal of Public Assets Act* as amended by Act 15 of 2021
10. It is our finding that the Applicant paid the prescribed administrative review fees. Accordingly, the Complaint was competent and within time by the time it was lodged before the Accounting Officer of the Respondent.
11. **The Tribunal answers this issue in the affirmative.**

Issue 2

Whether the Applicant is entitled to the evaluation report requested in accordance with Section 89(4) of the Public Procurement and Disposal of Public Assets Act?

12. The Applicant averred that under Section 89 (4) of the PPDA Act (as amended), the Applicant was entitled to be availed a copy of the evaluation report as requested and that the denial of the evaluation report by the Respondent is in contravention of Articles 28, 41 and 42 of the Constitution of the Republic of Uganda that provide for a right to a fair hearing.
13. The Respondent averred that the Applicant is not entitled to the evaluation report requested for and that the denial of the same by the Respondent is not in contravention of the right to a fair hearing granted under the Constitution.
14. **Section 89 (4) of the Public Procurement and Disposal of Public PPDA Appeals Tribunal Decision for Application No. 30 of 2021**

Assets **Act** as amended provides that a procurement and disposing entity against which a complaint is made shall, on request provide to the bidder a report indicating the reasons for rejection of the bidder and the stage at which the bidder was rejected and the report shall be used only for the administrative review process.

15. The import of the aforementioned provision is that a procuring and disposing entity is duty bound to avail information to a bidder who has made a complaint against it. Having made a valid complaint within the prescribed timeframe, the Applicant was entitled to be availed with a report indicating the reasons for its rejection and the stage at which it was rejected.
16. The Tribunal clarifies that **Section 89 (4)** of the *Public Procurement and Disposal of Public Assets Act* does not require an Entity to avail the evaluation report as suggested by the Applicant but instead refers to a report indicating the reasons for rejection of the bidder and the stage at which the bidder was rejected. This means that the Entity is only duty bound to avail a report which contains the information specified in section 89(4) of the *Public Procurement and Disposal of Public Assets Act*. The Entity need not avail the entire evaluation committee report to the aggrieved bidder See: **TRIBUNAL APPLICATION NO. 22 OF 2021- VCON CONSTRUCTION (U) LTD VERSUS UGANDA DEVELOPMENT BANK.**
17. Nevertheless, the Tribunal has failed to find merit in the actions and response of the Respondent regarding its refusal to avail the Applicant such information. The Respondent's insistence on the nomenclature of the said report by the Applicant as an evaluation report and ignoring the legal premise of **Section 89 (4) of the** Public Procurement and Disposal of Public Assets **Act** on which the request was made was in our view wrong. The Respondent owed a duty to the Applicant to avail the information requested for by the Applicant, and the failure to do so, curtailed the Applicant's right to a fair hearing,

with the likely effect that it restrained them from making adequate preparations for its administrative review process.

18. In the case of ***De Souza v Tanga Town Council Civil Appeal No. 89 of 1960 (1961) EA 377***, the East African Court of Appeal held that: ***“...if the principles of natural justice are violated in respect of any decision, it is immaterial whether the same decision would have been arrived at in the absence of departure from the essential principles of natural justice. That decision must be declared no decision.”***
19. The Tribunal finds that the Respondent’s refusal to avail the information requested for in accordance with section 89 (4) of the PPDA Act amounted to a violation of the principles of natural justice and the Applicant’s right to a fair hearing in contravention of Articles 28, 41 and 42 of the Constitution of the Republic of Uganda.
20. **The Tribunal answers this issue in the negative in regard to the aspect of the Applicant’s entitlement to the evaluation report. However, the Applicant was entitled to a report in terms of Section 89(4) of the Public Procurement and Disposal of Public Assets Act as amended and not the entire Evaluation Report.**

Issue 3

Whether the Applicant’s bid which had reached the financial comparison stage could be rejected for the reasons that should have been advanced at the technical evaluation stage?

21. The Evaluation Report (reviewed from the Procurement action file) signed on 21st October 2021 at page 63 of 134 indicates in Table 2a that GAT consults Ltd was responsive to the Commercial Responsiveness.
22. However, at page 66 of 134 of the said evaluation report, it is indicated that the Applicant’s bid was non responsive for failing to demonstrate minimum experience in five (5) key activities (page 83), lacking specific

experience (page 82) and that its ESHS Management Plan also lacked grievance redress mechanisms (page 85).

23. We noted that the Contracts Committee in its sitting of 15th October 2021 vide MIN 855/21/E/6 under bullet 3, "took note of records regarding arithmetic correction clarification were pre-mature as regards the stage of evaluation".
24. Under Bullet 4, it states that "The Contracts Committee therefore requested the Evaluation Committee to address the above issues and resubmit the file for consideration"
25. We reviewed a letter (in the procurement action file) dated 20th October 2021, received by the Respondent on 21 October 2021, replying to a letter by the Respondent dated October 18, 2021 ref No NWSC-HQ/WORKS/2021-21/172146 in which the Applicant was providing clarifications on its specific experience.
26. The Second Evaluation Report dated 21st October 2021 recommended *Zhonghao Overseas Construction Engineering Co. Ltd and Plumb Base Uganda Ltd JV* for award of Contract as the Best Evaluated Bidder at a total contract Price of UGX 9,5751,633,133/=. The Evaluation Report also mirrored the one of 21st September 2021 in which it indicated that the Applicant's bid was non responsive for failing to demonstrate minimum experience in five (5) key activities (at pages 82- 83), lacking specific experience (at page 82) and that its ESHS Management Plan also lacked grievance redress mechanisms (page 85).
27. However, Annexure G of the Application indicates that the Applicant was responding to a request to confirm and accept Arithmetic Corrections as of 31st August 2021 (*Annexure F to the Application*). Indeed, the Applicant accepted the Arithmetic corrections that

changed its bid price from **UGX 8,948,519,651/=** to the corrected **UGX 9, 357, 389, 651/=**

28. It is important to note that in Evaluation Report of October 21, 2021, only one bidder *Zhonghao Overseas Construction Engineering Co. Ltd and Plumb Base Uganda Ltd JV* qualified for the financial evaluation stage.
29. The Evaluation Criteria under Part 1 Section 3, Evaluation Methodology and Criteria, 2. Summary of Methodology, 2.1(d) on page 30 of the bidding document states that a financial comparison is undertaken to compare costs of the eligible, compliant, responsive bids received and determine the best-evaluated bid.
30. Part 1 Section 1, Instructions to Bidders (ITB) Clause 37.1 of the Bidding document requires only bids determined to be substantially responsive following the detailed evaluation criteria in accordance with ITB Clause 37.3 to be evaluated at the financial comparison stage.
31. Similarly, arithmetic corrections are only permitted at the financial comparison stage under Part 1 Section 1, ITB Clause 37.3 (b) of the bidding document. The correction permitted under Regulation 30 (3) of the PPDA (Evaluation) Regulations 2014 is only applicable at the Financial Comparison Stage.
32. Our reading of the evaluation methodology indicated that the evaluation was carried out using the Technical Compliance Selection Method (TCS) under a one stage-single envelope method, in which a bid is submitted in one sealed envelope, which is opened on the specified date and time in a single bid opening and all stages of the evaluation are conducted in sequence. See **Regulation 56 (6) (a) of the Public Procurement and Disposal of Public Assets (Rules and**

Methods for Procurement of Supplies, Works and Non Consultancy Services) Regulations, 2014.

33. As such, letters seeking correction of arithmetic errors sent to any affected bidder without the said bidder reaching the financial comparison stage under the Technical Compliance Selection Method was not in accordance with the ITB. The contracts Committee at its sitting 15th October 2021 (supra) rightly noted that writing the letter seeking arithmetical errors was pre-mature as regards the stage of evaluation. The Contract Committee accordingly returned the evaluation report for correction.
34. After the Contracts committee finding, the Evaluation Committee ought to have written back to the Applicant notifying them that the earlier letter seeking to correct arithmetic error was sent in error. We note that letters seeking correction of arithmetic errors sent to any affected bidder without the said bidder reaching the financial comparison stage under the Technical Compliance Selection Method was not correct. However, the Evaluation Report did not indicate that the Applicant had passed the technical evaluation stage and had reached the financial comparison stage.
35. It was therefore erroneous for the Applicant to assume and conclude that a letter seeking to correct arithmetic errors in a one stage-single envelope method would imply that its bid had reached the financial comparison stage. It is our view that in one stage-single envelope method seeking correction of arithmetic errors before completion of technical evaluation stage is not correct but not conclusive that a bidder has passed the technical evaluation stage.
36. **The Tribunal answers this issue in favour of the Respondent.**

Issue 4

Whether the projects submitted by the Applicant were of similar

nature in terms of either physical size, complexity, methods or technology?

37. Part 1 Section 1, ITB Clause 6.2.8 (a) required specific experience for participation as a civil works (sub)contractor in at least two (2) water treatment plant projects within the last ten (10) years that have been successfully completed (at least 70% complete) and that are similar to the proposed works.
38. Part 1 Section 3, ITB Clause 6.2.8 (a) at page 36 of the bidding document provided that the similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section 6, Statement of Requirements.
39. The Applicant presented projects which included the construction of Namwiwa Town Water Supply under Ministry of Water and Environment and construction of Mbulamuti Town Water Supply under Ministry of Water and Environment among others.
40. The Respondent averred that the Applicant did not demonstrate how similar its experience was in respect to Part 1 Section 3, ITB Clause 6.2.8 (a) and that therefore its bid was non-responsive in that regard given that in the instant case, the site is predominantly water logged which comes along with complexities in terms of site preparation and the contractor's ability to mobilise.
41. Regulation 7 (1) of ***The Public Procurement and Disposal of Public Assets (Evaluation) Regulations, S.I No. 9 of 2014*** provides that the evaluation of a bid, shall be conducted in accordance with the evaluation criteria stated in the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non Consultancy Services) Regulations, 2014 and in the bidding document.
42. Regulation 7(2) of the said regulations provides that an evaluation committee shall not, during an evaluation, make an amendment or
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addition to the evaluation criteria stated in the bidding document, and shall not use any other criteria other than the criteria stated in the bidding document.

43. The Tribunal has guided that the interpretation of the evaluation criteria relating to experience as stipulated in the evaluation and qualification criteria should not be interpreted or applied in a manner which restricts competition. See **Section 46 of the Public Procurement and Disposal of Public Assets Act** and **regulation 37 (4) of The Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, works and Non-Consultancy Services) Regulations S.I No. 8 of 2014**, and Tribunal decisions in **Samanga Elcomplus JV Vs. PPDA & UEDCL, PAT No. 4 of 2021, para 41, page 18** and **GAT Consults and Lee Construction Ltd JV Vs PPDA and Ministry of Water and Environment PAT No. 6 of 2021**
44. Part 1 Section 3, Section III (Evaluation and Qualification Criteria) under Detailed Technical Evaluation, Clause 6.2.8 (a) on page 36 of the Bidding Document required *Participation as a civil works contractor or civil works subcontractor, in at least two (02) water Treatment Plants projects..... within the last 10 years and that are similar to the proposed works..... The similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section 6 Requirements.*
45. The detailed technical evaluation criteria **ITB 6.2.9 (b)** provided that;
- “the projects under ITB 6.2.8 (a) or other contracts executed during the period stipulated in 6.2.8(a) required a minimum experience in the following five (5) key activities:*
- *At least two (02) contracts in the construction of reinforced concrete conventional water treatment plants/units with capacity not less*

than 3,000m³/day (or compact water treatment plants of capacity not less than 3,000m³/day for the alternative proposals).

- Construction of water abstraction intake on a river
- Electromechanical installations for large water/wastewater treatment plants.
- Laying of large diameter pipes (At least 3km of DN200 and above).
- General Water Treatment Plant site works and layout on at least 2 projects.

We do not agree with the Respondent that the previous projects must necessarily be of a physical size similar to the project at hand. However the bidding document stated that “*similarity shall be based on the physical size, complexity, methods/technology or other characteristics as described in Section 6 Requirements*” the bidding document then clearly defined the similarity characteristics as, “*required a minimum experience in the five (5) key activities*” namely; (i) *At least two (02) contracts in the construction of reinforced concrete conventional water treatment plants/units with capacity not less than 3,000m³/day (or compact water treatment plants of capacity not less than 3,000m³/day for the alternative proposals),* (ii) *Construction of water abstraction intake on a river,* (iii) *Electromechanical installations for large water/wastewater treatment plants,* (iv) *Laying of large diameter pipes (At least 3km of DN200 and above) and* (v) *General Water Treatment Plant site works and layout on at least 2 projects.*

46. The reference to specific cubic metres or lengths of pipes in criteria 6.2.8(a) should therefore be read in the context of a bidder who wishes to rely on similarity of physical size. The reference to these measurements should be read in the context of similarity of size. This would mean that the capacity of Nyamwiwa Town water treatment plant as clarified by the Applicant in its letter dated 20th October 2021 being 1000m³/day is similar but does not meet the specific similarity characteristics requirements specified in the bidding document in criteria 6.2.9(b) of the bidding document.

47. We note that the omission to mention the number of Km (as required under the criteria 6.2.9(b)) of 3KM of DN 200mm laid by Applicant during the implementation of the project was a material deviation and was not a matter that could be clarified pursuant to ITBs 30.1 and 32.2 of the bidding document and *Reg 11 of the PPDA (Evaluation) Regulations 2014*.
48. Clarification is not meant to introduce new information or documents in order to cure a material deviation in the bid. See the decision of this Tribunal in ***MY MAKA GROUP LTD VS. UNBS, APPLICATION NO.9 OF 2021 and APPLICATION NO. 13 OF 2020 - SMILEPLAST LTD versus PPDA & NAADS***.
49. Similarly, the Mbulamuti water treatment plant although with a package water treatment plant of capacity 240m³/day was of a far lesser or lower capacity than the required 2,000m³/day specified for alternative proposal. The Tribunal has not been convinced by the Applicant that the evaluation criteria in the bidding document was restrictive in terms of the specific similarity characteristics of the minimum experience in the five (5) key activities of (i) At least two (02) contracts in the construction of reinforced concrete conventional water treatment plants/units with capacity not less than 3,000m³/day (or compact water treatment plants of capacity not less than 3,000m³/day for the alternative proposals), (ii) Construction of water abstraction intake on a river, (iii) Electromechanical installations for large water/wastewater treatment plants, (iv) Laying of large diameter pipes (At least 3km of DN200 and above) and (v) General Water Treatment Plant site works and layout on at least 2 projects. These observations should have been well pointed out and
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addressed during the bidding stage as to change the criteria during the evaluation would be illegal. The Tribunal has previously rejected attempts to challenge evaluation criteria after bidding. Evaluation criteria cannot be changed during the evaluation stage. Allegedly restrictive evaluation criteria should ordinarily be challenged prior to bidding. See: **TRIBUNAL APPLICATION NO. 25 OF 2021- DOTT SERVICES LIMITED & HES INFRA PRIVATE LIMITED JV v MINISTRY OF WATER AND ENVIRONMENT.**

50. We find that the additional explanations by the Respondent that the site is predominantly water logged which comes along with complexities in terms of site preparation and the contractor's ability to mobilise are at best submissions at the bar. The said explanations are not contained in the statement of requirements. In any case the Bills of Quantities and Engineering Drawings availed to bidders would suffice to enable the Contractor mobilise effectively and overcome the complexities in terms of site preparation so as to attain the overall project scope and purpose.
51. In ***Arua Municipal Council v Arua United Transporters' SACCO C.A 25 of 2017***, Justice Mubiru held as follows:
"...All bids should be considered on the basis of their compliance with the terms of the solicitation documents, and a bid should not be rejected for reasons other than those specifically stipulated in the solicitation document. There should be no undisclosed preferences, no secret preferences and no discussions or decisions made, except above-board."
52. It is thus our finding that the projects submitted by the Applicant were not of similar nature in terms of either physical size, complexity, methods or technology as required in the bidding document. The

Respondent rightly disqualified the Applicant at the technical evaluation stage.

53. **The Tribunal answers this issue in the negative in favour of the Respondent.**

Issue 5

Whether the information provided by the Applicant in the documents submitted in support of its bid was sufficient in respect to Management Strategies and Implementation Plan (MSIP) and Environmental Social and Management Plan (ESMP)?

54. The Respondent averred that the submission of a satisfactory Management Strategies and Implementation Plan (MSIP) was a mandatory requirement and prayed that the Tribunal finds that the MSIP submitted by the Applicant was materially non-responsive and did not meet the evaluation criteria as stated in the bidding document. Further, that the Environmental Social and Management Plan (ESMP) submitted by the Applicant did not outline strategies to manage the risks.
55. Part 1; Section 2, Bid Data Sheet, ITB 15.1(e) required the bidder to submit Management Strategies and Implementation Plans (MSIP) to manage Environmental, Social, Health and Safety (ESHS) risks. The ITB goes ahead to futuristically state that *“the Contractor shall be required to submit for approval and subsequently implement the Contractor’s Environment and Social Management Plan (C-ESMP), in accordance with the particular conditions of contract sub clause 4.1, that includes the agreed Management Strategies and Implementation Plans (MSIP) described here”*.
56. Page 66 of the October 2021 Evaluation Report indicates amongst reasons for the Applicant’s non responsiveness under **E)**, *“Although GAT Consult submitted an **ESHS Management Plan**, describing some of the actions and management processes etc. that will be implemented by the Contractor, and its subcontractors, their submissions omitted the*

required strategy for obtaining approvals prior to the start of relevant works such as opening a quarry or borrow pit. The **ESHS Management plan** also lacked grievance redress mechanism”

57. We found that the Evaluation Committee adopted a non-existent criteria related to **ESHS Management Plan** in evaluating the Applicant. The Detailed Technical Evaluation at Sub Factor Criteria 6.2.3 on page 34 of the bidding document only required the Applicant to make declarations on Environmental, Social, Health and Safety (ESHS) past performance using form 5B ESHS Performance Declaration. The *Contractor's Environment and Social Management Plan (C-ESMP)* that includes the agreed *Management Strategies and Implementation Plans (MSIP)* is a requirement after the bidder has been successful and is the Contractor.
58. There are no other criteria relating to ESHS. ITB 6.1 relates to Joint Ventures, Consortia and Associations. Therefore, declaring the Applicant's bid non responsive on non-existent criteria is contrary to **Section 71(3) of the Public Procurement and Disposal of Public Assets Act 2003 and Reg 7(1) of the Public Procurement and Disposal of Public Assets (Evaluation) Regulations, 2014.**
59. The Applicant submitted a Management Strategies and Implementation Plan (MSIP). The Tribunal finds that since there was no specific format required in the bidding document, the bidders only had to submit the said plan bearing the requested information. The Tribunal holds that the plan submitted by the Applicant was sufficient.
60. Similar to the Tribunal's resolution on the previous issue, the Tribunal finds that the additional requirements and need for further explanation required by the Respondent did not form part of the bidding document.
61. **The Tribunal answers this issue in the affirmative in favour of the Applicant.**

Issue 6

Whether the decision of the Evaluation Committee to declare M/s Zhonghao Overseas Construction Engineering Co. Ltd and Plumb Base Uganda Ltd JV as the best-evaluated bidder was against the principles of procurement and specifically promotion of value for money as provided for under section 43 and 48 of the Public Procurement and Disposal of Public Assets Act?

62. **Section 52 of the Public Procurement and Disposal of Public Assets Act 2003 as amended** provides that a contract shall be awarded to the bidder with the best-evaluated offer ascertained on the basis of the methodology and criteria detailed in the bidding document.
63. In *Arua Municipal Council v Arua United Transporters' SACCO C.A 25 of 2017*, Justice Mubiru held that:
“The tendered price alone is seldom an accurate indicator for comparison of either the potential contractor’s ability to perform the required task, or the total cost of performing the task over time. Value for money requires a comparison for costs, benefits and alternative outcomes. Other qualitative factors such as the financial strength of the contractor’s business, their past performance and capacity for customer service, along with boosting local economic development.”
64. The Tribunal therefore does not find merit in the Applicant’s averment that the declaration of a bidder who does not have the lowest quoted price as the best-evaluated bidder is contrary to the procurement principle of promotion of value for money.
65. **The Tribunal answers this question in the negative in favour of the Respondent.**

Issue 7

Whether M/s Zhonghao Overseas Construction Engineering Co.

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Ltd and Plumb Base Uganda Ltd JV qualifies to participate under a reservation scheme?

66. **Section 50 (1)** of the **Public Procurement and Disposal of Public Assets Act 2003** provides for preference being given to domestically manufactured goods and Ugandan contractors and consultants to promote their development by giving them competitive advantage when competing with foreign manufactured goods and foreign contractors or consultants.
67. In this case, the bidding documents under paragraph 3 on page 4 indicate that the procurement was under reservation scheme. **Public Procurement and Disposal of Public Assets Authority Guideline on Reservation Schemes No. 1 of 2018** defines a reservation scheme to mean exclusive preference to procure goods, works and services set aside by threshold or sector. Paragraph 1.2 provides that a reservation shall apply to procurements of road works whose estimated cost is UGX 45 Billion and below; and other public works whose estimated cost is UGX 10 Billion and below.
68. **ITB 6.1** on page 10 of the bidding document allows bids to be submitted by a Joint Venture, Consortia and Association as long as a copy of the Joint Venture, Consortium and Association Agreement is attached.
69. **Section 59B of the Public Procurement and Disposal of Public Assets Act 2003**, is emphatic on Reservation schemes. Under **section 59B(2) of the Public Procurement and Disposal of Public Assets Act 2003**, a public procurement contract shall be subject to a reservation scheme in order to—
- (a) *promote the use of local expertise and materials;*
 - (b) *promote the participation of local communities or local organisations; or*
 - (c) *apply specific technologies.*

70. A procuring and disposing entity that intends to make a procurement under a reservation scheme shall deal with only the providers that are eligible to participate in a reservation scheme, in accordance with section 59B(3)(b) of the Act.
71. The PPDA Guideline on reservation schemes to promote local content in public procurement. No 1/2018 recognises providers to mean and include a Joint Venture, Consortia and Association. The Guideline is emphatic that reservations shall apply to benefit national and resident providers.
72. The question to be answered is whether **Zhonghao Overseas Construction Engineering Co. Ltd and Plumb Base Uganda Ltd JV are either national or resident providers.**
73. **Guideline 1.4 of** PPDA Guideline on reservation schemes No 1/2018 states as follows; “*where a bidder is a Joint Venture, Association, Consortium or Partnership, the individual Parties of the bidder shall be national or resident providers*”.
74. Simply put, the individual **providers** in the said Joint Venture **must both** be composed of **either a national provider or resident provider.**
75. A **resident provider** means a provider incorporated in Uganda for at least two years at the time of submission of the bid and is not a national provider. On the other hand, a **national provider** means a provider registered in Uganda and wholly owned and controlled by Ugandans. **See the definition section of the PPDA Guideline on reservation schemes No 1/2018**
76. It is important to note that the key distinguishing factor in the definition of a *national provider* and a *Resident provider* is that a

national provider is basically a provider **not** incorporated in Uganda but **Registered in Uganda** and **wholly owned and controlled by Uganda** where as a Resident provider is a provider **incorporated in Uganda for at least 2 years.**

77. Zhonghao Overseas Construction Engineering Co. Ltd was incorporated in China and was registered in Uganda on 28th June 2007. The Directors of the Company are WANG FEIFEI and MA YONGQUAN.
78. Plumb Base Uganda Ltd was incorporated in Uganda on 12 October 2006. There is no copy of the organisational documents of Plumb Base availed to the Tribunal. However, a registered resolution dated September 14, 2020 indicates that the shareholders of the Company are Muhwezi Dick and Kennedy Momanyi. National IDS of the said Muhwezi Dick and Kennedy Momanyi show that they are Ugandans (see page 7 of the bid by the BEB Vol 1 of 2- Original Copy
79. It is our finding that Zhonghao Overseas Construction Engineering Co. Ltd is a neither a national provider nor a resident provider as defined by the PPDA Guideline on reservation schemes No 1/2018.
80. Whereas it was registered in Uganda, there is no proof that it is wholly owned and controlled by Ugandans so as to qualify as a national provider for purposes of qualifying for or benefitting of reservation schemes. Its Directors even submitted Chinese passports. Section 253(2) of the Companies Act 2012 cited by the Respondent is inapplicable to the facts pleaded in this Application. Section 253 of the Companies Act concerns the effect of a certificate of registration of a foreign company for purposes of applicability of the Companies Act and the power to hold land. The section does not extend to or apply to eligibility for reservation schemes under the Public Procurement and Disposal of Public Assets Act.
81. It is only Plumb Base Uganda Ltd that qualifies as a resident provider
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within the definition provided in the PPDA Guideline on reservation schemes to promote local content in public procurement. No 1/2018.

82. The contents of the Joint Venture Agreement between *Zhonghao Overseas Construction Engineering Co. Ltd* and *Plumb Base Uganda Ltd* indicating interests as 45% and 55% respectively **do not override express provisions of the Public Procurement and Disposal of Public Assets Act 2003** and the PPDA Guideline No 1/2018 on reservation schemes to promote local content in public procurement. and is thus not applicable to the procurement at hand.
83. The Joint Venture of *Zhonghao Overseas Construction Engineering Co. Ltd* and *Plumb Base Uganda Ltd* JV did not and do not qualify for or to benefit of the reservation schemes.
84. This means that *Zhonghao Overseas Construction Engineering Co. Ltd* and *Plumb Base Uganda Ltd* JV should have been disqualified at the preliminary evaluation stage based on the criteria in Part 1; Section 3, Evaluation Criteria and Methodology, 3 Eligibility Criteria, 3.2(d)(e) of the bidding document.
85. **This question is resolved in the negative in favour of the Applicant.**

Issue 8

Whether the Applicant presented the best bid in comparison with the best-evaluated bidder and should be declared so?

86. In response to this issue, the Tribunal holds that it is not the function of the Tribunal to evaluate bids, as that is the preserve of the Evaluation Committee of a procuring and disposing entity.
87. Issue no. 8 is answered in the negative.
88. **The Tribunal answers this issue in the negative.**

Issue 9

What Remedies Available are available to the parties.

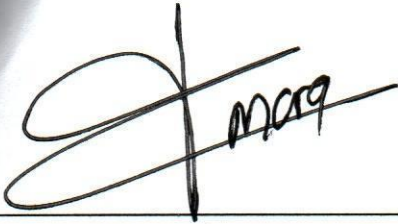
The outcome of our findings in this decision is that both the Applicant and the Best Evaluated Bidder were not qualified for an award in this procurement.

This being a merits review tribunal with power to set aside the original decision and substitute a new decision of its own. For the reasons above, it behoves the Tribunal to cancel the procurement.

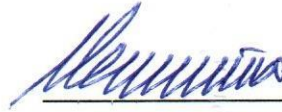
G. DISPOSITION

1. The Application partially succeeds.
2. The decision of the Accounting Officer is set aside.
3. The procurement process is hereby cancelled and the entity is advised to re-tender if it so wishes.
4. The Tribunal's suspension order dated November 23, 2021 is vacated.
5. The Entity must refund the administrative review fees paid by the Applicant.
6. Each Party to bear its own costs.

Dated at Kampala this 13th day of December 2021.



FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER