

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

APPLICATION NO. 16 OF 2021

BETWEEN

K-SOLUTIONS LTD=====APPLICANT

AND

MINISTRY OF ENERGY AND MINERAL DEVELOPMENT=====RESPONDENT

**APPLICATION FOR REVIEW IN RESPECT OF THE PROCUREMENT FOR THE
SUPPLY, INSTALLATION AND COMMISSIONING OF INFRASOUND STATION
EQUIPMENT AT ENTEBBE UNDER PROCUREMENT REFERENCE NO.
MEMD/SUPLS/2020-21/00006/DGSM**

**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 17th July 2020, the Ministry of Energy and Mineral Development (the Entity) initiated the procurement for the supply, installation and commissioning of Infrasound Station Equipment at Entebbe at the estimated cost of UGX 3,916,316,400/=.
2. On 11th August 2020, the Contracts Committee approved the open domestic bidding method, the bidding document and Evaluation Committee for the procurement. The Bid Notice for the said procurement was advertised on page 43 of the New Vision Newspaper of Monday, February 1, 2021.
3. On March 2, 2021, the Ministry of Energy and Mineral Development published a bid notice in the New Vision Newspaper extending the deadline for bid submission from 3rd March 2021 to 16th March 2021.
4. The Entity issued the solicitation documents to a total of five (5) companies i.e. Eagle Scientific Ltd, EnviroEarth, Ace Consult Ltd, All in Trade, and K-Solutions Ltd.
5. On 16th March 2021, the Entity received bids from only three (3) companies. The submitted bids were opened and prices read out as follows: EnviroEarth (UGX 3,669,910,384.92), Ace Consult Ltd (UGX 4,471,250,000) and K-Solutions (USD 704,305).
6. On 16th April 2021, the Best Evaluated Bidder Notice was issued recommending EnviroEarth for award of contract at a bid price of UGX 3,669,910,384.92. The bid submitted by K-Solutions Ltd was judged unsuccessful for offering a bid price in United States Dollars as opposed to Uganda Shillings as was stated in ITB 14.7 of the bidding document. The removal date of the Best Evaluated Bidder Notice was indicated as 29th April 2021.
7. On 6th May 2021, K-Solutions Ltd (the Applicant) applied for administrative review to the Accounting Officer of the Entity, who rejected the Application. The Applicant then applied to the Public Procurement and Disposal of Public Assets Authority (the Authority) for review of the decision of the Accounting Officer on 19th May 2021. The Authority, in its decision dated 16th June 2021, directed the Entity to re-evaluate the bids.

8. A re-evaluation of the bids, as directed by the Authority, was conducted by the Entity. According to the Evaluation Report dated 8th July 2021, K-Solutions was eliminated at the detailed evaluation stage and EnviroEarth was recommended for award of contract at a bid price of UGX 3,669,910,384.92.
9. On 2nd August 2021, the Best Evaluated Bidder Notice (NOBEB) that was displayed indicated that the Applicant had failed at the detailed technical evaluation stage regarding the required technical specifications for Wind Noise Reduction System (WNRS), Data Central Management Unit, and Infrasound Array Data Cables (Fiber Optics and Power Cables). The removal date of the Best Evaluated Bidder Notice was indicated as 17th August 2021.
10. On 4th August 2021, K-Solutions Ltd wrote a letter to the Accounting Officer of the Entity, requesting for details of the technical areas on which it was disqualified. By letter dated 10th August 2021, the Entity instead invited the Applicant for a meeting in which the Applicant would be debriefed on the details of the evaluation. The meeting was scheduled for 12th August 2021. The Applicant attended the meeting but was dissatisfied.
11. On 16th August 2021, the Applicant applied for administrative review to the Accounting Officer who in a letter dated 25th August 2021 and addressed to the Applicant, submitted details of non-conformities in the Applicant's bid but also informed the Applicant that the procurement was overtaken by events following the expiry of project funding at the end of the Financial Year 2020/21.
12. On 8th September 2021, the Applicant filed the instant Application before the Tribunal to challenge the outcome of the entire procurement process.

B. Application to the Tribunal

1. The Applicant avers that it met all the technical qualification criteria required of bidders in this procurement and that its bid was technically compliant. That its bid was unjustly treated in the evaluation process.
2. The Applicant argued that it was legally untenable and improper for a bid to automatically expire at the end of the financial year for one bidder yet later be awarded to another bidder in a subsequent year.

3. That the Respondent be ordered to refund the administrative review fees that had been paid by the Applicant in its application to the Accounting Officer.
4. The Applicant averred that it had suffered prospective loss in the form of loss of chance of winning the procurement contract and the profit thereunder in the sum of UGX. 1,290,000,000 representing half of the contract price.
5. Further, that the Applicant had suffered loss of UGX. 50,000,000 being actual money spent in participating in the procurement process including bid security.
6. That the Applicant had been greatly inconvenienced in having to challenge the illegal process through administrative review before the Accounting Officer and the Authority and is therefore entitled to general damages.
7. The Applicant named the Ministry of Energy and Mineral Development as the Respondent to the Application.

C. Reply to the Application

8. The Respondent argues that the Applicant misrepresented several facts in its Application and is not entitled to the reliefs it seeks from the Tribunal.
9. The Respondent raised preliminary objections to the Application stating that the Application has been overtaken by events and therefore, improperly brought before the Tribunal. The Respondent further stated that the Application was filed outside the statutory time limit provided under Section 91I of the PPDA Act, 2003 as amended by the PPDA (Amendment) Act, 2021.
10. The Respondent submitted that it carried out the re-evaluation of all bids as directed by the Authority in accordance with the bidding document, the law, and principles of justice, fairness, and transparency. That the Applicant's bid was marred with several non-conformities regarding the technical specifications and requirements of the bidding document.
11. That the Applicant's bid was substantially non-responsive to the requirements of the bidding document and that the Evaluation Committee reached a correct conclusion having found the Applicant's bid technically non-compliant and non-responsive.
12. That the Applicant is not entitled to any of the remedies it seeks and the Application be dismissed.

D The oral hearing

The Tribunal held an oral hearing on 23rd September 2021 via zoom software. The appearances were as follows:

1. Advocate Allan Bariyo, appearing jointly with Advocate Proscovia Kunihira and Bob Kabaziguruka, a Director of K-Solutions Ltd represented the Applicant.
2. The Respondent was represented by Counsel Loyola R. Karobwa, the Mining Lawyer at the Entity; Mugunga Emmanuel Freddie the Under Secretary/Accounting Officer; Andrew Aribaruho, the Head Procurement and Disposal Unit; Jospheh Nyago, Geophysicist and Technical Member; Sentongo Frederick, Senior Procurement Officer; and Fred Kigereigu, Principal Geologist and Technical Member.
3. The Best Evaluated Bidder was represented by Advocate Silver Kayondo appearing jointly with Advocate Solomon Byoruganda, Ednah Ruth Ninsiima, the in-house counsel for EnviroEarth, Moses Dalla, a representative of EnviroEarth's Managing Director and Cyndie Bellet, the Chief Finance Officer and Chief Operations Officer of EnviroEarth.

E. SUBMISSIONS

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

Applicant

2. The Applicant averred that it met all the technical qualification criteria required of bidders in this procurement and that its bid was technically compliant. That its bid was unjustly treated in the evaluation process.
2. The Applicant argued that it was legally untenable and improper for a bid to automatically expire at the end of the financial year for one bidder yet later be awarded to another bidder in a subsequent year.
3. That the Respondent be ordered to refund the administrative review fees that had been paid by the Applicant in its application to the Accounting Officer.
4. The Applicant averred that it had suffered prospective loss in the form of loss of chance of winning the procurement contract and the profit thereunder in the sum of UGX.

1,290,000,000 representing half of the contract price.

5. Further, that the Applicant had suffered loss of UGX. 50,000,000 being actual money spent in participating in the procurement process including bid security.
6. That the Applicant had been greatly inconvenienced in having to challenge the illegal process through administrative review before the Accounting Officer and the Authority and is therefore entitled to general damages.
7. The Applicant through his lawyer further filled a written rejoinder to the submissions of the Respondent in which it;
 - a) reiterated its submission that the Respondent had not provided details on which the Applicant's bid was disqualified and made rebuttals to para 3.6, Table 1 of respondent's reply and submissions on the technical evaluation.
 - b) contended that the instant Application was filed with the Tribunal, within the timeline stipulated in **Section 91I (2) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021.**
 - c) submitted that the Respondent having opted not to appeal the Authority's decision is estopped from challenging the said decision through this instant Application.
 - d) contended that the facts as pleaded in this Application by the Applicant have not been rebutted and are therefore deemed admitted as per the decision of *Marvin Baryaruha Vs. AG, Misc Cause No. 149 of 2016.*
 - e) contended that Respondent's Ministerial Policy Statement for Financial Year 2020/21 of March 15, 2021 (*which was attached to the rejoinder*), at page 21, 91 on output: 030577 purchase of specialised machinery and equipment includes budget amounts to procure specialised equipment for infrasound network and annual workplans for said activity
 - f) submitted that its bid and bid security was still valid, the procurement process was still on going and that formed the legal basis of its unilateral extension of its bid validity period.
 - g) concluded that the Applicant is entitled to damages and costs as provided for under the Advocates Act and Regulations made thereunder

Respondent

8. The Respondent argued that the Applicant misrepresented several facts in its Application and is not entitled to the reliefs it seeks from the Tribunal.
9. The Respondent raised preliminary objections to the Application stating that the Application has been overtaken by events and therefore, the Application before the Tribunal is a futile exercise. The Respondent further stated that the Application was filed outside the statutory time limit provided under Section 91I of the PPDA Act, 2003 as amended by the PPDA (Amendment) Act, 2021.
10. The Respondent submitted that it carried out the re-evaluation of all bids as directed by the Authority in accordance with the bidding document, the law, and principles of justice, fairness, and transparency. That the Applicant's bid was marred with several non-conformities regarding the technical specifications and requirements of the bidding document.
11. That the Applicant's bid was substantially non-responsive to the requirements of the bidding document and that the Evaluation Committee reached a correct conclusion having found the Applicant's bid technically non-compliant and non-responsive.
12. The Accounting Officer of the Respondent in his submission, challenged the legality of the Authority's decision made on June 16, 2021 regarding the directive that the Respondent converts the Applicant's offered bid price from United States Dollars to Uganda Shillings, which in his opinion was contrary to ITB 14.7 of the bidding document and was the genesis of all the challenges of administrative review that they have with the Applicant.
13. The Respondent's Head Procurement and Disposal Unit submitted that the Respondent was unable to communicate the expiry of project funding as indicated in the budget call circular issued by the Ministry of Finance, Planning and Economic Development because the Authority had ordered the Entity to suspend the entire procurement process following the Applicant's application for administrative review before the Authority.
14. That the Applicant is not entitled to any of the remedies it seeks and the Application be dismissed

The Best Evaluated Bidder

15. The Best Evaluated Bidder filed supplementary remarks and adopted its written submission dated September 13, 2021.

16. The Best Evaluated Bidder submitted that evaluation of bids is conducted in accordance with the evaluation criteria and no other criteria may be used in evaluation as per Regulation 7(1) and (2) of the *Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014*. It cited the Tribunal decision of ***International Business Solutions Ltd vs. PPDA & Ministry of Finance, Planning and Economic Development, Application No.21 of 2018*** to buttress its submissions.
17. The Best Evaluated Bidder further submitted that the Solicitor General had cleared the draft Contract to be executed between the Best Evaluated Bidder and the Respondent on August 3, 2021 and there was no reason why the said contract should not be signed and executed.
18. The Best Evaluated Bidder prayed that the Application be dismissed and the Best Evaluated Bidder be awarded costs for defending the Application.

F. RESOLUTION BY THE TRIBUNAL

Preliminary Objection

1. The Tribunal has considered the submissions of all parties. The Tribunal first will deal with the preliminary point of law raised by the Respondent.
2. The Respondent at paragraph 2.1 of its Response to the Application raised a preliminary objection regarding the competence of the Application stating that the Application has been overtaken by events and therefore, is improperly brought before the Tribunal. The Respondent at paragraph 2.2 of its Response to the Application further stated that the Application was filed outside the statutory time limit provided under Section 91I of the PPDA Act, 2003 as amended by the PPDA (Amendment) Act, 2021.
3. The pertinent question to be determined by the Tribunal at this point therefore is whether there is a valid and competent Application before the Tribunal. It is trite law that points of law can be raised at any stage of the proceedings whether or not they were pleaded in the pleadings. See ***Yaya vs Obur & Ors (Civil Appeal-2018/81) [2020] UGHC 165***.
4. A pure point of law is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. See ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696***.

5. The term *locus standi* literally means a place of standing. It means a right to appear in court, and, conversely, to say that a person has no *locus standi* means that he has no right to appear or be heard in a specified proceeding. To say that a person has no *locus standi* means the person cannot be heard, even on whether or not he has a case worth listening to. See *Njau & Others vs. City Council Of Nairobi [1976–1985] 1 EA 397 at 407.*
6. In ***OWNERS OF MOTOR VESSEL “LILLIAN S” VS CALTEX OIL (KENYA) LTD (1989) KLR 1***, Justice Nyarangi JA (as he then was) stated:

“.....A question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, court has no power to make one more step. Where court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction”
7. The Tribunal has recently held in ***Beautiful Engineering & Equipment Ltd vs. Uganda Electricity Transmission Company Limited Application No.15 of 2021*** that it is duty bound to inquire into the existence of the facts in order to decide whether it has jurisdiction. This is because Jurisdiction must be acquired before judgment is given. As such, the Tribunal must inquire into the facts of whether the Applicant has locus to file an Application before it and secondly whether the Tribunal is seized or clothed with Jurisdiction to interrogate the merits of Application before it.
8. Regarding Locus of the Applicant, **Section 89 (1) of the Public Procurement and Disposal of Public Assets (Amendment) Act 2021** 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”*.
9. **Regulations 4(1) and 4(2) of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014** provide ample guidance on whom a complaint must be addressed to and what a valid complaint is made of.
10. **Section 89 (1) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** is meant to provide administrative relief to a bidder who is *aggrieved by a decision of a procuring and disposing entity.*
11. A bidder for purposes of public procurement and disposal in Uganda is defined under **section 3 of the Public Procurement and Disposal of Public Assets Act 2003** as a

physical or artificial person intending to participate or participating in public procurement or disposal proceedings.

12. There are only four instances under which the Tribunal can exercise its jurisdiction. These instances are provided for under **sections 89(8) and 89(9) of the PPDA Act, 2003** read together with **section 91I(1)(a)-c) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021**, namely:
 - a) *Where an Accounting Officer does not make a decision or communicate a decision within the period specified in subsection (7), or*
 - b) *where a bidder is not satisfied with the decision made by the Accounting Officer under section 89(8), or*
 - c) *Where a bidder believes that the Accounting Officer has a conflict of interest in respect of the complaint, omission or breach that would be made under this section; or*
 - d) *where a Bidder believes that the matter cannot be handled impartially by the procuring and disposing entity.*
13. It is very clear that the Applicant by its letter dated August 16, 2021, applied for administrative review to the Accounting Officer. However, by that date the bids for the impugned procurement had all expired by at least 45 days as per **ITB 20.1** of the bidding document which states that the bid validity period shall be up to 2nd July 2021. There was no evidence to availed to the Tribunal that indicated that the Respondent had requested the parties to extend the validity of their bids.
14. The Applicant's Bid Submission Sheet dated March 16, 2021 at paragraph (e) stated that *"Our bid shall be valid for a period of up to 02/07/2021 from the date fixed for the bid submission deadline in accordance with the Bidding Document and it shall remain binding upon us and may be accepted at any time before the expiration of that period"*
15. Bid extension is provided for under **Regulation 52(5) of the PPDA (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014**). The provision is to the effect that where an extension to the bid validity period becomes necessary, a bidder shall be requested by a procuring and disposing entity in writing before the expiry of the validity of their bid, to extend the bid validity for a specified period beyond what is stated in the bidding document. It is worthy to note that requests for extension of bid validity applies to all bidders in a procurement process and it is not exclusive to a single bidder. After receiving the Applicant's first application for administrative review on 7th May 2021, the Accounting Officer of the respondent had power to request all bidders to extend the

validity of their bids in order to cater for the period of the administrative review process.

16. Sections 89(5) and (6) of the **Public Procurement and Disposal of Public Assets Act as amended by 15 of 2021** now explicitly obligates an Accounting Officer on receiving a complaint to immediately suspend the procurement or disposal process and request the bidders to extend the period of the bid validity and bid security for the duration of the suspension. This requirement came into force on 1st July 2021.
17. There is no evidence adduced to show that there was a request to all bidders by the Accounting Officer of the Respondent to extend bid validity beyond 02/07/2021 as stated in the bidding document and as provided for under the law. The omission to request bid extension is the fault of the Respondent's Accounting Officer. Unfortunately, it leaves our hands tied because we have no jurisdiction to handle an application filed by an Applicant who is no longer a bidder within the meaning of sections 3 and 91I (1) (a) of the **Public Procurement and Disposal of Public Assets Act as amended by 15 of 2021**.

The Tribunal dealt with a similar matter in *Hoima Taxi/Bus Owners & Drivers Saving & Credit Cooperative Society vs PPDA Application No.5 of 2014* where bids in the said Application had expired and Hoima District Council did not request bidders to extend their bids. The Tribunal held that there was no valid bid.

18. Reverting to this application, it is our finding that that once the bids expired on 2nd July 2021, there were no longer any valid bids. Consequently, the Applicant had no *locus standi* to apply for administrative review to the Accounting Officer through its letter dated 16th August 2021.
19. It is immaterial that the Applicant had by a letter dated 29th June 2021 purported to extend the validity of its bid period for another period of 120 days to 30th October 2021. It is further immaterial that the Bid Security of the Applicant was extended by the Applicant's Bankers NCB Bank on 31st August 2021 to 30th November 2021.
20. The Tribunal noted that the Applicant had paid Administrative Review fees to the Respondent on 12th August 2021 through Centenary Rural Development Bank Limited worth UGX 5,000,000/= in accompaniment of its Complaint of 16th August 2021. The Applicant requested for a refund of the said Administrative review fees in its Application to the Tribunal.
21. The Tribunal, in line with **Regulation 11(2) & (3) of the Public Procurement and Disposal of Public Assets (Administrative Review) Regulations, 2014** finds that the

said administrative review fees are not refundable to the Applicant because the Applicant's complaint was not upheld by the Accounting Officer.

22. Having concluded that the Applicant had no *locus standi* to file a complaint before the Accounting Officer and consequently no *locus standi* to file an Application for Administration Review before the Tribunal on account of expired bid, it is prudent to analyse the purpose of bid validity and its consequence on an Application before the Tribunal.
23. The purpose of the bid validity is stipulated in **Regulation 53(3) of the Public Procurement and Disposal of Public Assets (Rules and Methods for Procurement of Supplies, Works and Non-Consultancy Services) Regulations, 2014.**
24. Expiry of a bid's validity is a matter of law and the Tribunal has consistently held that "*Once the bid validity expires, the procurement process comes to an end. By the time this application for review was made, the bid had expired thereby putting an end to the procurement process in question*". Any Applicant based on an expired bid is incompetent. See Tribunal Decisions in *Kasokoso Services Limited vs. Jinja School Of Nursing And Midwifery Application No.13 of 2021*; *Acacia Place Ltd vs. PPDA & Electoral Commission Application No. 10 of 2021*; *Kazini Fredric vs. PPDA Application No. 16 of 2015*; and *Twed Property Development Limited vs. PPDA Application No. 9 of 2015*.
25. Needless to say, the Applicant's Application to the Tribunal is incompetent because the Applicant was not a bidder properly so called by the time it lodged its application before the Tribunal. **The Tribunal therefore has no jurisdiction to entertain this Application.**
26. The Tribunal has taken note of the Respondent's averment that the procurement was overtaken by events following the expiry of project funding at the end of the Financial Year 2020/21 vide the 2nd budget call circular issued by the Ministry of Finance, Planning and Economic Development dated February 15, 2021.
27. In our view, a Budget Call Circular does not cancel bids within the meaning of **Section 91I (3)(a) of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021.** The Budget Call Circular only forms the basis upon which the procuring and disposal entity could take steps to reject or cancel the bids.
28. The procedure for cancellation of procurement and disposal processes and rejection of bids is provided for under **Section 75 of the Public Procurement and Disposal of Public Assets Act 2003** which stated as follows;

“A procuring and disposing entity may reject any or all the bids at any time prior to the award of a contract”

29. Upon coming into force of the **Public Procurement and Disposal of Public Assets (Amendment) Act 2021** on July 1, 2021, the wording of the said **Section 75** of the **Public Procurement and Disposal of Public Assets Act 2003** was substituted in its entirety by the **Public Procurement and Disposal of Public Assets (Amendment) Act 15 of 2021** with an elaborate procedure and reasons for cancellation of procurement and disposal processes and rejection of bids, which now states as follows;

75. Cancellation of procurement and disposal processes and rejection of bids

(1) A procuring and disposing entity may, on the approval of the Contracts Committee, cancel a procurement process or a disposal process at any time, before a contract is awarded to the best evaluated bidder, as may be prescribed.

(2) A procurement process may be cancelled where—

a) the money available for the procurement is not adequate;

b) there is a significant change in the technical details or circumstances of the procurement requirement; or

c) the circumstances that gave rise to the request for procurement change significantly.

(3) A procuring and disposing entity may reject a bid during the evaluation stage, as may be prescribed.”

30. Unfortunately, despite the existence of the said information in the budget call circular as early as 15th February 2021, the Respondent did not take any steps to cancel the whole procurement in accordance with either **Section 75** of the **Public Procurement and Disposal of Public Assets Act 2003** or using the elaborate procedures stated in **Section 75 of the Public Procurement and Disposal of Public Assets Act as amended by Act 15 of 2021** since the applicability of both sections were available to the Respondent in the period before or after July 1, 2021.
31. The Respondent did not attempt to bring the adverse information contained in the Budget Call Circular to the attention of all affected bidders contrary to principles of transparency, accountability and fairness stipulated in **Section 43 and 45 of the Public Procurement and Disposal of Public Assets Act 2003**. The reliance on the Budget Call Circular dated 15th February 2021 by the Respondent was therefore misconceived.
32. The Tribunal finds that an Application before the Tribunal by the Applicant without *locus standi* is incompetent and incurably defective. The preliminary objection is upheld and the Application is accordingly struck out.
33. Having so decided, the Tribunal finds no need to delve into the merits of the case.

G. DISPOSITION

1. The Application is struck out.
2. The Tribunal's suspension order dated 8th September 2021 is vacated.
3. Each Party to bear its own costs.

Dated at Kampala this 27th day of September 2021.



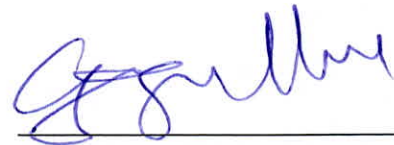
FRANCIS GIMARA S.C
CHAIRPERSON



NELSON NERIMA
MEMBER



THOMAS BROOKES ISANGA
MEMBER



GEOFFREY NUWAGIRA KAKIRA
MEMBER



PAUL KALUMBA
MEMBER