VTS GAHARA v SORAS ASSURANCE GENERALE

[Rwanda URUKIKO RW'UBUJURIRE – RCOMAA 00052/2018/CA (Mukandamage, P.J.) 07 Kamena 2019]

Amategeko agenga amasezerano – Amafaranga yishyurwa mbere yo gutangira imirimo – Umwishingizi ntaryozwa amafaranga yo gutangira imirimo mu gihe uwishingiwe yayakoresheje icyo yagenewe kandi n'uyasaba atagaragaza ko yaba yarakoreshejwe mu yindi mirimo idafitanye isano n'iyasabiwe ubwishingizi.

Incamake y'ikibazo: VTS Gahara Ltd yareze SORAS AG Ltd mu Rukiko rw'Ubucuruzi rwa Nyarugenge ivuga ko ku wa 28/11/2013 yagiranye na Kingdom Engineering Group of Company Ltd **(**KEGCOM Ltd) amasezerano y'isoko ryo kuyubakira ishuri Saint Athanase vocational and technical school, ariko ntiyarangiza imirimo yari iteganyijwe, ko KEGCOM Ltd nayo yagiranye amasezerano y'ubwishingizi na SORAS AG Ltd yishingira ko mu gihe cyose KEGCOM Ltd izakoresha mu bindi 60.000.000 Frw ihawe yo gutangiza imirimo, izayishyura VTS Gahara, ko ariko SORAS AG Ltd yasabwe gutanga ayo mafaranga ntiyabikora.

Urubanza rwaciwe SORAS AG Ltd ititabye maze Urukiko rwa Nyarugenge rwemeza ko KEGCOM Ltd itubahirije amasezerano y'ubwubatsi yagiranye na VTS Gahara Ltd, ko rero SORAS AG Ltd igomba guha VTS Gahara Ltd 60.000.000 Frw y'ingwate y'ubwishingizi.

SORAS AG Ltd yajuririye u mu Rukiko Rukuru rw'Ubucuruzi rwemeza ko urubanza rwaciwe n'Urukiko rw'Ubucuruzi ruhindutse kuko rwasanze ubwishingizi KEGCOM Ltd yafashe muri SORAS AG Ltd bureba gusa ‘‘avance de demarrage‘‘, butareba imirimo yose ikubiye mu masezerano VTS Gahara Ltd yagiranye na KEGCOM Ltd.

VTS Gahara Ltd yajuririye urwo rubanza mu Rukiko rw'Ikirenga ariko rwimurirwa mu Rukiko rw'Ubujurire bitewe n'ububasha bw'inkiko bwari bwahindutse. VTS Gahara Ltd yavugaga ko Urukiko Rukuru rw'Ubucuruzi rwemeje ko SORAS AG Ltd itagomba kurebwa n'amasezerano yabaye hagati ya VTS Gahara Ltd na KEGCOM Ltd kandi atari byo, ko kandi rwasobanuye nabi "avance de démarrage", naho SORAS AG Ltd ikavuga ko yishingiye amafaranga 60.000.000 KEGCOM Ltd yahawe yo gutangiza imirimo, ko kandi ayo mafaranga yakoreshejwe icyo yari yatangiwe.

Incamake y'icyemezo: 1. Amafaranga yishyurwa mbere yo gutangira imirimo yarakoreshejwe imirimo y'ubwubatsi kandi na nyiri bikorwa agakomeza kwishyura ibindi byiciro bumvikanyeho; umwishingizi ntiyayaryozwa mu gihe uyishyuza atabasha kugaragaza ko yakoreshejwe indi mirimo itari iy'ubwubatsi.

Ubujurire nta shingiro bufite.
Ubujurire bwuririye ku bundi bufite ishingiro.
Amagarama ahwanye n'ibyakozwe mu rubanza.

Amategeko yashingiweho:

Itegeko N^{o} 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano, ingingo ya 64

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Mu Rukiko rw'Ubucuruzi rwa Nyarugenge, VTS Gahara Ltd yareze SORAS AG Ltd, ivuga ko ku wa 28/11/2013 yagiranye na Kingdom Engineering Group of Company Ltd **(**KEGCOM Ltd) amasezerano y'isoko ryo kuyubakira ishuri Saint Athanase vocational and technical school, ariko ntiyarangiza imirimo yari iteganyijwe, ko KEGCOM Ltd nayo yagiranye amasezerano y'ubwishingizi na SORAS AG Ltd yishingira ko mu gihe cyose KEGCOM Ltd izakoresha mu bindi 60.000.000 Frw ihawe yo gutangiza imirimo, izayishyura VTS Gahara, ko ariko SORAS AG Ltd yasabwe gutanga ayo mafaranga ntiyabikora.

[2] Mu rubanza no RCOM 00070/2017/NYGE rwaciwe SORAS AG Ltd idahari, Urukiko rwemeje ko KEGCOM Ltd itubahirije amasezerano y'ubwubatsi yagiranye na VTS Gahara Ltd, ko rero SORAS AG Ltd igomba guha VTS Gahara Ltd 60.000.000 Frw y'ingwate y'ubwishingizi bw'avansi yishyuwe ku isoko ryo kubaka ishuri KEGCOM Ltd yari yahawe na VTS Gahara Ltd, 500.000 Frw y'igihembo cya Avoka na 100.000 Frw y'ikurikiranarubanza.

[3] SORAS AG Ltd yajuririye urwo rubanza mu Rukiko Rukuru rw'Ubucuruzi, ruca urubanza no RCOMA 00401/2017/HCC ku wa 07/06/2017, rwemeza ko urubanza rwajuririwe ruhindutse, kuko rwasanze ubwishingizi KEGCOM Ltd yafashe muri SORAS AG Ltd bureba gusa ''avance de demarrage'', butareba imirimo yose ikubiye mu masezerano VTS Gahara Ltd yagiranye na KEGCOM Ltd. Rwasanze kandi ibiteganyijwe mu ngingo ya 11 y'ayo masezerano ko ubwishingizi bugomba gukomeza kugeza ku iyakirwa ry'agateganyo ry'imirimo y'ubwubatsi bitareba SORAS AG Ltd kuko nta ruhare yagize mu ikorwa ry'ayo masezerano, rutegeka VTS Gahara Ltd guha SORAS AG Ltd 1.000.000 Frw y'igihembo cya Avoka n'ikurikiranarubanza, ikayisubiza n'igarama yishyuye itanga ikirego.

[4] VTS Gahara Ltd yajuririye urwo rubanza mu Rukiko rw'Ikirenga ivuga ko Urukiko Rukuru rw'Ubucuruzi rwemeje ko SORAS AG Ltd itagomba kurebwa n'amasezerano yabaye hagati ya VTS Gahara Ltd na KEGCOM Ltd kandi atari byo, ko kandi rwasobanuye nabi "avance de démarrage", naho SORAS AG Ltd ikavuga ko yishingiye amafaranga 60.000.000 KEGCOM Ltd yahawe yo gutangiza imirimo, ko kandi ayo mafaranga yakoreshejwe icyo yari yatangiwe.

[5] Urubanza rwahawe no RCOMAA 00012/2018/SC, ruza kwimurirwa mu Rukiko rw'Ubujurire ruhabwa no RCOMAA 00052/2018/CA hashingiwe ku biteganywa n'ingingo ya 105 y'Itegeko no 30/2018 ryo ku wa 02/06/2018 rigena ububasha bw'inkiko, ruburanishwa mu ruhame ku wa 17/04/2019 VTS Gahara Ltd iburanirwa na Me BOKANGA Aimé, naho SORAS AG Ltd ihagarariwe na Me MUKANZIGIYE Donatille.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURA RYABYO

a. Kumenya niba amasezerano y'ubwubatsi VTS Gahara Ltd yagiranye na KEGCOM Ltd yagira ingaruka kuri SORAS AG Ltd kubirebana n'igihe ubwishingizi yahaye KEGCOM Ltd bwagombaga kumara

[6] Me BOKANGA Aimé, uhagarariye VTS Gahara Ltd, avuga ko Urukiko Rukuru rw'Ubucuruzi rwakoresheje nabi ingingo ya 113 y'Itegeko n° 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano iteganya ko amasezerano agira inkurikizi ku bayagiranye, maze ruvuga ko SORAS AG Ltd nta ruhare yagize mu ikorwa ry'amasezerano yabaye hagati ya VTS Gahara Ltd na KEGCOM Ltd, rwirengije uko amasezerano y'ubwishingizi VTS Gahara Ltd yaregeye nka "bénéficiaire" ateye, cyane cyane ku ruhande rwa SORAS AG Ltd aho yemeye ko izishyura 60.000.000 Frw ishingiye ku masezerano yabaye hagati ya VTS Gahara Ltd na KEGCOM Ltd ateganya ko ubwishingizi bugomba gutangwa kuva imirimo itangira kugeza yakiriwe by'agateganyo, ko kandi SORAS AG Ltd yemeye ko mu gihe cyose VTS Gahara Ltd izandika ivuga ko imirimo itakozwe, ayo mafaranga izayishyura.

[7] Akomeza avuga ko Urukiko Rukuru rw'Ubucuruzi rwavuze ko "avance de demarrage" itareba irangiza ry'isoko ryose, nyamara yari gukomeza gutangwa kugeza igihe hamurikiwe imirimo yakozwe by'agateganyo nk'uko biteganywa n'ingingo ya 11 y'amasezerano yari hagati ya KEGCOM Ltd na VTS Gahara Ltd.

[8] Me MUKANZIGIYE Donatille, uhagarariye SORAS AG Ltd, avuga ko impamvu y'ubujurire ya VTS Gahara Ltd nta shingiro ifite, kuko ibisobanuro byatanzwe n'Urukiko Rukuru rw'Ubucuruzi byashingiye ku masezerano impande zombi zagiranye. Asobanura ko igihuje VTS Gahara Ltd na SORAS AG Ltd ari amasezerano y'ubwishingizi no DCO 30155 yo ku wa 24/12/2013, aho yishingiye 60.000.000 Frw VTS Gahara Ltd yishyuye KEGCOM Ltd mbere yo gutangira imirimo y'ubwubatsi bw'ishuri ryayo, SORAS AG Ltd yemera ko mu gihe ayo mafaranga yakoreshwa ikindi kintu kitari ubwubatsi yayishyura.

[9] Akomeza avuga ko ibyo VTS Gahara Ltd ivuga ko ubwishingizi bwagombaga kugeza igihe imirimo y'ubwubatsi yakiriwe by'agateganyo (réception provisoire) nta shingiro bifite, kubera ko, harebwe agaciro kose k'isoko kangana na 229.074.400 Frw, imirimo yakozwe ingana na 153.074.000 Frw, bikaba rero byumvikana ko 60.000.000 Frw y'ubwishyu bwa mbere SORAS AG Ltd yishingiye yakoreshejwe ibyo yagombaga gukora, kuko na VTS Gahara Ltd itigeze isaba kuyishyurwa ku mpamvu y'uko KEGCOM Ltd yaba yarayakoresheje mu bindi. Yongeraho ko andi mafaranga VTS Gahara Ltd yishyuye KEGCOM Ltd mu byiciro byakurikiyeho atigeze asabirwa ubwishingizi, ko kandi SORAS AG Ltd itigeze yishingira ko KEGCOM Ltd izarangiza neza imirimo yasezeranye gukora (bonne fin), ikaba rero ntacyo yasabwa kwishyura VTS Gahara Ltd.

UKO URUKIKO RUBIBONA

[10] Ingingo ya 64 y'Itegeko no 45/2011 ryo ku wa 25/11/2011 iteganya ko: ''Amasezerano akozwe ku buryo bukurikije amategeko aba itegeko ku bayagiranye. Ashobora guseswa ari uko babyumvikanyeho cyangwa ku mpamvu zemewe n'amategeko. Agomba kubahirizwa nta buriganya''. Naho ingingo ya 113 yaryo iteganya ko: ''Amasezerano agira inkurikizi ku

bayagiranye gusa, ntabangamira undi wese kandi amugirira akamaro gusa mu biteganyijwe bijyanye no gusezerana ibifitiye undi akamaro“.

[11] Izi ngingo zumvikanisha ko amasezerano akozwe mu buryo bukurikije amategeko aba itegeko ku bayagiranye kandi ari bo gusa agiraho inkurikizi, ko agirira undi muntu akamaro gusa mu biyateganyijwemo bimufitiye akamaro.

[12] Nk'uko bigaragara mu ngingo ya 2 n'iya 11 y'amasezerano VTS Gahara Ltd yagiranye na KEGCOM Ltd, bumvikanye ko igiciro cy'isoko ari 229.074.400 Frw akubiyemo ibyo igomba kwishyura n'imisoro, azishyurwa mu byiciro 4, ko icyiciro cya mbere kingana na 60.000.000 Frw KEGCOM Ltd izayahabwa mbere yo gutangira imirimo ikayafatira garanti muri banki 100%, izageza igihe imirmo yakiriwe by'agateganyo, ko icyiciro cya kabiri kingana na 57.390.000 Frw izakishyurwa imaze kubaka inzu zo kuraramo, igiye gutangira iyo gufunguriramo, igikoni n'ubwiherero, hanyuma n'ibindi byiciro bigakurikiraho kugera imirimo y'ubwubatsi yose irangiye. Ayo mafaranga yaratanzwe, ku buryo ubwo amasezerano yaseswaga, imirimo KEGCOM Ltd yari imaze kwishyurwa yari ifite agaciro ka 153.074.000 Frw, isabwa gusubiza 76.000.000 Frw nk'uko bigaragara ku mugereka w'ibaruwa VTS Gahara Ltd yandikiye SORAS AG Ltd ku wa 18/08/2016 iyisaba kwishyura 60.000.000 Fr y'ingwate yatanze, asigaye ikazayakurikirana mu nkiko.

[13] Nk'uko na none bigaragara mu masezerano y'ubwishingizi no DCO 30155 yo ku wa 24/12/2013 SORAS AG Ltd yagiranye na KEGCOM Ltd, iyi sosiyete yayisabye kuyiha ubwishingizi bwa 60.000.000 Frw, azishyurwa VTS Gahara Ltd nyuma y'uko iyi yanditse iyasaba igaragaza ko KEGCOM Ltd itubahirije inshingano zayo igakoresha ayo mafaranga yishyuwe mbere yo gutangira imirimo mu bindi bikorwa bitari ibyo kubaka ishuri. Bumvikanye kandi ko iyo garanti ifite agaciro kugera igihe VTS Gahara Ltd izaba imaze kugaruza ayo mafaranga yose.

[14] Urukiko rurasanga icyo SORAS AG Ltd na KEGCOM Ltd basezeranye gifitiye VTS Gahara Ltd akamaro ari uko KEGCOM Ltd niramuka ikoresheje 60.000.000 Frw yishyuwe na VTS Gahara Ltd mbere yo gutangira imirimo (paiement anticipatif), mu bindi bintu bitari imirimo yo kubaka ishuri, maze VTS Gahara Ltd ikabimenyesha SORAS AG Ltd, nayo izahita iyishyura ayo mafaranga.

[15] Urukiko rurasanga ariko ayo mafaranga 60.000.000 KEGCOM Ltd yarakoreshejwe imirimo y'ubwubatsi, kubera ko VTS Gahara Ltd yakomeje kwishyura ibindi byiciro bumvikanyeho mu ngingo ya 11 y'amasezerano kugeza ubwo isoko ryose iryishyuye, bityo VTS Gahara Ltd ikaba itasaba ko SORAS AG Ltd iyishyura, kuko itabasha kugaragaza ko yakoreshejwe indi mirimo itari iy'ubwubatsi.

[16] Ku byerekeye ibyo VTS Gahara Ltd iburanisha ivuga ko SORAS AG Ltd irebwa n'ibikubiye mu ngingo ya 11 y'amasezerano y'ubwubatsi yabaye hagati yayo na KEGCOM Ltd nta shingiro bifite, kuko nk'uko byasobanuwe n'Urukiko Rukuru rw'Ubucuruzi ayo masezerano nta ruhare SORAS AG Ltd yayagizemo, kuko nayo yamenye ibyerekeye isoko ibimenyeshejwe na KEGCOM Ltd yifuzaga garanti yasabwe na VTS Gahara Ltd. Byongeye kandi SORAS AG Ltd ntirebwa n'ibindi byiciro by'ubwishyu byakozwe nyuma y'icya mbere cya 60.000.000 Frw, kuko

itishingiye “avance de démarrage“[1] yagombaga kwishyurwa uko imirimo yakozwe igenda yishyurwa kugera isoko ryose rirangiye nk’uko bigenda mu masoko ya Leta aho uhawe isoko ahabwa amafaranga yo kumufasha mu mirimo akeneye ngo atangire isoko yatsindiye, akajya ayishyura uko akoze fagitire kugeza arangije imirimo, banki cyangwa umwishingizi nawe akiyemeza kwishyura ayo mafaranga yatanzwe nka “avance de démarrage“ mu gihe isoko ridakozwe, ahubwo yishingiye ubwishyu bwa 60.000.000 Frw KEGCOM Ltd yakiriye mbere yo gutangira imirimo nk’uko yari yabisabwe na VTS Gahara Ltd, ikaba rero nabyo itabishingiraho ngo isabe SORAS AG Ltd kwishyura ayo mafaranga.

[17] Hashingiwe rero ku ngingo z’amategeko zavuzwe haruguru, ku masezerano yabaye hagati ya SORAS AG Ltd na KEGCOM Ltd ndetse n’ayabaye hagati y’iyi sosiyete na VTS Gahara Ltd n’ibisobanuro bimaze gutangwa, Urukiko rurasanga ubujurire bwa VTS Gahara Ltd kuri iyi ngingo nta shingiro bufite, bityo urubanza yajuririye rukaba rugomba kugumaho.

b. Ku byerekeye amafaranga y’ikurikiranarubanza n’igihembo cya Avoka asabwa na SORAS AG Ltd

[18] Me MUKANZIGIYE Donatille, uhagarariye SORAS AG Ltd, avuga ko ashingiye ku ngingo ya 258 y’Igitabo cya gatatu cy’urwunge rw’amategeko mbonezamubano (CCLIII) no ku mabwiriza agenga ibihembo by’Abavoka, VTS Gahara Ltd ikwiye gutegekwa kuyishyura 1.000.000 Frw y’ikurikiranarubanza na 1.000.000 Frw y‘igihembo cya Avoka kuri uru rwego, kubera ko ikomeje kuyishora mu manza nta mpamvu.

[19] Me BOKANGA Aimé, uburanira VTS Gahara Ltd, avuga ko amafaranga SORAS AG Ltd iyisaba nta shingiro afite, kubera ko ari uburenganzira bw‘umuburanyi kujurira, ko kandi uhagarariye SORAS AG Ltd nta masezerano agaragaza y‘ibihembo bumvikanye azahabwa kuri uru rubanza.

UKO URUKIKO RUBIBONA

[20] Ingingo ya 152, igika cya 1 n’icya 2 y’Itegeko no 22/2018 ryo ku wa 29/042018 ryerekeye imiburanishirize y’imanza z’imbonezamubano, iz’ubucuruzi, iz’umurimo n’iz’ubutegetsi iteganya ko “Uregwa mu rukiko rujuririrwa ashobora na we kugira ibyo asaba yiregura. Ubujurire bwuririye

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[1] Avance de démarrage est le versement d’une partie du montant d’un marché public au titulaire de ce marché avant tout commencement d’exécution de ses prestations, acceptée dans l'acte d'engagement, pour lui permettre de faire face aux premières dépenses du marché. Les sommes versées à titre d’avance n’ont pas le caractère de paiement définitif ; elles peuvent être garanties par une sûreté et sont récupérées sur les sommes dues au titulaire à titre d’acomptes ou de solde. Caution d'avance au démarrage (...) Cette caution garantit les acomptes obtenus de la part de l'acheteur public qui seront remboursés par la banque au cas où le marché ne sera pas exécuté. http://www.acheteurs-publics.com/marches-publics-encyclopedie/avance consulté le 06/06/2019 a 8h:14

ku bundi bukorwa n’uwarezwe mu bujurire bwerekeye ku wajuriye cyangwa ku bandi barezwe mu bujurire“.

[21] Urukiko rurasanga amafaranga y’igihembo cya Avoka n’ay‘ikurikiranarubanza SORAS AG Ltd Isaba VTS Gahara Ltd afite ishingiro kuko ubujurire bwayo nta shingiro bufite nk’uko byagaragajwe haruguru, kandi yashatse Avoka wo kuyiburanira, ndetse akurikirana urubanza, ariko 2.000.000 Frw isaba ntigaragaza ko ari yo mafaranga yakoresheje kuri uru rwego, bityo ikaba igenewe 800.000 Frw y’ikurikiranarubanza n’igihembo cya Avoka, yiyongera kuri 1.000.000 Frw yagenewe n’Urukiko Rukuru rw’Ubucuruzi, yose hamwe akaba 1.800.000 Frw.

III. ICYEMEZO CY’URUKIKO

[22] Rwemeje ko ubujurire bwatanzwe na VTS Gahara Ltd nta ishingiro bufite;

[23] Rwemeje ko ubujurire bwuririye ku bundi bwa SORAS AG Ltd bufite ishingiro;

[24] Rwemeje ko nta gihindutse ku mikirize y‘urubanza no RCOMA 00401/2017/CHC/HCC rwaciwe n’Urukiko Rukuru rw’Ubucuruzi ku wa 07/12/2017 uretse gusa kubijyanye n’amafaranga y’ikurikiranarubanza n‘igihembo cya Avoka;

[25] Rutegetse VTS Gahara Ltd kwishyura SORAS AG Ltd amafaranga miliyoni imwe n’ibihumbi magana inani (1.800.000 Frw) y’ikurikiranarubanza n’igihembo cya Avoka nk’uko yasobanuwe haruguru;

[26] Ruvuze ko amafaranga y’ingwate y’amagarama VTS Gahara Ltd yatanze ijurira ahwanye n’ibyakozwe mu rubanza.