

IGIP MBH INGÉNIEURS- CONSEILS v GOVERNMENT OF RWANDA (MININFRA)

[Rwanda SUPREME COURT – RCOMAA
00012/2017/SC, (Kayitesi, Z., P.J., Cyanzayire, and
Mutashya J.) April 23, 2019]

Contract law – Claiming for refund of “works performance security” – A contractor for supervisory services cannot invoke the expiration of the contractual period to claim for the refund of works performance security before he/she submits a statement of work completion.

Facts: This case started from Nyarugenge Commercial Court whereby IGIP mbH Ingénieurs-Conseils, sued the Government of Rwanda on behalf of MININFRA, for breaching its contractual obligations as it did not pay for 5 invoices by IGIP mbH Ingénieurs-Conseils over supervising ESPINA Company works. The claimant also sued the Government of Rwanda for a refund of works performance security. In the ruling, the Court declared that the claim filed by IGP mH Ingénieurs - Conseils is unfounded and the claimed debt and damages shall not be awarded to it because it did not produce to the Court the sufficient elements of evidence.

IGIP mbH Ingénieurs-Conseils was not satisfied with the ruling and, it therefore appealed to the Commercial High Court. In its appeal, it alleged that the previous court disregarded the produced evidence and misinterpreted the Public Procurement Law by interpreting the contract concluded with MININFRA. The Commercial High Court ruled that the appeal lodged by IGIP mbH Ingénieurs-Conseils is hereby unfounded, and therefore it maintained the appealed judgement.

IGIP mbH Ingénieurs-Conseils appealed to the Supreme Court, arguing that the Commercial High Court did not order to be paid the debt related to the accomplished works, yet it had produced relevant evidence that included original invoices received by MININFRA, the latter has never reject them, neither has ever alleged that the works were not completed. It sustained that the report of completed works was submitted to MININFRA, and a related copy has been submitted to the Court.

The State Attorney in the instant case argues that this appeal is unfounded. As it has always been clarified, the main issue of this case is the production of evidence; such as invoices signed by the supervising official which the claimant has so far not produced, though it attempts to claim to have submitted them and that the Courts have disregarded them. With regard to the project work completion, he explains that those in charge of it, requested for the provisional acceptance of the works, but following the preliminary technical acceptance, a lot of related irregularities were observed, therefore both provisional and final acceptances of the works were immediately halted. It is thus clear that the works had not been accomplished.

IGIP mbH Ingénieurs-Conseils further states that the Court misinterpreted the tender security, which is normally a prior deposit by the successful bidder before the commencement of works; and the Court took it for works performance security which is deducted from every invoice submitted to the procuring entity; and this is the very security that is being claimed for. It further submits that the fact that ESPINA Company failed to complete all works cannot preclude it from being repaid 10% deducted from all invoices submitted to MININFRA

In his explanations, the State Attorney states that the claims by IGIP mbH Ingénieurs-Conseils are unfounded, though ESPINA had to execute the works, it was up to IGIP mbH

Ingénieurs-Conseils to supervise the works and their completion and report any inadequacies thereof. This is why the agreement between the Government of Rwanda and IGIP mbH Ingénieurs-Conseils provided for the works performance security only refundable once the works are completed and approved. Due to the fact that ESPINA abandoned the works unfinished, and IGIP mbH Ingénieurs-Conseils did not produce any report indicating such irregularities of ESPINA so that the tender was cancelled before the work completion, they cannot hereby claim to have duly accomplished their contractual obligations.

Held: A contractor for supervisory services cannot invoke the expiration of the contractual period to claim for the refund of work performance security while he/she does not indicate the completed works.

**The appeal lacks merit.
Court fee covered expenses incurred in this case.**

Statutes and statutory instruments referred to:

Law N° 22/2018 of 29/04/2018 relating to civil,
commercial, labour and administrative procedure,
article 75;

Law N° 12//2007 of 27/03/2007 on Public Procurement,
articles 75 and 101.

No cases were referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] This case stems from the service contract n° 096/S/2006/IR/MINITERE/NTB of 23/06/2006, between

the Government of Rwanda represented by the former Ministry in charge of Water Resources (MINITERE) and IGIP mbH Ingénieurs-Conseils, a contract entitled “*Contrat de consultants pour prestations de services de validation des études d’exécution établies par l’Entreprise, contrôle et surveillance des travaux de renforcement d’AEP de la Ville de Kigali à partir de la nappe phréatique de la Nyabarongo*”. The above contract was valued at 428,275 Euros and 31,700,000 Frw, and the works were to be completed within 14 months, but that period was extended. For the first time, the contract was extended from 24/04/2008 to 30/11/2008 (Addendum N° 1 for contract N°096/S/2006/IR/MINITERE/NTB), which was again extended from 24/12/2008 to 31/03/2009 (addendum N° 2 for contract N° 096/S/2006/IR/MINITERE/NTB).

[2] IGIP mbH Ingénieurs-Conseils states that on 31/03/2009 it continued working up to 30/11/2009 without contract. It states that when the Minister of Justice, Attorney General advised MININFRA that for IGIP mbH Ingénieurs – Conseils to be paid for the works done from 31/03/2009 to 30/11/2009, a written contract for the works done within that period should be signed. On 14/05/2010, IGIP mbH Ingénieurs - Conseils and MININFRA concluded a contract entitled “Contract of consultancy service for supervision of the works for the project to supply water to Kigali City from Nyabarongo ground water resources”. The contract was for a period of eight (8) months; that is from 31/03/2009 to 30/11/2009, and the claim is filed before the Courts for failure to comply with such contract.

[3] IGIP mbH Ingénieurs-Conseils sued MININFRA before Nyarugenge Commercial Court for the following (5) invoices:

- Invoice N° 29A with 18,886.93 Euro, and N° 29B with 8,180,146 Frw, unpaid yet submitted to MININFRA on 17/04/2009;

- Invoice N° 30A of 83,889.20 Euro, and Invoice N° 30B of 5,276,600 Frw, relating to the amount deducted and retained as “works performance security”, submitted to MININFRA on 22/01/2010;
- Invoice N° 31B claiming for 2,874,458 Frw, submitted to MININFRA on 20/01/2010. The total outstanding invoices amount to 102,786,13 Euro and 16,331,204 Frw. According to IGIP mbH Ingénieurs-Conseils, MININFRA has so far refused to pay those invoices and it is therefore requesting to be paid the due amount with an annual late debt interest of 18% accruing from 2009, 2010 and until the entire debt is covered. They have also claimed for damages over courts procedural costs amounting to 2,000,000 Frw and a counsel fee amounting to 7% of the total owed debt.

[4] The seized Court heard the case RCOM 00307/2016/TC/NYGE on 29/07/2016 and held that the claim filed by IGIP mbH Ingénieurs-Conseils lacks merit and it decided that the claimed debt and damages should not be awarded. The Court explained that the claimant failed to produce sufficient elements of evidence to prove that the disputed invoices were really submitted to MININFRA and that the latter disregarded them. The Court therefore found no base to compel MININFRA to pay the claimed Rwandan francs and Euros. The Court again explained that IGIP MbH Ingénieurs-Conseils never submitted to the Court with its contract concluded with MININFRA on 14/04/2009; it instead submitted the contract of 14/05/2010, and it failed to explain the link between the two contracts, neither did it indicate which one should serve as basis.

[5] IGIP mbH Ingénieurs-Conseils was not satisfied with the court’s ruling and therefore appealed to the Commercial High Court claiming that the previous court

unjustly treated it for two grounds: firstly, where it ruled that the contract amendment violated the article 74 of the Law n° 12/2007 of Public Procurement, and secondly, where it decided that there were no elements of evidence to prove that original invoices were submitted to MININFRA. It also stated that the Court did not relate the contents of the contract amendment with the provision of the law, because it provides for the amendment to the contract while there was no amendment, rather it was a mere extension of execution period done by the Permanent Secretary in MININFRA upon the request of IGIP mbH Ingénieurs-Conseils. It further states that it is also claiming for a refund of work performance security that amounts to 10%.

[6] MININFRA argues that the appeal grounds are not founded, because due to the fact that IGIP mbH Ingénieurs-Conseils admits that the contract was extended but denies the contract amendment, it disregards the fact that amending the contract duration is the very amendment provided under the aforementioned article 74. With regard to the work performance security claimed by the appellant, MININFRA states that it should not be refunded since the appellant failed to prove that the work was completed.

[7] The Commercial High Court adjudicated the case RCOMA 00494/2016/CHC/HCC on 06/01/2017 and held that the appeal lodged by IGIP mbH Ingénieurs-Conseils lacks merits and maintained the appealed judgement. With regard to whether there was a need for a special agreement over the contract extension, the Commercial High Court rectified the stance of the Commercial Court, by indicating that due to the fact that the amendment was only made on the execution period upon the request by the contractor and the procuring party approved in writing the extension period claimed, there was no need for a special agreement since no amendment was made, therefore, what was done does not contravene the law. Concerning the performance security

amounting to 102,786.13 Euros claimed by the appellant, the Court found it baseless because the appellant not only failed to prove that the claimed performance security was really retained, but also it failed to indicate that the works were completely executed, and finally received as per the requirement of the applicable laws.

[8] IGIP mbH Ingénieurs-Conseils appealed to the Supreme Court, challenging the Commercial High Court to have held that invoices submitted to MININFRA were not sufficient enough to prove a debt owed to it, rather the elements of evidence should be produced to prove that the performance security was submitted before the work commencement, since the subject matter of the appeal was not the work performance security, rather the debt payment for the works completed but not paid and the refund of the money deducted by MININFRA from the invoices as work performance security.

[9] Through the defence submissions against the appeal by IGIP mbH Ingénieurs-Conseils, the State Attorney raised the objection over the Supreme Court lack of jurisdiction. He submitted that the value of the subject matter is not 50,000,000 Frw and the damages awarded is the case do not amount to 50,000,000 Frw and that IGIP mbH Ingénieurs-Conseils has lost the case on the first and second instances due to the similar reason which is the lack of evidence.

[10] The Court heard the case about the raised objection on 13/06/2012, it ruled 20/04/2018, it found it void and therefore, ordered the hearing to be resumed on 19/06/2018. On this day, the case was not heard due to the then ongoing legal reforms and it was adjourned on 02/10/2018, whereby the hearing was conducted in public, Counsel Ndagijimana Emmanuel represented IGIP mbH Ingénieurs-Conseils and Counsel Umwali Munyentwari Claire represented the Government of Rwanda (MININFRA), and the Court fixed

the judgment pronouncement on 09/11/2018. As the Court was still in deliberations, Counsel Ndagijimana Emmanuel produced elements of evidence not debated by parties. These included the general terms and special terms of the contract and a letter allegedly written by the Permanent Secretary of MININFRA on 06/12/2009.

[11] Referring to article 75 of the Law n° 22/2018 of 29/04/2018 relating to civil, commercial, labour and administrative procedure and to the effects of the evidence produced by Counsel Ndagijimana Emmanuel on the ruling, the Court found that the judgment reopening was necessary for the parties to debate about them, and such hearing was fixed on 15/01/2019.

[12] On that date, all parties appeared and debated on those elements of evidence produced after the hearing had already been closed. Having heard what each of the parties had to say about the elements of evidence, the Court decided on the bench that before trying the case, it was necessary to ask MININFRA about the letter signed on 06/12/2009 by Marie Claire Mukasani as Permanent Secretary while the Permanent Secretary was named Mukasine Marie Claire, since the Court wanted MININFRA to explain whether the letter really emanated from her and that was just a typographical error. The case was adjourned on 19/03/2019, and the hearing was held in public on the very day, starting by examining MININFRA's reply to the Court; whereby it disclaimed the letter of 06/12/2009 stating that it was not written by Mukasine Marie Claire, its former Permanent Secretary, instead revealed a copy of another letter of 07/05/2009. The court also examined other elements of evidence that Counsel Ndagijimana Emmanuel produced following the closure of the hearing. On the very day, the hearing was not closed since the Court deemed it necessary to first have a few issues clarified before deciding on the issue. It therefore requested Counsel Umwali Munyentwari

Claire to seek for detailed information on the project including related relevant documents.

[13] The Court also requested the Court Registry to summon an employee from MININFRA able to elucidate to then the following issues:

- the finished and unfinished works on the project;
- the modalities of invoices reception and the person in charge of it.
- the manner in which the article 6.4, iii of the Special Terms was complied with, whether its provisions have been executed or not;
- the works that IGIP mbH Ingénieurs-Conseils claims to have supervised and completed while the State Attorney states that ESPINA, the supervisee, did not accomplish the works;
- To determine whether provisional and final receptions of works took place; as well as other relevant issues about the project.

The hearing was adjourned on 09/04/2019, and on the very day, all parties appeared as well as Niwenshuti Emmanuel, Officer in charge of construction in MININFRA, Yaramba Albert, in charge of water distribution studies at WASAC, and Mwesigye Sam, MININFRA's Legal Adviser.

[14] Niwenshuti Emmanuel indicated to the Court that the project had not been completed, the contractors had requested for provisional reception of works, but the preliminary technical reception revealed that much had not yet been done; consequently, provisional and final receptions did not take place. He elucidated that the role of IGIP mbH Ingénieurs-Conseils was to supervise the

performance of the project's works, including identification of the observed irregularities. He also stated that in case IGIP mbH Ingénieurs-Conseils had submitted a provisional report on the actual status of the works, with a clear reporting on the works well completed and not well completed, it could be refunded 5% of works performance security, but that was not done.

[15] With regard to the reception of invoices and the person in charge thereof, Niwenshuti Emmanuel stated before the Court that IGIP mbH Ingénieurs-Conseils used to submit invoices to MININFRA together with the report of the completed works; these documents were also handed to the engineer in charge of follow up, who had to verify if they meet the requirements and approve them before submitting them to Finance Office for payment.

[16] As to the compliance with the article 6.4, iii of the Special Terms, Yaramba Albert explained to the Court that the performance security to be refunded was 10%, of which 5% was to be reimbursed following a provisional reception of works, and the other 5% to be refunded after final reception. He states that the works have not been completed, and this resulted into no reception of the works, no submission of the work reports, and therefore, no performance security was refunded. He explained that the progress reports were submitted by IGIP mbH Ingénieurs-Conseils, and that the refund of works performance security was not supposed to be effected on each single invoice, but it had to be done after the provisional and final reception of works.

[17] The main issues to be analyzed in the instant case are related to debts claimed by IGIP mbH Ingénieurs-Conseils from MININFRA for the completed works, and the work performance security it alleges to be deducted from each invoice, but not refunded.

II. LEGAL ISSUES AND THEIR ANALYSIS

A. Whether the Government of Rwanda (MININFRA) owes a debt to IGIP mbH Ingénieurs-Conseils for the unpaid completed works

[18] Counsel Ndagijimana Emmanuel representing IGIP mbH Ingénieurs-Conseils states that the reason for the appeal was that the Commercial High Court had not ordered the payment of the debt for the completed works, yet he had produced relevant evidence that included original invoices received by MININFRA, and the latter never denied them nor ever declared that the works were not completed. He explains that the contract was signed in 2006 and that the one signed in 2010 is similar and complementary, and that the 2010 contract was signed after the Minister of Justice advised MININFRA that in order to effect the payment for the completed works without contract, another contract relating to those works should be signed, therefore it is not considered as an addendum, rather a contract made to extend the work execution period.

[19] He submits that IGIP mbH Ingénieurs-Conseils performed and completed the works and it was later awarded additional works, it was not possible to be awarded additional works without finishing the previous works. He states that IGIP mbH Ingénieurs-Conseils respected all the contracts it concluded, and the completed works are evident. He adds that the report of the completed works was submitted to the Court, and the law provided that in case a report is submitted and there is no feedback within a period of 60 days, such report is considered as approved. Concerning the issue of whether there were work reports made by IGIP mbH Ingénieurs-Conseils before requesting for payment, Counsel Ndagijimana Emmanuel submits that reports were prepared and approved by the staff of the

ELECTROGAZ or PNEAR ((*Programme National d'Alimentation en Eau Potable*), this is proven for example by the first and second invoices which were paid following the submission of the reports.

[20] Counsel Ndagijimana Emmanuel states that the testimony given by the staff members of MININFRA and WASAC should not be taken into consideration because they are among those who are involved in the present lawsuit, had they done what they were supposed to do, this issue would have been concluded. He states that it is Niwenshuti Emmanuel who signed on the disputed invoice n^o 29B.

[21] Counsel Umwali Munyantwari Claire argues that the main issue in this case is the production of evidence, such as an invoice signed by the supervising official, but the appealant has so far failed to prove it. She further states that the ruling of this case should be based on article 101 of the Law n^o 12/2007 of 27/03/2007 on public procurement, the unpaid invoices of IGIP mbH Ingénieurs-Conseils are subject to doubt as the person who received them is not indicated, except that Ir Bosco is mentioned on them, therefore they cannot be considered as a proof of a debt that Government owes to it.

[22] With regard to invoices 29A with amount of 18,886.93 Euros and 29B with 8,180,146 Frw, the State Attorney asserts that those invoices were established in 03/2009 and received by MININFRA on 30/04/2009, and they are based on the contract expired on 31/03/2009, and the claim filed by IGIP mbH Ingénieurs-Conseils is related to the contract of 14/05/2010 meant to have been commenced on 01/04/2009. Therefore, the claim of IGIP mbH Ingénieurs-Conseils, not only lacks evidence, but also it is out of the scope of the contract on which it relied by filing the claim.

[23] State Attorney Umwali Munyentwari Claire states that IGIP mbH Ingénieurs-Conseils did not submit the reports of the completed works, and the invoice allegedly signed by Niwenshuti Emmanuel is not a proof, as it simply carried French words “pour vérification”; which means that probably after verification, they observed that it did not meet the requirements more so that it was not even supported by the report.

DETERMINATION OF THE COURT

[24] The money claimed by IGIP mbH Ingénieurs-Conseils for the unpaid finished works amounts to 18,886.93 Euros for invoice 29A and 8,180,146 Frw for invoice 29B. It is obvious that those invoices were issued on 17/04/2009 for payment of the works completed in March 2009. There is also an amount of 2,874,458 Frw mentioned on invoice 31B obviously issued on 25/11/2010 for the works allegedly completed between April to November 2009. It is evident that the works allegedly carried out in March 2009, are based on addendum n° 2 for the extension of the contract n° 096/S/2006/IR/MINITERE/NTB and that is, from 24/12/2008 to 31/03/2009; whereas the works allegedly carried out from April to November 2009 are based on the contract n° 334/UPPR/010 signed on 14/05/2010 meant to be executed from 01/04/2009 to 30/11/2009.

[25] The contract n° 096/S/2006/IR/MINITERE/NTB of 23/11/2006 has attached documents that are also part of the contract and they are namely the general terms of the contract, the special terms of the contract and the appendices. The terms of these documents should be applied to the contract of 14/05/2010 as per the provisions of article 2 which states that the contractor shall carry out the works in accordance with the provisions of the preliminary

contract related to the project of water supply to Kigali City from Nyabarongo River.

[26] Article 6.4 of the general terms of the contract reads that the payment will be made only if the provisions of the special terms related to the payment are complied with, and that the contractor (consultant) should have issued an invoice indicating the amount to be paid. Paragraph 4, iii of the article 6 of Special Terms sets out the requirements for the payment of works, and it stipulates that a monthly payment of 7% of the total cost shall be effected, all in 13 installments and it will be conditioned to submission and approval of a monthly report. It was also agreed that the very last invoice will be cleared once the final report of the work is submitted.

[27] Article 101 of the Law n° 12//2007 of 27/03/2007 on Public Procurement provides that the payment shall be made if the successful bidder presents an official invoice indicating the amount of money due for payment. The invoice shall be approved and signed by the supervising official.

[28] Provisions of article 101 of the aforementioned law on Public Procurement, coupled with the provisions of paragraph 4 of article 6 of the General Terms together with paragraph 4 iii of article 6 of the Special Terms all concur to clarify that in order for a successful bidder to be paid for the work, there must be an approved report indicating the completed works, and an invoice approved and signed by the competent officer, and in this case, it is the supervising official.

[29] With regard to invoices 29A, 29B and 31B that IGIP mbH Ingénieurs-Conseils states that they are unpaid, the Court never got any report of the completed and approved works; neither did it get invoices approved and signed by the

supervising official. Invoices 29A and 29B indicate that they have been submitted to Ir J. Bosco/ELECTROGAZ for verification, and invoice 31B carries a stamp for acknowledgement of receipt by MININFRA, and this alone does not fulfil the requirements for invoice payment as above explained and that is, an approved report of the completed works, and an invoice approved and signed by the competent officer. According to arguments by the representative of IGIP mbH Ingénieurs-Conseils whereby he claims that the required reports were prepared are not convincing since he failed to submit them to the Court, yet he is bound to produce evidence as per the provisions of paragraph one of Article 12 of Law n° 22/2018 of 29/04/2018 relating to civil, commercial, labor and administrative procedure.

[30] Given all the elucidations above provided, the Court finds that the requirements provided under the law on public procurement and the agreements signed by both parties for the payment of the contractor, the latter did not comply with them, therefore it finds that there is no basis to hold that the Government of Rwanda (MININFRA) owes a debt to IGIP mbH Ingénieurs-Conseils for the unpaid finished works.

B. Whether the Government of Rwanda should refund to IGIP mbH Ingénieurs-Conseils the money related to the work performance security.

[31] Counsel Ndagijimana Emmanuel representing IGIP mbH Ingénieurs-Conseils states that the Commercial High Court confused the tender security provided under article 75 of the Law n°12/2007 of 27/03/2007 on public procurement with the work performance security of 10% deducted from each paid invoice, and which had to be refunded once the works are completed. He argues that the performance security provided under the aforementioned article 75 is submitted by the successful bidder before signing the

contract and it is different from the work performance security claimed by IGIP mbH Ingénieurs-Conseils, and such security is not required for the consultancy services such as the one awarded to IGIP mbH Ingénieurs-Conseils.

[32] He further states that the work performance security is highlighted in article 6.4 iii of the contract under the section of Special Terms and the mentioned reports were made and approved by the staff of Electrogaz or PNAER (Programme National d'Alimentation en Eau Potable, a project that was then in MINITERE) who were supervising the works. He stated that all the works were completed as evidenced by the document issued by MININFRA on 06/12/2009 and received on 17/01/2010, indicating the completed works and their duration; the fact that it was not submitted to previous courts is due to the fact that it has not been requested for and it was not yet issued. He also affirms that all invoices have been paid for (from 1st to 28th) as evidenced by the transfers made to account of IGIP mbH Ingénieurs-Conseils in Germany and BK Ltd, it remains 10% deducted from the work performance security and that is what is claimed for in invoices 30A and 30B.

[33] The Court asked Counsel Ndagijimana Emmanuel whether his client had provisional and final reports of the works approved by the supervising official, and he replied that the provisional report was not available because it was not provided for in the contract, he simply says there is unsigned final statement, and there is also the invoice 30B received by MININFRA indicating all the works completed. He submits that the unsigned report can be considered as the commencement of evidence as it is backed by the fact that the works were completed and paid for, it remains 10% deducted from the work performance security. With regard to the letter of 06/12/2009 that MININFRA indicated that it was not written by the former Permanent Secretary, he avers that his client withdraws himself to produce it as an

evidence; rather the very letter helped them to be aware of the existence of another letter of 07/05/2009 indicating that the works were completed.

[34] Counsel Ndagijimana Emmanuel submits that the fact that ESPINA has not completed all its works should not result in the non-refunding of the 10% which has been deducted from invoices received and verified by MININFRA, and IGIP mbH Ingénieurs-Conseils was paid for. He states that the works were done in different steps, and that at the end of each step, IGIP mbH Ingénieurs-Conseils issued invoice and was paid, it remained 10% for the work performance security which is claimed for because the works were completed and verified by MININFRA. He therefore sustains that the deducted amount should be refunded for the completed and approved works.

[35] State Attorney Umwali Munyentwari Claire representing the Government of Rwanda states that IGIP mbH Ingénieurs-Conseils cannot produce evidence for its allegations because, for being refunded the claimed amount of money, it has to present the invoice received and approved by the supervising official, and the report on the reception of the completed work, namely the provisional and final reports, as provided for in the contract, and as well supported by article 101 of the Procurement Law of 2007. The State Attorney again submits that the contract provides that IGIP mbH Ingénieurs-Conseils shall be refunded with 5% on the provisional reception and another 5% after final reception, but it failed to prove the existence of any of the receptions.

[36] With regard to the statements by IGIP mbH Ingénieurs-Conseils that provisional reception report was never part of the contract, the State Attorney Umwali Munyentwari Claire explains that there was no particularity for such project, thus such report was to be prepared. She

further submits that the fact that MININFRA had informed the Court that the letter of 06/12/2009 was not written by Mukasine Marie Claire, the then Permanent Secretary in the Ministry, and that the Ministry instead possessed a different letter of 07/05/2009, this should be a proof that IGIP mbH Ingénieurs-Conseils had an intention to fraudulently deceive the Court. She concludes that the letter of 07/05/2009 should in no way serve as an evidence in this case since it was then addressed to ESPINA, the former contractor, and therefore it has nothing to do with IGIP mbH Ingénieurs-Conseils.

DETERMINATION OF THE COURT

[37] The money claimed by IGIP mbH Ingénieurs-Conseils amounts to 83,889.20 Euros and 5,276,600 Frw, as earlier mentioned on invoices n° 30A and 30B, and the money relates to the work performance security that has been deducted from the invoices n° 01 to n° 28. The security was provided under the section of Special Terms document, which is also part of the contract concluded between the two parties as above expounded. That security is therefore different from tender security as thereby confused by the Commercial High Court

[38] Paragraph 4, iii of article 6 of the Special Terms stipulates that for each invoice, 10% shall be deducted for the work performance security of which 5% shall be reimbursed in the event of provisional reception of works, and the other 5% shall be refunded following the final reception. The file contains no document submitted to the Court to indicate that either the provisional reception or the final reception took place. Instead, the State Attorney submitted to the Court the respective letters of 04/09/2009 and of 12/10/2009 written by MININFRA, indicating that the contract with their contractor has been prematurely terminated before works reception. IGIP mbH Ingénieurs-

Conseils as the supervisor of the work, failed to present a report explaining reasons as to why the reception did not take place.

[39] The Court finds that the unsigned report that IGIP mbH Ingénieurs-Conseils brings forth to allege that they fully and duly performed their duties, yet unsigned as they too so admit, should not therefore be relied on to conclude that there was a reception of the works as required by paragraph 4, iii of the aforementioned article 6. A letter of 06/12/2009 produced by IGIP mbH Ingénieurs-Conseils as an evidence to prove that they have duly performed their duties, though it could not replace the statement of the reception of works, was found to be a forgery and IGIP mbH Ingénieurs-Conseils stopped invoking it as an evidence. The Court also voids the arguments by IGIP mbH Ingénieurs-Conseils by which it alleges that the fact that ESPINA failed to fully perform its duties, should not jeopardize the refund of work performance security. The Court finds that though the work was supposed to be executed by ESPINA, IGIP mbH Ingénieurs-Conseils was bound to supervise the proper execution of works and to thereof highlight any identified irregularity. It is for that reason that, the contract between the Government and IGIP mbH Ingénieurs-Conseils, provided a clause of work performance security, only refundable on sole condition that the works are completely done and received in accordance with paragraph 4, iii of article 6 of the same contract.

[40] The Court finds that IGIP mbH Ingénieurs-Conseils produced no evidence to prove the compliance with paragraph 4, iii of the above mentioned article 6 as a conditional fulfilment for the refund of claimed the work performance security. The Court therefore finds no ground for ordering the Government of Rwanda (MININFRA) to reimburse IGIP mbH Ingénieurs-Conseils the money relating to the deducted work performance security.

[41] With regard to the claimed 18% due debt interest, the Court finds that it shall not be examined, since the principal debt itself did not exist. The Court also finds that the counsel and procedural fees claimed by IGIP mbH Ingénieurs-Conseils should not be awarded since they won nothing in the case.

III. DECISION OF THE COURT

[42] Holds that the appeal lodged by IGIP mbH Ingénieurs-Conseils lacks merits;

[43] Holds that the judgement RCOMA 00494/2016/CHC/HCC rendered on 06/01/2017 by the Commercial High Court is sustained;

[44] Orders that the court fee deposited by IGIP mbH Ingénieurs-Conseils covers the expenses incurred in this case.