RUBARE v. IKIGO CY'IMISORO N'AMAHORO (RRA)

[Rwanda URUKIKO RW'IKIRENGA – RCOMA0149/12/CS (Kayitesi R., P.J., Mukandamage na Kanyange, J.) 11 Werurwe 2016]

Amategeko agenga umusoro – Umusoro ku nyongeragaciro – Imenyekanisha ry'umusoro ku nyongeragaciro – Amafaranga ahabwa uwatsindiye isoko rya Leta mu buryo bwo kumufasha gutangira imirimo ntiyafatwa nk'ubwishyu cyangwa ngo igihe yatangiwe abe aricyo giherwaho nk'igihe umusoro wagombaga kumenyekanishirizwa – Itegeko Nº37/2012 ryo kuwa 09/11/2012 rishyiraho umusoro ku nyongeragaciro, ingingo ya 10 – Itegeko Nº12/2007 ryo kuwa 27/03/2007 rigenga amasoko ya Leta, ingingo ya 20, iya 86 igika cya kabiri n'iya 8 – Itegeko Nº06/2001 ryo kuwa 20/01/2001 rishyiraho umusoro ku nyongeragaciro, ingingo ya 20.

Incamake y'ikibazo: RRA yaciye Rubare Josias ibihano n'inyungu z'ubukererwe angana na 21.380.684Frw y'ibihano n'inyungu ivuga ko zikomoka ku imenyekanisha ry'umusoro ku nyongeragaciro (TVA) yakoze atinze ujyanye n'ubwishyu bwa avansi yo gutangira imirimo. Rubare yajuriye kwa Komiseri Mukuru avuga ko yarenganyijwe kubera ko iyo avansi atari ubwishyu, ahubwo ari amafaranga yo gutangiza imirimo uwatsindiye isoko rya Leta agurizwa ariko ubujurire bwe ntibwahabwa agaciro maze atanga ikirego mu Rukiko Rukuru rw'Ubucuruzi asaba kuyavanirwaho avuga ko yabiciwe mu buryo bunyuranyije n'amategeko. Urukiko rwemeje ko ikirego cye nta shingiro gifite, rumutegeka kwishyura RRA izo nyungu z'ubukererwe.

Rubare yajuriye mu Rukiko rw'Ikirenga avuga ko Urukiko rwirengagije ko avansi yo gutangira imirimo atari ubwishyu bugomba gucibwa umusoro ku nyongeragaciro. Uhagarariye RRA avuga ko ikibazo kigomba gusuzumwa muri uru rubanza ari ikirebana n'igihe TVA igomba kwishyurirwa.

Incamake y'icyemezo: 1. Amafaranga ahabwa uwatsindiye isoko rya Leta mu buryo bwo kumufasha gutangira imirimo ntiyafatwa nk'ubwishyu cyangwa ngo igihe yatangiwe abe aricyo giherwaho nk'igihe umusoro wagombaga kumenyekanishirizwa. Bityo Rubare ntiyagombaga gucibwa ibihano n'inyungu z'ubukererwe ku musoro ku nyongeragaciro kuko yagombaga gusora igihe yari kuba akoze inyemezabwishyu cyangwa yishyuwe imirimo.

2. Uwajuriye agomba kugenerwa amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka atangwa mu bushishozi bw'urukiko igihe ayo asabya ari umurengera.

Ubujurire bufite ishingiro.
Amagarama y'urubanza aherereye ku warezwe.

Amategeko yashingiweho:

Itegeko Nº37/2012 ryo kuwa 09/11/2012 rishyiraho umusoro ku nyongeragaciro, ingingo ya 10.

Itegeko Nº12/2007 ryo kuwa 27/03/2007 rigenga amasoko ya Leta, ingingo ya 20, iya 86(2) n'iya 89.

Itegeko Nº06/2001 ryo kuwa 20/01/2001 rishyiraho umusoro ku nyongeragaciro, ingingo ya 20.

Imanza zifashishijwe:
RRA v. Misigaro, RCOMA0074/11/CS rwaciwe n'Urukiko rw'Ikirenga kuwa 11/04/2014.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Rubare Josias yaciwe ibihano n'inyungu z'ubukererwe bikomoka ku musoro ku nyongeragaciro yamenyekanishije atinze, nyuma yo kujuririra kwa Komiseri Mukuru avuga ko yarenganye ariko ubujurire bwe ntibuhabwe ishingiro, atanga ikirego mu Rukiko Rukuru rw'Ubucuruzi asaba kuvanirwaho 21.380.684Frw y'ibihano n'inyungu z'ubukererwe kuko yabiciwe mu buryo bunyuranyije n'amategeko, asobanura ko ayo mafaranga yayaciwe kuri avansi yo gutangira imirimo yahawe (avance de démarrage) kandi atari ubwishyuahubwo ari inguzanyo ihabwa uwatsindiye isoko kandi yishyurwa nk'ukobiteganywa n'ingingo ya 89 y'Itegeko rigenga amasoko ya Leta, mu gihe RRAyo yavugaga ko amafaranga ya avansi yo gutangira imirimo atari inguzanyoahubwo ari igice cy'agaciro k'isoko ryose kiba cyishyuwe mbere, ko kandi iyoavansi igomba gucibwa TVA hashingiwe ku biteganywa n'ingingo ya 20 (c)y'itegeko Nº06/2001 ryo kuwa 20/01/2001 rishyiraho umusoro kunyongeragaciro nkuko ryahinduwe kugeza ubu, kuko ivuga ko iyo habayeubwishyu mbere y'ibiteganywa mu duce (a) na (b) ubwo bwishyu bufatwa kobujyanye n'itangwa ry'ibintu cyangwa irya serivisi kandi bucibwa TVA.

[2] Urukiko rwemeje ko ikirego cya Rubare nta shingiro gifite, rumutegeka kwishyura RRA 21.380.684Frw y'ibihano n'inyungu z'ubukererwe, icyo cyemezo rukaba rwaragishingiye ku ngingo ya 86 y'Itegeko rigenga amasoko ya Leta, rusanga avansi Rubare yahawe atari inguzanyo ahubwo ari avansi yahawe ku bwishyu yagombaga kubona, ikaba agomba gusoreshwa hashingiwe ku ngingo ya 20 (c) y'Itegeko rishyiraho umusoro ku nyongeragaciro.

[3] Rubare Josias yajuririye urwo rubanza mu Rukiko rw'Ikirenga avuga ko Urukiko rwirengagije ko avansi yo gutangira imirimo atari ubwishyu bugomba gucibwa umusoro ku nyongeragaciro, mu gihe RRA yo ikomeza ivuga ko uwo musoro ugomba gucibwa hashingiwe ku biteganywa n'ingingo ya 20 (c) y'Itegeko rishyiraho umusoro ku nyongeragaciro.

[4] Iburanisha ryabereye mu ruhame kuwa 02 Gashyantare 2016, Rubare ahagarariwe na Me Nsengiyumva Abel naho RRA ihagarariwe na Me Kabibi Spéciose.

II. IBIBAZO BIRI MU RUBANZA N'ISESENGURWA RYABYO

1. Kumenya niba Rubare ataragombaga gucibwa ibihano n'inyungu z'ubukererwe bikomoka ku musoro ku nyongeragaciro RRA ivuga ko yamenyekanishije atinze.

[5] Uburanira Rubare avuga ko yajurijwe n'uko Urukiko rwa mbere rwagumishijeho ibihano n'inyungu z'ubukererwe yaciwe na RRA ivuga ko yatinze kumenyekanisha umusoro ku nyongeragaciro kuri avansi yo gutangira imirimo kandi nyamara iyo avansi atari ubwishyu, ko ahubwo ari amafaranga yo gutangiza imirimo ukora isoko rya Leta agurizwa kandi abanje gushaka umwishingira, ko mu gihe atarikoze uwamwishingiye amwishyurira, yakora iryo soko

ayo mafaranga akagenda yishyurwa kuri buri nyemezabwishyu (facture); ko ku birebana na Rubare wahawe na Caisse Sociale du Rwanda avansi yo gutangira imirimo akishingirwa na SORAS, yagiye yishyura iyo avansi uko yakoraga ‘’facture’’ kugeza arangije, bivuze ko ari inguzanyo yari yahawe kuko ubwishyu budasubizwa, ko n’urubanza RCOM0074/12/CS rwaciwe n’uru rukiko kuwa 11 Mata 2014 rwakemuye icyo kibazo aho rwerekanye ko avansi atari ubwishyu.

[6] Akomeza avuga ko RRA itavuga ko habaye gutinda kumenyekanisha TVA ibishingiye ko yishyurwa umunsi uwabonye isoko aboneyeho avansi kandi nyamara atari ubwishyu, byongeye kandi uwo musoro waciwe ku gaciro kose k’isoko, kandi n’ubwo RRA iyita ubwishyu, hagomba kwibazwa icyo buba bukorewe cyane cyane ko mu masoko ya Leta hishyurwa akazi kamaze gukorwa nkuko biteganywa n’ingingo ya 86 y’Itegeko rigenga amasoko ya Leta, ko rero niba hishyurwa akazi kamaze gukorwa, byumvikana ko avansi atari ubwishyu. Na none kandi ngo niba TVA itangwa ku isoko ryose ikongera igatangwa kuri avansi yo gutangira imirimo, bivuze ko yaba yishyuwe inshuro ebyiri.

[7] Avuga kandi ko agace ka (c) k’ingingo ya 20 y’Itegeko rishyiraho umusoro ku nyongeragaciro RRA iburanisha, nako ubwako kavuga ko hagomba kuba hakozwe inyemezabuguzi cyangwa ubwishyu, bishimangira ko avansi idafite igice cy’umurimo bijyanye kandi TVA ntiyacibwa mu gihe nta murimo wakozwe. Avuga ko kubera impaka zahoragaho zirebana na avansi yo gutangira imirimo, byabaye ngombwa ko hatangwa igisobanuro cyayo mu ngingo ya 10 y’Itegeko rishya rishyiraho umusoro ku nyongeragaciro (Itegeko Nº37/2012 ryo kuwa 09/11/2012), mu gusoza asaba ko imikirize y’urubanza rwajuririwe yahinduka.

[8] Uburanira RRA avuga ko ikibazo kigomba gusesengurwa ari icyo kumenya igihe TVA igomba kwishyurirwa kuko ku birebana na Rubare, iyo TVA yayishyuye ariko abikora akererewe, ko kandi ibyo umuburanira avuga abishingira gusa ku ngingo ya 20 (b) ivuga igihe habaye inyemezabuguzi (facturation) cyangwa habaye kwishyurwa umurimo wakozwe, akirengagiza agace kayo ka (c) kavuga ko iyo hishyuwe imirimo itarakorwa, TVA yishyurwa mu gihe kibanziriza ikindi muri ibyo byose, bivuze ko avansi yo gukora imirimo ari ubwishyu buba bubaye mbere y’uko imirimo ikorwa na mbere y’uko inyemezabwishyu ikorwa. Asanga kandi urubanza uburanira Rubare avuga ko rwakemuye ikibazo atari ko bimeze kuko rwibanze ku duce twa (a) na (b) tw’ingingo ya 20 y’Itegeko rishyiraho umusoro ku nyongeragaciro.

[9] Akomeza avuga ko n’ubwo byumvikana ko ubwishyu bubaho iyo imirimo yakozwe, ariko na none hagomba kwibazwa icyo amafaranga ya avansi aba yatangiwe, ko asanga atangwa kugira ngo uwatsindiye isoko abashe kurikora, bivuze ko ari amafaranga aba yishyuwe mbere yo gukora imirimo kandi atangwa mu rwego rw’amasezerano y’uwo murimo kuko ayo masezerano atabayeho n’ayo mafaranga atatangwa.

[10] Ku birebana n’Itegeko rishya rishyiraho umusoro ku nyongeragaciro, uburanira RRA avuga ko ritaje gusobanura ingingo ya 20 yo mu Itegeko rya mbere ahubwo hahinduwe uburyo bwo kwishyura, mu gusoza avuga ko hagumaho imikirize y’urubanza rwajuririwe.

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[11] Ku birebana n'igihe umusoro ku nyongeragaciro wishyurirwa, ingingo ya 20 y'Itegeko Nº06/2001 ryo kuwa 20/01/2001 rishyiraho umusoro ku nyongeragaciro ryakoreshwaga ku birebana n'umusoro Rubare yaciweho ibihano n'inyungu z'ubukererwe, iteganya ko: Umusoro wakwa iyo ibintu cyangwa imirimo byaguzwe. Igihe giteganijwe umusoro wakirwa ni ikibanziriza ibindi mu bihe bikurikira:

a) Ku birebana n'ibintu byacurujwe:

i) ni igihe ibyo bintu byakuriwe mu bubiko bw'ubicuruza;

ii) iyo ibyo bintu bitarahakurwa, ni igihe cyose byashyikirijwe uwo bigenewe.

b) Ku birebana n'imirimo ikorwa, kuyitumiza bifatwa ko byabaye mu gihe koko iyo mirimo yakozwe. Iyo mirimo (servisi) ihora ikorwa mu gihe hakurikijwe iteka cyangwa amasezerano ateganya ko kwishyura bikorwa mu byiciro, iyo imirimo ifatwa nk'aho yakozwe mu bice bikurikirana by'icyo gihe nk'uko byagenwe n'iteka cyangwa amasezerano kandi buri korwa ry'umurimo (servisi) rifatwa nk'aho ryabereye mu gihe kibanziriza ikindi muri ibi bikurikira:

i) igihe usoreshwa wiyandikishije yakoreye inyemezabuguzi cyangwa inyemezamusoro ku nyongeragaciro y'uwo murimo wakozwe;

ii) igihe usoreshwa wiyandikishije yishyuriwe umurimo yakoze.

c) iyo uzana ibintu cyangwa ukora imirimo akoze inyemezabuguzi cyangwa arishywe agaciro k'ibintu cyangwa imirimo mbere y'ibihe byavuzwe mu gika a) na b) by'iyi ngingo, igihe cyo gutanga ibyo bintu cyangwa gukora iyo mirimo ku birebana n'igice cyakorewe inyemezabuguzi cyangwa icyishyuwe, gifatwa nk'aho cyabaye igihe inyemezabuguzi yakorewe cyangwa igihe kurihwa byabereye".

[12] Ku birebana na avansi yo gutangira imirimo, ingingo ya 86, igika cya kabiri, y'Itegeko Nº12/2007 ryo kuwa 27/03/2007 rigenga amasoko ya Leta, iteganya ko '' Cyakora Igitabo cy'amabwiriza agenga ipiganwa gishobora guteganya avansi ku mirimo. Iyo avansi ntishobora gutangwa amasezerano atarashyirwaho umukono''. Ingingo ya 89 y'iryo Tegeko, iteganya ko "avansi yahawe uwatsindiye isoko isubizwa hakoreshejwe ikatwa ry'umubare runaka w'amafaranga ku nyemezabuguzi zatanzwe kandi zemejwe. Igitabo cy'amabwiriza agenga ipiganwa giteganya ijanisha ry'amafaranga azagenda akatwa kugeza avansi yose yishyuwe".

[13] Ku byerekeye Rubare, amasezerano yakoranye na Caisse Sociale du Rwanda,yateganyije mu ngingo yayo ya 29.1 ko ashobora guhabwa avansi ya 20% y'agaciro kose k'isoko[1], inateganya ko ayo mafaranga azajya yishyurwa kuri buri nyemezabuguzi ikozwe, Rubare akaba kandi avuga ko iyo avansi yayihawe ingana na 328.099.434Frw ihwanye na 20% y'isoko ryose.

[14] Hasesenguwe ibiteganywa n'ingingo ya 20 y'Itegeko Nº06/2001 ryo kuwa 20/01/2001 ryavuzwe haruguru, umusoro ku birebana n'imirimo ikorwa wakwa iyo hakozwe inyemezabuguzi cyangwa inyemezamusoro ku nyongeragaciro cyangwa igihe usora yishyuwe

[1]The contractor shall get, on his demand an advance payment equivalent as a maximum to twenty percent (20%) of the total contract sum. This advance should be guaranteed with a guarantee of 100% repayment stocked in a confirmed bank in Rwanda. Advance payment shall be reimbursed portionally on each certificate submitted to full amount before the final certificate".

umurimo wakozwe, cyangwa nkuko bivugwa mu gace ka c) k'iyo ngingo ari nako RRA ishingiraho, iyo,hakozwe inyemezabuguzi cyangwa hishyuwe agaciro k'imirimo mbere y'ibihe byavuzwe bivugwa mu duce twa a) na b), ko muri icyo gihe harebwa igice cyakorewe inyemezabuguzi cyangwa icyishyuwe bigafatwa nkaho aricyo gihe inyemezabuguzi yakorewe cyangwa kurihwa bwabereye.

[15] Urukiko rurasanga n'ubwo RRA ishingira kuri ako gace ka (c) ikavuga ko avansi Rubare yahawe ari ubwishyu, iyo miburanire yayo ntiyahabwa ishingiro kuko itagaragaza igice cy'imirimo cyakorewe inyemezabuguzi cyangwa icyishyuwe nk'uko ingingo y'Itegeko ibiteganya, ahubwo bigomba gufatwa ko ayo mafaranga ya avansi ari ahabwa uwatsindiye isoko mu rwego rwo kumufasha kuritangira ariko nta gice cy'umurimo runaka aba yishyuriwe.

[16] Byongeye kandi, avansi uwatsindiye isoko rya Leta ahabwa agenda ayishyura nk'uko ingingo ya 89 y'Itegeko rigenga amasoko ya Leta yavuzwe haruguru ibiteganya, bikanashimangirwa n'amasezerano Rubare yakoranye na CSR nkuko ingingo ya 29.1 yavuzwe haruguru ibiteganya, kandi akaba ari nako byagenze harebwe inyemezabuguzi Rubare yatanze nk'urugero ifite Nº1/Novembre-2008, igaragaza ko ku mafaranga 148.248.763 yishyuzaga, havanywemo 10% afatirwa (retenue) n'andi yo kwishyura angana na 26.684.777Frw (remboursement 20%), Rubare avuga ko ari avansi yishyuraga kandi koko ahura n'ateganywa mu ngingo ya 89 imaze kuvugwa hamwe no mu ngingo ya 29.1 y'amasezerano y'isoko, bityo kuri iyo nyemezabuguzi hagasigara 106.739.109Frw Rubare yagombaga kwishyurwa.

[17] Ibimaze kuvugwa byumvikanisha rero ko amafaranga Rubare yahawe nk'uwatsindiye isoko rya Leta yo kumufasha kurikora, atari ubwishyu nk'uko RRA ibivuga, kuyihabwa rero bikaba bitaragombaga gufatwa nk'igihe umusoro wagombaga kwishyurirwa, bityo rero akaba ataragombaga gucibwa ibihano n'inyungu z'ubukererwe kuko yagombaga gusora igihe yari kuba akoze inyemezabwishyu cyangwa yishyuwe imirimo.

[18] Kuba itangwa rya avansi ridafatwa nk'igihe cyo kwishyura umusoro, ni nabyo byemejwe mu Itegeko rishya Nº37/2012 ryo kuwa 09/11/2012 rishyiraho umusoro ku nyongeragaciro, mu ngingo ya 10 irebana n'igihe cyo kwishyura umusoro, aho mu gace ka kabiri ivuga "ku itariki igicuruzwa cyangwa serivisi byishyuriweho harimo n'ubwishyu bw'igice. Cyakora aka gace ntikareba avansi ihabwa abubaka nyuma bakazayisubiza bayikura mu nyemezabuguzi bakorera umukiriya". Nubwo iryo tegeko atari ryo ryagengaga umusoro Rubare yaciriwe ibihano n'inyungu z'ubukererwe, ariko igitekerezo kirimo cy'uko avansi isubizwa n'uwayihawe nk'uko na Rubare yabikoze, ni impamvu ishimangira ibyemejwe haruguru binahura n'ibyemejwe mu rundi rubanza rwaciwe n'uru rukiko ku wa 11/04/2014 rufite RCOMA0074/11/CS haburana RRA na Misigaro Louis, narwo rwagaragaje ko avansi atari ubwishyu.

[19] Hashingiwe ku byasobanuwe byose, Urukiko rurasanga Rubare ataragombaga gucibwa ibihano n'inyungu z'ubukererwe, bityo urubanza rwajuririwe rukaba ruhindutse mu ngingo zarwo zose.

2.Kumenya niba Rubare yahabwa amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka.

[20] Rubare asaba ko RRA yategekwa kumwishyura 2.000.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka, naho RRA ikavuga ko yakwirengera amafaranga yakoresheje mu rubanza.

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[21] Urukiko rurasanga mu gihe ubujurire bwa Rubare buhawe ishingiro, agomba kugenerwa amafaranga y'ikurikiranarubanza n'igihembo cy'Avoka, hashingiwe ku biteganywa n'ingingo ya 258 CCL.III iteganya ko "Igikorwa cyose cy'umuntu cyangirije undi gitegeka nyirugukora ikosa rigikomokaho kuriha ibyangiritse", ariko rusanga 2.000.000Frw asaba ari ikirenga ahubwo yagenerwa mu bushishozi bwarwo 1.000.000Frw.

III. ICYEMEZO CY'URUKIKO

[22] Rwemejeko ubujurire bwa Rubare Josias bufite ishingiro;

[23] Rwemejeko avaniweho ibihano n'inyungu z'ubukererwe bingana na 21.380.684Frw yaciwe na RRA;

[24] Rutegetse RRA guha Rubare Josias 1.000.000Frw y'ikurikiranarubanza n'igihembo cy'Avoka;

[25] Rutegetse RRA kwishyura amagarama y'urubanza angana na 100.000Frw