

ENGIN LTD v WASAC LTD

[Rwanda URUKIKO RW'IKIRENGA – RS/INJUST/RCOM 00001/2023/SC (Mukamulisa, P.J., Muhumuza na Kazungu, J.) 15 Werurwe 2024]

Amategeko agenga imiburanishirije y'imanza zasabiwe gusubirishwamo ku mpamvu z'akarengane – Gusaba kurenganurwa ku bitaragararijwe umucamanza mu rubanza rusabirwa gusubirwamo ku mpamvu z'akarengane – Mu gusobanura aho akarengane kabo gashingiye, ababuranyi berekana ibimenyetso cyangwa amategeko byagararijwe urukiko mu rubanza basaba ko rusubirishwamo rukabyirengagiza kandi byari kubagirira akamaro – Ibyo umuburanyi atagararije.

Incamake y'ikibazo: WASAC Ltd yagiranye amasezerano na ENGIN Ltd yo kuyikorera inyigo no kuyitegurira inyandiko zo gupiganira isoko mu Karere ka Ngororero mu gihe cy'amezi 9 ntiyubahiriza icyo gihe, WASAC Ltd iyongerera amezi 6, nayo arangira imirimo itarangiye bituma WASAC iyandikira iyimenyeshya ko yatangiye kuyibarira ibihano by'ubukererwe.

Imirimo yaje kurangira, hamaze gutangwa raporo ndetse yemejwe, WASAC Ltd yishyura ENGIN Ltd amafaranga ya nyuma ivanyemo 12.811.260frw, ahwanye n'ibihano by'ubukererwe bw'iminsi 60. Ibi byatumye ENGIN Ltd iregera Urukiko rw'Ubucuruzi isaba gusubizwa 12.811.260 frw yakaswe, kwishyurwa 13.118.875 frw y'inyungu z'ubukererwe ku bwishyu bw'amafaranga yanyuma, n'indishyi zinyuranye zirimo igihembo cya Avoka n'amafaranga y'ikurikiranarubanza.

Urukiko rw'Ubucuruzi rwaciye urubanza ruvuga ko ikirego cya ENGIN nta shingiro gifite, ruyitegeka kwishyura WASAC igihembo cya Avoka kingana na 500.000Frw.

ENGIN Ltd yajuririye mu Rukiko Rukuru rw'Ubucuruzi ivugako Urukiko rw'Ubucuruzi ntacyo rwavuze ku kuba WASAC yarabariye ibihano by'ubukererwe ku mibare itariyo kandi yarabiburanishije, Rwibeshye aho ruvuga ko ingwate yo kurangiza neza imirimo itareba ibindi bibazo uretse irangizwa ry'imirimo gusa, isaba kwemererwa gutanga ibimenyetso bigaragaza ko yishyuwe itinze, bityo WASAC ikaba yabitangira ibihano, isaba indishyi zitandukanye.

Urukiko Rukuru rw'Ubucuruzi rwaciye urubanza rwemeza ko ubujurire bwa ENGIN bufite ishingiro kuri bimwe, rutegeka WASAC kuyishyura 6.785.625 Frw y'ubukererwe bwo kwishyura itinze, hamwe n'indishyi zitandukanye.

ENGIN Ltd yasabye ko urubanza RCOMA00646/2020/HCC rwaciye n'Urukiko Rukuru rw'Ubucuruzi rusubirwamo ku mpamvu z'akarengane, irabyemererwa rusubirishwamo n'Urukiko rw'ikirenga.

Mu miburanire yayo mu rubanza rusubirwamo ku mpamvu z'akarengane ivuga ko ibihano by'ubukererwe yaciye bidakurikije amategeko ndetse raporo ivugwa mu ngingo ya 108 y'itegeko N° 12/2007 ryo ku wa 27/03/2007 rigenga Amasoko ya Leta itakozwe kuko itigeze iyisinyira ko iyibonye.

Ku rundi ruhande uregwa yiregura avugako ko ibihano by'ubukererwe bwo kurangira imirimo ku gihe bishingiye ku masezerano impande zombi zagiranye, ndetse ko ingingo ya 108 urega aburanisha mu rubanza rusubirwamo ku mpamvu z'akarengane itigeze iburanwaho mu Rukiko

Rukuru rw'Ubucuruzi, itari iri no mu bibazo bisuzumwa muri urwo rubanza, ahubwo yaburanye ivuga ko amasezerano yabo atateganyije ibihano byo gukererwa kurangiza imirimo ku gihe.

Incamate y'icyemezo: Ibitaraburanyeho mu rubanza rusabirwa gusubirwamo ku mpamvu z'akarengane, ni ukuvuga ibyo umuburanyi atagararije umucamanza ngo amusabe kubisuzuma, ntashobora kuvuga ko yabimurenganyijeho.

Ikirego nta shingiro gifite.

Nta mategeko yifashishijwe.

Imanza zifashishijwe:

RS/INJUST/RC 00024/2018/CS; Ngizweninshuti Albert vs Muhima Giovanni rwaciwe n'Urukiko rw'Ikirenga ku wa 21/02/2020.

RS/ INJUST/RC 00004/2019/SC; MUKAMANA Mamique n'abandi vs CANDALI Véréne rwaciwe n'Urukiko rw'Ikirenga ku wa 28/07/2020.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Ku itariki ya 25/09/2015, WASAC Ltd (WASAC muri uru rubanza) yasinanye na ENGIN Ltd (ENGIN muri uru rubanza) amasezerano yo kuyikorera inyigo no gutegura inyandiko zo gupiganira isoko ryo kugeza amazi mu Karere ka Ngororero mu gihe cy'amezi icyenda (9), ku giciro cya 180.950.000 frw cyangwa 213.521.000 frw habariwemo imisoro¹.

[2] Igihe kivuzwe haruguru nticyubahirijwe, ENGIN ihabwa amezi atandatu (6) y'inyongera, itariki ntarengwa yo kurangiza imirimo ishyingirwa ku wa 26/12/2016. Kuri iyi tariki nabwo ntiyarangiye, bituma WASAC yandikira ENGIN ku wa 12/01/2017 iyimenyesha ko yatangiye kuyibarira ibihano by'ubukererwe².

[3] Imirimo yaje kurangira, raporo yayo itangwa ku wa 24/2/2017, maze yemezwa ku itariki ya 09/5/2017. Naho WASAC yishyuye ENGIN amafaranga yanyuma ku itariki 31/10/2017 ivanyemo 12.811.260 frw, ahwanye n'ibihano by'ubukererwe bw'iminsi 60, ibazwe kuva ku wa 26/12/2016 kugeza ku wa 24/2/2017.

[4] Impande zombi zinaniwe kumvikana kuri ibi bihano, ENGIN yareze WASAC mu Rukiko rw'Ubucuruzi, ikirego cyandikwa kuri RCOM 00788/2020/TC, isaba ibi bikurikira : (i) gusubizwa 12.811.260 frw yakaswe, (ii) kwishyurwa 13.118.875 frw y'inyungu z'ubukererwe ku bwishyu bw'amafaranga yanyuma, (iii) n'indishyi zinyuranye zirimo igihembo cya Avoka n'amafaranga y'ikurikiranarubanza.

¹ *Appendice C, minutes of contract negotiation, resolutions of negotiation meeting, point 10: "Contract price: The contract price is for 213.521.000 FRW [...]. This amount is including all taxes".*

² *"WASAC would like to remind you that the contract has been ended on 26th December 2016 and we have regret to inform you that we have started to apply the penalties as it is stipulated in the contract".*

[5] Mu rwego rwa mbere, ENGIN yaburanye ivuga ko amasezerano yabo adateganya ibihano by'ubukererwe, ko ndetse isanga nta n'ubukererwe bwabayeho ; ko kandi niyo buza kubaho WASAC yari gukura ibihano mu ngwate yatanze yo kurangiza neza imirimo aho gukata ku mafaranga yari asigaye kwishyurwa angana na 90.475.000; yavuze ko WASAC yaje kwishyura ayo mafaranga ikererewe iminsi 145 ikaba igomba kubihanirwa igatanga inyungu z'ubukererwe zingana na 13.118.875 frw.

[6] WASAC yireguye ivuga ko yubahirije amasezerano, kuko ariyo ateganya ingano y'ibihano by'ubukererwe bwo kurangiza imirimo ku gihe n'uburyo bibarwa ; ko kandi mbere yo gutangira kubibara yamenyesheje ENGIN mu ibaruwa yavuzwe hejuru ; yashoje isobanura ko nta gihano ikwiriye gucibwa cyo kwishyura ENGIN itinze kuko ariyo nyirabayazana y'ubukererwe bwo, ko ahubwo iyo ibishaka yashoboraga no gusesa amasezerano.

[7] Urukiko rwaciye urubanza ku wa 22/9/2020, ruvuga ko ikirego cya ENGIN nta shingiro gifite ahubwo ruyitegeka kwishyura WASAC igihembo cya Avoka kingana na 500.000 Frw.

[8] Urukiko rwasobanuye ko ENGIN yatinze kurangiza imirimo ku gihe koko, ko kandi ibihano by'ubukererwe biteganyijwe mu masezerano impande zombi zagiranye ndetse no mu itegeko rigenga amasoko ya Leta. Naho ibihano byo gutinda kwishyurwa ENGIN yasabye, urukiko rwavuze ko nabyo biteganyijwe mu masezerano ariko ko nta bimenyetso yatanze byashingirwaho kugira ngo bibarwe : umubare w'amafaranga yagombaga kwishyurwa n'itariki yishyuriweho.

[9] ENGIN yajuririye urwo rubanza mu Rukiko Rukuru rw'Ubucuruzi, ivuga ko (a) Urukiko rw'Ubucuruzi ntacyo rwavuze ku kuba WASAC yarabariye ibihano by'ubukererwe ku mibare itariyo kandi yarabiburanishije, (b) urwo Rukiko rwibeshye aho ruvuga ko ingwate yo kurangiza neza imirimo itareba ibindi bibazo uretse irangizwa ry'imirimo gusa, (c) isaba kwemererwa gutanga ibimenyetso bigaragaza ko yishyurwe itinze, bityo WASAC ikaba yabitangira ibihano, (d) isaba indishyi zitandukanye.

[10] Urukiko Rukuru rw'Ubucuruzi rwaciye urubanza RCOMA00646/2020/HCC ku wa 30/07/2021, rwemeza ko ubujurire bwa ENGIN bufite ishingiro kuri bimwe, rutegeka WASAC kuyishyura 6.785.625 Frw y'ubukererwe bwo kwishyura itinze, hamwe n'indishyi za 1.000.000Frw akubiyemo igihembo cy'avoka n'amafaranga y'ikurikiranarubanza, no kuyisubiza 60.000 Frw y'ingwate y'amagarama yatanze ku nzego zombi.

[11] Urukiko rwashingiye icyemezo cyarwo ku mpamvu zikurikira :

- Ibihano by'ubukererwe bwo kurangiza imirimo ku gihe bishobora kuvanwa mu mafaranga y'inyemezabuguzi zigomba kwishyurwa cyangwa se ku ngwate yo kurangiza neza imirimo³;
- Ibarwa ry'iminsi y'ubukererwe bwo kurangiza imirimo ku gihe rigomba gushingira ku minsi yose nk'uko byemejwe n'Umuyobozi wa ENGIN mu iburanisha⁴ , kandi

³ Ingingo 183 y'Itegeko N°62/2018 ryo ku wa 25/8/2018 rigenga amasoko ya Leta iteganya ko:

“Amafaranga akatwa nk'ibihano by'ubukererwe cyangwa kudakora neza imirimo akurwa mu mubare w'amafaranga w'inyemezabuguzi zigomba kwishyurwa cyangwa ku ngwate yo kurangiza neza isoko [...] ».

⁴ Reba igika cya 17, cya kopi y'urubanza RCOMA 00646/2020/HCC rwaciye n'Urukiko Rukuru

iyo minsi yabazwe neza⁵, bityo amafranga WASAC yakase ENGIN yubahirije amategeko;

- Agaciro k'isoko kagomba kubarirwaho ibyo bihano ni akarimo imisoro (prix toutes taxes comprises)⁶ kandi ingano yabyo ikaba igomba kubarwa hashingiwe ku biteganywa n'amasezerano⁷ ababuranyi bagiranye aho gushingira ku ngingo 51 y'itegeko N°05/2013 ryo kuwa 13/2/2013 rigenga amasoko ya Leta nk'uko biburanishwa na ENGIN⁸ ;
- Inyungu z'ubukererwe ku bwishyu zasabwe na ENGIN zifite ishingiro, iminsi y'ubukererwe ni 75⁹ ifite agaciro ka 6.785.625frw ; iyo minsi ibarwa hashingiwe ku masezerano ariko kuko atateganyije ijanisha ry'ibihano mu gihe uwatanze isoko akarerewe kwishyura uwaritsindiye, hagomba kwifashishwa ibyateganyijwe k'ubukererwe mu kurangiza imirimo ku gihe bw'uwatsindiye isoko (ingingo 42.1 SCC), maze imibare ikaba iyi : $90.475.000 \times 75 \times 1/1000 = 6.785.625 \text{ Frw}$;
- Hari ibyo ENGIN yatakaje mu rubanza bityo WASAC igomba kubitangira indishyi za 1.000.000 Frw zikubiyemo igihembo cya Avoka 800.000 Frw n'ikurikiranarubanza ku nzego zombi 200.000 Frw.

[12] Ku wa 29/08/2021, ENGIN yandikiye Perezida w'Urukiko rw'Ubujurire isaba ko urubanza RCOMA00646/2020/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 30/07/2021 rwasubirwamo ku mpamvu z'akarengane.

[13] Amaze gusuzuma ubwo busabe, Perezida w'Urukiko rw'Ubujurire yandikiye Perezida w'Urukiko rw'Ikirenga avuga ko asanga urwo rubanza rwasubirwamo ku mpamvu z'akarengane.

⁵ Ibarwa kuwa ku itariki ya 26/12/2016 kugeza ku ya 24/2/2017 (umunsi raporo isoza imirimo yatangiye na ENGIN).

⁶ Mu gika cya 24 cy'urubanza rwaciwe n'Urukiko Rukuru rw'Ubucuruzi, Urukiko rwibutsa ingingo ya 38.1 ya *special conditions of contract* nayo igize amasezerano ababuranyi bagiranye, iteganya ko ako gaciro ari 213.521 Frw ; runibutsa kandi ko ako gaciro ugasanga no mu nyandiko mvugo yo kumvikana ku masezerano impande zombi zasinye ku wa 16/6/2015.

⁷ Ingingo 41.2.2 ya *General conditions* iteganya ko WASAC igomba kwishyura rwiyezamirimo mu minsi 60 amaze kuyigaragariza akazi yakoze hamwe na fagitire bijyanye, ariko ko bitubahirizwa iyo WASAC itabyemeye ahubwo ikagaragaza ibidakozwe neza ndetse ko rwiyezamirimo abikosora noneho ibyijyanye n'ubwishyu bwabwaga bigasubirwaho.

⁸ Ingingo 51 y'Itegeko N° 05/2013 ryo ku wa 13/2/2013 rihindura kandi ryuzuzwa Itegeko N° 12/2007 ryo ku wa 27/3/2007 rigenga amasoko ya Leta, iteganya ko « Uretse igihe bitewe n'impamvu ziteganywa n'iri tegeko, uwegukanye isoko ahanishwa gukatwa rimwe ku gihumbi (1%) by'agaciro kose k'isoko, buri munsi w'ubukererwe. icyakora icyo gihano ntigishobora kurenza gatanu ku ijana (5%) [...] ».

⁹ Ibarwa ry'iyi minsi turisanga mu bika bya 35, 36, 37, 38 by'urubanza ruregerwa mu karengane : imirimo yemejwe burundu ku wa 09/5/2017, kuwa kuri iyi tariki kandi hashingiwe ku ngingo 41.2.2 GCC, WASAC yari ifite iminsi 60 yo kwishyura facture yanyuma ya ENGIN, bivuze ko itariki ntarengwa yari iya 08/7/2017, nyamara yaje kwishyura ikoresheje OP yo ku wa 22/9/2017 ; hagati y'itariki ya 09/5/2017 n'ya 22/9/2017 harimo iminsi 75 (ubukererwe).

[14] Perezida w'Urukiko rw'Ikirenga amaze kubona raporo yarukorewe, yemeje ko rwongera kuburanishwa rwandikwa kuri RS/INJUST/RCOM 00001/2023/SC.

[15] Urubanza rwaburanishijwe mu ruhamwe ku wa 12/02/2024, ENGIN ihagarariwe na Me Kabarega Ngabo Robert na Me Serge DOUMTSOP NZOGNING, uyu asemurirwa na Ntakirutimana Yvonne ; WASAC ihagarariwe na Me Mukandori Brigitte, maze hasuzumwa ibijyanye no kumenya niba ibihano by'ubukererwe byarubahirije amategeko, ndetse hasuzumwa ibijyanye n'indishyi.

II. IBIBAZO BIRI MU RUBANZA N'ISESENGURA RYABYO

1. Kumenya niba ibihano by'ubukererwe bwo kurangiza imirimo ku gihe byubahirije amategeko

a) Kumenya ishingiro mu mategeko ry'ibihano by'ubukererwe bwo kurangiza imirimo ku gihe

[16] Me Kabarega Ngabo Robert na Me Serge DOUMTSOP NZOGNING bahagarariye ENGIN bavuga ko, bashingiye ku ngingo ya 108 y'Itegeko N° 12/2007 ryo ku wa 27/03/2007 rigenga Amasoko ya Leta, iteganya ko "Iyo bigaragaye ko amasezerano atubahirijwe, umukozi ushinzwe igenzura ry'iyubahirizwa ryayo, abikorera raporo kandi agahita ayishyikiriza uwegukanye isoko, agasinyira ko ayibonye", ikigaragara ari uko raporo ivugwa muri iyi ngingo itakozwe, ko iramutse yaranabayeho, ntayo ENGIN yahawe ngo isinyeho ko iyibonye; bongeyeho kandi ko ibaruwa WASAC yayandikiye ku wa 12/1/2017 itasimbura raporo iteganywa n'itegeko.

[17] Basaza bavuga ko WASAC yayiciye ibihano bidashingiye ku mategeko, ikaba igomba kuyisubiza amafaranga yayikase angana na 12.811.260 hiyongereyeho n'inyungu¹⁰ za 7,52% ku kwezi, mu gihe kingana n'amezi 60. Imibare y'ibyo ENGIN isaba gusubizwa iteye itya :

$$\begin{aligned} \circ \text{ Inyungu} &= 12.811.260 \times 7,52\% \times 60 = 57.804.752 \text{ Frw} \\ \circ \text{ Yose hamwe akaba} &: 12.811.260 \\ &+ 57.804.752 = 70.615.665 \\ &\text{Frw} \end{aligned}$$

[18] Me Mukandori Brigitte uhagarariye WASAC avuga ko ibihano by'ubukererwe bwo kurangiza imirimo ku gihe bashingiye ku ngingo ya 42.1¹¹ y'amasezerano (SCC), bityo ko ibyo ENGIN iburanisha kuri iyi ngingo n'ibyo isaba nta shingiro bifite.

¹⁰ Izi nyungu z'ubukererwe (kuri principe yazo) ENGIN ivuga ko izishingira ku ngingo ya 144 y'Itegeko N° 45/2011 ryo ku wa 25/11/2011 rigena amasezerano, aho iteganya ko "iyi kwica amasezerano birebana no kutishyura amafaranga cyangwa kudakora igisabwa gishoboka kuburwa mu mafaranga azwi cyangwa ashobora kumenyekana, inyungu zibarwa uhereye igihe igisabwa cyagombaga gukorwa hakuwemo ibyo uruhande rwishe amasezerano rufiteho uburenganzira."

¹¹ Ingingo 42.1.SCC : "The interest rate of the total amount of the contract per day late shall be applied to the consultant except in case of a force majeure agreed upon by both parties. However, *the overdue cannot exceed 10% of the total amount of the contract. Above 10%, the contract might be terminated without any other procedure*".

[19] Akomeza avuga ko ingingo ya 108 ENGIN iburanisha uyu muni ari nshya, kuko itaburanyweho mu Rukiko Rukuru rw'Ubucuruzi, ko ndetse itari mu bibazo yasabye ko bisuzumwa ; avuga ahubwo ko icyo gihe yaburanye ivuga ko amasezerano yabo atateganyije ibihano byo gukererwa kurangiza imirimo ku gihe.

[20] Anavugaga ko raporo ENGIN ivugaga, atumvaga imiterere yayo kuko WASAC yayandikiye inshuro ebyiri zose, ku wa 04/04/2016 no ku wa 22/7/2016, iyibwiraga ko ikerereza imirimo inayigaragariza imiterere y'imirimo igomba gukorwa kandi ibi byose byabaga bishingiye kuri raporo z'abatekinisiye¹²; ko rero nta tegeko ryishwe ahubwo ko ibisobanuro ENGIN itanga uyu muni, ari urwitwazo kuko no kwongera igihe cy'amasezerano inshuro eshatu zose ubwabyo bigaragaza neza ubwo bukererwe, bityo ibyo ENGIN iburanisha kuri iyi ngingo n'ibyo isaba bikaba nta shingiro bifite.

UKO URUKIKO RUBIBONA

[21] Urukiko rurasanga mu rubanza rusabirwa gusubirishwamo ku mpamvu z'akarengane, ENGIN itarigeze iburanisha raporo iteganywa mu ngingo ya 108 yavuzwe haruguru, kuko mu mwanzuro wayo yatanze mu Rukiko Rukuru rw'Ubucuruzi ntaho yigeze ivuga iby'ayo raporo cyangwa kuba ingingo ya 108 yaba yarirengagijwe; ibyo ntiyanabivuze mu nama ntegururubanza cyangwa se no mu iburanisha ry'urubanza muri urwo Rukiko.

Urukiko rurasanga ibitaraburanyweho mu rubanza rusabirwa gusubirwamo ku mpamvu z'akarengane, ni ukuvugaga ibyo umuburanyi atagaragarije umucamanza ngo amusabe kubisuzuma, adashobora kuvugaga ko yabimurenganyijeho. Ibi byatanzweho umurongo n'uru Rukiko mu manza zitandukanye harimo RS/INJUST/RC 00024/2018/SC rwa Ngizweninshuti Albert na Muhima Giovanni; urubanza RS/INJUST/RC 00004/2019/SC rwa Mukamana Mamiqwe & crts na CANDALI Véréne n'izindi¹³.

[22] Hashingirwe ku bisobanuro byatanzwe, Urukiko rurasanga ENGIN itavugaga ko yagiriwe akarengane ku kibazo itari yasabye Urukiko gusuzuma ; bityo iyo ngingo y'akarengane ikaba idakwiye gusuzumwa.

b) Kumenya niba ibihano by'ubukererwe byaragombaga kuvanwa mu ngwate yo kurangiza imirimo neza aho gukurwa mu mafaranga yari asigaye kwishyurwa

[23] Me Kabarega Ngabo Robert na Me Serge DOUMTSOP NZOGNING bahagarariye ENGIN bavugaga ko bashingirwe ku ngingo ya 79¹⁴ y'Itegeko N°12/2007 ryo ku wa 27/03/2007 rigenga

¹² Ibarurwa yo ku wa 04/04/2016 yakiriwe ku wa 05/04/2016 ; iyo ku wa 22/07/2016 yakiriwe ku wa 25/07/2016.

¹³ Reba Urubanza RS/INJUST/RC 00024/2018/CS rwaciwe ku wa 21/02/2020, haburana Ngizweninshuti Albert na Muhima Giovanni, igika cya 19 - 22 ; Urubanza RS/INJUST/RC 00007/2018/SC rwaciwe ku wa 13/03/2020, haburana Nditiribambe Samuel, Gatera Jason na Nyamaswa Faustin, igika cya 64 - 67 ; Urubanza RS/INJUST/RC 00004/2019/SC rwaciwe n'Urukiko rw'Ikirenga ku wa 28/07/2020 haburana MUKAMANA Mamiqwe n'abandi na CANDALI Véréne, igika cya 23; Urubanza RS/INJUST/RC 00009/2022/SC haburana SANLAM AG Plc na UWIHANGANYE Jean, igika cya 35 - 37

¹⁴ Ingingo 79: "Urwego rutanga isoko rwemerewe gukata amafaranga ku ngwate yo kurangiza neza isoko ku mpamvu z'imikorere mibi y'uwegukanye isoko. Uwegukanye isoko asabwa mu nyandiko n'urwego rutanga isoko kuzurisha ingwate ingana n'iyakaswe mu gihe kitarenze iminsi 20. Mu gihe iyo ngwate idatanze cyangwa

amasoko ya Leta isomewe hamwe n'ya 1,13°¹⁵ y'itegeko N° 5/2013 ryo ku wa 13/02/2013 rihindura kandi ryuzuza Itegeko N° 12/2007 ryo ku wa 27/03/2007 rigenga amasoko ya Leta, ibihano by'ubukererwe bwo kurangiza imirimo ku gihe byari kvanwa mu bwishingizi ENGIN yatanze.

[24] Bavuga ko ENGIN inenga Urukiko Rukuru rw'Ubucuruzi kuba rwaremeje ko WASAC yari ifite uburenganzira bwo guhitamo aho ikura ibihano rushingiye ku ngingo ya 183 yavuzwe hejuru, note 3 ; nyamara iri tegeko ritari ririho igihe amasezerano yashyirwaga mu bikorwa (2015 – 2016), bityo rukaba rwarishe ihame rya “*non- rétroactivité de la loi*”.

[25] Bashingiye ku ngingo ya 144¹⁶ y'Itegeko N° 45/2011 ryo ku wa 25/1/2011 rigenga amasezerano, basozwa basaba gusubizwa amafaranga yakaswe na WASAC hiyongereyeho n'inyungu zibariwe kuri 7,52% mu minsi 60 ayo mafaranga yamaze afatiriwe. Batanga imibare iteye itya : $12.811.260 \times 7,52\% \times 60 = 57.804.752$ Frw, yose hamwe akaba $12.811.260 + 57.804.752 = 70.615.665$ Frw.

[26] Me Mukandori Brigitte uhagarariye WASAC avuga ko ibihano biburanwa bishingiye ku ngingo ya 42.1 y'amasezerano (SCC) ; ko kuvuga ko Urukiko Rukuru rw'Ubucuruzi, mu kugena ibi bihano, rwagombaga gushingira ku ngingo ya 79 y'Itegeko N° 12/2007 ryo ku wa 27/03/2007 ryavuzwe haruguru nta shingiro bifite, kuko iyi ngingo ireba gusa ikibazo cyo kurangiza neza imirimo, kandi ikibazo gihari kikaba ari ugukererwa kurangiza imirimo ; ko nubwo imirimo yakererewe ariko yageze aho irarangira. Asoza avuga ko nta kosa WASAC yakoze ryatuma icibwa ibihano bisabwa.

UKO URUKIKO RUBIBONA

[27] Ingingo ya 1.1 (b) n'ya 3.1 z'amasezerano akomokaho uru rubanza “*General conditions of contract*”, ziteganywa ko azagengwa n'amategeko y'u Rwanda arebana nayo, muri rusange.

[28] Ingingo ya 79 igika cya 1 y'Itegeko N° 12/2007 ryo ku wa 27/03/2007 rigenga Amasoko ya Leta ryakurikizwaga igihe amasezerano yakorwaga ndetse akanashyira mu bikorwa, yateganyaga ko « Urwego rutanga isoko rwemerewe gukata amafaranga ku ngwate yo kurangiza neza isoko ku mpamvu z'imikorere mibi y'uwegukanye isoko. Uwegukanye isoko asabwa mu nyandiko n'Urwego rutanga isoko kuzurisha ingwate ingana n'iyakaswe mu gihe kitarenze iminsi makumyabiri (20) ».

[29] Ingingo ya 1, 13° y'Itegeko N° 5/2013 ryo ku wa 13/02/2013 ryuzuza kandi rihindura Itegeko N°12/2007 ryo ku wa 27/03/2007 yateganyaga ko « ingwate yo kwishingira kurangiza

umwishingizi ntiyishyure nk'uko yabisabwe, urwego rutanga isoko rufatira amafaranga ku nyemezabuguzi zemejwe.

¹⁵ Ingingo 1, 13° “ingwate yo kwishingira kurangiza neza akazi [ni], icyemezo gitanzwe na Banki cyangwa ikindi kigo kibifitiye uburenganzira mu rwego rwo kwizeza urwego rutanga isoko ko imirimo ijyanye n'isoko ritanzwe iramutse itagenze neza, haba mu rwego rwa tekini no ku byerekeye *kubahiriza ibihe ntarengwa byagenwe, urwego rutanga isoko rwahabwa amafaranga ateganyijwe kuri icyo cyemezo*”.

¹⁶ Ingingo 144: “Iyo kwica amasezerano birebana no kutishyura amafaranga cyangwa kudakora igisabwa gishobora kubarwa mu mafaranga azwi cyangwa ashobora kumenyekana, inyungu zibarwa uherye igihe igisabwa cyagombaga gukorwa hakuwemo ibyo uruhande rwishe amasezerano rufiteho uburenganzira”.

neza akazi ari icyemezo gitanzwe na banki cyangwa ikindi kigo kibifitiye uburenganzira mu rwego rwo kwizeza urwego rutanga isoko ko imirimo ijyanye n'isoko ritanzwe iramutse itagenze neza, haba mu rwego rwa tekini no ku byerekeye kubahiriza ibihe ntarengwa byagenwe, urwego rutanga isoko rwahabwa amafaranga ateganyijwe kuri icyo cyemezo».

[30] Mu byatumye ENGIN isubirishamo urubanza ku mpamvu z'akarengane, harimo ibyo inenga Urukiko Rukuru rw'Ubucuruzi bijyanye no kuba rwarashingiye ku ngingo ya 183 y'Itegeko N°62/2018 ryo ku wa 25/8/2018 rigenga amasoko ya Leta, rukemeza ko WASAC yashoboraga guca ibihano kuri fagitire cyangwa ku ngwate yo kurangiza neza imirimo. Uru Rukiko rusanga koko iyo ngingo itari gushingirwaho kuko amasezerano impande zombi zagiranye yabaye ku wa 25/09/2015 iryo tegeko ritarajyaho kubera ko hakurikizwaga Itegeko y'Itegeko N° 12/2007 ryo ku wa 27/03/2007 rigenga Amasoko ya Leta nk'uko ryahinduwe n'Itegeko N° 5/2013 ryo ku wa 13/02/2013.

[31] Urukiko rusanga ingingo zavuzwe haruguru zerekeye kutarangiza imirimo yateganyijwe mu masezerano ajyanye n'amasoko ya Leta, ariko zikaba zidakemura ikibazo cy'ibihano by'ubukererwe ari nacyo gisuzumwa muri uru rubanza. Mu gihe ENGIN idahakana ko yakererewe kurangiza imirimo, ikaba itanagaragaza aho ishingira yemeza ko ibihano byagombaga kuvanwa mu ngwate yo kurangiza neza imirimo, kandi impande zombi zikaba zarumvikanye ko nihaba ubukererwe ikizakurikiraho ari ibihano, usibye ko zitateganyijwe aho bizakurwa, WASAC nta kundi yari kubigenza kugira ngo ice ibyo bihano uretse kubikura muri fagitire yagombaga kwishyura ENGIN.

[32] Nyuma y'ibisobanuro bimaze gutangwa, Urukiko rusanga ku bijyanye n'ingingo yasuzumwaga, nta karengane ENGIN yagiriwe.

c) Kumenya agaciro k'isoko kagombaga gushingirwaho habarwa ibihano by'ubukererwe bwo kurangiza imirimo ku gihe

[33] Me Kabarega Ngabo Robert na Me Serge DOUMTSOP NZOGNING bahagarariye ENGIN bavuga ko bashingiye ku ngingo ya 5¹⁷ n'ya 39.2¹⁸ z'amasezerano rusange bagiranye (*General conditions contract/ GCC*), agaciro k'isoko kari kubarirwaho ibihano ari akatarimo TVA.

[34] Bakomeza basobanura ko Urukiko Rukuru rw'Ubucuruzi rutasuzumye neza imiterere y'isoko rikomokaho uru rubanza, kuko iyo habaho ubushishozi rutari gukoresha ingingo ya 59, igika cya 2¹⁹ y'Itegeko N° 62/2018 ryo ku wa 25/08/2018 rigenga amasoko ya Leta, itegeko ritariho igihe amasezerano yashyirwaga mu bikorwa.

¹⁷ Ingingo 5: “The total amount of contract is 180.950.000 Frw (One hundred eighty million nine hundred fifty thousand Rwandan franc). This amount is exclusive of local taxes”.

¹⁸ Ingingo 39.2. GCC: “As an exception to the above and as stated in the SCC, all local identifiable indirect taxes (itemized and finalized at Contract negotiations) are reimbursed to the Consultant or are paid by the Client on behalf of the Consultant”.

¹⁹ Ingingo 59, igika cya 2: “Igiciro kigomba kubarirwaho ibikenewe byose ku mirimo, ibicuruzwa cyangwa ibigemurwa, serivisi z'impuguke, cyane cyane imisoro, amahoro isonerwa cyeretse iyo bidateganyijwe cyangwa bisonewe. Igiciro kandi kigomba kubarirwamo inyungu z'uwasindiye isoko”.

[35] Me Mukandori Brigitte uhagarariye WASAC avuga ko igiciro cy'isoko cyari kugenderwaho mu kubara ibihano by'ubukererwe bwo kurangiza imirimo ku gihe, ari ikirimo TVA, kivugwa mu masezerano ahanditse “*appendice C ‘minutes of contract negotiations between WASAC and ENGIN’, point 10*” : 213.521.000 Frw ; asoza avuga ko nta kosa Urukiko Rukuru rw'Ubucuruzi rwakoze.

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[36] Ingingo ya 81 y'Itegeko N° 12/2007 ryo ku wa 27/03/2007 rigenga amasoko ya leta ryubahirizwaga igihe amasezerano yakorwaga n'igihe yashyirwaga mu bikorwa, yateganyaga ko « Igiciro kigomba kubarirwamo ibikenewe byose ku mirimo, ibigemurwa cyangwa serivisi zitangwa n'impuguke, cyane cyane imisoro, amahoro, isonerwa cyeretse iyo bidateganyijwe cyangwa bisonewe (...) ».

[37] Ingingo imaze kuvugwa yumvikanisha ko agaciro k'isoko kabarirwamo n'imisoro, uretse igihe isonewe. Ibi bihura n'ibigaragara mu biganiro WASAC na ENGIN bagiranye mbere y'uko basinya amasezerano, (*Contract negotiations*), aho bemeranyijwe ku gaciro k'isoko kangana na 213.521.000 Frw kabariwemo imisoro ²⁰. Aka gaciro k'isoko ni nako ababuranyi banditse mu masezerano bagiranye ku wa 25/09/2015²¹.

[38] Ingingo ya 64 y'Itegeko N° 45/2011 ryo ku wa 25/11/2011 rigenga amasezerano « amasezerano akozwe ku buryo bukurikije amategeko aba itegeko kubayagiranye (...) », hashingiwe kuri iyi ngingo, Urukiko rusanga ibyo impande zombi zemeranyijweho mu masezerano bigomba kugira agaciro kandi bikaba itegeko kuribo.

[39] Hashingiwe ku ngingo zimaze kuvugwa haruguru, Urukiko rusanga agaciro kemeranyijweho mu masezerano, ari akabariwemo n'imisoro, nk'uko n'Urukiko Rukuru rw'Ubucuruzi rwabyemeje. Bityo rero, hakaba nta karengane ENGIN yagiriwe kuri iyi ngingo.

d) Kumenya umubare w'iminsi yagombaga gushingirwaho mu kubara ibihano by'ubukererwe bwo kurangiza imirimo ku gihe

[40] Kuri iki kibazo Me Kabarega Ngabo Robert na Me Serge DOUMTSOP NZOGNING bahagarariye ENGIN bavuga ko ubukererwe ku bwishyu buteganywa n'ingingo ya 42.1 GCC ; ko ku bireba ubukererwe bwo kurangiza imirimo ku gihe, mu kubara iminsi hari gukoreshwa ingingo 1.1. f ya GCC, ivuga ko “*day means a working day unless indicated otherwise*”; ko ijambo ‘umunsi’ bishatse kuvuga umunsi w'umubyizi. Mu yandi magambo, bavuga ko kubara ubukererwe bikorwa mu minsi y'imibyizi gusa.

²⁰ *Appendic C, Minutes of Contract negotiation between WASAC and ENGIN, Article. 10: «The Contract price is for 213,521,000 Rwf. This amount is including all taxes»*

²¹ *Reba amasezerano yo ku wa 25/09/2015 (Consultancy services for detailed studies and preparation of bidding documents for water supply system in District of Ngororero) Article 38.1 of General Conditions of Contract stipulates that: «The Contract Price is fixed and set forth in the SCC». Article 38.1 of Special Condition of Contract stipulates that: «The Contract price is for 213,521,000 Rwf. This amount is including all taxes»*

[41] Bakomeza basobanura ko imvugo y'Umuyobozi mukuru wayo mu Rukiko Rukuru rw'Ubucuruzi, aho yavuze ko iminsi yose ibarwa yashakaga kuvuga gusa iminsi y'ubukererwe mu kwishyura ; bityo ko kuri bo amagambo y'uwo muyobozi atarimo imvugo yo kwiyemerera mu rukiko ibikwiye gutsindisha ENGIN, nk'uko Urukiko Rukuru rw'Ubucuruzi rwabivuze rushingiye ku ngingo ya 110 y'itegeko ryerekeye ibimenyetso n'itangwa ryabyo.

[42] Basoza bavuga ko mu gihe ubukererwe bwo kurangiza imirimo ku gihe bwari bumaze kugaragara, ibihano byari kuba biteye bitya: ibishingirwaho: agaciro k'isoko 180.950.000 frw, iminsi y'ubukererwe 41²². Ibihano by'ubukererwe bikaba : $180.950.00 \times 1/1000 \times 41 = 7.418.950$ Frw. Bivuze ko WASAC igomba gusubiza ENGIN $12.811.260 - 7.418.950 = 5.392.310$ Frw ; aya mafranga WASAC ikaba igomba kuyasubiza ENGIN hiyongereyeho inyungu zingana : $5.392.310 \times 60 \times 7,52\% = 24.330.102$ Frw ; igiteranyo cy'amafranga yose WASAC igomba gusubiza ENGIN ni $24.330.102 + 5.392.310 = 29.722.412$ Frw.

[43] Me Mukandori Brigitte uhagarariye WASAC avuga ko igihe cy'amasezerano y'ibanze (délai initial du contrat) cyateganyijwe mu mezi, kuko yari kumara amezi icyenda (9); ibihe by'inyongera nabyo bikaba byaragiye bigenwa mu mezi; ko ukwezi kubarwa mu minsi, iminsi yose kandi ikabarwa hatavuyemo *weekend* cyangwa iminsi y'ikiruhuko²³. Avuga rero ko kubara ubukererwe bwo kurangiza akazi ku gihe ataribwo bari kubarira ku minsi y'imibiyizi yonyine, mu gihe ubwo kwishyura bubarwa ku minsi yose y'ukwezi.

[44] Asoza avuga ko WASAC yabaze neza iminsi y'ubukererwe kuko yashingiye ku ngingo ya 42.1 SCC, bityo ibyo ENGIN iburanisha kuri iyi ngingo n'ibyo isaba nta shingiro bifite.

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[45] Ingingo ya 12, igika cya 1, y'Itegeko N° 22/2018 ryo ku wa 29/04/2018, ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsu iteganywa ko "urega agomba kugaragaza ibimenyetso by'ibyo aregera. Iyo abibuze, uwarezwe aratsinda."

[46] Urukiko rusanga ENGIN itabasha kugaragaza ko iminsi y'ubukererwe yagombaga kuvanwamo iminsi y'ibiruhuko kuko n'ubwo ishingira ku gace ka 1.1f k'amasezerano aho basobanura ko umunsi bivuga umunsi w'umubyizi, ariko nayo ubwayo ibara ubukererwe WASAC yagize mu kuyishyura yabaze iminsi yose n'iy'ibiruhuko iyibariramo. ENGIN ikaba ariyo igomba kugaragaza impamvu ku bihano yaciwe by'ubukererwe bwo kurangiza imirimo ku gihe, ariho babara iminsi y'imibiyizi gusa.

[47] Byongeye kandi, nk'uko WASAC ibiburanisha, dosiye igaragaza ko Umuyobozi Mukuru wa ENGIN, mu iburanisha ry'urubanza mu Rukiko Rukuru rw'Ubucuruzi, yemeye ko ku byerekeye ubukererwe, iminsi yose ibarwa ; bityo ibyo yiyemereye imbere y'Urukiko bikaba bimutsindisha nk'uko biteganywa n'ingingo ya 110 y'Itegeko N° 15/2004 ryo ku wa 12/06/2004 ryerekeye ibimenyetso mu manza n'itangwa ryabyo ryavuzwe haruguru.

²² Kuva 26/12/2016 - 24/2/2017 = 60 iminsi. Ugakuramo weekend zingana n'iminsi 6, ugakuramo kandi iminsi y'ikiruhuko 3. Noneho $60 - (16+3) = 41$

²³ Ibihe by'amasezerano ushyizeho n'ibihe by'inyongera ni ibi: 25/9/2015 – 25/6/2016; 25/6/2016 – 26/8/2016; 26/8/2016 – 26/11/2016; 26/11/2016 – 26/12/2016.

[48] Hashingiwe ku bisobanura byatanzwe, Urukiko rusanga ibihano by'ubukererwe byaciwe ENGIN byarubahirije amategeko, bityo kuba Urukiko Rukuru rw'Ubucuruzi rwaremeje ko igomba kwishyura 12.811.260 frw yaciwe nk'ibihano by'ubukererwe ntaho rwirengagije amategeko, bityo rugasanga nta karengane kabaye muri uru rubanza.

2. Gusuzuma ishingiro ry'indishyi zisabwa

[49] Me Kabarega Ngabo Robert na Me Serge DOUMTSOP NZOGNING bahagarariye ENGIN bavuga ko ishingiye ku ngingo ya 138,3° y'Itegeko rigenga amasezerano ryavuzwe haruguru, isaba indishyi zingana 50.000.000 Frw kuko WASAC yayiciye ibihano bitubahirije amategeko, bikaba byaratumye ibura akazi, ikaba kandi yarakomeje imanza ishaka kurenganurwa.

[50] Bavuga kandi ko nk'uko biteganywa n'ingingo ya 34 y'amabwiriza y'Urugaga rw'Abavoka mu Rwanda, basaba Urukiko rw'Ikirenga kuzategeka WASAC kwishyura igihembo cya Avoka kingana na 3.000.000Frw na 1.000.000Frw y'ikurikiranarubanza bashingiye ku ngingo ya 111CPCCSA.

[51] Me Mukandori Brigitte uhagarariye WASAC avuga ko indishyi zisabwa nta shingiro zifite kuko ENGIN ariyo nyirabayazana w'urubanza kuko yanze kuva ku izima kandi nta mpamvu. Akavuga ko WASAC yatanze ikirego kiregera kwiregura, isaba ko ENGIN yayiha igihembo cya Avoka kingana na 1.000.000 Frw cyo gukomeza gushorwa mu manza kandi nta makosa yayikoreye, isaba kandi n'amafaranga y'ikurikiranarubanza 500.000Frw.

[52] Abahagarariye ENGIN bavuga ko basanga ibisabwa na WASAC nta shingiro bifite ko nyamara yo ibyo yasabye bishingiye ku mategeko no ku makosa ya WASAC.

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[53] Urukiko rusanga indishyi ENGIN isaba muri uru rubanza itagomba kuzihabwa kuko ariyo yareze isaba gusubirishamo urubanza ku mpamvu z'akarengane ariko ikirego cyayo kikaba kitahawe ishingiro. Rusanga ahubwo ENGIN ariyo igomba guha WASAC indishyi muri uru rubanza, kuko kuyirega byatumye irukurikirana ndetse inashaka avoka, bityo mu bushishozi bw'Urukiko ikaba igenewe 300.000 Frw y'ikurikiranarubanza na 500.000 Frw, yose hamwe akaba 800.000 Frw.

III. ICYEMEZO CY'URUKIKO

[54] Rwemeje ko ikirego cya ENGIN Ltd cyo gusubirishamo ku mpamvu z'akarengane urubanza RCOMA00646/2020/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi ku wa 30/07/2021, nta shingiro gifite ;

[55] Rwemeje ko nta gihindutse ku mikirize y'urubanza RCOM 00646/2020/HCC rwaciwe n'Urukiko Rukuru rw'Ubucuruzi, ku wa 30/07/2021 ;

[56] Rutegetse ENGIN Ltd kwishyura WASAC Ltd 800.000Frw Y'ikurikiranarubanza n'igihembo cya avoka.