

**In the matter of an application by Strategic Action Security Limited Civil Appeal No: 41 of 2014 Court of Appeal**

[1] In August 2013, the Ministry of Local Government and Regional Development invited tenders by publication for the provision of security services for Regions 2, 3, 4, 5, 6 and 10. The tenders were opened by the National Procurement and Tender Administration Board (NPTAB) on August 27, 2013, in the compound of the Ministry of Finance and representatives of the applicant's company and the media were present. The tenders received were as follows:

Homesafe Security & Domestic Services Inc.	-	\$1,637,033,760
Strategic Action Security	-	\$1,145,317,440
R.K's Security Services	-	\$1,708,891,861

[2] By way of letter dated September 24, 2013, signed by the Permanent Secretary of the Ministry of Local Government and Regional Development, the Appellant company was notified that its existing contract to provide security services for the Coastland Regional Administration would conclude on October 31, 2013, and that arrangements should be made to hand over to the new awardee Homesafe Security and Domestic Services Inc.

[3] On September 30, 2013, the Appellant company submitted a written Protest/Complaint to the Ministry of Local Government and Regional Development detailing that its tender had bettered that of Homesafe Security and Domestic Services Inc. by over \$500 million and that it had been satisfactorily serving the aforementioned regions for many years without a warning or censure but the Ministry did not respond to the complaint.

[4] By way of letter dated September 30, 2013, the Appellant Company submitted a written complaint/protest to the Bid Protest Committee of the NPTAB and lodged the sum of \$2 million as registration fee to facilitate the hearing of the complaint/protest but NPTAB did not respond.

[5] It was discovered that Mr. Kanhai, the Managing Director of Strategic Action Security Limited was charged with receiving property knowing the same to have been stolen in Magisterial C.J No. 8112 of 2013 and was placed on \$100,000 bail on August 2, 2013, and the matter was pending hearing and determination. Moreover, it was further discovered that the Company Strategic Action Security Limited was facing 21 charges of failing to pay its guards the prescribed minimum wage of \$140 per hour. The offences were allegedly committed between July 1, 2012, and September 18, 2013, and were pending in the Magistrate's Court.

Mr. Brian Johnson, Managing Director, Homesafe Security and Domestic Services Inc., deposed that on April 26, 2013, when the applicant submitted its tenders there were instances of civil and criminal litigation which had to be disclosed.

[6] In the Bill of quantities computation sheet submitted by the Appellant VAT was not included in the tendered sum but was provided in a separate total figure; the tendered sum was therefore VAT exclusive.

Both NPTAB and the Ministry of Local Government and Regional Development contended that the Appellant's tender was non-responsive in that the Appellant failed to comply with two (2) mandatory requirements:

- (1) The Appellant failed to include Value Added Tax (VAT) to the price tendered; and
- (2) The Appellant did not disclose that there were several pending litigations filed against Mr. Kanhai, Managing Director of the Appellant Company.

[7] The Honourable Ian Chang, Chief Justice (ag) held that:  
The breaches alleged were material breaches of the requirements of the Standard Bidding Documents, as such the Court does not see it fit to disturb the decision made by NPTAB.

[8] In the Court of Appeal the issues that arose for consideration were:

- (a) Whether the criminal charges that were filed against Mr. Richard Kanhai amounted to pending litigation;
- (b) Whether the non-inclusion of VAT in the tendered sum amounted to a material breach.

[9] The Court of Appeal held that:  
"The various sources consulted establishes unambiguously that the term "litigation" is confined to and is descriptive of civil proceedings". The terms "any litigation" could not be interpreted to extend its application outside of the bounds of civil proceedings to include pending criminal proceedings. Such an interpretation would be strained to say the least. Additionally, the words "the parties concerned and the disputed amounts and awards" enforces its exclusive application to civil proceedings. There was therefore no requirement for the Appellant to disclose the charges mentioned against him and the Company; and

The non-inclusion of VAT in the tender figure amounts to a mere technical breach and the Court is not in agreement with Hon Justice Chang's finding of material breach in this regard, notwithstanding the inconvenience of performing a simple mathematical calculation.