

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT, ISLAMABAD**  
**JUDICIAL DEPARTMENT**

W.P.No.1784 of 2016

7c's Corporate Services

**Versus**

Oil and Gas Development Company Limited & others

**Date of Hearing:** 08.03.2017  
**Petitioner by:** Hafiz Arfat Ahmed Chaudhry, and Ms. Kashifa Niaz Awan, Advocates,  
**Respondents by:** Mr. Muhammad Ali Saif, Advocate for respondents No.1 & 2,  
Malik Muhammad Qayyum, Advocate for respondent No.3.

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**MIANGUL HASSAN AURANGZEB, J:-** Through the instant writ petition, the petitioner, 7c's Corporate Services, which claims to be a registered partnership firm, is challenging advertisements dated 06.04.2016 and 27.04.2016 published at the instance of the Oil and Gas Development Company Limited (respondent No.1), inviting bids for the award of contracts for the procurement of certain goods and hiring of specialized services listed in Schedule-I to this judgment.

2. In the said advertisements, it was mentioned that the tender documents could be viewed and downloaded from the website of respondent No.1. Respondent No.1 reserved to itself the right to accept or reject any bid or to annul the bidding process by rejecting all the bids in accordance with Rule 33 of the Public Procurement Rules, 2004 ("PPR 2004"). The tender documents contained an 'evaluation criteria'. The evaluation criteria pertaining to (i) hiring of stimulation and allied services at upcoming OGDCL wells, and (ii) hiring of coil tubing unit, liquid nitrogen pumping, and pumper services, provided that the minimum qualifying marks for any bidder were 70 out of 100. Up to 20 marks could be awarded under the following head:-

***"Relevant experience in reputed E&P companies in Pakistan during last three years. Copy of service contracts with other E&P companies for last three years must be provided."***  
(Emphasis added)

3. The petitioner's grievance was against the above-mentioned condition in the bid evaluation criteria formulated by respondent No.1.

4. Learned counsel for the petitioner submitted that the impugned condition in the bid evaluation criteria was in violation of Rules 2(1)(c), 10, and the 32 of the PPR 2004. He submitted that the said impugned condition was unduly restrictive and narrowed the bidding arena inasmuch as the required experience of a prospective bidder was limited to three years only (i.e. from 2013 to 2016), and that too only with respect to Exploration and Production ("E&P") Companies in Pakistan. He was of the view that the entire track record of the bidders should have been taken into consideration and not just their experience in the last three years. He further submitted that numerous companies, which have experience in providing specialized services to E&P companies abroad would be deprived of the award of up to 20 marks in the evaluation process.

5. Learned counsel for the petitioner further submitted that the impugned condition in the bid evaluation criteria was specifically designed by respondent No.1 so as to ensure that contracts were awarded to M/s Sprint Oil and Gas Services (respondent No.3); that respondent No.3 was being unduly favoured by respondent No.1 and had been pre-selected for the award of contracts pursuant to the tender bidding process challenged by the petitioner; that there were several potential competitors, who were aggrieved by the impugned condition in the bid evaluation criteria; that these potential competitors had not filed writ petitions, because they feared disqualification at the hands of respondent No.1 from participating in the bidding processes for respondent No.1's future projects; that respondent No.1 disqualified bidders, who indulged in litigation against respondent No.1; and that the impugned condition in the bid evaluation criteria is in violation of the potential competitors' fundamental rights guaranteed under Article 18 of the Constitution. Learned counsel for the petitioner further submitted that the petitioner is a registered firm engaged in the

business of procurement of oil and gas tools, and has exclusive rights to represent foreign manufacturers of tools and equipment in the oil and gas sector; and that the petitioner had no intention to participate in the tender bidding process. Learned counsel for the petitioner prayed for the writ petition to be allowed, and for the impugned condition in the bid evaluation criteria to be set aside.

6. On the other hand, learned counsel for respondents No.1 and 2 raised objections to the maintainability of the petition. He submitted that the petitioner did not have the *locus standi* to file the petition; that the petition was filed to obstruct respondent No.1 from exercising its executive authority and lawful rights; that several factual controversies had been raised by the petitioner, which could not be resolved in the constitutional jurisdiction of this Court; that the petition had been filed without proper authorization; that the petitioner had not availed the alternative remedy in terms of Rule 48 of the PPR 2004; that at no material stage had the petitioner approached respondent No.1 for the redressal of its grievances, if any; and that respondent No.1 had carried out the procurement process strictly in accordance with the PPR 2004.

7. He further submitted that the impugned advertisements dated 06.04.2016 and 27.04.2016 did not suffer from any legal infirmity; that the eligibility criteria, giving preference to contractors with local experience, was formulated by respondent No.1 strictly in accordance with Rule 24 of the PPR 2004; that the requirement of experience in reputed E&P companies in Pakistan during last three years was lawful, and experience beyond the three years could also be taken into consideration; and that the allegation of collusion made by the petitioner against respondent No.1 is a vexatious attempt to blackmail respondent No.1. Learned counsel prayed for the petition to be dismissed.

8. The position taken by respondent No.3 in its written comments was *inter alia* that since three parties had expressed their interest to participate in the bidding process, the

petitioner's allegation that respondent No.1 had structured the bidding criteria in order to accommodate respondent No.3, is without any foundation. Respondent No.3 also questioned the petitioner's *locus standi* to file the petition, and took exception to the allegations of 'malice' and 'collusion' made against it. It was further pleaded that the petition had been filed with a *mala fide* intent to frustrate the bidding process; that the petitioner was an unregistered partnership firm, which could not institute legal proceedings; that no partnership deed had been annexed to the petition; that the petition has been filed through an unauthorized person; and that the petitioner has not brought on record any document which would support its plea of being an agent of international companies.

9. Furthermore, respondent No.3 had pleaded that it had been functioning in Pakistan since 2004, and had worked with respondent No.1 in the past four years; that the requirement of the three-year local experience was included by respondent No.1/procuring agency in the bid evaluation criteria so as to ensure that the contract, intended to be awarded through a competitive bidding process, is successfully performed by a party which has experience of dealing with E&P companies in Pakistan; that physical presence of equipment and an established base in Pakistan is required so that contracts are performed in an uninterrupted manner; that the services for which the impugned advertisements had been issued are specialized services with respect to oil wells in Pakistan which in turn require specialized equipment and trained crew with experience of operating equipment in Pakistani environment.

10. After the learned counsel for the petitioner and respondents No.1 and 2 completed their arguments, the judgment was reserved. While dictating the judgment, it was noticed that the arguments of the learned counsel for respondent No.3 had not been heard. In order to be benefited by the submissions of the learned counsel for respondent No.3, the case was fixed for re-hearing. On 14.11.2016, learned counsel for respondent No.3 informed the Court that respondent No.3

had not been found to be the lowest or most responsive bidder in the bid evaluation process that had been carried out by respondent No.1 during the pendency of the case. He further submitted that since the contract was not likely to be awarded to respondent No.3, therefore, respondent No.3 should be deleted from the array of the respondents.

11. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

12. Before proceeding further in the matter, I propose first to deal with respondent No.3's preliminary objection to the effect that an unregistered partnership firm cannot file a writ petition. Registration of a firm takes place only when the Registrar makes necessary entries in the register of firms under Section 59 of the Partnership Act, 1932. The effect of non-registration of a partnership firm has been stated in Section 69(1) and (2) of the Partnership Act, 1932. Sub-section (2) is relevant for the purpose of the case and it reads as follows:-

*“(2): No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.”*

13. Learned counsel for the petitioner submitted that the mere fact that the petitioner was not registered under the provisions of the Partnership Act, 1932, would not adversely impact on the maintainability of the writ petition, which had been filed to agitate the petitioner's constitutional right and not to enforce a contractual right. In support of this contention, learned counsel for the petitioner relied on the following case law: -

(i) Usman Vs. Haji Omer Haji Ayub (PLD 1966 SC 328), wherein it has been held as follows:-

*“The Partnership Act does not prescribe any special mode for the creation of a partnership which can validly come into being even upon an oral agreement between the partners. Non-registration of the firm under section 69 of the Partnership Act does not affect the validity of the partnership or prevent any of the partners from suing for the dissolution of the firm or for accounts or the realization of the property of a dissolved firm. This section only bars a suit for enforcing a*

*right arising out of a contract against either the firm or any past or present member of it or against any third party.”*

- (ii) Muhammad Junaid Vs. Karachi Electricity Supply Corporation Limited (2010 YLR 952), wherein it has been held as follows:-

*“7. Section 69 of the Partnership Act prohibits filing of a suit by an unregistered firm against a party for enforcement of a right arising from a contract. However, such prohibition does not extend to a case, where the plaintiff seeks enforcement of statutory duty/obligation of defendant even if the plaintiff is an unregistered firm. Any remedy, which is sought by the unregistered firm for enforcement of a right other than arising from the contract, is not hit by the prohibition contained in section 69 of the Act...”*

- (iii) Countrymen through Partners Vs. Province of Sindh (2015 CLD 942), wherein it has been held as follows:-

*“14. ... Where it is not established/found that suit, so filed under the status of ‘firm’ is not for enforcement of a right, which is arising from a contract arrived between a ‘firm’ and ‘third party’ then such suit shall not [be] hit by disability, explained and defined by section 69 (2) of the Partnership Act, 19[32].”*

- (iv) Abdur Rehman Vs. Parvez Ahmed Butt (1983 CLC 1740), wherein it has been held as follows:-

*“In any event bar of section 69 of the Partnership Act will apply only when the plaintiff files a suit to enforce a right arising from a contract against either the firm or any past or present member of it or against any third party. The present suit is not based on either ground.”*

- (v) Creative Electronics and Automation Vs. Commissioner, Lahore (2013 CLC 1547), wherein it has been held as follows:-

*“In terms of section 69, no suit can be instituted in any Court on behalf of a partner unless the firm is registered and the persons suing is shown as a partner in the Register of Firms. Similarly, no suit to enforce a contractual right can be instituted by an unregistered firm. A review of section 69 shows that there is nothing in the stated section which is applicable to constitutional petitions. It has been held in a case titled “Muslim Commercial Bank Limited Karachi v. Haji Shaikh Yaqinuddin and 2 others” (PLD 1992 Karachi 314) that the bar under section 69(3) of the Partnership Act 1932 does not extend to constitutional jurisdiction or even to rent cases because section 69 is applicable specifically to suits, claim of set-off or other proceedings to enforce a right under a contract. A bare reading of section 69 (1) and (2) reveals that for filing a suit or for the enforcement of a right under the*

*Partnership Act, 1932, the firm must be registered. Subsection (3) provides that it shall apply to a claim of set-off or other proceedings to enforce a right arising from a contract. The use of the words "other proceedings" when interpreted, applying the rule of ejusdem generis would mean that other proceedings will not include constitutional jurisdiction as this jurisdiction, created by the Constitution of Islamic Republic of Pakistan, 1973 cannot be equated with suits or claim of set-off. Therefore, I am of the opinion that section 69 of the Partnership Act, 1932 will not apply to the instant petition."*

(vi) Abid Ali Vs. Bazar-e-Faisal Builders and Developers (2015 CLC 1074)), wherein it has been held as follows:-

*"10. As regards the contention of the advocate for the petitioner that Company Secretary Azam Hussain was not competent to file the suit on behalf of the company and since it was unregistered, he could not institute the suit on its name in view of embargo provided under section 69 of the Partnership Act, 1932, it may be observed that impediment envisaged under section ibid will be attracted only when the plaintiff institutes the suit to enforce a right arising out of a contract against either the firm or any past or present member of it or against any third party..."*

14. An authority of recent vintage on the scope of Section 69 of the Partnership Act, 1932 is the case of Ch. Nazir Ahmed Vs. Ali Ahmed (PLD 2016 SC 214)), wherein it has been held as follows:-

*"From the unambiguous language of the section the intent and purpose of the legislature is loud and clear, that is to make the adverse effects of non-registration so broad-based and comprehensive so as to make the provisions virtually compulsive. This seems to have been mandated with an unmistakable object to exert pressure which is to be brought to bear on the partners to have the firm and themselves registered. The section provides for the effect of non-registration of firms, in that subsection (1) relates to suits by partners against firms or the partners and subsection (2) relates to suits by firms against third person, as fatal, while subsections (3) and (4) lay down exceptions to the (lethal) effects of the non-registration of firms. On account of the penal consequences provided by subsections (1) and (2) of section 69 there cannot be two opinions that the registration of the firm, though has been left optional for the partners and that the facility of registration has been provided without compulsion (see Section 58 of the Act), for the purposes of suits falling within its purview the provisions of section 69 are absolutely mandatory."*

15. Furthermore, in the said judgment, it is held as follows:-

*"In other words subsections (1) and (2) of section 69 place a complete bar on every proceeding initiated vide a suit by an unregistered firm and its partners."*  
(Emphasis added)

16. As mentioned above, the petitioner, in the writ petition described itself as *“a registered firm”*. Despite being given opportunities, the petitioner did not produce its partnership deed (registered or unregistered) or a certificate issued by the Registrar of firms. Learned counsel for the petitioner took the position since the petitioner by instituting the writ petition was not seeking to enforce a right arising out of a contract, the mere fact that it was not registered, would not render the writ petition not maintainable. In support of his contention, learned counsel for the petitioner relied on the case law mentioned above. However, the petitioner was unable to show that it was *“a registered firm”* or even an unregistered partnership firm. The petitioner brought on record documents which show that it had entered into contracts for the supply of goods and services. In these contracts, the petitioner had been described as *“a company incorporated and registered with Islamabad Chamber of Commerce and Industry”* or a *“firm / company registered under the laws of Pakistan”*. The mere fact that the petitioner was issued a Membership Certificate by the Islamabad Chamber of Commerce and Industry or a Taxpayer Registration Certificate by the Federal Board of Revenue would not infuse it with legal personality having the capacity to sue. Only a natural or a juristic person can sue or be sued in its own name. Since the petitioner has not been able to show that it is a partnership firm, it is clearly not a juristic or juridical person. Consequently, I am constrained to hold that this writ petition is not maintainable.

17. A rather curious affidavit has been filed along with the writ petition. The affidavit reads as follows:-

*“I, Imran Khan son of Manzoor Ahmad No.1 Khattak Plaza, Tariq Market F-10/2 Islamabad do hereby solemnly affirm on my behalf and on behalf of other petitioners and declare that the contents of the accompanying Writ Petition are true and correct to the best of my knowledge and belief and nothing has been concealed therefrom.”*

(Emphasis added)

18. Neither in the pleadings, nor in the submissions of the learned counsel for the petitioner was it disclosed as to who these “potential competitors” or “other petitioners” are at whose



instance the petitioner had filed the writ petition. The sole petitioner in this writ petition is “7 C’s Corporate Services”. In the petition, it has been described as a *“registered firm in Pakistan”*, but no document showing its incorporation, establishment or registration has been brought on record. On account of such deficiency, the petition should not have been numbered or registered by this Court. The petitioner does not claim to be in a position to bid for or execute the projects with respect to which invitations to bid were published by respondent No.1. The petitioner, by filing this writ petition, is clearly acting as a surrogate for the unidentified “potential competitors” or “other petitioners”. Hence, the petitioner cannot be termed as an ‘aggrieved person’, and therefore cannot invoke the jurisdiction of this Court under Article 199 of the Constitution.

19. The petitioner claims to be a public interest litigant. Essentially, the petitioner’s case is that it was not in the public interest for respondent No.1 to include as part of the bid evaluation criteria, award up to 20 marks to bidders having *“experience in reputed E&P companies in Pakistan during last three years.”* Learned counsel for the petitioner submitted that the said criteria would unduly restrict the bidding arena by excluding all those potential bidders who had international experience in providing services to E&P Companies. The petitioner has asserted that the bidding process initiated by respondent No.1 was bound to cause a colossal loss to the public exchequer besides severely damaging the public interest.

20. Although, the petitioner claims to be a public interest litigant, it also claims to have exclusive rights to represent foreign manufacturers of tools and equipment related to the oil and gas sector. The petitioner also maintains that there were several potential competitors (*without identifying such competitors*) who were directly aggrieved by the condition of three years local experience. The record is silent as to any instructions from a “potential competitor” or a foreign entity to the petitioner to invoke the jurisdiction of this Court so that the tender bidding process initiated by respondent No.1 is set at

naught. Without such an authority, the petitioner cannot claim to hold brief for such “potential competitors”.

21. This Court has entertained a number of petitions under Article 199 of the Constitution complaining of infraction of fundamental rights of individuals, or of weak or oppressed groups who are unable themselves to take the initiative to vindicate their own rights. Public interest litigation has been termed as *“a strategic arm of the legal aid movement which is intended to bring justice within the reach of the poor masses who constitute the low visibility area of humanity”*. Public Interest Litigation discards the traditional concept of *locus standi* which means that only the person whose legal rights are being violated can approach the Court for redress. The trend of bringing public interest litigation in the Supreme Court and in the High Courts by public-spirited citizens has helped to ameliorate the miseries of thousands of persons, arising from repression, governmental omissions or excesses, administrative lethargy or arbitrariness.

22. Although the petitioner has not brought on record any agency agreement with a foreign entity, assuming that the petitioner is correct in its submission that it is in such an agency relationship, the petitioner has clearly acted for his own economic benefit by invoking the constitutional jurisdiction of this Court, because the participation of such foreign entities in the tender bidding process, and their ultimate success in such a process would advance the petitioner’s business interest. Since, the petitioner has a personal interest in the matter, this petition cannot be held to be in the public interest. Personal interest cannot be enforced through the process of this Court under Article 199 of the Constitution in the garb of public interest litigation. It is the duty of this Court to discourage such petitions and to ensure that the course of justice is not obstructed or polluted by unscrupulous litigants by invoking the extraordinary jurisdiction of this Court for personal gain under the garb of public interest litigation. Reference in this regard may be made to the following case law:-

- (i) The Hon'ble Supreme Court of Pakistan, in the case of Dr. Akhtar Hassan Khan Vs. Federation of Pakistan (2012 SCMR 455), quoted with approval the judgment in the case of Ashok Kumar Pandey Vs. State of West Bengal (AIR 2004 SC 280), wherein it has been held as follows:-

*“Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.”*

- (ii) In the case of Muhammad Shafique Khan Swati Vs. Federation of Pakistan (2015 SCMR 851), the Hon'ble Supreme Court of Pakistan has enunciated a word of caution to the effect that *“public interest litigation undertaken by a citizen must in the first place transparently demonstrate its complete bona fides: that such litigation is not being undertaken to serve a private or vested interest but is demonstrably aimed at serving the public interest, good or welfare.”*
- (iii) In the case of Ms. Imrana Tiwana Vs. Province of Punjab (PLD 2015 Lahore 522), it has been held that public interest litigation *“is not about personal interests and benefits but about public interest and welfare”*.
- (iv) The Hon'ble High Court of Sindh in the case of Muntizma Committee, Al-Mustafa Colony (Regd.), Karachi Vs. Director Katchi Abadis, Sindh (PLD 1992 Karachi 54),

has quoted with approval the judgment in the case of S. P. Gupta and others Vs. President of India and others (AIR 1982 SC 149), wherein it has been held as follows:-

*“17. ... we must hasten to make it clear that the individual who moves the Court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be activated at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the Court or even in the form of a regular writ petition filed in Court. We may also point out that as a matter of prudence and not as a rule of law, the Court may confine this strategic exercise of jurisdiction to cases, where legal wrong or legal injury is caused to a determinate class or group of persons or the constitutional or legal right of such determinate class or group of persons is violated and as far as possible, not entertain cases of individual wrong or injury at the instance of a third party, where there is an effective legal aid organisation which can take care of such cases.”*

23. The petitioner pleads that there were “several potential competitors” who were reluctant to invoke the constitutional jurisdiction of the High Court, because respondent No.1 invariably required a “No Litigation Certificate” from bidders, and does not enter into a business relationship with an entity which was in litigation with respondent No.1. Learned counsel for the petitioner submitted that the potential competitors did not come to the fore by filing a writ petition against the impugned bid evaluation criteria, because such litigation would have caused respondent No.1 to disqualify them from participating in the tender bidding process for its future projects. This, I am afraid, is not a tenable ground for such potential competitors to shy away from invoking the constitutional jurisdiction of this Court.

24. I need not dilate on the major strides made in the development of the jurisprudence surrounding the right to life under Article 9 of the Constitution. Suffice it to say that access to justice has been held by the Superior Courts to be a fundamental right in terms of Article 9 of the Constitution. Reference in this regard may be made to the cases of Baz Muhammad Kakar Vs. Federation of Pakistan (PLD 2012 SC 870), Malik Asad Ali Vs. Federation of Pakistan (PLD 1998 SC 161), Al-Jahad Trust Vs.

Federation of Pakistan (PLD 1996 SC 324), and Ghulam Abbas Vs. The State (2004 P.Cr.LJ 1321). This Court, in the case of Abdul Qayyum Vs. Chairman, Capital Development Authority (2015 PLC (C.S.) 617), has held that the right of access to justice is fundamental right and an integral part of the rule of law.

25. The right of access to justice is recognized as a basic human right. Every right when breached must be provided with a right to a remedy. *Ubi Jus ibi remedium* says the Roman maxim. Clauses of the Magna Carta which are the foundation for the basic 'right of access to Courts' are in the following words:-

*"No freeman shall be taken or imprisoned or disseised or outlawed or exiled or in anyway ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land. ... To no man will we sell, to no one will we deny or delay right to justice."*

26. Furthermore, in the case of Bremen Vulkan Schiffbau and Maschinenfabrik Vs. South India Shipping Corp. (1981 AC 909 = 1981 (1) All ER 289) Lord Diplock observed as follows:-

*"Every civilized system of government requires that the State should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant."*

27. Likewise, Steyn L.J. in R. Vs. Secretary of State for Home Dept., ex parte Leech (1993 (4) All ER 539 (CA)), held as follows:-

*"It is a principle of our law that every citizen has a right of unimpeded access to a court. In Raymond v. Honey 1983 AC 1 (1982 (1) All ER 756) Lord Wilberforce described it as a 'basic right'. Even in our unwritten Constitution, it ranks as a constitutional right."*

28. Now, the vital question that needs to be answered is whether a bidder can be disqualified from participating in a tender bidding process simply because he had instituted legal proceedings against the procuring agency? If the answer to this is, yes, would such disqualification not pose as a barrier to access to justice? I hasten to say, it certainly would, and thereby transgress a person's fundamental right of access to justice. A private party is at liberty not to enter into a contract with a party

against whom he has been litigating. However, such a luxury is not available to the State or a Procuring Agency, as defined in Public Procurement Regulatory Authority Ordinance, 2002. It is well established that in dispensing its largess or entering into contracts, the State is expected not to act as a private individual but should act in conformity with certain healthy standards and not in an arbitrary or discriminatory manner. A party will be reluctant to agitate its rights by invoking the jurisdiction of a Court of law against an authority for the fear of being ousted from a tender bidding process initiated by such an authority. A court of constitutional causes exercising equitable jurisdiction certainly cannot countenance this. Reference in this regard may be made to the following case law:-

- (i) In the case of Messrs Maxim Advertising Company (Pvt.) Ltd. Vs. Province of Sindh (2007 MLD 2019), bidders were required by the procuring agency to swear an affidavit regarding non-involvement in any legal dispute or controversy with any Government agency. In paragraphs 14 and 15 of the judgment, the Division Bench of the Hon'ble High Court of Sindh, held as follows:-

*“14. ... Though mere filing of a suit or pending litigation involving a reasonable cause which arises frequently in such cases involving payments claimed on account of extra work, modifications in schemes, extra items cannot be made a basis to deny participation to bid for the contract. The tendency for frivolous litigation and conditions involving blacklisting, if any, are required to be examined in a rational manner on merits of each case.*

*15. In view of the above we are of the opinion that the information as to pending litigations or the event of blacklisting by any other government agency cannot be withheld by a participant rather the public functionary would be failing in its duty to function in an honest, transparent and reasonable manner, if requisite information is not collected in a prudent, manner before awarding the work of public importance.”*

(Emphasis added)

- (ii) In the case of Premier Mercantile Services (Pvt.) Ltd. Vs. Trustees of Port of Karachi (2003 MLD 1063), only the plaintiff was pre-qualified for the grant of tender for the construction of a Container Terminal at Berths No.6-9 East Wharf, Karachi. The plaintiff had been in litigation with the

procuring agency, and had disclosed this fact in the pre-qualification documents. The Board of Trustees of the Karachi Port Trust ("KPT") decided to discharge the existing tender because the plaintiff was a defaulter of KPT's dues and had gone into litigation against KPT. The Hon'ble High Court of Sindh, after holding that *"the conduct of a party, who litigated for its right cannot be equated with a party whose past conduct in execution of work was poor"*, decreed the suit and directed KPT to consider the plaintiff's bid in a transparent manner.

- (iii) In the case of Pak Shaheen Containers Services (Pvt.) Ltd. Vs. Trustees of the Port of Karachi (PLD 2001 Karachi 30), the procuring agency/KPT, through a public notice, had invited bids for supply and operation of two Rail Mounted Gantry Container Handling Cranes for Berth Nos. 4-5 East Wharf, Karachi Port. In the said notice, it was mentioned that parties who were not in litigation with KPT could obtain the bid documents. KPT refused to issue bid documents to the plaintiff because it had been in litigation with KPT. The plaintiff filed a suit *inter alia* challenging the said condition in the notice. The Hon'ble High Court of Sindh ordered the deletion of the clause: "interested parties who are not in litigation with KPT". Furthermore, KPT was directed not to refuse the acceptance of the plaintiff's bid documents on the ground of litigation which had been commenced against it. In paragraph 9 of the judgment, it was *inter alia* held as follows:-

*"9. ... the impugned clause "Interested parties who are not in litigation, with KPT", prima facie, appears to be arbitrary, discriminatory, capricious, irrational and unreasonable as it clearly disqualifies any persons including Pak Shaheen from submitting bids and competing with other persons on merits without hindrance if he has in the past challenged any action of KPT on the ground that it had in any matter acted unfairly unreasonably, arbitrarily, discriminately or in an untransparent manner. .... Mr. Hamid, learned counsel for KPT was asked to cite any judicial precedent or a copy of the terms and conditions from any part of the world where a similar condition had been incorporated in a bidding document. He was unable to do so. Absence of such a*

*precedent confirms the opinion that such a condition is not regarded as a reasonable one. ...”*

29. The mere fact that a procuring agency cannot disqualify a party on the ground that such a party had litigated against the procuring agency does not mean that the procuring agency cannot require bidders to furnish information in the form of an affidavit or otherwise as to its litigation history with the procuring agency. The importance of such information has also been emphasized in the case of Messrs Maxim Advertising Company (Pvt.) Ltd. Vs. Province of Sindh (Supra).

30. Indeed vexatious litigation must be discouraged, but a Procuring Agency cannot arrogate to itself the right to determine whether legal proceedings instituted against it by a party are *mala fide*. It is for the Courts to penalize unscrupulous litigants indulging in frivolous and vexatious litigations by imposing exemplary costs.

31. Subsequent to the filing of the writ petition, there has been a change of circumstances, in that the tender now cannot be awarded to respondent No.3, who is said to be not the lowest evaluated bidder. Since the entire edifice of the petitioner’s case was based on the alleged collusion between respondent No.1 and respondent No.3, the circumstances subsequent to the filing of the petition have knocked off the bottom of the petitioner’s case. The petitioner, in his pleadings, made the following allegations against respondents No.1 and 3:-

*“1. ... The process has been initiated in collusion of the respondent No.3 and OGDCL has incorporated the condition of three years local experience which the respondent No.3 fulfills only... The process initiated by OGDCL is bound to cause colossal loss to the public exchequer besides severely damaging the public interest. It is tainted with malice and therefore, the same deserves to be struck down by this Honourable Court in exercise of Article 199 of the Constitution.”*

*5. ... The condition has been incorporated just to accommodate the respondent No.3 as the said respondent is the only company/entity that has three years local experience. ... Fact of the matter is that the criteria has been framed only to have a mutually “beneficial deal” in connivance of the respondent No.3.”*

*7. That whole process initiated by the respondent No.1 is engineered, manipulated and person specific...”*



32. The petitioner has made allegations of “collusion”, “malice”, “connivance” and “manipulation” against respondent No.1 without giving any particulars with respect to the said allegations. The mere fact that respondent No.3, after the bid evaluation process, has turned out not to be the lowest and most responsive bidder, and therefore not in a position to be awarded a contract by respondent No.1, renders such allegations to be presumptuous, without any factual basis, vexatious and wholly immaterial. The petitioner, in the case at hand, has abused its privilege in putting forward in the pleadings, the above referred irresponsible allegations against respondents No.1 and 3.

33. True, all pleadings delivered or affidavits sworn in the course of judicial proceedings before a Court of competent jurisdiction, are privileged, but it is equally important that such a privilege must not be abused by casting unsubstantiated aspersions and insinuations against parties to the *lis*. Such a privilege does not give a party a *carte blanche* to make any statement it likes, however defamatory. Such allegations may at times not form the foundation of a claim for damages for libel or defamation by the person against whom such allegations are leveled, but they can most definitely, in my view, be a ground for a Court of constitutional causes, exercising equitable jurisdiction under Article 199 of the Constitution, to penalize and deny relief to a litigant making such allegations.

34. In King v. Skinner (1876) 98 E.R. 529 Lord Mansfield, in a passage which has often been referred to, said:-

*“...neither party, witness, counsel, jury or Judge, can be put to answer, civilly or criminally, for words spoken in office. If the words spoken are opprobrious or irrelevant to the case the Court will take notice of them as a contempt, and examine on information. If anything of mala mens is found on such inquiry it will be punished suitably....”*

35. The admitted position is that the petitioner (7c's Corporate Services) had no intention to participate in the tender bidding process pursuant to the advertisements dated 06.04.2016 and 27.04.2016, it clearly does not have the *locus standi* to challenge the process. In the case of Muhammad Arshad Vs. Secretary, Government and Rural Development Department, Lahore

(2005 CLC 939), it has been, *inter- alia*, held that the mere possibility of bidding at the auction without actual participation conferred no *locus standi* to file a Constitutional Petition. Prospective/potential bidder, who had not joined the auction proceedings, could not be treated as an “aggrieved person” to maintain a constitutional petition under Article 199 of the Constitution. Since, the writ petition is found to be not maintainable for the reasons mentioned above, it is not necessary to go into the merits of the case.

36. In view of the foregoing discussion, this writ petition is found to be not maintainable. Therefore, the same is dismissed with costs. The ad-interim order granted, vide order dated 31.05.2016, stands vacated.

(MIANGUL HASSAN AURANGZEB)  
JUDGE

ANNOUNCED IN AN OPEN COURT ON 13/03/2017

APPROVED FOR REPORTING

(JUDGE)

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## **SCHEDULE-I**

Vide advertisements dated 06.04.2016, and 27.04.2016, respectively, published in the Newspaper "Daily Jang", the Oil and Gas Development Company Limited (OGDCL), inviting following bids for the award of contracts for the procurement of certain goods and hiring of specialized services:-

<b>S. #</b>	<b>TENDER ENQUIRY NO.</b>	<b>DESCRIPTION</b>	<b>BID SUBMISSION DATE &amp; TIME</b>	<b>BID OPENING DATE &amp; TIME</b>
1-	PROC-FA/CB/WS/CHEM-1766/2016	OIL BASE MUD CHEMICALS	09.05.2016 1030 Hrs.	09.05.2016 1100Hrs.
2-	PROC-SERVICES/CB/DO-1717/2016	HIRING OF CASING RUNNING IN SERVICES	09.05.2016 1430 Hrs.	09.05.2016 1500 Hrs.
3-	PROC-SERVICES/CB/PROD-1737/2016	HIRING OF SLICK LINE/EMR SERVICES AT UPCOMING OGDCL WELLS	10.05.2016 1030 Hrs.	10.05.2016 1100 Hrs.
4-	PROC-FA/CB/WS/CHEM-1744/2016	SHALE STABILIZER (SODIUM ASPHALT SULFONATE)	11.05.2016 1030 Hrs.	11.05.2016 1100 Hrs.
5-	PROC-SERVICES/CB/DO-1323/2016	HIRING OF RIG INSPECTION AND AUDIT SERVICES	11.05.2016 1430 Hrs.	11.05.2016 1500 Hrs.
6-	PROC-SERVICES/CB/PROD-1739/2016	HIRING OF STIMULATION AND ALLIED SERVICES AT UPCOMING OGDCL WELLS	12.05.2016 1030 Hrs.	12.05.2016 1100 Hrs.
7-	PROC-FA/CB/WS/CHEM-1751/2016	SPOTTING CHEMICAL	13.05.2016 1030 Hrs.	13.05.2016 1100 Hrs.

<b>S. #</b>	<b>TENDER ENQUIRY NO.</b>	<b>DESCRIPTION</b>	<b>BID SUBMISSION DATE &amp; TIME</b>	<b>BID OPENING DATE &amp; TIME</b>
1-	PROC-FD/CB/PROD-1745/2016	HIRING OF COIL TUBING UNIT, LIQUID NITROGEN, NITROGEN PUMPING AND PUMPER SERVICES	31.05.2016 At 1030 Hrs.	31.05.2016 At 1100Hrs.
2-	PROC-FD/CB/C&ESS-1661-A/2016	DESIGN & CONSULTANCY SERVICES FOR CONSTRUCTION OF RESIDENTIAL STAFF HOUSES & INFRASTRUCTURE WORKS AT NESHPA PLANT KARAK, KPK	01.06.2016 At 1030 Hrs.	01.06.2016 At 1030 Hrs.

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