

## **Actual problems of the antimonopoly requirements` observance in the bidding for the sale of land in the Russian Federation**

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### **Abstract**

*A comprehensive view of the topic of Antimonopoly regulation in the sphere of land auctions for the Russian legal science and legal science other Eastern European countries is highly relevant. The importance of such research is that foreign companies having business in Russia are not always aware of specificity in land tendering legal regulation and antimonopoly requirements in this sphere. Moreover, the practice of violation of antimonopoly legislation in the sphere of land tendering and probable means of legislation improvement may hereby present more interest for them. The authors cite and analyze various typical violations in the sphere of land tendering, including publication of land auctions notices in an improper printing agency; lack of applications registration and putting forward extra requirements towards the participants; display for land parcels auctions for which no technical specifications of networking have been determined and no payment for such networking has been established; attempts of local administration to provide land parcels without prior approval of the objects' places of location and without auctions (though such a procedure is of an extremely local character and is only performed in cases expressly specified by the Federal Law); collection of extra and illegal fees from physical and legal entities for participation in auctions; tendering in cases when they are not to be carried out under the Law (gardening, haymaking); underpricing of a land parcel, etc. Eventually a conclusion is drawn on the effectiveness of auctions which shall be secured by establishing a legal procedure which details and*

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*definitely determines tendering regulations, requirements towards the participants and order of agreement's conclusion. Control on the part of antimonopoly bodies, undoubtedly, allows forming barriers for dishonest participants of the auctions. The authors assume that it is rather difficult to achieve absence of mal-usage by means of coercive measures in this sphere. Auctions may only result in contract conclusion under fair terms and conditions if all the participants of relations hereof apply a principle of good faith while determining a vector of their behavior.*

**Keywords:** auctions, competitive legislation, dishonesty, land law, land parcel, residential house

**JEL Classification:** K0, K11

## **1.Introduction**

At a definite stage of land reform in Russia a necessity in appearance of such a legal construction like conclusion a sale (lease) agreement for a land parcel at the auctions arose. At the same time, the legislator was pursuing, at the minimum, two goals: firstly, to create an effective instrument of anti-corruption drive (as far as it was assumed that the public tendering would exclude a possibility of criminal dealings), and secondly, to increase budgetary gains from tendering. As it usually happens in Russia, a nice idea which succeeds in European countries, has not had the expected effect, having collided with the «originality» and «specific conditions» of the Russian reality.

To understand the reasons and develop necessary recommendations, we need to examine the theory and practice of tendering in Russia. It is necessary to note that the issues of land auctions and antimonopoly requirements in Russian legal science have already got a definite research. Thus, general academic issues on tendering have been scrutinized in the writings of O. Belyaeva (2012), A. Ermakova (2010), L. Gataulina (2007), D. Sakhabutdinova (2007) and many others. The issues of land auctions organization and tendering were under investigations of S. Dzagoev (2008), N. Averyanova and N. Razgeldeyev (2005), F. Rumyantsev (2011), S. Charkin (2012), etc. Antimonopoly requirements have been investigated in the writings of A. Evsikov (2012), L. Borisova (2006), P. Kameneva (2008), etc.

Meanwhile, the investigation of legal problems of Antimonopoly regulation in the sphere of land auctions in Russia should be continued. The importance of such research resides in the fact that foreign companies, while working in Russia, do not always know the specificity of land auctions regulations and antimonopoly requirements in this sphere. Moreover, a big concern for them may represent the practice of violation of antimonopoly

legislation in the sphere of land sales and possible ways of the legislation improvement.

In this article, the authors used the following methods of scientific knowledge: the logical method, the method of system analysis, comparative legal method, the method of historical analysis.

## **2. Legal regulation of land auctions in Russia**

The Land Code of Russia (LC RF) differentiates three procedures of provision of a land parcel destined for building: with a preliminary approval of an object's (a commercial, an industrial one, etc.) location; without a preliminary approval of an object's (a trade, an industrial one, etc.) location, i.e. at the auctions (for housing construction); and without a preliminary approval of the objects' places of location and without auctions (is applied in specially stipulated by the Law cases, for example, for building Olympic objects in Sochi). Under obligatory order, the land parcels shall be allotted for ownership (lease) at the auctions for housing buildings, agricultural use, at selling in the course of bankruptcy and in some other cases. If speaking about the procedure of sale of land parcels (rights for their lease) in auctions, we should distinguish three varieties in the frames of the above-said procedure.

Firstly, it is a so called «point construction» when, within borders of the built-up territories, officers of the local authorities of architecture and town-planning elicit «relatively free» plots (held by, for example, children's playgrounds) which are provided for construction of multi-family buildings. The order of land parcels provision under such construction is being regulated at the LC RF Art. 30.1. and Art.38.1.

Secondly, it is the allotment of a land parcel for building within the limits of a built-up territory in relation to which a decision was made to develop it without tendering in favour of a person with whom an agreement is concluded concerning the development of the built-up territory. The above-mentioned land parcel is provided either in free ownership or in lease according to the person's whom such contract has been concluded with (LC RF item 2.1, Art. 30) choice. According to item 3, Art. 46.1 of the Russian Federation Town-planning Code, the decision on a built-up land development may be adopted if such land is being built-up with multi-family buildings, recognized by the Russian Federation Government established order as dangerous structures (houses under the threat of collapse) and subject to be demolished or multi-family buildings the demolishing and reconstruction of which is planned under municipal targeted programs approved by a local self-government representative body. Consequently, the peculiarity of this agreement resides in the fact that a land parcel by itself is provided for a developer without the auction, however the choice of a developer is carried out by means of a special tender.

Thirdly, the provision of a land parcel for lease for integrated development aiming housing construction. In this case, the land parcel under the result of auctions is provided for construction of not only one separately taken house, but a whole quarter (micro-district) with all the necessary social and infrastructural objects.

### **3. Conception of auctions in the Russian Civil Law**

What is understood by «auctions» in the Russian Federation Civil Code and Land Code of the Russian Federation? Art. 447, RF CC follows that the auction is a means to conclude an agreement. However, such a conclusion in the literature is often disputed. V. Gruzdev notes that in the wide meaning, auctions are an entire mechanism of originating of an agreement, which represents the orderly interaction of its constituent elements.

In the narrow (own) sense of the word, auctions should be understood as a procedure of revealing a winner among subjects of property turnover who want to enter an agreement and who have submitted applications for participation in the auctions (Gruzdev V., 2010). In D. Borisov's opinion, the auction is a means of concluding an agreement, comprising a legal mechanism which secures a definite order in the organizer's activities and competition among the auctions participants for the purpose of revealing the winner whose offer may be recognized as the best among the others (Borisov D., 2009)

As far as the necessity of tendering may be conditioned by different reasons (it may be an imperative requirement of legislation, and wish of a seller to get the highest price for his goods), we assume that the auctions is the means of an agreement conclusion, prescribed by law or applied by an interested person under his free discretion with a view to ascertain the most profitable terms and conditions for himself.

As to tendering, the RF CC rules are very laconic. Depending on tendering purposes and their subject structure, the norms of special laws may be applied to auctions.

Such norms determine the purpose of tendering, procedure, composition and etc. Thus, the main target of the legislation which regulates tendering for placing of orders for state or municipal needs, is not only to secure placing of orders for a wide range of participants, but also to identify the person most able to successfully perform the contract. (VAS RF Presidium regulation dd. 28 December 2010).

### **4. Antimonopoly regulation procedures for land auctions**

In Art. 17 of the Federal Law «On protection of competition» dd. 26 July 2006 (hereinafter referred to as Law on protection of competition) a number of requirements to the order of tendering broadly worded as follows is lodged:

actions which lead or may lead to banning, limitations or elimination of competition are forbidden at tendering.

In practice, the violation of the article regulations often entails the cancellation of auctions' results. Thus, with respect to the auction carried out by the Committee for property management of Inzensky district, Ulyanovsk region, the antimonopoly body had ascertained that the notification on tendering regarding the sale of title for a land parcel lease agreement, published in the newspaper «Forward» dd. 6 February 2010 № 12 (10502) did not contain information considered obligatory by law.

In particular, there was no information about the application form for participation in auctions; term of decision making on refusal in tendering; place, date, time and order of the auctions participants determination; place and term of summing up results of the auctions, order of the auctions winners determination; date, time and order of the land parcel survey on locality; project of the sales agreement or lease of the land parcel; name of the body of State authority or local self-government body which adopted the decision on tendering, details of the above-mentioned decision.

According to an applicant's - Mr. Z. - information, the lack of details in the notification about tendering with respect to order of a winner determination led to Mr. Z.'s loss at the auction, because the applicant did not know what actions he had to carry out in order to become the winner in the auction. Thus, the organizer of the auctions had violated item 8 of Rules for organization and tendering on sale of land parcels considered either state or municipal property or rights to conclude lease agreements for such land parcels, approved by the Government Regulations dd. 11 November 2002 № 808, which led to limitation of competition at tendering on 30 April 2010. Consequently, at the organization of the auction by the Committee for property management of the municipality «Izensky district», actions considered to be a violation of the antimonopoly legislation in accordance with Part 1, Art. 17 of the Law «On protection of competition» (Decision of the Directorate of Federal Antimonopoly Service on Ulyanovsk region dd. August 4, 2010) had been carried out.

Practical situations, which need an integrated application of norms available in several branches of legislation, i.e. on protection of competition, land laws, on placing of orders for delivery of goods, works implementation, services provision for state and municipal needs seem to be rather complicated. Dispute situations may touch upon the issue of necessity of tendering. For example, the use of the auctions' mechanism for concluding an agreement with the winner may not originate in the law norms, however, their necessity may be conditioned by some other reasons, for example, by legal position of the Presidium of High Arbitration Court of the Russian Federation on this occasion.

Thus, antimonopoly bodies consider that local administration provided a land parcel for construction with preliminary agreement of the object's place of

location in the event, when several persons raise demands for the above-mentioned land parcel without tendering, in violation of item 1, Art. 15, RF Law dd. 6 July 2006 «On protection of competition» (Decision of the Arbitration Court of Belgorod region dd. 29 January 2013).

At the same time, the Land Code RF does not envisage a necessity in tendering in such situations. Meanwhile, the practice of law has elaborated a position according to which the right to conclude a land parcel lease agreement is subject to be put up for auction under rules of item 4, Art. 30, LC RF.

As noted in the Regulations Presidium of High Arbitration Court of the Russian Federation, case № A76-4758/2009 (hereinafter - Regulations), such method of land parcels provision meets the principles of combination of interests of the society and particular citizens set forth in item 11, Art 1, LC RF as well as secures justice, publicity, openness and transparency of the land parcel procedure provision to a particular person (Decree of the Presidium of High Arbitration Court of the Russian Federation dd. 14 September 2010).

At the first sight, such an approach ensures competition in the sphere of land parcels turnover. However, we assume that, in fact, Presidium has applied in the above-mentioned Regulations an analogy of the law reasoning as follows. The order of a land parcel provision for construction with the preliminary agreement of the object's place of location in the event, if several persons pretend to such land parcel, has not been settled in the LC RF. As long as the land parcel may be provided to only one of the applicants, it is necessary to determine such a person, which is impossible to do pursuant to the rules of choice of a land parcel, envisaged in Art. 31 of the Land Code, and within the procedure of land parcels provision for construction with preliminary agreement of the object's place of location.

At the same time, the Land Code of the Russian Federation makes no provision for the possibility of analogy of the law. In addition, Art. 30, LC RF determines two variants of land parcels provision for construction among the lands available either under state or municipal ownership.

A land parcel provision for construction with preliminary agreement of the object's place of location does not foresee tendering. The order, specified at LC RF quite comprehensively determines the relations which arise between the local self-government body and a person who applied for a land parcel provision. In this connection, the legal position of Presidium actually goes beyond the frames of the legal norm interpretation and creates a new norm. It is assumed that a gap revealed at the Land Law needs to be filled in by means of a special supplement to Art. 30, LC RF foreseeing obligatory tendering, which to the law is not needed, but should be applied if there have been two or more applicants for the land parcel. Right up to the development and adoption of such amendments the courts and antimonopoly bodies will follow the position stipulated by Presidium. The latest circumstance, proves a step-by-step

development of a judicial precedent as a source of law, officially not being recognized by the doctrine.

It should be taken into account that auctions are not the only means to conclude an agreement at availability of several potential contra-agents in Russia. Thus, by considering the case № A12-9036/2009 it was established that there existed a Regulation approved by the self-government body which determined rules of tendering in the case when several applications had been submitted. In Item 2.2.11 «Regulations on provision of land parcels for construction in Volgograd» approved by the Decree № 790 of Volgograd city Administration dd. 11 June 2004, it was envisaged that at submission of two or more applications regarding the choice of a land parcel and preliminary agreement of the object's place of location on one and the same territory, in relation to which no decisions had been made until that moment, the Volgograd Administration independently determined a person for whom a place of location of the capital construction object would be preliminary agreed on the basis of the following criteria: town-planning value and social significance of the supposed to construction object; its accordance to the architectural context and town-planning situation formed by that time, perspectives of the territory development (Decree of the Federal Arbitration Court of the Povolzhsky county dd. 24 December 2009).

Meanwhile, the absence of transparent and public criteria for selecting candidates with availability of vague criteria (how to estimate a «town-planning value» of an object?), is nothing less than the creation of conditions for growth of corruption in construction business. Besides, such an act must be adopted by the local representative body and not by the executive authority, which means that a misuse of powers takes place.

M. Popov reasonably draws attention to such an aspect of the issue under study, as the financing of works on a land parcel formation: an applicant, while carrying out a range of expensive and long-term activities, has the right to expect that the land plot chosen only thanks to his efforts will be for sure given only to him (Popov M., 2010). Today, however, this aspect of the problem in Russia has not been settled yet.

## **5. Analysis of typical violations of the antimonopoly legislation**

At present, in Russia nobody will guarantee that tendering in itself will secure a clear and open procedure for all interested persons. In connection with the necessity of tendering in frames of enforcement proceedings for getting the right to conclude a state or a municipal contract, a whole system of fraud on the part of the bidders and their organizers has been developed.

Scientific and legal literature notes that in connection with the rise of detailing the legalization concerning placing of orders and antimonopoly legislation, unfair applicants and auctions participants create more and more

latent methods of manipulation of the auctions procedure. It becomes more complicated to reveal such methods both for the other participants and for the State controlling authorities (Lykov A., 2011).

The creation of preferential conditions for the auctions participants may also be carried out by different actors and be expressed by different actions resulting in a disparity of the auctions participants (Petrov D., 2010).

For example, the courts have noted the facts when an auction organizer for circumvention of the prohibition in limitation to access to the auction, had undertaken the following actions: established an unreasonably short-term period for applications submission (nonmetering a big number of persons who wanted to take part in the auctions); eliminated the possibility of mailing the applications; violated open form of the auctions; refusal to accept applications through the office.

At the same time, the limitation of access to auctions not envisaged by the law, even the only one potential participant is an absolute reason for recognition the auctions organizer's actions as violation of Law on protection of competition (Decree of Presidium of High Arbitration Court of the Russian Federation dd. 20 September 2011).

The authors, in their legal practice, more than once noted the facts when antimonopoly bodies and public prosecutor's office authorities had recorded the following violations in competition: publishing notices of land auctions inappropriately (for example, instead of a newspaper with the run of 3000 copies in a newspaper with the run of 50 copies); lack of applications registration and offer of supplementary requirements towards the participants; networking in inappropriate conditions when no payment was established for such networking; attempts of local administration to provide land parcels without preliminary agreement of the object's place of location and without auctions (though such a procedure is of an extremely local character and only in cases set forth by the Federal Law); collection of extra and illegal fees from physical and legal entities for participation in auctions; tendering in cases if they are not subject to be tendered under law (gardening, haymaking); lowering the land parcel price, etc.

Sometimes the auctions participants disregard the same idea of auctions, performing collusion between themselves. The feature of such a collusion may be: winnings of one and the same company in a majority of auctions; winnings in auctions by a range of companies in turn; participation of a minimum number of participants in auctions; good awareness of auctions participants about competitors and their offers; insignificant decline in initial price; participants failure to appear at the auctions procedure; presence in the auctions of participants who have never declared their offer; limitation of access to information about coming auctions; considerable difference of cost of auctions due to results from those available in the market (Kinev A., 2011).

By evaluating legislation and legal practice as a whole, we may come to the conclusion that the «ideal» procedure of the auctions must ensure: the informational openness of the auctions, the uniform approach to all the participants, clear requirements to tender documentation, preliminary conditions of selection of the auctions' winner. Limitation by the organizer, not envisaged by the law, access to auctions of a single potential participant, is an unconditional grounds for recognition the action of the organizer of the auctions as violation of Law on protection of competition (Decree of the Presidium of High Arbitration Court of the RF dd. 20 September 2011).

## **6. Authors' proposals on improvement of the law and practice**

In our opinion such improvement shall include:

1) when organizing land auctions, at present, the only unremovable drawback which exists – the more the price of a land parcel, the more expensive will be the cost of apartments in a multi-family house built on it. However, if we arrange trading which is not to increase the cost per meter of land, but downward cost of a one square meter of a dwelling, such methods will allow stimulating social housing construction.

2) the procedure of the auctions has been imperatively envisaged for multi family buildings housing, but provision of a land parcel for an individual housing construction (hereinafter referred to as IHC) is possible without any auctions. In this case we speak about commercial land parcels for IHC, but not about citizens who have three or more children and to whom such land parcels are provided for free and without auctions. Thus, speaking about the above-mentioned commercial land parcels, we may note that such dual position of the legislator has not been substantiated (some citizens get land parcels for IHC without any auctions and others – on the auctions). In this sense, aiming at the development of healthy competition, it is reasonable to add to the Land Code of the Russian Federation the norm of compulsory tendering at sale a land parcel for IHC. Here, the experience of the Republic of Kazakhstan is notable, where Art. 48 of the Land Code comprises a clear and comprehensive list of cases of land provision without auctions.

3) the auctions on separate categories of lands (agricultural and recreation purpose) should be conducted in two stages: first, in the form of a contest for selection of participants, and then by means of a «classical» auction. The need for the introduction of such a measure is justified by the fact that the above-mentioned land categories require special care and attitude, that is why it is reasonable to give access to purchase (lease) land only to trained participants. The contests should be guided by the principle of equal access, transparency and competitiveness of its participants.

4) it is necessary to extend the possibility of public control over land tendering by not only posting information on websites of bodies of public

powers about emerging trades, but also on their progress, participants, winners, final price, etc.

5) today, tendering for sale of land parcels (rights for their lease) has nothing to do with the town-planning regulations, stipulated in article 24 of the Town-planning Code of the Russian Federation. What does this mean?

Let us suppose a city district was built in the 70s of the last century, and it was assumed that the number of its inhabitants would be 100 thousand people. On this basis, Soviet architects planned (and was built) a certain number of schools, hospitals, clinics, kindergartens, baths, laundry rooms and other social objects.

When the developer in order of a «point construction» adds in such a micro-district dozens of multi-family buildings, the only thing he is interested in is profit.

In turn, citizens are interested in how quickly they will be able to move into a new comfortable dwelling.

Seemingly, everyone is happy. However, things soon turn out to be quite paradoxical.

Therefore, two (or five) times as many children as the kindergarten is able to take live in the micro-district; the Soviet-era school is not designed for such a number of pupils; there are huge queues in the clinics because the number of doctors and clinics was calculated to serve the other quantity of population, etc.

Who is to blame for this situation? The answer is obvious: the local authority has no right to grant the land parcel for housing construction if, as a result of the building construction, regulations of regional and local town-planning design will be violated.

It is precisely this item which is not fixed in the LC RF and consequently, there is an urgent need to do so.

## **7. Conclusion**

Effectiveness of the auctions must be secured by fixing in law the procedure which exhaustively and unequivocally determines the order of tendering, requirements to the participants, order of contracting. Control on the part of antimonopoly bodies, undoubtedly, allows forming barriers for unfair auctions' participants.

However, we assume that it is rather difficult to achieve absence of abuse in this sphere by means of enforcement measures. The auctions may only be resulted in contract conclusion if all the participants of relations under consideration will proceed from the principle of good faith in determining vector of their behavior.

The knowledge on violations of the antitrust requirements in the practice of the land auction existing in Russia will help foreign investors to avoid taking unnecessary risks and unjustified expenses. The overseas investor should

monitor the observance of the principle of information openness of trades, a single approach to all participants, the availability of clear requirements to the competitive documentation, pre-defined conditions for the selection of the winning bidder for participation in the auction. Court practice in Russia exposes that the violation of these requirements as well as limiting the organizer's of the auction access to participation in trades of at least one potential participant are the absolute basis for recognition of actions of the organizer of trading in violation of the Law on protection of competition.

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