

The Russian Federation
Roundtable on the methods for allocating contracts/licenses for provision of local
and regional transportation services
February 25, 2013
Working Party No. 2 on Competition and Regulation
OECD Competition Committee

1. *Description of the industry and regulatory framework*

a) Public transport is of the most important industries in the Russian Federation. Share of paid public transport services among the total amount of paid public services in Russia accounts for more than 20%.

Thus, motor transport has a considerable share in the structure of passenger transportation.

According to Articles 4 and 5 of the Federal Law № 259-FZ of 08.11.2007 “Regulations of motor transport and in-city electric transport” transportation of passengers and luggage, goods is performed by means of in-city, suburban, inter-city, international commuter routes and are subdivided into scheduled (regular) services, charter services and taxi transportation.

In-city regular services include transportation of passengers and luggage within certain geographical area by public transport.

These means of transportation is intended first of all for the use of citizens with low income and to provide for territorial integrity of cities and accessibility of all communal utilities and areas; and in-city public motor transport performs a number of important social functions.

Regular passenger and luggage transportation are subdivided into:

- 1) transportation of passengers with getting on and off only at the specified stops on the regular transportation route;
- 2) transportation of passengers with getting on and off only at any possible point on the regular transportation route if it is not prohibited by official driving standards and road regulations (hail and ride services).

In this particular market the passenger transportation service by means of in-city public transport is the good in question. The market is segmented according to its geographical area and transportation route. Transportation services are provided by the entrepreneurs who act on their own initiative and free will and their activities are aimed at getting profit from provision of transportation services.

Additional the market can be segmented according to means of transportation used, i. e. by bus, trolleybus, tram or route taxi (minibus).

As a rule there are several public transport companies in large cities, thus the market of public transportation is potentially competitive. Different types of passenger transportation can be interchangeable in case their routes coincide

Chartered transportation and taxi cannot be substitutes of public transport because of the differences in pricing policy and target group.

Majority of in-city public transport markets are highly concentrated as in each segment there is a large transportation company who is the main player in the market and as a rule it is a state or municipal company.

Suburban or intercity public transport markets have practically the same characteristics.

b) Establishment and maintenance of public transport in the Russian Federation is under the control of subjects of the Russian Federation (suburban or intercity(inter-municipal) public transport) and local authorities (within the geographic area of the populated area, municipality or city district).

The Federal Law № 184-FZ of 06.10.1999 “On general principles of establishment of legislative (representative) and executive state authorities of the subjects of the Russian Federation” and Federal Law of 06.10.2003 № 131-FZ “On general principles of establishment of local authorities in the Russian Federation” regulate the powers of the authorities and as well as lay on them responsibilities to organize and maintain the public transport system.

Relatively recently adopted Federal Law of 08.11.2007 № 259-FZ “Regulations of motor transport and in-city electric transport” and the Resolution of the Government of the Russian Federation № 112 of 14.02.2009 (based on the law) “On assertion of the Rules of transportation of passengers and luggage by motor and in-city electric transport” do not define concept of establishment and organization of transport services.

The basis legal act regulating the aspects of establishment and running of motor transport services for customers is the departmental Order of the Ministry of the motor transport № 200 adopted on 31.12.1981 “on approval of the rules of establishment of motor transport services” (the documents dates back to Soviet era and as a consequence do not reflect the actual up to date situation). Analysis of this document indicates the establishment of motor transport services includes systematic study passenger traffic and elaboration of efficient routes in correspondence to it.

According to point 34 of these rules the responsibility to systematically observe, examine and analyze the passenger traffic was entrusted to motor transport enterprises. The result of the analyses is used as the basis for development and correction of route scheme, particular routes, timetables, intervals and etc. and is used for improvement of services especially at “rush hour”.

However these rules are the only document regulating this sphere at the present time (and there are no up to date legislative alternatives) and they are used with consideration of the changing situation and conditions which is proved by the judicial practice.

Systematic observation, examination and analysis of the passenger traffic as well as efficient adjustment of efficient route network is entrusted to motor transport enterprises (according to the Rules). However the establishment of the transport system is under the control of executive authorities of the subjects of the Russian Federation and local authorities. As a consequence the new regulations should be adopted which will legally define responsibility of the executive authorities of the subjects of the Russian Federation and local authorities to examine, analyze and elaborate (adjust) passenger traffic.

The analysis of the draft law № 423427-4 “On establishment of motor transport services with regular routes in the Russian Federation” (adopted in the first round) indicates that such provision as discussed above is not included. Thus this legislative deficiency should be eliminated during the second round of adoption at the State Duma.

The basis of the modern route network was established at the soviet time and it is quite obvious that the executive authorities of the subjects of the Russian Federation and local authorities do not act as fast and necessary to adjust the network for efficient service for needs of population.

The current legislation does not contain the definition of the term “route network”. According to the current legislation, the route network is not subject to mandatory publication. Part 1 of Article 789 of the Civil Code of the Russian Federation provides only for publication of the list of organizations that need to carry out shipping operations recognized as shipping operations by public transport. However, till the present a list of such organizations has not yet been published, and the order of the publication has not been determined either.

The new draft law refers to the Register of Routes of Regular Communication, which is maintained by local authorities (in respect of municipal routes), executive authorities of the constituent entities of the Russian Federation (in respect of inter-municipal routes), and the federal executive body authorized by the Government of the Russian Federation (in respect of routes among the subjects of the Russian Federation). The concept of the “Register of Routes of Regular Communication” has not been yet defined.

According to the FAS Russia’s opinion, it would be more appropriate to develop and *to publish a single system of transport communications and road and street networks, which would be in alignment with the planning structure of the settlement and the surrounding area, rather than to elaborate and to publish a route network and route registers.*

To meet the emerging needs of the passengers (in some cases due to the commissioning of new residential areas) carriers often independently develop new routes and schemes and apply to the relevant authorities with a request to open, or to change, a route and to approve certificates of developed routes. However, carriers face state authorities’ refusals,

which usually base their decision on the fact that the routes overlap, which, in their opinion, has a negative impact on road safety.

Moreover, experience has shown that such refusals are often unreasoned. They are not based on the federal laws, and, therefore, they create unnecessary obstacles to carriers in the operations and are recognized by the courts as a violation of Part 1 of Article 15 of the Federal Law of 26.07.2006 No.135-FZ “On Protection of Competition”.

The draft law “On the Fundamentals of Organization of Transport Services on Routes of Regular Shipping Services in the Russian Federation” (or the Regulation on Passenger Transport by Means of Road and Urban Surface Electric Passenger Transportation to be accepted in accordance with the draft law and to be approved by the Government of the Russian Federation) should set a clear procedure for the opening, the change and the closing of routes, and the grounds for issuing a refusal.

In the draft law accepted in the first reading there are two cases of refusal in the opening (change) of routes of regular service:

- 1) non-compliance of a regular route with the requirements for the organization of routes of regular communication established by the Rules of Organization of Passenger Transportation;
- 2) failure of the budget of the Russian Federation, and of a municipality to provide subsidies to carriers under the current Law.

Furthermore, the second reason for refusal in the opening (change) of routes is provided for all types of traffic, without exception, and the draft law provides for two types of traffic: regular service carried out on the basis of state and municipal orders using rates approved by the state authorities of the Russian Federation and local government, and, therefore, the provision of subsidies to carriers, and other regular services performed with the use of tariffs set by the carrier.

Thus, the second case of refusal in the opening (change) of routes may not be applied to those routes, which are opened at the initiative of carriers, and transportation on these routes are provided without subsidies, which is to be specified in the Law.

As for the first case of refusal, the Rules shall contain clear and specific requirements to organization of regular routes. A refusal to open (change) routes must be reasoned and based on evidence. Otherwise, the refusal will create unnecessary obstacles to the operations of economic entities.

According to the Estimated Program of Legislative Work of the State Duma of the Federal Assembly of the Russian Federation for the Spring Session in 2012 in Terms of Draft Laws for Priority Review, approved by the Resolution of the State Duma of the Federal Assembly of the Russian Federation dated 13.01.2012 No.16-6 DG after nearly a five-year break, the second reading of the draft federal law No.423427-4 “On the Basics of the Organization of Public Transport Services on Regular Routes in the Russian

Federation” was scheduled for May 2012, but so far it has not been considered.

The FAS Russia hopes that these issues will be resolved by adopting a law that establishes a common approach of the authorities and bodies of local self-government to organization of public transport services.

2. Distribution to Private Suppliers of Contracts on Rendering the Passenger Services by Means of Road Transportation

As it was said before, the institutional framework of the transport services in the constituent entities of the Russian Federation and the municipalities are defined by the legal acts of the constituent entities of the Russian Federation and the municipalities.

The said authorities shall be entitled to carry out admission of the carriers to the servicing of regular passenger routes on the basis of an agreement by establishing competitive or other conciliatory proceedings. *At the federal level, the obligation of competitive distribution of routes is not established.*

However, many regulations adopted by regions in this field have common standards. The basis for such legal acts is the rendering of regular passenger services on the basis of an agreement concluded between the carriers and the authorized body in the field of public transport services. In the absence of such an agreement, the services may be recognized illegal, and the carrier may be subject to administrative liability under the law of a subject of the Russian Federation.

A district or city government supervises the transport agencies and organizations which serve the population of a district or a city, coordinates routes and schedules of local transport, and draws companies and organizations to transport services on a contract basis.

Passenger services are rendered by transport organizations and individual entrepreneurs. Service providers are business entities of various forms of ownership, which render passenger services on the basis of relevant licenses.

As the field of public transportation is regulated on the regional and local levels, the practice has no single approach and requirements to the issues associated with an exclusive contract and the development of competition in the rendering of services. This also applies to the principles of selection of carriers, and the conditions of conducting tenders, building lots, and determining the winners.

It should be noted, however, that the attitude to tenders as a tool of selection of participants which does not restrict competition has been formed only in recent years. Prior to that, a position dominated among market participants and regulators, which consisted in the recognition of such tenders held by local administrations, which contradicted the antimonopoly legislation and restricted the rights of the carrier holding a license to carry out business activities.

The general principles and requirements for trading are established by law.

The antimonopoly requirements to tenders established for local authorities are determined in paragraphs 1 and 2 of Article 17 of the Law “On Protection of Competition”, which prohibit:

- coordination of operations of bidders in a tender by the organizers of the tender or the customers;

- creation of preferential conditions in a tender to a bidder or several bidders, including through access to information, unless otherwise provided by the federal law;

- violation of the procedure for determining the winner or winners of the tender;

- participation of the tender organizers or customers and (or) employees of the tender organizers or employees of the customers;

- restriction of access to participation in the tender not provided by the federal laws or other regulations.

Paragraph 4 of Article 17 establishes that violation of these rules is grounds for a court to find relevant tenders and transactions concluded afterwards void, including by the claim of the antimonopoly authority.

In accordance with Article 447 of the Civil Code of the Russian Federation, tenders are held in the form of an auction or a competitive tender. The person who offered the best conditions is declared a winner by the decision of the competition committee which is pre-assigned by the tender’s organizer. The competitive tender, which was attended by only one party, is deemed invalid.

The procedure of the tender for the selection of carriers to arrange transport on designated routes, is usually regulated by the acts of the authorized body of a subject of the Russian Federation. Such act determines the order of formation of the competition committee, the dates of the competitive tender, the conditions of admission of candidates to the competitive tender, the selection criteria, and the order of formation of lots.

Generally, a competitive tender is held in respect of municipal and inter-municipal (suburban) routes.

The regulations of the subjects of the Russian Federation establish the competence of the authorized body for the supervision over execution of a contract by a carrier.

The issue of legality of the tender by placing the state, municipal order to carry out transport services is controversial in the absence of federal regulation. In many cases, court decisions indicate that the competitive tenders for the right to carry transport services on the specified routes by their nature are not the placing of an order by means of holding a competitive tender for the provision of services for public use by the budget,

because such tender is performed at the expense of citizens themselves and does not provide for spending budget funds of a public entity.

In general, organization of passenger transport by means of road transportation is based on the contract concluded upon the end of a tender. The rules are established by public entities independently with the basic legal requirements.

Tenders

During the past few years Russian competition authorities repeatedly treated cases closely associated with passenger's vehicle transportation tendering process (including both the right to provide public transport services on regular municipal itinerary and the right to serve the regular passenger transportation routes). (hereinafter – the “tendering”).

Currently, the necessity of tendering for carrier which provides transportation services on a specific itinerary is undeniable by the authorities, although such tendering procedure is not stipulated by the legislation.

At a federal level, there are no any other acts or rules determining unified demands for such tendering. Furthermore, courts of different levels and districts repeatedly tried cases concerning actions of tendering organizers in respect of carriers, and their decisions are not always definitely evaluate actions of authorities.

Case study

The Stavropol Regional Office of the FAS Russia considered the case against the Government of the Stavropol Region based on the signs of violating part 1 Article 15 of the Federal Law No. 135 FZ “On Protection of Competition”.

The Government of the Stavropol Region has enacted the Resolution No. 170-p dated 05.05.2001 “On Introduction of Changes in the Resolution of the Government of the Stavropol Region No 256-p dated on 04.08.2010 “On the Actions for Implementation of the Law of the Stavropol Region “On the Organization of the Public Transport Services in the Stavropol Region”, such amendments add plus 7 points (evaluation criteria) to the participants of a tender for the availability of their own production facilities. Such amendments restrict equal terms for all other participants of the tender in case they do not have their own production facilities.

The scoring is based on the use of production facilities and it does not take into account such criteria as quality and timeliness of regular servicing and appropriate repair of vehicles. Such scoring gives odds to large business entities that usually own the mentioned facilities.

However the ownership is not a major point of consideration of the quality of work or service. Both federal and regional legislation don't gear traffic safety with the quality of services provided by the owners.

In accordance with Part 25 of the Resolution of the Government of the Stavropol region No. 256-p, the highest possible number of points which the carrier can get is 28. Meanwhile, 7 of such points (or 25 %) provides for the availability of production facilities. So, the participant of the tender who possesses the production facilities scores has an advantage over other participants and becomes the bid winner.

The Stavropol Regional Office of the FAS Russia found that the Government of the Stavropol Region violated Part 1 of Article 15 of the Federal Law No. 135 FZ "On Protection of Competition".

The court of appeal confirmed the position of the competition authority.

Auctions

Different economic spheres have different requirements for organization and conducting the auction. It helps to create a fertile competitive environment for business entities on the goods' markets and regulate the activity of government bodies. It also forbids the latter to create preferences for certain business entities.

Based on the practice of consideration of business entities applications in respect of bid organizers actions, the FAS Russia notes that generally carriers do not agree with the terms and conditions of auctions (e.g. tender documentation) and the activity of tender commissions in case of specific facts of scoring.

Case study

The Krasnodar Regional Office of the FAS Russia considered the case against the Transport Department of the Krasnodar Region (hereinafter – the Department) based on the signs of violating Part 1, Article 15 of the Federal Law No. 135 FZ "On Protection of Competition".

In the course of consideration of case materials the Krasnodar Regional Office of the FAS Russia determined that the Department had sent the letter No 60-1614/11-04-07 dated 01.04.2011 to OJSC "Svetlogradskoe ATP" concerning the conclusion of a contract (hereinafter – the Letter of 01.04.2011).

In this letter the Department persuades OJSC "Svetlogradskoe ATP" to negotiate an administrative agreement for regular bus passenger traffic among several regions of the Russian Federation (hereinafter – the Agreement).

In case of refusal to negotiate the Agreement the Department reserves the right to revoke approved timetables and route registration certificates. Such acts will remove the carrier from the list of regular bus passenger traffic routes among several regions of the Russian Federation.

In an application to the letter dated 01.04.2011 addressed to the JSC "Svetlograd Auto-transport Enterprise" Department detached a draft of the contract "for regular passenger transitions on the interurban bus route of regular communication between the constituent entities of the Russian Federation," the route "Stavropol -Gelendzhik", "Stavropol-Anapa" "Svetlograd-Krasnodar", "Svetlograd-Anapa".

The antimonopoly body, recognizing the Department's actions mentioned above to be a violation of Art. 15 of the Law on Protection of Competition, proceeded from the following basis.

In accordance with the paragraph 1 art.421 of the Civil Code of the Russian Federation, citizens and legal entities are free in a contract formation.

Coercion to a contract formation is not permitted, except the cases when the responsibility of a contract formation is provided by the Civil Code, the law or the obligation voluntary accepted.

In its turn, Russian law does not provide that the contract formation by the letter dated 01.04.2011, is an obligation for JSC "Svetlograd Auto-transport Enterprise" transportation on interurban bus route of regular communication between the constituent entities of the Russian Federation, it means that the rejection of the contract formation is not the ground for recall of direction passports agreements, in accordance with which JSC "Svetlograd Auto-transport Enterprise"'s transportation is carried out.

In the case of law violation the letter of the Department includes the threats of negative consequences for JSC "Svetlograd Auto-transport Enterprise" in the case of the regret of contract formation. It means the exclusion of the information about the carrier and its directions from the general registry of regular bus routes between constituent entities of the Russian Federation".

The threat of the recall of direction passports agreements could deprive of "Svetlograd Auto-transport Enterprise" the right to carry transportation on the directions mentioned above. It would lead to the restriction or elimination of competition in the interurban transportation market.

Department of the Federal Antimonopoly Service in the Krasnodar region recognized the actions of the Department in the letter № 60-1614/11-04-07 from 01.04.2011 "On the conclusion of the contract to be a violation of 2 Part 1 of Art. 15 of the Law on Protection of Competition and, and issued an order for the removal.

Courts of all three instances supported the position of the antimonopoly body.

Price policy

In accordance with the law the state regulation of prices (tariffs) for the carriage of passengers and luggage by all forms of public transport in the city, including the underground, and suburban (excluding railways) is carried. In this case, it is all about the municipal (intracity) transportation.

Authorities of constituent entities of the Russian Federation have the right to establish state regulation on the transportation of passengers and luggage by intraregional and interregional (intersubjective) routes. In practice, tariff regulation on intersubjective routes is not performed, the tariffs are set by the carrier.

Among the standard tender conditions there are: experience, existence of vehicles in a certain amount and with certain environmental requirements, the number of offenses, the existence of a technical base and etc. The legitimacy of setting by the Administration of some conditions is often a subject of litigation.

Moreover, normative acts of the constituent entities of the Russian Federation set the requirement to include one or more directions in lots. In the latter case it is possible to set combination of profitable and non-profitable directions.

Contracts with carriers on the results of the tender are usually urgent, concluded for a period of several years, with possible extension.

Annex to the contract is the direction passport with the traffic schedule.

A contract sets the responsibility of the parties for compliance. As a rule, contracts contain provisions which imply legal procedures of dispute resolution.

In order to improve the market regulation, the development of common rules now the work is carrying to form the legal framework: a draft of a federal law is developed on transport service organizations in different market segments. One of such a bills is passed in the first reading by the State Duma of the Federal Assembly of the Russian Federation in 2007. In this bill the requirements for competition in the transport routes is reflected to prevent the monopolization of markets. Antitrust authorities advocate adoption of these acts as soon as possible.

The ways of law improvement on organization of public transport services

The FAS Russia established numerous facts of violation of antitrust law by government authorities of the constituent entities of the Russian Federation and local governments in the sphere of organization of regular passenger transportation by road to the urban, suburban and inter-municipal routes.

The practice of the FAS Russia shows the need to improve at the federal level legislation

on the public transport services organization, in so far as establishing united requirements for the organization of public transport by civil authorities.

FAS Russia considers to be right to develop a standard document which defines procedures and conditions of the tenders. It would be binding on implementation by local governments and public authorities, which are responsible for organizing the transport of passengers by automobile transport on their territory.

FAS Russia had sent to Ministry of Economic Development of RF its proposals to initiate the formulation the model rules of tenders for a contract of carriage of passengers and luggage by automobile transport to the urban, suburban and intermunicipal routes, which sets the basic principles of access of market entities to the market of passengers and baggage by automobile transport, as follows:

- 1) Obligation to hold tenders as a tool of competitive selection of the carriers offering service on a particular route;
- 2) A unified procedure for tendering, including:
 - Public access to information about a tender (notice and tender documentation);
 - The mandatory requirements entities should met to apply for participation in a tender;
 - Requirements for technical equipment of applicants to participate in a tender, a road transport (equipment of buses with global satellite navigation systems, the availability of reserve buses, etc.);
 - An exhaustive list of documents submitted by applicants for participation in the competition;
 - Requirements for building lots, providing the opportunity to small and medium-sized businesses and individual entrepreneurs (one lot - one route) to participate in a tender;
 - Uniform rules of evaluation and comparison of applications for participation in a tender on the criteria which characterizes the quality of services (including the availability of equipment for handicapped, technical equipment, which enhances passenger comfort, the life of the vehicle, etc.);
 - The conditions for choosing the winner with an equal number of points;
 - The order and duration of contracts concluded by the results of a tender;
- 3) Transportation provision for privileged category of citizens during the tender time.

- 4) It should be noted that the cancellation of state regulation of tariffs for the carriage of passengers and luggage by automobile for intra-and inter-regional (inter-republic within the Russian Federation) routes, including taxis, and passenger and luggage public transport of all models in the city, including the metro, and suburban (excluding railways) would be an incentive for development of competition on the market of passenger automobile transport.

The possibility of regulating these tariffs is provided by the Government of the Russian Federation Decree dated March 7, 1995 № 239 "On measures of state regulation of prices (tariffs)." However, this provision is in conflict with the provisions of the Federal Law of December 28, 2009 № 381-FL "On the basis of state regulation of commercial activities in the Russian Federation" (hereinafter - the Law on Trade). According to paragraph 4 of Article 8 of the Trade Act, if federal law provides the state regulation of prices for certain goods (extra charges to its price), a price of such goods (extra charges to its price) are installed in accordance with the federal laws and also adopted in accordance with regulation acts of federal level and (or) regulatory acts of local government.

At the same time, the federal law providing the introduction of state regulation of inter-regional and intra-regional passenger transport tariffs is not available.

According to the author, the draft "On the Fundamentals of public transport service organization on the regular routes in the Russian Federation" (or taken in accordance with it Regulations of passenger automobile transport and urban surface electric passenger transport, claiming by the Government of the Russian Federation) should set clear procedures of opening, modification and closing of direction, as well as the reason of refusal to open (change) directions.

The bill, passed in the first reading, two cases of refusal to open (change) regular direction are foreseen:

- 1) Mismatch of regular route direction to the requirements for regular transportation direction organization, established by the Rules of public transportation organization;
- 2) Shortage of budget resources of constituent entity or municipality to provide transport operators with donations in accordance with the law.

Moreover, the second case of refusal to open (change) direction is provided for all the types of transportation, without exceptions, and the draft envisages two types of transportation: regular service, carried out on the basis of state and municipal orders using tariffs approved by the state authorities of the constituent entities of the Russian Federation and local government, and, respectively, providing carriers donations, and other regular services, performed with the use of tariffs set by the carrier.

Thus, the second case of refusal to open (change) the directions can not be applied to

those directions, which was opened at the initiative of carriers and transportation in accordance with which perform without donations, which should be specified in the law.

As for the first case of refusal to open (change) directions, it is necessary to write in the specific requirements for of regular communication routes organization in the Rules of the passengers transportation. Refusal to open (change) direction should be reasoned with evidence. Otherwise refusal will create unnecessary obstacles to the actions of economic entities.

In an exemplary program of legislative work of the State Duma of the Federal Assembly of the Russian Federation during the spring session of the 2012 in a field of the draft for priority review, approved by the Resolution of the State Duma of the Federal Assembly of the Russian Federation dated 13.01.2012 № 16-6 State Duma after nearly five-year break , the second reading of the Federal Law № 423427-4 «On the basis of public transport services organization in the regular directions in the Russian Federation" was scheduled on May 2012 but so far the draft has not been considered.

FAS Russia believes that these issues will be resolved with adoption of a law which establishes a common approach of the authorities and bodies of local government to the organization of public transport services.