LLINKS Law Offices
通力律师事务所

Shanghai
21F, South Tower
Shanghai Stock Exchange Bldg.
528 Pudong Road South
Shanghai 200120 P.R.China
Tel: (86 21) 6881 8100
Fax: (86 21) 6881 6880

Beijing
Units 902-903
Winland International Finance Centre
No.7 Finance Street, Xicheng District
Beijing 100034 P.R.China
Tel: (86 10) 6655 5050
Fax: (86 10) 6655 5060

上海
上海市浦东南路528号
上海证券大厦南塔21楼
邮政编码: 200120
电话: (86 21) 6881 8100
传真: (86 21) 6881 6880

北京
北京市西城区金融大街7号
英蓝国际金融中心9楼02-03单元
邮政编码: 100034
电话: (86 10) 6655 5050
传真: (86 10) 6655 5060

www.llinkslaw.com
master@llinkslaw.com

Llinks Corporate Law Bulletin
April 2007

Changes in the Acquisition of Industrial Construction Land under the Property Rights Law

By Tomy Xia

In the past, when foreign investors intended to acquire land for industrial construction, they would usually sign an initial letter of intent,[1] with the economic development zone's local management committee. This practice was especially in the economic development zones of the eastern costal areas. These letters of intent would usually include the foreign investors' intent to invest and the general specifications (including its area, location, uses, etc.) of the land for industrial construction (**industrial land**). Foreign investors, after signing letters of intent, would then obtain the relevant government approvals, and finally execute an agreement with the land administrative departments for the grant of state-owned land use rights. This method of obtaining industrial land is called "grant by negotiation". Under grant by negotiation, the State assigns the land use rights to land users for a term of years. The land users then pay fees to the State for the grant.[2]

However, the PRC's newly promulgated Property Rights Law [3] expressly prohibits acquiring the land use rights for industrial land through grant by negotiation. Under Article 137 Section 2 of the Property Rights Law, if land is intended for industrial, commercial, tourism, entertainment, commercial residences, or if the land has two or more intended users, the land use rights shall be assigned by means of auction, bid invitation or any other competitive pricing methods.

PRC regulatory policies on the grant of industrial land have become increasingly strict. The *State Council's Decisions on Deepening the Reform and Intensifying Land Management*, issued on 21 October 2004, requires government agencies to progressively introduce bid invitation, auction and other listing methods for the grant of land use rights for industrial land. The *Circular of the State Council on Intensifying the Land Control*, issued on 31 August 2006, also requires that land use rights for industrial land should be granted through bid invitation, auction or listing. Immediately thereafter, the Ministry of Land and

Resources issued the *Implementation on Circular of the State Council on Intensifying the Land Control by Supervision Department of Ministry of Land and Resources* (dated 4 April 2007). This regulation reaffirms that the government must use auction, bid invitation or listed methods to grant or assign industrial land. It is therefore clear that the grant of industrial land by bid invitation, auction or listing is encouraged by the State at the policy level.

In terms of legislation, under Article 12 of the *Law of PRC on Urban Real Estate Administration* (promulgated on 1 January 1995), land use rights can be assigned through auction, bid invitation or negotiations. The land use rights of land used for construction of commercial, tourist, recreational facilities, or luxury housing (**business land**) should, if conditions permit, be assigned through auction or bid invitation; otherwise the rights may be assigned through grant by negotiation. Although the *Law of PRC on Urban Real Estate Administration* acknowledges three methods for assigning land use rights, its requirement that land use rights be assigned through auction, bid invitation, or other public competitive pricing method only applied to "business land", rather than to industrial land.

Simultaneously, more and more problems are arising from the high demand for construction land. The land administrative departments, which are the State's agents for the transfer of land use rights for construction, have overused grant by negotiation. In many cases where competitive pricing transfer methods should have been used, grant by negotiation was used to promote local trade and investment. This misconduct has resulted in land use rights being assigned without competition, transparency, or publicity, and led to a serious loss of state-owned land resources.[4] To avoid this situation, the *Regulations on the Grant of State-owned Land Use Right by Bids Invitation, Auction or Listing*[5] (issued on 9 May 2002) stipulates that the land use rights for "business land" or for land with two or more intended users must be transferred by means of auction, bid invitation or listing. The newly stipulated Property Rights Law also broadens the definition of "business land" to include industrial land. Under the Property Rights Law, all "business land" must be transferred by auction, bid invitation or other public, competitive pricing methods, effectively abolishing grant by negotiation.

The Property Rights Law specifically lists auction and bid invitation as public competitive pricing methods for the transfer of land use rights. The *Regulations on the Grant of State-owned Land Use Rights by Invitation of Bids, Auction or Listing* establishes procedures for granting land use rights by bid invitation and by auction. Granting land use rights by bid invitation involves a city or county level land administrative department publishing announcements for the public bidding on such land, thereby inviting natural persons, legal persons or other organizations to bid. The land user is then determined according to the result of the bidding process. Granting land use rights by auction involves the grantor (a land administrative department) publishing an announcement of such auction, and all bidders participating in a competitive auction at a designated time and place, quoting their prices publicly. The land use rights are then assigned in accordance with the results of such auction.

It is important to note that "competitive pricing methods" has a flexible definition. Although the Property Rights Law lists auction and bid invitation as examples of "competitive pricing methods", these examples are not exhaustive. In our opinion, granting land use rights by listing[6] would also qualify as a competitive pricing method.

Contact Details

If you would like to know more information about the subjects covered in this publication, please feel free to contact one of the following people or your usual Llinks contact.

Shanghai	Beijing
David Yu Tel: (86 21) 6881 8100 - 6635 David.Yu@llinkslaw.com	**Wayne Chen** Tel: (86 10) 6655 5050 - 1022 Way.Chen@llinkslaw.com
Ming Zhang Tel: (86 21) 6881 8100 - 6632 Ming.Zhang@llinkslaw.com	

1 According to the *Interpretations by Supreme People's Court on Certain Issues Regarding Application of Laws in Contract Dispute Cases Involving State-Owned Land Use Rights*, industrial construction land grant contracts executed between local management committees of economic development zones and land users are invalid.

2 See Article 2 of *Provisions on the Agreement-based Assignment of the State-Owned Land Use Rights* (which was issued by Ministry of Land and Resources on 11 June 2003 and came into effect on 1 August 2003).

3 The Property Rights Law was issued on 16 March 2007 and will come into effect on 1 October 2007.

4 Based on the statistics provided by the Chinese Academy of Surveying & Mapping, in 2002, 124,200 hectares of land was transferred through assignment by negotiation, representing 58.82% of all transfers of state owned land, paid or unpaid. Only 18,100 hectares, or 14.57% of all transfers of state owned land, used competitive pricing methods.

5 In the view of legal hierarchy, the regulations are a sort of department regulation whose legal effect is lower than law.

6 Granting land use rights by listing is a process whereby the grantor publishes a notice at a designated land exchange facility, disclosing the terms and conditions for granting of the land use rights, accepts quotations from bidders and updates the price in the listed notice accordingly. The land user is determined based on the prices quoted at the end of the period.