

Chapter 23

Concession Agreements in Russia

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I. INTRODUCTION

§ 23:1 Overview

Concessions are an effective tool for attracting private capital to infrastructure facilities. The introduction of relevant Russian legislation has, therefore, been long awaited. In 2005, Russia adopted new legislation opening the door for concession agreements into many parts of the public sector including transportation, energy, education, health care, and utilities. The Russian Law “On Concession Agreements”¹ (the “Law”) contains the most general provisions on concession, including entities involved in the concession granting process, concession facilities, selection procedure, concession agreement as well as certain financial security and government support issues, but neglects including clear and detailed regulation of issues of the relations between the state and private investors during implementation of concession projects. The thrust of regulation of the relations between the state and a concessionaire upon conclusion of a

[Section 23:1]

¹The Russian Law “On Concession Agreements,” No. 115-FZ (July 21, 2005).

concession agreement has been transferred by the lawmaker to the agreement itself, the conditions under which depend on the specificity of the object of concession, the volume of required investments, etc.

The Law complements the Law On Foreign Investment (June 9, 1999) and the Land Code (October 25, 2001). In addition, it contains an exhaustive list of areas (objects of concession agreement) in which state concessions can be granted.² These areas are:

- motor roads and transport infrastructure engineering works, including bridges, flyovers, tunnels, vehicle parking lots, vehicle checkpoints and trucks toll collection facilities;
- railroad facilities;
- pipeline transport facilities;
- sea and river ports, including port hydraulic works, and their production and engineering infrastructure facilities;
- sea and river vessels, vessels for combined (river-sea) navigation as well as vessels providing icebreaker assistance, vessels engaged in hydrographic and scientific research activities, ferry crossings, dry-docks and floating dry-docks;
- airfields or buildings and/or structures intended for aircraft takeoff, landing, taxiing and parking;
- airports production and engineering infrastructure facilities;
- hydraulic structures;
- facilities designated for the production, transmission and distribution of electrical and thermal power;
- utility infrastructure systems and other utility facilities, including water-, heat-, gas- and power-supply facilities, sewage disposal and treatment facilities, household waste processing and utilization (burial) facilities, facilities designated for the illumination of urban and rural populated areas and landscape redevelopment;
- underground railroad and other public transport;
- facilities used for medical and preventive treatment

²The Russian Law “On Concession Agreements,” No. 115-FZ, art. 4 (July 21, 2005).

activities as well as for the organization of public recreation and tourism;

- healthcare, education, culture and sports facilities as well as other cultural and social amenities.

If an object of a concession agreement or other non-state/municipally-owned property is intended for use in accordance with its common designation, to provide for a uniform production process and perform the activity contemplated by the concession agreement, the grantor may enter into a contract with the owner of such non-state/municipally-owned property. Such a contract determines the procedure for providing the property to the concessionaire; however the grantor must condition the emergence of rights and obligations under such a contract to the emergence of relations under the concession agreement.

The enactment of the Law is hoped to mark the beginning of a new era that allows for a higher degree of cooperation between the private and public sectors in Russia. The ability for a viable Russian public private partnership model to be developed is now more likely as a result of the Law. In addition, alternative legal structures that have been developed over last few years in order to implement various types of BOT/BOOT (build-(own)-operate-transfer) projects may now be based on a more reliable and certain legal framework. The success of the Law will, however, depend on its smooth implementation and consistency of application by state/municipal authorities and courts together with the absence of renewed debate on the scope of the Law and the resulting legal uncertainty such debate would bring.

II. CONCESSION AGREEMENT

§ 23:2 Overview

The Law “On Concession Agreements”¹ (the “Law”) provides for the conclusion of a concession agreement between the private investor (“concessionaire”) and the relevant state/municipal authority (“grantor”) that owns the respective immovable property (facility). Relations between

[Section 23:2]

¹The Russian Law “On Concession Agreements,” No. 115-FZ (July 21, 2005).

the parties to a concession agreement are regulated by civil law. However, the concession agreement is quite an inflexible instrument, because most of its provisions are stipulated by the Law and may not be changed or excluded by the parties.

Under the concession agreement the concessionaire is obligated to (re-)construct and use/exploit the relevant facility in the manner specified in the agreement and receive any earnings from its use of the facility. In return for granting the concession, the state/municipal authority receives a concession fee from the concessionaire.

Other related services in connection with the facility are not covered by the concession agreement (e.g. relating to utilities, supply or to the exercise of the concession). Careful drafting contractual arrangements supplementing the concession agreement will be required for the purpose of regulating all related matters.

§ 23:3 Conclusion of a concession agreement

A concession agreement is concluded by way of conducting an open or closed tender. The general rule is to conduct an open tender; a closed tender is conducted if the concession agreement is to be concluded for an object of strategic significance for the country's defense or if information constitutes a state secret. The tender winner is determined by the tender commission. The criteria for selecting the winning bidder are not set up in the Law "On Concession Agreements;"¹ rather they shall be identified in the tender documentation on a case-by-case basis. In case of any breach of the tender procedure, any third party may file a claim to invalidate the tender results and, as a consequence, the concluded agreement. Russian law does not provide any scale of severity for such procedural breaches, so that any violation may lead to the project being set aside.

[Section 23:3]

¹The Russian Law "On Concession Agreements," No. 115-FZ (July 21, 2005).

§ 23:4 Provisions of a concession agreement

The Law “On Concession Agreements”¹ (the “Law”) contains many detailed provisions on the required content of concession agreements. The following list may be of particular interest to potential investors. It should, however, be pointed out that it remains to be seen how the requirements, introduced by the Law, will be dealt with in practice and to what extent certain provisions can be modified by a particular concession agreement.

It is mandatory that a concession agreement contains the following substantial provisions:

- obligations of the concessionaire concerning development and/or reconstruction of the object of concession agreement and meeting the deadlines set for its development and/or reconstruction;
- obligations of the concessionaire concerning engagement in the activities contemplated by the concession agreement;
- effective term of the concession agreement;
- composition and description of the object of the concession agreement, including specifications thereof;
- procedure for the provision of land parcels to the concessionaire for the purpose of engagement in the activities contemplated by the concession agreement and the term of such land parcels lease (sublease) agreements to be concluded with the concessionaire (if land parcels lease agreements are necessary for the activities contemplated by the concession agreement);
- purposes and term of using (operating) the object of the concession agreement.

The Government of the Russian Federation approves a model concession agreement with respect to certain objects of a concession agreement. A concession agreement with respect to the objects regulated by a model agreement must comply with the model agreement.

Concession fees may be paid in cash, as a percentage of production or profit or can consist of a transfer of assets to the state/municipal authority.

[Section 23:4]

¹The Russian Law “On Concession Agreements,” No. 115-FZ (July 21, 2005).

§ 23:5 Term of a concession agreement

The Law “On Concession Agreements”¹ (the “Law”) does not contain a restriction on the minimum or maximum term of concession agreements. Originally, a statutory limit of between 7 and 99 years was proposed, however, this was not included in the final version of the Law. The Law only refers to the period that is necessary for the creation or reconstruction of the concession facility and the scope and period required to recoup the concessionaire’s investment. As a consequence, when negotiating concession agreements, concessionaires will need to agree to clear provisions with respect to the duration of concessions and what rights of renewal will be available under the concession agreement.

§ 23:6 Operations

The state/municipal authority is entitled to supervise fulfilment of the concession agreement by accessing the site and requesting documentation, but it may not interfere with the concessionaire’s economic activities.

The concessionaire bears the expenses incurred in connection with the performance of obligations under a concession agreement, unless the concession agreement provides otherwise. The grantor may defray part of the expenses incurred in connection with the development and/or reconstruction of an object of the concession agreement as well as with the use thereof, and provide guarantees to the concessionaire in accordance with federal laws, other statutory regulations of the Russian Federation, laws of the constituent members of the Russian Federation, and statutory regulations of the local self-government authority. The amount of expenses defrayed by the grantor is indicated in terms of the competitive procedure for the right to enter into the concession agreement or in the resolution on the conclusion of a concession agreement without competitive procedures, as well as in the concession agreement.

The concessionaire’s rights to the facility are subject to the registration of the concession agreement as an encumbrance in the Immovable Property State Register.

[Section 23:5]

¹The Russian Law “On Concession Agreements,” No. 115-FZ (July 21, 2005).

The concession relates to the facility but does not include rights to the underlying land plot, which means that a separate lease contract must be concluded with the relevant state/municipal authority.

The land parcel whereon the object of the concession agreement is located and/or which is necessary for the concessionaire to engage in the activities contemplated by the concession agreement is to be leased by the grantor to the concessionaire for the term of the concession agreement.

The concessionaire may not assign its rights under the land parcel lease agreement to any other persons or sublease such land parcel, unless the concession agreement provides otherwise.

III. RISKS OF INVESTORS

§ 23:7 Overview

The risk of damage to the facility must be borne by the concessionaire unless otherwise agreed in the concession agreement. The concession agreement may stipulate the obligation on the part of the concessionaire to insure the facility at its own expense.

There are no provisions related to the compensation of the concessionaire should the project fail for economic reasons.

At the request of a party to the concession agreement the agreement may be amended by court judgment on the grounds specified in the Civil Code of the Russian Federation. A concession agreement may be terminated in the event of an early cancellation by court judgment. Easy early termination without any obligatory compensation for investors increases a project's credit risk, and creates questionable incentives for the government.

§ 23:8 Security and assignment

The concessionaire may not pledge the project assets or rights under the concession agreement which is a conventional form of security for bank loan finance that will impede financing of concession projects in Russia.

Assignment of contractual rights is allowed only after the facilities have been commissioned and with the explicit consent of the grantor. Unless otherwise stipulated in the concession agreement, intellectual property arising in con-

nection with the use of the facility is the property of the state/municipal authority. The concessionaire is, however, entitled to exclusive IP rights during the term of the concession agreement.

Products and revenues received by concessionaire as a result of activities contemplated by the concession agreement will be the property of such concessionaire, unless the concession agreement provides otherwise. Therefore such products and revenues may be pledged as security for the project financing. Shares of the concessionaire company can also be pledged to the lenders.

Property that is developed or acquired by the concessionaire in the implementation of a concession agreement, but does not constitute an object of a concession agreement, will be in the ownership of concessionaire, unless the concession agreement provides otherwise, and also may be used as security for a project loan.

As far as the concessionaire obtains title to products and revenues which he receives under the concession agreement, the concessionaire's right under the agreement can be used as security by way of pledge.

The land parcel whereon the object of the concession agreement is located and/or which is necessary for the concessionaire to engage in the activities contemplated by the concession agreement is leased by the grantor to the concessionaire for the term of the concession agreement.

The concessionaire may not assign its rights under the land parcel lease agreement to any other persons or sublease such land parcel, unless the concession agreement provides otherwise. The Law "On Concession Agreements"¹ does not contain specific provisions as for the pledge of the land parcel, but it seems that the pledge is possible when the concession agreement provides for assignment of concessionaire's rights under the lease agreement.

§ 23:9 Protection of investors' rights

The concessionaire is protected from subsequent legisla-

[Section 23:8]

¹The Russian Law "On Concession Agreements," No. 115-FZ (July 21, 2005).

tive changes adversely affecting its position by a ‘grandfathering’ provision. This provision obligates the parties to amend the concession agreement to the extent necessary to maintain the concessionaire’s rights and status as initially agreed. According to Article 20, if during the term of a concession agreement any laws of the Russian Federation, laws of the constituent members of the Russian Federation or statutory regulations of local self-government bodies establish provisions detrimental to the status of a concessionaire so as to deprive the concessionaire of a substantial part of what it was entitled to expect in concluding the concession agreement, the parties thereto shall modify the provisions thereof so as to provide for the concessionaire’s property interests existing at the signing of the concession agreement.

However, the abovementioned provisions on the concession agreement modification are not applied if the change is made to technical regulations or any other statutory regulation of the Russian Federation governing relations in the area of the subsoil, environmental and public health protection.

The concessionaire is entitled to the reimbursement of losses caused by unlawful actions (omissions) of government authorities, local self-government bodies or their officials, as stipulated by the Civil Code of the Russian Federation.

§ 23:10 Concessionaire’s liability

The concessionaire is liable to the grantor, if in the development and/or reconstruction of an object of a concession agreement the concessionaire fails to observe the requirements set by the concession agreement, technical specifications and project records or other mandatory quality standards of the developed and/or reconstructed object of the concession agreement.

The concessionaire is liable to the grantor for the quality of the object of the concession agreement during the period established by the concession agreement, or, if such a period is not established, the concessionaire is liable to the grantor during the five years from the delivery of such an object of the concession agreement to the grantor.

§ 23:11 Termination of a concession agreement and dispute resolution

A concession agreement may be terminated on the basis of

a court judgment at the request of a party to the concession agreement in the event of material violation of a concession agreement provision by the other party to such an agreement, substantial change in the circumstances wherefrom the parties to the concession agreement proceeded in its conclusion, as well as on other grounds provided by the Law “On Concession Agreements,”¹ other federal laws or the concession agreement. Material violations of concession agreement provisions are the following:

- breach of the terms set for the development and/or reconstruction of an immovable property;
- use (operation) of the object of a concession agreement for purposes not indicated in the concession agreement, breach of procedure for the use (operation) of the object of a concession agreement;
- non-execution by the concessionaire of its obligations to engage in the activities contemplated by the concession agreement;
- termination or suspension of activities contemplated by the concession agreement without the grantor’s consent;
- non-execution or undue execution by the concessionaire of its obligations under the concession agreement to provide to individuals and other consumers goods, works and services, including the services of water-, heat-, gas- and power-supply, sewage disposal and public transport services.

Disputes Resolution. Disputes between the grantor and concessionaire are resolved in accordance with the laws of the Russian Federation.

IV. TENDER

§ 23:12 Overview

Tender for the right to enter into a concession agreement (“tender”) may be open (where the bids may be submitted by any persons) or closed (where the bids may be submitted only by the persons to whom invitations to such tender are sent pursuant to the resolution on the conclusion of a concession agreement).

[Section 23:11]

¹The Russian Law “On Concession Agreements,” No. 115-FZ (July 21, 2005).

Closed tenders are held when the concession agreement is to be concluded with respect to the objects of a concession agreement, the information that constitutes a state secret, as well as those of strategic importance for the defense capabilities and security of the state.

In holding an open tender, information about tender procedures is published on the grantor's official Internet site ("official Internet publication"). If a municipal entity has no official Internet site, publication of such information will be done on the official site of the constituent member of the Russian Federation where such municipal entity is located.

§ 23:13 Resolution on the conclusion of a concession agreement

Resolution on the conclusion of a concession agreement is adopted by the respective authorized state or municipal body:

- the Government of the Russian Federation—with respect to the objects of concession agreement the ownership right to which are held by the Russian Federation;
- the Government of the Russian Federation on instruction of the President of the Russian Federation—with respect to the objects of a concession agreement of strategic importance for the defense capabilities and security of the state;
- the body of state power of the relevant constituent member of the Russian Federation—with respect to the objects of a concession agreement the ownership right to which is held by a constituent member of the Russian Federation;
- the body of local self-government—with respect to the objects of a concession agreement the ownership right to which is held by a municipal entity.

Resolution on the conclusion of a concession agreement contains provisions with respect to:

- tender documents, terms and conditions of the concession agreement inclusive;
- procedure for the conclusion of a concession agreement;
- composition of the tender commission on holding tender for the right to conclude the concession agreement ("tender commission").

§ 23:14 Tender documents

Tender documents contain:

- terms and conditions of the concession agreement;
- composition and description, including specifications, of the object of concession agreement;
- requirements for the bidders (including qualifications, professional and business requirements) which are taken into account in the pre-selection of bidders;
- tender criteria and their parameters;
- complete list of documents and materials to be submitted by the bidders (including documents and materials confirming their conformity to the requirements for bidders) and the forms in which the documents and materials shall be submitted;
- deadlines for the publication of tender notice or for the distribution thereof in accordance with the resolution on the conclusion of a concession agreement, concurrently with an invitation to the tendering;
- procedure for the submission of applications for tendering and requirements for such applications;
- place and period of submitting applications for tendering (commencement and closure dates and time);
- procedure for, place and time of submitting tender documents;
- procedure for providing clarifications regarding any provisions of the tender documents;
- indications regarding the manner of securing execution of obligations under the concession agreement by the concessionaire;
- amount of the deposit contributed in order to secure the execution of an obligation to enter into the concession agreement (“deposit”), procedure for and time of its contribution; details of the accounts whereto the deposit shall be contributed;
- deadline of tender notice publication;
- procedure for, place and time of submitting bids (commencement and closure dates and time);
- procedure for and period of modification and/or withdrawal of applications for tendering and the bids;
- procedure for, place, date and time of opening envelopes with the applications for tendering;

- procedure for and time of bidders pre-selection, date of signing a report on the bidders pre-selection;
- procedure for, place, date and time of opening envelopes with the bids;
- procedure for the bids consideration and evaluation;
- procedure for the determination of the successful bidder;
- deadline for signing an act of tender results;
- deadline for the conclusion of the concession agreement;
- draft lease (sublease) agreement with respect to the land parcel intended for the performance of activities contemplated by the concession agreement;
- draft concession agreement.

From the date of tender notice publication in the media determined by the grantor, official Internet publication or from the date of dispatching tender notice with the invitation to tendering for the persons specified in the resolution on the conclusion of a concession agreement, the grantor or tender commission provides tender documents to the applicants on the basis of their applications, as prescribed by the procedure indicated in the tender notice on condition that the applicants prepay the provision of such documents, if any prepayment is set. Provision of tender documents prior to the date of tender notice publication is prohibited.

Grantor or tender commission provides written clarifications regarding provisions of the tender documents as per bidders requests, if any such requests are filed with the grantor or tender commission not later than 10 working days before the submission of applications for tendering expires. Clarifications regarding provisions of the tender documents shall be distributed by the grantor or tender commission to every applicant not later than five working days after the request receipt, but not later than five working days before the expiry of submission of applications for tendering, with attached contents of the request and without indication of the requesting applicant, and shall also be officially published on the Internet. The applicants' requests and clarifications regarding provisions of the tender documents at the applicants' requests with attached request contents and without indication of the requesting applicant may also be distributed to the applicants in electronic form.

The grantor is entitled to amend tender documents on

condition that it extends the deadlines for the submission of applications for tendering and the bids at least by 30 working days from such amendment. Notice of tender documents amendment shall within three working days therefrom be carried in the official publication determined by the grantor and officially published on the Internet or distributed to the persons specified in the resolution on the conclusion of a concession agreement.

§ 23:15 Tender criteria

Tender criteria are established by tender documents and used for the evaluation of bids. Tender criteria may include:

- timeframe for the development and/or reconstruction of an object of concession agreement;
- period from the signing of the concession agreement until the date when the developed and/or reconstructed object of concession agreement meets the technical and economic specifications established by the concession agreement;
- technical and economic specifications of the object of a concession agreement;
- amount of goods produced, works executed and services rendered in the performance of activities contemplated by the concession agreement;
- period from the signing of the concession agreement until the date when goods production, works execution and services rendered in the performance of activities contemplated by the concession agreement reach the amounts established by the concession agreement;
- amount of concession payment;
- maximum prices (tariffs) of the goods produced, works executed and services rendered in the performance of activities contemplated by the concession agreement, as well as surcharges to such prices (tariffs).

The following parameters are set for each tender criterion:

- an initial level in the form of a number other than zero (“initial level of a tender criterion”);
- an decrease or increase for the initial level of a tender criterion as stated in the bid;
- a rate depending on the importance of a tender criterion.

Rates depending on the importance of tender criteria may

vary from zero to one and the aggregate of all the rates shall be equal to one.

§ 23:16 Tender commission

With a view to holding a tender grantor sets up a tender commission. The tender commission consists of not more than five members. A tender commission is authorized to transact business if its meeting is attended by not less than 50% of its total membership, and each member of the tender commission shall have one vote. Resolutions of the tender commission are adopted by a majority of votes of the attending members. Should the votes divide equally, the vote of the tender commission chairman shall be decisive. Resolutions of the tender commission are entered into the minutes signed by the tender commission members that attended its meeting.

Persons who submitted applications for tendering or are staff members of the entities that submitted applications for tendering, or individual shareholders (members) of such entities, members of their management bodies or affiliates of the bidders may not be members of the tender commission. If such persons are discovered among tender commission membership, the grantor replaces them by other persons.

Tender commission performs the following functions:

- publishes tender notice (in case of open tendering);
- dispatches tender notice with the invitation to tendering for the persons specified in the resolution on the conclusion of a concession agreement (in case of closed tendering);
- publishes notice of tender documents modification and dispatch such notice to the persons specified in the resolution on the conclusion of a concession agreement;
- accepts applications for tendering;
- provides tender documents and clarifications regarding provisions of the tender documents to the persons which submitted applications for tendering (“applicants”);
- considers the applications for tendering;
- determines the applicants that failed to pass pre-selection, take decision to deny such persons access to tendering and dispatch thereto relevant notices;
- determines the bidders;

- dispatches to the bidders invitations to submit their bids in accordance with tender criteria, consider and evaluate the bids;
- determines the successful bidder and dispatch thereto a notice of recognition as such;
- signs a report on tendering results;
- notifies the bidders on tendering results;
- publishes a notice on tendering results.

§ 23:17 Tender notice

Tender notice is included by the tender commission in the official publication determined by the grantor or officially published on the Internet (in case of open tendering) or dispatched to the persons specified in the resolution on the conclusion of a concession agreement concurrently with the invitation to tendering (in case of closed tendering) within the time set in tender documents, but not later than 30 working days before the period of submitting applications for tendering expires.

The tender commission is entitled to publish the tender notice in any form of mass media, including electronic, provided that such publication may not be in lieu of carrying such notice by an official publication or in lieu of an official Internet publication.

Tender notice indicates:

- grantor's name, postal address and telephone number;
- object of a concession agreement;
- effective term of the concession agreement;
- requirements for the bidders;
- tender criteria and their parameters;
- procedure, place and deadline for providing tender documents to applicants;
- amount of payment charged by the grantor for tender documents, procedure for and deadlines of effecting such payment, if any;
- seat of the tender commission;
- procedure for, place and period of submitting applications for tendering (commencement and closure dates and time);
- procedure for, place and period of submitting bids (commencement and closure dates and time);

- place, date and time of opening envelopes with the applications for tendering;
- place, date and time of opening envelopes with the bids;
- procedure for the determination of the successful bidder;
- deadline for signing a report on tendering results by tender commission members;
- deadline for the conclusion of the concession agreement.

§ 23:18 Submission of applications for tendering

Applications for tendering must meet the requirements established for such applications by tender documents and contain documents and materials confirming that the applicants meet the requirements for bidders.

An application submission deadline is no less than 30 working days from the publication of a tender notice or from the dispatch of such notice to the persons specified in the resolution on the conclusion of a concession agreement concurrently with the invitation to tendering.

Applications for tendering must be in the Russian language, in writing and in optional form in two copies (original and a copy), each certified by the applicant's signature and submitted to the tender commission as prescribed by the tender documents in a separate sealed envelope. An application for tendering shall enclose a list of documents and materials submitted by the applicant certified by the signature thereof, the original of which list shall remain with the tender commission and the copy—with the applicant.

An application for tendering submitted to the tender commission is included into an applications register and given an ordinal number with the indication of the date and precise time of its submission (hours and minutes) for the avoidance of its coincidence with the time of other submissions. The date and time of an application submission to the tender commission with the application number is inscribed on the copy of the documents and materials list submitted by the applicant.

The envelope with an application for tendering submitted to the tender commission after the applications submission deadline is not opened, but returned to the submitting applicant together with the list of documents and materials

submitted thereby, with a mark that the application for tendering was denied acceptance.

If less than two applications for tendering are submitted by the applications submission deadline, the tender is declared aborted by the grantor's decision to be taken the next day after the deadline, and the amount of the deposit contributed shall be refunded to the applicant within five days after the above decision is taken.

An applicant is entitled to modify or withdraw its application for tendering any time before the applications submission deadline. Modification of an application for tendering or a notice of its withdrawal is deemed valid, if such modification or notice was delivered to the tender commission before the applications submission deadline.

§ 23:19 Opening of envelopes containing applications for tendering

Envelopes with the applications for tendering are opened at a meeting of the tender commission as prescribed by tender documents. In such an event, the name (last name, first name and patronymic) and location (place of residence) of each applicant, whose envelope with the application for tendering is opened, shall be declared and entered into a report of opening envelopes with the applications for tendering.

Applicants and their representatives are entitled to be present at the opening of envelopes with the applications for tendering.

§ 23:20 Pre-selection of bidders

The pre-selection of bidders is conducted by the tender commission in accordance with the procedure established by the tender documents whereby the tender commission considers:

- whether the application for tendering meets the requirements contained in tender documents. In doing so, the tender commission may request from an applicant clarifications regarding any provisions of the application for tendering submitted thereby;
- whether the applicant meets the requirements stated in tender documents. In doing so the tender commission

may request from an applicant clarifications regarding any provisions of the documents and materials submitted thereby for confirmation that the applicant meets such requirements.

Proceeding from the results of the bidders pre-selection, the tender commission takes a decision on the admission or non-admission of an applicant to tendering and enters such decision in the bidders pre-selection report, which shall include the name (for legal entities) or last name, first name and patronymic (for individuals) of the applicant who has passed the pre-selection and is admitted to tendering, and the name (for legal entities) or last name, first name and patronymic (for individuals) of the applicant who has not passed the pre-selection and is not admitted to tendering, with the reasons underlying such decision.

The decision of non-admission to tendering is made by the tender commission if:

- the applicant does not meet the requirements for bidders;
- the application for tendering does not meet the requirements;
- the documents and materials submitted by the applicant are incomplete an/or unreliable.

The tender commission, within 3 working days from the signing of the bidders pre-selection reports by its members (but no later than 60 working days before the bids submission deadline), shall distribute to the bidders a notice requesting bids. Notices of non-admission to tendering with a copy of the above report are dispatched to the applicants not admitted to tendering and the amounts of deposits contributed thereby shall be refunded to them within 5 working days from the signing of such a report by the tender commission members.

§ 23:21 Submission of bids

A bid must be in the Russian language, in writing in two copies (original and a copy), each certified by the bidder's signature and submitted to the tender commission as prescribed by tender documents in a separate sealed envelope. A bid must enclose a list of documents and materials submitted by the bidder certified by the signature thereof, the original list shall remain with the tender commission and the copy—with the bidder.

A bid submitted to the tender commission is entered into a bids register and given an ordinal number with the indication of the date and precise time of its submission (hours and minutes) for the avoidance of its coincidence with the time of other submissions. The date and time of the bid submission to the tender commission, with the bid number, is inscribed on a copy of the list of documents and materials submitted by the bidder.

A bidder is entitled to submit its bid at a meeting of the tender commission at the time of opening envelopes with the bids, which time shall be the bids submission deadline.

A bidder is entitled to modify or withdraw its bid any time before the bids submission deadline. Modification of a bid or a notice of its withdrawal is deemed valid, if such modification or notice was delivered to the tender commission before the bids submission deadline.

The bid must indicate in numerical form each tender criterion level proposed by the bidder.

§ 23:22 Opening of envelopes containing bids

Envelopes with the bids are opened at a meeting of the tender commission as prescribed by tender documents. In such an event, the name and location (for legal entity) or last name, first name and patronymic and place of residence (for individual) of each bidder whose envelope with the bid is opened, as well as the levels of tender criteria stated in the bid, are declared and entered into a report of the bids opened.

The bidders that submitted their bids to the tender commission or their representatives are entitled to be present at the opening of envelopes containing the bids.

The envelope, with a bid submitted to the tender commission after the bids submission deadline, is not opened, but rather returned to the submitting bidder together with the list of documents and materials submitted thereby, with a mark that such bid was denied acceptance.

§ 23:23 Procedure for bids consideration and evaluation

Bids are considered and evaluated in accordance with the procedure described in tender documents by the tender commission, which determines whether the bid meets the tender

criteria and compares the terms and conditions proposed in the bids in order to determine the successful bidder.

Proceeding from the results of considering the bids, the tender commission resolves whether a bid meets the tender criteria.

Decisions to the effect that a bid does not meet tender criteria are taken by the tender commission if a condition provided by the bid does not comply with the tender criteria parameters.

Evaluation of the bids that are decided to be in compliance with the tender criteria parameters is performed by the tender commission as follows:

- if it is established that the initial level of a tender criterion should increase, the value of the criterion level stated in the bid shall be determined as the product of the rate of such criterion by the ratio of the difference between the criterion level stated in the bid and the initial level of such criterion to the difference between the greatest criterion level among those stated in all the bids and the initial level of such criterion;
- if it is established that the initial level of a tender criterion should decrease, the value of the criterion level stated in the bid shall be determined as the product of the rate of such criterion by the ratio of the difference between the initial level of such criterion and the criterion level stated in the bid to the difference between the initial level of such criterion and the smallest criterion level among those stated in all the bids;
- for each bid, the values determined by all tender criteria shall be added together.

The tender commission evaluates the conditions proposed in the bids by the comparison of such addition results.

By the grantor's decision, to be taken the next day after the bids submission deadline, a tender is declared aborted if less than two bids are submitted to the tender commission or if the tender commission accepted less than two bids as satisfying the tender criteria. If the tender is declared aborted, the grantor refunds the bidder the amount of the deposit contributed within 5 days from such decision. The grantor may consider the bid submitted by only one bidder and, if it meets the tender criteria, decide on the conclusion of a concession agreement with such bidder on the conditions provided in the bid.

§ 23:24 Procedure for determination of successful bidder

The bidder that offers the best conditions is deemed the successful bidder.

If two or more bids equally provide the best conditions, the bidder that submitted the bid to the tender commission earlier than such others bidders is declared the successful bidder.

The decision on the successful bidder is entered into the report on bids consideration and evaluation, which contains:

- tender criteria;
- conditions proposed in the bids;
- results of bids consideration with the indication of the bids determined to be non-complying with tender criteria;
- results of bids evaluation;
- the name and location (for legal entity) or last name, first name and patronymic and place of residence (for individual) of the successful bidder; and the reasons underlying the decision taken by the tender commission on the successful bidder.

§ 23:25 Contents of report on tender results and execution deadline

Not later than 5 working days from its signing, the report on bids consideration and evaluation the tender commission signs a report on tender results, which include:

- resolution on the conclusion of a concession agreement, with the tender type indicated;
- tender notice;
- list of persons to whom the tender notice was dispatched concurrently with the invitation to tendering as per the resolution on the conclusion of a concession agreement (for closed tender);
- tender documents and amendments thereto;
- bidders' requests for the clarification of any provisions of the tender documents and the relevant clarifications provided by the grantor or tender commission;
- report of opening applications for tendering;
- original applications for tendering submitted to the tender commission;

- report of bidders pre-selection;
- list of the bidders to whom notices requesting bids were dispatched;
- report of bids opening;
- report on bids consideration and evaluation.

Report on tender results is kept with the grantor throughout the effective term of the concession agreement.

The amount of all deposits contributed by the bidders is refunded to all the bidders, except the successful bidder, within five working days from the signing of the report on tender results.

§ 23:26 Publication of notice on tender results, bidders' notification of tender results

The tender commission, within 15 working days from the signing of report on tender results or from the grantor's decision to declare the tender aborted, publishes a notice on tender results indicating the name and location (for a legal entity) or last name, first name and patronymic and place of residence (for an individual) of the successful bidder or the decision to declare the tender aborted with the reasoning underlying such decision in the official publication that carried the tender notice and officially publishes the decision on the Internet.

In addition, the tender commission, within 15 working days from the signing of report on tender results or from the grantor's decision to declare the tender aborted, distributes to the bidders a notice on the tender results.

Any bidder is entitled to request from the grantor clarifications regarding the tender results, and the grantor must provide to such bidder the relevant clarifications in writing within 30 days from the receipt of the above request.

§ 23:27 Procedure for conclusion of concession agreement

Within 5 working days from the signing of the report on tender results by members of the tender commission, the grantor dispatches to the successful bidder a copy of such report as well as a draft concession agreement, which must be in conformity with the resolution on the conclusion of a concession agreement and the bid submitted by the success-

ful bidder. The concession agreement must be signed no later than 90 working days from the signing of report on tender results.

If the successful bidder refuses to sign or evades signing the concession agreement within the established time, the grantor is be entitled to propose that the concession agreement must be concluded with the bidder, whose bid by the results of the bids consideration and evaluation provides for conditions second-best after those offered by the successful bidder. The grantor dispatches to such [second-best] bidder a draft concession agreement, which conforms to the resolution on the conclusion of a concession agreement and the bid submitted by such bidder. The concession agreement must be signed no later than 90 working days from the dispatch of the above documents. The deposit contributed by the successful bidder that failed to sign the concession agreement within the established time is not refunded.

The concession agreement is concluded in writing and comes into force on the day of its signing.