

LAW ON CONCESSIONS OF THE REPUBLIC OF SRPSKA



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The National Assembly of the Republic of Srpska at its session held on 27 of June 2013 passed the Law on Concessions and the same was published in the Official Gazette of the Republic of Srpska No. 59/13.

The concession is the right to perform economic activities using public goods, natural resources and other assets of general interest, and the right to perform activities of general interest, and this right is granted to a concessionaire for a specified period, with payment of a concession fee.

TERMS USED IN RELATION TO CONCESSIONS

Basic terms used in the Law on Concessions shall have the following meaning:

- a) **„Conceding Party“ (grantor)** is the Government of the Republic of Srpska, on behalf of the Republic of Srpska or Assembly of a unit of local self-government, on behalf of the unit of local self-government;
- b) **„Concessionaire“** is a company established in accordance with the regulations of the Republic of Srpska, with whom the Conceding Party concluded the concession contract;
- c) **„Competent Authority“** is the ministry responsible for a particular area which includes the subject of a concession whose award is responsibility of the Government of the Republic of Srpska, i.e. mayor of the city or municipality for the subject of the concession from the jurisdiction of local self-governments;
- d) **„Bidder“** is any, domestic or foreign, legal or natural person, a consortium of two or more parties connected with a contract, which submitted a bid for the concession award;
- e) **„Feasibility study for granting concession“** is a document on the technical, financial, economic, environmental and legal analysis of justification for the concession award (hereinafter: the Study);
- f) **„Concession fee“** is a fee payable by the Concessionaire in accordance with the contract governing the concession and
- g) **„Concession Contract“** refers to a contract concluded in written form between the Conceding Party and the Concessionaire selected as the best bidder.

SUBJECT OF THE CONCESSION

Pursuant to the Law on Concessions subject of the concession shall be the following:

a) construction, use and maintenance of:

- roads and associated infrastructure facilities,
- railways, navigable channels and ports, and
- airports,

b) use of public water resources:

- waters for technological processes for economic activities,
- water and water lands for the use of hydro-reservoirs, swimming pools, ponds,
- water lands for the realization of some of the economic activities or for the realization of other concession subjects in accordance with this Law,
- for the extraction of material from watercourses (gravel, sand, stone) in accordance with the program of planning watercourses,
- construction and use of energy facilities with installed capacity exceeding 250 kW, with the exception of energy facilities using bio-mass and bio-gas or solar plants with photovoltaic cells on buildings regardless of installed capacity,
- construction or reconstruction and use of petroleum pipeline and facilities for storage, transportation and distribution of oil and gas,
- exploration and exploitation of mineral resources,
- planned cull of wild animals along with hunting and fishing,
- games of chance, postal and telecommunication services, other than reserved postal services and common and international communications,
- passenger and freight railway transportation,
- public transport in road traffic,
- areas and facilities of natural, construction, cultural and historical heritage,
- utility services, except water supply projects, as well as the construction, maintenance, use or reconstruction and modernization of utility facilities,
- management and processing of waste in accordance with special regulations, other than waste which is secured by a municipal activity,
- construction or reconstruction and modernization of the spa facilities and use of the same,
- construction of facilities of tourist infrastructure and superstructure,
- activities related to catering,
- agricultural land and
- construction, use and maintenance of sports facilities.

CONCESSION CONTRACT

Concession contract shall regulate the mutual rights and obligations of the conceding party and the concessionaire in connection with the subject of granted concession. Concession contract shall be concluded in accordance with concession documents, tenders, decision on the selection of the winning bidder and the concession award.

Concession contract, depending on the subject matter of concessions, contains the following:

- subject of concession,
- terms and conditions of use of the subject of concession,
- concession period,
- beginning of concession activity,
- ownership rights over the assets related to the performance of the concession activities, including the right over the land on which the concession activities shall be performed and defining ownership relations after the expiry of the concession contract,
- property given for use by the conceding party,
- amounts, deadlines, payment method, then method of changing the concession fee,
- method and terms of securing funds for financing concession activities and dynamics of investment,
- minimum standards of service quality criteria and methods for determining the price or tariff for end users,
- minimum technical standards which are to be applied as well as environmental protection,
- rehabilitation and recultivation of areas degraded in the course of concession activities,
- right of supervision by the conceding party,
- scope and manner of reporting on the execution of contractual obligations,
- right of the conceding party to approve the project documentation, as well as contracts entered by the concessionaire, in particular with the concession owners or related parties,
- type, amount and method of providing security for execution of the concession contract, insurance policies that the concessionaire must maintain during the concession period,
- remedies in the event of failure to fulfill contracted obligations by any of the contracting parties,
- description of the events that are considered as changed circumstances and *force majeure*, and conditions for the modification or termination of the contract in the event of their occurrence,
- rights and obligations of the contracting parties with respect to confidential information,
- rights to the assignment of the concession contract and the change in ownership structure of the concessionaire,
- method of amending the concession contract,
- conditions for termination of the concession contract,
- method of transfer of immovable property, equipment and plant to the conceding party in the state in which the same must be handed over by the end of the concession period,
- method of regulating relations in the event of termination of the concession contract and other elements relevant to the subject of the concession.

Concession contract shall be concluded in writing, signed by the authorized persons of the conceding party and concessionaire.

Concession contract shall be entered in the register of concessions maintained by the Commission for Concessions.

CONCESSION AWARD METHOD AND PROCEDURE

The procedure for granting a concession may be initiated on the basis of:

- Initiative of the competent authority (the procedure is regulated under Articles 12-24 of the Law)
- Initiative of the interested party (Article 25) and
- Bids in the negotiated procedure (Article 26-27).

CONCESSION PERIOD AND CONCESSION FEE

The concession contract shall be concluded for a specified period which cannot exceed 50 years. The deadline to which a concession is granted may be extended in the negotiation procedure, but not longer than the period of 50 years.

The concession fee is an obligatory and constituent element of the concession contracts. It has a monetary character and it consists of the following:

- One-time fee for the entitlement and the same is to be paid at the conclusion of the concession contract and
- Concession fee for the use which is expressed in percentages depending on the annual turnover of the concession activity or per unit.

The concession fee for the granted right is treated as an income of the Budget of the Republic of Srpska i.e. the Budget of local government, depending on the jurisdiction of the concession award. The concession fee for the use of the concession granted by the Government shall be divided between the Budget of the Republic of Srpska and the Budget of local government on whose territory the concession activity is performed, in the following proportion:

- 30:70 for developed municipalities,
- 30:70 for medium developed municipalities,
- 20:80 for underdeveloped municipalities and
- 10:90 for extremely underdeveloped municipalities.

RIGHTS AND OBLIGATIONS OF THE CONCESSIONAIRE

The selected bidder who has not established a company with headquarters in the Republic of Srpska must set up a company in accordance with the regulations of the Republic of Srpska before the conclusion of the concession contract .

The concessionaire, who in addition to performing concession activity, carries out other activities, has an obligation to maintain a separate account and separate accounting records for concession activity in its accounting calculations, as well as to draw up a separate financial report.

At the request of the concessionaire, and with prior approval of the Concession Commission, the concession contract may be assigned to any third person or financial institution with which the concessionaire concluded the financing contract regarding the concession, in the event that the concessionaire due to the economic, organizational, financial or other justifiable reasons cannot fulfil contractual obligations within defined deadlines and in the manner determined by the concession contract, or in the event that the concessionaire cannot realize its obligations under the financing contract.

The concessionaire may, in order to ensure the fulfilment of contractual obligations, make a change in ownership structure in percentage higher than 50% or a change of the owner, but with the prior approval of the Concession Commission and the Concession Party.

Rules of Procedure of assignment of the concession contract and the change in ownership structure of the concessionaire, published in the Official Gazette of the Republic of Srpska, No. 65/14, prescribes the procedure and conditions for the transfer of the concession contract, as well as the procedure and conditions of changes in the ownership structure of the concessionaire.

TERMINATION OF THE CONCESSION CONTRACT

The concession contract shall be terminated in case of:

- termination of existence of subject matter of concession,
- upon the expiration of the agreed period,
- initiation of bankruptcy or liquidation of the concessionaire,
- unilateral termination,
- mutual agreement between the concession party and the concessionaire,
- on the date of finality of the decision of the Government on establishing of general interest for the construction of facilities or works on the concession subject in accordance with the regulations governing the area of expropriation,
- with finality of the court decision which annuls or cancels the concession contract,
- abolition, cancelling or annulling of the decision on selection of the preferred bidder and the concession award, after the conclusion of concession contract,
- fulfilling the conditions prescribed by another law, which result in the termination of the concession contract.

CONCESSION COMMISSION

The Concession Commission is a permanent and independent regulatory body with characteristics of a legal entity, based in Banja Luka.

The Commission members shall be appointed by the National Assembly on the proposal of the Government, following a public competition. There are a total of five members who are appointed for a term of five years and may be appointed for one more term.

The Commission shall have the following duties:

- to prepare documents on policy and proposes its adoption by the National Assembly,
- to supervise the implementation of the policy,
- to give a consent to a feasibility study,
- to give a consent to the documentation for the tender,
- to propose the decision on selection of the most favourable bidder and the concession award,
- to open and evaluate submitted bids following the public call for concessions,
- to give a consent to the proposal of the concession contract and an annex of the same,
- to approve the terms and conditions of standard contracts for the provision of public services,
- to check the overall performance of the concessionaire, in accordance with the concession contract, including in particular the continuous supply of services to users, quality of services, the application of tariffs and other terms of the contract,
- to decide on complaints of service users, in relation to the amount of compensation and other conditions under which the concessionaire provides public services, unless this is under the jurisdiction of another authority by a specific law,
- to give a consent to the transfer of the concession contracts and the change in ownership structure of the concessionaire,
- to give prior approval to the establishment of a lien in favour of financial institutions,
- to keep a register of concession contracts and
- to decide on other requirements, in accordance with the responsibilities defined by the Law on Concessions.

Bylaws (valid on 25.12.2014)

- Rules of Procedure of assignment of the concession contract and the change in the ownership structure of the concessionaire (“Official Gazette of the Republic of Srpska” No. 65/14)
- Rules on the content and manner of keeping the register of concession contracts (“Official Gazette of the Republic of Srpska” No. 65/14)
- Instructions for assessing the public interest in unsolicited proposal (“Official Gazette of the Republic of Srpska” No. 103/05)

CONCESSION LAW OF THE FEDERATION OF BOSNIA AD HERZEGOVINA

Concession Laws are laws governing the procedures for commercial exploitation of natural and other resources of public or general interest at both, the level of the Federation of Bosnia and Herzegovina, and at the cantonal level.

The Concession Law of the Federation of BiH was adopted in 2002 and was aimed at creating a transparent, non-discriminatory and clear legal framework for establishing the conditions under which the concession will be awarded, and stimulating foreign investment in areas where concessions may be granted.

Authorities to grant concessions are divided, according to the said Law, between the entity level and cantons, which should, within six months from the date of entry into force of this law bring their laws on concessions or harmonize already adopted law.

Participants in the process of awarding concessions are governments, relevant ministries and commissions for concessions at the federal and cantonal level and concessionaires, and, in some cases, municipalities.

Government of the Federation is responsible for granting concessions in case of: construction /renovation and use (of motorways and main roads and associated infrastructure facilities, railroads, navigable canals, ports, and airports); use of waterways and other waters in the area or of interest to two or more cantons; construction of hydropower facilities of more than 5 MW; construction and use of hydro-reservoirs in the area or of interest for two or more cantons; construction, use and management of pipelines for oil and gas transportation and storage in pipelines and terminals; games of chance; use of forests and forest lands; passenger and freight railway transport and for areas and facilities of natural and cultural heritage.

A concession award which is not within the jurisdiction of the Federation is governed by cantonal laws. In these laws it is stipulated that the cantonal governments are responsible for the award of concessions in the following cases: use of waterways and other waters; construction of hydropower facilities up to 5 MW; construction and/or use of water accumulations; research and/or use of energy and other mineral resources, including all types of salts and salt waters regulated by special laws; research and/or the use of crude oil and natural gas; research and/or the use of non-metallic and metallic mineral resources including the secondary mineral raw materials defined by special law; hunting and fishing; public transport of passengers; use of healing, thermal and mineral waters; hydro melioration systems and systems for the extraction of material from water; use of agricultural land; hotels and other tourist facilities; areas for sport and recreation; utility services; management and processing of waste; research and use of wind energy; research and use of solar energy; cable television and the Internet; facilities and activities within the protected zone which are not natural and cultural heritage; right to carry out activities of public services and other resources that are within the competence of the cantons.

Organization of the Concession Commissions

At the federal level there is the Concession Commission of the Federation of BiH which exists as a professional, independent and regulatory body.

The Concession Commission of the Federation of BiH acts in accordance with the Concession Law of the Federation of BiH (Official Gazette of the Federation of BiH, No. 40/02 and 61/06).

The Commission members are appointed by the Parliament of the Federation of BiH. The Commission does not carry out the procedure for granting concession, but it only participates in individual stages of the proceedings as a regulator. It also prepares the Document on Concessions Policy which is to be adopted by the Government of the Federation of BiH.

Commissions at the cantonal level are established in accordance with the cantonal concession laws. The same establish the organization and the role of the Commission in the process of awarding concessions. The decision on the composition and number of the members of the Commission is adopted by cantonal parliaments or governments or the relevant ministries. Under these laws it is possible to establish: professional commissions, commissions as a working bodies of the cantonal parliament, permanent commissions within the line ministries and ad hoc commissions. The same should prepare a document on Concessions Policy which is to be adopted by the Government of the canton.

There are two procedures for the award of concessions ("new concessions") that can be implemented at federal and cantonal level:

- a) **Tender procedure** (Articles 24-27 of the Concession Law of the Federation of BiH) is the basic procedure for the award of concessions initiated by the competent authority. When conducting a public tender the competent authority must carry out certain research and development of studies, announce a public tender, collect bids, choose the best offer and make a decision on granting the concession.
- b) **Unsolicited Proposal** (Article 28 of the Concession Law of the Federation of BiH) is to be carried out on the basis of proposal submitted by the investor / bidder without public tender. The investor/bidder submits the proposal to the ministry which assesses whether there is a public interest for the concession.
If it finds the public interest, the ministry submits a request to the Commission for authorization to negotiate with the bidder.
The Ministry cannot conclude a Concession Contract based on unsolicited proposal without an authorization from the Commission.

Content of the concession contract is more-less similar to that of the concession contract stipulated by the Law on Concessions of the Republic of Srpska, provided that there is a difference in the duration of the contract.

The concession contract in FBiH can be concluded for a period which may not be longer than 30 years, which in exceptional circumstances may be extended, but not longer than 50 years. Also, the contract may be renewed for a period not exceeding half of the originally agreed term. The concession contract cannot be transferred to another concessionaire without prior approval of the Commission.

TERMINATION OF THE CONCESSION CONTRACT

The Concession Contract shall be terminated in case of:

- the expiration of the agreed period
- initiation of bankruptcy of the concessionaire,
- termination of existence of subject matter of concession, and
- termination of the Concession Contract (if the Concessionaire is insolvent or bankrupt and if the Concessionaire, i.e. Conceding Party fails to fulfil its obligations).

Annual income from concession fees in the Federation of BiH could be significantly increased if all companies that have licenses for exploitation of mineral resources signed a contract on concessions. In this case the annual concession fee for all cantons in the exploitation of mineral resources could amount to approximately 10 million BAM.

In addition, out of the available data, it is estimated that in the Federation of BiH there are over 100 quarries operating without authorization and signed contracts on concessions and therefore do not pay any fees.

However, the most important consequences for the society are the loss of unused, i.e. unrealized "new concessions" as well as nonexistence of contracts for "old concessions". It is particularly important that there are significant capital investments in the area of infrastructure construction in the Federation of BiH, where these mineral rows are used, and at the same time there are no signed concession contracts with all economic entities which in carrying out of their activities use natural resources on the basis of previously issued licenses and do not pay any concession fee.

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