

Creation of Real Estate Based on Public Private Partnership and Municipal Private Partnership Agreements in the Russian Federation

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Abstract. The article considers individual questions connected with the application of the legislation on public private partnership and municipal private partnership agreements as new types of contracts at the newly built property development. Public private partnership and municipal private partnership agreements are contracts at the initial development stage. Their objective is to attract investments in the Russian economy including for the creation of separate real estate types (capital facilities). The Law enables one to build the relationship in such a way that joint efforts result in the grounds for the accrual of the ownership right to the built (reconstructed) asset. This circumstance certainly influences the infrastructural development of the Russian Federation and its municipal units, the rather that it occurs due to the attraction of extra-budgetary sources

1. Introduction

Taking into account the adoption of Federal law # 224-FZ dated 13.07.2015 “On public private partnership and municipal private partnership in the Russian Federation and introduction of amendments to certain legislative acts of the Russian Federation” (hereinafter referred to as Law) [1], contracts (agreements) of public private partnership and municipal private partnership were added to the existing capital facilities creation contracts. Before the enforcement of the said Law, the state made an attempt to attract investments in the Russian economy by the conclusion of concession agreements, including those for the creation of separate types of real estate, almost analogous assets.

This topic is attractive for researchers, since the application of these contracts is possible in various fields of activity [2-19].

2. Public private partnership and municipal private partnership contracts (agreements)

Public private partnership and municipal private partnership contracts (agreements) bear some similarity with the concession agreement applied at the implementation of federal law # 115-FZ dated 21 July 2005 “On concession agreements”[2]. This similarity is primarily based on the cooperation of a public-law entity and a private actor.

3. Concession agreements

According to the law on concession agreements, under a concession agreement one party (concession owner) undertakes at its cost to build and (or) reconstruct some property defined therein – real estate



(capital facilities) or immovable and movable assets, which are technologically interconnected and meant for carrying out of the activities provided for by the concession agreement (hereinafter referred to as object of the concession agreement), the ownership right to which belongs or will belong to the other party (concession grantor), carry out the activities using (operating) the object of the concession agreement, and the concession grantor undertakes to provide the concession owner with the right of possession and use of the object of the concession agreement for carrying out of the said activities, for a period set therein [2]. Thus, the concession agreement is oriented to build or reconstruct facilities with their further operation under certain conditions.

The subject of the concession agreement shall be the concession grantor's giving possession of real estate (including with technologically interconnected movable assets) to the concession owner for the creation and (or) reconstruction of property at the concession owner's cost, but without accrual or transfer of the ownership right thereto or alienability to any third parties.

The object of the concession agreement shall be the real estate asset to be built or reconstructed, wherein the property is owned by the Russian Federation, the RF constituent entities and municipal units. Consequently, the object of the concession agreement can be only public and municipal property.

The parties to the agreement shall be the concession grantor and the concession owner. The concession grantor shall represent the Russian Federation, on behalf of the RF Government or an authorized federal executive authority or a RF constituent entity, on behalf of a public authority of the RF constituent entity, or a municipal unit, on behalf of a self-governing authority.

The concession owner shall represent an individual entrepreneur – a Russian or foreign legal entity or acting with no separate legal identity under a simple partnership agreement (joint activity agreement) of two or more of the said legal entities [2].

4. Scope of the public private partnership agreement and the municipal private partnership agreement

The public private partnership agreement and the municipal private partnership agreement constitute a civil contract between a public partner and a private partner concluded for a period of no less than three years in the order and on the conditions set by the Federal law.

The parties to the public private partnership agreement and the municipal private partnership agreement shall be a public partner and a private partner.

In this regard, the public partner shall be the Russian Federation, on behalf of the RF Government or its authorized federal executive authority, or a RF constituent entity, on behalf of a supreme executive authority of the RF constituent entity or its authorized executive authority of the RF constituent entity, or a municipal unit, on behalf of the head of the municipal unit or another authorized self-governing authority according to the charter of the municipal unit.

The private partner shall be represented by a Russian legal entity, with which the agreement is concluded under the Law. It means that private partners cannot be represented by individuals, including individual entrepreneurs, as well as foreign individuals and legal entities.

The public private partnership and the municipal private partnership agreement shall constitute a legal partnership concluded for a specified term and based on the pooling of resources and the distribution of risks between the public partner, on the one hand, and the private partner, on the other hand, executed on the ground of the public private partnership agreement and the municipal private partnership agreement concluded according to the federal law to attract private investments to the economy and to ensure accessibility of goods, works and services and increase their quality by public and local self-governing authorities[1].

Under such agreement, the private partner undertakes to create fully or partially, at its own cost or at the cost of attracted funds a real estate asset being the object of the agreement, or immovable and movable assets, which are technologically interconnected and meant for carrying out of the activities provided for therein, to operate and (or) maintain such real estate, and the public partner undertakes to provide the private partner with the rights of possession and use thereof for carrying out of the said

activities and to enable the accrual of the private investor's ownership right to the object of the agreement, subject to compliance with the requirements provided for by this Federal law and the agreement. Under the agreement, the parties also undertake to fulfill other obligations arising out of the agreement elements defining the form of public private partnership and the form of municipal private partnership (article 12 of the Law) [1].

The concession agreement and the public private partnership and municipal private partnership agreement have identical objectives – to attract private investments to the national economy and to ensure accessibility of goods, works and services and increase their quality by public and local self-governing authorities. At the same time, the execution of the concession agreement and the public private partnership and municipal private partnership agreements has different results.

The adoption of Federal law # 224-FZ dated 13.07.2015 “On public private partnership and municipal private partnership in the Russian Federation and introduction of amendments to certain legislative acts of the Russian Federation” [1] was preconditioned by the presence of complicated economic conditions the country has been facing in recent times, when an active participation of the private capital was necessary for the upgrading of the existing infrastructure and its further development. Considering that the law structure allows to build the relationship in such a way, that the joint efforts can result in the private partner's grounds for the accrual of the ownership right to the built (reconstructed) asset, this circumstance certainly influences the infrastructural development of the Russian Federation and municipal units, the rather that it happens at the cost of the attraction of extra-budgetary sources.

It should be noted that the following legal entities cannot be private partners and act in favor of the private partner: public and municipal unitary enterprises; public and municipal establishments; public companies and other legal entities founded by the Russian Federation based on federal laws; economic partnerships and business entities, economic partnerships beyond the control of the Russian Federation, a RF constituent entity or a municipal unit; subsidiary business entities beyond the control of the organizations set forth in clauses 1 – 4, part 2, article 5[1]; non-profit organizations founded by the Russian Federation, RF constituent entities and municipal units in the form of funds; non-profit organizations founded by the organizations in the form of funds set forth in clauses 1 – 6, part 2, article 5 of the law [1].

Objects of the public private partnership agreement and objects of the municipal private partnership agreement have a rather comprehensive list [1]. Upon an analysis of this list, we see that these objects mainly include social and transport infrastructural facilities, which are particularly important for the Russian economy. Besides, some of them refer to highly dangerous, technically challenging and unique facilities. The list of these facilities is presented in article 49.1 of the Town-Planning Code [3].

The list of the facilities also includes facilities of production, primary and (or) further (industrial) processing, storage of agricultural products entered into the list approved by the RF Government according to the RF legislation on the agricultural development and defined according to the criteria set by the RF Government. This list includes private highways and sections of private highways, asset complexes meant for the production of industrial products and (or) carrying out of other activities in the sphere of industry, and other facilities.

An analysis of the facilities shows that in the vast majority of cases objects of public (municipal) private partnership are similar to objects of concession agreements [4]. At the same time, the list of the PPP objects has remained closed, and the implementability of the PPP agreements is preserved only with regard to real estate [5].

An object of the agreement can be only property, which regard to which the RF legislation has not set an affiliation only to public or municipal property or a prohibition on the alienation to private ownership or being in private ownership.

The state is certainly interested in the creation of these objects, therefore, the objective of the investor base expansion does not only provide for the attraction of investors to the creation of objects but also a further transfer of these objects to the contractual parties.

The ground for the conclusion of such agreement is the resolution of a public authority representing the interests of a public-law entity on the implementation of a certain public private partnership project. The public private partnership agreement is generally concluded by a bidding process in the form of a tender for the right to conclude such agreement.

If we compare the foreign practice of the conclusion of these agreements, it should be noted that the tender procedure is not a compulsory condition for selecting a private partner in public private partnership projects in all the countries[6]. It can be exemplified by the Netherlands. In the Netherlands, a private partner in projects is selected by means of negotiations and “a competitors’ dialog” held in case of complicated contracts, when the state encounters difficulties in the evaluation of technical details of meeting the objectives or a legal or financial part of the project. The selection has two stages. At the first stage, the candidates must meet the selection criteria and submit their applications. At the second stage, the candidates’ most preferential offers are analyzed based on the decision-taking criteria, which were preliminarily published and are applied to outline the most economically sound bid [6].

The following functions of the private partner constitute compulsory elements of the public private partnership agreement and the municipal private partnership agreement:

construction and (or) reconstruction (hereinafter referred to as creation) of the agreement object by the private partner; full or partial financing of the creation of the agreement object by the private partner; operation and (or) maintenance of the agreement object by the private partner; accrual of the private partner’s ownership right to the agreement object, provided that the agreement object is encumbered according to the Federal law.

Besides, the agreement can provide for: design of the agreement object by the private partner; full or partial financing of the operation and (or) maintenance of the agreement object by the private partner; partial financing of the private partner’s creation of the agreement object by the public partner, as well as financing of its operation and (or) maintenance; ensuring of the operation of the agreement object by the public partner, provided that the private partner only performs maintenance of this agreement object.

In case the extent of the public partner’s financing of the agreement object creation and the market value of the movable and (or) immovable assets transferred by the public partner to the private partner under the agreement, or the market value of the transferred rights to such assets (if the agreement does not provide for the accrual of the private partner’s ownership right to such assets) jointly exceed the extent of the private partner’s financing of such objects creation, a compulsory element of the relevant agreement shall be the private partner’s legally provided obligation to transfer the object of the public private partnership agreement and the object of the municipal private partnership agreement to the public partner’s ownership upon the expiry of a period defined by the agreement, but no later than the agreement termination date.

The agreement shall include the material conditions provided for by article 12 [1] of the law, including the public partner’s obligation to provide the private partner with a land plot (land plots) for carrying out of the activities provided for by the agreement, the term of the contract of lease of such land plot and the rent amount for such land plot or its calculation procedure.

In case the agreement provides for the private partner’s obligation to transfer the agreement object to the public partner’s ownership upon the expiry of a certain period provided for by the agreement, the agreement shall include the procedure, conditions and terms for the private partner’s transfer of the agreement object to the public partner.

Under the Law, the private partner undertakes to fulfill the obligations thereunder by its own forces. The private partner is entitled to fulfill its obligations thereunder with the attraction of third parties, only if provided for by the contractual terms and conditions. In this case, the private partner shall be liable for the third parties’ actions, as if those were its own actions.

In case the contractual terms and conditions admit the private partner’s attraction of third parties for the fulfillment of its obligations – the public partner shall execute a written consent to the

attraction of the third parties. The consent shall be executed by a separate document being an integral part of the agreement.

5. Conclusion

Thus, at the creation of real estate assets (capital facilities), the legislator enables to use new contracts. The considered public private partnership agreements and municipal private partnership agreements provide new opportunities for the acquisition of the ownership right to the real estate assets and for the operation and maintenance of such real estate. In this regard, the agreements provide for guarantees of the private partner's rights and legal interests at the execution of the public private partnership and municipal private partnership agreements. Article 15 of the Law [1] contains the provisions, which guarantee equal rights to private partners provided for by the RF legislation and a legal status excluding taking of discriminatory and other measures, which prevent the private partners from a free disposal of investments, products and income gained as a result of the activities provided for by the agreement.

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