

Orlovski Tunnel: Legal Aspects

8 October 2007, Frankfurt am Main

Background

- One of our principal roles, as legal advisors to the public sector on this project, is to ensure that the draft Concession Agreement (**CA**) and other Grantor-issued documentation comply with both:
 - international market standards; and
 - Russian law
- Russian law provides an appropriate framework to structure the project in line with the standard market practice
- The project will benefit from the experience of the WHSD project



Legal framework

- The project will be implemented in accordance with the Law On Concession Agreements of 21 July 2005 (the ***Concession Law***)
- The Concession Law:
 - Establishes rules concerning the tender process and the contracting authority
 - Provides enough contractual freedom to negotiate a balanced CA which would meet market expectations and bankability requirements



Specific legal issues

- Concession parties
- Financial mechanism
- Risk allocation
- Rights to the Tunnel
- Transfer of land and subsurface rights
- Lenders' security
- Concession tender



Concession parties

- Concessionaire:
 - pursuant to the Concession Law the Concessionaire must have been the entity who has applied for prequalification. Therefore, bidders need to ensure that whatever entity is the formal applicant is then capable of being the Concessionaire
 - no legal requirement for the Concessionaire to be a Russian company
- Grantor:
 - will be the Russian Federation (represented by the Highways Agency) and the City of St Petersburg
 - clear legal basis for contracting authority of the Highways Agency (on behalf of the State) and the City flowing from the Concession Law and the approved regulations on the project
 - clear separation of rights and duties of Grantors to be embodied in the CA



Financial mechanism

- Capital grant will be provided by the Grantor from the Investment Fund and from the City budget in the form of a non-repayable subsidy to finance a part of the design and construction costs
- Availability payments will be made during the operation stage
- Binding nature of the Grantor's contractual obligations:
 - the CA will set out in detail all financial obligations of the Russian Federation and of the City of Saint-Petersburg
 - under Russian law the State and the City are both obliged to include necessary funding in their respective budgets to satisfy their financial obligations under the CA
 - the Grantor will remain liable to the Concessionaire (with all its money and assets) even if any terms of the Investment Fund or other budgetary source of funding change or are unavailable



Risk allocation

- The Grantor will assume traffic risk
- The Grantor will ensure that land and subsurface rights are provided to the Concessionaire (in respect of the footprint to be disclosed in the bid instruction document)
- The Grantor will be responsible for carrying out the work necessary to upgrade and then maintain the connecting urban road network
- The Grantor will assume the risk of certain changes in law



Risk allocation (continued)

- The Concessionaire will assume design, construction and operational risks, including obtaining necessary approvals and licences
- The Grantor intends to provide compensation and/or extensions of time to the Concessionaire for risks assumed by the public sector
- Russian law permits termination payment in line with international practice
- Some other risks are likely to be shared between the Grantor and the Concessionaire, including utility relocation risk



Land and subsurface rights

- The Grantor guarantees provision of land and will ensure that subsurface rights are transferred to the Concessionaire within the footprint to be disclosed in the bid instruction document
- Land rights
 - Land will be transferred on the basis of the CA and the land plot lease agreement (**LPLA**)
 - Where lease of land is not appropriate, the Grantor will provide equivalent right of use
 - Lease fees to be fixed in the CA and intended to be minimal
- Subsurface rights
 - The Grantor and the Concessionaire will share the risk of obtaining mining and mining allotment licences for the indicated footprint to construct and operate the Tunnel



Rights to the Tunnel

- The Tunnel will remain a state property (throughout the CA term)
- The Concessionaire will have the contractual right under the CA to construct the Tunnel and then to operate and maintain the Tunnel (throughout the CA term)
- The Concessionaire will not be entitled to pledge the Tunnel
- The fee for the Concessionaire's right to possess the Tunnel (the concession fee) is intended to be minimal



Lenders' security

- Legal tools which may be used to provide security to Lenders and which the Grantor intends to provide, or to consent to, in the Direct Agreement
 - security assignment of rights under the CA
 - pledge of shares in the Concessionaire or in its holding company
 - termination payments to be made directly to the Lenders
 - suspension of termination of the CA to allow the Lenders to exercise their step-in rights
- Other security which the Grantor expects the Lenders may request:
 - pledge of the Concessionaire's rights to bank account(s)
 - security interest in the Concessionaire's rights under other project agreements



Concession tender

- The Concession Law sets out a detailed framework for the tender under the project
- Tender procedure is expected to be similar to the procedure adopted on the WHSD project, in particular
 - Tender will consist of prequalification and bid stages
 - Pre-qualification requirements will be allowed to be satisfied by the applicants' parent companies / affiliates
 - Applicants will be required to submit a bid bond at bid submission



© Freshfields Bruckhaus Deringer 2007

This material is for general information only. It is not intended to provide legal advice and may not be relied upon. Further, this material does not represent the Grantor's position in respect of the issues covered herein.

