

The Importance of Negotiation in the Public Procurement Process

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ABSTRACT: Negotiation has been and is one of the key elements when it comes to business success. The largest companies in the world were founded as a result of the abilities of their leaders to manage to find the optimal balance between personal goals and objectives, and at the same time, the respect and the knowledge to know when and how to relate to the negotiating partner. Negotiation is present in all areas of our lives, and trade negotiation is just an extended aspect of negotiation that already takes place at every moment, in different everyday situations. Negotiation is first and foremost a form of communication: negotiating means communicating in the hope of reaching an agreement. International trade negotiation is an organized process of communication between companies, which aim to gradually adapt their interests related to the object of negotiation in order to achieve a mutually acceptable business agreement, materialized in the international contract. In the process of applying the procedures for awarding public procurement contracts, the contracting authority, through the internal department specialized in awarding public procurement contracts, has a number of tasks, such as: elaboration of an annual public procurement program, elaboration of award documentation or the tender documentation, the fulfillment of the obligations regarding publicity, the application and completion of the award procedures, the constitution and keeping of the public procurement file.

KEYWORDS: negotiation, communication, negotiating partners, public procurement, contracts

Introduction

Almost every day, any of us is convinced or persuaded by someone. Each of us has a point of view or we have to exchange something with others. We negotiate with our boss the development of a project, with the supplier we can negotiate the conditions for concluding a contract, with the client the payment conditions. We can negotiate anytime, with anyone and anything. Negotiation is present in all aspects of our existence, in a multitude of forms, is carried out in a variety of fields and is equally known locally, nationally and internationally.

By negotiation we mean "any form of unarmed confrontation, through which two or more parties with contradictory but complementary interests and positions seek to reach a mutually advantageous arrangement, whose terms are not known from the beginning" (Volkema 1999, 194). In this confrontation, mainly and loyally, arguments and evidence are brought, pretensions and objections are formulated, concessions and compromises are made in order to avoid both the rupture of relations and the open conflict. "The agreement of the parties may be a simple verbal agreement, consolidated by a handshake, it may be a tacit consent, a letter of intent or a protocol, written in a hurry, it may be a convention or a contract, written in accordance with certain procedures and common customs, but it can also mean an armistice, a pact or an international treaty, drafted in compliance with special procedures and customs" (Churchman 1995, 57).

Negotiation "is a competitive process in which, starting from the basis of common interests, the parties seek to reach an agreement that, in parallel with the satisfaction of common interests, to ensure their own preponderant advantages. In essence, however, negotiation must lead to a consensus and not to a victory of one party over the other" (Hames 2011, 126). Thus, "all negotiating parties can win and none lose. But in the end, the negotiation has only one goal, that being to reach a common interest and to achieve collaboration between the parties. Each party will be more or less successful in the negotiation depending on the favorable clauses obtained in its favor, although in itself the completion of a negotiation even if concessions have been made can be considered a success, as long as there is something to be gained from the collaboration"

(Pistol 2014, 62). In this sense, negotiation is considered a dynamic process of adjusting different ideas and arguments, through which the parties with their own objectives, regardless of the field, discuss how to reach a consensus, based on mutual interest and on "a complex of processes planning, analysis and negotiations between two or more partners, in order to carry out transactions" (Van der Molen, Gramsbergen-Hoogland 2019, 203). Hence the importance of talks in a negotiation, which "represents a process of probing, exchange of views, a form of communication between partners to reach an agreement of will. The essential premise of the negotiation is to maintain the open nature of communication, ensuring a working climate and cooperation between the parties" (George 2018, 41).

Negotiation - a form of communication

Negotiation is a concentrated and interactive form of interpersonal communication, in which two or more parties in disagreement seek to reach an agreement that solves a common problem or achieves a common goal. Thus, negotiating means communicating in the hope of concluding an agreement in order to obtain the best possible result. Being an "organized process of communication between companies, the aim is the progressive adaptation of their interests related to the object of negotiation in order to achieve a mutually acceptable business agreement, materialized in concluding various contracts" (Whitaker, Austin 2001, 154). In this sense, the essential premise of the negotiations is to maintain the open character of the communication, to ensure a working climate and cooperation between the parties. Negotiation is inseparable from human communication and is inevitably based on dialogue.

"Negotiation allows the creation, maintenance and development of an interpersonal or social relationship, in general, as well as a business relationship, in particular. It should also be mentioned that negotiations do not always necessarily follow manifested results in the direction of an agreement. They are often made for their side effects such as: maintaining the contract, gaining time, preventing the deterioration of the conflictual situation. Apart from these, the negotiators' meetings can be seen as a potential channel for urgent communications in crisis situations" (Gulea 2015, 43). The absence of communication can be considered an alarming sign of the impossibility of conducting the negotiation; its presence is an indication of the chances that the negotiation will take place. At the same time, we must give sufficient security to the climate of discretion and sound gradual construction.

Thus, "discussions are the most common ways of transmitting verbal messages, which include leading and conducting meetings, speeches, sales of products and services, consulting employees, resolving complaints, conducting negotiation activities" (Candea, Candea 2018, 26). If we refer to the human interaction aspect of negotiation, we must consider other forms of interactions that take place between people. In this sense, "studies show that negotiation is correlated with situations such as solving problems, as well as situations of confrontation between people. For this reason, a human interaction can evolve on any of these coordinates - problem solving, pure confrontation or negotiation. The people involved will be the ones who will opt for one or the other of the possibilities" (Guasco, Robinson 2017, 131). Problem solving is a form of interaction in which the parties involved perceive their objectives related to a common problem as identical, by maintaining the open nature of communication, ensuring an optimal climate of work and cooperation between the parties.

As a process of interpersonal communication, "negotiation involves a series of particular aspects and characteristics, materialized in a set of initiatives, exchanges of messages, contracts and confrontations, respecting established rules and customs in a legal, cultural, political and economic environment" (Goldwich 2011, 87). Thus, "the negotiation is based on a process of interaction, adjustment and harmonization of the distinct interests of the parties, so that, beyond the competitive nature of the relations between the parties, the agreement will become mutually advantageous (Adler, Rodman, Du Pré 2017, 167). Based on "the concept of mutually beneficial agreement, the success of the negotiation can be defined, if each partner achieves a satisfactory

gain from his point of view and feels that the other is satisfied with the result” (Putman, Roloff 1997, 98). Therefore, the main aspects of a successful negotiation are: “different particular interests predominate, the final solution is imposed by the strongest party, the interaction of the parties is dominated by struggle, the power relationship between the parties is a central aspect in their interaction” (Shell 2016, 41).

In order to refer to the human interaction aspect of negotiation, we must also consider other forms of interactions that take place between people. In this sense, “studies show that negotiation is correlated with situations such as solving problems, as well as with situations of confrontation between people. For this reason, a human interaction can evolve on any of these coordinates - problem solving, pure confrontation or negotiation. The people involved will be the ones who will opt for one or the other of the possibilities” (Sistar, Ignat 2011, 87). The differences between the three types of interactions are great, and highlighting them helps us better understand the specifics of negotiation. Problem solving is a form of interaction in which the parties involved perceive their objectives regarding a common problem as identical. The joint project is dominated by consensus, and the parties involved are engaged in a rational process of finding the optimal solution. For this, they generate several possible solutions and, based on objective criteria, they choose the convenient one. Thus, the final result does not depend on the preference, priorities or objectives of each, but common interests predominate through by: “following certain methodologies, predominantly rational, the final solution is one that meets the criteria established initially, and there are no (or are not relevant) emotional aspects” (Rotaru 2018, 97).

Hence the importance of establishing a negotiation strategy that has the role of “anticipating certain developments in the negotiations and preparing in time for appropriate responses to support the position in the negotiation by establishing the overview, setting priorities (primary and secondary), choosing the means of action and the framework of the negotiation, identifying the solutions to withdraw or change the orientation during the negotiation” (Shell 2016, 156). This can be done depending on a number of factors, such as: “own resources, the situation of domination or dependence on the market, the situation in which the negotiation takes place, the possible actions of the partner, the personality of the negotiators, etc.” (Rivera-Batiz, Oliva 2013, 112).

Peculiarities of negotiation in the public procurement process in Romania

The negotiation aims to adjust the various ideas and arguments, through which the parties with their own objectives, regardless of the field, discuss to reach a consensus, based on mutual interest. In the public procurement process “ensuring the efficient use of public funds involves the application of the awarding procedure by the contracting authorities, respectively by using the competitive system so as to obtain a maximization of the desired result and the use of awarding criteria that reflect primarily the advantages of economic nature of the offers presented” (Chelaru 2016, 57).

The application of the procedures for awarding public procurement contracts in Romania is done by the National Authority for Regulation and Monitoring of Public Procurement which is coordinating this field. The contracting authority has the right to initiate the application of the award procedure only after the award documentation has been elaborated or, as the case may be, the competition documentation. Any situation for which there is no explicit regulation is interpreted in terms of the principles underlying the award of the public procurement contract. The award of the public procurement contract is done through a series of procedures, regulated by legislation, such as:

- a) open auction;
- b) restricted auction;
- c) competitive negotiation;
- d) competitive dialogue;
- e) partnership for innovation;

- f) negotiation without prior publication;
- g) competition of solutions;
- h) award procedure applicable in the case of social services and other specific services;
- i) simplified procedure (Law no. 98/2016, art. 7 (1) and art. 68 and Government Emergency Ordinance (GEO) of Romania no. 34/2006, art. 18 (1)).

The necessary information about the documentation for awarding the public procurement procedure are found in Law no. 98/2016 on Public Procurement and refers to:

- general information on the contracting authority;
- instructions regarding deadlines to be observed and formalities to be completed in connection with participation in the award procedure;
- if the minimum qualification requirements are requested, as well as the documents to be presented by the bidders/candidates for proving the fulfillment of the qualification and selection criteria;
- the specifications or the descriptive documentation, the latter being used in case of applying the competitive dialogue or negotiation procedure;
- instructions on how to prepare and present the technical and financial proposal;
- detailed and complete information regarding the award criterion applied for establishing the winning bid;
- instructions on how to use the remedies and information regarding the mandatory contractual clauses.

The contracting authority draws up the procurement file and the report of the award procedure for each awarded public procurement contract or framework agreement concluded, as well as for each dynamic procurement system launched. This report of the award procedure must include at least the following documents/information:

- a) "the name and address of the contracting authority, the object and value of the public procurement contract / framework agreement or of the dynamic procurement system;
- b) if applicable, the results of the qualification and/or selection process of the candidates / tenderers and / or the reduction of their number during the award procedure;
- c) reasons for rejecting an offer that has an unusually low price;
- d) the name of the bidder declared the winner and the reasons for which his bid was designated the winner;
- e) to the extent that they are known, the party/parties of the public procurement contract / framework agreement that the successful tenderer intends to subcontract to third parties and the name of the subcontractors;
- f) justification of the reasons regarding the choice of the award procedure, in case of applying the procedures of competitive negotiation, competitive dialogue or negotiation without prior publication of a participation notice;
- g) justification of the reasons for which the contracting authority decided to cancel the award procedure;
- h) where applicable, the reasons for which other means of communication than electronic means have been used for the submission of tenders;
- i) when applicable, the conflicts of interest identification and the measures taken in this regard" (Law no. 98/2016, art. 216 (2)).

The stages of the public procurement process specific to the entities of the Romanian Public Administration refer to:

- Public procurement planning
- Initiation and launch of the procedure
- Carrying out the procedure
- Completion of the procedure
- Contract administration.

For the **Public Procurement Planning stage**, the related activities are the following:

- Identifying needs and setting priorities
- Identifying the applicable legal provisions
- Market research, identification and risk assessment
- Estimating the value and choosing the procedure
- Preparation of the public procurement plan
- Obtaining approvals and initiating the procedure
- Establishing the schedule of the procedure.

These activities may be carried out by the contracting authority starting at any time from the first half of the year and for a period directly proportional to the degree of complexity of the object of the contract, provided that the procurement plan is integrated in the Investment Program, ie no later than July 15 of the previous year, when the draft budget for the following year is sent, as well as the estimates for the next 3 years.

For the second stage - **Initiation and launch of the procedure** - the activities presented require compliance with certain terms, as follows:

- The elaboration and transmission of the intention notice requires a maximum of 3 days (being influenced by the size and organizational structure of the contracting authority)
- The publication of the notice of intent is made within a maximum of 12 days from the date of sending the text of the notice to the Official Gazette
- Preparation of documentation for selection has a duration established depending on the nature and complexity of the public procurement contract
- The appointment of the evaluation commission is made in maximum 3 days depending on the size, the organizational structure and the Regulation of organization and functioning of the contracting authority
- The elaboration and transmission of the participation announcement is done in maximum 3 days depending on the size and organizational structure of the contracting authority
- The publication of the participation announcement is made in maximum 12 days from the date of sending the text to the Official Gazette
- The transmission of the documentation for the elaboration and presentation of the preliminary offer varies depending on: the award procedure to be applied, the stage within the procedure and the nature of the contract. So:
 - for restricted auction:
 - Selection stage: documentation regarding the qualification and selection of candidates - minimum 25 calendar days
 - Evaluation stage: sending the documentation for the elaboration and presentation of the offer - minimum 40 calendar days regardless of the nature of the contract
 - for open tender: the documentation for the elaboration and presentation of the offer is submitted in at least 40 calendar days regardless of the nature of the contract
 - in case of a competitive negotiation:
 - selection stage: sale Documentation referring to the qualification and selection of candidates - minimum 25 calendar days
 - consultation and negotiation stage: transmission Documentation for the elaboration and presentation of the preliminary offer - no minimum number of days is specified
 - evaluation stage: transmission Documentation for the elaboration and presentation of the final offer - minimum 15 days regardless of the nature of the contract
 - in case of a negotiation with a single source - a minimum number of days is not specified regardless of the nature of the contract

- for the situation of a request for offer - the transmission of the documentation is done in minimum 10 days (in case of works contracts) and minimum 5 days (in case of supply or service contracts)
- Receiving requests for clarifications. For the entire period of submission of the documentation or for the entire period from the time of submission of the documentation, as appropriate, but not later than 8 days before the deadline for submission of letters of interest, preliminary offer or offer, as appropriate
- Receipt of letters of interest and related documents or the preliminary offer or the offer throughout the period from the moment of sending the documentation but not later than the established deadline
- The evaluation of the documents related to the selection by the evaluation committee (in case of restricted auction and competitive negotiation) is done according to:
 - Number of letters of interest and related documents received
 - The established qualification criteria
 - Clarity of received documents
- The communication of the result of the selection stage varies depending on the size, the organizational structure and the regulation of organization and functioning of the contracting authorities.
- Elaboration and transmission of invitations to participate in the negotiation and consultation stage (competitive negotiation). The duration varies depending on the characteristics and nature of the contract, the organizational structure and the regulation of organization and functioning of the contracting authority.
- Establishing the negotiation and consultation meeting/sessions. The establishment of the number of negotiation and consultation sessions and of the time interval between them are at the discretion of the contracting authorities depending on the characteristics of the contract.

The third stage - ***Carrying out the procedure*** - consists of:

- opening the bids and drawing up the minutes of the bid opening meeting. The duration of this activity varies depending on:
 - the number of offers received and the number of forms that accompany the requested offer
 - the means of drafting the minutes of the opening of tenders
 - the way of presenting the information within the offers
 - the logistics available to the contracting authority and the way in which the opening session was prepared
- evaluation of offers and preparation of evaluation report. The duration varies depending on:
 - the number of received offers and the forms that accompany the offer
 - the way of presenting the information within the offers
 - the complexity of the contract
 - the volume of information to be analyzed in an offer
 - the clarity of the forms used in the documentation issued by the contracting authority.

The fourth stage - ***Completion of the procedure*** consists of the following:

- Sending the result of the procedure to all those who submitted the offer. It is made in maximum 2 days from the presentation of the evaluation report and of the proposal for awarding the contract by the evaluation committee
- Concluding the public procurement contract. It is made during the validity period of the submitted offers, but not earlier than 7 days from the date of communication of the result of the procedure

- The transmission of the award notice is made within a maximum of 30 days from the date of concluding the contract
- The entry into force of the contract takes place at the moment of presenting the letter of bank guarantee of good execution, but before the expiration of the validity term of the offers

In the fifth stage - *Contract administration* - is performed:

- Granting and paying the advance. In accordance with the legislation in force and only with the condition of observing the clauses of the contract
- Payments under the contract. In accordance with the legislation in force and only with the condition of observing the clauses of the contract
- Deliveries or receptions. In accordance with the legislation in force and only with the condition of observing the clauses of the contract
- Restoration of the guarantee of good execution. Only after the contractor has fulfilled all the contractual obligations and in accordance with the contractual clauses
- Registration in the patrimony of the contract results. In accordance with the legislation in force.

Conclusions

In the negotiation process, a set of initiatives, contracts and confrontations between the partners are imposed by observing some rules and usages that respect the procedural and deontological requirements. Understood as a process of interpersonal communication, negotiation is a process of interaction, adjustment and harmonization of the distinct interests of the parties through dialogue and discussions on the objectives pursued and the adaptation of strategies to obtain the most advantageous result. Between the communication process and the society there is a close relationship of dependence and interaction, the communication playing a major role in the daily life of each person, regardless of the degree of complexity of the activities it carries out. In the negotiation process an essential moment is the choice of how to conduct negotiation: a special importance must be given to establishing appropriate tactics that must take into account a number of elements, ie the specific circumstances in which the negotiation takes place, the purpose and means available, the actions of the negotiating partner, the techniques used, their dosage and elaboration.

The approach of the negotiation concept must be seen both as a communication process and as a set of influencing factors and general conditions of development that leave their mark on the final results, together with the relations of dependence between them. Negotiation is a competitive process in which, starting from the basis of common interests, the parties seek to reach an agreement that, in parallel with the satisfaction of common interests, to ensure their own preponderant advantages. An essential element in the success of the negotiation is related to the adopted strategy, which must take into account all the factors that can intervene during the negotiation by applying tactics, techniques, tricks and negotiation schemes, learned and practiced in time, in order to get benefits for both parties. It is very important that the two parties in the negotiation focus on win-win situations, with long-term benefits and partnerships, which leads to an integrative and creative negotiation to obtain an advantageous result.

Negotiation will continue to be an essential process in the business world, and in the field of public procurement, the specifics of negotiation have a special importance, a set of knowledge that covers quite varied fields for the application of various types of public procurement contracts being necessary. In addition to the skills specific to the work of a negotiator in the field of public procurement, thorough judicial, planning and forecasting knowledge are required to draw up contracts in the public domain in order to provide services, perform works or products. The importance of efficient negotiation in the public domain is determined by the increasingly complex socio-economic and contemporary political context, as the relationships and activities

that people carry out become more and more diversified. Thus, negotiation begins to impose itself as one of the most precious attributes of daily life, requiring a behavior that determines adaptability, responsibility, innate qualities and a series of intellectual and behavioral acquisitions shaped over time.

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