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Research Article

Negotiation of Agreements with Government Agencies as an Approach for More Space and Opportunities for the Private Sector: The Features of the Albanian Reality

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Abstract

The negotiation as a conversation process between two or more parties to settle a dispute or to reach an agreement is an efficient method and it requires attention not only from the private sector, but also from the public one. Negotiation is evaluated in two aspects, from the success achieved and the relationship created. The result that the negotiated agreement reaches is more convenient compared to that achieved through unilateral administrative acts. Establishing relationships with local and national government is a necessity for the private sector. This means that the negotiating agreements with various state authorities should be part of their daily tasks. This paper explores some features of the negotiation process, in which public administration is a party and also gives some recommendations on the real possibilities that government agencies can provide to private companies as a way for surviving and being successful in these dynamic and complex market. We mainly focused on agreements between representatives of the tax authorities and the debtor taxpayers, and at the Albanian legislation on public procurement, which provides the possibility of negotiation between the contracting authority and the bidder. From the analysis of the negotiated cases of the customs administration we notice a level of scepticism in the government agencies while negotiating with debtor entities, which is evidenced by the small number of signed agreements. However the effect of these agreements is evident because the paid value is about 50% of the total negotiation value. Arrangements based on installments, remission of penalties or interest, the possibility to compromise and defer the duties payment are some of the recommended programs that may be part of the tax administration' offer to debtor entities.

Keywords: *government agencies, negotiation, agreement, tax administration*

1. Introduction

We do like to think that we live in a world dominated by private enterprises, where the government is increasingly falling from its economic role against individuals and private companies both inside and outside the country. But in reality it (the government) remains a very strong player with which all businesses and organizations must learn to interact. Governments regulate, subsidize and put taxes to business activity, buy and sell products and services to private companies or invest as partners in many agreements. In order to do business one must necessarily interact with the government. Individuals and organizations undertake to engage with governments, among others, for two essential reasons, first to reach an agreement on a transaction and second for the regulations that favour their interests.

At a certain point we all have to cooperate with government institutions. Some of us do it rarely but some others do it almost every day. We cooperate with the government using our individual capacities, but also with our capabilities as representatives of companies or organizations where we work. The existence of business relationships with local or central government, or with other institutions, makes reaching agreements with different state authorities such as the Competition Authority, the Authority of Environment Protection, the General Directorate of Taxation, or government contracting authorities part of the companies' daily tasks. A private company which want to be awarded a project, a

tender, or a concessions, etc., should normally negotiate with several governmental institutions. Many people who do have relationships with the government do not look at their activities as negotiations and in these conditions they do not consider themselves as negotiators as well (Shell, 2006). Moreover, individuals and organizations that have relations with governments see themselves in an almost inferior role. While government officials involved in the deal with private parties see themselves simply as executer of laws and regulations which they are forced to implement. Their behaviour and actions mainly depend on transactions that law allows and not by the negotiation (Patterson K., Grenny J., McMillan R., Switzler A., 2002). Can we say that seeking permission, license, concession or a subsidy from an agency or a government office resembles a negotiation? Similarly, when we ask a government official not to fine us or a tax agent to forgiveness or delay tax payment, does it mean that we are negotiating?

2. Businesses and Individuals Facing Government Agencies in Negotiation

Why do businesses and individuals feel differently when negotiating with government agencies? Negotiations do not require a well polished table, a team of lawyers and a large amount of detailed documents (Fisher R., Ury W., Patton B., 1991). The negotiation *is a communication process by which two or more parties seek to achieve their interests, or the persons they represent, through an agreement to resolve the conflict that exists or for a desired action in the future* (Robert H. Mnookin, Scott R. Peppet and Andrew S. Tulumello, 2000). The parties are involved in the negotiation for the reason that at least one party has decided that it can improve the situation in which it is found and both parties agree on several acts which require the participation of both parties. Why do businesses and individuals feel differently when they are not negotiating among themselves, but with government agencies?

If the government as a negotiating party feels differently from private organizations, this is due to two factors, its special powers and specific restrictions, restrictions which operate directly into it. Besides their natural attributes, which are generated by their assets and resources, all governments are empowered by their monopoly, privileges and immunities, their role as protector of the public interest and welfare, as well as the protocol and the characteristic formalities (Gruenfeld D., & Berger G., 2002). It works lined with powers under special political restrictions. These are such restrictions under which no private company, no matter how big or how small it is, can work with. As typical restrictions we can mention the legal framework that must be respected in all activities of the public administration bodies, control and accountability to superior bodies, the pressure of interest groups who are represented by the government, incentives and bureaucratic interests of their organizations and operating norms (Salacuse, 2008). But what is meant by each of them? Let's start the discussion about the powers to further continue with the restrictions.

- The negotiation failure between individuals and private sector companies does not necessarily close all the alternatives or ways for the respective parties, each party has the possibility to choose other alternatives. The nature and the extent of other opportunities affect the strength of the parties in the negotiations. Negotiation with the government almost always means negotiating with an entity that has a monopoly on what is required. This fact makes the other party feel "weak". The government legal monopoly makes its institutions almost immune from market forces and gives stability that little private sector companies may have. This factor tends to colour all the interaction between the government and the private parties throughout the negotiation period.
- In the negotiation process the government feels different compared to the private sector negotiators and other individuals this because it enjoys many privileges and immunities arising from the law itself. It does not only have the power to regulate how the way businesses operate, but it also has the ability to seize property, to break the contract, threaten by force and if necessary uses this force against the other party to reach its goals. The national legal system in order to allow the government to perform its basic tasks, gives it a group of privileges and immunities. It is precisely these factors that give the government specific authority at the negotiating table. Multinational corporations, although they have endless capital and technology available to them, do not own this power.
- Public Interest. The government covers its actions, legal or not, with the excuse that it operates more in the public interest rather than the private profit. It normally justifies its behaviours as actions made for the "national security", "public welfare" or "for the benefit of mankind". Unselfishly government officials seek to achieve public goods by negotiation, while private companies simply seek to profit. Outside the negotiating table the role of representing the interests of the public gives the government the ability to mobilize the support of society for its negotiation and not only that, but to gain advantages that private companies do not and can never have. Moreover it can also use political influence.
- Protocol and formalities. The government and its representatives are usually sensitive to issues related to the status, prestige and dignity, as long as these elements are essential to perform their primary purpose,

governance. Governments consider these formalities' failure as a sign of disregard, or worse still as a challenge to their authority. As a result its representatives bring to the negotiating table manners and inflexible approaches. In fact any suggestion that both sides are equal can be regarded as an insult.

As it was earlier emphasized the characteristic powers now give the government power in negotiations with private parties. However, in practice few governments are free to use this power according to their desire. Their behaviour and actions in one way or another are subject to various limitations. If private parties fail to recognize and understand these restrictions, all this can allow business companies or individuals to use them in their favour. In this way private party fails to mitigate the difference of power between the parties, this difference which separates them from government negotiators on the other side of the table. Let us stop a bit wider and longer at the government restrictions on negotiations.

- Rules (laws) arrange all the actions of government agencies including negotiations with people or private companies. As a result the negotiation with the government is more like a process led by the rules and not by the free interaction which appears during negotiations between parties in the private sector. Laws and regulations do not only affect the types of decisions taken by governments, but they also affect the decision-making process. Rules do not only bring contracts' freedom restriction to various government agencies, but they also restrict the interaction between them. Tough rules and regulations may limit the type of transactions and the way they are reached.
- Voters. The fact that an institution or a government agency has the monopoly on what the other side wants to negotiate does not mean that he is omnipotent. Inevitably their very necessary resources and assistance depend on a number of interest groups. Depending on the state, county or municipality, government agencies and their officials depend on different groups of voters and supporters such as political parties, trade unions, military, media and civil society organizations, groups these from which they derive power and authority. So we have to understand and recognize specific voters, interest groups and the means by which they influence the actions of government agencies.
- Policies. Government agencies or better the civil officials and policy-makers perceive and act towards problems and issues being negotiated in a very different way from the private side, due to special interests. The reasons for this perception or these behaviours partly come from the fact that unlike the benefits that reaches a private company when negotiating (such as the profit, the increased property value, the fat rewards etc.) civil officials, locally or centrally, answer to certain policies. These policies may for example be necessities to maintain the budget of the institution, to enhance the prestige of the unit and to avoid competition of other entities or institutions, to protect the authority and the "pieces of the cake". All government negotiators are agents, and this means that they negotiate on behalf of the government or of its institutions and not on their own behalf. One of the consequences of the policies' necessity and the need to please voters, especially in cases when the unit does not receive anything from negotiating with an individual or a private company is the negotiating delay. This delay lasts more than it could have ever been predicted (and possibly up to an indefinite time), especially in those cases when faced with a problem of controversial issues, which on its side has a negative influence on political interests. Instead of taking a decision, which would offend one group or another, the strategy chosen by the majority of the government agents is the delaying of negotiations until this delay becomes very costly for the private party.
- Operational norms. Government agencies operate according to certain norms which are rarely found in private businesses. In particular, these norms are related to incomes, resources and objectives of these institutions. They do not only affect the way how these agencies operate, but also how they negotiate. The reasons why the government is not influenced by trade promoters at the same level with the private sector is that government agencies typically do not keep the financial or commercial gain realized in negotiations for themselves. Many governments and government agencies are not free to allocate their production factors such as capital, labour and technology in the way that their leaders and their negotiators consider or judge as the best one. The decision-making process of private companies, for example whom to borrow capital or from whom to take, or what equipment to buy and what not, is affected by the level of the potential profit of each investment project, while government agencies take these decisions according to rules set by policy. As long as government agencies are subsidized by the government treasury and controlled by government officers their main goal would not be the maximizing of the profit, but the continuation of political and social benefits. However the biggest limitation is considered the fact that government agencies and institutions should follow the objectives that legislators have decided and built for them. They cannot pursue objectives that they themselves describe as the most important and moreover they cannot easily change served objectives.

3. Tax Procedures, Legal Restrictions of Negotiations and the Favourable Positions of the State Administration

In the case of tax procedures, the public administration body (the tax authority) may allow the subject to enter into an agreement for the payment in installments of tax liability. This agreement is a natural product of negotiation that takes place between representatives of the tax authority, acting as an agent of the state interests and that of the debtor taxpayer entity. However this negotiation is legally well-structured as regards the right to initiate negotiations, the methodology of expressing the will of the parties to sign the agreement, the authority responsible to complete the deal, as well as its final deadline.

Thus, the legal framework[1] provides that only when financial circumstances prevent the taxpayer to pay in full and within the tax obligations, he may request and be allowed to enter into an installment payment agreement. This case should be made present by the subject in a written way, through a written request to enter into an installment payment agreement, which must be addressed to the Director of the Regional Branch and must set out the reasons that prevent the taxpayer to pay taxes. As above, three important moments of the negotiation process are exposed:

-*firstly*, negotiations cannot take place for any reason, or every time the parties need to meet or to ensure their best interests, but only when there is a deficiency case, or in case of financial difficulties of the entity or taxpayer. This legal limit, in terms of grounds of negotiations, constitutes an essential difference between the negotiation in the public sector with the private sector where negotiations can take place for whatever reason the interested parties have and not only when they are in a difficult financial situation.

-*secondly*, the Albanian legal framework does not allow the tax administration to be the initiator of a negotiation with the debtor subject, although they may be fully aware of his financial situation. Only the debtor entity may initiate a negotiating procedure through a written request and not the other party. This is a very important limitation for the state party.

-*thirdly*, the difficult financial circumstance, so the cause of the negotiation, is subject to assessment by the tax administration, which can also reject the request for an installment payment agreement. Tax administration may even require a bank guarantee to secure its position before entering into such an agreement with the subject taxpayer[2]. This legal provision puts the state organization (the tax authority) in a very favourable position in the negotiation process, against the private party.

The legal framework provides restrictions even for the form of the negotiation agreement and the deadlines within which it can be negotiated. Thus the agreement on payment by installments shall be in a written way and signed by the regional director and the taxpayer. This arrangement cannot last longer than the end of the following calendar year.

In order to ensure the favourable position of the state party in the negotiation, the legal framework provides the conditions when the installment payment agreement can be resolved unilaterally by the tax administration. Thus, Article 78 of the Code of Tax Procedures provides that: "*the installment payment agreement is solved by the tax administration when: a) the taxpayer does not make payments in accordance with the agreement; b) the taxpayer does not pay other tax liabilities arising during the period covered by the agreement. If the payment instalment agreement is broken, all the unpaid tax obligations, which are covered by this agreement, shall be paid within 30 calendar days from the date of the decision for the agreement termination*".

In order to view the efficiency of the negotiated agreements between debtors' entities and tax institutions we have observed cases of negotiated agreements in the Elbasan Customs. It appears that there are currently 251 debtor entities with a total debt of 251 827 980 ALL, of which only 8 subjects have negotiated with the customs' administration and signed for a total value of 15,119,772 ALL (Elbasan, 2016). From the moment of the conclusion of these agreements it has been received 7,445,408 ALL. The agreement acts do not exceed the period of 1 year and the repayment of the obligation is divided into periodic installments. The conclusion of these negotiated agreements does not provide the forgiveness of debts or penalties. The main condition upon which these agreements are negotiated is the immediate payment of customs duties.

From the above case analysis we conclude that the number of negotiated agreements is very small compared to the total number of subject debtors and the real spaces for negotiation. Meanwhile the effect of these agreements is evident because the total value of the repaid obligation is about 50 percent of the value of negotiation.

[1] *Law No. 9920, dated 19.5.2008 "On tax procedures in the Republic of Albania", as amended, Articles 77, 78*
[2] *Law no.9920/2008, Article 77, paragraph 5*

4. Public Procurements and the Negotiation with the Contracting Authority

The Albanian legislation on public procurements[3] provides the possibility of negotiation between the contracting authority and the economic operator bidders, mostly in two procurement procedures: "The negotiated procedure with prior publication of the contract notice" and "the negotiated procedure without publication of the contract notice"[4], which mainly develops in the unexpected and emergency cases. However, the process of negotiation, in the case of public procurement procedures is subject to certain legal restrictions, which:

a) Ensure the application of the basic principles of public procurement, as well as *equal treatment of operators*, *transparency of procedures, procurement effectiveness, prevention of interests' conflict, prohibition of corrupt practices*, etc.
b) Ensure advantageous position of the public administration body (the contracting authority).

Let's first look at some important moments of public procurement procedures in negotiation:

- On the negotiated procurement procedure[5], the standard documents are included in the invitation to negotiate. In addition, the standard documents must be available in electronic form.
- On the negotiated procedure with prior publication of the contract notice, the contracting authority issues a notice which invites economic operators to express their interest to participate, thus ensuring transparency of procedures. The way and the place where the contract notice is published, as well as minimum limits for receiving requests for participation are provided by law[6].
- In accordance with the general principle, the contracting authority shall determine the deadline for the receiving of requests to participate, taking into account the time required to prepare and submit a bid, in particular, the complexity of the contract and the time required for preparation of the bid, in accordance with the principle of proportionality. Candidates who have presented their requests within time are required to sign a statement that they have no conflict of interest.
- Law provides the legal obligation to inform the candidates about the qualifying results, leaving them time to appeal in case of disqualification. Thus, the deadline for sending invitations to qualified candidates cannot be shorter than 5 days from the communication of the results of prequalification.
- Under Article 40(4) of the PPL, limiting the number of candidates who will be invited to submit a bid is not allowed, in other words, no "short list of candidates" is allowed. All economic operators that meet the minimum requirements set by the contracting authority should be invited to the next stage of procedure.
- In the negotiated procedures, the contracting authority shall not invite less than three economic operators. In cases where the number of candidates who have expressed interest is lower than the minimum specified, the contracting authority may continue the procurement procedure, provided that there are at least 2 candidates. Otherwise, the procedure must be cancelled.
- As regarding the moment of negotiation with the qualified bidders, the legislation does not explain much, leaving discretion to the contracting authority to negotiate in order to meet its interests. Thus, under Article 32(3) of the PPL, the contracting authority negotiates individually with the bidders, in order to adapt the offers made to the requirements specified in the contract notice, the technical specifications and in the additional documents. The goal is to select the best offer in accordance with Article 55 of the PPL. Likewise, in the case of the negotiated procedure without prior notification, and depending on the complexity of the contract, the public authority can conduct negotiations at different stages with each of the selected candidates.

The foregoing emerge some characteristics of the negotiation process, in public procurement procedures:

Firstly – the preparatory procedures (pre-negotiation) to go in the negotiation are well-structured by the law and no laxity is allowed, due to the necessity of securing the primary purpose of the administrative procedures of procurement: "Protecting public interest". That is why one should prepare some standard documents, make several announcements, respect certain limits, and provide the opportunity to appeal to the non successful operators. Non-compliance with these strict pre-negotiation procedures entails the invalidity of the procurement procedures.

Secondly – we cannot negotiate with any operator which offer appears attractive to the contracting authority, because the basic principles governing public procurement procedures must be respected in these negotiations. Thus *equal treatment of operators* prevents the contracting authority to disqualify from the negotiation an operator, while

[3] *Law no.9643 dated 20.11.2006 "On Public Procurement", as amended (PPL), Council of Ministers Decision (CMD) no.914, dated 29.12.2014 "On approval of public procurement rules" and the PPA guidelines.*
[4] *Law no.9643 dated 20.11.2006, Article 33, paragraph 2, letter "c"; CMD No.914, dated 29.12.2014, Article 36, paragraph 2(c).*
[5] *Article 41 of Law No.9643 dated 20.11.2006 (PPL).*
[6] *Article 43 of the PPL.*

theoretically negotiation is a process of talks where a party chooses freely the other negotiating party. In the case of negotiations due to the public procurement procedures, *the free will of the parties* is a principle which should "leave the field" to the principle of *discrimination prohibition* and the *protection of public interest*.

Thirdly – the target of the negotiation (the best offer) is not the discretion of the free will of public administration participating in negotiations. The purpose why it is being negotiated is precisely defined by law: to select the best offer in accordance with Article 55 of the PPL. Referring to this article: *"The winning bid must be: a) the offer, that based on the requirements and criteria set out in the tender documents, meets the requirements of the procurement object with the lowest price; or b) the most economically advantageous offer, based on various criteria linked to the procured subject, such as the quality, the price, the technical qualities, the aesthetic, functional, and environmental characteristics, the operating costs, the economic efficiency, the after-sales service and technical assistance, the delivery date and the period or periods of execution, provided that these criteria are objective and non-discriminatory".* The contracting authority evaluates and compares the available offers, to determine the winning bid, in accordance with the procedures and criteria specified in the tender documents. Thus, in determining the winning bid should not be used any criteria, that is not included in the tender documents.

So "*the best offer*" is the targeting of the negotiation process in public procurement. Naturally this is the intention of the parties involved in the negotiation process even in general terms. But, unlike the negotiations in general, in the negotiation of public procurement, *the best offer* represents a target that must necessarily and strictly be subject to the law and cannot be left to the subjective judgment of the state party (the contracting authority) to determine what is "the best offer" or "the very good offer". The law cares to provide the obligation of public authority, which is involved in procurements, to respect the principle of *the prohibition of abusive practices and corruption in public administration*.

Fourthly – the most favourable position of the public authority in negotiation is guaranteed at every stage of the negotiation process. Thus, the economic operator should only bid in respond to the strict terms of the announced tender by the contracting authority and cannot change these conditions. Furthermore, the contracting authority may suspend the procedure of negotiation at any time and does not have to face any responsibilities towards the economic operator. This last one, if called upon to negotiate, own only the right to say "yes" or "no" to the variant or the bid submitted by the contracting authority.

5. Conclusions and Recommendations

The fact that in most cases when negotiating with government agencies we are negotiating with a *monopoly* operator makes the success in negotiations decisive and the failure extremely costly. The reasons why negotiating with a public entity differ from negotiating between two private entities, are: the monopoly position of government in the area where the negotiation is realized, the public interest that it upholds, the legal framework favours its position against private and the fact that the existence in the market and the continuity of the functioning of the state entity is not usually affected by its success or failure in the negotiations.

So for example in the area of fiscal policy, when private companies negotiate about taxes they are faced with strict rules and regulations imposed by the legal framework in force. These deals are more complex compared to the agreements between individuals. Tax institutions are less flexible and pragmatic. Negotiation of tax liabilities and especially the negotiation space adds and reduces the uncertainty with which tax inspectors see the mistake made by the taxpayer. Various investors are often sceptical about various repayment tax schemes or their remission. It seems as if all this creates a precedent by which the actions of a particular group are contrary to the actions of others. It is for the tax authorities to distinguish taxpayers' unintentional errors from intentional ones.

If it is not negotiated on tax penalties the interests and the obligations grow steadily. Government agencies can take actions, with or without prior notice, which hinder everyday business operations. These actions, legal or not, among other things can also lead businesses towards bankruptcy. At any moment or stage we should create negotiation spaces and real opportunities for businesses.

The analysis of the negotiated cases by the customs administration revealed scepticism from the state towards negotiations with debtor entities, which is evidenced by the small number of agreements related to debtor entities. However the effectiveness of the negotiated agreements is reflected in the trend of debtors to pay their obligations on time under the terms specified in the agreement. This trend has led to the collection of about 50% of the obligations negotiated by the agreements.

Increasingly there is a need of flexible tax repayment programs. Based on the experience of other countries and the necessity imposed by the market and its conditions, below we list some programs or recommendations that can be implemented in our country:

Agreements based on installments. These agreements are mainly built for individuals who at a certain time do not have a real opportunity for total repayment of unpaid tax debt. This program or this agreement allows taxpayers to pay affordable monthly installments until the entire obligation is paid. The monthly installments are determined based on the taxpayer's financial capabilities, and based on them is determined even the payment period. Actually, as we mentioned above, the tax authority offers agreements with one year payment period. We think that this rule laid down by legal entities should be reviewed, and tax administration should be the authority which will define the negotiating deadline.

The cancelation of interests and penalties. The cancelation of penalties or interest can be offered to the taxpayers who do have financial difficulties or are in special conditions. However it is the duty of the government agencies to define the criteria and conditions that taxpayer should have in order to benefit from these programs or not. These two programs can eliminate only the interests and the penalties without decreasing the principal itself.

Pay a certain amount in exchange for the total liability. The compromise possibility can be seen as another bid by the government agencies. In these cases, the parties negotiate to reach an agreement under which taxpayers pay a smaller amount of money compared to their total obligation.

The deferment of obligations' payment. In cases when companies are in financial difficulties, or when expenses are higher than incomes or even when they have problems with liquidity they can take advantage of other offers that relate to the deferment of tax liability. In these cases, the liability or the payment may be extended for a period of one year or more depending on the conditions of the taxpayer.

Certainly that in all these cases the parties must negotiate face to face. Taxpayers on their hand can choose to be alone or have representatives, specialist in the field. Tax institutions, and beyond, should provide advice on the negotiation space and the adjustment or compatibility of interests and needs of the interested party with the solutions offered by the government and its institutions programs.

Naturally, implementing these programs is not easy. The guarantees and the collateral systems need fundamental changes; these changes should even affect the tools and techniques of collecting the debt. All these steps will be considered as positive for all those who face time and reflect their responsibility towards the tax system. In the taxpayer point of view we can say that the creation of more incentive debt payment programs would be very positive and stimulus. For this reason we think it is time that fiscal legislation, namely the Tax Procedure Code, must change, creating so more space for negotiation possibilities by public administration bodies.

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