

CORONAVIRUS IN SPAIN: MEASURES WITH REGARD TO PUBLIC PROCUREMENT IN ROYAL DECREE-LAW 8/2020

On 18 March, Royal Decree-Law 8/2020, of 17 March, on extraordinary urgent measures to address the economic and social impact of COVID-19 (the "**COVID-19 RDL**") was published, and that, among other things, adopts measures to mitigate the effects of COVID-19 on public procurement. These measures consist of the possibility of requesting an extension, compensation for certain damage and, if applicable, the re-establishment of the financial balance in concession contracts, subject to certain requirements and limits depending on the type of contract. No specific term of validity is set for these measures, which will depend on the timeframe of the impact of COVID-19 or of the measures adopted by the State, the autonomous regions or the local administration to combat it. Royal Decree-Law 11/2020, of 30 March ("**RD-Law 11/2020**"), amending the COVID-19 RDL, was published on 1 April. The State Attorney's Office has issued at least two reports stating its position on certain matters raised by these two laws (the "**SAO reports**").

Key issues

- What will happen to supply and service contracts for successive deliveries?
- What will happen to single-performance supply and service contracts?
- Can works contracts be suspended?
- Is the economic rebalancing of works and service concessions possible as a result of the COVID-19 crisis?

MEASURES AFFECTING PUBLIC SECTOR CONTRACTS

As we have said, the COVID-19 RDL has approved certain measures to make performance of certain public sector, administrative or private contracts more flexible.

The State Attorney's Office takes the position in the SAO Reports that the COVID-19 RDL constitutes a special public procurement law that supersedes the general regime. Accordingly, if the COVID-19 RDL does not recognise any measures – suspensive or compensatory –, then no measures can be requested under the general regime. This position raises no small amount of questions and, in any case, will have to be revised in its application by the courts. Be that as it may, we consider that the general regime would only be superseded, naturally, in the case of contracts regulated by the COVID-19 RDL, as opposed to the position taken in the SAO Reports.

Continuous provision supply or service contracts

In the case of **continuous provision supply or service contracts**, when the existing situation created by COVID-19 and the measures adopted to combat it make it impossible to perform them:

- They are suspended as of when the existing situation arises until the contracting body notifies the lifting of the suspension, because it is possible to resume them. As such, an administrative decision will be required for the lifting of the suspension.
- However, as the contractor is required to request and accredit recognition of the impossibility of performance by the contractor (with a term of five calendar days for reply and non-reply constituting rejection), there is the possibility that the contract must resume if the contracting body replies that performance is not impossible or if it simply fails to reply by the deadline.
- Note that there is no specific term for the application (the five-day term is for deciding on the application, not for presenting it, as we see it), although, being prudent, it would be advisable to present it as soon as possible, because if the contracting body disagrees about the possibility of performing the contract, it is better to know it from the outset, in order to adapt the activity of the company accordingly, as well as to avoid additional damage (such as the possible termination of the contract or the requirement to pay damages to the Administration for improper suspension).
- The SAO reports confirm that **a first application must be submitted for impossibility of performance to be declared**, and, once declared, **a subsequent application evidencing all damage borne by the contractor**, which would imply waiting for the end of the state of emergency, in order to be able to quantify all the damage suffered exactly. It is also true that proper justification of all expenses borne cannot perhaps be prepared immediately.
 - This suspension will not constitute grounds for termination of the contract.
 - It will be possible to request compensation for loss and damage limited to the items indicated and with the limits established in the COVID-19 RDL (salaries of personnel attached to the contract at 14 March already paid, maintenance costs of the definitive guarantee, leases and maintenance of machinery and equipment, where it is accredited it cannot be used for other purposes and cost of insurance envisaged in the bidding specifications for the performance of the contract).

The determination of such loss and damage will, in all likelihood, be a point of friction with companies.

Moreover, some very reasonable doubts arise, such as:

- How can the means attached to the contract be reasonably shown to be actually attached to the contract.
- How can it be reasonably shown that it was not possible to allocate the means attached to the contract to other purposes.

RD-Law 11/2020 has resolved some doubts that were raised initially:

- The salary costs include the cost of Social Security contributions.

- The suspension of the contract (and therefore the compensation) can be total or partial, when so specified by the contracting body, determining the part that is suspended.

Meanwhile, there is no provision for compensation for loss of profit in the form of a liability claim against the State, in other proceedings, but this approach would be complicated.

In fact, the SAO Reports state that:

- If performance of the contract is not impossible, no compensation of any kind will apply, since the measures adopted by means of the COVID-19 RDL are general measures adopted in an exceptional situation that the contractor would have the legal duty to observe.
- If performance is deemed impossible, only the items and amounts indicated in the COVID-19 RDL would be subject to compensation.

In any event, the contractor will have to make a special effort to justify the items and amounts to be compensated. The reply to the request for compensation from the contracting body should be issued within a term of five calendar days. A failure to reply implies rejection.

These extraordinary rules will not apply to:

- Contracts for services or supplies in the area of healthcare, pharmacy or other areas where the object is linked to the health crisis caused by COVID-19.
- Contracts for security, cleaning or IT systems maintenance services.
- Contracts for services or supplies necessary to guarantee the mobility and security of transport infrastructures and services.
- Contracts awarded by those public entities listed on official markets and not financed by the General State Budget.

Single performance supply or Service contracts

In the case of **supply and service contracts other than those indicated** above (that is, those that are not continuous provision, but single-performance), that do not lose their purpose due to the existing situation created by COVID-19 or the measures adopted to combat it, there is no automatic suspension. In these cases, when the contractor suffers a delay:

- The contracting body may be asked for an extension for the time lost, which will be granted on the basis of a prior report from the Contract Manager confirming that the delay is the result of the existing situation created by COVID-19 or the measures adopted to combat it and it is not attributable to the contractor.

In this case, no deadline is set for the application or the decision, and no provision is made for a failure to reply. To be on the safe side, it should be submitted as soon as possible, as in the case of continuous provision supply or service contracts. Moreover, the SAO Reports state that the deadline applicable would be 15 days from the date on which the cause of the delay arose.

- The possible suspension of the contract, pursuant to general public procurement rules, is not ruled out, although it could be interpreted that the

silence of the COVID-19 RDL highlights the legislative intention of not ordering suspension on these grounds, because, if it had wanted to allow for the possibility of suspension, it could have done so, as in the case of continuous provision contracts.

The contractor will be able to apply for payment of additional salary costs borne for this reason, up to a maximum of 10% of the initial price of the contract.

Our understanding is that additional salary costs refer to salary costs for personnel responsible for performance of the contract, as a result of the delay, although it may be worth considering compensation for the cost of new employees that had to be used for the performance of the contract, in order to ensure fulfilment thereof.

It is worth considering whether, in the event suspension of the contract is triggered, pursuant to the terms of the foregoing paragraph, damages can be claimed under the legislation that allows for such claims in the event of suspension. One thing that does appear to be clear is that, if there is no suspension, it will not be possible to claim additional salary costs. As in the case of continuous provision contracts, claiming such items is complicated, as it requires filing a liability claim against the State, which is unlikely to be upheld.

This claim will require a special verification procedure by the contracting body.

- In these contracts, if the delay caused as a result of the COVID-19 crisis means the purpose of the contract is lost, it will have to be terminated.
- These extraordinary rules do not apply to the same contracts that are excluded in the case of continuous provision supply or service contracts.

Work contracts

In the case of works contracts in which it is impossible to continue performing the contract, but which do not lose their purpose due to the existing situation created by COVID-19 or the measures to combat it, the contractor:

- may request suspension of the same as of when the existing situation arose that prevented provision of the service and until it can be resumed (the contracting body will notify the contractor of the end of the suspension). Suspension is not automatic. In fact, it would be advisable to request it as soon as possible, justifying the impossibility of performing the contract, as the effects of the suspension (and the possibility of claiming damages associated with the suspension) depend on the suspension being agreed by the contracting body. Although the COVID-19 RDL links this request to the justification of the attached means affected by the suspension, it is possible, in our opinion, to separate the request for suspension from the accreditation of all the damage, because the latter will only be provided at the end of the state of emergency period.
- may request damages limited to the items indicated and within the restrictions established in the COVID-19 RDL, which are the same as for the continuous provision supply and service contracts, unless the increased salary costs are calculated according to the collective agreement and personnel remain attached to the contract when it resumes. With regard to loss and damage, the same considerations that we made when discussing continuous provision service and supply contracts apply here.

- must offer to honour its commitments if the final deadline is extended and provide official confirmation that both the contractor and subcontractors, suppliers and providers hired for the performance of the contract are up-to-date in compliance with their labour and social obligations at 14 March and that the contractor is up-to-date with its payment obligations for subcontractors and suppliers.
- the SAO Reports state, moreover, that the contract need not be amended due to these circumstances because the COVID-19 RDL did not equate them with force majeure or unforeseeable circumstances.

Works or services concession contracts

- In the case of **works or services concession contracts**, the right to the re-establishment of the balance is recognised in order to compensate: i) a fall in income; and ii) an increase in costs (including salary costs) with regard to those envisaged in ordinary performance, as a result of the existing situation created by COVID-19 and the measures adopted to combat it. This will only apply when the contracting body finds that it is impossible to perform the contract due to such circumstances, at the request of the contracting body. No deadline is set, for either requesting re-establishment or for requesting the declaration of impossibility of performance which, moreover, creates difficulties for application.
- There will, as such, be two possible relevant applications by the concessionaire: for re-establishing the balance and for a declaration of impossibility of performing the contract. No deadline is set for either of them, although the concessionaire should act promptly and diligently in order to conserve its rights, requesting recognition of the impossibility of performance of the contract (that is, as soon as any of such circumstances arises, even if the consequences thereof have not yet been quantified).

Only then, depending on the reply from the Administration, will the concessionaire be able to reorganise the activity, if applicable.

Moreover, the "impossibility of performing the contract" can raise difficulties, although it will depend on the obligational content of the same and the specific circumstances of the contract, personnel involved, etc. Thus, it is very easy to imagine situation in which full performance of the contract may not be impossible and yet, on the other hand, there will be damage derived from lower income and greater costs due to the existing situation created by COVID-19 and the measures adopted to combat it.

- The SAO Reports consider that the COVID-19 RDL requires the impossibility of performance of a contract to be total, that there is no 'impossibility' of performing a contract if the toll road or motorway maintains the conditions that enable it to remain open to road traffic and that this is still legally permitted and that the reduction in the number of vehicles using the toll road or motorway, and the resulting fall in income of the concessionaire, does not entitle it to re-establish the economic balance of the concession pursuant to the COVID-19 RDL. Moreover, it believes that this RDL supersedes the general regime and, as a result, re-establishment cannot be sought on the grounds of less traffic or force majeure, unforeseeable risk or other concepts that would apply under the general contract regime.
- At some point, the courts will presumably have to decide on the position of the State Attorney and how it applies, because it could be considered

whether the rule applies to situations of partial impossibility of performance or if, aside from the rules of the COVID-19 RDL, it is possible to request financial compensation in line with the general rules on public procurement. This possibility would moreover be reinforced in the case of concession contracts that fall outside the scope of the COVID-19 RDL, because their specifications are governed by legislation predating the 2011 procurement act or because they are concessions in relation to which performance is not completely impossible.

- The SAO Reports also remark that even when it is considered impossible to execute the contract and its balance is re-established by means of the extension, these would not be additional salary costs; therefore, those costs incurred while the contract's execution was not possible would not qualify for compensation, when it is agreed to re-establish it through an extension for the same length of time. The State Attorney's Office itself acknowledges that this criteria may restrict or even prohibit the application of the rule, insofar as there will hardly be any additional salary costs that could be compensated.
- The courts will also have to pronounce on this, in light of its predominantly formalistic nature.
- If there are grounds for rebalancing under the COVID-19 RDL, this will consist of a potential exceptional extension of the term by up to 15% or the modification of the financial conditions of the contract.
- RD-Law 11/2020 has specified that only contracts subject to Act 9/2017 on Public Procurement, the Restated Text of the Public Procurement Act approved by Royal Legislative Decree 3/2011, Act 31/2007 on procurement in certain sectors, Volume I of Royal Decree-Law 3/2020 or Act 24/2011 on public procurement in the defence and security sectors, will be deemed public sector contracts for these purposes and, as such, eligible to benefit from these provisions.
- As such, contracts subject to Act 30/2007, the Restated Text of the Public Administration Procurement Contracts Act approved by Royal Legislative Decree 2/2000, Act 13/1995 and provisions other than the foregoing would be excluded and ineligible to benefit from the measures, when the only difference is the date they were awarded. We feel this exclusion is unjustified and may be due to an error.

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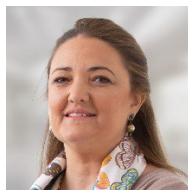
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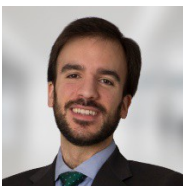
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