The impact of the state of alarm declaration in the public contracting field

1st April 2020

As a consequence of the public health emergency and international pandemic following the unstoppable expansion of COVID-19, the Government passed *Real Decreto 463/2020*, of 14th March, which declared the state of alarm for the control of the health crisis triggered by COVID-19 (hereinafter, the "***RD 463/2020***"). The measures adopted by the Government in order to contain the spread of the pandemic imply, in particular, temporary restrictions on freedom of movement, which implies important consequences for the labor sector and, therefore, for the Spanish economy.

In this extraordinary scenario, many consequences are arising in the national and international context, among which we can point out (i) the very significant fall in demand; (ii) the physical inability to continue rendering certain services and (iii) the decrease in the need to continue performing certain contracts.

Moreover, the impact of the current situation on public contracting is also significant, with the legal authorities

playing a key role in modifying and cancelling contracts, reestablishing economic balance and delaying or terminating contracts for extraordinary reasons. This has been taken into consideration by *Real Decreto-Ley 8/2020*, of 17th March, on urgent and extraordinary measures to face the economic and social impact of COVID-19 (hereinafter, "***RDL 8/2020***").

Furthermore, on the 29th of March, the BOE published *Real Decreto-ley 10/2020*, of 29th March, which establishes a recoverable paid leave for employees who do not provide essential services, in order to reduce the movement of the population in the context of the fight against the COVID-19 (hereinafter, "***RDL 10/2020***"), which clearly also has effects in the area of public contracting.

Finally, as of today, April 1st 2020, the BOE published *Real Decreto-ley 11/2020*, of 31st March, on urgent extraordinary measures in the social and economic fields to face COVID-19 (hereinafter, "***RDL 11/2020***"), which amends part of what is established in *RDL 8/2020*, regarding public contracting. It also amends the second paragraph, section 4, of Article 29 of *Ley 9/2017*, of 8th November, *de Contratos del Sector Público*, which implemented into the Spanish legal system: Directives of the European Parliament and of the Council 2014/23/UE and 2014/24/UE, of 26th February 2014 (hereinafter, "***LCSP***").

The following is a summary of developments in the field of public contracting, which cannot be understood as legal advice for a specific case, which would require detailed analysis and reference by ONTIER. Therefore, it is intended only as a guide to understanding the flood of new regulations that will undoubtedly lead to the establishment of interpretative criteria through time.

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1.- THE SUSPENSION OF THE DEADLINES AND INTERRUPTION OF THE TIME LIMITS FOR THE PROCEDURES OF PUBLIC SECTOR ENTITIES REFERRED TO IN *RD 463/2020*.

From the very beginning we must clarify that the declaration of the state of alarm by virtue of *RD 463/2020* **does not lead to general suspension of public sector contracts**. In this regard, only the contracts whose execution is impossible during the state of alarm will be suspended as a result, for example, of the lack of workers for their performance, the health conditions of the hired staff, the lack of supply or provision necessary for the execution of the hired services, etc.
The general principle, in the current situation, is the **continuity of the contract**.
In particular, through the **approval and publication of *Real Decreto 463/2020*, the suspension of deadlines for the entire public sector is established.** In this regard, Article 2 of *Ley 39/2015, de 1 de octubre, del Procedimiento Administrativo Común de las Administraciones Públicas* (hereinafter, "**LPAC**") identifies as the public sector the General State Administration, the Autonomous Communities, the Local Corporations and the Institutional public sector.

The Third Additional Disposition of *RD 463/2020* states the following: "***Se suspenden términos y se interrumpen los plazos para la tramitación de los procedimientos de las entidades del sector público. El cómputo de los plazos se reanudará en el momento en que pierda vigencia el presente Real Decreto o, en su caso, las prórrogas del mismo***".

This means that, from an objective point of view, this suspension affects the administrative procedures subject to *Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público*, to *Ley 33/2003, de 3 de noviembre, del Patrimonio de las Administraciones Públicas*, tax regulations and any other procedures that, regardless of their purpose and regulation, may be processed by public sector entities.

However, as we have already stated, the aforementioned suspension of deadlines does not simply mean the suspension of the performance of all those public contracts which may continue to be performed, nor does it grant other deadlines for performance. Therefore, the contracts must continue to be performed under the terms initially agreed. Only the **deadlines** for the procedures concerning the relationship between the contracting authority and the contractor are **suspended and interrupted**, such as the procedures for imposing penalties, requests for economic re-balancing, contractual modification, liquidation of the works carried out, etc.

Recently, the Eighth Additional Disposition of *RDL 11/2020* has developed, in general terms and without specifying the procedures affected by its application, how the suspension of administrative deadlines should be applied. To this end, this disposition provides that the period for filing appeals through administrative means or for initiating any other procedures that may have unfavorable or negative effects on the interested party shall be calculated from the working day following the date on which the state of alert is lifted. This, regardless of the period of time that has elapsed since the notification of the administrative act that is the object of the appeal or challenge. Therefore, in the event that a notification that can be challenged in administrative proceedings has been received prior to the declaration of the state of alarm by *RD 364/2020*, the counting of deadlines will be restarted after the lifting of the state of alarm.

On the other hand, this general rule of the suspension of time limits and interruption of the deadlines is subject to an exception by virtue of which, by means of a **justified decision, the competent body may agree to the measures of organization and investigation that are strictly necessary to avoid serious damage to the rights and interests of the concerned party** in the proceedings. All the above, as long as the latter agrees, or when the concerned party agrees that the deadline should not be suspended.

It should also be noted that the suspension also affects the prescription and expiry periods of any rights and actions. In particular, the Fourth Additional Disposition states the following: "***Los plazos de prescripción y caducidad de cualesquiera acciones y derechos quedarán suspendidos*** *durante el plazo de vigencia del estado de alarma y, en su caso, de las prórrogas que se adoptaren*".

Last but not least, it should be noted that **the suspension of administrative periods expressly provided for in the Third Disposition of *RD 463/2020* shall not**

affect the periods established in the recent *Real Decreto-ley 8/2020, de 17 de marzo, de medidas urgentes y extraordinarias para hacer frente al impacto económico y social del COVID-19*, which will be analyzed in the following pages of this Note.

1.1.- How does the suspension provided for in the Third Additional Disposition affect each of the execution phases of public contracts?

The Third Additional Disposition of *RD 463/2020* implies, as we have just seen, that the terms and deadlines for procedures relating to public contracts are suspended, without this being associated *de facto* with the total suspension of contracts.

The following is a brief analysis of the consequences that suspending the terms and interrupting the deadlines as a result of the declaration of the state of alarm should have at the different stages of the performance of the public contracts:

- **Pre-contracting phase or within the deadline for submission of tenders.** Although *RD 436/2020* **does not expressly provide for this, it would be more than advisable** to publish a warning in the contracting party's profile, located on the *Plataforma de Contratación del Sector Público* highlighting the interruption of the deadlines for the submission of bids, as well as the subsequent publication of a new warning of the reopening of the deadline for the submission of bids, once the state of alarm has been lifted[1].

The only compulsory provision is the publication of the reopening of the deadlines in order to encourage the competition and participation of companies in public sector tenders.

But can a new tender be published now while the state of alarm remains? Initially, yes, it is possible, since the functioning of the public sector cannot be completely stopped, regardless of the fact that a warning is given to suspend the counting of the deadline for the appropriate submission of bids.

In this regard, the staff of the contracting authorities may continue working, preparing and publishing future tenders, justification reports, specifications, etc., which will not affect the deadlines that have been suspended for the submission of tenders or the filing of special appeals on contracting matters, etc., as a result of the declaration of the state of alarm by *RD 463/2020*.

- **Contracting award phase**. When the contract has already been awarded or is in the process of being awarded, processing may continue, provided that the physical performance of the contract is possible once the state of alarm is lifted.

Therefore, it would seem that the suspension established by *RD 463/2020* does not affect the signing of the contract while the current situation remains, unless the contract is subject to a special appeal in the field of contracting. In such cases, the fifteen-day period foreseen *ex lege* for its presentation must be respected.

- **Contract perfomance phase**. If, at the time the state of alarm was declared, the contract was being executed, it is necessary to issue, ex officio or at the request of one of the parties, an administrative resolution which clearly and precisely **indicates the circumstances which have led to the suspension of the contract and the factual situation in which the contract remains**.

In this regard, Article 103 of *Real Decreto 1098/2001*, which passes the *Reglamento General de la Ley de Contratos de las Administraciones Públicas* provides that this Certificate must be issued within a máximum period of **two working days** from the day following that on which the suspension is agreed, and must also be **signed by the representative of the contracting body and by the contractor**. In the event of a construction contract, it must also be signed by the **Project Manager**, with the estimate of the works carried out and the materials collected on site.

In addition, this annex must be included within a maximum period of **ten working days**, which may be extended to one month depending on the level of complexity of the work carried out.

The importance of this Certificate is that by means of its publication the situation which has caused the suspension will be expressly recorded, as well as the instructions ordered by the contracting authority with regard to the suspended contract.

Furthermore, despite the specific situation, all invoices that have accrued as a result of the performance of the contract must continue to be paid, as well as those that are incurred while this situation persists, since no rule provides for the suspension of payment obligations and, therefore, must contribute to the incentive of cash flow of the companies.

- **Contracts that have expired prior to *RD 463/2020***. In the event that a contract has expired prior to the declaration of the state of alarm, without a new contract having been concluded to continue to carry out the same services as the previous one, the expired contract may be extended, **provided that there are reasons of public interest not to interrupt the services provided**[2].

[1] In this regard, the *Subdirección General de Coordinación de la Contratación Electrónica* has published the instructions for the interruption of deadlines for the processing of public contracting procedures in the *Plataforma de Contratación del Sector Público*. Access to the publication: https://contrataciondelestado.es/wps/wcm/connect/0594c2c0-24e1-4c6e-870b-9a70ad928887/INSTRUCCIONES+ESTADO+DE+ALARMA.pdf?MOD=AJPERES

[2] For all of these, the "*Informe 4/2016 de la Junta consultiva de contratación administrativa relativa a cuestiones referentes a la duración de un contrato de servicios y su prórroga. plazo de ejecución y plazo de duración. retraso en la ejecución del servicio por causas no imputables al contratista*".

1.2.- Suspension v. telecommuting in public contracting.

Telecommuting is only one form of working organisation, which meets both technological innovation and organisational flexibility in a changing world, which can be introduced in those public sector contracts where this is possible.

In addition, in order to guarantee the continuity of public sector contracts and therefore ensure that the public interest is satisfied, it is logical that telecommuting can be introduced in those contracted services where it is possible.

In this way, the suspension will only affect those services where it is not possible to implement this type of working organization and, therefore, the suspension will be declared.

In this regard, *RDL 10/2020*, which stops non-essential activity (as will be analysed in the corresponding chapter), excludes from its scope of application workers who can continue to carry out their activity normally by means of telecommuting or any of the remote service supply ways.

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2.- MEASURES IN THE FIELD OF PUBLIC CONTRACTING ESTABLISHED BY *RDL 8/2020*, ON EXTRAORDINARY URGENT MEASURES TO ADDRESS THE ECONOMIC AND SOCIAL IMPACT OF COVID-19 TAKING INTO ACCOUNT THE AMENDMENTS INTRODUCED BY *RDL 11/2020*.

RDL 8/2020, dedicates section IV of Chapter III (Article 34) to establishing measures in the field of public contracting to address the consequences of COVID-19.

As a preliminary matter, it should be noted that **none of the measures analyzed below will apply to the following contracts:**

- Services or supply contracts for healthcare, pharmaceutical, whose object is related to the health crisis triggered by COVID-19.
- Contracts for security services, cleaning or maintenance of computer systems.
- Contracts for services or supplies necessary to ensure the mobility and security of transport infrastructures and services.
- Contracts awarded by public bodies that are listed on official markets and do not obtain income from the *Presupuestos Generales del Estado*.

The "special" regulation on the basis of COVID-19 measures will also apply to public contracts, in force at the time of the entry into force of *RDL 8/2020*, entered into by public sector bodies subject to *Ley 31/2007, de 30 de octubre, sobre procedimientos de contratación en los sectores del agua, la energía, los transportes y los servicios postales o Libro I del Real Decreto-ley 3/2020, de 4 de febrero*.

Regarding the expression "**public contracts**", *RDL 11/2020* adds a seventh section to Article 34 of *RDL 8/2020* which states the following: "*7. A los efectos de este artículo sólo tendrán la consideración de «contratos públicos» aquellos contratos que con arreglo a sus pliegos estén sujetos a: la Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público, por la que se transponen al ordenamiento jurídico español las Directivas del Parlamento Europeo y del Consejo 2014/23/UE y 2014/24/UE, de 26 de febrero de 2014; o al Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público; o a la Ley 31/2007, de 30 de octubre, sobre procedimientos de contratación en los sectores del agua, la energía, los transportes y los servicios postales; o Libro I del Real Decreto-ley 3/2020, de 4 de febrero, de medidas urgentes por el que se incorporan al ordenamiento jurídico español diversas directivas de la Unión Europea en el ámbito de la contratación pública en determinados sectores; de seguros privados; de planes y fondos de pensiones; del ámbito tributario y de litigios fiscales; o a la Ley 24/2011, de 1 de agosto, de contratos del sector público en los ámbitos de la defensa y de la seguridad.*"

This new and misleading provision raises important doubts, since in the event of contracts concluded by contracting authorities other than the public administration and other public sector entities, the rules relating to the main incidents - so far as this is concerned - that affect the performance phase of these contracts are governed by private law. However, many specifications of these bodies refer to the LCSP or the LPCSE in such matters. Consequently, and until a satisfactory interpretation of this "clarifying" modification is consolidated, it will be necessary to consider each specification on a one-to-one basis.

Following the order established in the aforementioned article, we are going to analyze the measures agreed with respect to (i) public service and supply contracts for the consecutive provision of services concluded by bodies belonging to the Public Sector, (ii) public service and supply contracts other than those referred to in the previous section (iii) construction contracts and (iv) public works and service concession contracts

As a common measure to all public contracts, we can highlight, as we will see, the suspension and extension of the deadlines, the compensation for damages and/or the economic balance of the contract, with the limits and exceptions that we will analyze next and **provided that the performance of the contract is impossible** as a result of the COVID-19 or the measures adopted by the State, the Autonomous Communities or the Local Administration to fight against it, **that the contractor presents a request and that the contracting body answers expressly recognizing the impossibility of performing the contract.**

(i) <u>Public service and supply contract other than those referred to in the previous</u>

section[3] entered into by entities belonging the Public Sector[4].

The first section of Article 34 has been modified by section ten of the First Final Disposition of *RDL 11/2020* deleting the phrase "*quedarán automáticamente suspendidos*" which was contradictory to the rest of the section which, as we shall see, establishes the need for the contractor to urge the suspension of the contract. Therefore, contracts whose execution becomes impossible as a result of COVID-19 or the measures adopted by the State, the autonomous communities or the local administration to deal with it **will be totally or partially suspended from the moment the situation that prevents their performance arises and until such time as the performance can be resumed**. To this end, it will be understood that the performance can be resumed when, having ceased the circumstances or measures that were preventing it, the contracting body notifies the contractor of the end of the suspension.

Therefore, it is established that **the contractor must address his request to the contracting authority** reflecting: the reasons why the performance of the contract has become impossible; the staff, facilities, vehicles, machinery, installations and equipment assigned to the performance of the contract at that time; and the reasons why it is impossible for the contractor to use the means mentioned in another contract. These circumstances, which are highlighted in the application, may be subject to subsequent verification. **Once the period specified (five calendar days) has elapsed without the contractor being notified of the express decision, it shall be understood that it has been rejected.**

In the event that, following the above procedure, the contracting authority agrees to suspend the contract, the contractor would be entitled to **compensation for damages suffered** during the period of suspension, upon request and evidence by the contractor of the reality, effectiveness and amount of such damages. The damages for which the contractor **may be compensated are only the following**:

1.º The salary costs actually paid by the contractor to the staff assigned on 14th March 2020 to the ordinary execution of the contract, during the period of suspension (see the section on paid leave covered by *RDL 10/2020*).

In this regard, in the amendment made to Article 34 by paragraph 10 of the First Final Disposition of *RDL 11/2020*, the eighth paragraph is added, which clarifies that these salary expenses shall **include the corresponding social security contributions**.

2.º Expenses for maintenance of the final guarantee, relating to the period of suspension of the contract.

3.º Expenses for rent or maintenance costs for machinery, installations and equipment relating to the period of suspension of the contract, directly related to the execution of the contract, provided that the contractor proves that these means could not be used for other purposes during the suspension of the contract..

4.º Expenses relating to the insurance contracts provided for in the specifications and related to the subject matter of the contract, which have been contracted out by the contractor and are in force at the time of the suspension of the contract.

Likewise, it is established that the provisions of section 2.a) of Article 208 of *Ley 9/2017*, of 8th November; nor the provisions of Article 220 of *Real Decreto Legislativo 3/2011*, of 14th November, which passes the *Ley de Contratos del Sector Público* will not be applicable to these suspensions.

Consequently, comparing the damages that can be compensated according to *RDL 8/2020* and those established in *LCSP* we observe that **NOT included as compensable concepts are** (i) the **compensations for termination or suspension of the work contracts** that the contractor had signed for the performance of the contract at the time the suspension began, nor (ii) **3 percent of the price of the services that should have been performed by the contractor during the period of suspension,** in accordance with the provisions of the work schedule or the contract itself.

In addition, in those public service and supply contracts for consecutive services, when on the expiry of a contract the new contract guaranteeing the continuity of the service has not been signed as a result of the suspension of the contracting procedures arising from the provisions of *Real Decreto 463/2020*, of 14th March, declaring the state of alarm for the purposes of managing the health crisis situation arising from COVID-19, and the corresponding new contract cannot be signed, the provisions of the last paragraph of Article 29.4 of *LCSP*, that is, the **extension of the contract**, regardless of the date of publication of the tender for this new file.

Finally, it is noted that **the suspension** of public sector contracts under this Article **shall in no way constitute grounds for the termination of such contracts.**

(ii) Public service and supply contacts other than those referred to in the previous section, entered into by bodies belonging to the Public Sector.

In the context of these contracts, an extension of the performance period is established when the contractor is in delay in complying with the deadlines set out in the contract as a result of COVID-19 or the measures taken by the State, the Autonomous Communities or the local administration to fight against it and the contractor offers to comply with its commitments if the initial deadline or the current extension is extended. In this case, the contracting authority will grant the extension for a period that will be at least equal to the time missed for the aforementioned reason, unless the contractor requests a shorter one.

[3] A consecutive contract imposes on the debtor contractor (or on both, if the contract creates mutual obligations) a series of actions of repeated performance over a period of time. A single-tract contract is a contract in which the contracting debtor must perform in a single action.

[4] In the sense defined in Article 3 of *Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público*, by which the Directives of the European Parliament and the Council 2014/23/EU and 2014/24/EU, of 26 February 2014, are incorporated into Spanish law.

The contracting body will grant the contractor an extension of the deadline, subject to a report from the Project Manager of the contract[5], in which it is determined that the delay is not due to a cause that can be blamed on the contractor, but that it has occurred as a result of COVID-19 under the terms indicated in the previous paragraph. In these cases, no penalties will be imposed on the contractor, nor will the contract be terminated.

Nothing is said in article 34.2 of *RDL 8/2020* about the implementation of the extension of the deadline to minor contracts. For this reason, the *Abogacía General del Estado* (State General Attorney) has clarified this omission in the Report "*sobre la aplicación de la ampliación de pazo o prorroga prevista en el artículo 34.2 del Real Decreto Ley 8/2020 a los contratos menores*", dated 19th March 2020. In this regard, the State General Attorney says that Article 34.2 of *RDL8/2020* does not expressly exclude from its application minor contracts and given the singular or exceptional nature of this rule it must prevail over the provisions of the LCSP in relation to this type of contracts. In addition, the situation created as a consequence of the spread of COVID-19, and therefore the delay in meeting the initially agreed deadlines, cannot be identified with a case of non-compliance by the contractor, and therefore the extension regime contained in article 34.2 of *RDL 8/2020* will be applicable to minor contracts.

Additionally, contractors will be entitled to the **payment of additional salary expenses** actually incurred as a result of time missed due to COVID-19, **up to a maximum limit of 10 per cent of the initial contract price**. Once again, this payment will only be made **upon request and proof of the reality, effectiveness and amount of these expenses by the contractor**. In this case, no maximum time limit for the answer of the awarding body is expressly established, nor is the negative or positive sense of silence.

(iii) <u>Public work contracts</u>.

As is the case with service and supply contracts for consecutive contracts or services, it is established that **the contractor may request the suspension or extension of the works contract** provided that it has not lost its purpose as a result of the situation created by COVID-19 or the measures taken by the State, and again, **provided that this situation makes it impossible to continue with the performance of the contract**. To this end, it will be understood that the performance can be resumed when, having ceased the circumstances or measures that were preventing it, the contracting authority notifies the contractor of the end of the suspension

In this regard, according to the wording given to the third paragraph of Article 34 by section ten of the First Final Disposition of *RDL 11/2020*, in those contract in which, according to the «*programa de desarrollo de los trabajos o plan de obra*» the completion of their execution period was foreseen **between 14th March, the date of the beginning of the state of alarm, and during the period of the same**, and as a result of the situation created by COVID-19 or the measures adopted by the State, delivery of the work cannot take place, **the contractor may request an extension** of the final delivery deadline provided that he offers to meet his pending commitments if the initial deadline is extended, and the corresponding request must be completed.

Once the suspension or extension of the deadline has been agreed, **only the following amounts will be compensated**:

1.º The salary expenses effectively paid by the contractor to the staff assigned to the regular performance of the contract, during the period of suspension.

The salary expenses to be paid, in accordance with the "*VI convenio colectivo general del sector de la construcción 2017-2021*", published on the 26th September 2017, or equivalent agreements agreed in other areas of collective negotiation, shall be the basic salary referred to in article 47.2.a of the collective agreement for the construction sector, the disability bonus of article 47.2.b of the aforementioned agreement, and the extraordinary bonuses of article 47.2.b, and holiday pay, or their respective equivalent amounts agreed in other collective agreements for the construction sector. The expenses must correspond to the staff indicated that was assigned to the performance before March 14th and continues to be assigned when it resumes.

In this regard, in the amendment made to Article 34 by paragraph 10 of the First Final Disposition of *RDL 11/2020*, the eighth section is added, which clarifies that these salary expenses shall **include the relevant social security contributions**.

2.º Expenses for maintenance of the final guarantee, relating to the period of suspension of the contract.

3.º Expenses for renting or maintaining machinery, installations and equipment, provided that the contractor can prove that these resources could not be used for purposes other than the performance of the suspended contract and that the amount of such expenses is less than the cost of terminating such contracts for the renting or maintenance of machinery, installations and equipment.

4.º Expenses related to the insurance contracts provided for in the specifications and related to the subject matter of the contract, which have been subscribed to by the contractor and are in force at the time of the suspension of the contract.

The right to compensation and damages shall be recognized only when the main contractor proves that the **following conditions have been met**:

– That the main contractor, subcontractors, suppliers and providers contracted for the performance of the contract were up to date with their labor and social obligations, as of 14th March 2020.

[5] At this point we must warn that the appeal made to the "*director de la obra*" (Project Manager) in article 34.2 of *RDL 8/2020* is nothing more than a mere formal fact. As these are service and supply contracts, it would have been correct to mention the "*responsable del contrato*", as established in Article 62 of the LCSP.

– That the main contractor was up to date with its payment obligations to its subcontractors and suppliers under the terms of Articles 216 and 217 of *Ley 9/2017, de Contratos del Sector Público*, as of 14th March 2020.

It is also established that **the suspension is subject to the contracting authority determining the failure to carry out the contract, at the request of the contractor and within five calendar days**.

To do so, the contractor must address his request to the contracting authority, indicating: the reasons why the performance of the contract has become impossible; the staff, premises, vehicles, machinery, installations and equipment assigned to the performance of the contract at that time; and the reasons why it is impossible for the contractor to use the means mentioned in another contract. After the indicated period (five calendar days) without notifying the contractor of the express resolution, it shall be deemed to have been dismissed

It should be noted that the provisions of Article 208.2.a) and Article 239 of the *LCSP* will not be applicable to the suspensions of this case; nor will the provisions of Article 220 and Article 231 of *Real Decreto Legislativo 3/2011, de 14 de noviembre, por el que se aprueba el texto refundido de la Ley de Contratos del Sector Público*.

The exclusion of the application of Article 239 of the *LCSP* (only indicated for construction contracts) means the **non-application of the case of force majeure** or the compensation associated with it, as well as the compensatory concepts established in Article 208 of the *LCSP* and which do not correspond to those established in *RDL 8/2020* as indicated in section (i) regarding public contracts for services and supplies for consecutive services entered into by entities belonging to the Public Sector.

(iv) <u>Public contracts of works and services awards</u>.

In this case, the concession holder's right to re-establish the economic balance of the contract is determined by **extending its initial duration by up to 15 per cent, as necessary, or by amending the clauses of economic content included in the contract**. Once again, however, it will be necessary for the **contracting authority, at the request of the contractor, to consider the inability to perform the contract**.

The contract will only be re-balanced when the performance of the **concession contract is impossible**. The process for this rebalancing is the previous request of the concession holder and proof of the reality, effectiveness and amount by the contractor of these expenses.

This re-balancing shall in any event compensate the concession holders for the loss of revenue and the increase in costs incurred, including any additional salary costs they may have actually paid, compared with those provided for in the ordinary performance of the works or service concession contract during the period of the situation created by the COVID-19.

In conclusion, as stated above, public contracting measures to reduce or limit the effects of this crisis in this area are subject to many conditions and requirements that will make it difficult to ensure the effectiveness of such measures. Likewise, everything will depend on the willingness of the contracting bodies to grant or not grant requests for suspension, extension, etc.

Once this screening has been passed, it should be noted that *RDL 8/2020* also limits the concepts that can be indemnified (reducing those recognized in the *LCSP*).

The contractor is also required to gather evidence and provide proof that the situation triggered by COVID-19 and the regulatory measures adopted has impeded the performance of the contract.

Finally, it should be borne in mind that, although the suspension of deadlines agreed by *Real Decreto 463/2020* declaring the state of alarm is not applicable to the deadlines established in *RDL 8/2020*[6], it cannot be ignored that the procedural deadlines in the administrative jurisdiction are suspended or interrupted and that the *Consejo General del Poder Judicial* has clarified[7] that while the state of alarm is still in force, the filing of procedural documents is not appropriate except in cases declared urgent and non-reparable. Therefore, if the application is rejected, the contractor must wait until the state of alarm is raised before filing an administrative appeal before the jurisdiction..

We also add a final warning: until the suspension of the contract is agreed or the contract is performed (with the greatest possible diligence), otherwise the contracting authority could impose penalties on the contractor or even terminate the contract for cause due to the contractor.

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3.- IMPACT OF *RDL 10/2020*, CEASING NON-ESSENTIAL ACTIVITIES AND PROVIDING FOR RECOVERABLE PAID LEAVE FOR WORKERS.

Without wishing to expand on an exhaustive understanding of *RDL 10/2020* beyond public contracting, it should simply be noted that this *RDL* entails the "paralysis" of services not considered essential, establishing that from 30th March and 9th April 2020, both included, people within the scope of the extension of *RDL 10/2020* will be entitled to recoverable paid leave.

To this end, it must be determined that the following activities subject to public sector contracts are not stopped by *RDL 10/2020*:

• Those who have been hired by the emergency procedure.
• The works, concessions, services and supplies that are essential for: (i) the maintenance and safety of buildings, (ii) the adequate provision of public services, (iii) and the

[6] As established in the Ninth Additional Provision of *RDL 8/2020*.
[7] Note of the *Consejo General de Poder Judicial*, dated 18th March 2020.
http://www.poderjudicial.es/cgpj/es/Poder-Judicial/En-Portada/El-CGPJ-establece-que-durante-el-estado-de-alarma-solo-podran-presentarse-escritos-procesales-vinculados-a-actuaciones-judiciales-urgentes-y-siempre-a-traves-de-LexNET-

provision of services in a non-physical form.
• The following services in particular: (i) cleaning, maintenance, emergency repairs and surveillance, (ii) collection, management and treatment of dangerous waste, municipal solid waste, dangerous and non-dangerous waste, (iii) collection and treatment of waste water, clean-up activities and other waste management services and transport and removal of sub-products.

One of the essential questions that arises following the entry into force of *RDL 10/2020* is what happens to public contracts that, after the declaration of the state of alarm and the publishing of *RDL 8/2020*, had not suspended their activity and that, as a result of *RDL 10/2020*, have been forced to stop. The question then arises as to whether the regime established in Article 34 of *RDL 8/2020* is not compatible with the recoverable paid leave under *RDL 10/2020*.

In principle, the purposes of the two regulations concerning contracts with public sector entities are different.

Therefore, *RDL 8/2020* allows contractors to request the suspension of the contract or the extension of the term of performance of the contract (as appropriate), in the event that the declaration of the state of alarm or the measures taken by the Administrations as a consequence, which make the performance of the contract impossible.

On the other hand, the purpose of RDL 10/2020 is to prevent workers who do not carry out activities considered essential from being sent to workplaces.

In view of the above, if a company awarded a contract with a public sector entity had, prior to the entry into force of *RDL 10/2020*, requested the suspension of the contract on the grounds of inability to execute it, it would not, in principle, be affected by the general suspension provision, provided that the contracting authority accepted the request for suspension made earlier.

On the other hand, the Fifth Additional Provision of *RDL 10/2020* establishes that the beforementioned is "*sin perjuicio de lo establecido en el artículo 34 del Real Decreto-ley 8/2020, de 17 de marzo*".

Therefore, it cannot be excluded that the companies that have not used the procedure of Article 34 of *RDL 8/2020* (because until now they could perform the contract) cannot now request the suspension due to the inability to perform the contract when it becomes impossible to perform it.

To this end, it should be borne in mind that if the contract can be reactivated once the period of validity of *RDL 10/2020* has elapsed and the workers recover the hours lost as established, a request for suspension would not seem justified.

Another relevant question in this respect is what happens to **recoverable paid leave** and whether it is indemnifiable as a contractor's expense in the cases set out in Article 34.

In this regard, the current wording of the first paragraph of Article 34 of *RDL 8/2020* states: "*No obstante, en caso de que entre el personal que figurara adscrito al contrato a que se refiere el punto 1.º de este apartado se encuentre personal afectado por el permiso retribuido recuperable previsto en el Real Decreto Ley 10/2020, de 29 de marzo, el abono por la entidad adjudicadora de los correspondientes gastos salariales no tendrá el carácter de indemnización sino de abono a cuenta por la parte correspondiente a las horas que sean objeto de recuperación en los términos del artículo tres del mencionado Real Decreto Ley, a tener en cuenta en la liquidación final del contrato*".

Compensable paid leave shall therefore not be regarded as compensable salary for the purposes of Article 34.1 but as a payment on account.

Once again, a problem arises in this respect, which is that this clarification has only been included in the first paragraph of Article 34 *RDL 8/2020* concerning public service and supply contracts for the provision of consecutive services, but not in the third paragraph relating to the works contract. However, the most logical interpretation is that in the case of works contracts this compensable paid leave is not considered to be compensable salary either.

4.- POSSIBLE TOTAL OR PARTIAL SUSPENSION OF CLEANING AND SECURITY CONTRACTS.

RDL 11/2020 has modified paragraph six of Article 34 of *RDL 8/2020*, establishing that in the event of security and cleaning service contracts, it will be possible to suspend them totally or partially, under the terms established in paragraph 1 of this article. Furthermore, this shall be possible only at the request of the contractor or *ex officio*, if as a result of the measures adopted by the State, the Autonomous Communities or the local Administration to address COVID 19, any or all of its buildings or public facilities are closed, either totally or partially, making it impossible for the contractor to provide all or part of the contracted services. In the event of partial suspension, the contract will be partially suspended with regard to the provision of services related to the public buildings or facilities that are totally or partially closed, from the date on which the public building or facility or part of it is closed and until it is reopened. To this end, the contracting authority shall notify the contractor of the security and cleaning services to be maintained in each of the buildings. It shall also notify the contractor of the date on which the building or public facility, or part of it, will be totally reopened so that the contractor can proceed to restore the service under the agreed terms.

5.- AMENDMENT OF PUBLIC SECTOR CONTRACTS IN ORDER TO INCREASE SERVICES.

In view of the current situation, it will probably be necessary for many service contracts, especially those for cleaning, etc., to be extended in order to cover the growing need related to the health crisis, such as, for example, the cleaning and sanitizing service in contracts for the cleaning of buildings, especially for public use such as hospitals. In this regard, it should be taken into account that, given that *RD 463/2020* and *RDL 8/2020* do not establish anything that changes the general regime for modifying contracts, it will be necessary to comply with the provisions of the *LCSP*.

Therefore, amendments are only possible if they comply with the regulations of the aforementioned Subsection 4 of the Law, for **reasons of public interest** and subject to the

procedure of Article 191. In this regard, amendments to public contracts will only be possible if they are provided for in the specific administrative specifications or, otherwise, when the conditions established in the *LCSP* are met.

With regard to the amendments to public contracts provided for in the specific administrative specifications, "*los contratos de las Administraciones Públicas podrán modificarse durante su vigencia hasta un máximo del veinte por ciento del precio inicial cuando en los pliegos de cláusulas administrativas particulares se hubiere advertido expresamente de esta posibilidad*".

The LCSP then addresses the second possibility of a change occurring, i.e. when it is not provided for in the specification, or when the specification does not meet the necessary conditions of clarity. In these cases, either it is a **variation that is strictly necessary in order to meet the objective cause that makes it necessary**, or else we enter into the cases of the "legal" modification that this Article 205 *LCSP* addresses.

There are three cases in which an unforeseen amendment could be justified.

The first deals with cases where it **becomes necessary to add additional works, supplies or services to those initially contracted**, provided that the following two requirements are met: a change of contractor is not possible, for economic or technical reasons; and provided that the amendment to the contract will entail an increase in its amount not exceeding 50 per cent of its initial price, excluding VAT).

The second consists of **"*circunstancias sobrevenidas*" that were unforeseeable at the time the contract was tendered**, provided that the amendment does not alter the overall nature of the contract (and that the amendment to the contract entails an alteration in its amount not exceeding 50 percent of its initial price, excluding VAT).

The third consists of "*las modificaciones no sean sustanciales*". It shall be considered An amendment shall be considered essential when it results in a contract of a substantially different nature from the one originally entered into. In any event, a modification shall be considered "*sustancial*" when one or more of the following conditions are met:

1º That the amendment introduces conditions which, had they been included in the initial procurement procedure, would have allowed the selection of candidates other than those initially selected or the acceptance of a bid other than that initially accepted or would have brought more participants into the procurement procedure. In any event, the situation referred to in the preceding paragraph shall be deemed to arise where the work or service resulting from the original project or the tender documents, respectively, plus the intended amendment, require a different classification of the contractor than that, if any, required under the original tendering procedure.

2º That the amendment alters the economic balance of the contract to the benefit of the contractor in a way that was not foreseen in the initial contract. In any case, the case provided for in the previous paragraph will be considered to arise when, as a result of the amendment to be made, new units of work would be introduced whose amount would represent more than 50 percent of the initial budget of the contract.

3º That the amendment substantially broadens the scope of the contract. In any case, the case provided for in the previous paragraph shall be considered to arise when:
-The value of the amendment entails an increase in the amount of the contract that exceeds, alone or jointly, 15% of the initial price of the contract, excluding VAT, in the case of works contracts, or 10%, excluding VAT, in the case of other contracts, or that exceeds the limit that, depending on the type of contract, is applicable from among those indicated in articles 20 to 23 of the Law.
– The works, services or supplies subject to amendment are within the scope of another contract, either current or future, provided that the processing of the procurement file has been initiated.

In such cases, such an alleged amendment to the contract would in fact constitute a new award.

Consequently, since there is no provision for amending the specifications, a new tendering procedure should be launched in such circumstances.

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6.- SPECIAL REFERENCE TO THE ENFORCEMENT OF GUARANTEES IN ADMINISTRATIVE CONTRACTS AS A RESULT OF THE ALARM STATE DECLARATION.

In view of the current situation created after the declaration of the state of alarm and the entry into force of *RDL 8/2020*, which establishes the measures described above, the question arises as to what the consequences may be of the contractor not being granted the suspension or extension of the contract period.

As previously noted, it is essential that as long as no suspension of the contract or extension of the deadline is agreed, the contractor continues to perform the contract (with the utmost diligence), otherwise the contracting authority could impose penalties on the contractor or even terminate the contract for reasons for which the contractor is responsible.

This is without prejudice to the possibility of the contractor attempting or succeeding in proving that the impossibility of continuing with the performance of the contract or meeting the deadlines set.

In this regard, there is no doubt that one of the enforcement means available to the Administration for the purpose of ensuring proper compliance with the contract is to **warn of the possible execution or seizure of the guarantees provided**.

LCSP distinguishes between the guarantees to be provided in contracts concluded with Public Administrations and the guarantees for other public sector contracts.

In the latter case, the law provides for a wide range of guarantees, as well as for determining their form. As established in Article 110 of the *LCSP*, relating to the responsibilities to which the guarantees are subject, these shall be responsible for:

a) the obligation to enter into the contract in time, in

accordance with the provisions of Article 153.
b) the penalties imposed on the contractor in accordance with Article 192 of the LCSP (wrong performance).
c) the correct performance of the services provided for in the contract, including the improvements offered by the contractor that have been accepted by the contracting body, of the expenses incurred by the Administration due to the contractor's delay in fulfilling its obligations, and of the damages caused to the Administration as a result of the performance of the contract or its non-performance, when its termination is not appropriate.
d) the seizure that may be ordered in the cases of termination of the contract, in accordance with what is established in the contract or in this Law.
e) in addition, in contracts for construction, services and supplies, the final guarantee shall be responsible for the non-existence of defects in the goods constructed or supplied or the services rendered during the guarantee period provided for in the contract.

In this regard, it should be noted that **the execution of guarantees does not occur automatically**, but requires the processing of a prior procedure, where the responsibility of the contractor is determined and settled.

Since there is no specific procedure in this regard, Article 97 of *Real Decreto 1098/2001*, of 12th October, which passed the *Reglamento general de la Ley de Contratos de las Administraciones Públicas*, and which regulates the "standard" procedure for resolving incidents arising in the performance of contracts, provided that no other procedure is provided for, must be followed.

This procedure foresees that the agreement to start the procedure is at the initiative of the Administration or at the request of the contractor, with a hearing of the contractor and a report from the relevant service, as well as, when necessary, a report from the "*servicio jurídico y de la intervención*". Finally, a decision will be issued by the Administration.

Article 112 of the *LCSP* recognizes the condition of interested parties in the procedures that affect the guarantee provided, to the guarantors, endorsers and insurers that have established the respective guarantees for all purposes, which results in the non-existence of automaticity.

This could be used to invoke the circumstances that justified the suspension of the contract and the guarantor could object to the execution.

In this regard, **it is essential that the evidence proving the inability to perform the service and, therefore, the absence of non-compliance, be pre-constituted**.

In this regard, the suspension of administrative deadlines and terms established by *RD 463/2020* should also be taken into account, so that, in theory, the procedure would not be effective until the state of alarm is raised. Without prejudice to the above, *RD 463/2020* provides that the competent body may agree, by means of a resolution stating the reasons and with the agreement of the interested party, not to suspend the deadlines and to continue the procedure.

If, despite the aforementioned, the administration decides that the execution or seizure of the guarantee is appropriate, it could be appealed before the corresponding courts, also requesting, if necessary, a precautionary measure of suspension of the execution, all this without prejudice to the actions that would correspond to the guarantors and insurers. Once again, the suspension of procedural deadlines agreed by *RD 463/2020* should be taken into account.

However, the measure could be considered with express reference to the provisions of paragraph 4 of the Second Additional Provision of *RD 463/2020*, which states: "*No obstante lo dispuesto en los apartados anteriores, el juez o tribunal podrá acordar la práctica de cualesquiera actuaciones judiciales que sean necesarias para evitar perjuicios irreparables en los derechos e intereses legítimos de las partes en el proceso*". This would require proof of the irreparable damage that would be caused by the execution or seizure of the guarantee.

Without prejudice to the above, in this situation it would be highly advisable to urge the Administration to refrain from executing the guarantee on the grounds of the right to effective judicial protection under Article 24 of the Spanish Constitution and the case law of the Constitutional Court on the need to wait for a judicial decision on the precautionary measure to avoid acts of execution contrary to a possible ruling in favor of the same as set out, among others, in *Sentencia 199/1998* of 13th October. This case law has also been accepted by the Supreme Court as, among others, in the *Sentencia* of 28th April 2014. In the same way, a communication to the guarantor or insurer should be considered.

In conclusion, although in the area of administrative contracting, the Administration could seek to execute the guarantees provided: (i) the execution of the guarantee could not be automatic; (ii) it would be necessary to wait for the lifting of the suspension of deadlines if the interested party does not agree; and (iii) it would be possible to oppose the circumstances that have prevented the performance of the contractual obligation, which are beyond the control of the contractor.

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7.- THE SUBCONTRACTOR IN THE STATE OF ALARM SCENARIO.

Firstly, we must warn that *RDL 8/2020* does not provide for any of its provisions to deal with the consequences that may arise in the legal sphere of subcontractors as a result of the declaration of a state of alarm.

Article 34.3 of *RDL 8/2020* only makes express reference to the figure of the subcontractor when it lists the costs that may be subject to compensation and indemnification to the contractor while the contract is suspended as a result of COVID-19 pandemic. Therefore, the costs to which the contractor is entitled to be compensated include those of the subcontractor assigned to the performance of the contract on 14th March 2020 for the period of the suspension.

Therefore, by virtue of the abovementioned, the subcontractor must continue to be paid for as long as the contract is suspended as a result of the current health crisis, without it being legal to suspend payment of the salaries of

the means assigned to the performance of the contract.

This measure is intended to provide an advantage in terms of the continuity of contracts and, by recognizing compensation for the salaries or costs paid to subcontractors, to ensure that the contractual relationship is maintained for the duration of the situation and therefore to avoid, at all costs, the large-scale termination of contracts.

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8.- SUPPLY OF ESSENTIAL SERVICES.

In the scenario we are facing, we see how the services of urban solid waste collection, the maintenance of certain facilities and services such as the management of the integral water cycle, lighting or health centers, telecommunications, etc., continue to operate despite the extraordinary nature of the situation.

To this end, Article 18 of *RD 463/2020* governs essential services by stating that:

> "*1. Los operadores críticos de servicios esenciales previstos en la Ley 8/2011, de 28 de abril, por la que se establecen medidas para la protección de infraestructuras críticas, adoptarán las medidas necesarias para asegurar la prestación de los servicios esenciales que les son propios.*
> *2. Dicha exigencia será igualmente adoptada por aquellas empresas y proveedores que, no teniendo la consideración de críticos, son esenciales para asegurar el abastecimiento de la población y los propios servicios esenciales.*"

Therefore, *RD 463/2020* provides for an **obligation for critical infrastructure operators to ensure the provision of their services**. In this way, they remain under the supervision and surveillance of the *Ministerio del Interior*.

Among these operators, as provided for in *Ley 8/2011* of 28th April, which establishes measures for the protection of critical infrastructures, are companies, both public and private, from sectors such as telecommunications and energy (electricity, gas and oil); nuclear industry; the financial system; transport (air, road, railway and shipping); water; space; the chemical industry; urban and metropolitan transport; food and health.

Therefore, in its Article 18, *RD 463/2020* states that the critical operators of the essential services foreseen must take the necessary measures to ensure the provision of the essential services that are specific to them, also establishing that: "*Dicha exigencia será igualmente adoptada por aquellas empresas y proveedores que, no teniendo la consideración de críticos, son esenciales para asegurar el abastecimiento de la población y los propios servicios esenciales*".

This last point is obviously very abstract, which leads to legal uncertainty as it is not clear what other companies and promoters can be considered essential to the population at this time. It is also not clear what control and communication mechanism will exist to enable such (undefined) companies to know whether and under what conditions they should guarantee their services.

Ley 8/2011 of 28th April, which establishes measures for the protection of critical infrastructures indicates in Article 4 that the *Ministerio del Interior*, throughthe *Secretaría de Estado de Seguridad*, shall be responsable for the *Catálogo Nacional de Infraestructuras Estratégicas*, which contains all the information and assessment of the country's strategic infrastructures, including those classified as critical or European critical.

In October 2018, the *Comisión Nacional para la Protección de las Infraestructuras Críticas*, chaired by the *Secretaria de Estado de Seguridad* and as Vicepresident, the *Director del Departamento de Seguridad Nacional*, passed the *Plan Estratégico Sectorial* (*PES*) for the Health Sector and the review of the *Planes Sectoriales del Sector Transporte* - Air, Road, Rail and Shipping subsectors, as well as the Water Sector. In addition, 24 new Critical Operators were appointed for the above sectors.

It is expected that the *Ministerio del Interior* will soon extend the list of strategic infrastructures or issue a communication identifying the companies or suppliers that at this time should be considered as those related to strategic infrastructures and essential services.

Obviously, critical operators of essential services (and similar) must continue to perform the public contracts they have been awarded and ensure the provision of their services.

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9.- THE PROCESSING OF CONTRACTS TO BE ENTERED INTO UNDER THE EMERGENCY CONTRACTING PROCEDURE.

RDL 8/2020 sets outs, in its Sixth Additional Provision, that **the introduction of any type of direct or indirect measure by the bodies of the *Administración General del Estado* to deal with COVID-19 will justify the need to act immediately,** under the provisions of Article 120 of the *LCSP*.

Therefore, all contracts to be entered into by the *Administración General del Estado* or its public bodies and institutions governed by public law to address the needs arising from the protection of people and other measures adopted by the *Consejo de Ministros* to address COVID-19, **the emergency procedure** will apply to them.

In this regard, it is established that if it is necessary to make payments on account for preparatory actions to be carried out by the contractor, the provisions regarding guarantees in the aforementioned *Ley 9/2017*, will not be applicable, and the contracting body will determine this circumstance based on the kind of service to be contracted and the possibility of meeting the need by other means. The justification of the decision taken must be recorded in the corresponding file.

This justifies, at the national level, the use of the emergency procedure provided for in Article 120 *LCSP*, reinforced by the declaration of the state of alarm in *Real Decreto 463/2020*, of 14th March, which declares the state of alarm for the management of the health crisis situation triggered by COVID-19. The emergency processing provides for an exceptional regime when the Administration has to act immediately due to any of the following cases: catastrophic events, situations involving serious danger or needs

affecting national defense.

In these cases, the emergency contracting procedure applies, which is characterized by the following:

The contracting body, without the obligation to process a contract file (and may even use verbal contracting), may order the performance of what is necessary to remedy the event that has occurred or to satisfy the need that has arisen, or freely contract its object, in whole or in part, without being subject to the formal requirements established in the *LCSP*, including that of the existence of enough credit. In the event that there is no adequate and enough credit, once the agreement has been reached, it will be provided in accordance with the provisions of the *Ley General Presupuestaria*.

If the contract has been entered into by the *Administración General del Estado*, its *Organismos Autónomos*, *Entidades Gestoras* and *Servicios Comunes de la Seguridad Social* or other State public entities, the *Consejo de Ministros* shall be informed of these agreements within a maximum period of thirty days.

The period for starting the performance of the services may not exceed one month from the adoption of the aforementioned agreement. If this time limit is exceeded, the contracting of such services shall require a procedure.

As the case law has stated, "*lo que ampara la normativa de emergencia es una situación administrativa inmediata, absolutamente necesaria para evitar o remediar en lo posible las consecuencias del suceso en cuestión*", *Sentencia del Tribunal Superior de Justicia de la Rioja*, of 4th February 2010, in accordance with *STS 7 de abril de 1983*.

In order to verify the due compliance with the budgets foreseen in the rule, we can refer to the recent resolution of the *Junta Consultiva de Contratación del Estado* no. 17/2019, issued during the emergency proceedings carried out for the development of the 2019 electoral process.

Some scenarios that could fit in the emergency contracting needs, with the prior agreement of the contracting authority, as a consequence of this scenario are the following:

- Communication and telecommuting equipments;
- Extraordinary cleaning and sanitizing works;
- Supply of protective material (hydroalcoholic gel, masks and gloves);
- Supply of cleaning material;
- Support services and assistance to telecommuting;
- Care services for people;
- Security services to guarantee the compliance with the closing instructions and the prohibition of the use of facilities.

10.- WHAT IMPACT THE DECLARATION OF THE STATE OF ALARM HAS ON PRIVATE CONTRACTS?

RDL 11/2020 has specified, in its amendment of Article 34 of *RDL 8/2020*, that the concept of "***contratos públicos***" referred to in that article must refer **only to those contracts which, according to its specifications, are subject to:** *Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público*, which incorporated into Spanish law Directives 2014/23/UE and 2014/24/UE, of 26th February 2014, of the European Parliament and the Council; *Real Decreto Legislativo 3/2011*, dated 14th November, which adopts the revised text of the *Ley de Contratos del Sector Público*; or *Ley 31/2007*, dated 30th October, on procurement procedures in the water, energy, transport and postal services sectors; or *Libro I del Real Decreto-ley 3/2020*, dated 4th February, on urgent measures incorporating into Spanish law various European Union directives in the field of public contracting in certain sectors; private insurance; pension plans and funds; taxation and tax lawsuits; or *Ley 24/2011*, of 1st August, on public sector contracts in the fields of defense and security.

However, the *Subdirección General de los Servicios Consultivos de la Abogacía General del Estado*[8] has clarified the question of whether or not *RDL 8/2020* is applicable to contracts entered into by public sector entities that are of a legal-private nature, such as state-owned companies or public sector foundations.

Finally, with regard to the suspension regime applicable to private contracts entered into by public sector entities, the *Subdirección General de los Servicios Consultivos de la Abogacía General del Estado* clarifies that the difficulties in executing contracts also affect this type of contract, regardless of the public sector entities that enter into them, so Article 34 of *RDL 8/2020* in the area of contract suspension shall be applicable.

In addition, the suspension of the deadlines and the interruption of the deadlines established by the Third and Fourth Additional Provisions of *RD 463/2020* also affect private contracts entered into by public sector entities, which affects public contracts with the special characteristics that we indicated at the beginning of this Note.

Consequently, until a peaceful understanding of this "explanatory" amendment is established, a case-by-case analysis of each individual specification or contract will be required.

11. AMENDMENT TO THE TERM OF THE SUPPLY CONTRACT OF THE *LCSP*.

In addition to the amendment of the exceptional and temporary regime of Article 34 of *RD Ley 8/2020*, *RDL 11/2020* has been used to introduce a change in the general regulation of the *LCSP* that will be of a permanent nature. Therefore, the Seventh Final Disposition modifies article 29.4 second paragraph of the *LCSP* and, in this way, allows supplies (and not only services) of consecutive provision or

[8] Reference to whether Article 34 of *Real Decreto-l 8/2020*, is applicable to state-owned companies (and public sector foundations). *Subdirección General de los Servicios Consultivos de la Abogacía General del Estado*. Access: https://delajusticia.com/wp-content/uploads/2020/03/Informe_1_Abogac_a_sobre_art_culo_34_RDL_8_2020_1584644185.pdf

delivery to have access to the exceptional option of the period of duration greater than 5 years - the maximum ordinary period with the extensions included - provided that it justifies its necessity in terms of the period of recovery or amortization of the investments.

12. NEW REGIME OF HUNOSA AND *FÁBRICA DE MONEDA Y TIMBRE* AS ITS OWN MEANS.

In the same way, *RDL 11/2020* has been used to add an additional fifty-fifth provision to the LCSP, with "unlimited duration", to convert HUNOSA and its affiliates into the means of the *Administración General del Estado*, of the State public sector entities that have the status of contracting authority, of the *Principado de Asturias* and the other Autonomous Communities that have part of its share capital. The purpose of this measure is to undertake, through this business group, actions and regeneration of mining regions.

It is also foreseen that the *Fábrica Nacional de Moneda y Timbre-Real Casa de la Moneda (FNMT-RCM)*, a state-owned public business entity, may act as its own means and technical service for contracting authorities belonging to the state, autonomous community or local public sectors.

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