

Informative Note

Main measures on public procurement in relation to COVID-19 adopted by Royal Decree Law 11/2020

1st April 2020

Royal Decree Law 11/2020 of 31 March adopting urgent supplementary measures in the social and economic field to deal with COVID-19, which comes into force the day after its publication in the Official State Gazette on 1 April 2020, contains a series of measures that complement those already adopted previously by the executive and, specifically, those included in Royal Decree Law 8/2020 of 17th March, some of which it profoundly modifies.

RDL 11/2020 has corrected some of the public procurement measures introduced by RDL 8/2020 and has amended Article 29 of the Public Sector Contracts Law regarding the duration of service and supply contracts.

The main developments included in the RDL 11/2020 in the area of **public procurement** are set out below.

1. Amendment of Article 34 of RDL 8/2020

The first final provision of RDL 11/2020 modifies paragraphs 1, 3 and 6 of Article 34 of RDL 8/2020. In addition, RDL 11/2020 adds two new paragraphs (7 and 8) to Article 34.

1.1. Changes to contracts for successive supplies and services

For public contracts for services and supplies of successive provision, RD-law 11/**2020 eliminates the reference to automatic suspension** (in line with the information provided by the State Attorney's Office) and allows for **partial suspension of the contract**. In these cases, the damages to be paid by the contracting body will be the same as those envisaged for cases of total¹ suspension but **will be limited to the part of the contract that has been suspended**.

RDL 11/2020 also introduces a new paragraph to Article 34 of RDL 8/2020 regarding compensation for salary expenses, as this will also include expenses related to social security contributions.

¹ In cases of total suspension, the contractor shall be entitled to compensation for the following items; (i) salary costs actually paid by the contractor to the personnel assigned on 14 March 2020 to the ordinary performance of the contract, during the period of suspension, (ii) costs for the maintenance of the final guarantee, relating to the period of suspension of the contract, (iii) costs of renting or maintaining machinery, installations and equipment relating to the period of suspension of the contract, directly linked to the performance of the contract, provided that the contractor can prove that these resources could not be used for other purposes during the suspension of the contract and (iv) the costs of insurance policies provided for in the tender documents and linked to the subject matter of the contract, taken out by the contractor and in force at the time of the suspension of the contract.



In addition, another new feature introduced by RDL 11/2020 is that relating to **staff assigned to the contract** who are affected by recoverable paid leave². In these cases, the payment by the contracting entity of the corresponding salary expenses will not have the character of compensation but rather a payment on account for the part corresponding to the hours that are subject to recovery and to be taken into account in the final settlement of the contract.

1.2. Changes to works contracts

Article 34.3 of RDL 8/2020 stipulated that if the work was to be delivered after 14 March and the end of the state of alarm and it was not possible to carry it out as a result of the de facto situation created by COVID-19 or the measures adopted by the State, the contractor could request an **extension of the final delivery deadline** provided that it offered to meet its outstanding commitments by extending the initial deadline.

With this modification, **any doubt about the possible restrictive³ application of article 34.3 of RDL 8/2020 is eliminated** and the contractor is obliged to complete the **corresponding request for justification**.

1.3. Amendment to contracts for security and cleaning services

RDL 11/2020 allows for the **total or partial suspension⁴** of security and cleaning service contracts, under the terms established for service and supply contracts for successive deliveries, and at the request of the contractor **or ex officio**.

RDL 11/2020 includes this measure for cases in which, as a result of the measures adopted to combat COVID 19, any of its public buildings or facilities have been totally or partially closed, 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 the services linked to the public buildings or facilities that have been totally or partially closed, from the date on which the public building or facility or part thereof 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 him 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.

1.4 Other amendments

1.4.1. Introduction of a new paragraph 7 to Article 34 RDL 8/2020

The new Article 34(7) of RDL 8/2020 introduced by RDL 11/2020 defines what is meant by "*public contracts*". Thus, only those contracts which, according to their specifications, are subject to the provisions of this law will be considered as "public contracts":

- Law 9/2017, of 8th November, on Public Sector Contracts,
- To Royal Legislative Decree 3/2011 of 14th November, approving the revised text of the Public Sector Contracts Act;

² Provided for in Royal Decree Law 10/2020 of 29 March.

³ The previous wording had raised some doubts as to whether the suspension regulated in Article 34.3 of RDL 8/2020 was applicable only to works contracts with an imminent completion deadline. The amendment made by RDL 11/2020 makes it clear that this is not the case and that the paragraph of the article regulates a specific case.

⁴ The amendment is a response to the situation reported by the Advocate General's Office in its "Consultation on the suspension of cleaning contracts if the building is closed" dated 25th March 2020.

- Law 31/2007, of 30 October, on procurement procedures in the water, energy, transport and postal services sectors; or Book I of Royal Decree Law 3/2020, of 4th February, on urgent measures incorporating into Spanish law various European Union directives in the field of public procurement in certain sectors; private insurance; pension plans and funds; taxation and tax litigation;
- Law 24/2011, of 1st August, on public sector contracts in the fields of defence and security.

1.4.2. Amendment to Article 29 of the Public Contracts Act

Finally, paragraph 1 of FD 7 of RDL 11/2020 amends the second paragraph of Article 29(4) of the LCSP. Thus, **exceptionally**, in the case of **supply and service contracts, a period of more than five years may be established**, when

- This is required by the recovery period of the investments directly related to the contract and these are not susceptible to being used in the rest of the contractor's productive activity; or
- Its use would be uneconomic, provided that the amortization of such investments is a relevant cost in the provision of the supply or service. Such circumstances must be justified in the contract file with an indication of the investments to which it refers and their recovery period. The concept of relevant cost in the provision of the supply or service will be subject to regulatory development.

This modification is not linked to the measures adopted by the Government of the Nation within the framework of the COVID-19 crisis and is therefore intended to be permanent.

We hope that these comments will be useful and, in any case, the tax team at **Andersen Tax & Legal**, is at your disposal to clarify any doubts you may have in this regard.

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