

Informative Note

## Resumption of tendering deadlines and improvements in the regulation of public contracts

11th May 2020

Regarding 5th May Royal Decree-Law 17/2020, approving measures to support the cultural sector and of a tax nature to deal with the economic and social impact of the COVID-2019

Royal Decree Law 17/2020 once again has an impact on public procurement, activating the tender periods that had been suspended, reinterpreting the regulations to be applied to public contracts that could no longer be completed as a result of both the pandemic and the measures dictated to avoid it, and finally, taking advantage of the situation, to incorporate some technical improvements that could well have waited for the passing of an ordinary law. The most relevant points introduced in this area are analysed below.

### Resumption of tendering periods

The suspension of the deadlines for tender procedures has been lifted and new tendering procedures not related to COVID-19 can be processed if they are done electronically. Logically the deadlines for any special appeal that may be lodged in these procedures have been maintained (additional provision eight).

### Regulation of the execution of public contracts

The rule clarifies the regulation of the execution of public contracts whose implementation has been affected by the pandemic or the measures taken to combat it (final provision nine).

This clarification of art. 34 of Royal Decree Law 8/2020 that justifies the fact that the ninth final provision takes effect from the effective date of said Royal Decree Law, a sort of retroactive effect. Specifically, it allows for the advance payment of compensation that the administration should pay for the suspension of supply and recurrent services contracts once the agreed suspension has ended and the provision of the services and supplies has resumed. To this end, the contracting authority is required to make an advance payment, either in a single instalment or in several instalments, which will be deducted from the final settlement of the contract.

With regard to works and service concessions, it is specified that the economic rebalancing will only apply to those concessions whose execution has become impossible and has been recognised as such by the contracting administration, and it is clarified that the impossibility of execution may be partial when the impossibility only affects one part of the contract.

Finally, an attempt is being made to clarify, albeit with little success, the scope of application of the scheme in question. In contrast to the interpretation according to which the precept was only applicable to contracts awarded under Law 30/2007, TRLCSP 2011 and LCSP 2017, it is said that the specific regime of Article 34 Royal Decree Law 8/2020 includes any contracts that are still in force regardless of the public procurement regulations governing them. Specifically, reference is made to long-term contracts for works and their complementary services (it should be borne in mind that service and supply contracts have traditionally had a maximum duration of five years) to works and service concession contracts and management contracts. The problem arises when the provision seeks to clarify what arrangements apply



to them. Thus, it says, in addition to the provisions indicated in paragraphs 1 and 3, the provisions of the articles relating to compensation for the suspension of contracts in the public procurement regulations prior to Royal Legislative Decree 3/2011, of 14 November, which are applicable to them, will not be applicable to the suspensions referred to in this article, nor will the compensation for suspension provided for in the contract specifications in the field of public procurement regulations in the water, energy, transport and postal services sectors. This is undoubtedly an unfortunate diction for contracts for recurrent services complementary to works and construction contracts, as it seems to exclude both the legal regime applicable under its regulatory law and that established in sections 1 and 3 of Royal Decree Law 8/2020, which would mean that any compensation would be eliminated. A systematic interpretation would, however, lead to the conclusion that works and service contracts complementary to works are subject to the provisions of Article 34 and not to the compensation regime that would be applicable by virtue of the application of the provisions of the specifications or the law applicable to them. Concessions or contracts for the management of public services shall be governed by Article 34(4) as worded by this provision.

### Regulation of the provisions of requirements of independent bodies of public sector entities

Article 33 LCSP (The new Public Sector Contracts Act) 2017 is amended, and specifically, the regulation of the requirements to be met by the so-called independent bodies of public sector entities that do not have the status of contracting authority and thus be able to directly award contracts to them.

It should not be forgotten that these other public sector entities are those that produce goods and services which they sell to the market and compete in a system of free competition (eighth final provision). There are two modifications. Firstly, the conditions to be applied to contracting authorities and other public sector entities to be considered as exercising control over their own environment have been equalized by abandoning the criterion of the Commercial Code to identify the dominant company. Secondly, in the case of orders between wholly public companies of the same group or controlled by the same entity, it is foreseen that eighty percent of the activity carried out by the own means must be done for the controlling entity which sets the tariffs, specifying that they will have to be adjusted to market prices.

We hope the information is useful and of your interest. At Andersen Tax & Legal we have created a multidisciplinary team to attend to all the questions that may arise on this aspect or in relation to the COVID-19.

For more information please contact:

[José Vicente Morote](#) | Partner in the area of Public and Regulatory Law  
[jvicente.morote@andersentaxlegal.es](mailto:jvicente.morote@andersentaxlegal.es)

[Carlos Mínguez](#) | Partner in the area of Public and Regulatory Law  
[carlos.minguez@andersentaxlegal.es](mailto:carlos.minguez@andersentaxlegal.es)

[Silvia del Saz Cordero](#) | Of Counsel in the area of Public and Regulatory Law  
[silvia.delsaz@AndersenTaxLegal.es](mailto:silvia.delsaz@AndersenTaxLegal.es)

The above comments are for information purposes only and do not constitute professional opinions or legal advice, nor do they necessarily include the opinions of the authors. If you are interested in obtaining additional information or clarification of the content, please contact us by telephone on + 34 963 527 546/34 917 813 300 or by e-mail at [communications@andersentaxlegal.es](mailto:communications@andersentaxlegal.es).