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News update: COVID-19

Public and Tax Departments

1. **Suspension of public contracts and re-establishment of economic balance in works and service concessions**
 2. **Suspension of administrative deadlines**
 3. **Urgent tax measures arising from the situation produced by COVID-19**
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SUSPENSION OF PUBLIC CONTRACTS AND RE-ESTABLISHMENT OF ECONOMIC BALANCE IN WORKS AND SERVICE CONCESSIONS

The Royal Decree-Law ("RDL") 8/2020, of 17 March, on urgent extraordinary measures to deal with the economic and social impact of the COVID-19 published in today's Official State Gazette (BOE) of 18 March 2020 and already in force contains a set of provisions on public procurement (Article 34) which are analyzed below.

As indicated in the preamble, in order to prevent COVID-19 and the measures adopted by the State, the Autonomous Communities or the Local Administration to fight against it from leading to the termination of public sector contracts, a specific regime for the suspension of such contracts is foreseen.

According to Article 34, the measures approved apply to contracts in force at the time of the entry into force of the RDL, entered into by public sector entities defined by Article 3 of Law 9/2017, of 8 November, on public sector contracts ("LCSP"), by Law 31/2007, of 30 October, on procurement procedures in the water, energy, transport and postal services sectors and by Royal Decree Law 3/2020, of 4 February, on urgent measures incorporating various European Union directives in the field of public procurement in certain sectors into Spanish law; private insurance; pension plans and funds; taxation and tax litigation.

It should be borne in mind that the suspension of administrative periods provided for in RD 463/2020, as amended by RD 465/2020, does not apply to the periods indicated in this RDL and that the measures provided for will remain in force for one month without prejudice to the possibility of extending them.

The applicable regime is differentiated according to the following classification of contracts:

I. Service and supply contracts for the provision of services in succession

According to the regulation approved, the suspension operates automatically from the moment the situation that prevents the performance of the contract occurs and until the performance can be resumed, when, the circumstances or measures that prevented it having ceased, the contracting authority notifies the contractor of the end of the suspension.

Although it is stated that the suspension operates automatically, the contractor must necessarily take certain steps in order to receive compensation for damages actually suffered by them during the period of suspension.

Firstly, it is essential that the contracting authority should evaluate the impossibility of executing the contract as a result of COVID-19 or the measures taken to fight it. To this end, the contractor must:

1. Address a request to the contracting authority to establish the impossibility of performing the contract with the following content:
 - i. Statement of reasons why the execution of the contract has become impossible.
 - ii. List of the personnel, premises, vehicles, machinery, installations and equipment assigned to the execution of the contract at this time.
 - iii. Reasons why it is impossible to use the related means in another contract.

The circumstances set out in the request may be subject to subsequent verification.

2. Keep continuously in touch with the person responsible for the contract or the contracting authority so that they may resolve the request within a maximum of five calendar days, bearing in mind that if the contractor is not notified of the express decision within that period, the request will be deemed to have been rejected on the grounds of silence. Although the RDL does not indicate this, it should be subject to the same regime of challenge as the rest of the administrative acts produced by silence.
3. Keep and obtain all the documentation justifying and accrediting the above circumstances and the expenses incurred, for the purposes of claiming future compensation for damages mentioned below.

Once the resolution of the suspension of the contract has been obtained, it will be possible to claim compensation for damages by proving the reality, effectiveness and amount of the same. The regulation limits the damages that can be compensated to the following concepts:

1. Salary costs actually paid by the contractor to the staff assigned on 14 March 2020 for the ordinary performance of the contract, during the period of suspension.
2. Costs of maintaining the definitive guarantee, relating to the period of suspension of the contract.
3. Expenditure on rent or maintenance costs for 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 the resources could not be used for other purposes during the suspension of the contract.
4. Costs of insurance policies provided for in the specifications and linked to the subject matter of the contract, taken out by the contractor and in force at the time of suspension of the contract.

In any case, the ordinary regime for the suspension of contracts provided for in Article 208.2.a) of the LCSP does not apply; nor does article 220 of Royal Legislative Decree 3/2011, of 14 November, which approves the consolidated text of the Public Sector Contracts Law (*Ley de Contratos del Sector Público/LCSP*).

In the event that upon the expiry of a contract it has not been possible to formalize a new contract that guarantees the continuity of the service as a result of the paralysis of the contracting procedures derived from the provisions of RD 463/2020, and the new contract cannot be formalized, the obligatory extension of up to 9 months provided for in Article 29.4 of the LCSP may be applied, without the condition of publication of the tender notice (*anuncio de licitación*) 3 months prior to the end of the contract being applicable.

II. Service and supply contracts other than those mentioned in the previous section

In the case of public service and supply contracts in force and other than those referred to in Section I, provided that they have not lost their purpose as a result of the de facto situation created by COVID-19, and the contractor is late in meeting the deadlines as a result of the situation created by COVID-19 or the measures taken to fight it, the contractor may propose to meet the deadline if an extension of the initial deadline or of the current extension is granted.

The contracting authority must grant the requested extension, giving it a time limit that is at least equal to the time lost, unless the contractor proposes a shorter one. A prior report from the person responsible for the contract will be required (the RD mentions the Director of Works), in which it is determined that the delay is not due to a cause attributable to the contractor, but that it has occurred as a result of the COVID-19.

In these cases, no penalties may be imposed on the contractor and the contract may not be terminated. Furthermore, contractors shall be entitled to the payment of any additional salary expenses actually incurred as a result of the time lost, up to a limit of 10% of the initial contract price. However, these expenses shall only be paid at the request of the contractor and provided that the reality, effectiveness and amount of such expenses by the contractor is reliably proven.

III. Works contracts

In those public works contracts in force that have not lost their purpose as a result of the de facto situation created by COVID-19 or the measures approved to fight against it, and where, in accordance with the "work development programme or works plan", their execution period was scheduled to end between 14 March and the period of the state of alarm, and as a result of the factual situation created by COVID-19 or the measures approved to fight against it, the delivery of the work cannot take place, the contractor may request an extension of the final delivery deadline provided that they offer to meet their outstanding commitments if the initial deadline is extended.

To this end, it is first of all essential that the contracting authority evaluates the impossibility of executing the contract as a result of COVID-19 or the measures taken to fight against it. To this end, the contractor must:

1. Address a **request** to the contracting authority to establish the impossibility of performing the contract with the following content:
 - Statement of reasons why the execution of the contract has become impossible;
 - List of the personnel, premises, vehicles, machinery, installations and equipment assigned to the execution of the contract at this time;
 - Reasons why it is impossible to use the resources in question in another contract.

2. Keep continuously in touch with the person responsible for the contract or the contracting authority so that they may decide on the application within a maximum of **five calendar days**, bearing in mind that if the contractor has not been notified of the decision within that period, the application shall be deemed to have been rejected. As in the case of Section I, although the RDL does not indicate this, it should be subject to the same system of objections as the rest of the administrative acts produced by silence.
3. Keep and obtain all documentation justifying and accrediting the above circumstances and the expenses incurred, for the purposes of a future compensation for damages.

If the decision to suspend the contract or to extend the deadline has been obtained, the contractor may apply to the contracting authority for damages by providing evidence of the reality, effectiveness and amount of such damages. The rule limits the damages that can be compensated to the following concepts:

1. Salary costs actually paid by the contractor to the staff assigned to the ordinary performance of the contract, during the period of suspension.

The salary expenses to be paid, in accordance with the VI General Collective Agreement for the Construction Sector (*Convenio Colectivo General del Sector de la Construcción*) 2017-2021, published on 26 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 supplement of article 47.2.b of the aforementioned agreement, and the extraordinary compensations of article 47.2.b, and the holiday pay, or their respective equivalent concepts agreed in other collective agreements for the construction sector.

The expenses must correspond to the personnel indicated who were assigned to the execution before 14 March and continue to be assigned when it is resumed.

2. Costs for the maintenance of the final guarantee, relating to the period of suspension of the contract.
3. Expenditure on the rental or maintenance of 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 thereof is less than the cost of terminating the contracts for the rental or maintenance of machinery, installations and equipment.
4. Costs corresponding to insurance policies provided for in the specifications and linked to the object of the contract, which have been taken out by the contractor and are in force at the time of suspension of the contract.

In addition, the right to damages shall only be granted when the main contractor provides evidence that:

- (i) both the principal contractor and the subcontractors, suppliers and providers were aware of the labour and social obligations on 14 March 2020, and
- (ii) that the main contractor was up to date with payments to its subcontractors and suppliers as provided for in Articles 216 and 217 of the LCSP, on 14 March 2020.

IV. Construction concession and service concession contracts

In public contracts for works concessions and service concessions in force at the time of entry into force of the regulation, the concessionaire, as appropriate in each case, shall be entitled to the economic rebalancing of the contract, provided that the contracting authority, at the request of the concessionaire, has established that it is

impossible to perform the contract. In addition, the contracting authority must provide clear evidence of the reality, effectiveness and amount of these expenses.

In any event, the rebalancing will compensate the concessionaire for the loss of revenue and the increase in costs incurred, including any additional salary expenses actually paid by the concessionaire compared to those foreseen in the ordinary execution of the works or service concession contract during the period of the de facto situation created by COVID-19.

The rebalancing can be done by:

- a) the extension of its initial duration by up to 15 per cent or
- b) the amendment of the clauses of economic content included in the contract.

V. Contracts in the water, energy, transport and postal services sectors

The regulation approved also applies to contracts in force at the entry into force of this Royal Decree-Law, entered into by public sector entities subject to Law 31/2007, of 30 October, on procurement procedures in the water, energy, transport and postal services sectors or Title I of Royal Decree-Law 3/2020, of 4 February.

VI. Exemptions

The suspension measures referred to in Sections I and II shall not apply to the following contracts:

- Contracts for health, pharmaceutical or other services or supplies, the subject matter of which is linked to the health crisis caused 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 those public entities that are listed on official markets and do not obtain income from the General State Budget (*Presupuestos Generales del Estado*).

Finally, it is specified that the indicated measures could be modified or altered by those others adopted by the Minister of Transport, Mobility and the Urban Agenda to guarantee the necessary services for the protection of persons, goods and places, which could imply a modification of the cases in which the suspension of contracts is applicable.

SUSPENSION OF ADMINISTRATIVE DEADLINES

Royal Decree 465/2020, of 17 March, amending Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis situation caused by COVID-19, modifies paragraph 4 of Additional Provision 3 and adds two new paragraphs 5 and 6, establishing the regime of suspension of administrative deadlines as follows:

- Suspension of terms and interruption of periods for the processing of procedures of public sector entities (as delimited by Law 39/2015, of 1 October), which will be resumed at the time that the rule loses force or, where appropriate, its extensions.
- Exceptions to the suspension of terms and interruption of deadlines referred to in the previous paragraph in the following cases:
 - o Measures of organization and instruction which are strictly necessary and which the competent body agrees to by means of a motivated resolution, in order to avoid serious damage to the rights and interests of the interested party in the proceedings, provided that the interested party agrees to these measures or that the time limit is not suspended.
 - o Procedures and decisions relating to situations closely connected with the facts justifying the state of alarm, or which are essential for the protection of the general interest or the basic functioning of the services.
 - o Administrative procedures in the areas of affiliation, settlement and Social Security contributions.
 - o Tax deadlines, subject to special regulations, and deadlines for filing tax returns and self-assessments.
 - o The deadlines set out in Royal Decree Law 8/2020, of 17 March, on urgent extraordinary measures to deal with the economic and social impact of COVID-19.

On the other hand, and taking into account that, with regard to the time limits for submitting tenders in tendering procedures for public sector contracts, some contracting entities have published some criteria that differ from general suspension and interruption, we recommend confirming with each contracting entity the criterion adopted.

Kind regards,

Department of Public Law

URGENT TAX MEASURES RESULTING FROM THE SITUATION CAUSED BY COVID-19

Following the declaration of the state of alarm for the management of the health crisis situation caused by COVID-19 by Royal Decree 463/2020, of 14 March, several measures have been approved in the area of taxation.

Deferrals for SMEs (*PYMEs*)

This measure was introduced shortly before the declaration of the state of alarm. Royal Decree-Law 7/2020, of 12 March (BOE 13-3-2020) establishes the possibility for SMEs (whether natural or legal persons) to request the deferral of state debts whose self-assessment deadline is between 14 March and 30 May 2020 and if the amount of all deferred tax debts does not exceed 30,000 Euros.

The deferral is a period of six months, the first three without interest.

It is important to note that the possibility of requesting this deferral is also extended to concepts that, in principle, cannot be deferred: withholdings, taxes levied and corporate income tax payments in instalments.

Suspension of tax deadlines

On the other hand, two provisions referring to the suspension of tax deadlines have been published in today's BOE of March 18: Royal Decree-Law 8/2020, of March 17, and Royal Decree 465/2020, of March 17.

In summary, the situation regarding the suspension of tax deadlines is as follows:

- The obligation to file and pay self-assessments (*autoliquidaciones tributarias*) (e.g. VAT Form 303, Withholding Tax Form 111, Foreign Income Tax Form 720, etc.) is not suspended.
- The deadlines for payment of deferrals and settlements received are suspended if the deadline for payment is 18 March or later. In these cases, the deadline for payment is extended to 30 April 2020.
- The deadlines for attending information requests, foreclosure proceedings (*diligencias de embargo*), actions related to auctions and awards of goods and presentation of claims (except in customs matters) for which the deadline had not expired on 18 March are also suspended. The deadline is extended to 30 April 2020.
- In the same way, guarantees on immovable property will not be enforced until 30 April 2020.
- The deadlines for filing tax settlements received, actions related to the auction processes, attending to requirements, seizure proceedings, opening of claims or hearings that are communicated as of 18 March 2020 will be extended until 20 May (or later if a general rule provides for a longer extension).
- If the interested party, despite the above, complies with the request or submits the claims within the initial period, the procedure is deemed to have been completed.
- The period from 18 March to 30 April 2020 shall not count for the purposes of determining the maximum duration of tax or prescription proceedings.
- For the purposes of prescription and appeals, the acts that put an end to proceedings and can be appealed in replacement and/or economic-administrative claims will be understood to have been notified when there has been an attempt to notification between 18 March and 30 April 2020. The period for appeal will not begin until the end of this period (30 April 2020) or later if the notification is made later.

Frequent Questions and Answers:

1. **What happens with declarations or self-assessments for which the deadline for submission is soon to expire (e.g. employment tax form 111, VAT forms 303 and 349, etc.)?** These declarations or self-assessments must be submitted within the initial period established by law. There has been no extension or suspension.
2. **What is the deadline for filing form 720 for the declaration of goods abroad?** As in the case of all other declarations and self-assessments, the deadline for filing has not been extended or suspended. The deadline is 31 March.
3. **What happens to tax deferral payments or tax settlements received that are due as of today (18 March)?** These payments are suspended and can be made until 30 April 2020.
4. **What happens with requests for information, foreclosure proceedings, claims procedures, the deadline for which is 18 March or later?** The deadline for dealing with such proceedings is extended to 30 April 2020, without the need to request any extension of the deadline.
5. **If I have received, before 18 March, the notification of a tax settlement or the resolution of an appeal for reconsideration, what is the deadline for appealing?** In these cases, the time limit for lodging an appeal remains unchanged, it being one month from its notification.
6. **If I have received, after 18 March, a tax settlement or a decision on an appeal for reconsideration, what is the deadline for appeal?** In such cases, the period for appealing shall not begin until 30 April or the date on which the notification was made, whichever is the later.
7. **If a tax procedure ends before 30 April and has lasted more than six months, can it be claimed to be a nullity by expiration?** No, if it has not lasted more than six months excluding the period between 18 March and 30 April.

We hope this information will be useful to you and we remind you that Roca Junyent is at your disposal to extend or clarify any question of your interest.

Kind regards,

Tax Department of Roca Junyent