Pérez-Llorca

Special Information Briefing COVID-19 (No. 7): Main questions on the practical application of the public procurement measures approved as a consequence of COVID-19 in Royal Decree Law 8/2020 of 17 March

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7. Emergency processing

Madrid, 21 March 2020

I. INTRODUCTION

On 30 January 2020, the World Health Organisation ("**WHO**"), following the advice of the Emergency Committee established under the International Health Regulations (2005), declared the current outbreak of COVID-19 to be a public health emergency of international concern. Furthermore, on 11 March 2020[1], the WHO stated that "*COVID-19 could be considered a pandemic*"[2].

As a consequence of this emergency situation caused by COVID-19, the Council of Ministers has approved a series of measures aimed at limiting the economic, social, labour and public health impacts derived from the spread of this disease. The Social Agents have also proposed a series of measures that will enable companies to implement flexible working solutions.

In this context, on 12 March 2020, the Council of Ministers passed, in an extraordinary session, Royal Decree Law 7/2020 of 12 March, by means of which urgent measures were introduced in order to mitigate the economic impact of COVID-19. The agreed measures can be divided into four groups:

(i) Support to the business sector.

(ii) Reinforcing the health system.

(iii) Efficient management of the Public Administrations.

(iv) Measures to support families.

Similarly, on 14 March 2020, the declaration of a state of alarm was published in the Official State Bulletin, following its approval by Royal Decree 463/2020 of 14 March, which declared the state of alarm for the management of the health crisis caused by COVID-19 (the "**RD 463/2020**"). This regulation includes the following measures[3]:

(i) Declaration of a state of alarm, which affects the entire national territory and which has a duration of 15 calendar days.

(ii) Limitation of the freedom of movement of persons.

(iii) Possibility of carrying out temporary confiscations and compulsory personal services.

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[1] https://www.who.int/ith/2019-nCoV_advice_for_international_traffic-rev/es/

[2] https://www.who.int/es/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020

[3] More information at: https://www.boe.es/boe/dias/2020/03/14/pdfs/BOE-A-2020-3692.pdf.

(iv) Containment measures in the field of education and training.

(v) Containment measures in the field of commercial activity, cultural amenities, recreational establishments and activities, hotel and restaurant activities and other additional activities.

(vi) Containment measures in relation to places of worship and civil and religious ceremonies.

(vii) Measures aimed at reinforcing the National Health System throughout the national territory.

(viii) Measures to ensure the provision of goods and services needed for the protection of public health.

(ix) Measures related to transport.

(x) Measures to ensure food supply.

(xi) Custom transit.

(xii) Guarantee of the supply of electricity, products derived from petroleum and natural gas.

(xiii) Public and private media.

(xiv) Suspension of procedural and administrative deadlines, as well as statute of limitations and expiration periods.

Non-compliance or reluctance to comply with instructions from the competent authority during the state of alarm may be sanctioned in accordance with the law, under the terms established in article 10 of Organic Law 4/1981 of 1 June, on states of alarm, exception and siege.

Both the impact that COVID-19 is having on the population and the aforementioned measures taken by the Administration are without doubt affecting many economic sectors of our country. For this reason, on 17 March, Royal Decree Law 8/2020, on urgent extraordinary measures to deal with the economic and social impact of COVID-19 (**"RD-L"**) was passed, which mainly includes the following measures[4]:

(i) Measures to support employees, families and vulnerable groups.

(ii) Measures to make temporary activity adjustment mechanisms more flexible in order to avoid dismissals.

[4] More information at: https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-3824.

(iii) Liquidity guarantee to support the economic activity in the face of transitory difficulties arising from the situation.

(iv) Measures to support COVID-19 research.

Among the measures to guarantee liquidity to sustain economic activity in the face of the transitory difficulties arising from the situation, article 34 includes certain public procurement measures to mitigate the consequences of COVID-19.

II. MAIN QUESTIONS

Chapter III of RD-L includes a section VI with a single article (34) that regulates the measures passed in the area of public procurement to mitigate the consequences of COVID-19. Thus, as announced in the Explanatory Memorandum of the regulation, this provision is aimed at establishing measures to avoid the negative effects on employment and business viability derived from the suspension of public contracts. In this regard, in order to avoid COVID-19 and the measures introduced by the different public administrations leading entities in the public sector to terminate contracts, a specific regime for the suspension and extension of contracts is foreseen.

Insofar as we understand that extensive case studies exist in this area, it is worth noting that the answers to the questions surrounding the aforementioned article that are suggested herein are of a general nature. For this reason, the answers provided in this briefing cannot in any way replace the individual analysis that must be carried out in each case. Additionally, since public law is governed by the principle of declarative self-governance, the resolutions passed by the Administration and the case law enacted by the courts in the review of the administrative decisions will define the final interpretation most suited to the law.

As will be seen below, the answers given to the questions raised in relation to public contracts in force at the time of COVID-19, are in line with the basic principles that rule contractual relations. Thus, with due regard for the specifically stated rules, the answers provided are in line with the general principles of objective good faith, balance of performance or prohibition of unjust enrichment, when an exceptional situation beyond the control of the parties interferes with the ordinary course of the contract.

Having clarified the above, we now set out below the general framework that provides answers to the main questions surrounding the implementation of this new regulation.

1. Scope of application

Does this regulation affect private contracts governed by the public procurement legislation?

Yes. This regulations affects (i) service and supply contracts for continuous and non-continuous provision, (ii) construction works contracts, and (iii) concession contracts for works and services entered into by any of the entities in the public sector, in the sense defined in article 3[5] of Law 9/2017, of 8 November, on Public Sector Contracts, which transposes into Spanish law the Directives of the European Parliament and of the Council 2014/23/EU and 2014/24/EU, of 26 February 2014 (**"Public Procurement Act"**), with the exceptions expressly provided for in the last section of article 34 RD-L[6].

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[5] "*1. For the purposes of this Law, the following entities are considered to be part of the public sector:*
- *a) The General State Administration, the Administrations of the Autonomous Communities, the Autonomous Cities of Ceuta and Melilla and the Entities that make up the Local Administration.*
- *b) The Management Entities and the Common Services of Social Security.*
- *c) Autonomous Bodies, Public Universities and independent administrative authorities.*
- *d) Consortiums with their own legal personality referred to in Law 40/2015, of 1 October, on the Legal System of the Public Sector, and local legislation, as well as consortiums regulated by customs legislation.*
- *e) Public foundations. For the purposes of this Law, public foundations are understood to be those that meet any of the following requirements:*
  - *1. That they are initially established with a majority direct or indirect contribution from one or more entities in the public sector, or that they receive such contribution after they are established.*
  - *2. That the assets of the foundation consist of more than 50 per cent of goods or rights contributed or assigned by subjects belonging to the public sector on a permanent basis.*
  - *3. That the majority of voting rights in its board of trustees correspond to representatives of the public sector.*
- *f) Mutual companies that collaborate with the Social Security Authorities.*
- *g) The Public Business Entities referred to in Law 40/2015, of 1 October, on the Legal System of the Public Sector, and any public law entities with their own legal personality linked to a subject that belongs to the public sector or is dependent on it.*
- *h) Commercial companies for which greater than 50 per cent of the share capital is held directly or indirectly by entities mentioned in letters a), b), c), d), e), g) and h) of this section, or in cases in which, without exceeding this percentage, it is in respect of the aforementioned entities in the case provided for in article 5 of the revised text of the Securities Market Law, approved by Royal Legislative Decree 4/2015, of 23 October.*
- *i) Funds without legal personality.*
- *j) Any entities with their own legal personality, which have been created specifically to meet needs of general interest that are not of an industrial or commercial nature, provided that one or more subjects belonging to the public sector finance the majority of their activity, control their management or appoint more than half of the members of their administrative, management or supervisory body.*
- *k) Associations formed by the entities mentioned in the preceding paragraphs.*
- *l) For the purposes of this Law, the Provincial Councils and the General Meetings of the Historical Territories of the Basque Country are also considered to be part of the public sector as far as their procurement activity is concerned.*"

[6] The following contracts are exempt from the application of sections 1 and 2 of article 34 RD-L:
- a) Contracts for health, pharmaceutical or other services or supplies whose purpose is linked to the health crisis caused by COVID-19.
- b) Contracts for security services, cleaning or maintenance of computer systems.
- c) Contracts for services or supplies that are necessary to guarantee the mobility and safety of infrastructures and transport services.

The foregoing implies that this regulation not only covers administrative contracts, but also private contracts performed by (i) public sector entities that, being a contracting authority, do not meet the conditions to be considered public administrations, and (ii) public sector entities that do not meet the conditions to be considered either administrations or contracting authorities.

In addition, section 5 of article 34 establishes that the stipulations thereof shall also apply to contracts entered into by public sector entities subject to (i) Law 31/2007, of 30 October, on procurement procedures in the water, energy, transport and postal services sectors or (ii) Book I of Royal Decree Law 3/2020, of 4 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.

Are there any exceptions to the scope of application?

Yes. Section 6 of article 34 establishes that sections 1 (suspension of service and supply contracts for non-continuous provision) and 2 (extension of service and supply contracts for non-continuous provision) of article 34 RD-L do not apply to:

(i) Contracts for health, pharmaceutical or other services or supplies whose purpose is linked to the health crisis caused by COVID-19. Therefore, only those linked to the situation caused by COVID-19 should be considered to be affected by the exception.

(ii) Contracts for security services, cleaning or maintenance of computer systems.

(iii) Contracts for services or supplies that are necessary to guarantee the mobility and safety of infrastructures and transport services. In this regard, the measures approved by RD 463/2020 concerning the provision of certain transport services should be taken into account.

(iv) Contracts awarded by public entities that are listed on official markets and that do not obtain their income from the General State Budget. This section only applies to contracts awarded by Aena SME, S.A., given that it is the only public entity listed on the stock exchange and that does not receive income from the General State Budget.

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d) Contracts awarded by public entities that are listed on official markets and that do not obtain their income from the General State Budget.

Does the exclusion referred to in article 34.6 RD-L mean that contractors whose contracts cannot be suspended or extended lack the right to be compensated for loss and damage derived from the situation caused by COVID-19?

No. As we have seen, article 34.6 RD-L excludes the application of sections 1 and 2 of RD-L to certain contracts. However, the foregoing does not mean that, in those cases where contractors who have to continue to perform their contracts see their costs increase as a consequence of the situation caused by COVID-19, contractors cannot claim this increase in costs by way of a contractual claim for damages before the contracting authority.

In this regard, it can be concluded that the spirit of section 6 is to avoid the suspension of contracts that are considered essential in the context of the COVID-19 crisis, and not to eliminate the possibility of contractors being subsequently compensated for the increased costs caused by this exceptional situation, which is beyond the control of all parties.

It seems difficult to argue that, on the one hand, certain contracts can be suspended and the contractors compensated for the loss and damage caused and, on the other hand, that the same right to compensation not be granted to those contractors who were obliged to continue performing the contract with all the consequences, because they are holders of contracts considered essential or strategic.

Does this regulation affect collaboration agreements signed with public sector entities?

No. As previously stated, RD-L specifically affects contracts that have been entered into by any of the entities in the public sector, but it does not apply to collaboration agreements, which are of a different legal nature.

Another issue is that, as has occurred historically, there are true contracts in the framework of legal transactions that have been called or classified as collaboration agreements. In this case, the RD-L would apply to such collaboration agreements, since, as our Supreme Court has repeatedly stated, "*it must not be the name that the intervening parties give to the business that is the subject of the dispute that determines the legal regime that must regulate it, but its real nature*"[7].

2. Is COVID-19 a force majeure event?

The RD-L, as part of the regulation of measures relating to employment, establishes that contract suspensions and reductions in the working day that were caused directly by the losses of activity as a result of COVID-19, including the declaration of the state of alarm, that lead to the suspension or cancellation of activities, the temporary closure of public places, restrictions on public transport and, in general, on the mobility of people and/or goods, lack of supplies that severely

[7] For all, Judgment of the Administrative Chamber of the Supreme Court of 8 June 2012 [ECLI: ES:TS:2012:4313].

prevent continuing the ordinary development of the activity, or in urgent and extraordinary situations due to staff infection or to the adoption of preventive isolation measures ordered by the health authority, which are duly accredited, will be considered to be the result of a force majeure event[8] (with the consequences included in article 47 of the Consolidated text of the Workers' Statute Law).

Notwithstanding the above, it is also true that the existence of force majeure, as a basis for suspending contracts or reducing the working day, must be established by the labour authority, regardless of the number of workers affected[9].

The cases of force majeure set out in the public procurement regulations (which are practically the same in all the previous public procurement regulations[10]) do not expressly include epidemics or health crises, but rather the following situations:

(i) Fires caused by atmospheric electricity.

(ii) Natural phenomena with catastrophic effects, such as tidal waves, earthquakes, volcanic eruptions, ground movements, sea storms, floods and other similar events.

(iii) Loss and damage caused by violence in times of war, tumultuous robberies or serious disturbances of public order.

In this context, it could be doubted whether the COVID-19 crisis is a force majeure event for the purpose of public procurement legislation.

For the purposes of assessing whether to include the situation derived from COVID-19 as a force majeure event, the following circumstances may be taken into consideration:

(i) RD-L declares that the consequences of COVID-19 can be considered to be a force majeure event. Additionally, article 34, section 3 of the RD-L expressly excludes the application of article 239 of the Public Procurement Act (*force majeure*), so the situation caused by COVID-19 could be considered to be a force majeure event, but the effects foreseen in the Public Procurement Act have been expressly excluded.

(ii) Public procurement regulations does not include epidemics or health crises as cases of force majeure, as is the case in other regulations[11].

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[8] Section 1 of article 22 (Exceptional measures in connection with procedures for the suspension of contracts and reduction of the working day on grounds of force majeure).This is also referred to in article 24.

[9] Section 2 (b) of article 22 of the RD-L.

[10] Article 144 of Royal Legislative Decree 2/2000, of 16 June, which approves the revised text of the Public Administration Contracts Law, article 214 of Law 30/2007, of 30 October, on Public Sector Contracts, article 231 of Royal Legislative Decree 3/2011, of 14 November, which approves the revised text of the Public Sector Contracts Law and article 239 of the Public Procurement Act.

[11] Article 4 of Organic Law 4/1981 of 1 June on states of alarm, exception and siege.

(iii) To date, there is no case law to support epidemics or health crises being considered as force majeure events in the field of public procurement.

(iv) Nevertheless, some case law does indicate that, although the classification of force majeure will depend on how the circumstances evolve and the effects reflected in each contract, there may be natural phenomena with catastrophic effects that are not expressly foreseen in the rule but that are also considered situations of force majeure[12]. This is in accordance with the provisions of article 239 (2) (b) of the Public Procurement Act[13].

In line with the foregoing, even though the classification of force majeure depends on how the circumstances evolve and the effects reflected in each contract, in principle it could be argued that this is a case of force majeure because the effects and consequences of this health crisis are even more serious than those produced as a consequence of other phenomena that are listed as force majeure events in the different public procurement regulations. This is mainly evidenced by three facts:

(i) The high number of infections and fatalities.

(ii) The declaration of a global pandemic by the WHO.

(iii) The declaration of the state of alarm and strong restrictive measures approved by the Administration.

3. Service and supply contracts for continuous provision

When is it understood that performance of a contract has become impossible?

The first section of article 34 establishes that service and supply contracts for continuous provision whose performance becomes impossible as a consequence of COVID-19, or the measures implemented by the public administration to fight it, will automatically be suspended from the beginning of the factual situation that prevents performance and until performance can be continued (the contracting body will notify the contractor of the end of the suspension).

The RD-L does not offer any details on what should be understood by "*impossibility of performing the contract*". As an interpretative criterion, it seems logical to turn to the public procurement regulation. Thus, two articles of Royal Legislative Decree 3/2011, of 14 November, approving the

[12] Judgment of the Administrative Chamber of the Supreme Court of January 28, 2015 [ECLI:ES:TS:2015:956].

[13] "2. *The following shall be considered as cases of force majeure:*
a) Fires caused by atmospheric electricity.
b) Natural phenomena with catastrophic effects, such as tidal waves, earthquakes, volcanic eruptions, land movements, sea storms, floods or other similar events.
c) Damage caused by violence in time of war, tumultuous robbery or serious disturbance of public order."

revised text of the Public Sector Contracts Law ("**TRLCSP**") (which were also included in the previous public procurement regulations and in the Public Procurement Act) should be highlighted, which refer to the impossibility of performing the contract:

(i) Article 211 (1) (g) of the TRLCSP: "*The impossibility of performing the provision on the initially agreed terms, when it is not possible to modify the contract*". This article is applicable to all the contracts subject to the TRLCSP.

(ii) Article 279, section e) of the TRLCSP: "*The impossibility of exploiting the works as a consequence of the agreements entered into by the granting Administration after the contract*".

By analysing how case law has interpreted these articles, we can reach a better understanding of what is meant by "*impossibility of performance*" of a contract and, thus, know, in application of RD-L, the cases in which this situation could be invoked. In this regard, from an analysis of the case law, the following considerations can be made.

Firstly, in terms of the application of these provisions, there are two main types of impossibility:

(i) Material or technical impossibility: It consists of a factual situation (normally attributable to the Administration) that technically[14] or materially[15] prevents performance of the contract.

(ii) Legal or judicial impossibility: This is an action by the Administration, an administrative act or the existence of a general provision, which prevents performance of the contract[16].

Similarly, in order for the factual or legal situation to be considered "impossible", case law requires:

(i) In objective and unambiguous judicial terms, the deprivation of the service, and that it is impossible in a broad contractual sense (and not only in terms of the economic and material perception that the contractor has of its ability to provide the service in the conditions under which the contractor is paid)[17].

(ii) Such impossibility of performing the contract to be related to the cause and purpose of the contract[18].

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[14] Judgment of the Administrative Chamber of the National Court of 23 July 2019 [ECLI: ES:AN:2019:3366].

[15] Judgment of the Administrative Chamber of the Galician High Court of Justice of 7 June 2018 [ECLI: ES:TSJGAL:2018:3893].

[16] Judgment of the Administrative Chamber of the Castilla La Mancha High Court of Justice of 23 April 2018 [ECLI: ES:TSJCLM:2018:1149].

[17] Judgment of 27 January 2014 of the Administrative Chamber of the High Court of the Basque Country [ECLI: ES:TSJPV:2014:353].

[18] Judgment of 11 November 2016 of the Administrative Chamber of the Castilla y León High Court of Justice [ECLI: ES:TSJCL:2016:4083].

In addition, from the analysis of the case law, it can be interpreted that when the impossibility of performing a contract is ascertained, it is not a total, unsurmountable and *sine die* impossibility, but rather an impossibility (as expressly established in article 211 (1) (g) TRLCSP) of performing the contract in the "*initially agreed*" terms. This is the case for which we understand that the suspension of the contract can be requested in application of article 34.1 RD-L. Several examples of this case are the following:

(i) Impossibility of performing a contract for cafeteria services at a public university if the Administration has ordered the closure of the establishment.

(ii) Impossibility of performing a contract for touristic promotion services through means of transport, if the Administration suspends or limits that transport activity due to the closure of land and/or air communications.

(iii) Impossibility of supplying office material to a Ministry if its facilities have been closed in compliance with a general provision.

Is the suspension of the contract automatic in this case? Should I request it?

As we have seen, the first section of article 34 establishes that public service and supply contracts for continuous provision whose performance becomes impossible "*shall be automatically suspended*". Nevertheless, the third paragraph of this section states that the suspension will only apply when the contracting body, at the contractor's request and within a period of five calendar days, has assessed the impossibility of performing the contract as a consequence of the situation described in its first paragraph.

It is worth noting that the provision for contracts to be "*automatically suspended*" is expressly included for these service and supply contracts for continuous provision and it is not, however, included in the regulation contained in public works contracts, which only establishes that the contractor will be able to request suspension and that the contracting body will decide whether or not the situation of "*impossibility of performance*" exists.

In this regard, it can be seen that the recognition of the situation of suspension is automatic *ex lege* and there is no need for it to be recognised by the Administration in the event of legal or material impossibility.

Taking into account the foregoing, we recommend requesting the suspension of the contract whenever there are enough reasons to consider that suspension of the contract is justified. Thus, in accordance with the considerations previously made as regards the impossibility of performing the contract, we understand that the suspension of the contract can be requested in two cases:

(i) Cases of material or legal impossibility, in which we understand that a suspension occurs *ex lege* or by operation of law. For instance, if the Administration has approved the closure

of the establishment in which a specific service was being provided, or if it has directly approved the suspension of the service that is the subject of the contract.

(ii) Cases of impossibility that may be subject to evaluation by the Administration. This would occur, for instance, if, in the opinion of the company's in-house Health and Safety Director, the purpose of the contract could not be fulfilled because the health and safety of the workers could not be guaranteed.

When shall I submit the request for suspension?

There is no specific deadline for the contractor to submit a request for suspension. We recommend that suspensions are requested as soon as the detailed explanation and documentary justification are available, which, as far as possible, will allow you to submit a consistent request for suspension in accordance with the above.

Which issues should I include in the request for suspension?

When the conditions for requesting the suspension of the contract are met, the contractor must submit the request for suspension to the contracting authority, stating (i) the reasons why performance of the contract has become impossible, (ii) the personnel, premises, vehicles, machinery, facilities and equipment assigned to the performance of the contract at that time, and (iii) the reasons why it is impossible for the contractor to use the means referred to in another contract. The Administration reserves the right to subsequently verify the veracity of these issues.

The provision does not require evidence of the aforementioned issues. However, in order to facilitate the work of the Administration, it is possible to prepare a request in which all the above requirements are explained in detail and substantiated by documentation, detailing, as far as possible:

(i) the reasons why performance of the contract has become impossible (e.g. because they are directly affected by RD 463/2020, because the service or supply cannot be provided with guarantees of compliance with the workers' health and safety recommendations, because the workers are in quarantine, etc.);

(ii) the personnel, premises, vehicles, machinery, facilities and equipment assigned to the performance of the contract at that time, documenting, if possible, this fact; and

(iii) the reasons preventing the contractor from using the means mentioned in another contract, explaining, if possible, the other service and supply contracts that the company has been granted and the situation of each one.

What can I do if the Administration does not respond within five calendar days or if the request is rejected?

Once the request for suspension has been submitted, it should be understood to have been rejected (i) if the contractor is served with an express rejection decision, or (ii) if the contractor has not been served with an express decision within five calendar days.

In both cases, the contractor should in principle continue to provide the services or supplies. However, provided that there is sufficient justification of the imminent need to suspend the contract due to the impossibility of continuing its performance, the contractor may appeal the decision of the Administration in court (whether it be express or by administrative silence), as well as request, without hearing the other party, an interim measure to suspend the contract, and also request, alternatively, the ordinary processing of the interim measure[19].

Which loss and damage is eligible for compensation?

Where a request for suspension is expressly granted, the contracting authority must compensate the contractor for the loss and damage actually suffered by the contractor during the period of suspension, following the request and reliable evidence of its existence, effectiveness and amount by the contractor. Only the following loss and damage can be claimed:

(i) The salary expenses[20] actually paid by the contractor during the period of suspension to the staff assigned to the normal performance of the contract on 14 March 2020.

To this end, it will be necessary to provide workers' payslips evidencing that that these workers were assigned to the contract in question before 14 March and that they will remain assigned when the contract is resumed. If the payslips do not show the assignment of the employees to the service, work slips signed by the contracting authority or, as a last resort, affidavits from the employees and the relevant human resources departments justifying the assignment must be provided.

(ii) The expenses for the maintenance of the definitive guarantee, relating to the period of suspension of the contract.

To this end, it will be necessary to prove the financial costs incurred as a result of maintaining the definitive guarantee. If necessary, proof of payment can be requested from the relevant bank or insurance company.

[19] The processing of interim measures, without hearing the other party, is one of the judicial proceedings that has not been suspended due to the enforcement of RD 463/2020.

[20] Those actually paid to the employee. Costs associated with social security contributions are excluded.

(iii) Expenditure on rent or maintenance expenses for machinery, facilities and equipment directly allocated to the performance of the contract and relating to the period of suspension of the contract, provided that the contractor proves that these resources could not be used for other purposes during the suspension of the contract.

To this end, it will be necessary (a) to provide, where possible, the rental or maintenance contracts for machinery, facilities and equipment; and (b) to explain, if possible, the other works contracts that the company has been granted and the situation of each one, to rule out that they could have been used for other purposes.

(iv) The expenses related to the insurance policies provided for in the particular bid specifications and connected with the purpose of the contract, which have been taken out by the contractor and which are in force at the time of the suspension of the contract.

This is a *numerus clausus* list of reimbursable expenses, so no expenses other than those listed above may be claimed.

Which period is eligible for compensation?

The effective period of suspension, i.e. from the moment performance of the contract became impossible until the contract is resumed by order of the contracting authority.

What is the time limit for submitting claims?

Article 34.3 of the RD-L does not establish a specific time limit for those contractors entitled to compensation for the suspension referred to in said article to request the corresponding compensation for loss and damage. However, for those contracts governed by the Public Procurement Act, given that the RD-L does not exclude the application of article 208 (2) (c) of the Public Procurement Act, the right to claim is subject to a statute of limitations of one year from the moment the contractor receives the order to resume performance of the contract. It is understood that this order to resume performance will occur once the state of alarm ceases, and that will be the most appropriate moment to submit the claim. In any case, if a partial claim is to be submitted during the state of alarm, it should be taken into consideration that statutes of limitations are currently suspended[21].

For all other contracts to which, for temporary reasons, the previous public procurement regulations apply, it is understood that their right to request compensation for loss and damage expires after four years from the completion of the contract, in accordance with the provisions of the General Budgetary Law[22].

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[21] Fourth additional provision (suspension of statute of limitations and expiration periods) of Royal Decree 463/2020, of 14 March, which declares the state of alarm for the management of the health crisis caused by COVID-19.

[22] Case law of the Supreme Court, in the aforementioned judgment of 31/01/03 and in that of 09/09/2009.

On the other hand, for contracts governed by private law as regards their effects and termination, the statute of limitations for claiming damages will be five years from the date on which compliance with the obligation can be required[23].

Can the contracting authority extend a successive service or supply contract if, on expiry of one of the existing contracts, the new contract guaranteeing continuity of performance has not been and cannot be signed?

Yes. The RD 463/2020 has resolved to suspend all contracting procedures, so if, on expiry of any of the existing contracts, the new contract guaranteeing the continuity of the service has not been and cannot be signed, the original contract may be extended until the start of performance of the new contract for a maximum period of nine months, without modifying the other conditions of the contract[24], regardless of the date of publication of the invitation to tender for this new contract.

4. Service and supply contracts for non-continuous provision

Can I request the suspension of the contract?

The suspension of public service and supply contracts for non-continuous provision is not expressly provided for in section 2 of article 34 RD-L. On the contrary, this provision only provides that extensions can be requested for contracts of this type when the purpose has not been frustrated as a result of the factual situation created by COVID-19 and when the contractor is late in meeting the deadlines set out in the contract as a result of COVID-19 or the measures taken by the various public authorities to combat it.

We consider that, for this type of contract, where performance is not successive, the extension of the service or supply is best suited to the situation caused by COVID-19. In this way, unless there is a specific need to suspend the contract in a particular case, the contractor should request an extension of the contract.

In the event that the need to suspend the contract arises, we should resort, in the case of public contracts, to the general regulation on suspension included in article 208 of the Public Procurement Act (or the regulation on suspension of the public procurement regulation that is applicable) or, in the case of contracts governed by private law, to the provisions on suspension included in the contractual documentation, and if appropriate, in the rules applicable to the contract[25].

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[23] Article 1964 (2) of the Spanish Civil Code. For the purposes of calculating the statute of limitations, the transitional regime introduced by the fifth transitional provision of Law 42/2015 of 5 October amending Law 1/2000 of 7 January on Civil Procedure shall be taken into account.

[24] Article 29 (4) of the Public Procurement Act.

[25] For claims under contracts governed by private law, please refer to Special Information Briefing COVID-19 (No. 6) (The legal consequences of possible breaches of contract due to COVID-19)

In this case, is the extension mandatory for the contractor authority?

Yes, in the case described, the contracting authority will agree to the extension, following a report from the "*Contract Works Director*" which determines that the delay is not attributable to the contractor but to one of the above circumstances.

We understand that the reference to the Contract Works Director is an error since this section regulates service and supply contracts. It should therefore read "*following a report from the person responsible for the contract*".

Can penalties be imposed on the contractor as a result of this delay, and could the contract be terminated?

No. Article 34.2 of the RD-L expressly states that, in these cases, no penalties will be imposed on the contractor, and the contract will not be terminated.

What will the duration of the extension be?

The extension will cover at least the time lost due to the aforementioned reason, unless the contractor requests a shorter extension.

Which loss and damage will be compensated?

Following the request and with reliable evidence of its reality, effectiveness and amount, the contractor will be entitled only to the payment of additional salary expenses[26] effectively incurred as a result of the time lost due to COVID-19, up to a maximum limit of 10 per cent of the initial contract price.

5. Works contracts

What is meant by "impossibility of continuing the performance of the contract"?

The RD-L does not provide any details of what should be understood as "*impossibility of performance of the contract"*. As an interpretative criterion, it seems logical to turn to the regulation of public procurement. Thus, it is worth highlighting two articles of the TRLCSP (which were also included in the previous public procurement regulations and in the Public Procurement Act) that refer to the impossibility of performing the contract:

(i) Article 211 (1)(g) of the TRLCSP: "*The impossibility of performing the service according to the terms originally agreed, when it is not possible to amend the contract*". This article applies to all contracts subject to the TRLSCP.

[26] Those actually paid to the employee. Costs associated with social security contributions are excluded.

(ii) Article 279, section e), of the TRLSCP: "*The impossibility of carrying out the works as a result of agreements adopted by the granting authority after the contract*". This article is applicable to concession contracts.

Thus, by analysing how the case law has interpreted these provisions, we will be able to reach a better understanding of what is considered to be the "*impossibility of performance*" of a contract and, thus, know, in application of the RD-L, in which cases this assumption could be invoked. In this regard, from an analysis of the case law, the following conclusions can be reached.

Firstly, in applying these provisions, there are two main types of impossibility:

(i) Material or technical impossibility: It is a factual situation (usually attributable to the Administration) that technically[27] or materially[28] prevents the performance of the contract.

(ii) Legal or judicial impossibility: It is an act of the Administration, an administrative act or the existence of a general provision, which prevents the performance of the contract[29].

Similarly, in order for the factual or legal situation to be considered "*impossible*", the case law requires:

(i) In objective and unambiguous legal terms, the deprivation of the provision of the service, must be prevented in a broad contractual sense (and not only in relation to the contractor's economic and material perception of his/her ability to provide the service under the conditions under which it is paid) [30].

(ii) Such impossibility to perform the contract must be related to the subject matter and object of the contract [31].

Similarly, from the analysis of the case law, it can be understood that when the impossibility of performing a contract is established, it is not a total, insurmountable and *sine die* impossibility, but rather an impossibility (as article 211 (1) (g) of the TRLCSP expressly establishes) of performing the contract in the terms "*initially agreed*". In this regard, we consider that the RD-L seeks to differentiate two assumptions:

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[27] Judgment of the Contentious-Administrative Chamber of the National Court of 23 July 2019 [ECLI: ES:AN:2019:3366].

[28] Judgment of the Administrative Chamber of the Galician High Court of Justice of 7 June 2018 [ECLI: ES:TSJGAL:2018:3893].

[29] Judgment of the Administrative Chamber of the Castile-La Mancha High Court of Justice of 23 April 2018 [ECLI: ES:TSJCLM:2018:1149].

[30] Judgment of 27 January 2014 of the Administrative Chamber of the High Court of Justice of the Basque Country [ECLI: ES:TSJPV:2014:353].

[31] Judgment of 11 November 2016 of the Administrative Chamber of the High Court of Justice of Castile and Leon [ECLI: ES:TSJCL:2016:4083].

(i) The assumption that the contract has "*been frustrated as a result of the factual situation caused by COVID-19*"[32]. This scenario refers to a total, insurmountable and *sine die* impossibility, but its consequences have not been expressly regulated by the RD-L.

For instance, a contract that must be definitively terminated by agreement of the Administration because there are no budgetary funds to deal with that investment after the COVID-19 crisis. In this case, the contract has clearly been frustrated.

(ii) The assumption that there is an "*impossibility of performance of the contract*" in the terms originally agreed. In this case we understand that the suspension of the contract can be requested in accordance with the RD-L. Some examples of this scenario are as follows:

- The impossibility of performing a works contract because the Administration has ordered the closure of all infrastructure projects under construction.

- The impossibility of performing the contract because the health and safety of the employees assigned to the works cannot be guaranteed. The threat to their health and safety must be adequately justified.

Is the suspension of the contract automatic in this case? Should I request it?

In the case of works contracts where it is impossible to continue the performance of the contract due to these circumstances, it is the contractor who may request a suspension and the contracting authority has a certain margin of discretion to decide whether to grant the suspension or, on the contrary, to continue the work.

In view of the above, it is possible to request suspension provided that there are sufficient grounds for considering the suspension of the contract justified.

Can I request the suspension of the contract if the expected date of completion of the work, according to the "work development program or work plan", is not between 14 March, the start date of the state of alarm, and during the period of the state of alarm, or if the factual situation caused by COVID-19 does not prevent the delivery of the work during that period?

Given the literal wording of the first and fourth subsections of article 34.3 of the RD-L, it seems that the suspension of works contracts under this article will only be possible when each and every one of the following requirements are met:

(i) when their purpose has not been frustrated as a result of the situation described above;

(ii) when, due to COVID-19, it is impossible to continue with the performance of the contract;

[32] Sections 2 and 3 of article 34.

(iii) when the work is scheduled to be completed, in accordance with the "work development program or work plan", between 14 March, the start date of the state of the alarm, and for the duration of the state of alarm; and

(iv) when the delivery of the works cannot take place as a result of the factual situation caused by COVID-19 or the measures taken by the State.

Compliance with the last two requirements greatly limits the number of contracts to which the suspension of the contract provided for in this article will be applicable, given that it is likely that the vast majority of contracts affected by the COVID-19 emergency and whose performance has become impossible, are not expected to be completed in the coming days or weeks, or that the factual situation caused will not prevent the delivery of the works within that period.

In our opinion, situations such as those described, in which it is legally or materially appropriate to suspend the contract, cannot be left unregulated or without due compensation for the damage incurred[33].

In this context, we understand that whenever it is justified that the situation caused by COVID-19 does not legally or materially allow the performance of the works, the suspension may be requested.

Therefore, in the event that the contracting authority considers that the suspension of the contract is not appropriate under this article, either because the completion of the contract is not anticipated during the period of the state of alarm, or because this situation does not prevent the delivery of the works in the aforementioned period, the suspension of the contract may be requested under the provisions of article 208 of the Public Procurement Act, which functions in a subsidiary capacity. It is true that article 34.3 of the RD-L expressly excludes the application of articles 208 (suspension) and 239 (force majeure) of the Public Procurement Act, as well as articles 220 (suspension) and 231 (force majeure) of the TRLCSP. However, this exclusion must be understood to refer only to those works that fit the factual situation governed by article 34, not to those other cases that the contracting authority excludes from the application of that provision on the grounds that not all the requirements are met. Therefore, the ordinary rules on public procurement must continue to be applied to the latter.

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[33] In this regard, article 239 of the Public Procurement Act states that "*In cases of force majeure and provided that there is no reckless action by the contractor, the latter shall be entitled to compensation for loss and damage, which may have been incurred in the performance of the contract*". It could be argued that in the present case we are dealing with a case of force majeure, in addition to the fact that it is recognised in the RD-L itself in the regulation of employment measures, because the effects and consequences of this health crisis are even more serious than those that occur as a result of other events that are listed as causes of force majeure in the different public contracting regulations.
Similarly, article 208 (2) of the Public Procurement Act establishes that "*Once the suspension has been agreed, the Administration will pay the contractor for the loss and damage actually suffered by the latter (...)*".

Taking the above into consideration, in the event that it is genuinely legally or materially impossible to continue with the performance of the contract, even though the end date of the contract is not anticipated during the period of the state of alarm, or the situation does not prevent the delivery of the work during that period, a letter can be sent to the contracting authority requesting the suspension of the works with the following content:

(i) A principal claim consisting of the suspension of the works under article 34.3 of the RD-L.

It should be explained, in addition to the other requirements set out in said article[34], that the specific case of legal or material impossibility of performing the works shall also be understood as included in article 34.3 of the RD-L, given the purpose and spirit of the rule. Notwithstanding the fact that the date of completion of the contract is not anticipated during the period of the state of alarm or the situation does not prevent the delivery of the work in this period.

(ii) In the event that the contracting authority considers that the contract should not be suspended, either because the end date of the contract is not anticipated during the period of the state of alarm, or because the situation does not prevent the delivery of the works during that period, a subsidiary claim consisting of:

(a) In the case of public contracts, the suspension of works under article 208 of the Public Procurement Act[35];

(b) In the case of private contracts, the suspension of the contract on the basis of the provisions of the contractual documentation and the rules of private law applicable to such contracts.

In this subsidiary claim we recommend covering the same issues set out in article 34.3 of the RD-L[36].

When should I submit the request for suspension?

The provision does not indicate a specific deadline for the contractor to submit the request for suspension. We recommend that it be requested as soon as the detailed explanation and documentary justification are available, which, as far as possible, will allow a comprehensive request for suspension to be assessed.

What issues should I include in the request for suspension?

When the conditions for requesting the suspension of the contract are met, the contractor shall make the request for suspension to the contracting authority, stating (i) the reasons why the

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34 See question: *What issues should I include in the request for suspension?*
35 Or the equivalent provision of the applicable procurement standard *ratione temporis*.
36 See question: *What issues should I include in the request for suspension?*

performance of the contract has become impossible, (ii) the personnel, premises, vehicles, machinery, facilities and equipment assigned to the performance of the contract at that time, and (iii) the reasons why it is impossible for the contractor to use the means referred to in another contract. The Administration reserves the right to subsequently verify the veracity of these issues.

The provision does not require evidence of the aforementioned issues. However, in order to facilitate the work of the Administration, it is possible to prepare a request in which all of the above requirements are explained in detail and substantiated by documentation, detailing, as far as possible:

(i) the reasons why the performance of the contract has become impossible (for example, because they are directly affected by RD 463/2020, because the service or supply cannot be provided with guarantees of compliance with the workers' health and safety recommendations, because the workers are in quarantine, because the supply of essential materials for performing the works has been suspended etc.);

(ii) the personnel, premises, vehicles, machinery, facilities and equipment assigned to the performance of the contract at that time, documenting, if possible, this fact; and

(iii) the reasons preventing the contractor from using the means mentioned in another contract, explaining, if possible, the other services and supplies contracts that the company has been awarded and the status of each one.

In order to increase the likelihood of success of this request, we recommend that, whenever possible, positions be aligned with the agents involved in the work (works director, quality control bodies, health and safety coordinators, inspectors, etc.). If possible, communications should be provided in which said agents propose the suspension.

What can I do if the Administration does not respond within five calendar days or the request is rejected?

Once the request for suspension has been submitted, it should be understood said request has been rejected (i) if the contractor is served with an express rejection decision, or (ii) if the contractor has not been served with an express decision within five calendar days.

In both cases, the contractor should continue to carry out the works. However, provided that there is sufficient justification for the imminent need to suspend the contract due to the impossibility of continuing its performance, the contractor may appeal the decision of the Administration (whether express or by administrative silence) in court, together with an *ex parte* request, , for an interim measure to suspend the contract, also requesting, in the alternative, the ordinary processing of the interim measure.

Which loss and damage is eligible for compensation?

Once the suspension is granted, only the following items will be eligible for compensation:

(i) The salary expenses actually paid by the contractor to the staff assigned to the ordinary performance of the contract, during the period of suspension.

To this end, it will be necessary to provide workers' payslips demonstrating that these workers were assigned to the works in question before 14 March and that they will remain assigned when the works are resumed. If the payslips do not show the assignment of the employees to the works, work slips signed by the contracting authority or, as a last resort, affidavits from the employees and the relevant human resources departments supporting the assignment must be provided.

Furthermore, it is specified that the salary expenses to be paid, in accordance with the VI General Collective Agreement for the Construction Sector 2017-2021, published on 26 September 2017, or equivalent agreements agreed in other areas of collective bargaining, will be the basic salary referred to in article 47 (2) (a) of the collective agreement for the construction sector, the disability supplement in article 47 (2) (b) of the aforementioned agreement, and the extraordinary payments in article 47 (2) (b), and the vacation pay, or their respective equivalent items agreed in other collective agreements for the construction sector.

(ii) The maintenance expenses of the definitive guarantee, relating to the period of suspension of the contract.

To this end, it will be necessary to vouch the financial costs incurred as a result of maintaining the definitive guarantee. If necessary, proof of payment can be requested from the relevant bank.

(iii) Expenditure on rent or maintenance expenses for machinery, facilities and equipment, provided that the contractor proves that these means could not be used for other purposes during the suspension of the contract and the amount is less than the cost of terminating such contracts for the rental or maintenance of machinery, facilities and equipment.

To this end, it will be necessary (a) to provide, where possible, the rental or maintenance contracts for machinery, facilities and equipment; and (b) to explain, if possible, the rest of the works contracts that the company has been awarded and the situation of each one to exclude the possibility that they could have been used for other purposes.

(iv) The expenses related to the insurance policies provided for in the tender document and connected with the object of the contract, which have been entered into by the contractor and are in force at the time of the suspension of the contract.

For this purpose, it will be necessary to provide the insurance policy contract and proof of payment of the same for the duration of the suspension.

This is a *numerus clausus* list of reimbursable expenses, so no expenses other than the above may be claimed, if the request is considered under article 34 of the RD-L.

Which period is eligible for compensation?

The effective period of suspension, i.e. from the moment the performance of the contract became impossible until the contract is resumed by order of the contracting authority.

Are there any additional requirements for compensation for loss and damage?

Yes, in addition to the above, recognition of the right to compensation and damages will take place when the main contractor proves that it has fulfilled (i) its employment and social obligations, as of 14 March 2020 (both for itself and for the subcontractors, suppliers and providers it has hired for the performance of the contract); and (ii) that it has fulfilled its obligations to pay its subcontractors and providers as of 14 March 2020.

What is the time limit for submitting a claim?

Article 34.3 of the RD-L does not establish a specific time limit for those contractors entitled to compensation for the suspension referred to in this article in order to request the relevant compensation for damages. However, for those contracts governed by the Public Procurement Act, given that the RD-L does not exclude the application of article 208 (2) (c) of the Public Procurement Act, the right to claim is subject to a limitation period of one year which will run from the moment the contractor receives the order to resume the performance of the contract.

It is understood that this order to resume performance will take place once the state of alarm ceases, and that will be the most appropriate time to submit the claim. In any case, if a partial claim is to be submitted during the state of alarm, it should be taken into consideration that the statute of limitation periods are currently suspended[37].

For all other contracts to which, for temporary reasons, the previous public procurement regulations apply, it is understood that their right to request compensation for damages expires

[37] Fourth additional provision (suspension of statute of limitations and expiration periods) of Royal Decree 463/2020, of 14 March, declaring the state of alarm for the management of the health crisis caused by COVID-19.

after four years from the completion of the contract, in accordance with the provisions of the General Budgetary Law[38].

For those contracts governed by private law as regards their effects and termination, the limitation period for claiming damages will be 5 years from the date on which compliance with the obligation can be required[39].

Can the suspension of the contract be requested if it can be understood that due to the situation caused by COVID-19 its purpose has been frustrated?

No. In accordance with the first section of article 34.3 of the RD-L, public works contracts, when their purpose has not been frustrated as a result of the situation described and when, due to COVID-19, the performance of the contract is impossible, the contractor may request the suspension of the contract from the moment the situation that prevents its performance arises and until said performance can be resumed (the contracting body will notify the contractor of the end of the suspension).

Therefore, if the contract has been frustrated as a result of the situation caused by COVID-19, we understand that its termination must be requested. This request for termination and the effects thereof will be governed by the public procurement rules applicable to the specific contract or by private law, depending on the nature of the contract.

If the work is not suspended, but due to the situation caused by COVID-19, there will be a delay in the deadlines, what can I do? Am I entitled to be compensated for loss and damage?

The fourth paragraph of section 3 of article 34 RD-L, expressly provides that (i) when, in accordance with the "work development program or works plan", a contract is due to be completed between 14 March, the date on which the state of alarm began, and during the period of the contract, and (ii) as a result of the factual situation created by COVID-19 or the measures taken 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 outstanding commitments if the initial deadline is extended.

In the event that the work is not in one of the two previous categories, but the COVID-19 crisis also implies a delay in the meeting of deadlines, we understand that the contractor may also request an extension of the period of performance and that the Administration must grant it, in the case of public contracts, in accordance with the provisions of article 195 (2) of the Public Procurement Act (or its equivalent in the various public procurement regulations applicable for temporary

[38] Supreme Court rulings of 27 January 2003 (RJ 2003, 2282), 8 February 2007 (RJ 2007, 858), 15 June 2007 (RJ 2007, 6410), 2 April 2008 (RJ 2008, 2390), 15 December 2011 (RJ 2012, 2788), 1 October 2014 (RJ 2014, 5226) and 22 May 2019 (RJ 2019, 1969).

[39] Article 1964 (2) of the Civil Code. For the purposes of calculating the limitation period, the transitional regime introduced by the fifth transitional provision of Law 42/2015 of 5 October amending Law 1/2000 of 7 January on Civil Procedure shall be taken into account.

reasons)[40], and, in the event that the contract is a private contract, it will be necessary to comply with the specific content of the contractual documentation.

In both cases, we understand that the contractor will be entitled to be compensated only for the same items that are included in the event of suspension of the contract[41].

6. Concession contracts for works or services

What can a concessionaire do to compensate for the loss and damage that is caused by the COVID-19 crisis?

Under article 34.4, it may request the contracting authority to restore the economic equilibrium of the contract.

What must be provided in the request for the restoration of the economic equilibrium of the contract?

In its request for restoration of the economic equilibrium, the concessionaire must demonstrate:

(i) The impossibility of performing the contract as a result of the factual situation caused by COVID-19 or the measures taken by the various administrations to combat it.

(ii) Evidence of the existence, effects and the amount of the loss of revenue and the increase in costs incurred (which will include any additional salary costs[42] actually paid, compared to those estimated in the ordinary performance of the works or service concession contract during the period of the factual situation caused by COVID-19).

Only if the contracting authority considers that the two previous points are in line and sufficiently justified, will it consider the request for economic rebalancing of the contract.

What can be understood by "impossibility of contract performance as a consequence" of the COVID-19 crisis?

The RD-L does not provide any details of what should be understood as "*impossibility of performance of the contract*". As an interpretative criterion, it appears logical to turn to the regulation of this type of contract in the public procurement regulations. Thus, it is worth

[40] Article 195 (2) of the Spanish Procurement Act: "*If the delay is caused by reasons not attributable to the contractor and the contractor offers to meet its commitments if the initial period of performance is extended, the contracting authority shall grant it, giving it a period that is at least equal to the time lost, unless the contractor requests a shorter one. The person responsible for the contract shall issue a report establishing whether the delay was due to reasons attributable to the contractor.*

[41] For claims under contracts subject to private law, see Special Information Briefing COVID-19 (No. 6) (The legal consequences of possible breaches of contract due to COVID-19)

[42] Those effectively paid to the worker. Costs associated with social security contributions are excluded.

highlighting two articles of the TRLCSP that are applicable to concession contracts (causes for termination) (which were also included in the previous public contracting regulations and in the Public Procurement Act) and which refer to the impossibility of performing the contract:

(i) Article 211(1) (g) of the TRLCSP: "*The impossibility of performing the service according to the terms originally agreed, when it is not possible to amend the contract.*"

(ii) Article 279, section e) of the TRLSCP: "*The impossibility of carrying out the works as a result of resolutions adopted by the granting administration after the contract*".

Thus, by analysing how the case law has interpreted these provisions, we will be able to reach a better understanding of what is meant by "*impossibility of performance*" of a concession contract and, thus, know, in accordance with the RD-L, in which cases a restoration of the economic equilibrium of the concession contract could be requested. In this regard, from an analysis of the case law, the following considerations can be made.

Firstly, in application of these provisions, there are two main types of impossibility:

(i) Material or technical impossibility: This consists of a factual situation (usually attributable to the Administration) that technically[43] or materially[44] prevents the performance of the contract.

(ii) Legal or judicial impossibility: It is an act of the Administration, an administrative act or the existence of a general provision, which prevents the performance of the contract[45].

Similarly, in order for the factual or legal situation to be considered "*impossible*", the case law requires:

(i) In objective and unambiguous legal terms, the deprivation of service provision, and that is impossible in a broad contractual sense (and not only in the area of the economic and material perception that the concessionaire has of his ability to provide the service under the conditions in which it is paid).[46]

(ii) Such inability to perform the contract must be related to the cause and purpose of the contract[47].

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43 Judgment of the Administrative Chamber of the National Court of 23 July 2019 [ECLI: ES:AN:2019:3366].

44 Judgment of the Administrative Chamber of the Galician High Court of Justice of 7 June 2018 [ECLI: ES:TSJGAL:2018:3893].

45 Judgment of the Administrative Chamber of the Castilla La Mancha High Court of Justice of 23 April 2018 [ECLI: ES:TSJCLM:2018:1149].

46 Judgment of 27 January 2014 of the Administrative Chamber of the High Court of the Basque Country [ECLI: ES:TSJPV:2014:353].

47 Judgment of 11 November 2016 of the Contentious-Administrative Chamber of the Castilla y León High Court of Justice [ECLI: ES:TSJCL:2016:4083].

Similarly, from the analysis of case law, it can be understood that when the impossibility of performing a contract is established, it is not a total, insurmountable and *sine die* impossibility, but rather an impossibility (as article 211 (1) (g) of the TRLCSP expressly establishes) of performing the contract in the terms "*initially agreed*".

In this regard, we consider that the RD-L has intended to differentiate between two assumptions:

(i) The assumption that the contract has "*been frustrated as a result of the factual situation created by COVID-19*"[48]. This case refers to a total, insurmountable and *sine die* impossibility.

For instance, a concession contract to be definitively terminated by order of the Administration to guarantee public health and safety following the COVID-19 crisis. In this case, the concession contract has been frustrated and must be terminated.

(ii) The assumption that there is an "*impossibility of performance of the contract*" in the terms originally agreed. This is the case in which we understand that the restoration of economic equilibrium of the contract may be requested under the RD-L.

For example, the closure of a sports centre under concession by express order of the Administration to contain the spread of COVID-19. In this case, the concessionaire will cease to receive income during the time that the centre is closed, which will make it impossible to perform the contract in the terms initially agreed, so it may request the restoration of the economic equilibrium of the concession.

We understand that it would also be appropriate to request the restoration of the economic equilibrium in those cases where facilities are not temporarily closed, but the COVID-19 crisis affects the economic equilibrium of the concession by qualitatively reducing its revenues or increasing its costs in such a way that the contract can no longer be carried out as awarded.

A strategy will be outlined later to address the request for restoring the economic equilibrium of the contract, depending on the scenario involved.

When is the restoration of the economic equilibrium of the contract requested?

Requests for restoring the economic equilibrium of the contract, under public procurement rules, are usually made (i) once it is clear what is disturbing the economic equilibrium of the concession and (ii) normally when the concessionaire is already incurring losses or is experiencing the frustration of economic benefits, the realisation of which was reasonably expected.

[48] Article 34.2 and 34.3 RD-L

Notwithstanding the above, it is possible to initiate a procedure before the contracting authority from an early stage as it demonstrates the diligent conduct of the concessionaire. From the moment that it is found that there is a legal or factual situation that has begun to economically disturb the contract (for example, the closure of the facilities by order of the Administration), it is reasonable that this situation be brought to the attention of the authority that awarded the contract. These actions allow the Administration to adopt measures that will minimise the economic impact on the concessionaire.

Thus, for example, if the closure of the concessionaire's facilities were ordered and a significant economic impact were to be established, the appropriate measure would be to request the first restoration of the economic equilibrium of the contract, expressly stating that a second restoration of the economic equilibrium would be requested again in the event that the temporary closure was extended and provided that the first restoration of the economic equilibrium was not sufficient to maintain the economic equilibrium of the concession.

Can the suspension of the contract be requested together with the restoration of the equilibrium at the moment when the "impossibility of performance" occurs?

The RD-L does not expressly provide for the figure of suspension for the concession contract (as it does for other contracts). We understand that this may be due to the fact that, as a consequence of the long timeframes of the concessions, it may not make sense to suspend the contract, but rather the performance, and to grant some measure of restoring its economic equilibrium due to the situation resulting from such suspension.

However, the suspension of concession contracts due to the pre-emptive or temporary closure of facilities is not unknown to public procurement law[49] and case law[50].

However, there is a precedent[51] (in which the facilities had not been closed down) that rejects the suspension of the concession on the grounds that the frustration of the economic expectations of the contract must be included in an assumption of risk and venture. This "frustration" meant that "*revenues were 89% lower than expected*".

The above indicates that some courts, except in the case of closure of facilities, are reluctant to agree to suspend the concession contract.

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[49] Article 102 of Law 13/2003, of 23 May, regulating the public works concession contract, article 203 of Law 30/2007, of 30 October, on Public Sector Contracts, 220 of Royal Legislative Decree 3/2011, of 14 November, approving the revised text of the Public Sector Contracts Law, and 208 of Law 9/2017, of 8 November, on Public Sector Contracts.

[50] Judgment of the Administrative Chamber of the High Court of Justice of Las Palmas de Gran Canaria of 12 June 2018 [ECLI: ES:TSJICAN:2018:1415].

[51] Sentence of the Contentious Administrative Court number 2 of Santander of February 21, 2018 [ECLI: ES:JCA:2018:48].

In view of the above, we consider that it is possible to request the suspension of the concession together with the corresponding restoration of the economic equilibrium of the contract, provided that the facility or establishment in question has been closed down and, consequently, performance has been halted. The suspension of the concession in the case of temporary total closure of facilities may be convenient for the purposes of justifying the postponement or partial payment of the remuneration items that are paid to the municipal authorities (canon) while the temporary closure of the facilities continues[52].

What specific measures can be requested to implement the restoration of the economic equilibrium of the contract? Can I specifically request the postponement of the payment of the fee or its modification through the rebalancing request?

A request may be made to restore the economic equilibrium of the contract by (i) extending its initial duration to a maximum of 15 per cent or (ii) amending the clauses of economic content included in the contract, including the concession fee.

Although this is a question that should be assessed by each concessionaire in view of their own circumstances, it seems that the most convenient thing would be to present a first written assessment of the "impossibility of performing the contract" under the terms initially agreed, requesting the postponement of the payment of the fee, and announcing the request for the restoration of the economic equilibrium of the contract.

After the RD-L was issued, which expressly recognises "*the amendment of the economic clauses included in the contract*", it seems possible that the contracting authorities will admit the postponement and/or modification of the concession fee, especially if it can be argued that the COVID-19 crisis is a case of force majeure[53]. Moreover, it is possible that the contracting authorities will allow the postponement and/or modification of the concession fee, especially if it can be argued that the COVID-19 crisis is a case of force majeure:

(i) There are legal precedents[54] that do not specifically acknowledge that the alleged cases are of force majeure (for example, the abandonment of the contract by a strategic partner) acknowledging indirectly that in the case of an event of force majeure that substantially alters the conditions of performance of the contract, a certain transfer of risk to the Administration could be allowed.[55]

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52 Ruling of the Contentious-Administrative Chamber of the Balearic Islands Supreme Court of Justice of 1 December 2005 [ECLI: ES:TSJBAL:2005:1152].

53 It could be argued that in the present case we are dealing with a case of force majeure, not only because it is recognised in the RD-L itself in the regulation of employment measures, but also because the effects and consequences of this health crisis are even more serious than those caused by other phenomena that are listed as causes of force majeure in the various public procurement rules.

54 Judgment of the Contentious-Administrative Chamber of the Supreme Court of Justice of Madrid of 19 September 2012 [ECLI: ES:TSJM:2013:12094].

55 Judgment of the Contentious-Administrative Chamber of the Supreme Court of Justice of Madrid of 19 September 2012 [ECLI: ES:TSJM:2013:12094].

(ii) Another precedent indirectly permits the postponement of the payment or the partial payment of the annual fee, considering that there is an unforeseeable phenomenon of force majeure such as the "*razing of a beach*"[56].

Can I take advantage of the mechanisms of public procurement regulations if the concession does not involve an "impossibility of performance of the contract"?

As stated above, one of the requirements of the RD-L for the contracting authority to accept the request for restoring the economic equilibrium is that it should identify an "*impossibility of performing the contract*". However, what happens if we understand that our concession is not in that category, despite the fact that the COVID-19 crisis is damaging our concession and causing us loss and damage? Well, we consider that the concessionary companies could take advantage of the mechanisms that the public contracting regulations (RD-L apart) set aside for these cases.

In accordance with the above, if we consider that the COVID-19 crisis is disturbing the economic equilibrium of the concession, but does not make its performance impossible, for example, because it does not seriously threaten the economic viability of the contract, a restoration of the economic equilibrium of the concession could be requested in accordance with the public procurement regulations that apply to each contract[57].

Similarly, this option would fit in with the jurisprudential doctrine of our Supreme Court[58], which has established that, under public procurement regulations, if there is no case of "*impossibility of continuing with the operation*" requesting the economic rebalancing of the contract is appropriate.

In this regard, we recall that the rules on public procurement recognise the possibility of requesting a restoration of the economic equilibrium of the concession if a case of force majeure occurs that directly involves a substantial disruption of the operation of the concession. Thus, although cases of force majeure are expressly regulated in the different contracting rules, also in a uniform manner, and pandemics and health crises are not included as cases, it is true that, as has been pointed out, the COVID-19 crisis has been considered by the RD-L as a case of force majeure in the[59] regulation of employment measures.

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[56] Ruling of the Contentious-Administrative Chamber of the Balearic Islands Supreme Court of Justice of 1 December 2005 [ECLI: ES:TSJBAL:2005:1152].

[57] It was expressly included for the first time in Article 248 (Maintenance of the economic equilibrium of the contract) of Law 13/2003, of 23 May, regulating the public works concession contract, but the case law also recognises its application to those contracts subject to Royal Legislative Decree 2/2000, of 16 June, which adopted the revised text of the Public Administration Contracts Law, via Article 163.2 of said body of law (Decision of the Contentious-Administrative Chamber of 28 January 2015 [ECLI: ES:TS:2015:956]). Also in Article 241 (Maintaining the economic equilibrium of the contract) of Law 30/2007 of 30 October on Public Sector Contracts, Article 258 (Maintaining the economic equilibrium of the contract) TRLCSP and Article 270 (Maintaining the economic equilibrium of the contract) Public Procurement Act.

[58] For all of them, sentence of the Administrative Chamber of the Supreme Court of June 2, 2016 [ECLI: ES:TS:2016:2713].

[59] Among others, Articles 22 and 24 of the RD-L.

In short, a request for restoration of economic equilibrium made outside of the RD-L should justify (i) the fundamental breakdown of the operation of the concession and (ii) that the COVID-19 crisis and its consequences should be included in a case of force majeure for the purposes of public procurement regulations.

Can I make a request for a restoration of the economic equilibrium of the contract in accordance with the RD-L and another, in a subsidiary capacity, in accordance with the public procurement regulations?

Yes, this is a possible option, provided that compliance with the requirements can be justified. In this respect, the structure of the application could be as follows:

(i) Request the restoration of the economic equilibrium of the concession under the RD-L, justifying "*the impossibility of performing the contract*".

(ii) Alternatively, if the contracting authority considers that it is possible to continue with the performance of the contract, it would request the restoration of the economic equilibrium of the contract in accordance with the applicable public procurement regulations, establishing (a) the COVID-19 crisis and its consequences as a case of force majeure[60]; and (b) the fundamental breakdown of the operation of the concession.

7. Emergency processing

The sixth final provision of the RD-L amends article 16 of Royal Decree Law 7/2020 of 12 March, which adopts urgent measures to respond to the economic impact of COVID-19. Thus, it is included that, in cases of emergency processing, if it is necessary to make payments in advance for preparatory actions to be carried out by the contractor, the general guarantee regime of the Public Procurement Act will not be applicable, the contracting authority being the one that will determine this circumstance based on the nature of the service to be contracted and the possibility of meeting the need by other means. In addition, the justification for the decision taken must be recorded in the file.

[60] It could be argued that in the present case we are dealing with a case of force majeure, not only because it is recognised in the RD-L itself in the regulation of employment measures, but also because the effects and consequences of this health crisis are even more serious than those produced as a result of other phenomena that are listed as causes of force majeure in the various public procurement rules.