

Special Information Briefing COVID-19 (No. 12):

Measures relating to public procurement included in Royal Decree-law 11/2020 of 31 March, adopting additional urgent social and economic measures to deal with COVID-19

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1. Introduction

On 1 April 2020, **Royal Decree-Law 11/2020 of 31 March** was published in the Official State Bulletin, **adopting additional urgent social and economic measures to deal with COVID-19 (“RDL 11/2020”)**. The RDL establishes a new range of measures, mainly of a social and economic nature, which expand upon and enhance those already adopted through the Royal Decree-Laws approved in recent days, as well as Royal Decree 463/2020, of 14 March, which declared the state of alarm for the management of the health crisis caused by COVID-19, and its subsequent extension, approved by Royal Decree 476/2020, of 27 March.

In this briefing, we provide a general analysis of the measures approved in different areas, including links to specific briefings for each of them.

2. Amendment of Article 34 of RDL 8/2020

Section 10 of the First Final Provision of RDL 11/2020 (i) amends, with effect from the entry into force of RDL 8/2020, section 1, the fourth subparagraph of section 3 and section 6 of Article 34 of RDL 8/2020; and (ii) adds two new sections, 7 and 8, to the aforementioned Article 34.

A. Amendment relating to the service and supply contracts for the successive provision of services.

The main amendments made to Article 34.1 of RDL 8/2020 are as follows:

- (i) The reference to the automatic suspension of these contracts is removed, thus clarifying that the contracting authority, at the request of the contracting company, must authorise the suspension.
- (ii) The suspension may be total or partial. In the event of a partial suspension, the damages to be paid to the contractor by the contracting authority will be those relating to the suspended part of the contract, in accordance with Article 34.1.
- (iii) In the event that the personnel assigned to the contract include personnel affected by the recoverable paid leave provided for in RDL 10/2020, the payment by the contracting body of the relevant salary expenses shall not be considered compensation, but rather a prepayment for the portion corresponding to the hours that need to be recovered under the terms of Article 3 of the aforementioned RDL 10/2020, to be taken into account in the final settlement of the contract. In essence, it provides that, insofar as this period of paid leave is expected to be recovered by the workers, the corresponding salary expense will not be subject to compensation and will be paid

in accordance with the provisions of the contract as an interim payment for the settlement.

B. Amendment relating to works contracts

The previous wording of Article 34.3 of RDL 8/2020 raised a doubt as to whether it was possible to request the suspension of the contract if its term of completion, in accordance with the “work development programme or works plan”, was not between 14 March, the date on which the state of alarm began, and during the period of the state of alarm. The amendment of RDL 11/2020 clarifies that the suspension of contracts whose performance has become impossible may be requested and granted regardless of their completion date.

On the other hand, although the amendment made in this respect seems to refer only to service and supply contracts for successive services, we understand that the provisions relating to the salary expenses of the personnel affected by the recoverable paid leave provided for in RDL 10/2020 are equally applicable to works contracts. In other words, in the event that the personnel assigned to the works contract include personnel affected by the recoverable paid leave provided for in RDL 10/2020, the contracting entity will pay the corresponding salary expenses in accordance with the provisions of the contract as a payment on account, but not as compensation.

C. Amendment relating to contracts excluded from the application of Article 34 of RDL 10/2020

The main amendments made to Article 34.6 of RDL 8/2020 are as follows:

- (i) With the amendment introduced by RDL 11/2020, this exclusion refers to the provisions of all of the sections of Article 34, except for the provisions of the penultimate paragraph of section 1, which allows for the mandatory extension of certain service and supply contracts for successive performance as provided for in Article 29.4 of Law 9/2017 of 8 November. In other words, in the contracts referred to in paragraph 6, the exceptional rules of suspension and extension created by Article 34 will not be applicable, although they may be extended under exceptional circumstances to guarantee the continuity of the service.
- (ii) For security and cleaning service contracts, which were originally excluded from any suspension, the amendment provides that total or partial suspension will be possible, under the terms established in Article 34.1 of RDL 8/2020, and at the request of the contractor or on its own initiative, if as a result of the measures adopted by the State, the Autonomous Communities or the local administration to combat COVID-19, any or some of its public buildings or facilities are totally or partially closed, making it impossible for the contractor to provide all or part of the contracted services. In the event of its partial suspension, the contract will be partially suspended with regard to

the provision of services linked to the public buildings or facilities that are totally or partially closed, from the date on which the public building or facility or part thereof is closed and until it is reopened. To this end, the contracting authority shall notify the contractor of the security and cleaning services to be maintained in each of the buildings. It shall also notify him of the date on which the building or public facility or part of it will be reopened so that the contractor can proceed to restore the service under the agreed terms.

D. Definition of “public contracts”

The new section 7 clarifies that for the purposes of Article 34 of RDL 8/2020, only those contracts which, according to their terms, are subject to (i) Law 9/2017 of 8 November; or (ii) Royal Legislative Decree 3/2011 of 14 November; or (iii) Law 31/2007 of 30 October; or (iv) Book I of Royal Decree-Law 3/2020 of 4 February; or (v) Law 24/2011 of 1 August, will be considered “public contracts”.

We understand that this provision refers to any aspect of the contract, so that this regulation also applies to contracts whose establishment and performance is subject to any of the above laws and whose effects and termination are subject to private law.

Similarly, we understand that Article 34 of RDL 8/2020 is also applicable to those contracts subject to the legal framework for public procurement prior to that in force, i.e. Royal Legislative Decree 2/2000 of 16 June or Law 30/2007 of 30 October.

E. Clarification regarding reimbursable salary costs

RDL 11/2020 provides that the salary expenses referred to in Article 34 of RDL 8/2020 shall include those relating to the relevant social security contributions.

3. Amendment of Article 29.4 of Law 9/2017, of 8 November

The second subparagraph of Article 29.4 is amended to allow, by way of exception, supply contracts (in addition to service contracts, for which this exception was already provided) to be made subject to a term of more than five years, where this is required by the period for recovering the investments directly linked to the contract and where these investments cannot be used for the contractor’s other business activity or would be uneconomic to use, provided that the amortisation of such investments is a relevant cost in the provision of the supply or service, circumstances that must be justified in the contractual documentation with an explanation of the investments to which it refers and their reimbursement period.

The information contained in this Special Information Briefing is of a general nature and does not constitute legal advice. This document has been prepared on 2 April 2020 and Pérez-Llorca does not assume any commitment to update or revise its contents.