

**MEASURES IN THE FIELD OF PUBLIC PROCUREMENT ESTABLISHED  
IN ARTICLE 34 OF ROYAL DECREE-LAW 8/2020 OF 17 MARCH,  
AMENDED BY ROYAL DECREE-LAW 11/2020 OF 31 MARCH**

**1. Public service and supply contracts with successive  
performance of obligations**

Those contracts in force at the entry into force of Royal Decree-Law 8/2020, of 17 March, the performance of which becomes impossible as result of COVID-19, **will be suspended, in whole or in part, from the time the situation that prevents their performance arises and until such performance can be resumed.** It will be understood that performance may be resumed when the contracting authority notifies the contractor the termination of the suspension.

**For the suspension of the contract to be successful, the contracting authority must assess the impossibility of performing the contract** within 5 calendar days of the request for suspension made by the contractor. The contractor must state, along with its request, the reasons why the execution of the contract has become impossible; the personnel, premises, vehicles, machinery, installations and equipment allocated to the performance of the contract at that time; and the reasons that make it impossible for the contractor to use such equipment, personnel and means in another contract. **All these circumstances may be subject to subsequent verification by the contracting authority.**

In the absence of an express resolution by the contracting authority within the aforementioned period of 5 calendar days, **administrative silence will have negative effects**, and therefore **the request for suspension** will be understood as **tacitly rejected**.

Should the suspension of the contract be assessed, the contracting authority shall **pay the contractor the damages suffered by the latter during the period of suspension.**

Will all damages be indemnified? **No. Not all damages will be compensable. The only damages that can be indemnified are the following:**

- i. **The salary costs**<sup>1</sup> actually paid by the contractor to the staff allocated on 14 March 2020 to the normal performance of the contract, during the period of suspension.
- ii. **The expenses for maintenance of the performance guarantee**, relating to the period of suspension of the contract.
- iii. **Expenditure on rent or maintenance costs for machinery, installations and equipment** relating to the period of suspension of the contract, directly linked to the execution of the contract, provided that the contractor can prove that these means could not be used for other purposes during the suspension of the contract.
- iv. **The costs corresponding to the 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.

If the suspension of the contract is partial, **the damages that can be indemnified will be limited to the part of the contract that is suspended**, and not to the entire contract.

However, the concepts listed below **will not be** indemnified in the event of suspension of the contract assessed by the Administration, as established in section 2.a) of Article 208 of Act 9/2017, of November 8, on Public Sector Contracts:

- i. **Compensation for the termination or suspension of employment agreements** that the contractor had concluded for the performance of the contract at the time the suspension began.

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<sup>1</sup> If the personnel allocated to the contract include employees on recoverable paid leave, the payment by the contracting authority of the corresponding salary costs shall **not be in the nature of an indemnity, but rather as a payment on account for the part corresponding to the hours that are subject to recovery**, which shall be taken into account in the final settlement of the contract.

- ii. **3% of the price of the services that should have been rendered by the contractor during the period of suspension, as provided for in the works programme or in the contract.**

In those contracts, the expiration of which takes place before the new contracts guaranteeing the continuity of the service have been executed as a consequence of the paralysis of the procurement contracting procedures, their validity may be extended beyond the maximum term of five years.

**The suspension of contracts for this exceptional reason shall in no event constitute grounds for termination of said contracts.**

## **2. Public service and supply contracts other than those referred to in the previous section**

In those contracts in force at the entry into force of the aforementioned Royal Decree-Law 8/2020, where the contractor has incurred delay in meeting the deadlines set out in the contract as a result of COVID-19, **will be extended by the contracting body if the contractor offers to meet its commitments provided that the initial deadline or the current extension is extended.** This extension shall be at least equal to the time lost as a result of COVID-19, unless the contractor requests a shorter period. In such cases, **no liquidated damages will be imposed on the contractor and the contract cannot be terminated.**

Additionally, **contractors will be entitled to the payment of additional salary expenses** actually incurred as a result of the time lost, **up to a maximum of 10 per cent of the initial contract price.** This payment will only be made at the request of the contractor and with the latter's reliable accreditation of the reality, effectiveness and amount of these expenses.

## **2. PUBLIC WORKS CONTRACTS**

In the contracts in force at the time of the entry into force of Royal Decree-Law 8/2020, provided that they have not lost their purpose as result of the factual situation created by the COVID-19, **the contractor may request the suspension of the contract from the time the factual situation that prevents the performance of the contract arises and until the performance of the contract can be resumed.** It will

be understood that performance may be resumed when the contracting authority notifies the contractor the termination of the suspension.

Suspension shall only take place when the contracting authority, at the request of the contractor and within five calendar days, assesses that it is impossible to perform the contract.

For those contracts where, according to the “works development programme or works plan”, the completion of their performance period is foreseen between 14 March 2020 -the date on which the state of alarm was declared- and throughout the duration of the state of alarm, **the contractor may request an extension of the final delivery period** provided that he offers to meet its outstanding commitments if the initial deadline is extended, although the contractor **must submit the corresponding request explaining the reasons which should give rise to the extension.**

Will all the damages be indemnified once the suspension, or if applicable, the extension of the deadline has been assessed? **No. Not all damages will be compensable. Only the following damages will be indemnified:**

- i. **The salary costs** actually paid by the contractor to staff who were allocated to the regular performance of the contract before 14 March and who will continue to be allocated upon resumption of the contract, during the period of suspension.
- ii. **The expenses for maintenance of the performance guarantee**, relating to the period of suspension of the contract.
- iii. **Lease or maintenance costs for machinery, installations and equipment**, provided that the contractor can prove that these resources could not be used for purposes others than the performance of the suspended contract and that the amount of such costs is lower than the cost of terminating such contracts for the leasing or maintenance of machinery, installations and equipment.
- iv. **The costs corresponding to the 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.

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However, the concepts listed below, which would be subject to compensation in the event of suspension of the contract agreed by the Administration, as established in section 2.a) of article 208 of Law 9/2017, **shall not be indemnified**:

- i. **Compensation for the termination or suspension of employment contracts** that the contractor had concluded for the execution of the contract at the time the suspension began.
- ii. **3% of the price of the services that should have been performed by the contractor during the period of suspension**, as provided for in the works programme or in the contract.
- iii. **Any other damages** suffered by the contractor and which would be indemnified **in the event of occurrence of a force majeure event** as provided for in Article 239 of Act 9/2017.

In addition, it should be noted that the successful contractor's right to indemnification **will only be admitted if and to extent that the contractor can provide undoubtful evidence that the following conditions have been met**:

- i. That the **main contractor, subcontractors, suppliers and providers** contracted for the performance of the contract are **up to date with the fulfilment of their labour and social obligations, as of 14 March 2020**.
- ii. That the **main contractor is up to date with its payment obligations to its subcontractors and suppliers**.

### **3. Public contracts for works and service concessions**

In the contracts in force at the time of the entry into force of Royal Decree-Law 8/2020, the *de facto* situation created by COVID-19 will **entitle the concessionaire to request the restoration of the economic balance** of the contract by:

- i. **The extension of its initial duration** to a maximum of 15 per cent; or
- ii. **The amendment of the economic clauses** of the contract.

The restoration of the economic balance will in any event entail the indemnification of the concessionaires in relation to the **loss of revenue and the increase in costs incurred** compared to those foreseen in the ordinary performance of the works or service concession contract during the period of the factual situation created by COVID-19. The likely additional salary expenses effectively paid by the contractor will be taken into account among the costs incurred by the contractor.

Such indemnification shall be paid only if the contractor requests it and provides undoubtful evidence of the reality, effectiveness and amount of such expenditure.

**The economic balance shall only be restored where the contracting authority, at the request of the contractor, has assessed that it is impossible to perform the contract** due to the situation created by COVID-19.

#### **4. Miscellaneous**

Notwithstanding the above, the following should be taken into consideration:

- (a) Solely those contracts which, according to their own specifications, are subject to the following acts **will be deemed as “public contracts”**: (i) Act 9/2017, of 8 November, on Public Sector Contracts; (ii) Royal Legislative Decree 3/2011, of 14 November, approving the revised text of the Public Sector Contracts Act; (iii) Act 31/2007, of 30 October, on procurement procedures in the water, energy, transport and postal services sectors; (iv) 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; (v) Act 24/2011, of 1 August, on public sector contracts in the fields of defence and security.
- (b) The **salary expenses** referred to in article 34 of Royal Decree-Law 8/2020 shall **include those related to the corresponding social security contributions**.
- (c) The following contracts are<sup>2</sup> **excluded from the provisions** laid down in article 34 of Royal Decree-Law 8/2020:

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<sup>2</sup> This exclusion shall not apply to public service and supply contracts with successive performance of obligations if, on expiry of the contract in question, the new contract guaranteeing continuity of performance has not been concluded as result of the suspension of the procurement procedures due to COVID-19.

- i. Contracts for health, pharmaceutical or other services or supplies, whose object is linked to the health crisis caused by COVID-19.
  - ii. Contracts for security services, cleaning or maintenance of computer systems<sup>3</sup>.
  - iii. Service or supply contracts necessary to ensure mobility and security of transport infrastructures and services.
  - iv. Contracts awarded by those public entities that are listed on official markets and do not obtain income from the General State Budget.
- (d) Finally, it should be noted that the **Minister of Transport, Mobility and the Urban Agenda**, as the competent authority designated in Article 4 of Royal Decree 463/2020, of 14 March, declaring the state of alert for the management of the health crisis situation caused by COVID-19, **may adopt any additional measures** it deems appropriate to ensure the necessary services for the protection of persons, goods and places. These measures may involve, among others, an **amendment in the events which could give rise to the suspension of the contracts**.

Madrid, April 2, 2020

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<sup>3</sup> In relation to contracts for security and cleaning services, **total or partial suspension is possible** if, as a result of the measures taken to fight against COVID 19, one or more of the buildings or public facilities are totally or partially closed, making it impossible for the contractor to render all or part of the commissioned services.

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