

Impact of COVID-19 on public procurement

Force majeure

The preamble of Royal Decree 463/2020 of 14 March declaring a state of emergency to manage the health-related crisis triggered by COVID-19 affirms that the measures it contains represent the Spanish Government's actions to protect the health and safety of its citizens, contain the spread of the virus and fortify the public health system. What's more, it classifies the state of emergency as an extremely serious and extraordinary situation.

Regarding the regulation of works agreements, Article 239 of the Spanish Public Sector Contract Act 9/2017 of 8 November (*Ley de Contratos del Sector Público*, or the "LCSP") lists certain events as cases of force majeure: Fires caused by atmospheric electricity, natural phenomena with catastrophic effects such as tsunamis, earthquakes, volcanic eruptions, tectonic movement, storms at sea, floods and similar events, as well as destruction caused by violence during war, looting or serious impacts to public order.

The concept of force majeure is capped off by the terms of Article 1105 of the Spanish Civil Code, which recognises force majeure alongside events which despite being predictable, cannot be stopped.

It is reasonable to suggest that the extraordinary and exceptional circumstance caused by the rampant spread of the virus represents an event of force majeure, which is unavoidable and cannot be attributed to the ordinary course of governmental powers and remit. Thus, the virus appears to fit with the reference to "*similar events*" as described in Article 239 of the LCSP.

Amendment of transport service agreements

Public transport by road, rail, air and sea owned by the State and operated under a public contract or subject to public service obligations has been amended by Royal Decree 463/2020, with services cut by at least half. Moreover, the Ministry of Transport is authorised to reduce services even further. Services falling under regional or local remit or ownership have not been cut.

Supply of basic necessities and services

The defence, interior, health and transport ministries have been appointed under Royal Decree 463/2020 as relevant authorities delegated by the government and are authorised to issue any orders, resolutions, provisions and instructions required to ensure the rendering of ordinary and extraordinary services to protect people, assets and locations, including orders to guarantee market supply and the operation of services and basic necessity production facilities.

In particular, the Ministry of Health has been granted the power to adopt as many measures as necessary to ensure market supply and the operation of production facilities affected by supply shortages.

Article 16 of Royal Decree-law 7/2020 of 12 March adopting urgent measures to combat the economic impact of COVID-19 states that the passing of any direct or indirect measures by the General State Administration in the fight against COVID-19 justifies the need to act immediately by means of the urgent procedure prescribed under Article 120 of the LCSP.

Following the publication of Royal Decree 463/2020, this ability is now afforded to the government in relation to all contracts, i.e. not just those falling under the remit of the General State Administration as the sole authority for the purposes of a state of emergency attributed by Article 4 of Royal Decree 463/2020.

Against this backdrop, the government may agree to do whatever is necessary to address the consequences of the virus spreading by undertaking services and supplies without having to meet the formal requirements set out in the LCSP, even where credit is lacking.

The haste of the terms of Royal Decree 463/2020 allows the government to not only circumvent the formal and budgetary requirements of contracting procedures, but to also disregard material requirements (capacity and solvency, deadlines, manner, purpose, guarantees, benefits...).

Freezing of time frames in contracting procedures

The third additional provision of Royal Decree 463/2020 stipulates the suspension of time frames and deadlines for the procedures followed by public sector entities throughout the term or any extensions of the Decree.

Consequently, all periods stated for contracting procedures already underway upon the entry into force of the Decree are frozen, as well as those relating to administrative appeals or special appeals filed before the administrative courts tasked with hearing such contract-related challenges.

Under the fourth additional provision of Royal Decree 463/2020, time frames concerning the statute of limitations and expiry of rights and actions are also frozen.

Suspension of educational activities and the closure of establishments to the public

Royal Decree 463/2020 enforces the temporary closure to the public of retail stores – with the exceptions listed in the Decree –, as well as museums, archives, libraries, monuments and any properties or premises at which shows, sporting and leisure activities and catering activities are held or performed. Moreover, classes at all levels of education are also suspended.

We must also add the relevant restrictions on the freedom of movement under Article 7.1 of Royal Decree 463/2020, restrictions on the movement of vehicles foreseen under Article 7.2 and the reduction in private transport hire under Article 14.2 a) to this list.

Not only that, we should also bear in mind the measures adopted and recommendations given by the three territorial public administrations in relation to remote working for public and private sector employees.

These measures supplement those adopted by the relevant regional and local authorities in matters of health, education and culture, which have been ratified by the first final provision of Royal Decree 463/2020 where they do not contradict its terms and include, for example, the suspension of teaching activities, closure of establishments open to the public within hospitals and health centres, the isolation of certain areas, a ban on terraces and the suspension of events, gatherings and sports matches.

Royal Decree 463/2020 does not refer specifically to the performance of public sector contracts currently in force for the purpose of directly or indirectly providing the public services affected by the compulsory measures adopted by the authorities in response to this extraordinary situation, hence the terms of the LCSP apply in this case.

Such situations may be addressed as follows:

a) Contractual amendments

Article 205 of the LCSP sets out the possibility of amending agreements when the change is not accounted for among the contractual specifications. This can be done where necessary based on unforeseen circumstances which could not be predicted at the time the contract was put out to tender, provided that such necessity is born out of a situation which a relevant authority could not have seen coming and that the amendment does not affect the overall purpose of the agreement.

b) Restoring the economic balance of the agreement

The LCSP affords contractors the right to maintain the economic balance of works agreements (Article 270) and public service agreements (Article 290). In both instances, the right to restore the balance occurs in three cases:

- Agreement amendments
- Mandatory government actions which impact the economic elements of the agreement
- Events of force majeure

The economic balance of the agreement is restored by means of adopting the pertinent measures in each case, with the LCSP referring to the amendment of rates and remuneration, the reduction of the contractual term or any other changes to the economic-based clauses of the agreement.

In the case of mandatory government actions, the agreement term may be extended by no more than 15% of its initial term, in view of the maximum duration limits prescribed by law.

c) Agreement suspension

Article 208 of the LCSP states that the suspension of the agreement obliges the government to compensate the damages caused to the contractor. Such compensation includes costs for retaining the final guarantee, compensation for the termination or suspension of employment contracts, the salaries of those working on the contract during the suspension period, the rent or costs of maintaining machinery, installations and equipment, 3% of the price of the services which the contractor would have rendered during the suspension period and any costs relating to insurance policies taken out by the contractor under the administrative clauses linked to the agreement purpose.

Suspension of the agreement must be documented by means of a certificate including details of the damages suffered by the contractor. A refusal to issue such certificate entitles the contractor to consider the agreement as suspended as of the date on which issuance was requested. The right to claim payment of the aforementioned compensation expires one year from the contractor's receipt of the order to resume performance of the agreement.

d) Agreement termination

Article 211.1 g) of the LCSP outlines the grounds for termination of the agreement, one of which is an inability to perform under the initially agreed terms when a contractual amendment is not possible or, where an amendment can be made, it involves an individual or collective price rise of around 20% of the original price. In the event of termination, the contractor will be entitled to compensation equalling 3% of the remaining non-performed amount, unless said party rejects the contractual amendment proposed by the government.