THE IMPACT OF COVID-19 ON PUBLIC CONTRACTS. SPANISH APPROACH[1]

El impacto del Covid-19 en los contratos públicos. Perspectiva española

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ABSTRACT: This report was prepared for the Research Chair in Public Contracts Law of the University of Jean Moulin Lyon 3 (France), whose Director is Pr. François Lichère. It gives a law perspective of the Covid-19 health crisis impacts on public contracts in Spain. It has been published in a comparative and wider analysis on the topic that is available on the web: https://chairedcp.univ-lyon3.fr/themes-de-recherches-et-rapports-1

KEYWORDS: Public contracts, covid-19, suspension, modification

RESUMEN: Este informe fue elaborado para la Cátedra de Investigación en Derecho de los Contratos Públicos de la Universidad Jean Moulin Lyon 3 (Francia), cuyo Director es el Pr. François Lichère. Ofrece una perspectiva jurídica de los impactos de la crisis sanitaria del Covid-19 en los contratos públicos en España. Se ha publicado en un análisis más amplio y de Derecho comparado sobre el tema que se encuentra disponible en la web: https://chairedcp.univ-lyon3.fr/themes-de-recherches-et-rapports-1

PALABRAS CLAVE: Contratos públicos, covid-19, suspensión, modificación

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Please specify the period, the territory (local or national) and activities affected by it (all the economic activities, some of them…). 5.- During the Covid-19 health crisis, did your state adopt specific regulations about public contracts?. 5. a) If yes, please specify what they consist of exactly? Are they still in force? If not, when did they end?. 5. b) If no, were there guidances given by the State or local authorities? If yes, please specify what they were/are. 5.c) In both cases, have there been any difficulties in implementing or assessing these new measures?. 5.d) Do you find it useful to maintain these measures in the future?. II. CASES OF SUSPENSION OF PUBLIC CONTRACTS. 1. Due to the Covid-19 health crisis, were there any suspending execution of public contracts? As far as you can assess it, who generally decided to suspend the contract (contracting authorities, economic operators, agreement between parties)? It may also be that there was sometimes no official decision i.e. de facto suspension. Were public contracts suspended de facto because of practical difficulties to suspend them by a formal decision?. 2. Did the public contract holder have to provide evidence of his inability to temporarily perform the contract? Were there difficulties to provide such evidence?. 3. Were some contractual partners subject to penalties due to the suspension of the contract?. 4. What damages have been or may be awarded to the economic operator as a result of the suspension of the contract?. 5. What are the legal bases for the additional costs compensation due to the suspension of the contract? Contract terms. Please specify which ones; usual legal mechanisms (law, regulation, case law). Please specify which ones; Other. III. CASES OF TERMINATION OF PUBLIC CONTRACTS. 1. Due to the Covid-19 health crisis, do you know any case of termination of public contracts?. 1. a) If yes, who decided to terminate the contract: contracting authorities, economic operators… ? And what was the main reason for it?. 2. What damages have been or may be awarded as a result of the termination of the contract?. 3. Did the public contract holder have to provide evidence of his inability to perform definitively the contract? Were there difficulties to provide such evidence?. IV. CASES OF DEGRADED PERFORMANCE OF PUBLIC CONTRACTS. 1. In most cases, was the deadline of the contract extended for less than, equal to or longer than the lockdown period or specific local or government regulations relating to the Covid-19 health crisis?. 2. What was the preferred way to extend the contract deadline: unilateral change by the contracting authority (for example, a service order) or modification by agreement?. 3. Did some contractual partners (either economic operator or contracting authority) refuse to extend the contract deadline? 4. Did some public contract holders receive cash advance due to the pandemic? If so, what is the legal basis?. 5. In most cases, did public contract holders have to face an unilateral change of the contract by the contracting authority or modification by agreement, or both?. 6. What were the reasons for the unilateral change of the contract?. 7. During the Covid-19 health crisis, contracting authorities usually imposed new organisational actions. For instance, the government imposed special measures such as wearing masks, social distancing, etc. In your state, what damages have been or may be awarded as a result of these new organisational actions imposed by the contracting authority?. 8. Except new organisational actions imposed by the contracting authority, what damages have been or may be awarded as a result of the degraded performance of the contract? For instance, security measures tend to increase the costs of organizing public works (hiring more vehicles or bunkhouses, etc.). 9. What is the legal basis for the additional costs compensation?. 10. Is additional costs allocation between contractual partners widely considered? Or are they generally considered to be borne by the economic operator?. 11.

Broadly speaking, did contracting authorities easily decide to compensate or grant cash advance to public contract holders? If so, what was their purpose: to support the contractual partner, to support the economy, or both?. V. GENERAL CONSIDERATIONS REGARDING THE IMPACTS OF THE COVID-19 HEALTH CRISIS ON PUBLIC CONTRACTS. 1. In your state's legal system, are there legal mechanisms that allow contractual partners to adapt or stop performing the contract in specific circumstances? For instance, in French law, the force majeure case or the doctrine of unforeseeability (imprévision) exist in such circumstances. 2. Do you find these legal mechanisms appropriate to tackle the Covid-19 health crisis or would it be necessary to adapt or specify them?. 3. In your opinion, how should the parties introduce the epidemic/pandemic risk into future contracts?. 4. In your opinion, are existing amendment clauses suitable for solving the Covid-19 health crisis problems?. 5. Do you consider that the EU rules on public contract modifications (for example, art. 72 Directive 2014/24) curb contract adaptations? And State aid EU rules?. 6. Are there any litigation claims in your state regarding public contracts and impacts of the Covid-19 health crisis either regarding the award or the performance? if so please specify. 7. What are the grounds of these litigation claims?. 8. What types of lawsuits are or could be filed (damages, annulment etc)?. 9. Do you know of any successful out-of-court settlement?. 10. Do you think the rules applied to other types of contracts than public contracts or other sets of rules may be more appropriate to resolve the current situation of public contracts?. 11. In your opinion, is it necessary to modify the law? A new legislation, regulation, a new trend in the case Law or other solution?. 12. Do you have any other remarks that you think we should be aware of about your country regarding the impact of Covid-19 crisis on public contracts?.

I.- GENERAL QUESTIONS

1. What is the current definition of public contracts in the legal system of your State?

In Spain, the current Law in force that must be considered is the Law 9/2017, 8th November, on Public Sector Contracts, that transposes the European Parliament and the Council Directives 2014/23/EU and 2014/24/EU, of 26 February 2014, into the Spanish legal system, (herein after LCSP). LCSP is the Law that transposes the content of European Directives on public procurement. But this Law has a more extensive content. Only one part of the same corresponds to said transposition. But the Law is also made up of other rules applicable to public sector procurement and that are in line with the Spanish tradition on the matter.

Article 2 of the LCSP defines its "objective scope of application" stating that are included under the same:

a) 'public sector contracts': contracts for pecuniary interest -whatever their legal nature- concluded in writing between one or more economic operators and one or more of the public sector entities included in the subjective scope of application of the LCSP for the execution of works, the supply of products or the provision of services.

- The LCSP also determines that a contract has pecuniary interest when the economic operators involved in the same obtain some type of economic benefit, either directly or indirectly.

b) Under some circumstances, contracts subsidized by entities considered to be contracting authorities concluded by other natural or legal persons are also under the scope of application of the LCSP, (only if the subsidized contracts are above EU thresholds).

2. What is the legal status of public contracts?: contracts of private law; contracts of public law; both private and public law; Irrelevant distinction; Other:……..

In Spain, since many decades ago there has been a specific Public Law to regulate the purchases made, originally, by Public Administrations, or, nowadays, according to the updated terminology, by entities -with public nature or not- linked to the public sector. This terminological updating is not only a matter of names. Many years ago, public purchasers were mainly Public Administrations. Nowadays and for different reasons, many of the purchases we are interested in are made by entities linked to the public sector, but not necessarily Public Administrations.

In the Spanish legal tradition on this topic, the contracts concluded by public sector entities -mainly Public Administrations- have their own regulation separated from the Civil Law. There is a Law on Public Sector Contracts (currently, the aforementioned LCSP). Although this is not to say that Civil Law is never applicable, because depending on different factors a contract concluded by a public sector entity could even be mainly regulated by Civil Law.

The Spanish tradition on the topic is based on the French tradition, and it is built on the basis of the so-called "administrative contracts" as a category. A category that, in principle, has nothing to do with the European Law.
In the current Spanish Law on Public Sector Contracts, only Public Administrations can celebrate "administrative contracts". Originally an administrative contract was a contract concluded by a Public Administration to meet needs in the general interest. Nowadays, an "administrative contract" are a works contract, a supply contract, a service contract, a services concession contract or a works concession contract concluded by a Public Administration. But all these types of contracts can be also concluded by entities that are not considered Public Administrations, but contracting authorities. In this later case, all of them are considered private contracts, but, in part, are under the scope of application of the Law on Public Sector Contracts.

Private contracts: mainly, those signed by entities of the public sector, which are not Public Administrations. But also, in some cases, contracts concluded by Public Administrations.

In order to understand the regulation of the Spanish LCSP it must be highlighted that the intensity in the application of the current LCSP depends on the combination of three different factors:

i. The nature of the contracting entities
ii. The nature of the contract (administrative or private), and
iii. The amount of the contract (European thresholds)

The combination of these three aspects leads to many possibilities.

Regarding contracting entities under its subjective scope of application, the LCSP quotes three different groups (Article 3):

a) Public Administrations: a group of territorial and non territorial-based entities endowed with public nature. It is worth noting that there are entities with a public nature that this Law does not consider "Public Administrations". That is, to this Law the public nature of an entity does not mean that the entity is a "Public Administration". But to this Law all Public Administrations are considered "contracting authorities" *per se*.
b) Contracting authorities: in the sense of the concept determined by the EU Directives on Public Procurement. "State, regional or local authorities, bodies governed by public law or associations formed by one or more such authorities or one or more such bodies governed by public law". 'bodies governed by public law' means bodies that have all of the following characteristics:
    a. they are established for the specific purpose of meeting needs in the general interest, not having an industrial or commercial character.
    b. they have legal personality
    c. they are financed, for the most part, by the State, regional or local authorities, or by other bodies governed by public law; or are subject to management supervision by those authorities or bodies; or have an administrative, managerial or supervisory board, more than half of whose members are appointed by the State, regional or local authorities, or by other bodies governed by public law.
    - According to Spanish LCSP All the Public Administrations are contracting authorities, but not vice versa. Most of the entities with a public nature that this Law does not consider "Public Administrations" are contracting authorities because observe the requirements envisaged by EU Directives.
c) Other entities of the Public Sector: residual category where are included entities not belonging to the two above categories (e.g.: a public enterprise).

As said, only Public Administrations conclude administrative contracts, and only administrative contracts are completely under the scope of application of the LCSP: Maximum application of the LCSP Preparation-award-formalization-execution/performance-termination.

Minimum application of the LCSP is for contracts concluded by Public Sector Entities that do not have the status of Public administrations or contracting authorities. These contracts shall be governed in their preparation and award by particular public rules but with regard to their effects, modification and termination is totally applicable the Civil Law.

3. What kind of contracts are included in the Public Contracts category? Please give examples (public procurement, concessions…)

A discussion arisen with occasion of the transposition of the current Directives had to do with the option contained in the current Spanish Law to match the contractual types envisaged in the same, with those in the Directives. That meant to make disappear some traditional and characteristic contractual types from the Spanish legal order. Significantly, the "contract for the management of public services", which would be redirected to the "service contract" or to the "service concession contract", depending on whether or not the transfer of operational risk occurs. Many authors, including the Council of State, considered that this measure should had be re-thinked because was not required by European Directives and might undermine the provision of important "public services". In any case, finally the current Law on Public Sector Contracts approved in 2017, includes a general regulation, common to all 5 contract types it regulates: works contract, supply contract, service contract, service concession contract, and works concession contract. These contract types are those recognized in EU Directives. In addition to this common regulation, it contains specific provisions adapted to the "idiosyncrasy" of each one thereof. In the case of works and services concessions, these specificities are reflected, for example, in the provision of specific rules which affect the provision of specific preparatory actions for the same, or the system for the performance and termination thereof.

Through Directive 2014/23/EU, for the first time EU Law regulates service concessions. Notwithstanding, in Spain, even before Directive 2014/23/EU the Law on Public Sector Contracts already included these kinds of contracts in its objective scope of application. Unlike in other States, in Spain, it has long been the case that there has been no problem whatsoever in including "works concessions" and "services concessions" into the framework of general provisions on public contracts. Nonetheless, the adoption of Directive 2014/23/EU, has entailed modifications which have had a bearing on the configuration made of these two types of contracts. Thus, the current Spanish Law incorporates the requirements of Directive 2014/23/EU (and in doing so, introduces far-reaching modifications); nonetheless, this did not entail a drastic systematic change.

The traditional regulation of "works concessions contracts" and "services concessions contracts" in Spain has revolved around the legal nature attributed to the work or service which is the subject of the "public works" and "public services" contract. The legal regime for both types of contract was conditioned by the type of ("public") works or services which constituted the object thereof.

Directive 2014/23/EU defines "works concessions" and "services concessions" on the principal basis of economic-budgetary considerations; i.e., without taking into account the essence of the provision which is placed in the hands of the successful tenderer. In order for there to be concessions, concessionaires must be remunerated for the provision of the services they assume through the right to exploit the activity subject to the concession or through said exploitation accompanied by a price, and said exploitation must entail the transfer to the concessionaire of the so-called "operating risk". In Spain, in particular, the "public services management contract" (into which services concessions

were included) implied that the concessionaire assumed the operation of a "public" service, but it was not required for that exploitation to entail the assumption by the same of the "operating risk", as required by EU Directive. As the EU had not regulated services concessions until the adoption of Directive 2014/23/EU, the full scale of the divergence had not been demonstrated. With the inclusion of a regulation for "services concessions" into Directive 2014/23/EU, the need to adapt Spanish Law has become inescapable.

In any case, the approval of Directive 23/2014/EU has indeed entailed a significant innovation in the way works and service concession contracts are conceived in Spain. It has already been pointed out that, although the conclusion of such contracts always implied recognition of a right to exploit the works or services that are the object of the business in favor of the concessionaire, they did not necessarily entail the transfer to the same of the "operating risk", in the sense required by the Directive. In accordance with European law, the new LCSP requires that, in concessions, the "operating risk" always be assumed by the concessionaires.

The solution adopted by the Spanish legislator has been to "reconfigure" the types of contracts envisaged in the national public procurement legislation in order to bring them fully into line with those regulated by the EU Directives. The main practical effect of this reform lies in the fact that, with the new conception, many contracts which were previously considered "public service concessions", as they entailed the exploitation by the concessionaire of service of this nature, can no longer be catalogued as "services concessions", as they do not entail the transfer of "operating risk" and must now be classified as "service contracts". In brief, nowadays for the Spanish legislation concession contracts are only those ones that imply, both, the exploitation of a work or service and the assumption of the operating risk by the concessionaire. In fact, the qualification that a contracting authority makes of a contract in the tender documents may be challenged if it is understood that the type of contract does not correspond to that which the contents of the aforesaid documents show it to be. Well, it is possible find different decisions from special appeal tribunals in the field of procurement in which the qualification of a contract made by the contracting authority is invalidated. Some of these decisions had to do with the fact that the contracting authority had qualified as a "public services concession" a business in which, subsequent to the analysis thereof, it was evident that, even though an exploitation right was acknowledged for the concessionaire, this did not entail the transfer of the operating risk and, accordingly, the contract had to be qualified as a services contract.

Finally, it is worthy to note that the rules for works and services concessions are applied irrespective of the amount that each business may attain. The European thresholds, for example, affect the need to publicize the contract on a European level, but not the essential conception of the business.

In brief, the types of contracts the types of contracts envisaged in the Spanish public procurement legislation is fully into line with those regulated by the EU Directives.

4. Was there, or maybe still is, one or many lockdown(s) or curfew(s) in your state due to the pandemic? Please specify the period, the territory (local or national) and activities affected by it (all the economic activities, some of them…)

In March 14th 2020, the Government of Spain approved the Royal Decree 463/2020 declaring the state of alarm for the management of the health crisis situation caused by COVID-19[2]. This state of alarm implied restriction of movements for the citizens, and *de facto* a lockdown. This state of alarm was extended every 15 days until June 21st, 2020. Thus, through Royal Decree 476/2020, of March 27, which extends the state of alarm declared by Royal Decree 463/2020, of March 14, the extension was extended until 00:00 hours on 12 April 2020; through Royal Decree 487/2020, of April 10, the extension was arranged until 00:00 hours on April 26, 2020; Royal Decree 492/2020, of April 24, established a new extension until 00:00 hours on May 10, 2020; Royal Decree 514/2020, of May 8, ordered the extension of the state of alarm until 00:00 hours on May 24, 2020; Royal Decree 537/2020, of May 22, extended the state of alarm until 00:00 hours on June 7, 2020; and finally Royal Decree 555/2020, of June 5, extended the state of alarm until 00:00 hours on June 21, 2020. In these Royal Decrees the central government also designed a de-escalation plan divided into different phases for transitioning towards a "new normal".

As explained, the first state of alarm ended on June the 21st, and was totally commanded by the central state Government. After the 21st of June, the regional governments were the ones that have mainly managed the de-escalation. In view of the evolution of the pandemic, the Royal Decree 926/2020, of October 25, declared a new state of alarm to contain the spread of infections caused by SARS-CoV-2, that, in principle, will be in force until May 2021.

In this Royal Decree a limitation was imposed on the freedom of movement of people at night, in such a way that between 23:00 and 6:00, people would only be able to circulate on the roads or spaces of public use because of limited and justified reasons.

In the second state of alarm there is no longer a single/unique command assumed by the central government. The Autonomous Communities, respecting the limits set by the state parliament and within the framework of their powers, have been able to enact regulations to specify the limitations imposed by the State. For example, the Autonomous Communities, depending on the incidence of the epidemic, have approved perimeter confinements that have prevented citizens from leaving certain areas of a city or a specific town or group of neighboring towns.

5.- During the Covid-19 health crisis, did your state adopt specific regulations about public contracts?

X YES NO

5. a) If yes, please specify what they consist of exactly? Are they still in force? If not, when did they end?

[2] https://www.boe.es/eli/es/rd/2020/03/14/463/con

The *Independent Public Procurement Regulation and Supervision Office* (*Oirescon*) has highlighted that in the specific field of public procurement the regulatory impact of this historical stage has been especially intense. To the point that the already normally changing state and regional regulatory framework in this matter experienced even greater activity. This frenzied activity was monitored by the *Oirescon* through the preparation of a "dynamic" document that was reviewed weekly until the end of the first state of alarm. The first publication of the document took place on April 1, 2020 and the last on June 22, 2020, and shows that in the period under review, up to 700 regulations related to the field of public procurement were approved[3]. Most of them are still in force, although some circumstances will be difficult to justify in an administrative file (e.g.: the pandemic is not an unforeseen circumstance any more). In any case, the measures included throughout this legislation had an impact in the different phases of public procurement, that is to say: the awarding, execution and termination of contracts. The main rules adopted were:

1. The First measure affecting public contracts was included in the Royal Decree that declared the state of alarm in Spain (Royal Decree 463/2020). Its Third Additional Provision declared the suspension of administrative deadlines. It stablished that deadlines in administrative procedures were suspended and that would be resumed at the moment in which that Royal Decree or, where appropriate, the extensions of the same expired.

Of course, this general suspension of administrative deadlines, also affected to the administrative procedures related to the awarding of public contracts. Notwithstanding the foregoing, if the awarding of a particular contract was considered of general interest, the competent contracting body, by means of adopting a reasoned decision, had the power to order the continuation of its awarding. The use or none use of is possibility have caused some litigation between contracting authorities and economic operators (see answer to question number 32).

This general suspension of the administrative procedures was lifted on May the 8th, 2020.

2. Royal Decree-Law 7/2020, of March 12, on adopting urgent measures to face the economic impact of Covid-19. This Royal Decree-Law included some "Measures for the efficient management of Public Administrations". Its article 16 referred to measures in the field of public procurement. Basically, this Article stated that to:

a) Public sector entities may use the emergency procedure to award contracts concluded to face Covid-19. This "emergency solution" is regulated in the Article 120 of the Spanish Law on Public Sector Contracts (LCSP). This solution means that when a public administration needs to act immediately due to catastrophic events or situations that pose serious danger (and the pandemic for Covid-19 was assimilated to these circumstances[4]), a contracting authority may directly award the contracts needed to face the extraordinary situation, without observing neither the ordinary award procedures nor other formal requirements established in the LCSP.

[3] The latest version of the "dynamic document" is available at: https://bit.ly/3hnVGdc
[4] Article 16 of Royal Decree Law 7/2020 expressly declared the adequacy of the emergency procedure provided for in Article 120 of the Law on Public Sector Contracts for the purchase of all types of goods and services required by public sector entities to deal with Covid-19.

In short, the award procedures foreseen in the Law on Public Sector Contracts were no modified during to the pandemic. However, in this period the vast majority of contracts concluded in order to acquire medical products or health devices but also other kind of goods and services in any way useful to deal with the situation created by the pandemic have been awarded by using the "emergency procedure". And this regardless the contracts were above or below the European thresholds.

Commonly, the real application of the "emergency procedure" regulated in Article 120 of the Spanish LCSP is very low. However, with the pandemic, Article 16 of the Royal Decree Law 7/2020 expressly declared the adequacy of the same for the purchase of all types of goods and services required by public sector entities to deal with Covid-19. But the emergency procedure possibility has not been conceived or described in the general LCSP having in mind a pandemic, but natural catastrophic events, such as, a fire generated by a thunder, floods caused by heavy rains, rockslides, and so on. In any case, the pandemic of Covid-19 was assimilated to these circumstances.

It is important to highlight again that the application of the emergency procedure to fight against Covid-19 was designed in a very broad way. Actually, it could be used to award the contracts needed to adopt *"any type of direct or indirect measure"* to deal with Covid-19. That is to say not only to award contracts related to the acquisition of medical products and health tools. Of course, it has been used for these kinds of purchases, but, moreover, it has also been used by way of example: to award supply contracts of videoconferencing systems, methacrylate sheets in order to separate office tables, laptops to telecommuting, and so on.

The emergency procedure speeds up and simplifies the award of contracts. And the use of this solution can be justified in some circumstances (such as in this pandemic). But once the contract is concluded, there is no justification for not giving information about it. In other words, the regulation about this procedure does not establish specialties in terms of transparency regarding the publication of data about the contracts concluded through this exceptional procedure. Therefore, all contracts that are being formalized following this exceptional measure should be, at least, listed in the Public Sector Procurement Platform. This guarantee of transparency is even more relevant since these are contracts directly awarded without publicity and without real concurrence.

And what has happened in Spain?. At least initially, the main problem emerged with the use of this emergency procedure during the Covid-19 pandemic was that the information about the contracts concluded this way was not published, or not well-published. This problem has someway been "solved" and currently there are different websites that give information about these contracts[5].

[5] By way of example:
a) https://transparencia.gob.es/transparencia/transparencia_Home/index/PublicidadActiva/Contratos/Contratos/TotalUrgentes.html
b) https://transparencia.aragon.es/content/contrataci%C3%B3n-de-emergencia
c) https://ajuntament.barcelona.cat/transparencia/es/contratos-emergencia-covid19
d) https://bit.ly/2RPHZc8

b) In these cases, if it will necessary to make payments on account for preparatory actions to be carried out by the contractor, the common provisions regarding guarantees in the LCSP will not apply (see answer to question 19).

c) When contracting these needs must take place abroad, the formalization of the contracts will correspond to the Head of the Mission or Permanent Representation, and it will be subjected to the conditions freely agreed by the Public Administration with the foreign contractor.

3. Royal Decree-Law 8/2020, of 17 March, on extraordinary urgent measures to address the economic and social impact of Covid-19. Among other things, Article 34 of this Royal Decree-Law adopts different measures to mitigate the effects of Covid-19 on public contracts. Some parts of Article 34 were amended or clarified by means of the Royal Decree-Law 11/2020, of 31st March and Royal Decree-Law 17/2020, of 5th May.

In the Statement of Motives of this Royal Decree-Law it was explained that to prevent Covid-19 and to avoid that the measures adopted by the State, the CCAA or the local Administrations to combat it could lead to the termination of public sector contracts, it was approved a specific regime through which contracting authorities could opt, where appropriate, for the total or partial suspension of contracts. If a total or partial suspension of a contract is adopted, this measure can be complemented with the possibility for the contractor of requesting, -depending on the type of contract- an extension of the term of the contract, the compensation for certain damages, or, if applicable, the re-establishment of the financial balance in concession contracts.

The different measures would be applied depending on the type of contract: continuous service contracts, continuous supply contracts; single performance supply or service contracts; works contracts; works or services concession contracts. In brief, the settled rules were as follows:

a) In the case of **continuous provision supply or service contracts**, when the existing situation created by Covid-19 and the measures adopted to combat it make it impossible to perform them:

- They can be suspended as of when the existing situation arises until the contracting body notifies the lifting of the suspension, because it is possible to resume them. As such, an administrative decision will be required for the lifting of the suspension.
- The suspension is not automatic. The contractor should request for the suspension and accredit recognition of the impossibility of performance of the contract (with a term of five calendar days for reply and non-reply constituting rejection). Hence, there is the possibility that the contract must resume if the contracting body replies that performance is not impossible or if it simply fails to reply by the deadline.
- Contractors had to make a special effort to justify the needed of suspension of the contact.
- There is no specific term for presenting the application, because the five-day term is for deciding on the application, not for presenting it.

- If the contractor does not request for the suspension of the contract, the correspondent contracting authority could declare it *ex officio*.
- This suspension will not constitute grounds for termination of the contract.
- It will be possible to request compensation for loss and damage to the items and within the limits established in the Royal Decree-Law 8/2020 (salaries of personnel attached to the contract at 14 March already paid, maintenance costs of the definitive guarantee, leases and maintenance of machinery and equipment, where it is accredited it cannot be used for other purposes and cost of insurance envisaged in the bidding specifications for the performance of the contract).
- Regarding the loss and damage, the RD-Law 11/2020 resolved some doubts that were raised initially, such as:

    - The salary costs include the cost of Social Security contributions.
    - The suspension of the contract (and therefore the compensation) can be total or partial, when so specified by the contracting body, determining the part that is suspended.

Meanwhile, there is no provision for compensation for loss of profit in the form of a liability claim against the State, in other proceedings, but this approach would be complicated. In fact, the State Attorney's Office Reports state that if performance of the contract is not impossible, no compensation of any kind will apply, since the measures adopted by means of the Covid-19 RDL are general measures adopted in an exceptional situation that the contractor would have the legal duty to observe.

The determination of such loss and damage will, in all likelihood, be a point of friction with companies.

b) In the case of other **supply and service contracts** (that is, those that are not continuous provision), that do not lose their purpose due to the existing situation created by Covid-19 or the measures adopted to combat it, there is no suspension. In these cases, when the contractor suffers a delay in the execution of the contract:

- The contracting body may be asked for an extension for the time lost, which will be granted on the basis of a prior report from the Contract Manager confirming that the delay is the result of the existing situation created by Covid-19 or the measures adopted to combat it and it is not attributable to the contractor. In this case, no deadline is set for the application or the decision, and no provision is made for a failure to reply.
- The contractor will be able to apply for payment of additional salary costs borne for this reason, up to a maximum of 10% of the initial price of the contract.
- This claim will require a special verification procedure by the contracting body.
- In these contracts, if the delay caused as a result of the Covid-19 crisis means the purpose of the contract is lost, it will have to be terminated.
- These extraordinary rules do not apply to the same contracts that are excluded in the case of continuous provision supply or service contracts.

c) With regard **works contracts** in which it is impossible to continue performing the contract, but which do not lose their purpose due to the existing situation created by Covid-19 or the measures to combat it, the contractor:

- May request suspension of the same as of when the existing situation arose that prevented provision of the service and until it can be resumed (the contracting body will notify the contractor of the end of the suspension). Suspension is not automatic. It must be requested by the contractor, who must justify the impossibility of performing the contract, and indicate the means affected by the suspension (the personnel, dependencies, vehicles, machinery, facilities and equipment linked to the execution of the contract at that time)
- May request damages limited to the items indicated and within the restrictions established in the Covid-19 RDL, which are the same as for the continuous provision supply and service contracts, unless the increased salary costs are calculated according to the collective agreement and personnel remain attached to the contract when it resumes. With regard to loss and damage, the same rules explained regarding to the continuous provision service and supply contracts apply here.
- The contractor must offer to honour its commitments if the final deadline is extended and provide official confirmation that both the contractor and subcontractors, suppliers and providers hired for the performance of the contract are up-to-date in compliance with their labour and social obligations at 14 March and that the contractor is up-to-date with its payment obligations for subcontractors and suppliers.
- The State Attorney's Office Reports state, moreover, that the contract need not be amended due to these circumstances because the Covid-19 RDL did not equate them with force majeure or unforeseeable circumstances.

d) In the case of **works or services concession contracts**, the measures adopted to combat Covid will entitle the concessionaires to reestablish the economic balance of the contract. If there are grounds for rebalancing, this will consist of a potential exceptional extension of the term by up to a maximum 15% of its initial duration, or the modification of the financial conditions of the contract. The right to the re-establishment of the balance is recognized in order to compensate: i) a fall in income; and ii) an increase in costs (including salary costs). This will only apply when the contracting body finds that it is impossible to perform the contract due to such circumstances, at the request of the contractor. No deadline is set, for either requesting re-establishment or for requesting the declaration of impossibility of performance which, moreover, creates difficulties for application.

e) Exceptions: These extraordinary rules will not apply to some contracts that were considered essentials:

- Contracts for services or supplies in the area of healthcare, pharmacy or other areas where the object is linked to the health crisis caused by Covid-19.
- Contracts for security, cleaning or IT systems maintenance services.

- Contracts for services or supplies necessary to guarantee the mobility and security of transport infrastructures and services.
- Contracts awarded by those public entities listed on official markets and not financed by the General State Budget.

No specific term of validity is set for these measures, which will depend on the timeframe of the impact of Covid-19 or of the measures adopted by the State, the autonomous regions or the local administration to combat it. The State Attorney's Office has issued at least two reports stating its position on certain matters raised by the cited Royal Decree-Laws.

5. b) If no, were there guidances given by the State or local authorities? If yes, please specify what they were/are.

This question does not apply to the Spanish case.

5.c) In both cases, have there been any difficulties in implementing or assessing these new measures?

Yes, in some cases, there have been difficulties in implementing or assessing all these measures. By way of example:

- Regarding the suspension of public contracts there have been contractors who did not request the total or partial suspension of their contracts and stopped executing the contract without the previous approval of the correspondent contracting authority.
- In contracts concluded by using the emergency procedure (direct award) the formalizations of the same were not published. And during the pandemic this emergency solution became widespread. As explained, the rules related to the emergency procedure do not establish specialties in terms of transparency of the formalization of contracts. Therefore, all contracts concluded by means of this exceptional measure should be, at least, listed in the Public Sector Procurement Platform.

5.d) Do you find it useful to maintain these measures in the future?

There are aspects whose need for improvement in the general LCSP may have been evidenced because of the pandemic. For instance:

- It is needed a simplification and flexibilization of award procedures for extraordinary circumstances. But having said that, in our view, today it is difficult to justify in many cases the application of the "emergency procedure" to combat Covid-19. In contrast to what happened in March 2020, nowadays it is difficult to maintain that Covid-19 pandemic fits in the concept of unforeseen event.
- The *force majeure* can not only affect work contracts, but also others.

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Generally speaking, it does not seem appropriate to maintain the measures adopted during the pandemic once the pandemic ends. At least not in the so broad way for their application that has been designed to fight the pandemic. That is, from our point of view it would be necessary to deeply reflect on what concrete aspects could be included in the LCSP. (e.g: the admissibility of the full payment of the contract in advance has caused important problems. See answer to question 19).

II.- CASES OF SUSPENSION OF PUBLIC CONTRACTS

1. Due to the Covid-19 health crisis, were there any suspending execution of public contracts? As far as you can assess it, who generally decided to suspend the contract (contracting authorities, economic operators, agreement between parties)? It may also be that there was sometimes no official decision i.e. de facto suspension. Were public contracts suspended de facto because of practical difficulties to suspend them by a formal decision?

a) Yes, the execution phase of many public contracts was suspended. E.g.: public kindengardens concession contracts; restaurant and coffee service concession contracts; supply contracts for provision of menus to public schools, etc.
b) In general, the suspension was decided by the correspondent contracting authorities at the request of the contractors.
c) Yes, there were cases in which the suspension just occurred *de facto*, due to practical difficulties at least initially in requesting and obtaining a formal decision by the contracting authority. This circumstance could generate impossibility of a compensation of damages being recognize.

2. Did the public contract holder have to provide evidence of his inability to temporarily perform the contract? Were there difficulties to provide such evidence?

As explained (see answer to question 7.a), according to Article 34 of the Royal Decree-Law 8/2020, contracts would be suspended when their execution were impossible. In that case, the general rule was that it would be the contractor who should request the suspension to the contracting authority. Although the contractor´s request had to explain why the performance of the contract could not go ahead, the contracting authorities were the ones that had to analyzed whether such impossibility existed or not.

Although to our knowledge, in general, there were not particular problems to provide evidence of the inability to temporarily perform the contracts, those difficulties emerged in some kind of contracts. Indeed, in some contracts the contractors have had problems provide evidence about the impossibility of fully compliance the contract, a circumstance that could lead to the partial suspension of the same.

By way of example, this difficulty occurred with regard to home care services contracts. Many users of these services did not want to continue receiving the service because of fear of contagion and this caused a very significant decrease in the number of users, what

affected the contractor. In any case, many Autonomous Communities solved these problems by complementing the State regulations (e.g. Andalusia or Catalonia).

3. Were some contractual partners subject to penalties due to the suspension of the contract?

Not to our knowledge.

4. What damages have been or may be awarded to the economic operator as a result of the suspension of the contract?

As explained, Article 34 of the Royal Decree-Law 8/2020 establishes the possibility of suspension continuous provision supply or service contracts, and works contracts. In these cases, the damages that can be compensated are:

- The salary costs that have been paid by the contractor to the personnel assigned to the execution of the contract during the period of suspension. The salary costs include the cost of Social Security contributions.
- The costs for maintenance of the final guarantee during the period of suspension.
- The costs for renting or maintaining machinery, installations and equipment directly assigned to the execution of the contract, provided that the contractor proves that these means could not be used for other purposes during the suspension of the contract.
- The costs of insurance policies provided for in the contract documents and linked to the object of the contract, which have been signed by the contractor and are in force at the time of the suspension of the contract.

In the event of partial suspension, the damages to be paid will be those corresponding to the part of the contract suspended in accordance with this section of this article.
The determination of such loss and damage will, in all likelihood, be a point of friction with companies.

5. What are the legal bases for the additional costs compensation due to the suspension of the contract? Contract terms. Please specify which ones; usual legal mechanisms (law, regulation, case law). Please specify which ones; Other

The legal base is Art. 34 of the RDL 8/2020

III.- CASES OF TERMINATION OF PUBLIC CONTRACTS

1. Due to the Covid-19 health crisis, do you know any case of termination of public contracts?

X YES NO

1. a) If yes, who decided to terminate the contract: contracting authorities, economic operators… ? And what was the main reason for it?

Contracting authorities are the ones that have to asses if once the contracts can be resumed, their performance has lost its purpose. In this is case, Article 211.1.g) of the LCSP establishes as a cause for termination of public contracts: *"g) The impossibility of executing the object of the contract in the initially agreed terms, when it is not possible to modify the contract within the limits of admissible modifications; or when, the modifications imply, individually or jointly, alterations in the price thereof, in an amount greater, more or less, than 20 percent of the initial price of the contract, excluding VAT"*. In general, the termination or contracts has been exceptional, and only have affected some sectors (e.g.; contracts for the provision of services for artistic interpretation and that had been concluded for local celebrations were terminated due to cancellation of these kind of celebrations. See answers to questions 14 and 15).

2. What damages have been or may be awarded as a result of the termination of the contract?

The regulations on Covid-19 have not established great news in this regard. Therefore, the general rule is the ordinary one stated in Art. 213.4 of the LCSP. According to this Article, the contractor would be entitled to request for the payment of the services already performed and to a percentage of 3% of the amount of costs of the services, works, or supplies finally not performed.

However, Article 4 of the Royal Decree Law 17/2020, established a particular rule applicable to a sort of contracts that have been affected by termination: services contracts for artistic interpretation and entertainment (many contracts for the provision of services for artistic interpretation and that had been concluded for local celebrations were terminated due to cancellation of these kind of celebrations). The mentioned Article 4 established that when the termination of contracts for artistic interpretation and entertainment -whose amount did not exceed 50,000 euros- was adopted as a result of Covid-19, or the sanitary measures adopted to combat it, the contractors may request for a compensation that may not be less than 3% nor higher than 6% of the contract price. In this case, the provisions of article 213.4 of LCSP shall not apply.

3. Did the public contract holder have to provide evidence of his inability to perform definitively the contract? Were there difficulties to provide such evidence?

To our knowledge, for now there have only been cases of contract termination in the aforementioned field of services contracts for artistic interpretation and entertainment. But there have been no major probative difficulties about the inability to perform the contract, since they were entertainments cancelled by the Administrations themselves (e.g., local/municipal summer festivals that were cancelled)

In other types of contracts, we are not aware of cases in which termination has occurred. In any case, litigation claims that can be pose, could make appear evidences of such probatory difficulties.

IV.- CASES OF DEGRADED PERFORMANCE OF PUBLIC CONTRACTS

1. In most cases, was the deadline of the contract extended for less than, equal to or longer than the lockdown period or specific local or government regulations relating to the Covid-19 health crisis?

The extension of the initial deadline of contracts was a measure foreseen in Article 34 of the Royal Decree-Law 8/2020 for some types of contracts: single performance supply or service contracts; works contracts and works or services concession contracts
Generally speaking, as far as we know the application of this measure it is not being problematic in practice nor in single performance supply or service contracts, nor in works contracts.

In the particular case of works contracts, our practical experience let us state that when an extension has been requested by the contractor, the extension has been recognized by the contracting authority for a term equal to or greater than that affected. In fact, if, for example, it was detected that there could be problems with the supply of certain materials used in the execution of the works, this circumstance has been taken into account when determining the extension of the new term.

In the case of continuous provision supply or service contracts, the extension of the deadline does not apply. For those ones that were totally or partially suspended, were appropriate, it applies the explained compensation regime.

Finally, with regard to services and works concession contracts the right to restore the economic balance of the contract could be implemented by means of an extension of the initial duration of the contract to a maximum of 15% or by means of the modification of the economic clauses. (This regime is explained in detail answer to question 26). However, this are usually long terms contracts in whose performance must be observed the principle of sole *risk and venture* of the concessionaire. Therefore, the extension of concession contracts is not as "automatic" as regarding other contracts. It only can be recognized when the balance of the concession has really been broken. That's why although some concessionaires (big companies) have announced their intention to request for the economic rebalance of highways concessions, some administrative authorities in different reports have already pointed out that a decrease of income not necessarily implies the right to rebalance the financing of the concession[6]. It is necessary a case by case study. In any case, it is true that during the alarm state the highways remained open, and that because of the mobility restrictions have suffered a drastic reduction in the number of users, and this may result in the restoration of the economic balance of the contract when the gross operating margin has been negative during the period of the alarm state (Article 25 of Royal Decree-Law 26/2020 of 7 July), that could lead to the extension of the initial term.

[6]Report of the Galician Competition Authority IPRO 2/2020 on eventual compensations to the highway concessionaires for the reduction of income during the state of alarm from the perspective of the competition. Available at: https://competencia.gal/publicaciones/cgc/IPRO_2_2020_cast.pdf. See also the report of the General State Attorney 394/20 of Abril, the 2nd.

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ISSN 2007-3798

2. What was the preferred way to extend the contract deadline: unilateral change by the contracting authority (for example, a service order) or modification by agreement?

In the context we are interested in now, the extension of a public contract must be declared by a unilateral administrative act adopted by the correspondent contracting authority within the framework of an administrative procedure that, in principle, begins at the request of the contractor.

3. Did some contractual partners (either economic operator or contracting authority) refuse to extend the contract deadline?

To our knowledge, nor economic operators nor contracting authorities have refuse to extend the contract deadlines in works contracts.
As explained in question 16, contracting authorities are more reluctant to extend the concessions deadlines to restore their economic balance, at least in some cases such as highways concessions. In the latter cases, what contracting authorities are sometimes doing is not answering the concessionaires´s request for extension, and no answering means rejection.

On the other hand, in some contracts, in spite the contractors could obtain an extension of their contracts term, they are not interested in so. In fact, they would like the termination of the contract since the Covid-19 has significantly increased the contracts performing costs, and the costs are not easily compensated by contracting authorities. For instance, this has happened in some health transport services contracts, or in some cleaning services contracts. In these cases, a mandatary extension of the term will be imposed to the contractor only if at the term of the contract a new contract has not yet been awarded.

4. Did some public contract holders receive cash advance due to the pandemic? If so, what is the legal basis?

In Spanish Public Procurement Law, the general rule is that the Administration has to pay the price of the contract within 30 days from the date of approval of the work certificates or documents that prove the conformity of the goods or services with the provisions of the contract (Article 198.4 Law 9/2017, of 8th November, on Public Sector Contracts – LPSC)[7].

However, the pandemic led to the approval of a set of exceptional legal provisions to adapt public procurement to the new scenario and ensure the immediate supply of essential equipment. In particular, the Royal Decree-Law 9/2020 of 27th March[8] enables contracting authorities to make some of the payments, or even paying the full price, prior to the performance of the contract when absolutely indispensable. This circumstance will

[7] https://www.boe.es/buscar/act.php?id=BOE-A-2017-12902
[8] https://www.boe.es/buscar/act.php?id=BOE-A-2020-4152

be asses in view of the market situation and commercial traffic of the State in which the procurement is carried out.

This measure responds to the requirements of some economic operators to receive cash in advance in exchange for the urgent supply of essential products to hospitals, such as masks or ventilators. However, it also creates significant problems when the contractor does not provide the products, or they do not meet the minimum health requirements. To give an example, in March the Spanish Government purchased more than 8,8 million masks from Hangzhou Ruining Trading Co., Ltd. The contractor required the full payment of the contract in advance (31.291.547,08 euros) but when the masks arrived at the hospitals the health staff found that their capacity to filter particles was lower than that specified for that model.

For these situations, the mentioned Royal Decree-Law establishes that the risk of loss arising from these operations shall be borne by the State budget.

5. In most cases, did public contract holders have to face an unilateral change of the contract by the contracting authority or modification by agreement, or both?

The health crisis caused by COVID-19 has led the Spanish Government to declare the suspension of all public contracts, apart from those which are essential to face this extraordinary situation (supply of health equipment, cleaning and disinfection services, etc.). Article 34 of Royal Decree-Law 8/2020 of 17th March9 states that, when the performance of a public contract is not possible given the situation created by the pandemic, it will be suspended totally or partially. An example of a public contract that may be suspended only in part is the cleaning or security services of a public building that is partially open.

When the suspension came to an end, the new scenario made it difficult, or even impossible, to execute many contracts in the terms initially agreed. Thus, contracting authorities amended some aspects of the contract performance to compensate the contractor for the suspension (see questions 8 f) or to adapt it to the new circumstances. The amendment of public contracts is subjected to severe limitations under Spanish public procurement law, due to their impact on the principles of equal treatment and competition. For this reason, we cannot assert that this mechanism was used in most cases, but just in those where there was no other solution except for adjusting the contract. Article 205 (2)(b) LPSC enables the modification of a public contract during its performance to face unforeseeable circumstances. In order to assess the unforeseeable character of the circumstances, we must take into account two basic ideas. On one hand, that it could (or should) not have been foreseen by the Administration, in accordance with the rules of human judgement, at the time of the contract award. On the other hand, that the absence of foresight would not have been caused by negligence on the contracting authority.

Contracting authorities should not introduce more amendments than those that are strictly necessary to ensure the proper performance of the contract. In addition, the modification

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

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ISSN 2007-3798

may not alter the overall nature of the contract and any increase in price shall not be higher than 50% of the value of the original contract, either alone or together with other modifications agreed in accordance with this article.

To give an example, the regional Government of Madrid used this mechanism to amend the civil/state liability insurance policy of their Health Service due to COVID-19. In their opinion, the pandemic was a sudden and unforeseeable situation that aggravates the insured risk and justifies an increase of 42,81% in the initial price (12.733.425 euros). This measure was considered according to the law because (i) it did not alter the global nature of the contract since it had not impact on other terms and conditions, and (ii) it did not exceed the maximum threshold laid down in the law[10].

6. What were the reasons for the unilateral change of the contract?

The main reason to amend the term and conditions of the contract is to ensure the satisfaction of public interests by ensuring the proper performance of the provisions. The new scenario that arises as a result of COVID-19 may led to a massive resolution of public contracts that cannot be performed in the initial terms anymore. To avoid this, the Public Administration can use its administrative prerogative to amend public contracts (*ius variandi*). This exorbitant power enables contracting authorities to impose certain conditions on the contractor during its performance. Given the unilateral nature of the decision, it is only justified on grounds of public interest and subjected to the legal constraints mentioned above. Moreover, the modification will only be mandatory for the contractor if it does not exceed 20% of the original value of the contract.

However, the mentioned prerogative does not apply to all public contracts, but to administrative contracts and some private contracts (Articles 25 and 26 LPSC). But, even in such cases, contracting authorities can agree on a set of amendments with the contractor to ensure the fulfilment of the pursued public objectives.

7. During the Covid-19 health crisis, contracting authorities usually imposed new organisational actions. For instance, the government imposed special measures such as wearing masks, social distancing, etc. In your state, what damages have been or may be awarded as a result of these new organisational actions imposed by the contracting authority?

As explained above, the main measure adopted was the suspension of public contracts during the alarm state. However, the Administration also imposed some other restrictions and organisational actions that go beyond that period and may have a negative impact on specific contracts. For example, road transport contractors have experienced a significant reduction in their activity due to mobility restrictions imposed by the Government, but at the same time they have been required to make substantial investments to ensure sanitary measures in vehicles (disinfection, social distancing, ventilation equipment installation, etc.).

[10] https://www.comunidad.madrid/sites/default/files/dictamenes/2020/dictamen_140-20_des.pdf

In this situation, the Government has declared the right of the contractors to get the economic balance of the contract restored. This measure intends to mitigate the impact of the administrative measures in terms of income reduction due to the decrease of the demand and cost increase to adapt the vehicles to the sanitary requirements (Article 24 of Royal Decree-Law 26/2020 of 7 July)[11]. The mobility restrictions had also the same impact on concessions for the construction, maintenance and operation of toll roads, concessions for the conservation and operation of highways, and concessions for service areas. Even though during the alarm state the highways remained open, the drastic reduction in the number of users may result in the restoration of the economic balance of the contract when the gross operating margin has been negative during the period of the alarm state (Article 25 of Royal Decree-Law 26/2020 of 7 July).

On the other hand, the Government has also approved a special legal regime for contracts concerning artistic interpretation and entertainment (Royal Decree-Law 17/2020 of 5 May, Article 4)[12]. The modification or suspension of these contracts will involve the right of the contractor to receive an advance payment, provided that the amount of the contract does not exceed 50.000 euros. That payment will be up to 30% of the price of the contract. If the organisational actions lead to the termination of the contract given the impossibility of performing it in the terms initially agreed, then the contracting authority may award damages to the contractor. The amount shall not be less than 3 or more than 6% of the contract price. As above, this provision only applies when the amount of the contract does not exceed 50.000 euros.

8. Except new organisational actions imposed by the contracting authority, what damages have been or may be awarded as a result of the degraded performance of the contract? For instance, security measures tend to increase the costs of organizing public works (hiring more vehicles or bunkhouses, etc.).

Apart from organisational measures, the only action to mitigate the damages in the performance of the contract is the cost compensation set out in Article 34 of Royal Decree-Law 8/2020 of 17th March (see question No. 20). It has been claimed, however, that the salary costs include situations in which the contractor must hire the necessary staff for the conservation and maintenance of the work or service during the situation created by the Covid-19. This provision also refers to costs for renting or maintaining machinery, installations and equipment directly assigned to the execution of the contract, but it does not cover new acquisitions.

9. What is the legal basis for the additional costs compensation?

The basis for the cost compensation is the extraordinary legal mechanisms enacted by the Spanish Government to face the pandemic. Among them, the Royal Decree-Law 8/2020 of 17th March is particularly relevant in relation to damage and cost compensations.

[11] https://www.boe.es/diario_boe/txt.php?id=BOE-A-2020-7432
[12] https://bit.ly/2RdC1BZ

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ISSN 2007-3798

10. Is additional costs allocation between contractual partners widely considered? Or are they generally considered to be borne by the economic operator?

As a general rule, the relations between the Administration and the contractor are determined by the principle *pacta sunt servanda*. In accordance with this principle, obligations arising from the contract have the force of law between the contracting parties and must be fulfilled under the agreed terms (Article 189 LPSC). Thus, the contract is based on the immutability of the conditions accepted by the parties by mutual agreement. In addition to the immutability of the contract, another essential premise inherent to public contracts in the Spanish legal system is the attribution to the contractor of the *risk and venture of the contract* (Article 197 LPSC). This involves that the contractor assumes the normal risks that are associated with the performance of the contract, so that a mere variation in the circumstances under which the contract was concluded would not allow him to unilaterally request the amendment of the contract. According to the Spanish Supreme Court, the contractor not only benefits from the greater advantages that the dynamics of the contract bring to him compared to those initially foreseen, but also has to bear the increased costs that its execution may entail (Judgement of 20 July 2016). The principle of risk and venture carries with it an element of uncertainty in the economic results of the contract – it means that the frustration of the economic expectations that the contractor took into consideration in order to consent to the contract does not release him from the strict compliance of the contract conditions.

However, there are some specific situations in which the contracting authority must restore the economic balance of the contract. This occurs when it is disturbed for reasons attributable to the contracting authority, e.g. unilateral modification of the contract (*ius variandi*) or other actions which, due to their mandatory nature, directly determine the rupture of the economy of the contract (*factum principis*), or for reasons of force majeure or unforeseeable circumstances.

11. Broadly speaking, did contracting authorities easily decide to compensate or grant cash advance to public contract holders? If so, what was their purpose: to support the contractual partner, to support the economy, or both?

The Royal Decree-Law 8/2020 of 17th March establishes a special regime to compensate for the rupture of the economic balance of the concessions due to the factual situation created by Covid-19 and the measures adopted by the Administration to deal with it. Article 34.4 stated that, when the contractor can prove the impossibility of performing the contract, he will have the right to be compensated by an extension of the initial duration of the contract to a maximum of 15% or the modification of the economic clauses included in the contract.

The main purpose of this measure is to ensure the satisfaction of the public interests. Moreover, the rebalancing of the reciprocal obligations aims to prevent all the damage from falling on one of the parties. It is a requirement for loyalty and good faith which must inspire the relations between the administration and the contractor.

However, in practice, the scope of application of the mentioned provision has been rather limited. Initially, the Administration made a restrictive interpretation of this possibility and claimed that the compensation in the works and services concessions was only pertinent when the impossibility entails the absolute unfeasibility of executing the contract. This did not happen, in its opinion, when the performance of the contract could continue, even if the way in which it could be done varies due to the alarm state. The problem is that the absolute impossibility is not compatible with essential works and public services, such as water supply, public transport, etc.

The new wording of the last paragraph of Article 34.4, introduced by Royal Decree-Law 17/2020 of 5th May, calls for a more flexible interpretation. It admits the application of the exceptional regime of restoring the economic balance of the concession when the impossibility of performing the contract is only partial, not absolute or total.

A second problem arises in relation to those cases in which the contractor cannot prove the impossibility of performing the contract, either total or partial, but he can evidence the rupture of the economic balance. In this scenario, the Administration can propose to the contractor an "adjustment of the provision" to the current circumstances, both in terms of substantive content and remuneration, by exercising its prerogative to interpret the terms of the contract set out in Article 190 LPSC. This leads to a new interpretation of the impossibility of performing the contract, i.e., the impossibility of performing the contract in the terms initially agreed.

One clear example of the above is the compensation to infrastructure concession companies in Spain (highways, car parks, transport of passengers, etc.). Although the first reaction of the Spanish Government was to refuse any compensation, then changed its mind in view of the flood of complaints. Now the Royal Decree-Law 26/2020 of 7 July accepts the restoration of the economic balance in public contracts for regular passengers' transport by road to mitigate the consequences of Covid-19 (Article 24). The rebalancing shall be determined taking into account income reduction due to a decrease in passenger demand, as well as cost increase due to disinfection of vehicles during the state of alert.

V.- GENERAL CONSIDERATIONS REGARDING THE IMPACTS OF THE COVID-19 HEALTH CRISIS ON PUBLIC CONTRACTS

1. In your state's legal system, are there legal mechanisms that allow contractual partners to adapt or stop performing the contract in specific circumstances? For instance, in French law, the force majeure case or the doctrine of unforeseeability (imprévision) exist in such circumstances.

In Spanish law, Article 239 LPSC refers to the force majeure in relation to work contracts, which exists when an unforeseeable, inevitable and irresistible event occurs. This provision establishes the right of the contractor to be awarded compensation for damages that occurred in the execution of the contract, provided that there is no imprudent act on his part. It is worth noting, however, that the law specifies the cases in which it is possible to claim the concurrence of force majeure:

a) Fires caused by atmospheric electricity.
b) Catastrophic natural phenomena, such as seaquakes, earthquakes, volcanic eruptions, ground movements, sea storms, floods or similar.
c) Violent damage caused in time of war, tumultuous robbery or serious affrays.

The mentioned situations should be interpreted in a restrictive manner. It means that the concept of force majeure cannot be extended to other situations. As we will discuss in the next question, this interpretation of the concept makes it unsuitable for responding to new realities, such as a global pandemic.

Furthermore, Article 254 LPSC admits the realization of adjustments in the economic plan of work concessions when the concurrence of force majeure results in an increase in costs for the contractor. In the event that the force majeure completely hinders the performance of the works, the contract will be terminated and the contracting authority will be required to pay the concessionaire the total amount of the works performed, as well as the increased costs incurred as a result of the indebtedness to a third party.
On the other hand, the LPSC refers to the doctrine of unforeseeable risk as a cause for modification or termination of public contracts. It applies when a risk that could not be foreseen at the time of the conclusion of the contract appears and, as a consequence, the performance conditions of the contract change substantially, so that it becomes much more onerous for one of the parties than originally envisaged.

As stated in Article 205 LPSC, the concurrence of unforeseeable circumstances justifies a modification of the contract that has not been provided for in the initial procurement documents when the following conditions are met:

a) The need for the modification arises from circumstances that a diligent Administration could not have foreseen.
b) The modification does not alter the overall nature of the contract.
c) Any increase in price is not higher than 50% of the value of the original contract, either alone or together with other modifications agreed in accordance with this article.

If the modification of the contract is not possible, then the contract must be terminated (Article 211 LPSC).

2. Do you find these legal mechanisms appropriate to tackle the Covid-19 health crisis or would it be necessary to adapt or specify them?

Generally speaking, the use of the force majeure and the doctrine of unforeseeable risk to deal with the health crisis raises certain difficulties that must be borne in mind. As we have already mentioned, the concept of force majeure should be interpreted in a restrictive manner and cannot be extended to situations other than those provided by law. The first problem is that Article 239 LPSC does not address a scenario where there is a global pandemic. The only possibility would be to understand that this situation is included in the open clause "or similar", stated in letter (b) concerning catastrophic natural

phenomena. Moreover, this mechanism only operates in relation to work contracts, but not to services or supply contracts, which are also affected by the extraordinary situation. It is reasonable to include the pandemic in the concept of force majeure, even though the legal provisions are not entirely clear in this regard, but its suitability to respond to tackle Covid-19 is subjected to a more flexible interpretation of this concept. In particular, it should be extended to all public contracts to ensure a homogeneous response to the health crisis.

However, there is another difficulty that must be sorted out: The requirement of a direct causal relationship between the event and the contractual damage. This relation is clear when a natural phenomenon damages the public infrastructures (e.g. when a flood destroys a highway), but it may be questioned in the case of the pandemic. In the latter, the damages are not caused by the pandemic itself, but by the rules issued by the public authorities to combat it. Again, we need to make a generous interpretation of this requirement to make it fit in the concept of force majeure.

The doctrine of unforeseeable risk seems to be more suitable for this situation since it enables the modification or even the termination of public contracts affected by the pandemic. But it raises the same problems as the force majeure when it comes to compensating the damages in services or supply contracts.

From the above, it can be concluded that neither of the mentioned mechanisms is fully appropriate to tackle the health crisis. The new scenario demands a specific legislative response to deal with the impact of the pandemic on contract performance. The different Royal Decrees enacted by the Spanish Government during the alarm state aimed to achieve that objective, but it would be desirable to regulate the "new normal" of public procurement.

3. In your opinion, how should the parties introduce the epidemic/pandemic risk into future contracts?

Providing that the different Governments have now a certain experience in combating the pandemic, the best solution would be to anticipate the possible problems that could arise during the contract performance and write them down in the contract documents. If the preparation of the contract has always been essential for the successful completion of the contract, now it is even more relevant. Contracting entities should include the estimated costs that the contractor will have to face in order to comply with the required health measures or as a result of new restrictions imposed by the authorities.

On the other hand, they should specify the conditions that would justify an eventual modification of the contract and the more suitable way to adapt its terms without harming the contractor's interests in excess. This would solve the problem of the legal limitations to modify the contract when it has not been expressly included in the documents.

4. In your opinion, are existing amendment clauses suitable for solving the Covid-19 health crisis problems?

We consider that the amendment clauses included in Article 205 LPSC, in relation to those cases where the modification of the contract has not been provided for in the initial procurement documents, are not suitable for solving the problems linked to the pandemic. The only provision that could be used in that context is section 2(b) of the mentioned Article, in accordance to which the concurrence of unforeseeable circumstances may justify the modification of the contract when the following conditions are met:

a) The need for the modification arises from circumstances that a diligent Administration could not have foreseen.
b) The modification does not alter the overall nature of the contract.
c) Any increase in price is not higher than 50% of the value of the original contract, either alone or together with other modifications agreed in accordance with this article.

The problem is that the health crisis cannot be considered as an unforeseeable event anymore, and it precludes the possibility of using this path to adjust the terms of the contract to the new circumstances. Moreover, the limit of 50% in the modification of the contract might not be enough to address the specific situation, especially when more than one modification is needed. So, once again, we must resort to the extraordinary solutions stated in the legal provisions approved by the Government during the alarm state. It seems to be a good moment for the legislator to think about including some of these provisions in the ordinary public procurement law.

5. Do you consider that the EU rules on public contract modifications (for example, art. 72 Directive 2014/24) curb contract adaptations? And State aid EU rules?

The legal regime of modifications included in the European Directive on Public Procurement reveals the same difficulties as the Spanish regulation, particularly concerning the (un)foreseeable nature of the pandemic and its consequences. However, it leaves more space for significant modifications of the contract since the limit of 50% applies in relation to each amendment individually.

Concerning the State aid, generally we can claim that compliance with EU procurement rules suppresses any undue economic advantage. It would mean that the State aid rules do not impose more restrictions to contract adaptation than those established in the Directive. However, it does impose constraints on other domestic measures to support the national industry that are not compatible with such a severe situations, and that is why the European Commission has adopted a Temporary Framework for State aid measures to support the economy in the current Covid-19 outbreak [C(2020) 1863 final, 19.03.2020].

6. Are there any litigation claims in your state regarding public contracts and impacts of the Covid-19 health crisis either regarding the award or the performance? if so please specify.

There is no doubt that the impact of Covid-19 on public procurement has led to many disagreements between the contracting authorities and the contractors. The measures

adopted by the Government to mitigate the negative consequences of the pandemic on contract holders have been deemed insufficient and have drawn quite a few criticisms. It is early to know whether these criticisms have resulted in litigation claims since most of the administrative procedures to claim for compensation are still open. However, it is reasonable to anticipate that the litigation claims will arise sooner than later. To give an example, various big companies in charge of the operation of highways have already released their intention to go to court to seek further compensation.

From a procedural perspective, the main difficulties are related to the general suspension of administrative procedures and the mandatory extension of contracts. The Catalonian Administrative Body for Contractual Appeals has disclosed several pronouncements in this regard which give us an insight into the premature complaints. Thus, in its decision 198/2020 of 28 May[13], it had to deal with the decision of the contracting authority of non-suspension of the deadline for submission of tenders, despite the fact that Royal Decree 463/2020 of 14 March has declared the general suspension of most procedures. It pointed out that, because of this provision, the contracting authority should have frozen the deadlines instead of continuing with the procedure.

In the decision 210/2020 of 10 June[14], the dispute arises from the intention of the contracting authority of extending a service contract for lifeguarding and rescuing at the beach. Under Article 34.1 of Royal Decree-Law 8/2020 of 17th March, the extension of the contract will be possible where, at the expiration of a contract, a new contract guaranteeing the continuity of the service has not been concluded as a result of the suspension of the contracting procedures, and it is not possible to conclude it. In this case, an economic operator who was interesting in the new contract challenged the contracting authority's decision of extending the services of a contract awarded in 2019 to 2020. The administrative body understood that the requirements to use this mechanism were not met and the contracting authority could easily award a new contract.

7. What are the grounds of these litigation claims?

As mentioned before, by way of example, in the decision 198/2020 of 28 May the ground was the decision of the contracting authority to continue with the deadline to submit tenders instead of adopting the suspension.

In the decision 210/2020 of 10 June, the ground was the non-compliance with the conditions to adopt the mandatory extension of the contract to ensure the continuity of the service.

8. What types of lawsuits are or could be filed (damages, annulment etc)?

In both cases, the complainant requests the annulment of the administrative decision. Specifically, in the first case the suspension and subsequent extension of the deadline for submitting tenders is requested. In the second case, the petition is the suspension and

[13] https://bit.ly/3tAigSx
[14] https://bit.ly/3eF0g51

http://revista.jacobea.edu.mx/
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annulment of the decision to award the contract to the previous economic operator using the extension mechanism.

9. Do you know of any successful out-of-court settlement?

No.

10. Do you think the rules applied to other types of contracts than public contracts or other sets of rules may be more appropriate to resolve the current situation of public contracts?

In the Spanish legal system, public contracts have a different regulation and purpose than those celebrated between two or more private parties. The key factor in the formers is the appropriate satisfaction of public interests and, for that reason, they are subjected to more rigorous requirements in their award and performance. So, in our opinion, these contracts should be disciplined for a specific regulation as they are nowadays, which is the most accurate to give solutions to the different problems that may arise in practice.

Nevertheless, it is worth noting that extraordinary situations require extraordinary solutions. Even though the Spanish Public Procurement Law establishes several mechanisms to deal with unforeseen and severe circumstances that may threaten the performance of public contracts, the truth is that these provisions have been revealed as insufficient in the most crucial stage of the pandemic. It should be complemented, thus, with specific legislation that enables to regulate and give a swift response to the various vicissitudes that may affect the different parties of the contract. For example, as we have mentioned before, the Spanish Government approved extraordinary legal provisions to award damages to the contractor and restore the economic balance of the concessions.

11. In your opinion, is it necessary to modify the law? A new legislation, regulation, a new trend in the case Law or other solution?

The Spanish Public Procurement Law, like the European Public Procurement Directive, includes mechanisms to adapt public contracts to very severe circumstances that might alter the terms and conditions of the contract, as well as having a negative impact on the side of the contractor. The problem is that the procedures and solutions included in the Spanish legislation are characterised by a concerning red tape that makes it difficult to comply with the objective of giving a quick response to the needs of the different groups (population, economic operators, public authorities, etc.). For example, the regulation of negotiated procedure without publication is much more cumbersome than the one contained in the Directive, so that it led in practice to excessive use of the emergency procedure.

The “new normal” clearly needs a Public Procurement Law flexible enough to address future waves of the Covid-19and its consequences. Considering that the pandemic is not an unforeseen event anymore, the legislation should specify – among other issues – the procedural mechanisms to award new contracts and the allocation of costs between parties.

12. Do you have any other remarks that you think we should be aware of about your country regarding the impact of Covid-19 crisis on public contracts?

At this point, we believe that it is important to highlight one of the most concerning problems that arise during the pandemic: the absence of reliable data regarding the public contracts that have been awarded during that period, in particular by using the emergency procedure. Since the beginning, the Spanish Government has been reluctant to publish this information at the State's contracting platform even though it is mandatory. However, the acquisition of faulty equipment – such as masks and tests – and the pressure of the media forced the public authorities to inform about the spending of the public funds. The problem is that, even at present, it is difficult to ascertain the number and quantity of the contracts that have been awarded. Indeed, many voices are claiming that not all of them have been published as required.

On the other hand, the organisation of the information uploaded to the mentioned platform is confusing and the search mechanisms are not very intuitive. Unlike other countries, such as Portugal or Ukraine, the Spanish Government has not articulated special technological mechanisms to identify the contracts awarded to face the health crisis. This circumstance makes the search for information a tedious task and runs against the duty of transparency that should inspire public procurement.