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Economic rebalancing of works and services concessions and the new right to withdraw from a contract under the Spanish Public Procurement Act 2017

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There are many and very important changes introduced by the new Public Procurement Act 2017[1] (LCSP) in respect of works and services concession contracts, a new contractual category that replaces public service management contracts. This analysis deals with the important changes introduced in the concessionaire's right to the economic rebalancing (adjustment) of a concession and the concessionaire's new right to withdraw (resile) from a contract when performance becomes extraordinarily onerous as a result of the concurrence of two circumstances specified by the LCSP.

1. Rules governing the economic rebalancing of a concession

As explained in a previous analysis, although the concept of operational risk introduced by the LCSP recalls, in view of its regulation, the concept of "risk and peril" that already generally applied to administrative contracts, a concessionaire's right to the economic rebalancing of a concession, as regulated by the previous recast version of the Public Procurement Act and recognized by case law, has been significantly reduced.

The first change in the regulation contained in the LCSP for the economic rebalancing of a works concession (art. 270) and a services concession (art. 290) consists of the fact that such

[1] *Ley 9/2017, de 8 de noviembre, de Contratos del Sector Público.*

rebalancing is no longer merely a right of the concessionaire - although this will continue to be the most frequent case - since it is also possible for the contracting authority to proceed to rebalance when the application of the circumstances provided for in these articles would give rise to extraordinary benefits for the concessionaire that go beyond the forecasts of the contract's economic-financial plan.

Secondly, it is striking that the LCSP no longer provides that one of the grounds for economic rebalancing is that "the events of contractual review provided for in the contract itself occur", as stated in the previous recast version (art. 258). This does not preclude, however, the concession documents from referring to revision events which directly or indirectly permit the economic rebalancing of the contract, provided that the conditions and limits laid down in art. 204, which only allows changes of up to 20% of the initial price subject to compliance with formal (accuracy and clarity) and content requirements, are met. Naturally, these events may never entail the elimination of operational risk, since this is a *sine qua non* for the contract to be characterised as a works or services concession.

According to the LCSP, the events that may trigger economic rebalancing of a concession are only the two that follow:

(a) First, where the contracting authority makes an amendment to the works concession contract (falling under art. 262 LCSP) or introduces in the services concession contract any of the changes carried out in the contracted service or any of the charges to be paid by users as a result of circumstances provided for in general in respect of the amendment of administrative contracts under arts. 203 to 207 LCSP.

In this event of economic rebalancing due to the exercise by the contracting authority of the *ius variandi* - which was already recognised in the previous recast version - it should be pointed out that the right to the economic rebalancing in works concessions is no longer provided for any change introduced by the contracting authority in the contract, as the previous recast version did, but only with respect to those provided in art. 262 LCSP, which are limited to "modifications of the works" despite the fact that unilateral changes introduced by the contracting authority for the public interest (generally provided for in art. 261(b) LCSP) can affect as much or more so the economic balance of a concession.

For a services concession contract, on the other hand, any amendment to the contract that may be introduced by the contracting authority may lead to the economic rebalancing of the concession, without this unequal treatment between a works concession and a services concession being justified.

b) Second, where "the actions of the contracting authority, due to their binding nature for the concessionaire, directly determine a substantial breakdown of the economics of the contract".

> As we can see, the LCSP specifies that the *factum principis* that gives rise to the economic rebalancing of a concession is the one resulting from the actions of the "contracting authority" (the previous recast version referred generically to "actions of the authority"), thus excluding the cases in which the actions of other public authorities alter the initially agreed financial terms. This is confirmed by the fact that, as we will show below, one of the events entitling the concessionaire to withdraw from the concession, without compensatory redress for any of the parties, is "the passing of a general provision by an authority other than the contracting authority after the formalisation of the contract".

Apart from these statutory cases, the LCSP provides, both for works and services concessions, that "economic rebalancing of a contract will only be appropriate when force majeure directly determines a substantial breakdown of the economics of the contract. For these purposes, force majeure shall mean the circumstances listed in Article 239".

Furthermore, the LCSP expressly provides that "in any case, there shall be no right to economic rebalancing for failure to meet demand forecasts included in the contracting authority's study or in the study that the concessionaire may have carried out".

In the light of these last clarifications, one may ask whether, after the LCSP, economic rebalancing of concessions are possible in the event of unforeseeable risk.

The previous recast version did not mention unforeseeable risk as one of the grounds for economic rebalancing of a contract, but this possibility had been recognized by the legal doctrine of the *Consejo de Estado*[2] (Opinion 54700, adopted on 5 December 1990) and had been applied by case law where, due to an extraordinary and unforeseeable event, the legal position of the concessionaire within the concession contract was altered and the performance of the services it had been obliged to perform became excessively onerous (see Judgment of the Supreme Court of 16 May 2011, Appeal no. 566/2008).

The LCSP only provides for unforeseeable risk, in its art. 205(2)(b), as one of the grounds for the contracting authority to amend any administrative contract without the need for a new tendering procedure. Specifically, it is the case where "the need to amend an existing contract arises from supervening circumstances that were unforeseeable at the time when the contract was put out to tender", provided that the three conditions laid down in this provision are met: that the need for the amendment arises from circumstances which a diligent contracting authority could not have foreseen, that the amendment does not alter the overall nature of the contract and that the amendment to the contract involves an alteration in value not exceeding, alone or in conjunction with other modifications agreed pursuant to this article, 50% of the initial price, excluding value added tax.

[2] Translator's note: Supreme advisory body to the Spanish Government.

However, this unforeseeable risk is incardinated as an event of contractual amendment that the contracting authority may introduce and not as a right of the contractor to economic rebalancing of a contract. Therefore, in order for the amendment to be agreed upon – the grounds for which may be made clear by the contractor - the contracting authority will have to take into account its "necessity" and its being "indispensable to respond to the unforeseeable circumstance that has occurred". The LCSP does not specify the concept of 'necessity', but bearing in mind the strict interpretation of amendment events (in accordance with the exceptional nature of the amendments to contracts and that confirms the legal requirement that the amendment is "strictly indispensable"), we understand that it refers to the amendment being necessary in order for the contract to continue to be performed as originally envisaged.

With regard to the economic rebalancing of a concession, it should also be noted that a shift in the balance "for the benefit of the contractor in a manner not provided for in the original contract" is considered a "substantial modification" and cannot therefore be carried out under art. 205(2)(c), which allows modifications - whatever their origin - which are not substantial. In any event, the aforementioned article adds that a modification shall be deemed substantial when, as a result of the proposed modification, new work units representing more than 50% of the initial budget of the contract are introduced.

Where it is appropriate to recognize the contracting authority's or the concessionaire's right to economic rebalancing, the LCSP (arts. 270(3) and 290(5)) provides that "such shall be exercised by adopting the appropriate measures in each case", listing next some possible measures that include the following:

— a change in the charges fixed for the use of works in the works concession or in the charges to be paid by users or in the remuneration to be paid by the contracting authority in the case of services;

— a change in remuneration to be paid by the contracting authority;

— a reduction of the concession period; and

— in general, "any alteration of the financial clauses included in the contract".

However, following this open-ended clause, the statute, like the previous recast version, contains restrictions on the possibility of extending the concession period under economic rebalancing, in two ways:

(a) This possibility shall only apply in cases of economic rebalancing through actions of the contracting authority that are compulsory for the concessionaire and in events of force majeure that directly determine a substantial breakdown of the economics of the contract.

A concession of services also requires that more than 50% of the concessionaire's remuneration comes from the charges paid by users.

(b) The period for which the concession is extended may not exceed 15% of the initial duration.

In this regulation, it is observed that the LCSP has abolished the right recognised to the concessionaire of works to be guaranteed by the contracting authority, in the event of force majeure that did not completely prevent the execution of the works or the continuity of the operation, the minimum income agreed in the contract.

2. The new right to withdraw from a concession contract

As a development, undoubtedly justified by the drastic reduction in the right to economic rebalancing, the LCSP (arts. 270(2) and 290(6)) recognizes a concessionaire's right to withdraw from the contract, without compensatory redress for either party, when such is extraordinarily onerous, as a result of one of the following two circumstances:

(a) The passing of a general provision by an authority other than the contracting authority after the formalisation of the contract.

(b) Where the concessionaire is legally or contractually required to incorporate technical advances into the works or the operation that improve them significantly and whose availability on the market, in accordance with the state of the art, has occurred after the formalisation of the contract.

For the purposes of applying this right, the LCSP specifies that compliance with the contract shall be deemed to be "extraordinarily onerous for the concessionaire" when the impact of the provisions of the authority or the price of technical improvements to be incorporated entails an annualised net increase in costs of at least 5% of the net turnover of the concession for the remainder of the period until its conclusion. Where appropriate, any additional revenue generated by the measure shall be deducted for the calculation of said cost increase.