SPACE PROCUREMENT REGULATION: THE COLOMBIAN SPACE PROCUREMENT ACT OF 2010

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Abstract

The regulation of spatial activities has been widely studied and its importance demonstrated in multiple occasions. Nevertheless, in the developing countries without experienced in space affairs, this problematic is not necessarily known. A very clear example is treated in this paper, the case of the project of purchase of a telecommunication satellite by the Colombian State (SATCOL). The absence of a specific legislation for the acquisition of spatial assets made the project fail, taking into account that the conditions of insurances, responsibility, social security imposed by the general public procurement regulation were inappropriate.

The following study demonstrates that the space procurement regulation adopted after the SATCOL failure, the decree 1340 of 2010, was no more than a transitory remedy that does not take into account all the necessary elements to ensure the purchase of space assets and that it is necessary to create a real and complete regulation on this topic, that it is in agreement with the international principles of Space Law. Such a regulation would be a element to ensecure the contractual relation between the Government and the private partners, inciting companies to participate to Colombia's future space projects and by the same time would protect the Colombian State against its own lack of experience in space matters.

I. INTRODUCTION

The development of space activities in a State requires a legal framework allowing a proper, efficient and satisfactory regulation.

In the Colombian case, space activities have been developed without the creation of any space policy, without taking into account the needs of industry, the Academy nore the State itself and out of the *corpus juris spacialis*, given the reluctance of the Colombian State to ratify the Space Treaties.

Thus, the procurement process for the purchase of a telecommunications satellite b the Colombian State was affected and could not be performed since the satellite construction companies didn't shown up due to heavy restrictions and contractual liability rules imposed by Colombian law.

Therefore it was necessary for the Colombian government to change the space procurement rules through the Decree 1430 of 2010 adapting to the reality of space activities and practices that have been developed in this area.

However, the actual scope of the decree leaves much to be desired and does not solve the problem.

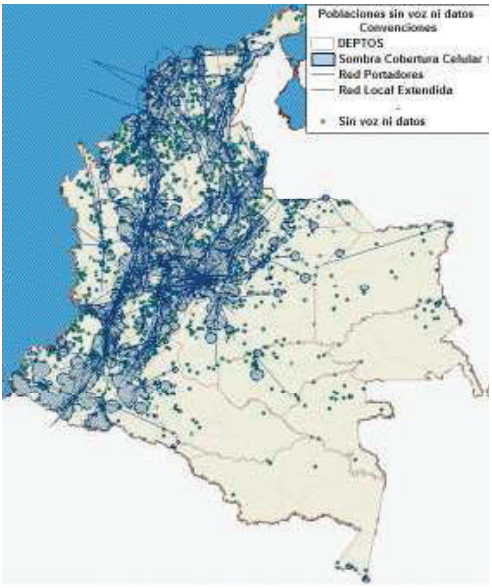
II. SATCOL, A SPACE PROCUREMENT FAILURE

The Colombian government, in its willingness to widespread Internet access to retired populations, created a policy called Compartel.

This policy, which is already fully implemented, aims to achieve universal access to Internet and telephone in every part of the Colombian territory and encourage people with low resources to it use. The aim is also to ensure that public institutions like schools, city halls and libraries have Interneteven in isolated regions.

In the process of implementing this policy, the Ministry of ICT realized that the best and less expensive option to reach all corners of the territory would be Space (graph.1).

(Graph. 1)



From this idea was imposed the idea of buying a telecommunications satellite for the Colombian State. The main idea was not to rely on a saturated market and with an exponential rise of prices.
According to the study done by the Ministry of ICT and under the National Development Plan, the savings possible on fifteen years was 165 million dollars.

Additionally, from 2009 to 2012 the financing of the satellite would be complete since more than half the total amount was already before starting the acquisition process.

The ministry decided toguarantee the transparency, through a tender process. Through this process, a call forbids would be open to all

interested persons and selection through an analysis of the proposals made by participants.
About fifteen satellite construction companies were interested in submitting a proposal and fully followed the requirements of the State procurement act.

However, when the ministry and companies began the process,they to realize that public procurement act was not adapted to the spatial projects and the enforcement of the law was too strict. It was thus not possible to comply fully with the traditional regulation.
One of the main problems is the issue of insurance. Colombian law has many a lot of guarantees and insurance those are not compatible with space activities and space technology purchases.

Another major problem was the taxes issues. At some point it was estimated that the taxes would represent about 8% of the total budget, which is extremely high and greatly reduces the profit of companies. Above all, because those companies that have business in other countries should also pay taxes in those countries, companies were finally submitteda double taxation.

Finally a very important issue was the obligation for the company to pay benefits in Colombia. Paradoxically, the construction of the satellite is not carried out in Colombia, for which the collection of benefits does not make sense and again forcing companies to pay twice the benefits.

In addition to economic issues and attractiveness of the project, is the fact that Colombia has not ratified any of the treaties of the *corpus jurisspatialis,* and has not (to date) any internal regulation to solve the problems that could appear purchasinga satellite, except the one provided in the general public procurement act.

The combination of these different factors meant that in the first instance, despite the interest of 15 companies, only one proposal was submitted in 2009, ISS Reshetnev, but this proposal did not meet the necessary requirements.

To remedy some of the problems was issued on April 28, 2010 the Decree 1430 on "guarantees for contracts on space technologies".

Similarly, the Ministry considered the possibility of changing the selection process of the company and moved from call for bids system to direct contracting. But the attorney general prevented this change the ministry had to continue with the tender.
In August 2010, the Ministry had to declare the bid void because only one proposal had been received complete company China Great Wall Industry Corporation and the offer did not meet all the requirements.

Therefore it was missed the chance for Colombia to get its own communications satellite and get a transfer of technology.

The current government does not consider that the issue of satellite telecommunications network is a priority, so it can be said that the project was postponed indefinitely and the funding amount has been used to expand the fiber optic network.
The SATCOL Experience of bidding process, Taughta lot on the importance of a special and specific regulation on state activities and led to the first specific regulation for space procurement in Colombia, the decree 1430.

III. THE 1430 PROCUREMENT DECREE OF 2010

In 2010, the Colombian government adopted a decree regulating and completing the general public procurement act. The 5 articles decree an only deal with contractual guarantee, that is to say, does not provide rules for the risk sharing in the project itself.

The scope of this decree is obviously narrow, as well as the size of the decree itself, that cannot be compared to a NASA's FAR (Federal Acquisition Regulation) complement. It does not fixe specific rules for the tenders' process in space-related

activities, even if it appears essential in a high technology, high-risk sector. This decree thus does not provide substantive solutions to the difficulties mentioned above, and does not give incentives for the companies to contract with the State for space projects.

The legal security provided by the decree itself is also an issue. Yet, the decree is only an administrative act and not a law or statutory law. By its nature, it is capable of petition for nullity before a court if its legal basis if is contestable, as well as capable of cancelation by the administration itself, when a Law adopted by the Congress could only be modified by the Congress itself, providing therefore a better security of legal stability.

IV. THE NEED FOR A PROCUREMENT ACT

Colombia is at a very important stage for the development of its space activities and policy. The country that never ratified the space treaties thus plans to buy a remote sensing satellite, as a first national space project. Colombia is thus a very low experienced country in space affairs and space activities, and s good and strong space procurement would therefore limit the risk of the project.

Space is still a high risky business. The late events in Russia prove that no country has a total control of the risk in space activities. That affirmation is even more important for developing and new space faring countries, due to the lack of experience in this area. In most cases, these countries choose to acquire space assets to qualified companies in order to take advantage of the experience of these providers of space goods and services. The lack of experience from the part of the government thus leads to an asymmetry that a good procurement policy and regulation should compensate. The specificity of space activitiesimposes the creation ofa specific regulation for space procurement on labor, transfer of technology, tax, insurance and should present a model of risk sharing between the State as a customer and the private partner as a provider.

Another question that has to be solved is the ratification of the space treaties by Colombia. Thus, the consequences of the no-ratification of these treaties on space procurement and partnerships is not clear, since it sets issues on responsibility sharing between the State and the provider. Colombia needs to coordinate with international treaties through the integration of their international practices or a ratification of the *corpus juris spatialis*, or both.

CONCLUSION:

The Colombian space procurement decree was born after the necesity to support the creation and development of space activities, making Colombia a new space faring country after the failure of IntelSat project due to the lack of companies interested in a partnership with the Colombian Government. At this time, it appeared necesary to create incentive and a legal framework for space procurement while the general procurement act was not adapted to space activities. In Colombia as in all countries, space procurement is not and cannot be considered as a normal procurement. The characteristics of space activies are specific, because of the high level of technology, the high costs, high rick. All these characteristics make that only a few number of compagnies are abble to be providers in a space project. Now, these companies have to be incited to contract with government, even more for new space faring countries. The relation between the government and the provider has to be based on mutual trust. By fixing clearly and definitively the rules of the game, the procurement act is the cornerwall tool of the trust in the contractual relation. It has to be clear, precise, and complete so the risk can be reduced.

In 2010, Colombia, a wish-to-be new space faring country that never ratified the Space Treaties,made an effort to adopt a specific

regulation for space procurement, due to his difficulties to find a provider for its first national space project. Nevertheless, it has to be improved, equally on the form than on the content. The decree 1430 seems useless being only an administrative act, and regulating a very small part of the space procurement. It appears also clearly that the Colombian general procurement act, regulating the element of public procurement that are not regulated specifically by the decree, is not adapted to space activities but only to classic procurement.