

PUBLIC POLICY AND THE NEW REGULATORY FRAMEWORK ON ELECTRONIC GOVERNMENT PROCUREMENT IN COLOMBIA*

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ABSTRACT

Government Procurement can be described as the process by which large amounts of public funds are utilized by public entities to purchase goods and services from the private sector. The incorporation of Information Technologies to Government Procurement is called Electronic Government Procurement. This dissertation will describe Colombia's policy and regulation making process on the matter. It underscores that Colombia's legal framework on Electronic Government Procurement now includes the two legal pillars that UNCITRAL has established in its works on the matter, which are: 1. Rules about electronic disclosure of government procurement related information and 2. Rules about functional equivalence of electronic government procurement documents. Functional equivalence is a principle of electronic commerce that allows the replacement of paper-based physical documents with electronic documents. This research emphasizes that before the 8th of July 2005 Colombian Electronic Government Procurement legal framework lacked the functional equivalence pillar and this circumstance denied the possibility of using Information Technologies in Government Procurement administrative

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Procedures. Furthermore, it explains how thanks to the issuance of Law 962/2005, the pillar has been introduced to the regulatory framework as this law has established new rules about functional equivalence for administrative procedures. Prior to concluding, the author provides his own interpretation of Law 962/2005. The sources of this research have been Colombian policy documents and legislation, international reports and regulations and legal journals and textbooks. This dissertation arrives at the conclusion that Colombian Government Procurement legal framework has been complemented thanks to Law 962/2005 in such a way that it is now possible to do Electronic Government Procurement.

Key words: eGP, electronic government procurement, electronic government, government procurement, IT law, e-commerce.

POLÍTICA PÚBLICA Y EL NUEVO MARCO REGULATORIO DE LA CONTRATACIÓN PÚBLICA ELECTRÓNICA EN COLOMBIA

RESUMEN

La contratación pública es la actividad a través de la cual grandes cantidades de recursos públicos son utilizados por entidades de esa misma naturaleza para comprar y adquirir bienes y servicios del sector privado. Cuando a esta actividad se le incorpora el uso de tecnologías de la información y la comunicación se genera el concepto de contratación pública electrónica, en inglés e-government procurement que a su vez tiene como sigla eGP. El presente documento describe el proceso de elaboración de política pública y regulación en material de eGP en Colombia. Subraya que sólo hasta hoy en día el sistema de contratación pública colombiano logró incorporar los dos pilares que la CNUDMI ha propuesto como bases legales para el eGP: 1. Reglas sobre publicación de información sobre procesos de contratación y, 2. Reglas sobre equivalencia funcional de documentos electrónicos expedidos con ocasión de la actividad contractual. Por equivalencia funcional se debe entender el principio según el cual los documentos electrónicos reciben la misma validez y fuerza vinculante que los documentos expedidos en soporte papel. Esta

investigación enfatiza que antes del 8 de julio de 2005, la regulación de contratación pública electrónica carecía del pilar de equivalencia funcional y que tal circunstancia hacía nugatoria la posibilidad de usar tecnologías de información en las labores de la administración pública. El documento explica cómo gracias a la expedición de la Ley 962 de 2005, el pilar faltante de equivalencia funcional fue establecido, ya que esta norma incorporó este principio para el general funcionamiento de la administración y sus procedimientos administrativos. Antes de exponer sus conclusiones, el autor sugiere su propia interpretación de la Ley 962/2005. Las fuentes que han servido de insumos para la elaboración del documento han sido documentos oficiales del gobierno colombiano así como regulación local, igualmente, legislación y reportes de organizaciones internacionales, libros y artículos en la materia. Este documento llega a la conclusión de que con la Ley 962/2005 las interpretaciones que existían en materia de contratación pública electrónica deben cambiarse al punto de que se acepte el uso de TI para el efecto de generar eGP en Colombia.

Palabras clave: *contratación pública electrónica, eGP, e-procurement, comercio electrónico, TICS.*

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List of Abbreviations

eGP	Electronic Government Procurement
GP	Government Procurement
PP	Public Procurement
e-Government	Electronic Government

IADB	Interamerican Development Bank
UNCITRAL	United Nations Commission for International Trade Law
CONPES	Consejo Nacional de Política Económica y Social
DNP	Departamento Nacional de Planeación
IT	Information Technologies

INTRODUCTION

The concept of Government Procurement¹ (hereon GP) describes a broad activity. GP occurs whenever states, their regional or local subdivisions, or in general, any body governed by public law, acquires goods, services or works from private suppliers or contractors. For the accomplishment of this activity and since discretionary powers of state officials can avoid an objective selection, GP follows a special administrative procedure established by local legislations, where the principles of transparency, value for money and equality among suppliers are strictly applied.

The study of GP mixes up issues related to administrative law, trade law, commercial law, litigation, foreign investment, public policy and economics. Regarding the last topic —the economic relevance of GP—, Colombian studies have shown that GP accounts for over 16% of the GDP². It has been well recognized that GP sets in motion a large number of economic transactions³ and plays an important role in the economies of developing countries⁴ as a tool for industrial development and domestic policy⁵.

With the appearance of internet, a new concept was introduced within government's affairs: "e-government". E-government seeks to shorten the distances between public authorities and citizens with the use of information technology and

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- 1 Public procurement is also known as State Contracts, Government Purchases, Public Contracts, but for the purpose of this research we will use the concept of "Government Procurement" as this is the terminology used by international regulatory organizations such as UNCITRAL, World Bank, Inter American Development Bank, WTO, OECD, etc. In literature and different jurisdictions the word "Government" is usually replaced by the word "Government" without changing the meaning of the concept.
 - 2 National Planning Department, Colombia, documento CONPES 3186/02, "Hacia una política para la eficiencia y la transparencia en al contratación pública".
 - 3 OECD, Directorate for Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy Competition Policy and Procurement Markets, May 7th 1999, <http://www.oecd.org/dataoecd/35/3/1920223.pdf>. April 4th 2005, 22:47.
 - 4 LAGUADO-GIRALDO, ROBERTO, *A Critic to the objectives of Public Procurement initiatives in the context of WTO*, Universidad Javeriana, revista *Vniversitas*, n° 108, Bogotá, Colombia, June, 2005.
 - 5 ARROWSMITH, SUE, Public procurement as an instrument of policy and the impact of market Liberalization, *Law Quarterly Review*, 1995. L.Q.R. 1995, 111(Apr), 235-284.

mostly internet⁶. It can be applied to any kind of public affairs, such as education, provision of justice, tax controls, budget execution, control and, for the purposes of our proposed research, also to GP.

The application of e-government to GP has been generally called Electronic Government Procurement (hereon eGP), what describes the general activities that states undertake for modernizing their procurement methods introducing the use of electronic commerce and information technology⁷. This can only be achieved by the dematerialization and digitalization⁸ of the GP administrative procedure. eGP has several advantages: it increases transparency levels, makes the provision of public services more efficient, reduces time, promotes economies of scale, automates the administrative procedure and makes easier the storage of GP related files.

International guidelines have contributed to the determination of what are the legal pillars of an eGP legal framework contain. After a couple of years, two main pillars have been identified: a. Rules about electronic disclosure of GP related information and b. Rules about legal validity of GP electronic documents. The most relevant contribution in this respect comes from the United Nations Commission for International Trade Law's (hereon UNCITRAL) whose goal in this matter is to introduce GP into the world of electronic commerce⁹. Works inside UNCITRAL, regarding the future of GP, have shown that electronic disclosure and electronic publication of procurement related information is a pillar in eGP legislations¹⁰. In another context, UNCITRAL has also established important guidelines about electronic transactions and electronic commerce¹¹, which have been applied by several countries in the past years, and have been the fundament for ensuring *Functional equivalence* between paper based documents and electronic documents as another legal pillar for eGP. When referring to *Functional Equivalence* implies that electronic

6 BASU, SUBHAJIT, "E-Government and Developing Countries: an Overview", *International review of law computers & technology*, vol. 18, March 2004, n° 1, pp. 109–132.

7 GEBAUER, JUDITH; BEAM, CARRIE, and SEGEV ARIE, "Impact of the internet on procurement", *Acquisition Review Quarterly-Spring*, 1998.

8 For "dematerialization" and "digitalization" we shall understand the process of creating an electronic document with the same legal validity as traditional documents printed in paper.

9 UNCITRAL, United Nations Commission on International Trade Law. Thirty-eighth session Vienna, 4-22 July 2005. Report of Working Group I (Procurement) on the work of its sixth session. (Vienna, 30 August-3 September 2004). UNCITRAL, General Assembly. Resolution adopted by the General Assembly [on the report of the Sixth Committee (A/51/628)] 16 December 1996. 51/162 Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law.

10 *Ibid.*

11 United Nations Commission for International Trade Law, UNCITRAL, Model Law on Electronic Commerce, Adopted by the General Assembly by Resolution (51/162 1996).

communications such as e-mails, should receive the same legal treatment as paper based documents¹².

These two guidelines constitute the two pillars of eGP legislation¹³: 1. Electronic disclosure of GP related information and 2. *Functional equivalence* between GP electronic documents and GP paper based documents.

Colombian legislation had clearly incorporated electronic disclosure of information with the enactment of Decree 2170/2002. On the other hand, Colombian commentators had shown different points of view about the presence of the second mentioned pillar within Colombian applicable legislation about GP. Some said that Colombian legal framework developed the *Functional Equivalence* principle for eGP, others did not agree.

The World Bank and the Inter American Bank at a first stage thought Colombia had already established GP laws and regulations that applied the *functional equivalence* principle¹⁴. Recently, the same institutions have concluded that Colombian eGP framework lacks the *Functional Equivalence* pillar for GP documents¹⁵.

While these discussions were held, one new law was silently and timidly passed: Law 962/2005. This law will change the history of eGP as it welcomes the *functional equivalence* pillar for GP, putting end to previous undesirable approaches.

From now on, Colombian GP officials must interpret GP legislation and understand that Law 80/1993, Decree 2170/2002, the Administrative Code and complementary pre-existing legislation have been amended by Law 962/2005. There has not been an express derogation. Law 80/1993 and Decree 2170/2002 remain untouchable and that is why it is very important that GP officials study and apply with due care Law 962/05.

12 *Ibid.*

13 GREINER, M.J., Übersicht zu einigen Entwicklungen im internationalen Handels und Verfahrensrecht. *Schweizerische Zeitschrift für Wirtschaftsrecht* (Zürich, Switzerland) 66:5:251-256, 1994. MATECHAK, JASON P.; YUKINS, CHRISTOPHER R.; WALLACE, DON, Jr., UNCITRAL Model law: reforming electronic procurement, reverse auctions, and framework contracts. MYERS, J.J., UNCITRAL Model Law on Procurement. *International business lawyer: Journal of the Section on Business Law of the International Bar Association* (London, United Kingdom) 21:4:179-182, April 1993. Procurement Lawyer. Winter, 2005.

14 Word Bank, Electronic Government Procurement, Legal and Regulatory Country Profile, Colombia, January, 2002.

15 Inter American Development Bank & World Bank, *Country Procurement Assessment Review* – Colombia. CPAR. April, 2005.

The aim of this dissertation is to show that with the enactment of Law 962/2005, the *Functional Equivalence* pillar has been introduced to Colombian administrative law and consequently provided the lacking element that the Colombian eGP legal framework needed for making eGP feasible and coherent with international trends in the matter.

The first section of the dissertation will provide a brief conceptual background on GP, e-Government and eGP. Those concepts are developed in Colombian Public Policy regarding the matter and for that reason the second section will describe Colombian Public Policy on e-Government and eGP as well as the legal framework on both matters. This section will also describe how this legal framework was interpreted before and after the enactment of Law 962/2005 and will also draw the attention on how this law, even though does not make part of GP specific legislation, has contributed and generated the most important change in the field with the introduction of the *Functional Equivalence* pillar.

As the law was only issued six weeks ago and no judgment or comments have been provided about its reach, the third section will provide the author's own interpretation and a forecast on the effects that the law will bring to Colombia's eGP legal framework.

1. ABOUT GOVERNMENT PROCUREMENT AND ELECTRONIC GOVERNMENT PROCUREMENT

The term "Electronic Government Procurement" (eGP) results from a combination of two concepts: Electronic Government and Government Procurement. Government procurement —GP— occurs whenever states, their regional or local subdivisions, or in general, any body governed by public law, acquires goods, services or works¹⁶. For the accomplishment of this activity, and since discretionary powers of state officials can avoid objective selection of suppliers and contractors, GP follows a special administrative procedure where the principles of transparency, value for money and equality among suppliers and contractors, should be strictly applied.

GP responds to a common concept¹⁷ implying the activity where government agencies purchase or contract the acquisition of goods and services necessary to

16 For a complete analysis on the terminology of Government Procurement, see, WEISS, FRIEDL, *Public Procurement in European Community Law*, The Atholone Press, London, 1993, p. 6.

17 HOEKMAN, BERNARD, *Using International Institutions to Improve Public Procurement*, *The World Bank Research Observer*, Vol. 13, n° 2, August, 1998, pp. 249-69, p. 249.

provide the public, the citizens and the states agencies, with defense and basic utilities, public health, infrastructure, public consultants and so forth. Because public resources are scarce and belong to the tax payers, all the collective goods and services should be acquired at the least cost and in a fair and transparent manner¹⁸. In more simple terms, GP is the process by which large amounts of public funds are utilized by public entities to purchase goods and services from the private sector¹⁹.

Colombian government procurement regulations (Law 80/1993, Decree 2170/02) do not describe what is meant by GP (in Spanish, *Contratación pública*²⁰), but identify the elements of the definition, that is, they define the basic contractual objects²¹, the parties of the contract²², the procedures that should be applied²³, the formalities that shall be followed²⁴, and chiefly, the applicable rules and principles²⁵.

1.1. Electronic Government (e-Government)

E-government appears in a variety of labels and spellings²⁶ such as e-government, e-governance, e-governance, e-government, one-stop government, digital government, electronic government, online government and in the Spanish language, *gobierno electrónico*, *teleadministración*, *gobierno digital*, *gobierno en línea*, etc.

E-government is more than just a government website in the internet²⁷; it is a transformation process for modernizing public administration²⁸, a new vision for the

18 *Ibidem*.

19 HUNGA, ROBERT R., Obstacles to Public Procurement Reform in Developing Countries. Public Procurement. The Continuing Revolution. Public Procurement Research Group. School of Law. University of Nottingham. Kluwer Law International. London. 2003. p. 17.

20 Unless otherwise stated, translations in the dissertation from Spanish are my own translations.

21 Articles 32, Civil and Commercial Codes.

22 Article 2.

23 Articles 24 and 30 Law 80/1993.

24 Article 41 Law 80/1993.

25 Articles 13, 24-29 and 32 Law 80/1993.

26 FANG, ZHIYUAN, E-Government in Digital Era: Concept, Practice and Development. School of Public Administration, National Institute of Development Administration (NIDA), Thailand. International Journal of the Computer, *The Internet and Management*, Vol. 10, n° 2, 2002, p. 2.

27 BASU, SUBHAJIT, E-Government and Developing Countries: an overview. *International Review of Law Computers & Technology*, Volume 18, n° 1, pp. 109-132, March 2004.

28 HUANG, JIMMY C.; LEE, JAE-NAM, PAN; SHAN L., ZULFIQAR, KHAN, E-Government: an exploratory study of on-line electronic procurement system [Case study]. Global Co-Operation in the New Millennium, The 9th European conference on Information Systems, Bled, Slovenia, June 2001, p. 1011.

public sector's future that takes, in an initial stage, the form of an internet web governmental page²⁹ and follows a full and organized road map for introducing the use of information and communication technologies and particularly internet, as a tool to achieve government³⁰. It is not an objective *per se* but a means in organizing³¹ public governance for better serving citizens and enterprises³². E-government is a reinvention of the government in order to deliver efficient and cost effective services³³. Whatever effort can be made, a narrow definition can constrain opportunity and too broad can dilute its value as a rallying force³⁴.

E-government has also been described as a stage model³⁵, this is, a description of a series of steps that governments have to follow in order to incorporate the use of IT in its affairs for the enhancement of its operations and a better provision of public services³⁶. The models use *triggers*. A *trigger* is one, or a series of events can determine the end of one stage and the continuation to the next. This dissertation focuses in the *trigger* that has marked Colombia's advancement from one stage to another in according to the model designed by Colombia's public policy in eGP.

29 FANG, ZHIYUAN, *ibid.*

30 OECD, The E-government imperative, in OECD E-Government Studies, OECD, Paris, 2003, p. 22.

31 LAYNE, KAREN and LEE, JUNGWOO, *Developing Fully Functional E-government: a four stage model. Government Information Quarterly* 18 (2001) p. 130.

32 TRAUNMULLER, ROLAND, WIMMER, MARIA, *E-Government – A road map for progress. Digital Communities in a networked society. E-commerce, e-business and e-government*, Kluwer Publishing Group, The Netherlands, 2004.

33 FANG, ZHIYUAN, E-Government in Digital Era: Concept, Practice and Development. School of Public Administration, National Institute of Development Administration (NIDA), Thailand, *International Journal of The Computer, The Internet and Management*, vol. 10, n° 2, 2002, p. 2.

34 SCHARF, CHRISTINA; SCHEDLER, KUNO, *Exploring the interrelation between electronic government and the new public management. A managerial framework for electronic government*, Institute of Public Services and Tourism at the University of St. Gallen (Switzerland), p. 2.

35 VIBORG ANDERSEN, KIM, *E-government and Public Sector Process Rebulidng (PPR): Dilettantes, Wheel barrows, and Diamonds*, Centre For Research on IT in Policy Settings (CIPS), Copenhagen Business School, Denmark, Kluwer, The Netherlands, 2004, p. 3.

36 Commentators still do not agree about the number and the content of those stages that describe the advancement of e-government strategies (LAYNE, KAREN and LEE, JUNGWOO, *ibid*) and critics have been raised against this model based on a descriptive approach of e-government (VIBORG ANDERSEN, KIM, *op. cit.*, pp. 86-87) because stages are hard to use as *flag poles* and *milestones*. Moreover, the models usually show evolution and enhancements from stage I to stage II and so on, disregarding that these phases might occur simultaneously or in some cases not in the established order. Further more, none of the proposed models have had the quality to capture the drivers and evolution of e-commerce, and finally, questions and problems regarding the definition of the *triggers* that define the entry from one stage to another have not been sorted out yet.

1.2. Electronic Government Procurement (egp)

1.2.1 Procurement and e-procurement

“Procurement” refers to the purchases and acquisition of goods, services and works by organizations. Thus, procurement encompasses all activities involved in obtaining material and services and managing their inflow into an organization towards the end user³⁷.

When IT is introduced to Procurement we are in front of Electronic Procurement. Consequently Electronic Procurement (e-procurement) can be seen as the complex organizational activity towards the satisfaction of the needs or the effort of implementing solutions for that same goal through the incorporation of information and communication technologies³⁸. It is a group of activities, rather than one single technological conduct, that allows to profit from the benefits of information and communication technologies—mainly Internet—to systematize one or all acquisition phases and procedures of organizations regardless of its character. At the end, e-procurement are the technologically based processes that improve the acquisition chain of organizations³⁹.

1.2.2. Electronic Government Procurement

1.2.2.1. The concept

The application of e-Government to GP generates the concept of e-Government Procurement. According to one definition, e-GP is the use of information technologies (especially Internet) by the government in conducting its procuring relationships with suppliers, for the procurement of works, goods and consultancy services, required by the public sector. e-GP breaks down the physical barriers of space and

37 BEAM, CARRIE; GEBAUER, JUDITH and SEGEV, ARIE, Impact of the Internet on Procurement. Lessons Learned, document in file of the author, retrieved at: <http://www.dau.mil/pubs/arq/98arq/beam.pdf>, June 20th, 13:42.

38 MERCADO KIERKEGAARD, SYLVIA, Going, going, gone! E-procurement in the EU. MCM-IMF International Organization, document in file of the author retrieved from <http://www.psu.edu/jo/EBEL/pdf/40.pdf>, June 20th 2005, 17:58.

39 LAGUADO-GIRALDO, ROBERTO, Sistemas de E-government procurement. (*Electronic Government Procurement Systems*), *Revista Jurídica del Perú*, n° 42, Lima, Perú, November 2002.

time and allows a more transparent and efficient information flow and wider access to information and services⁴⁰.

Despite the fact that this definition was provided by authorized organizations in the field, it lacks one important element. e-GP can not be limited to disclosure of GP related information. If IT is being introduced to procurement, it shall benefit all aspects of procurement, not only the need for publicity and disclosure. If IT is applied to procurement, all aspects must be benefited. For instance, the equivalence of paper based documents to digital documents; introduction of digital signatures, and in general, IT must be used for performing GP procedures in full. In such way, the given definition of eGP should be complemented with the reference that IT must be applied not only for publicity purposes but also for executing the administrative GP process itself, this is, to perform electronically all, or at least some, of the most important of its phases.

By taking in consideration the abovementioned, e-GP can

“exploit online interoperability and add value to the relationship between government and business”⁴¹.

Consequently, when interactions between the participants of the GP relationship (final users, procurement officers, suppliers, paying officers/financial departments and financial institutions) move from paper-based infrastructures to a future-oriented, flexible environment that provides facsimile transmissions, bulletin boards, purchase cards, electronic catalogues, electronic funds transfers and computer-to-computer communications using the internet and electronic mail, and chiefly, if the GP officials and procuring entities can develop an electronic administrative procedure, we can think we are in presence of e-GP⁴².

40 BDB EGP HARMONIZATION GROUP: African Development Bank, the Interamerican Development Bank, the World Bank, the Nordic Development Fund, <http://www.mdb-egp.org/data/default.asp>. Retrieved August 26th 12:14.

41 ADB, IADB, WORLD BANK, *Strategic Electronic Government Procurement*, Strategic Overview an Introduction for Executives, March 2004.

42 WITTIG, WAINE, International Trade Centre, *A strategy for improving public procurement*, GP, October 1999, p. 19.

1.2.2.2. The two pillars of eGP: information and functional equivalence

Procurement legislation is the backbone of a GP system⁴³ and consequently, of an eGP system. International guidelines have been contributing to the determination of are the pillars of an eGP framework. For instance, current works inside the United Nations Commission on International Trade Law —UNCITRAL—, regarding the future of GP, have shown that electronic disclosure and electronic publication of procurement related information is a pillar that should be present in eGP legislations⁴⁴. This pillar can be labeled as “Information and disclosure requirement”.

In another context, UNCITRAL has also established a second guideline about electronic transactions and electronic commerce⁴⁵, which have been applied by several countries⁴⁶ in the past years, and have been the fundament for ensuring equivalence between paper-based documents and electronic documents. This pillar, which has been labeled the “*Functional Equivalence*” principle⁴⁷, has been applied to electronic commerce and also to the public sector. In a simplified fashion, *Functional Equivalence* means that electronic communications such as e-mails, should receive the same legal treatment that paper based documents enjoy⁴⁸.

Some countries, like France⁴⁹ and Uruguay⁵⁰ have already incorporated this pillars to their eGP frameworks and others, like the European Member States, will be required to do it by the year 2006⁵¹.

43 WALKER, SINTHYA, *Setting up a public procurement GP procurement public procurement system: the six step method. Public Procurement – The continuing revolution*. Public Procurement Research Group, School of Law, University of Nottingham, Kluwer Law International, London, 2003, p. 3.

44 UNCITRAL, United Nations Commission on International Trade Law, Thirty-eighth session Vienna, 4-22 July 2005, report of Working Group I (Procurement) on the work of its sixth session, (Vienna, 30 August-3 September 2004).

45 UNCITRAL, General Assembly, Resolution adopted by the General Assembly [on the report of the Sixth Committee (A/51/628) 16 december 1996, 51/162 Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law.

46 UNCTAD - Trade and Development Board - Commission on Enterprise, Business Facilitation and Development, *Expert Meeting on Electronic Commerce Strategies for Development*, Geneva, 10-12 July 2002, item 3 of the provisional agenda.

47 UNCITRAL, *op. cit.*, *ibid.* ft. 51.

48 *Ibid.*

49 Administration Electronique 2004-2007/ADELE Presented by the Agency for the development of Electronic Administration (Agence pour le développement de l'administration électronique (ADAE).

50 Presidential Decree 65/1998.

51 Public Sector Directive 2004/18 EU.

The *Functional Equivalence* pillar was established taking into consideration that traditional paper-based documentation is the main obstacle for the development of modern means of communication⁵² within any kind of organization, be it private or public. As GP processes were designed as paper based processes, the incorporation of this pillar will provide the flexibilities that the digital era demands. When applying the principle, procuring entities can replace traditional paper-based documents with electronic messages that enjoy full legal validity.

These two pillars constitute the twofold legal requirements for eGP legislation:

1. Electronic disclosure of GP related information and
2. *Functional equivalence* of electronic GP documents.

2. ELECTRONIC GOVERNMENT PROCUREMENT IN COLOMBIA

2.1 Public Policy on eGP in Colombia

International efforts have shown that without political commitment and support from the highest levels of government, it is very difficult to achieve wholesale and systematic changes to the e-government legal framework⁵³. eGP is an expression of e-Government and as such, must also be seen as a Macro-Project that demands a leader—an orchestra director—in charge of determining in which direction should the project go. eGP requires strong public policy participation and commitment from all kinds of agencies involved in the field.

Colombia has designed a strong public policy for making e-government and e-GP real. Public Policy documents were introduced in the e-government's regulatory

52 UNCITRAL, United Nations Commission on International Trade Law. Thirty-eighth session Vienna, 4-22 July 2005, report of Working Group I (Procurement) on the work of its sixth session, (Vienna, 30 August-3 September 2004).

UNCITRAL, General Assembly, resolution adopted by the General Assembly [on the report of the Sixth Committee (A/51/628) 16 december 1996, 51/162 Model Law on Electronic Commerce adopted by the United Nations Commission on International Trade Law.

53 HUNJA, ROBERT R., *Obstacles to public procurement Reform in Developing Countries, Public Procurement. The continuing revolution*, Public Procurement Research Group, School of Law, University of Nottingham, Kluwer Law International, London, 2003, p. 21.

framework⁵⁴ in 2000, but the first explicit legal instrument regarding electronic public administration was only issued five years later (Law 962/2005).

At the end of the last decade of the past century, Colombia created the National Information Council and issued policies and guidelines about the subject (1997's Consejo Nacional de Informática and Bases para una Política Nacional de Informática). In 2000, Policy Document CONPES⁵⁵ 3072/2000 *Agenda de conectividad* (Connectivity Agenda) created a Presidential Program with the precise task of making the Government the model user of IT⁵⁶. Policy document CONPES 3072/2000 suggested a three-phase model for the introduction of IT to the county: information, interaction and transaction.

The first stage (information) was due in December 2000, the second one (interaction) in December 2001 and the third one (transaction), by June 2002. In the information stage, governmental entities displayed information about their public functions in the internet; in the interaction stage, entities were required to interact electronically with citizens and, in the transaction phase, public bodies were required to contract electronically with private suppliers. This last stage is the origin of eGP strategies and public policies regarding eGP in Colombia.

It must be mentioned that CONPES 3072/2000 was biased towards a telecommunication network development that promoted better and more competitive participation of the country in the new digital economy⁵⁷ and did not address the issue of the legal complexities arising from e-government, nor e-GP policies, because its aim was not that one itself but simply to provide general and basic policy guidelines towards the subject. This is how out of the nine recommendations that the document gave, none were related to the making of proper legislation in the subject nor regarded the application and hermeneutic of the current one. No mention about the two pillars took place.

Nevertheless, due to strong public policy, Colombia climbed in the past two years, thirteen positions in the *United Nations E-government Ranking*,⁵⁸ With this

54 Departamento Nacional de Planeación, República de Colombia, Policy documents 3072/2000, 3186/2002, 3249/2003, see also, *Country Procurement Assessment Review World Bank*, April 2005, par. 2730.

55 A CONPES document is a public policy assessment and a set of recommendations by the Colombian National Council of Economic and Social Policy.

56 LAGUADO-GIRALDO, ROBERTO, "La contratación pública electrónica en Colombia", revista *Vniverstias*, June 2005.

57 BUSTOS, SEBASTIÁN; FERRAZ, JOÃO CARLOS; HILBERT, MARTIN, (CEPAL, EUROPEAID) *Estrategias nacionales para la sociedad de la información en América Latina y el Caribe*, March 2005, p. 51.

58 United Nations Organization's *Global E-Government Readiness Report 2004*.

foundational public policy, the Government issued another policy document, especially addressed to the GP field, CONPES 3249/03 “Public Policy on Government Procurement for a Managerial State”. After identifying dispersion and disparities in different information systems, the Council for Economic and Social Policy —authority in charge of elaborating those policy documents— concluded that Colombia needed unification, quality production of data and proper use of it. This is how the first strategy for developing e-GP national information systems was proposed for Colombia.

Policy document CONPES 3249/03 reiterated three main ideas⁵⁹: that eGP policy needs an institutional reorganization within Colombia’s governmental structure that provides for a specialized public body in charge of designing public policy in eGP matters. In second place, the document reiterated the need of an information system for GP that centralizes and generates all the public and technological interfaces used in GP. Finally, the document recognized that for making e-GP real, two stages should be fulfilled: (i) the *information* stage and (ii) the *government procurement management* stage⁶⁰.

The first stage —*information*— implies developing an e-GP legal system with the regulatory framework⁶¹ that ruled at that time: Law 80/1993 and Decree 2170/2002. Doubts about the application of Law 527/1998 on electronic commerce to the public sectors had not been clarified by then. This phase developed an Information based eGP system which uses the internet for disclosing and making available to the public all kinds of GP related information. This is the case of simple eGP systems, such as the one that Colombia had from 2000 to 2004 before the enactment of Law 962/2005⁶².

Information based systems focus on disclosing the following procurement related information:

- a. Procurement plans.
- b. Procurement current opportunities.
- c. Bidding documents.
- d. Requirements for participation.
- e. Requirements and evaluation criteria set out in the tender documentation.

59 LAGUADO-GIRALDO, ROBERTO, La contratación pública electrónica en Colombia, revista *Vniversitas*, December 2004, Policy document CONPES 3186/02 also addressed the topic but is irrelevant for the discussion.

60 CONPES, 3249/2002 “Public Policy on Government Procurement for a Managerial State”, 20th October 2003, p. 21.

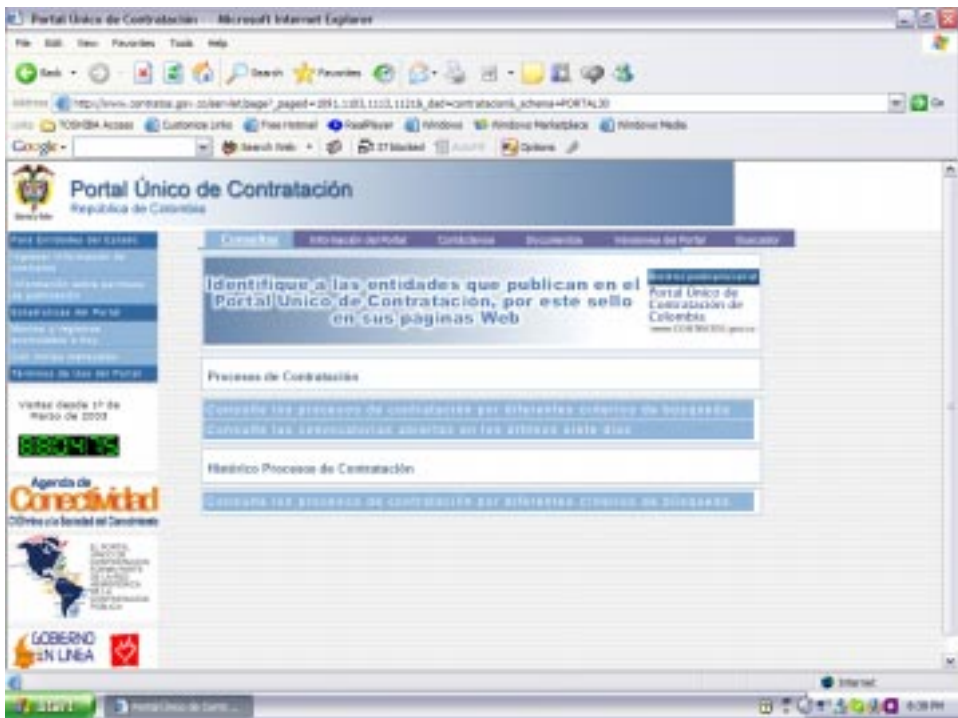
61 *Supra* 2.2.1, p. 19.

62 *Supra* 2.2.

- f. Tender decision on contract awards.
- g. The name of the entity.
- h. A description of the goods or services included in the contract.
- i. The name of the supplier awarded the contract.
- j. The value of the contract award, etc.

With the design and improvement of the Colombian Government Procurement Portal⁶³ and the enactment of Decree 2170/2002⁶⁴ Colombia reached this level. These public policy measures are relevant because they are the guidelines that pave the way for including in the legislation the information pillar.

GRAPH 1. Colombian Government Procurement Portal. The website discloses information about the procurements that are currently taking place in Colombian jurisdiction as well as the past and future intended procurements. www.contratos.gov.co



63 See, http://www.contratos.gov.co/servlet/page?_pageid=1091,1103,1113,1121&_dad=contratacion&_schema=PORTAL30

64 *Supra* section 2.2.1.2.

The second stage —*government procurement management*— implies the reformulation of the legal e-GP framework. According to Policy Document CONPES 3249/2003, the second stage implies incorporating efficiently and functionally the use of electronic means to GP processes. The *information* stage will be auxiliary and the procuring activity will be held in electronic format eliminating as far as possible the use of paper-based processes. It supposes a new *how to* perform GP processes whilst incorporating means (digital) differently than the traditionally used; redistributing work loads and burdens for public and private sector and creating new fashions, models and work schemes for interacting with public entities⁶⁵.

According to the quoted policy document, the second stage will be characterized by the following events: simplification and standardization of bidding documents, digitalization of all kinds of documents part of the proposals, automated-electronic evaluation and awarding systems and chiefly, enabling legal reforms that provide for the reengineered GP process which should be expressly incorporated in the legal framework rather than being dug out from painful interpretations of the current regulatory system. In short, this stage required legal modifications to the GP framework. Those modifications should ensure the incorporation of the *Functional Equivalence*⁶⁶ pillar that had been proposed by UNCITRAL in its Model Law of Electronic Commerce.

It should be concluded that Colombian public policy is being developed by taking into consideration the two main pillars of an eGP legal framework⁶⁷. The two stages mentioned in the document coincide with the pillars provided by UNCITRAL. Accordingly, the first stage —*information*— matches with the publicity pillar suggested by UNCITRAL and the second stage —*GP management*— coincides with the recognition of the *Functional Equivalence* pillar promoted by the same organization.

2.2. Colombian legal issues in Electronic Government Procurement

2.2.1. The current legal Framework

Regulatory framework, including primary legislation such as laws or secondary legislation as decrees or presidential orders must be seen as the starting point of

65 CONPES, 3249/2002, pp. 22-23.

66 *Infra* section 1.3.2.2.

67 *Ibid.*

any GP system⁶⁸. It settles the administrative GP procedural rules, provides legal basis and ensures private and public parties' rights and responsibilities. The regulatory framework connects the administrative GP process with all other institutional structures (public expenditure, fiscal control, etc.) and defines *how* GP shall be done. The definition of that *how* includes the means that can be used, —i.e information technologies or paper—, in the procurement.

Colombian GP framework is composed by a variety of regulations each one of them with different scope⁶⁹. For the purpose of this dissertation, references to only the two main regulations will be made:

- a. Law 80/93 (General Public Procurement Statute).
- b. Decree 2170/2002. Other supplementary regulatory instruments such as the newly issued Law 962/2005 and Law 527/1998 will be mentioned.

2.2.1.1. Law 80/1993 “General Government Procurement statute”

Law 80/93 develops article 150 of the Colombian Constitution according to which within Colombian regulation, one single statute that rules all GP must exist. The law has as a general purpose to set the rules and principles applicable to all contracts concluded and performed by public entities. Some of its main characteristics are the following:

- a. General statute: the statute is considered to be the “General Statute” and as such, regulates and reaches every single procurement within Colombian jurisdiction (articles 1 and 2). According to these articles, any public entity is bound by what is stated in Law 80/93, including ministries, state departments, superintendence, courts, parliament’s chambers, local or regional authorities, public enterprises and state owned companies, regardless of the levels and their centralized or decentralized character. In sum, the law shall govern any kind of public contract celebrated by any kind of public entity. It should be noted that despite the fact that the statute is deemed to be “general”, different public sectors have issued especial regulations for their procurements. Nevertheless, the ideas exposed in this dissertation are also applicable to them.

68 HUNJA, ROBERT R., *op. cit.* p. 19.

69 It must be understood that the Constitution and the Administrative Code also make part of the legal framework settling down the pillar rules for the public sector functioning.

- b. A statute of principles: great part of the statute is devoted to the detailed definition of the principles that rule GP in Colombia. They do not differ much from the general principles that inform GP in other jurisdictions⁷⁰ —be them civil law or common law based— and, are nothing else than the reiteration of the principles that characterize the Colombian administrative function. They are, according to the Article 3 of Law 489/1998 (Statute of the Public Administration), the following: efficiency, celerity, transparency, responsibility, legality, morality, open participation, publicity and responsibility.
- c. Autonomy of public entities: despite being a general statute, Law 80/93 gives freedom and autonomy for procurement purposes. This means that each entity will receive from the public budget certain amount of resources and the decision about how to spend it and which contracts are to be celebrated correspond exclusively to internal procurement officials.
- d. Procedural GP rule: Law 80/03 describes a detailed administrative procedure for the selection of the supplier, making of the contract and its further supervision. Two different kinds of regulations are applied in Colombian public contracts:
 1. First, as stated above, public law —this is Administrative law contained in the Administrative Code (arts. 1-81) and other regulations— gives shape and determines the exhaustive and detailed administrative procurement process. This process is composed by a chain of steps ensuring publicity and disclosure of the procurement information, and is detailed in article 30 Law 80/93. Colombian process follows a basic four stage procedure. A first step develops disclosure of GP related information; a second stage describes the reception of proposals; the third stage evaluates the proposals and the fourth stage awards the contract to the winning supplier.
 2. Second, private law is applied to the contract itself. Thus, for determining the precise roles and obligations of each party —whether public or private—, the civil and commercial codes are meant to fill the content of the contract itself. In such way Article 13 Law 80/93 states that the contracts that public entities award will be ruled by commercial and civil applicable legislation, exception made of some particular matters specifically defined in the statute.

⁷⁰ See MERCADO KIERKEGAARD, SYLVIA. MCM-IMF- International Organization, Tuborgvej 106 Denmark, Going, Going, Gone! E-Procurement in the EU, Section 4.

Law 80 was drafted more than one decade ago, when IT was maybe present but no evident, and obviously, even less in the mind of developing countries legislators. When this statute was drafted, legislators were concerned about giving a uniform national framework for GP that could eradicate previous regulatory failures. That is why the intention of uniformity and giving principles was the basic concern, leaving unregulated the consequences that IT will bring. In addition, it was drafted bearing in mind a rigid and hard administrative law inheritance which fought for the respect of public interest and the prevalence of citizen's rights but did not consider the changing administrative function. Thus, Law 80/1993 reflects a general characteristic present in all Colombian administrative law: disregard of the changes that technology could bring.

Law 80/93 is under revision by the government⁷¹ and the World Bank⁷², and several amendments have been proposed, not only for introducing rules regarding the use of IT within the GP process but also for the enhancement and modernization of the current legal framework. As a final outcome of these initiatives, no articles concerning the use of IT for GP were accepted by the members of the Colombian Congress.

Are they needed? Not anymore. Law 962/2005 sufficed the requirements for eGP. In section 2.3 will elaborate on how Law 962/2005, even though it does not aim to modify GP legislation, provides the theoretical and legal basis for eGP in Colombia. Law 962/2005 contributed by the acceptance of the second pillar that has been mentioned: *functional equivalence*.

2.2.1.2. Decree 2170/2002 – An anticorruption strategy for Government Procurement in Colombia

In December 2002, President ÁLVARO URIBE issued decree 2170/2002 with the firm purpose of fighting corruption in GP. The issue of corruption in GP is a world wide concern. For the OECD GP provides the major intersection between the public and the private sector⁷³ and developing countries suffer millionaire daily losses trying to lower corruption levels affecting this field⁷⁴.

71 Policy document CONPES 3249/03, p. 14.

72 World Bank, Country Procurement Assessment Report Update – Colombia, December 2004, annexes 2005, par. 5490.

73 OECD, Report on the “Global Forum on Governance – fighting corruption and promoting integrity in GP government procurement”, 29-30 November 2004, Paris, Available at <http://www.oecd.org/dataoecd/11/18/34340364.pdf>, April 4th 2005, 22:00 p.m.

74 Policy documents from South American countries have reached to conclude that nearly 19% from the value of a public contract represents the share of corruption involved in the system; corruption takes

Efficient public administration and GP require transparent legal and regulatory frameworks and clean and clear practices⁷⁵. The government is committed to undertake a comprehensive public administration reform. Fighting corruption is one of the priorities in all areas of public administration and therefore the government established special public agencies to work on anti-corruption strategies.

Colombia was conscious about the benefits of a more transparent GP system and therefore issued Decree 2170/02, a whole new and complete regulation about “Anti-Corruption in Government Procurement”. The role of a decree within Colombian regulatory framework is to fill in the blanks of primary legislation, in this case Law 80/93, develop its mandates, and to give the missing details needed for interpretation and enforcement of the law. Decree 2170/2002 reflects government’s plans of that time aiming to strengthen the instruments against corruption and focusing in GP capture that amounted to nearly 12.4% of the overall public budget destined to purchases and acquisitions⁷⁶.

This is the first regulatory instrument that imposed—in Articles 1 and 2—the obligation to use internet for disclosing and generating massive publication of GP related information. With decree 2170/02 Colombia reached the “*Information*” level mentioned by Policy Document 3249/2003 and incorporates the first pillar of eGP regulation.

2.2.1.3. Law 527/1998 on Electronic Commerce

Law 527/98 is the result of incorporating UNCITRAL’s Law Model on Electronic Commerce to Colombian regulatory framework. Almost 90% of the latter was copied and replicated into Law 527/98 aiming to give Colombia an e-commerce legal instrument that enabled industry and private sector to operate and do business in the digital market⁷⁷.

The main aims of Law 527/98 are to provide adequate regulation to Electronic Data Interchange, with general scope, to accept legal validity to electronic evidence

place in 49.7% of public contracts; and 70.3% of suppliers consider that levels of corruption have increased in the past 3 years, see, Departamento Nacional de Planeación, República de Colombia, documento CONPES 3249 de 2003 *Política de contratación pública para un Estado gerencial*, Available at www.dnp.gov.co

75 World Bank. CPAR Colombia, 2005, Par. 5400.

76 Policy Document CONPES 3186/2002 “Una política de Estado para la eficiencia y la transparencia en la contratación pública” (State’s Policy for efficiency and transparency in public procurement) 31st July 2002.

77 Congreso de la República de Colombia, *Congress Gazzete*, number 44, April 24th/1998, p. 25.

and to set rules about international trade law contracts when celebrated by electronic means. Very importantly, Law 527/98 established the PKI “Public Key Infrastructure”⁷⁸ for electronic commerce in Colombia. PKI are systems that

“grant legal significance to digital signatures in situations where physical signatures would otherwise be required”⁷⁹,

allowing confidentiality, authenticity, integrity of the information and non-repudiation. As defined by UNCITRAL, an electronic signature is data in electronic form, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory’s approval of the information contained in the data message⁸⁰.

The World Bank’s eGP forum 2001⁸¹ concluded that Colombian eGP legal framework was composed by Law 80/93 and Law 527/98⁸², and that “Law 527 of 1999 does not limit the scope of the use of electronic transactions only to private transactions”⁸³. On the contrary, the Organization of American States and the Inter American Agency for cooperation and development do not consider Law 527 as part of the Colombian eGP regulatory system⁸⁴. Finally, the latest web-tool for comparison of worldwide eGP systems, designed by the African Development Bank, the Inter American Development Bank, the World Bank, the Nordic Development

78 For further information see, RIVOLTA MERCEDES and PRANDINI PATRICIA, Chief of Cabinet Office —Argentine Federal Government. Argentine public key infrastructure development— a comparative study of PKI experiences in Latin America, April 25th 2002.

79 RADIN, MARGARET JANE, *Retooling contract for the Digital Era*, Public Policy Internet, Privacy Taxes and Contract, Edited by Nicholas Imparato, Hoover Institution Press, 2000, p. 119.

80 UNCITRAL, Model Law on Electronic Signatures 2001, Article 2. (a).

81 The Workshop on Electronic Procurement in Government (eGP), took place at World Bank Headquarters in Washington, DC, April 30 and May 1, 2001. It was a very successful event where representatives of fifteen countries explained to each other their accomplishments and their plans in electronic government procurement. Five multinational development banks (MDBS) also participated, as did observers from a handful of private companies. Source: <http://www.worldbank.org/eprocurementforum>, retrieved: 8th July/2005, 23:34.

82 RESTREPO-URIBE, ESTEBAN, *Legal issues for e procurement: the case of Colombia*, Proinvestment Consultores, World Bank eGP Forum, 2001. [http://wbln0018.worldbank.org/OCS/egovforum.nsf/c3c9b2819079a45d852569bc007722a0/480fc7eefc7413185256a87006c9b6e/\\$FILE/Colombia_legal_issues-paper.pdf](http://wbln0018.worldbank.org/OCS/egovforum.nsf/c3c9b2819079a45d852569bc007722a0/480fc7eefc7413185256a87006c9b6e/$FILE/Colombia_legal_issues-paper.pdf) Available 7th June 10:26 a.m.

83 The World Bank, Forum Electronic Government Procurement – Country Legal Profile: Colombia January 2002 [http://wbln0018.worldbank.org/OCS/egovforum.nsf/c3c9b2819079a45d852569bc007722a0/f06dc3339299e48b85256b66007b3746/\\$FILE/Colombia.doc#colombialink2](http://wbln0018.worldbank.org/OCS/egovforum.nsf/c3c9b2819079a45d852569bc007722a0/f06dc3339299e48b85256b66007b3746/$FILE/Colombia.doc#colombialink2) Available 7th June 10:43 a.m.

84 Organization of American States, Agencia Interamericana para la Cooperación y el Desarrollo, National and Subnational Electronic Public Procurement Profiles, April 25th 2001, p. 11.

Fund (BDB eGP Harmonization Group⁸⁵) remarked that the only legislation about eGP in Colombia is Law 80/93, excluding Law 527/98.

Commentators were divided in respect to the same issue, thus, some considered that thanks to Law 527/98, administrative acts in electronic form should be legally accepted without any further modification to the legal framework⁸⁶ while others disagreed, challenging these position and, considering that Colombian legal framework contain no specific rules that allow the public administration to act electronically⁸⁷. This discussion is very relevant because the outcome of its conclusion will allow to determine if GP regulation allows the application of the *Functional Equivalence*⁸⁸ principle or what is the same, if the second pillar is included already in eGP legislation.

Notwithstanding the abovementioned, Law 962/2005 (July 8th), was issued by Colombian Congress marking an end to any kind of discussion regarding the applicability of Law 527/1998 for e-Government purposes, including eGP, which means that six weeks (July 2005) ago the Colombian Legislator gave green light for applying the *Functional Equivalence* principle to all administrative procedures and for the enactment of administrative acts what meant the acceptance of the second pillar of eGP legislation.

Law 962/2005 constitutes the most important regulation so far issued in the context of eGP. It should be noted that it does not make part of an eGP primary legal framework but has a direct application to it.

2.3. Amendments to Administrative Procedures regulation: the birth of egp

In April 2005, a report was jointly produced by the IADB and the World Bank about the improvement and developments in Colombian GP system and regulation⁸⁹. The

85 See, <http://www.iadb.org/ros/prm/egpv2/imap/Compare.asp?metodo=comparacion&idioma=en&ids=154,252,238&tipo=HTML>. Retrieved August 22nd 16:54. g

86 RINCÓN CÁRDENAS, ERICK, IBÁÑEZ PARRA, ÓSCAR, "El acto administrativo electrónico y las nuevas tecnologías de la información", Universidad Sergio Arboleda, Colombia, revista *Civilizar*, n° 7, Temas jurídicos. Available at http://www.usergioarboleda.edu.co/civilizar/Acto_Administrativo_Electronico_Nuevas_Tecnologias_Informacion.htm. June 3rd, 12:27 a.m.

87 LAGUADO GIRALDO, ROBERTO, Actos administrativos por medios electrónicos, *Revista Jurídica del Perú*, julio 2003, n° 46.

88 *Infra* section 1.3.2.2.

89 World Bank, *Country Procurement Assessment Review – Colombia*, CPAR, April 2005.

assessment included the evaluation of the progress on implementation of an eGP system in Colombia. The Banks emphatically considered that Colombian government had only reached an initial eGP phase⁹⁰ and that its regulatory framework needed modification, improvements and adjustments. This meant that Colombian GP regulation had only developed the *information* element required for doing eGP but not the *Functional Equivalence* element.⁹¹

After the assessment, it was concluded that there was not a single article in the bill of law that modified Law 80/93⁹² enabling the conclusion of governmental contracts and procurements through electronic means. Again, the Banks recognized that Colombia had developed the *information* pillar, and that the amendments initiatives of Law 80/1993 lacked *functional equivalence* pillar.

Thanks to the latest legislation developments, Bank's next assessment and report should say that Colombia is ready for eGP as it now counts with the two mentioned elements. The improvement is due to the enactment of Law 962/2005 that modifies not the GP legislation itself but the Administrative Procedure Law.

2.3.1. Law 962/2005, an amendment to the Administrative Procedures Legislation

In July 8th 2005 Law 962 was passed. Its main objective is to facilitate all kinds of relationships between citizens and public authorities⁹³. The law is expression of Colombian public policy regarding the modernization and use of IT and as such constitutes the main legal instrument that so far develops those aims settled in policy documents regarding the use of IT by the Government⁹⁴. No other current legislation will generate so important changes about *how* public authorities can develop their public functions. This *how* now includes the use of electronic messages and systems for the fulfillment of public entities and officials' daily duties. Law 962/2005 introduced the *Functional Equivalence*⁹⁵ principle of electronic communications within Public Sector's activities.

90 *Ibid*, par. 2630.

91 *Ibid*, par. 2750.

92 Bill of Law 035/04, being discussed by the Colombian Congress.

93 Article 1, Law 692/05.

94 Policy Documents CONPES 3072/2000 and 3249/2003, *Infra*, Section 2.1.

95 *Infra* section 1.3.2.2.

Ab initio, article 1.4 states that the government must be technologically enhanced. For that purpose the Department of Public Service (Departamento Administrativo de la Función Pública⁹⁶) and the Ministry of Communications (Ministerio de Comunicaciones⁹⁷) will provide any kind of support that public entities need for the achievement of the mentioned goal.

The scope of Law 962 reaches any administrative procedure⁹⁸, this is, any kind of legal relationship between citizens and any public entities. Therefore, procedures involving central or local authorities, judicial bodies and public enterprises can now be held by electronic means. Of course, GP procedures were also touched by the law since it is one kind of administrative procedure. In consequence, electronic communications issued by any public body during any kind of administrative procedure, including of course GP procedures, has gained *functional equivalence*⁹⁹ with paper based documents and communications.

It should be remarked that the new rules set in Law 962/05 are applicable to GP regulation since —as we said before¹⁰⁰— GP is one specific type of administrative procedure. This means that all of its provisions and rules concerning the use of electronic means for public/administrative procedures are also applicable to its full extent to GP regulation. Accordingly, Law 80/93¹⁰¹, decree 2170/02¹⁰² which set up *how* GP procedures must be done, should now incorporate the use of technologies such as Internet.

2.3.2. Law 962/2005: importance to egr

For more than four years the Government¹⁰³, worked in the drafting of bills of law modifying Law 80/1993¹⁰⁴, which included articles¹⁰⁵ that allowed the use of IT in

96 www.dafp.gov.co

97 www.mincomunicaciones.gov.co

98 Article 2 Law 962/05.

99 *Infra.* 1.3.2.2.

100 *Infra.* 1.1.

101 *Infra.* 2.1.1.

102 *Infra.* 2.1.2.

103 A group conformed by the National Planning Department, with support from the World Bank-Colombian National Planning Department's Procurement Project, and the Ministry of Transport were in charge of drafting the bills of law.

104 Bill of Law 085/2000 Senado, 018/2002 Cámara, 261/2002 Cámara, 06 and 07/2003 Cámara and, recently 034/04 Cámara.

105 From Bill of Law 261/03, article 38 and; from Bill of Law 07/03, article 31.

the GP administrative process. Should they have been approved, amendments would have put an end to the narrow limitation held by that time, but the bills were not discussed nor approved by the Congress because the legislative agenda privileged other bills of law related to different topics.

Fortunately, Law 962/2005 filled the space left by the rejection by the Congress of the mentioned bills of law that modified Law 80/1993. Despite the fact that Law 962/05 is not part of GP regulation nor a modification to the GP current legal framework, it is the most important starting point for promoting the use of IT by the government and consequently, for finally making eGP feasible after the introduction of the missing pillar.

Years before, public agencies were not convinced and were scared to use IT for their daily tasks. Cultural barriers and lack of training kept public officials out from using technology. But, more disturbingly, high legal advisers were not comfortable with the idea of accepting and admitting the use of IT for necessary tasks, being the issuance of administrative acts the most important of them¹⁰⁶.

Why was it difficult to accept without prejudices the use of IT for governmental purposes? It was difficult because Colombian public officials have a limited scope of action. Exceeding those competences can amount to criminal and administrative sanctions. According to article 6th of the Colombian Constitution,

“(...)public servants are responsible for the violation of the Constitution and the Law, but also for the omission and extra-limitation on their functions”¹⁰⁷.

In this way, legislation provides a precise authorization and indicates each one of the tasks and duties that can and must be performed by them; whatever is not specifically allowed is meant to be emphatically prohibited.

It was not clear if those duty catalogues allowed public officials to use IT for their tasks. GP public policy¹⁰⁸ and practices¹⁰⁹ were directly affected by this narrow interpretation and only with the enactment of Law 962/2005 public officials will

106 LAGUADO-GIRALDO, ROBERTO, Actos administrativos por medios electrónicos, *Revista Jurídica del Perú*, julio 2003, n° 46.

107 *Constitución Política de Colombia 1991, Artículo 6, Los particulares sólo son responsables ante las autoridades por infringir la Constitución y las leyes. Los servidores públicos lo son por la misma causa y por omisión o extralimitación en el ejercicio de sus funciones.*

108 Policy Document 3249/03 accepted that legal amendments were needed before using IT for the GP administrative procedures.

109 See the Chat that the Connectivity Agenda held for solving problems and enquiries about the topic. <http://www.gobiernoenlinea.gov.co/noticias/articulos/10/chat220803.pdf>, retrieved 18th August 2005.

gain the express authorization that the Constitution requires. Here lays the relevance of Law 962/2005: it is the permission that eGP officials were asking for.

3. FORECASTING THE EFFECTS THAT LAW 962/2005 WILL BRING FOR E-GOVERNMENT PROCUREMENT

Law 962/05 (July the 8th) was enacted only six weeks before the writing of this paper. For this reason, there are no judgments from Colombian courts, nor comments from academics in its respect. It is still a law whose effects haven't been appreciated in practice. Law 962/2005 is uncharted water. This section will analyze what is likely to happen after its enactment and the effects that will generate within the Colombian eGP legal framework.

3.1. General remarks: effects on Colombian e-Government framework

The enactment of Law 962/05 plays an unprecedented role for the implementation of Colombian e-Gov strategies. As it has been mentioned, this rule is the first one to broadly regulate the introduction of IT into government and public functions and allow the application of these technologies to all kinds of administrative procedures¹¹⁰.

By administrative procedures, the Government adopts administrative decisions with which it expresses its will, creates legal consequences and comprises its liability. These decisions are called *Administrative Acts*. According to the Colombian Administrative Code and its articles 1 to 81 and 84, they were to be enacted in an adequate form, by a competent organ or public servant with authority, following a precise procedure that seeks a lawful end and, finally, must have enough fundamentals¹¹¹. If the Administrative Act did not suffice these characteristics it could be nullified¹¹² by a court after a lawsuit, thus losing its legal force as if it had never been issued.

110 Decree 3816/2003 was issued in December 31st aiming to provide an institutional framework for E-government. As such, the decree assigned responsibilities to different public entities and bodies in order to develop E-gov's public policy for Colombia. Though this decree was previously issued, it did not regulate the legal issues of E-Gov and its scope was limited to a distribution of tasks and responsibilities. It is for this reason that this piece of legislation cannot be considered as the first one to regulate in depth the use of IT within the Public Administration.

111 State Council (*Consejo de Estado*) Holding on Judgment 5694 by judge OLGA INÉS NAVARRETE BARRERO, Bogotá 17th of February 2000.

112 Article 84 Administrative Code establishes the cases when administrative acts could be nullified.

In addition from the above, even if the administrative act sufficed the mentioned characteristics, should it not be notified and made public to its addressees, Courts will consider it as non-existent¹¹³. Therefore, Colombian public law¹¹⁴ has established two conditions for the administrative act to be lawful and produce effects: first, it shall enclose the abovementioned characteristics, and second, it must be disclosed by specific means, promoting the awareness of the procedures, contents and fundaments of the decisions adopted in its exercise.

Administrative acts, before the enactment of Law 962/05, could not be produced electronically because the use of IT means were not expressly authorized for the accomplishment of the second requirement mentioned in the previous paragraph¹¹⁵. As stated above, according to Colombian public law, whatever is not expressly authorized for the public servant is deemed to be prohibited. The Colombian Administrative Code¹¹⁶ —which rules all administrative procedures including GP procedures— only accepts traditional methods of notification¹¹⁷ such as physical summons of the file, placement of the decisions on boards and physical notices in the domicile of the interested parties.

Legislation did not mention that *e-mails* or *web pages* could be used for giving publicity to the administrative decisions¹¹⁸. This situation —exception made for some tax cases— was applicable to all kind of administrative procedures.

The enactment of Law 962/05 puts an end to these limitations, complementing and amending the Administrative Code and giving place to administrative acts in electronic form. Their validity can not be challenged nor its existence since:

1. Administrative procedures and administrative acts can now be issued and produced using IT according to the Second Paragraph and Third Sub-paragraph article 6th Law 692/05.
2. They can be electronically *notified* according to the Second Paragraph Article 6th Law 692/05.

113 State Council (Consejo de Estado). Holding on Judgment 3544, judge MANUEL SANTIAGO URUETA AYOLA, 25th February 1999; and Holding on Judgment 6106, judge JUAN ALBERTO POLO FIGUEROA, 1st July 2000.

114 Colombian Administrative Code, articles 84 and State Council (Consejo de Estado). Holding on Judgment 5254 by judge MANUEL SANTIAGO URUETA AYOLA, Bogotá, 26th August 1999.

115 LAGUADO-GIRALDO, *op. cit.*

116 Articles 43-48 Administrative Codes establish that an administrative act will only be legally binding from the moment it has been notified or made public to its interested party.

117 IBÁÑEZ-PARRA, ÓSCAR; RINCÓN-CÁRDENAS, *op. cit.* p. 31.

118 For reference on notification of administrative acts in electronic form, see, LAGUADO-GIRALDO, ROBERTO, *Actos administrativos por medios electrónicos*, *op. cit.*, p. 40.

In the short term, Colombian Public Administration will see a new way of doing things. Fears that tied up officials' hands should be eliminated because the new GP framework must be now interpreted taking in consideration that Law 962/05 has entitled the Public Administration to use IT tools and applications.

3.2. Effects on the Colombian e-Government Procurement legal framework

3.2.1. A comprehensive legal framework for e-Government Procurement

Policy document 3249/03 suggested an amendment to Law 80/93, in order to provide allowance for the use of IT in GP processes. The Congress never passed the amendments and even if it would have done it, in the final debates, the only article that mandated the use of IT for GP processes¹¹⁹ was suppressed¹²⁰. The panorama could not be worse.

From now on, GP officials must interpret GP legislation and understand that Law 80/1993, Decree 2170/2002, the Administrative Code and complementary pre-existing legislation have been amended by Law 962/2005. There has not been an express derogation. Law 80/1993 and Decree 2170/2002 remain untouchable and that is why it is very important that GP officials study and apply with due care Law 962/05. This might not be as easy as it looks.

3.2.2. Clarifying Article 6 Law 962/2005

The fundamentals of Law 962/2005 are the modernization of administrative procedures and the introduction of electronic means for the performance and activities of public entities and officials¹²¹. It can be foreseen that Law 962/2005 will be the legal instrument that will make e-Government and eGP possible.

119 Bill of Law 034/04 Senado.

120 *Congress Gazette*, n° 338, (June 8th 2005), Second debate in Senate, Bills of Law 238-2005, 014-2003.

121 *Ibid.*

The most important of its articles—for the purposes of this dissertation—is article 6¹²², but it has lacunas and inconsistencies. Nevertheless, its writing can be improved and in a short term, secondary legislation, such as governmental decrees and presidential instructions, should be issued for a better understanding and application of the rule, but in the meanwhile, this dissertation intends to provide a brief clarification.

The article contains a very important but also conflictive rule in the second paragraph, which has two sentences:

“Administrative procedures and their administrative acts can only be enacted in the way described in current legislation. *The assumption of the procedure, its notification and publication can take place using electronic supports, applications and means*”. (Emphasis added by the author).

122 Ley 692/2005, julio 2005, artículo 6° “*Medios tecnológicos. Para atender los trámites y procedimientos de su competencia, los organismos y entidades de la Administración Pública deberán ponerlos en conocimiento de los ciudadanos en la forma prevista en las disposiciones vigentes, o emplear, adicionalmente, cualquier medio tecnológico o documento electrónico de que dispongan, a fin de hacer efectivos los principios de igualdad, economía, celeridad, imparcialidad, publicidad, moralidad y eficacia en la función administrativa. Para el efecto, podrán implementar las condiciones y requisitos de seguridad que para cada caso sean procedentes, sin perjuicio de las competencias que en esta materia tengan algunas entidades especializadas.*

*[La sustanciación de las actuaciones así como la expedición de los actos administrativos, tendrán lugar en la forma prevista en las disposiciones vigentes. Para el trámite, notificación y publicación de tales actuaciones y actos, podrán adicionalmente utilizarse soportes, medios y aplicaciones electrónicas]***

Toda persona podrá presentar peticiones, quejas, reclamaciones o recursos, mediante cualquier medio tecnológico o electrónico del cual dispongan las entidades y organismos de la Administración Pública.

En los casos de peticiones relacionadas con el reconocimiento de una prestación económica en todo caso deben allegarse los documentos físicos que soporten el derecho que se reclama.

La utilización de medios electrónicos se regirá por lo dispuesto en la Ley 527 de 1999 y en las normas que la complementen, adicione o modifiquen, en concordancia con las disposiciones del Capítulo 8 del Título XIII, Sección Tercera, Libro Segundo, artículos 251 a 293, del Código de Procedimiento Civil, y demás normas aplicables, siempre que sea posible verificar la identidad del remitente, así como la fecha de recibo del documento.

Parágrafo 1° Las entidades y organismos de la Administración Pública deberán hacer públicos los medios tecnológicos o electrónicos de que dispongan, para permitir su utilización.

Parágrafo 2° En todo caso, el uso de los medios tecnológicos y electrónicos para adelantar trámites y competencias de la Administración Pública deberá garantizar los principios de autenticidad, disponibilidad e integridad.

[Parágrafo 3° Cuando la sustanciación de las actuaciones y actos administrativos se realice por medios electrónicos, las firmas autógrafas que los mismos requieran, podrán ser sustituidas por un certificado digital que asegure la identidad del suscriptor, de conformidad con lo que para el efecto establezca el Gobierno Nacional.] Emphasis added by the author.

The word “way” is rather obscure and could mean either the legal requirements for administrative procedures¹²³ or the instruments and techniques that can be used during the procedure. If the interpreter understands that the word “way” means the instruments, the consequence of this interpretation would be the denial of IT applications because current legislation, before the enactment of the Law, does not admit the use of IT for the reasons that had been profoundly explained.

In order to arrive to a sound interpretation, the meaning of “way” should be analyzed and apparently there are several possibilities for doing so. Therefore, GP officials and Courts (in this case Administrative Courts) should follow the guidelines given by the Colombian Civil code in its articles 25 to 31 for law interpretation and more precisely, the following hermeneutical rules: grammatical rule (article 27) and systematic interpretation rule (article 30).

3.2.2.1. Grammatical interpretation of Second Paragraph article 6 Law 962/2005

According to the grammatical rule of interpretation,

“When the sense of the law is clear, the interpreter would not disregard its literal sense for consulting its spirit. But, for interpreting an obscure expression of the law, the interpreter can make use of its spirit and intension, either when clearly stated in the same law or in its historical enactment process”.

When this rule mentions the historical process it refers to the debates held by congressmen when discussing and passing the law.

The literal sense of the word “way” does not provide enough bases for its understanding. According to this interpretation rule, the spirit and historical process of enactment of Law 962/2005 show that its purpose was to allow the use of IT for public affairs and GP¹²⁴. Introductory articles from the Law and the discussions held inside the Congress show that one of the main aims of the law is to introduce the use of IT within the Colombian Public Administration. If this is so, the expressions

¹²³ *Infra* 3.1.

¹²⁴ *Congress Gazettee*, n° 678, (December 12th 2003). First debate in Camara, Bill of Law 014-2003. Bogotá, D. C., 27th November 2003, and, First Proposal for debate in *Senado*, Bill of Law 14-2003 *Senate*, 238-2005 *Cámara. Congress Gazettee*, n° 338, (June 8th 2005), Second debate in Senate, Bills of Law 238-2005, 014-2003.

“the way” can only mean the rules settled in the Administrative Code regarding the administrative procedures¹²⁵ and administrative acts¹²⁶.

This means that the first sentence of the second paragraph of article 6 Law 962/05 just wants to reiterate that the Law is not modifying those rules established long ago in the Administrative Code and will only affect one specific issue concerning administrative procedures and administrative acts, which is, the use of new technology as a support and means for achieving governance. Understanding that the word “way” refers to the means goes against the enactment process and the aims of the Law. Therefore GP officials must not understand that the referred sentence is unauthorizing the use IT for GP but only stating that when the officials and entities use the means, they should follow the legal precepts about the lawfulness of administrative procedures and administrative acts¹²⁷.

3.2.2.2. Systematic interpretation of Second Paragraph article 6 Law 962/2005

According to the *systematic* rule,

“The context of the law can be used for the illustration of each one of its parts, ensuring coherence and soundness amongst them”.

The context of Law 962/2005 is the Modernization of Colombian public administration. In order to determine how the word “way” should be understood, and in application of the systematic rule, the interpreter must have in consideration the writing of the second sentence of the second paragraph. This second sentence establishes that

“The assumption of the procedure, its notification and publication can take place using electronic supports, applications and means”.

Furthermore, Subparagraph 3 of the same article establishes that

“When administrative acts are issued electronically, required traditional signatures can be replaced by electronic signatures that ensure the identity of its author in accordance with what for that effect establishes the National Government”.

125 Articles 1-81 Administrative Code.

126 Article 84 Administrative Code.

127 *Infra* section 3.1.

If Subparagraph 3rd of article 6 regulates electronic signatures and digital certificates for administrative procedures and administrative acts, and if the second sentence of first Paragraph of article 6 allows the electronic notification and publication of administrative acts, the only possible interpretation for the first sentence of first paragraph of article 6 is the allowance of IT for public administration. The opposite interpretation will be incoherent with the other set of rules that have been mentioned.

Consequently, GP officials should take into consideration both, the spirit of the Law 962/05 and other parts of the article 6 and understand that even though there might be obscure and contradictory parts, the whole law is enabling the use of IT for GP.

3.2.3. From information to digitalization in e-gp¹²⁸

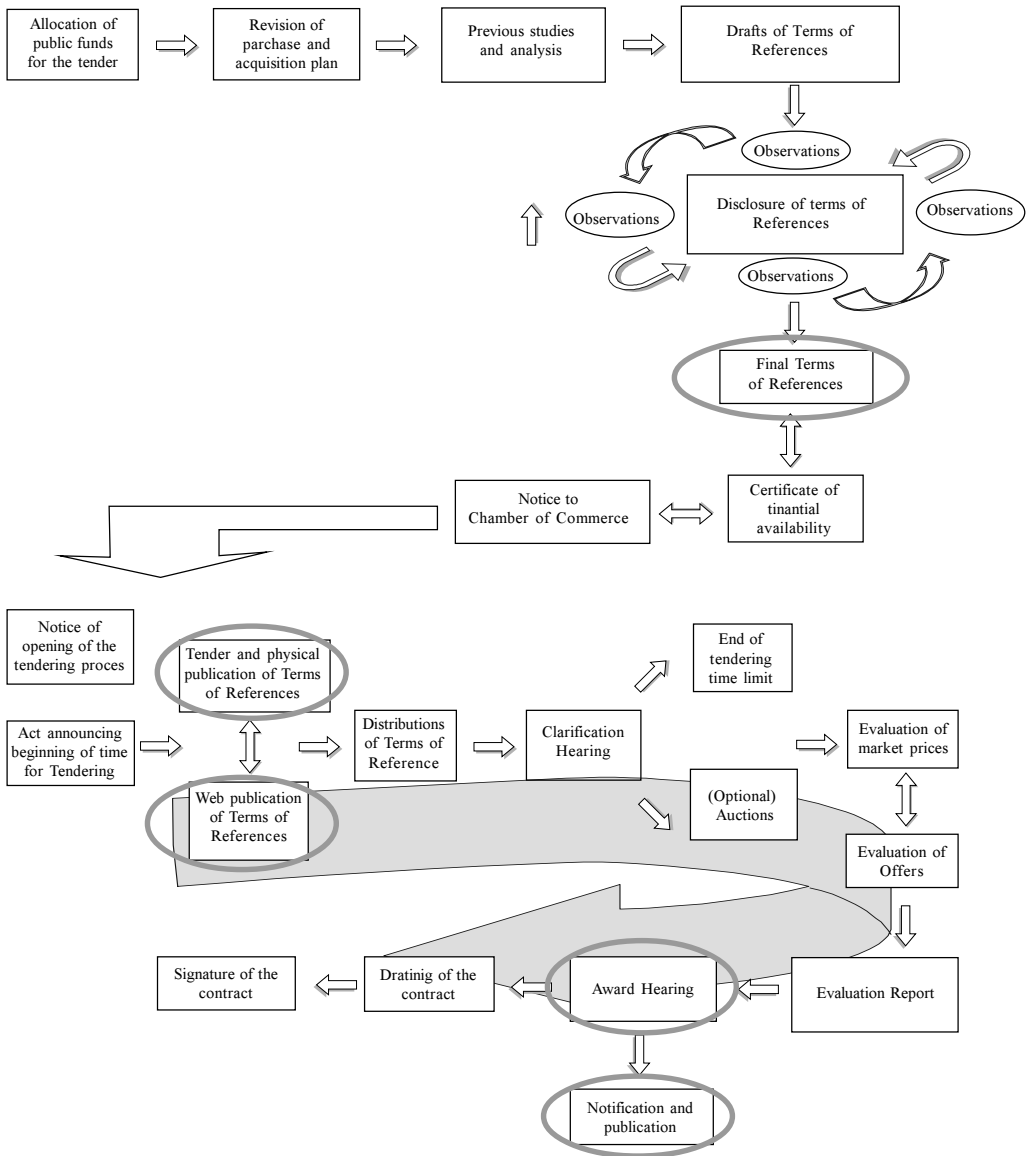
GP procedure is a chain of administrative decisions. Such chain is just a chain of administrative acts, which have different nature, order and relevance. Article 30 of Law 80/1993 and Decree 2170/2002 establish the procedure for tendering GP processes which will be used for explaining what the situation was before the enactment of Law 962/05 and how is it after its enforcement. The following comments can be applied to other kinds of GP processes but for explanatory purposes, referring to one single procedure is enough. The principles aforementioned are applicable to all of them. The mentioned procedure is described in the following chart:

The chart shows a typical procurement according to GP Colombian legislation and makes emphasis in the administrative acts that can be enacted electronically since the enactment of Law 962/05. Before its issuance, those acts could only take the form of paper-based documents. Now, they can be e-mails or any kind of electronic document.

Attention should be drawn over the circled boxes. The entire workflow is a chain of decisions but the ones that are circled constitute the most important of them since they are not merely transitional decisions—which demark the end of one phase and the beginning of the next one—but instead, contain very important determinations adopted by the Administration such as *what is going to be procured? To whom will the Government procure? What are the requirements and selecting criteria? Why is the Government selecting that, and not other supplier?* They are substantial determinations.

128 *Infra*, section 2.1.

GRAPH 2. A Colombian Government Procurement Administrative procedure.



Just a few months ago (before 8th of July/05), those decisions could only be made by enacting a physical paper-based administrative act. It should be underlined that GP regulation did not expressly deny the use of IT during the GP process but, as it has been said, it did not expressly allow its use. As mentioned above, interpretation and hermeneutic of current regulation did not give green light for that. It was rather amber.

Decree 2170/2002 established mandatory up-loads of those administrative acts¹²⁹, but, the narrow interpretation only reckoned those documents as plain and simple ones without legal validity. They were an important example of an eGP information based system and pulled Colombia to a recognizable level of eGP readiness, but pitifully, were not considered valid administrative acts with the severe consequence of denying the opportunity to jump to a more functional eGP stage¹³⁰. GP processes were conducted paper-based with an input of electronic disclosure, nothing more. There was no *Functional Equivalence*¹³¹ between electronic administrative GP acts and paper based administrative GP acts.

It can be foreseen that Law 962/05 will make feasible the transition from an information based eGP to a functional eGP system and will give place to the two elements of eGP systems: information and functional equivalence. Months before, public bodies had to disclose GP related information, after Law 962/05 the process will be digitalized, this is, the phases of the procedure can take place, in full, with legal validity, when performed electronically. Accordingly, as Policy Document 3249/03 establishes, all of the phases described in the GP procedure diagram can take place electronically and Colombia will have “GP management”¹³².

Negative or opposite interpretations should be over. Law 962/05 is the legal expression of public policy established in Policy Document 3292/05; Law 962/05 is the needed *trigger* that Colombian eGP legislation required; Law 962/05 is the legal amendment that Policy Document 3249/05 requested¹³³; Law 962/05 is the application of Law 527/99 to public function and GP, and finally; Law 962/05 is the beginning of eGP in Colombia.

129 Decree 2170/2002 article 1, 2 and 12.

130 Policy Document 3249/2003.

131 *Infra*, Section 1.3.2.2.

132 *Infra*. Section 2.1.

133 *Infra*, section 1.4.

CONCLUSIONS

1. *The success of implementing eGP in Colombia, or in other countries, depends on the design of public policy in the field, commitment from the government and serious actions plans in the matter*

Colombia has been working on an action plan for the implementation of eGP. Without that plan and a sound public policy, the risks of never reaching a modern GP system coherent and harmonic with international standards are high¹³⁴. A basic action plan should start defining what is understood by eGP, what calls for stronger policies and operational leadership, enhancement of management, planning and agreements about the reform programs and regulations¹³⁵. Today, Colombia's action plan should be seen as fructiferous.

2. *Colombian regulation on eGP is an expression of Public Policy in the same field, which at the same time has developed international guidelines on the use of Electronic Communications for e-commerce and the public Sector. Colombia now counts with the two pillars of eGP*

Works from UNCITRAL have signaled which are the pillars that should be present in an eGP system, which are, (i) the creation of information and electronic disclosure systems of GP related data and (ii) the recognition of functional equivalence of the electronic documents involved in the GP administrative procedures.

Colombian Public Policy documents (3072/00 and 3249/03) developed the public policy on eGP which was later on applied to e-government and eGP legislation. Though no specific regulation was incorporated in the GP framework related to the use of IT for GP administrative procedures, a different legal body was enacted (Law 962/2005), complementing and giving a coherent and functional legal framework for both e-government and eGP.

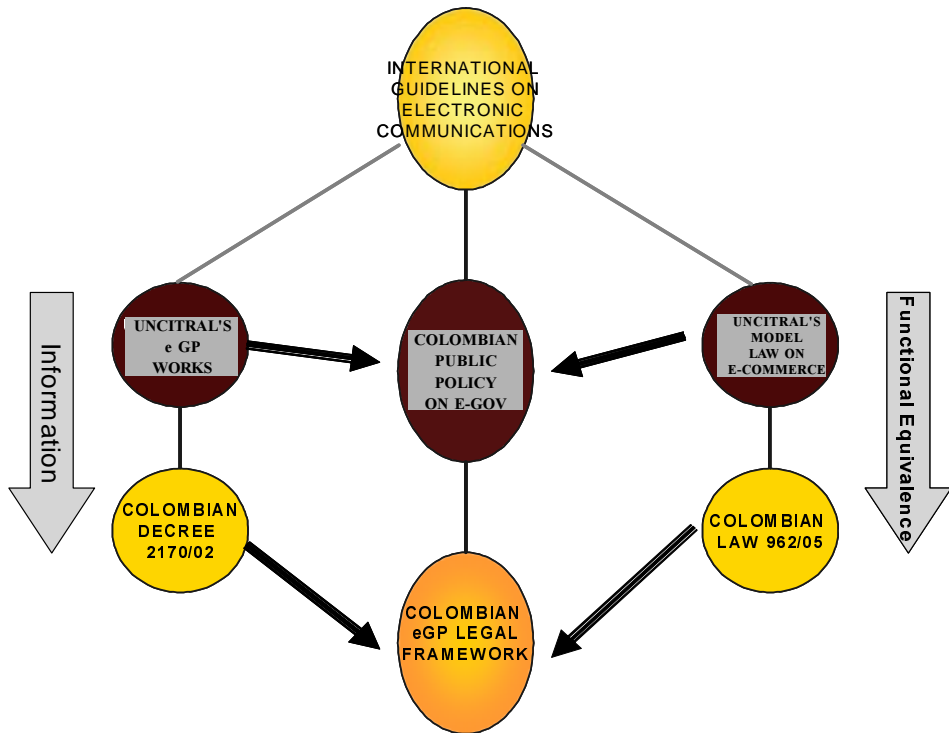
According to UNCITRAL's guidelines, two pillars should be present in an eGP legal framework: *information* and *functional equivalence*. Decree 2170/02 contributed with the development of the *information* pillar suggested by UNCITRAL while Law 962/05 added the *functional equivalence* lacking pillar. The former regulation makes part of GP framework while the latter is part of a more general framework,

134 World Bank - IADB *Country Procurement Assessment Review – Colombia*, cpar, April 2005, par. 4020.

135 ADB, IADB, World Bank, *Strategic Electronic Government Procurement-. Strategic Overview an Introduction for Executives*, March 2004.

that is, Administrative Procedures Law. The combination of those regulations and a correct interpretation of their mandates will make easier the success of eGP in Colombia. The following chart illustrates the abovementioned conclusion:

GRAPH 3. Colombian Public Policy and Legal Framework on Electronic Government Procurement.



3. Article 6 Law 962/05 must be interpreted carefully

Article 6 is the most important rule included in Law 962/05 related to e-government and eGP, but contains obscure terminology and lacunas. For its correct comprehension the interpreter must use Colombia's Civil Code hermeneutical rules (arts. 25-31) and understand that the only possible interpretation is that the use of IT —by public servants and state agencies— has been authorized. Other interpretation contravenes the spirit of the law and other parts of the same article. Other interpretation will preserve the undesirable *status quo* held before the enactment of the law.

4. *Implementing eGP: a long process*

Not because Colombia has complied with the international guidelines on eGP, can we think that the Government's efforts towards eGP be suspended. On the contrary, the workload is higher. The Department of Public Service and the Ministry of Communications are responsible for ensuring that the new provisions are applied and incorporated to GP. If not, legislators and policy maker's efforts would have served for nothing.

After the enactment of the law, the Government should make sure that the following activities take place:

- a. Training in the use of IT within the public sector and, specifically, for GP officials.
- b. Technological enhancement of public entities and GP systems.
- c. Cultural changes within the GP officials, promoted by the Department of Public Service, ensuring that the way of doing things by the government contemplates the new technologies.
- d. Allocation of resources for future investments that ensure that the GP and Public Sector's systems remain up-dated.

5. *Colombia has surpassed the eGP information stage and Law 962/05 is the trigger that opens the door for the next level: eGP management*

Public Policy documents and international guidelines have seen eGP as a stages model. Policy document 3249 recognized that two stages should be completed before being able to operate an eGP system in Colombia: an information stage, that could easily be achieved with the current legislation by the time of writing the policy document and, an electronic GP management stage, which by that time could not be completed because the legal framework lacked the *functional equivalence* pillar. Now that Law 962/05 has introduced this principle to the public sector operation, Policy Document 3249/03's suggestions should be taken as accomplished.

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