



# Implementation Guide

## Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts



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# 1 Context

## a. Objective of the Policy

The *Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* (the Policy) addresses the ownership and licensing of intellectual property (IP) arising during a Crown procurement contract.

The objective of Crown procurement contracts is to acquire goods and services and to carry out construction in a manner that enhances access, competition and fairness and results in the best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people. As part of this commitment, the Government of Canada has made specific provisions for social and economic development objectives to be pursued. The Government of Canada believes that commercial exploitation of IP contributes to economic growth and job creation, and that such exploitation is best achieved by the private sector.

Thus, the Policy establishes the **default position of the contractor owning the IP arising under Crown procurement contracts**. In appropriate circumstances, the Crown may choose to own the IP via one of several specific exceptions or requesting a Treasury Board (TB) exemption (Appendix A) of the policy. It is important to note that contractor ownership does not preclude the Crown from using the IP, provided that the Crown obtains an appropriate licence. A licence will, in many circumstances, satisfy the Crown's needs with respect to the IP.

## b. Purpose of the Implementation Guide

This Implementation Guide is intended solely for the use of public servants (e.g., managers engaging in contracting, procurement officers, etc.) to assist with the application of the Policy. It illustrates, step by step, the process for determining the ownership or licensing of IP arising under Crown procurement contracts. A decision tree summarizing the decision-making process is provided, along with guidance on assessing potential for commercial exploitation.

The Public Works and Government Services Canada (PWGSC) *Standard Acquisition Clauses and Conditions (SACC) Manual* is intended for the use of PWGSC contracting officers. Departments doing their own contracting may refer to the PWGSC SACC Manual to assist in the drafting of clauses concerning IP. Departments are advised to consult their legal counsel prior to using PWGSC clauses, or in the drafting of their own clauses.

## c. Responsibilities

Industry Canada (IC) is responsible for:

- summarizing the annual statistical report on ownership of IP generated under a Crown procurement contract and its potential commercial exploitation;
- identifying any TB exemptions claimed by departments and notifying the Treasury Board Secretariat (TBS), in order for TBS to verify if such exemptions were actually granted;
- sharing the findings from the aforementioned annual statistical report with members of the Assistant Deputy Minister Committee on Science and Technology (ADMCST);
- establishing a framework for the review of this Policy and ensuring that a review is initiated within five years of the effective date of this Policy.

TBS is responsible for:

- verifying if TB exemptions were actually granted and informing IC. In cases where TB exemptions were not granted, TBS will assist IC in following-up with the department(s) as necessary.

PWGSC is responsible for:

- producing an annual statistical report on ownership of IP generated under a Crown procurement contract and its potential for commercial exploitation. PWGSC must provide this report to IC and TBS.

Deputy Heads or their designates are responsible for:

- the implementation of the Policy and for the training of their personnel; ownership decisions related to the Foreground IP; ensuring that the potential for commercial exploitation is identified;
- submitting data on IP ownership to PWGSC in a timely and accurate manner; and ensuring that solicitation and contract documentation is complete and consistent with the Policy.

## 2 Understanding Intellectual Property (IP)

### a. What is IP?

IP, very broadly, refers to the legal rights that result from intellectual activity in the industrial, scientific, literary and artistic fields. IP rights—whether in the form of patents, trademarks, copyright, industrial designs, integrated circuit topographies or plant breeders’ rights—reward this intellectual activity.

In the course of Crown procurement, IP rights may, or may not, be generated. Some of these rights are automatically protected by legislation (e.g., when a contractor writes a paper, it is automatically protected by copyright). Other rights (e.g., patents, industrial designs) need to be applied for and granted by a national IP office such as the Canadian Intellectual Property Office (CIPO).

*Example: The Crown procures research and development services and the contractor (a private lab) produces a novel research product in the form of an invention that could be patented; IP is created.*

In many cases, however, IP will not arise under a contract. For example, if the Crown is purchasing an off-the-shelf product, there is no IP created.

*Example: The Crown buys a one-year subscription to a nanotechnology journal. While IP exists in the journal, no new IP is created through the procurement (subscription purchase).*

### b. “Background” and “Foreground” IP

Section 4 of the Policy defines Background and Foreground.

**Background** means all Intellectual Property that is not Foreground IP.

**Foreground** means IP first conceived, developed, produced or reduced to practice as part of the work under a Crown procurement contract.

*Examples:*

*The Crown signs a contract to purchase four dozen “off-the-shelf” fluorescent light fixtures. While there is likely Background IP associated with the fixtures, no Foreground IP is created under the contract.*

*A contractor uses his/her own software application (Background) under a Crown procurement contract for development of an interface (Foreground) for a government database.*

A firm develops a speech (under contract) for the Minister. The speech created under the contract is the Foreground. Any pre-existing data, reports, or newspaper articles that the contractor incorporated into the speech are Background.

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In complex situations, it may be challenging to distinguish between Foreground and Background IP. For example, open source software creates certain challenges in distinguishing IP and in determining what a license permits. It is important to ensure that IP rights are respected and to understand the nature of the

Crown's rights to the IP. Advice should be sought from departmental IP specialists and legal advisors.

*Note:* Before issuing solicitation documents (e.g., a Request for Proposals) and the contract, departments should first define their IP requirements, particularly the ownership and licensing rights to the Foreground and the licensing rights to the Background. Contracting authorities must clearly articulate these requirements in the contract. Modifications to the standard contractual clauses may be necessary to properly reflect the department's needs.

## 3 Application of the Policy

The Policy applies to:

- all departments listed in Schedules I, I.1 and II of the *Financial Administration Act* unless specifically exempted by an Act of Parliament or by Treasury Board (e.g., Canada Revenue Agency);
- Foreground IP meaning IP first conceived, developed, produced or reduced to practice as part of the work under a Crown procurement contract;
- a procurement contract of any value.

The Policy does **not** apply to:

- the sale, transfer or disposal of existing Crown-owned IP, as the Policy deals only with the IP generated under a Crown procurement contract;
- contractual arrangements, including but not limited to, collaborative research agreements or Memoranda of Understanding (MOUs);
- prototypes or any other physical embodiments of intellectual creation that may be deliverables of a Crown procurement contract (the Policy deals with intellectual property, not tangible property);

- the ownership of, or the right to use, any trademarks or trade names;<sup>1</sup>
- personal information as defined under the *Privacy Act* (R.S.C.) c. P-21 or to Foreground in any compilation or database containing personal information or Crown-supplied information if that Foreground cannot be exploited without using that personal information or Crown-supplied information.

The Policy does **not** affect existing ownership rights of the Crown, the contractor or a third party to their respective Backgrounds.

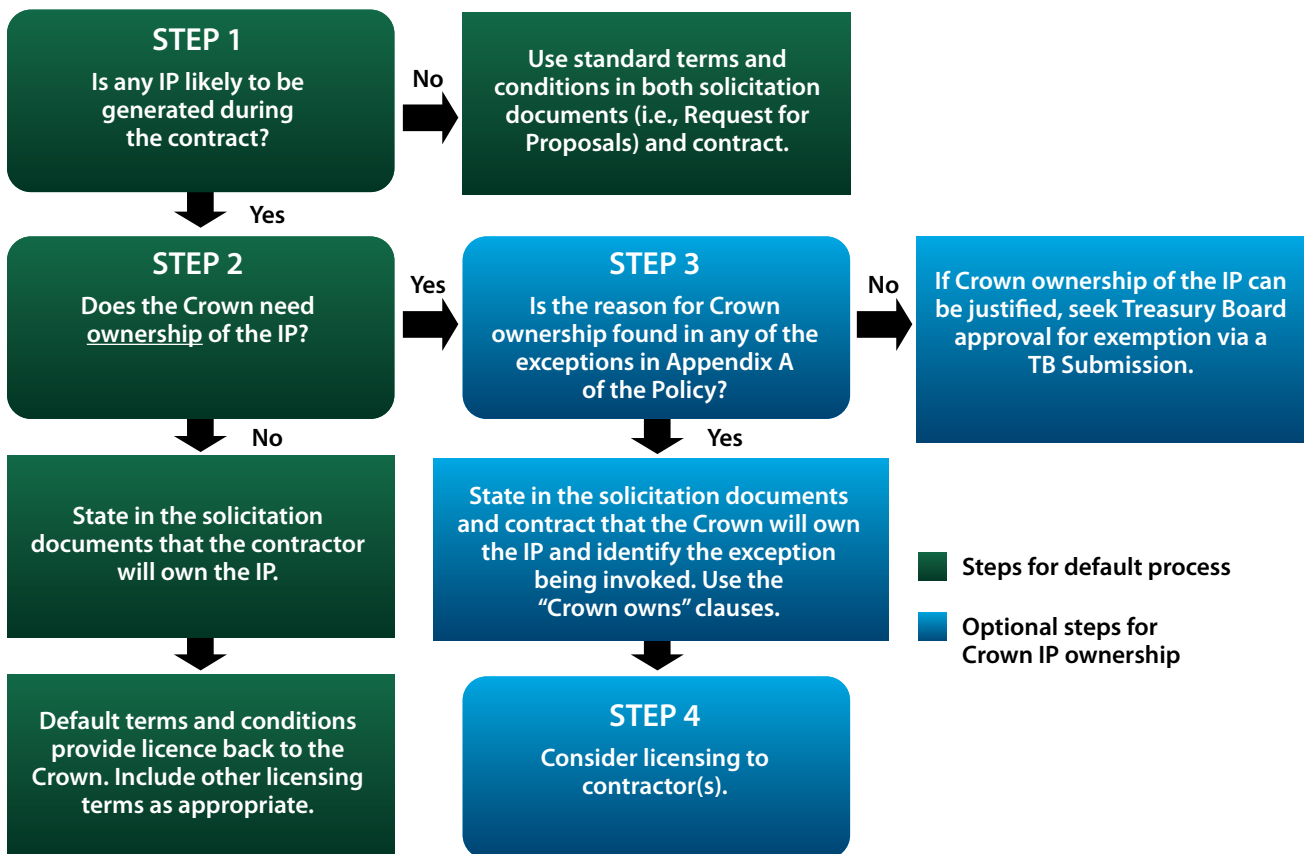
The Policy does **not** affect IP ownership rights between the contractor and any of its subcontractors, except that the contractor shall be required to obtain from its subcontractors those ownership or licence rights that the contractor agrees, in the Crown procurement contract, to provide to the Crown.

<sup>1</sup> Departments may determine their own positions on the matter of ownership of trademarks and trade names, according to other relevant government policies.

# 4 Using the Policy to Decide on Title to (Ownership of) IP Arising Under Crown Procurement Contracts

When the Crown intends to enter into a contract, it is important that the solicitation documents and the contract clearly specify who is to own the Foreground IP. The following flow chart provides the key considerations under the Policy.

## DECISION TREE





### Step 1: Is any IP likely to be generated during the contract?

Before the solicitation document is generated, managers, technical authorities, procurement officers and/or the contracting authority should determine whether or not they believe IP will be created under the contract. Departmental IP experts and/or legal counsel should be consulted as necessary to assist with this determination.

**If no**, use your department's/agency's standard contracting terms and conditions.

*Note:* If IP is generated in the contract, even though none was anticipated, it will default to the contractor in the absence of a contractual provision to the contrary.

**If yes**, incorporate clauses into the solicitation documents and the contract that stipulate who will own the Foreground IP (see Step 2).

### Step 2: Does the Crown need ownership of the IP?

**If no**, state in the solicitation documents and include appropriate clauses in the contract indicating that the contractor will own the IP. Recall that the intention of the Policy is that the contractor should own the Foreground IP unless there is a reason for the Crown to own it.

If the contractor will own the IP, departments should obtain a licence to the Foreground and Background. In determining the type of licence required, managers, project managers, scientists/researchers, procurement officers, etc. must consider current and future needs in a government-wide context. This includes the Crown's needs to the Foreground and Background to use, operate, maintain and make improvements to the contract deliverables. In instances where the contractor has a licence, but not the IP rights to the Background IP, advice should be sought from departmental IP specialists and legal advisors.

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*Example:* A Crown procurement contract to purchase a fleet of military armoured vehicles was awarded to Contractor A. Under the contract, Contractor A owns the Foreground. The Crown now wants to improve the vehicles; however, the Crown did not obtain a licence to the Foreground and Background IP. Therefore, the Crown does not have the appropriate IP rights to enable it to improve the vehicles. The Crown now has no choice but to purchase a licence allowing it to improve the vehicles or sole-source the work to Contractor A.  
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**If yes**, state in the solicitation documents and the contract that the Crown will own the IP. The reason for the Crown's ownership must fall within one of the exceptions in Appendix A of the Policy, otherwise, an exemption to the Policy must be obtained from Treasury Board via a TB Submission (see Step 3). Departments may need to consult experts for trade policy advice.<sup>2</sup>

### Step 3: Is the reason for Crown ownership found in any of the exceptions listed in Appendix A of the Policy?

It is important to note, that just because an exception **could** be invoked to give the Crown IP ownership, this does not mean that the exception **should** be invoked. For example, Copyright (Appendix A, exception 5 of the Policy) could potentially be invoked in a large number of circumstances. However, before invoking an exception, departments and agencies should consider whether they in fact need to own the IP (Step 2). Crown ownership of the Foreground may not be needed, even when there is an available exception.

**If no**, see Treasury Board Exemption, Appendix A of the Policy.

There may be cases in which Crown ownership of the IP could be justified, but none of the exceptions listed in Appendix A applies. In these cases, departments must

<sup>2</sup> Contracting authorities should always seek trade legal advice from their departmental legal services unit regarding any proposed requirement for commercial development in Canada that may be affected by trade agreements, e.g., World Trade Organization–Agreement on Government Procurement (WTO-AGP), the North American Free Trade Agreement (NAFTA) and the Agreement on Internal Trade (AIT).

request an exemption via a TB submission, which must be approved by Treasury Board for the department to claim ownership of the IP.

**If yes**, insert the appropriate clauses into the solicitation documentation and procurement contract to clearly provide that the Crown is claiming Foreground IP ownership, as described in Appendix A of the Policy.<sup>3</sup>

The following exceptions are listed in Appendix A:

**1. National security.** The Policy allows the Crown to own the IP when it is judged that national security could be at stake.

*Example: The Crown contracts for the services of a private biotech company to undertake research to develop a biological agent, which could be patented. However, the new biological agent has the potential to become a threat to national security. As such, the Crown would want to retain ownership of the IP.*

**2. Where statutes, regulations or prior obligations of the Crown to a third party or parties preclude contractor ownership of the Foreground IP.**

This exception covers two cases:

1. where laws or regulations preclude contractor ownership of the new intellectual property that the contractor creates in the course of the Crown procurement contract;
2. where the Crown has a pre-existing obligation to a third party regarding intellectual property (e.g., Memorandum of Understanding and Collaborative Research and Development Agreement) that may preclude vesting ownership of the IP to the contractor.

*Example: A federal laboratory has acquired the use of a technology from a large pharmaceutical company via an agreement. This agreement states that the Crown must pay licence fees and allows the pharmaceutical company to own the IP rights in any further discoveries or improvements made to the technology. This type of prior agreement may limit the IP rights provided to future contractors.*

**3. When the contractor declares in writing that he/she is not interested in owning the Foreground IP.** It is important to keep a paper or electronic record of this declaration on file. Use of this exception does not preclude the contractor from seeking a licence.

*Example: The protection of IP takes resources that many small and medium-sized enterprises (SMEs) may not possess. Rather than defend their IP from competitors, the contractor may prefer that the Crown own the IP and grant them a licence. In such a scenario, the contractor would have to state in writing that it does not want to own the IP.*

**4. Where the main purpose of the Crown procurement contract, or the deliverables contracted for, is:**

**4.1 To generate knowledge and information** for public dissemination (but not necessarily free dissemination).

<sup>3</sup> In instances where the Crown owns the Foreground as set out in Appendix A, the Crown may require that the contractor provide, at the Crown's expense, any reasonable assistance to enable the Crown to seek and secure intellectual property rights in the Foreground.

.....  
*Example: The Crown procures research that is used to develop a model building code to guide construction practices in Canada. The code is intended to be made available to the public (at a cost). In the contract for the procured research, the Crown could claim IP ownership because its intention is to disseminate (and commercialize) the code. In this example, if the Crown owns the IP, the Crown could sell (or give away) the code.*  
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**4.2 To expand upon an existing body of Crown Background as a prerequisite to the transfer of the expanded Background to the private sector, through licensing or assignment of ownership (not necessarily to the original contractor), for the purposes of commercial exploitation.**

This exception has three objectives:

1. to maintain the integrity of the resulting IP package;
2. to avoid the fragmentation of the IP package (i.e., multiple ownership of the various pieces of IP); and
3. to simplify the process for transfer of the resulting IP package, at a later date, to the private sector for the purpose of commercial exploitation.

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*Example: Crown employees developed software (legacy system) several years ago, and the Crown owns the Background IP. A contractor is hired to re-code/modify the existing software (legacy system). To prevent fragmentation of the IP, and in order to facilitate transfer to the private sector for the purposes of commercial exploitation, the Crown retains the ownership on the legacy system as well as any newly created Foreground IP.*  
.....

**4.3 To deliver a not-yet fully developed component or subsystem that will be incorporated into a complete system at a later date (Foreground deliverable to be a single component of a final product to be completed in the future by the Crown), as a prerequisite to the planned transfer of the complete system to the private sector, through licensing or assignment of ownership, for the purposes of commercial exploitation.**

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*Example: A device will be developed through Crown procurement contracts by two contractors. Both contractors will be developing Foreground IP that will be required for a complete system. The Crown requires IP ownership of the deliverables (from both contractors) in order to incorporate each deliverable into a complete system as a prerequisite to the planned transfer to the private sector for the purposes of commercial exploitation. In this example, if the Crown did not take ownership of the IP created by both contractors in the deliverables (using the fragmentation exception), IP rights in the complete system may be fragmented. If the IP in the deliverables was owned by the contractors (and not the Crown), the compilation of the complete system could be hindered.*  
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**5. Where the Foreground IP consists of material subject to copyright, with the exception of computer software and all documentation pertaining to that software.** This exception applies only to non-software material subject to copyright.<sup>4</sup>

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*Example: The Crown contracts with a contractor to prepare a report. The Crown may choose to own the copyright in the report by using this exception of the policy.*  
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<sup>4</sup> Under this exception, the contractor would own the intellectual property attached to software and its documentation, unless the Crown invokes one of the exceptions specified in Appendix A Sections 1-4.

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**By owning the copyright, the Crown can control permission of publication. If the contractor held the copyright, the Crown would need to seek permission to use the material outside of the scope of any licensing obtained as part of the contract (i.e., royalty-free license).**  
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#### **Step 4: Consider licensing to contractor(s).**

To encourage commercial exploitation of IP that has been generated by a contractor in circumstances where the Crown owns the IP, the department should consider licensing the IP to the contractor.

The Crown may decide whether to grant a licence to the contractor and the terms of any such licence. When the following two conditions are met, the Crown must grant the licence royalty-free:

1. the Crown relied on the exceptions described in sections 4.2 and 4.3 of Appendix A to take ownership of the Foreground IP; and
2. the licence to the Foreground is not being granted as part of the transfer of the final product or complete system to the private sector.

In other cases, where the Crown grants a licence as part of the transfer of the final product or complete system to the private sector or when the Crown takes ownership through the use of any other exception, the Crown may require royalties.

When the contractor takes ownership of the Foreground IP, the Crown needs a royalty free licence to ensure that it can exercise its rights in the deliverables. Depending on the licensing terms, the department may then use the IP, only in a manner that is not in competition with the contractor.

## **5 PWGSC Standard Acquisition Clauses and Conditions (SACC)**

The *PWGSC Standard Acquisition Clauses and Conditions (SACC) Manual* is intended for the use of PWGSC contracting officers. Departments doing their own contracting may refer to the PWGSC SACC Manual to

assist in the drafting of clauses concerning intellectual property. Departments are advised to consult their legal counsel prior to using PWGSC clauses, or in the drafting of their own departmental clauses.

# 6 Determining Potential for Commercial Exploitation

The Title Policy has been strengthened to take the potential for commercial exploitation of the IP generated under a Crown procurement contract into account. The Policy defines **Commercial Exploitation** (*Exploitation commerciale*)—“any use, transformation and/or dissemination of the Foreground that generates, or is intended to generate, revenues.” As part of the regular contracting process, the Responsible Department is required, at contract award, to identify whether they think this contract will result in the creation of Foreground IP that is potentially commercially exploitable.

In cases where PWGSC is the contracting authority for a client department, the decision to identify whether Foreground IP generated under a contract has the potential for commercial exploitation is the responsibility of the client department. If a PWGSC contracting officer identifies a potential omission, they should contact the client department.

In making the determination of whether a contract will generate Foreground IP with the potential for commercial exploitation, departments may choose to consult with suppliers.

To help make a determination on whether the IP is commercially exploitable, departments may wish to use this checklist:

- If the IP was made into a product would there be a market for it?
- Are there similar products already in the marketplace?

- Are there known receptors for this IP (e.g., customers)?
- Would the IP provide a solution to an issue or problem that others are trying to solve?
- Does the IP build on the contractor’s existing product line or market strategy?
- Has the contractor expressed an interest in commercializing this IP?

A “yes” response to one or more of the questions above may indicate a potential for commercial exploitation.

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**Examples:**

- **A research and development project that solves a technical problem may result in Foreground IP with commercial potential.**
  - **Foreground IP in a report or speech is unlikely to have commercial potential.**
  - **Computer software will sometimes result in commercial potential. This includes when the Crown would retain ownership of either a legacy or not yet fully developed system plus and any Foreground IP generated when a contractor is hired to re-code/modify the system. In this case the Crown would retain such ownership of the Foreground IP in order to prevent fragmentation of the IP.**
- .....

# Appendix: Frequently Asked Questions

## Intellectual Property

**Q: How does one protect IP?**

**A:** IP can be protected in a variety of ways including patents, trademarks, copyright, industrial designs and integrated circuit topographies.<sup>5</sup> Protection of IP may arise automatically (such as with copyright) or may require that the IP be registered with the Canadian Intellectual Property Office (such as with patents).

**Q: When should IP ownership be decided?**

**A:** Decisions about the ownership of the IP need to be made before entering into a Crown procurement contract. In a competitive bidding situation, the Crown must identify in the solicitation documents its intention with regards to the ownership of the IP. In the case of a sole-source contract, the Crown should indicate whether the Crown or the contractor will own the arising IP before entering into negotiations with the contractor.

**Q: Is there a difference between IP ownership and use?**

**A:** Yes. The Crown does not necessarily need to own the IP in order to use it. The Crown should obtain a comprehensive licence to address its needs. Consultations with legal representatives can help determine if the general contracting terms and conditions used by your department include these rights.

**Q: Why does the government want suppliers to keep the IP created in the course of a Crown procurement contract?**

**A:** The Government of Canada believes that commercial exploitation of IP is best achieved by the private sector.

**Q: Can the Crown share the IP ownership with the contractor?**

**A:** It is generally considered inadvisable for the Crown to jointly own IP.

**Q: If IP is owned by the Crown, is it reported anywhere?**

**A:** Yes. Departments and agencies must report all forms of IP ownership (Crown-owned or contractor-owned) for all contracts valued at greater than \$25,000. The organization must identify in both the contract and in its contract reporting system which exception was the justification for the Crown retaining the ownership. Further to determining ownership of IP, departments are required to identify contracts that have the potential for commercial exploitation. The data from the departmental systems are provided annually to Public Works and Government Services Canada indicating the number of times the Crown retained the ownership of the IP, and the exceptions used to justify it. Given the potential value of IP as an asset to the organization, care should be taken to properly manage the IP.

**Q: Whom can I contact in my department/agency to help decide on the ownership of the IP in the contract?**

**A:** Your central contracting group, material management or IP specialists would be good resources. Your organization's legal services unit can also provide assistance.

## Common Misunderstandings

**Q: If the contractor owns the Foreground IP, what has the Crown paid for?**

**A:** The Crown has received the deliverable contracted for in the contract. The Crown should obtain a comprehensive licence to address its needs. For example, by including licensing terms in the contract, the Crown can obtain a licence that provides it with certain rights, such as: the right to make certain uses of the deliverables of the contract without paying any more money to the contractor, and the ability to copy, translate or change the products without seeking permission

<sup>5</sup> <http://www.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/eng/wr00822.html>

from the contractor. These rights are contingent on the understanding that the Crown is using the deliverable for government purposes.

**Q: If the department agrees that the contractor is to own the IP, does the department have to go back to that contractor every time we need to change something or want more work?**

**A:** Not necessarily, as long as the Crown obtains an appropriate licence to the IP. This could be accomplished by using licensing terms, whereby the contractor is required to provide the Crown with a perpetual, non-exclusive, royalty-free licence to use the IP for government purposes. If the Crown has a perpetual licence and the terms and conditions of that licence are quite broad, then the department does not have to go back to the contractor each time the Crown wants to do something with the IP. Consideration of future use by the Crown is an important step to be taken before any Request for Proposal is published or any supplier is approached on a sole source basis.

**Q: If the Crown agrees that the contractor is to own the IP, can the contractor be required to report on their use of the IP?**

**A:** This type of obligation could be made a part of the contract. It is important that all obligations for the contractor are outlined in the Statement of Work. These obligations can include a reporting requirement. In such cases, you may need to consult with your material management/procurement specialists for the correct wording. Given that reporting can place a burden on the contractor, it is recommended that this requirement be used only in cases where the Crown believes that commercialization/use of the IP is likely.

## Data Collection for IP Contracts Management Information Systems

**Q: How does a department report on the cases where the Crown retains IP ownership?**

**A:** The data on the ownership of the IP and the potential for commercial exploitation are collected at the time of contract approval in departments' and agencies' financial/procurement systems. This information is then reported by departments and agencies to PWGSC, TBS and IC.

**Q: What happens to data that is submitted?**

**A:** An annual report is prepared by IC and shared with the ADM Committee on Science and Technology (ADMCST) and Treasury Board Advisory Committee on Contracts (TBACC).

**Q: How long does the department need to track what happens to the IP owned by the Crown?**

**A:** Contracts are to be retained for a minimum period of time as is prescribed by respective departmental policies. Record keeping and record management go hand-in-hand with the ability to secure and protect IP rights. Records of ownership and licences to IP need to be kept as long as the goods (including licensed software) or services for which the IP is relevant are in use.

Whenever an exception retaining the ownership of the IP is invoked, proactive efforts should be made throughout the life of the contract to gather and secure information and evidence pertinent to the Foreground. Thorough documentation (e.g., records, dated copies of drafts, emails or documents) of the IP created in the course of contract will be essential in establishing ownership and securing/protecting rights. Contract closeout is an opportunity to review the information gathered and ensure its accuracy and completeness.