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Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts

Note to reader

This Policy was amended September 14, 2022.

Please be advised that this policy is owned and administered by Innovation, Science, and Economic Development (ISED). All enquiries should be directed to ISED's Web Services Centre at 1-800-328-6189.

1. Effective date

- 1.1 This Policy will take effect on April 1, 2015.
- 1.2 It replaces the Treasury Board Policy on *Title to Intellectual Property Arising under Crown Procurement Contracts* (dated October 1, 2000).

2. Application

- 2.1 This Policy applies to all departments listed in Schedules I, I.1 and II of the *Financial Administration Act* (FAA), with the exception of the

Canada Revenue Agency. It also applies to a Commission established pursuant to the *Inquiries Act* that is designated as a department for the purposes of the *FAA* through an Order in Council.

- 2.2 Section 6.4 & 7 on monitoring compliance and consequences for non-compliance do not apply with respect to the Office of the Auditor General, the Office of the Privacy Commissioner, the Office of the Information Commissioner, the Office of the Chief Electoral Officer, the Office of the Commissioner of Lobbying, the Office of the Commissioner of Official Languages, the Office of the Public Sector Integrity Commissioner, the Office of the Communications Security Establishment Commissioner, the Public Prosecution Service Canada and commissions established pursuant to the *Inquiries Act*. The deputy heads of these organizations are solely responsible for monitoring and ensuring compliance with this Policy within their organizations, as well as for responding to cases of non-compliance in accordance with any Treasury Board instruments providing principles and guidance on the management of compliance.
- 2.3 This Policy applies to Foreground Intellectual Property (IP):Intellectual Property first conceived, developed, produced or reduced to practice as part of the work under a Crown Procurement Contract.
- 2.4 This Policy does **not** affect:
- existing ownership rights of the Crown, the Contractor, or a third party to their respective Background IP;
 - 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.

2.5 This 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;
- the ownership of, or the right to use, any trademarks or trade names;
- 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;
- personal information as defined under the *Privacy Act* or to Foreground IP in any compilation or database containing personal information or Crown-supplied information, if that Foreground IP cannot be exploited without using that personal information or Crown-supplied information.

3. Context

- 3.1 For the purposes of this Policy, IP includes any rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields including all intellectual creation legally protected through patents, copyright, industrial design, integrated circuit topography, and plant breeders' rights, or subject to protection under the law as trade secrets and confidential information.

- 3.2 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.
- 3.3 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.
- 3.4 This Policy does not require that departments compromise their operations (e.g. being tied into a sole source situation or accept too narrow a licence to allow the full use of the Foreground IP), but rather allows the federal government to seek licenses broad enough to permit the Crown to use the IP.
- 3.5 This Policy is issued under the authority of section 7 of the *Financial Administration Act* (FAA).
- 3.6 This Policy is to be read in conjunction with the *Policy Framework for the Management of Assets and Acquired Services*.
- 3.7 Additional mandatory requirements are set out in the *Directive on the Management of Procurement*;

4. Definitions

For the purposes of this Policy:

"Background IP" (« *Acquis* »)

means all Intellectual Property that is not Foreground IP.

"Commercial Exploitation" (« *Exploitation commerciale* »)

means any use, modification, transformation and/or dissemination of the Foreground IP that generates, or is intended to generate, revenues.

"Contracting Department" (« *Autorité contractante* »)

means the Department entering into a Crown Procurement Contract.

"Contractor" (« *Entrepreneur* »)

means any party or parties, collectively, to a Crown Procurement Contract not defined as the Crown.

"Crown" (« *État, la Couronne ou Sa Majesté* »)

means Her Majesty the Queen in Right of Canada, including departmental corporations as defined in the *Financial Administration Act*.

"Crown Procurement Contract" (« *Marché conclu avec l'État* »)

means a 'contract' as defined in the *Policy on the Planning and Management of Investments*;

"Deputy Head" (« *Sous-ministre* »)

means the deputy head, the chairperson, the president or other chief executive officer of a Responsible Department and any person having the appropriate capacity to act on her or his behalf.

"Deputy Head of a Contracting Department" (« *Sous-ministre de l'Autorité contractante* »)

means the deputy head, the chairperson, the president or other chief executive officer of a Contracting Department and any person having the appropriate capacity to act on her or his behalf.

"Foreground IP" (« *Élément original* »)

means IP first conceived, developed, produced or reduced to practice as part of the work under a Crown Procurement Contract.

"Intellectual Property" (« *Propriété intellectuelle* »)

means for the purposes of this policy, any rights resulting from intellectual activity in the industrial, scientific, literary, or artistic fields including all intellectual creation legally protected through patents, copyright, industrial design, integrated circuit topography, and plant breeders' rights, or subject to protection under the law as trade secrets and confidential information. Intellectual Property does not include prototypes or any other physical embodiments of intellectual creation when such physical embodiments are deliverables of a Crown Procurement Contract. Please see the *Implementation Guide – Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts* for more information.

"Responsible Department" (« *Ministère responsable* »)

means the Department for which good(s) and/or service(s) are being acquired under the Crown Procurement Contract.

5. Policy Statement

5.1 Objective

The objective of this Policy is to enhance Canada's economic growth by increasing commercialization of Intellectual Property. To this end, the contractor is to own the rights to Foreground Intellectual Property created as a result of a Crown Procurement Contract. This default position is subject to exceptions and exemption found in Appendix A.

5.2 Expected results

- When the Contractor generates IP under a Crown Procurement Contract, they have an opportunity to own and commercialize the Foreground IP.
- When the Crown's intended use of the Foreground IP requires ownership of the IP, the Crown has the opportunity to take sole ownership, either through

exceptions or the Treasury Board Exemption provided in Appendix A.

- When the Crown's intended use of the IP can be met through licence arrangements, it has the opportunity to seek the needed licence(s) whether broad or narrow.
- Responsible Departments have improved clarity in IP ownership decision-making.
- Roles, responsibilities and accountabilities for the management of IP generated under a Crown Procurement Contract are clearly defined and understood by all departments.

6. Policy Requirements

6.1 Deputy Heads or their designates are accountable to establish an effective approach for the implementation of this Policy within their respective departments by:

- 6.1.1 ensuring the proper management of Foreground IP arising from Crown Procurement Contracts by having the Contractor be the owner of any Foreground IP, subject to the exceptions and exemption in Appendix A; and ensuring that the potential for commercial exploitation is identified.
- 6.1.2 ensuring that documentation on Foreground IP ownership decisions is complete and consistent with the Policy;
- 6.1.3 ensuring that adequate resources are allocated to the orientation and training of personnel regarding their implementation of the Policy.

- 6.2 The Deputy Head of the Contracting Department is responsible for:
- 6.2.1 ensuring the Contract terms are consistent with the objective of this Policy;
 - 6.2.2 ensuring the appropriate licensing of IP as detailed in Appendix B;
 - 6.2.3 ensuring that departmental data on IP ownership and potential "commercial exploitation" is accurate and is submitted in a timely manner to the open government portal and to ensure that reporting responsibilities on policy compliance are met, as requested by the Treasury Board Secretariat (TBS).
- 6.3 Deputy heads or their designates are responsible for ensuring that managers:
- 6.3.1 adhere to the stepwise process for deciding IP ownership and licensing outlined in the Implementation Guide – Policy on Title to Intellectual Property Arising Under Crown Procurement Contract;
 - 6.3.2 adhere to the implementation of this Policy and provide certain types of information to the open government portal which will be used by Innovation Science and Economic Development (ISED) & TBS to fulfill their responsibilities set out in paragraphs 6.5 and 6.6.
- 6.4 Monitoring and Reporting Requirements
- 6.4.1 Deputy heads are responsible for:

- 6.4.1.1 monitoring decisions on ownership of the Foreground IP made by departmental staff;
- 6.4.1.2 monitoring compliance with this Policy within their department and taking corrective action as needed.

6.5 ISED is responsible for:

- 6.5.1 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;
- 6.5.2 sharing the findings from the aforementioned annual statistical report with members of the Assistant Deputy Minister Committee on Science and Technology (ADMCST);
- 6.5.3 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.

6.6 TBS is responsible for:

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

7. Consequences

Deputy heads or their designates are responsible for ensuring that corrective actions are taken to address significant issues of non-compliance with this Policy.

8. Roles and Responsibilities of Innovation Science and Economic Development

As per the *Department of Industry Act*, the powers, duties and functions of the Minister extend to and include all matters relating to patents, copyrights, trade-marks, industrial designs and integrated circuit topographies. ISED plays a role in sponsoring, overseeing and administering this Policy and will undertake activities assigned to it under this Policy

9. References

9.1 Relevant legislation

- *Department of Industry Act*
- *Financial Administration Act*
- *Privacy Act*
- *Inquiries Act*
- *Copyright Act*
- *Industrial Design Act*
- *Integrated Circuit Topography Act*
- *Patent Act*
- *Plant Breeder's Rights Act*

9.2 Related Policies/Publications:

- Treasury Board Directive on the Management of Procurement
- Treasury Board Policy on the Planning and Management of Investments
- Implementation Guide – Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts

10. Enquiries

For questions on this Policy instrument, please contact ISED Web Services Centre at 1-800-328-6189.

Appendix A – Exceptions to Contractor Ownership and Treasury Board Exemption

By default, the Contractor is to own the Foreground IP arising under Crown Procurement Contracts, unless the Crown claims one of the exceptions listed below, or applies for a TB exemption from this Policy through a TB Submission. Under the Crown Procurement Contract, the Crown may claim ownership of the Foreground IP for the following reasons (please see Implementation Guide for further details, and for model clauses consistent with this Policy):

1. National security.
2. Where statutes, regulations or prior obligations of the Crown to a third party or parties preclude Contractor ownership of the Foreground IP.
3. When the Contractor declares in writing that he/she is not interested in owning the Foreground 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.

4.2 To augment 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.

4.3 To deliver a not-yet fully developed component or subsystem that will be incorporated into a complete system at a later date, 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.

5. Where the Foreground IP consists of material subject to copyright, with the exception of computer software and all documentation pertaining to that software.
6. Unused.
7. Unused.
8. Treasury Board Exemption

The Crown may take ownership of Intellectual Property in circumstances where it is justified but not provided for in one of the exceptions listed above, and the Responsible Department has, in collaboration with the Contracting Department, sought and obtained Treasury Board approval for such an exemption. Prior to seeking an exemption, it is important to consider whether Foreground IP ownership is necessary, or if a license would suffice.

Appendix B – Licensing Intellectual Property

Contractor ownership of Foreground IP does not preclude the Crown from using the Foreground IP, provided that the Crown obtains a royalty-free licence to have the right to use, or have used by a third party, the Foreground IP owned by the Contractor. 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. Examples of the licensing provisions for such situations can be found in the Model Clauses (*Implementation Guide – Policy on Title to Intellectual Property Arising Under Crown Procurement Contracts*).

Contractor Owned Intellectual Property

- When the Contractor takes ownership of the Foreground IP, the Policy allows the Crown to require the Contractor to provide it with a royalty-free license to exercise all IP rights in the Foreground for government activities except commercial exploitation.
- The Crown may require the Contractor to carry out commercial exploitation of the Foreground IP in Canada and/or within a specific period of time, to the extent that the requirement is consistent with Canada's trade agreement obligations. The detailed requirements can be specified in the contract or in a separate agreement between the Crown and the Contractor.

Crown Owned Intellectual Property

- When the Crown takes ownership of the Foreground IP through the use of exceptions in Sections 4.2 or 4.3, any Foreground IP licence the Crown grants a Contractor, other than a licence to the final completed product, must be royalty-free. When the Crown takes

ownership through the use of any other exception, the Crown may require royalties for the licence.

- When the Contractor requires the use of the Crown's Foreground IP, the Contractor has 30 working days to make a request in writing for the licence, following contract completion. The Crown may also grant a licence to the Contractor for the Contractor's use of the Crown's Background IP. While the Crown has the right to refuse such requests, it must provide an explanation in writing for the refusal within a reasonable period of time.

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