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INTRODUCTION TO INTELLECTUAL PROPERTY RIGHTS IN PUBLIC PROCUREMENT OF INNOVATION

1.1 Introduction

When procuring innovation new findings, insights, and potentially new technology are part of the deal. Who owns the Intellectual Property (IP) Rights can be very important. If a public authority retains the intellectual property rights the incentive to innovate, search for new solutions for the involved companies can be too limited. Or it results that a public authority pays too much for intellectual property rights it does not (or cannot) exploit. If a public authority leaves the intellectual property rights at the involved supplier, vendor-lock-in looms. The authority is tied to the vendor for a specific service or product it has paid to develop.

This guide aims to introduce the subject of Intellectual Property Rights to public procurement officers, as this can be an important aspect when procuring innovation. The guide explains the kind of problems that careful consideration and management of intellectual property rights would prevent. Using examples from practice, the guide illustrates the different options for allocation of intellectual property rights and their respective advantages and risks. Finally, we provide an overview of applied approaches and corresponding sets of ‘standard terms and conditions’.

1.2 Why consider IP rights?

When regular normal pencils are procured and delivered, it is clear to both buyer and supplier what the buyer will own; the pencils according to the agreed specifications. The purchasing public authority would typically focus on spending as little effort as possible in the procurement process, and there is little worry with the supplier whether they should protect their intellectual property applied in the pencils as similar pencils can easily be brought from another supplier. However, this is not always as easy in the procurement of innovations. The following two examples will clarify.

Vendor lock-in
The impact of vendor lock-in is characterised by the following example. A local public authority prepares a tender for the replacement of the radar-module in a marine (vessel) traffic control system. This system consists of a radar-module, and an IT system featuring an application to show vehicle locations on screen. This IT system also manages the data-interface from the radar-module to the user application.

In the original tender for this marine traffic control system, the contracting authority did not work out specific conditions with respect to ownership and administration of intellectual property rights. Although the public authority could claim ownership of intellectual property rights, there were no clear and complete specifications of the data—communication-interface between the radar-module and the rest of the system developed and delivered to the public authority.

So when preparing the tender for replacement of the radar-module, the public authority is not able to provide the required interface specifications necessary to integrate the radar in the existing marine vessel traffic control system. This made it that the public authority was forced to involve the original supplier of the IT system to manage the integration. This supplier charged for the integration a price that is equal to the budget for the entire tender. This resulted in a doubling of the estimated cost. The public authority decided to discontinue the tender process.

While in the example of the radar-system the legal ownership of the intellectual property is not the core of the debate, the public authority did not possessed the required knowledge. A requirement specifying a detailed...
Another example where ownership of intellectual property caused problems is in the pre-commercial procurement of an innovative IT system by a central government. Initially many parties showed interest in joining a procedure in which the government pays for feasibility studies and prototypes for multiple solutions. However, two out of three companies selected for working out a prototype backed out when having to agree to hand over ownership of the intellectual property of their prototype to the public authority. Two potential valuable prototypes were hence not developed.

This second example illustrates how taking away ownership of intellectual property from the market removes the incentive to innovate. The public authority lost two out of the three most promising solutions because of the approach to make the best solution public and tender the final development 1.

The two examples clarify the need to consider how to handle of Intellectual Property and the rights to intellectual property in public procurement of innovations. The next section provides background information from a legal perspective to the most relevant types of intellectual property rights.

1.3 Background

Modern Intellectual Property Rights are the result of the Renaissance. In this period an increased number of innovations were developed. To protect the developers of these innovations patents were invented. However, Intellectual Property Law is not only about patents.

By default governmental contractors used to leave intellectual property rights with the contracted supplier, resulting in Vendor lock in. In reaction most public authorities decided to retained all intellectual property rights. This solved the previous problem but resulted in higher cost and less innovation. If the public authority retains intellectual property rights the supplier has less incentive to innovate, since it has no possibility to exploit the intellectual property rights with third parties. As a consequence a supplier will not invest its own resources and the authority pays for all the Research & Development.

Different types of Intellectual property rights

There are many different kinds of intellectual property rights. Though at first sight, they may not all seem equally relevant, public purchasers can come across any of these rights. The most common forms of intellectual property rights are:

- copyrights
- related rights or neighbouring rights
- patent rights
- trademarks/brands
- protection of company/trade secrets
- database rights
- design rights
- chip topography rights
- breeders rights
- portrait rights
- domain name rights (new)

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1 In the eyes of the public authority, the two companies that did not agree to the terms for making the prototype should not have participated in the first place. This example is used to clarify the effect of limiting the IP rights of suppliers.
Of these different forms of intellectual property rights three types are most relevant in the public procurement of innovation: patent rights, protection of trade secrets and copyrights.

A patent\(^\text{2}\) is a common method of legally protecting inventions (products or processes). In Europe it is regulated by European patent law. It is an exclusive right to make, use, import and sell an invention. It is granted for a limited time. A result of a patent is that the exact details of the invention are disclosed. An innovation can only be patented if it is new and non-obvious to an expert.

A more common method of intellectual property are trade secrets. The innovation is protected by keeping it a secret, which can be legally supported by agreeing a Non-Disclosure Agreement (NDA) between the public authority and the supplier. Trade secrets lend itself specifically to processes that are applied in a ‘closed’ environment. Maybe the best known trade secret is the recipe for Coca Cola\(^\text{3}\). Trade secrets are not disclosed publically, and can last indefinitely unlike patents that have an expiry date. While trade secrets can, if properly protected by the supplier, last indefinitely. Intellectual property rights provide the supplier has no additional protection once the information of the trade secret is uncovered, for example through reverse engineering of an innovation.

A copyright\(^\text{4}\) gives the creator of an original work exclusive rights to it, usually for a limited time. Copyright may apply to a wide range of creative, intellectual, or artistic forms, or “works”. Copyright does not cover ideas and information themselves, only the form or manner in which they are expressed.

### 1.4 Ownership and sharing of IP rights

The two extremes for ownership of intellectual property rights – ownership at purchasing authority versus ownership at developing supplier – both have potential negative effects for the public authority. The primarily negative effects a vendor lock-in or an overpayment of the innovation. Section 1.2 describes these negative effects and provides two examples.

The most successful approaches avoid these disadvantages by ‘dividing’ or sharing the intellectual property rights. The goal of sharing is to ensure a public authority can use and apply the intellectual property, while leaving intellectual property rights and the opportunities to commercialize it at the developing companies. The public authority is protected from a vendor lock-in due to intellectual property rights and there is a strong incentive in the market to innovate. The overview below illustrates different approaches to this end – which we refer to as sharing intellectual property rights.

#### Approaches to share IP rights

**Licences**

Licensing is the solution for retaining intellectual property rights at the supplier that develops the innovation, while protecting the public authority (or client in general) against vendor lock-in and consequent high costs when vendors exploit their ‘monopoly position’. A licence\(^\text{5}\) is an agreement between the holder of intellectual property rights (the licensor) and a second party (the licensee). Important is the licensor remains owner of the intellectual property rights. The terms are described under which the licensee can use the intellectual property rights. The terms can contain a wide range of conditions such as the time the licence is valid, the conditions for

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\(^{3}\) Leon Stafford for The Atlanta Journal-Constitution Dec. 8, 2011 [Coke hides its secret formula in plain sight in World of Coca-Cola move](http://www.oecd.org/sti/sci-tech/37569498.pdf)

\(^{4}\) The economics of Patents and Copyrights, F. Lévèque, Y. Ménière, 2004

renewal, the geographical area or industry that the licence applies. This results in multiple type of licences. Below different type of licences are concisely described:

- An exclusive licence is a licence that gives the licensee the sole right to use the intellectual property rights. The licence will not be given to any other party. A non-exclusive licence on the contrary can be given to multiple licensees.
- Cross licensing occurs in industry. Companies swap licences to use certain intellectual property rights. There is little relevance for public procurement.
- An open licence is a licence that will be provided to anybody that requests it. This could be for free or for a reasonable fee (or other conditions). Open licences are best known for (all but) technical standards in the electronics industry such as CDs.
- An open source software licence is a licence that allows the licensee a lot of freedom. It is often used in open source software projects. The most commonly known is the GNU General Public Licence\(^6\). There is also an open software licence approved by the EU: EUPL\(^7\). Open licences can be of interest to public authorities if they wish to ensure that:
  - the intellectual property rights developed is accessible to all;
  - the original developer (or the authority) receives the credits for the development;

Off course different combinations can be made. There are exclusive regional licences for example.

**Royalties**

Royalties\(^8\) are payments from the ‘licensee’ to the ‘licensor’ for the use of intellectual property.

Section 1.5 discusses different structures for licences and royalties in more details.

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**Example: Open licences in Dutch civil engineering\(^9\)**

An example of the application of open licences is the general agreement to use open licenses for innovations in civil engineering works in the Netherlands. Organisations representing Dutch suppliers in civil engineering, the main contracting authority, and independent knowledge centres agreed in 2007 to use open licenses as a means to increase innovation in (Dutch) civil engineering sector.

The general agreement is that through open licences, public authorities have the freedom to:

- maintain, fix, modify, and demolish the delivered work.
- apply the innovation in new works under payment of royalties
- contract other suppliers for works using the intellectual property, again under the payment of royalties to the intellectual property owner

The supplier owning the intellectual property have the freedom to earn back investments and commercialize the intellectual property through:

- application in works for other public authorities
- application in new works for the same original public authorities
- receiving royalties whenever the original public authority that requires the innovation in new works that are contracted to other suppliers

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\(^7\) [https://joinup.ec.europa.eu/software/page/eupl](https://joinup.ec.europa.eu/software/page/eupl)


\(^9\) CROW – Samen werken aan innovatie – open licenties in de gww, 2009
When to consider sharing IP rights?

Consider how to sharing intellectual property rights is most relevant when:

- New intellectual property rights will result from a collaboration between a public and private organisations and
- Both the public and private organisation have a stake in the application of the intellectual property rights (both directly or in the future).

An obvious case is where a public authority tenders for R&D to develop a product it requires (for instance in pre-commercial procurement). However, intellectual property rights management is also relevant in case a public authority allows for innovation in a tender through a functional specification of the product, however the tender does not include future work or maintenance. Future work may include building the next bridge to the same specifications and design as the current one, or adding a new module to an existing software system.

1.5 Step by step guide for procurement officer to an IP rights strategy

Step 1: Needs and Risk assessment

When dealing with intellectual property rights in a tender it is important for the public authority to identify their needs and risks.

The checklist below may help with this assessment:

<table>
<thead>
<tr>
<th>Question</th>
<th>Consideration</th>
</tr>
</thead>
<tbody>
<tr>
<td>Could new intellectual property be developed as part of the tender?</td>
<td>• Does the public authority aim for an innovative solution?</td>
</tr>
<tr>
<td></td>
<td>• Does the tender allow for innovative solutions</td>
</tr>
<tr>
<td></td>
<td>• Is a custom, tailor-made solution required, or can a standard solution be sufficient as well</td>
</tr>
<tr>
<td></td>
<td>• Does the public authority invest in the R&amp;D for innovations?</td>
</tr>
<tr>
<td></td>
<td>• Does the supplier itself invest in the R&amp;D for innovations?</td>
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<tr>
<td>Is there a risk of vendor-lock in?</td>
<td>• Is maintenance included in the tender?</td>
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<td></td>
<td>• Is the ability to perform maintenance affected by ownership intellectual property?</td>
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<tr>
<td></td>
<td>• Is there a (potential) wish to standardise?</td>
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<tr>
<td></td>
<td>• To what extent does the public authority become dependent on the supplier</td>
</tr>
<tr>
<td></td>
<td>• Are there substitutes available in the market?</td>
</tr>
<tr>
<td>Is there market opportunity to commercialize intellectual property?</td>
<td>• Is there a commercial market for the solution as a whole, or for application of the new/innovative components of the solution?</td>
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<tr>
<td></td>
<td>• Will the public authority require a solution with same / similar intellectual property rights in the near future?</td>
</tr>
<tr>
<td>Are there other risks for retaining intellectual property rights at public authority?</td>
<td>• Is the intellectual property rights transferrable? Would other market parties be able to do maintenance, advance the current solution, and/or create new versions of the solution based on specifications and knowledge that is</td>
</tr>
</tbody>
</table>
Transferrable to the public authority:
- Can intellectual property rights relevant to public authority be ‘separated’ from other overall intellectual property rights?

Are there any other risks for not retaining intellectual property rights at the public authority?
- Will society in general benefit from sharing intellectual property rights as public knowledge?

Step 2: Decide on the approach to take
The following options are open in procurement when it comes to intellectual property rights:
- Claim the full rights to new intellectual property
- Claim no rights to new intellectual property
- Share intellectual property rights between public authority and supplier.

Based on the needs and risks the public authority decides on the best strategy to follow.

In general:
- The more innovation and investment expected from the market, the more intellectual property rights should be left with the market.
- The more opportunities for commercialization of the intellectual property rights by the market, the more intellectual property rights should be left with the market.
- The more ‘after-sales’ improvement and development are expected on the innovation, the more reason there is to leave intellectual property rights at the market. For example companies of standardized software packages typically provide regular updates and improvements developed for a group of customers.
- The larger the risks on vendor lock-in, the larger the necessity to pertain intellectual property rights (e.g. through a licence-structure).
- The more uncertain the future is, the larger the necessity to pertain intellectual property.

In most cases the adverse of the above statements is true as well. For example when only limited investment for innovation is necessary, there is limited opportunity in the market for commercial exploitation, and/or the product or service concerned is a specific one-off solution, the public authority should claim intellectual property rights.

Step 3: Work out terms and agreements (or use standard clauses)
The last step in the process depends on the outcome of step 2.

Leave IP rights at supplier
In case the public authority decides to leave the intellectual property rights entirely with the supplier, the public authority most likely does not have to include additional conditions in its contracts. The intellectual property rights resides where it was created. So without further action it resides with the supplier.

Retain IP rights at public authority
As claiming full ownership of intellectual property rights is still the ‘default’ option for many public authorities, often there are national standard contract terms and conditions readily available for this option. Refer to these standard terms and conditions in the tender process. As an example appendix 2 features the Dutch General Government Terms and Conditions for Public Service Contracts. Most countries have a similar set of standard terms and conditions.

Share IP rights between public authority and supplier

Draft Prepared for public consultation starting the 15th January 2014
Preparing the terms and conditions when the goal is to share intellectual property rights, standard clauses for terms and conditions may not exist or fit the specific needs of the public authority for the tender at hand.

When sharing the intellectual property rights the aim is:
- To arrange sufficient rights for the public authority to ensure that their processes are not hindered in any way.
- To ensure the public authority agrees an equitable remuneration for the supplier for using the intellectual property rights
- To provide the supplier involved the (maximum) possibility to exploit the intellectual property rights in other business opportunities.

**Free non-exclusive license**
The most common approach for a public authority in sharing intellectual property rights is to require a free non-exclusive licence for its own use. Free means without any future payment being required. Non-exclusive means that the intellectual property rights holder (the licensor) can use the intellectual property rights itself or licence others as well.

Variants to this agreement can require a free non-exclusive licence for a certain region

**Exclusive license**
With an exclusive license only the licensee is allowed to use the licensed intellectual property. The intellectual property rights holder is not allowed to commercialize the intellectual property in other business opportunities. Therefore, the exclusive licence is generally not suitable for sharing intellectual property rights with the market.

**Open licence under payment of royalties**
In the example of open licenses in Dutch civil engineering, a public authority requires open licenses for the intellectual property rights, such that the public authority can use the intellectual property for new projects and even provide sublicenses to other companies. However, the intellectual property rights remain at the supplier and the public authority is obliged to pay royalties to the intellectual property rights holder for every use.

The party that owns the intellectual property rights is entitled to demand payment of royalties when providing licences. This raises the question who is best able to manage this administration. A risk is that companies may also try to get out of paying royalties by making minor changes. It often requires a careful and attentive legal department with ample time to receive royalties, or in fact outsource administration and monitoring to a third party.


1.6 Example clauses

Two examples clauses are given that can be used for sharing intellectual property rights. Based on these examples you can draft a contract clause that meets your needs. It is recommended to involve your legal department for further expert advice.

**Important:** Conflicts may arise when a public authority has intellectual property rights clauses by default trade agreements, while other intellectual property have their own clauses by default. Agreement must be
accomplished which of the default agreements to accept. Then still this can lead to complications, for instance when a new project specific technology is combined with earlier innovative technologies from the supplier.

Example 1: Standard Public Private Partnership clause from Ireland.
The following example is a set of standard clauses used in Ireland for Public Private Partnerships: http://ppp.gov.ie/wp/files/documents/DBFOM_Contract/clause-26.pdf. Intellectual property rights is left with the contractor. The authority acquires a “perpetual, transferable, non-exclusive, royalty-free licence (carrying the right to grant sub-licences) to use for any purpose”.

Example 2: CHARM-PCP, a regional approach.
The relevant clauses of the CHARM-PCP contract are provided in appendix 1 to this document. The CHARM-PCP is a pre-commercial procurement. A consortium of five government parties from the UK, the Netherlands and Belgium has challenged companies to develop innovative traffic management technology. Since the road authorities involved have no interest in intellectual property rights outside of their own countries, they have limited the licence they are acquiring to their three countries.

According to these clauses to enable sharing of intellectual property rights it is required to:
- Know what intellectual property was present at the start (clause 17.2).
- Keep track of the development of intellectual property rights during the project (clause 17.3).
- Take into account the background information that is required for the application of the intellectual property rights created in the project (clause 17.5).

Of course this is necessary irrespective of who owns the intellectual property rights. In addition this example provides the public authority the possibility to claim any intellectual property rights that is developed in the project but not used for three years (clause 18.5).

Example 3: Approaches outside of the EU

A very similar approach is used outside of the EU. Below links are listed to examples from Canada and Australia.

Canadian approach:

Australian approach:
Appendix 1.

Example regional licence in the CHARM-PCP

Below the relevant excerpts from the CHARM-PCP framework agreement are presented. The CHARM-PCP is a pre-commercial procurement executed under English law.

Definitions

“Background Intellectual Property” means Intellectual Property owned or controlled by either of the Parties at the date of this Framework Agreement or which shall at any time thereafter become so owned or controlled otherwise than as a result of the Project under this Framework Agreement;

“Copyright” has the meaning ascribed to it by the Copyright, Designs and Patent Act 1988;

“Foreground Intellectual Property” means any intellectual property created by either Party as a result of their involvement in this Framework Agreement;

“Intellectual Property” means patents, inventions (whether or not patentable or capable of registration), trademarks, service marks, copyrights, topography rights, design rights and database rights, (whether or not any of them are registered or registerable and including applications for registration, renewal or extension of any of them), trade secrets and rights of confidence, trade or business names and domain names and all rights or forms of protection of a similar nature which have an equivalent effect to any of them which may now or in the future exist anywhere in the world;

17. Intellectual Property Rights

17.1 All Background Intellectual Property used or supplied under this Framework Agreement in connection with the Project shall remain the property of the Party introducing the same and nothing contained in this Framework Agreement or any licence agreement pertaining or pursuant to the Project shall affect the rights of either Party in its Background Intellectual Property.

17.2 The Contractor shall within two weeks of the signing of this Framework Agreement provide the Authority with full information in writing about what Background Intellectual Property it (or any of its subcontractors) holds at the date of this Framework Agreement that pertains or may pertain to the Project or any part thereof.

17.3 If the Contractor (or any of its subcontractors) generates Foreground Intellectual Property, whether
the Contractor (or subcontractor) intends to file for protection of it or not, the Contractor shall within one Month from such generation inform the Authority about the contents of such Intellectual Property.

17.4 Subject to clauses 17.5 and 18.5, the Intellectual Property rights, generated by the Contractor or any of its subcontractors, arising out of Foreground Intellectual Property shall, in relation to the Authority, belong to the Contractor.

17.5 The Contractor gives the Authority and RWS and MOW a free and non-exclusive licence to use the Foreground Intellectual Property and if necessary the Background Intellectual Property and any relevant open source licences for internal use within the UK, The Netherlands and Belgium with protection of claims of third parties and upon request offers licences to third parties at a fair market price with consideration of the rights of other third parties that do not accrue to the Contractor.

18. Exploitation of Intellectual Property

18.1 The Contractor shall inform the Authority of any Results which are capable of exploitation whether patentable or not.

18.2 The Contractor shall, as appropriate, devise, publish, implement and maintain procedures for the management of Foreground Intellectual Property in the Results and in particular, but without limitation, shall use all reasonable endeavours to ensure that:

18.2.1 the Results of the Project are identified, recorded and carefully distinguished from the outputs of other research and development activities not covered by the Project;

18.2.2 prior to any publication of the Results of the Project, patentable inventions arising from the Results are identified, duly considered for patentability and, where it is reasonable so to do, patent applications in respect thereof are filed at the British or European Patent Office; and

18.2.3 all such patent applications are diligently executed having regard to all relevant circumstances.

18.2 The Contractor shall permit the Authority to monitor the operation and effectiveness of the Contractor’s procedures for the management of Foreground Intellectual Property in such a way as the Authority considers reasonably necessary.

18.3 Consistent with the good management of Foreground Intellectual Property and the agreement of the Authority, the Contractor shall use its best endeavours to:

18.3.1 promote the dissemination of the Results of the Project; and

18.3.2 where reasonable and practicable, exploit commercially such Results to generate either capital or revenue or both.

18.4 The Contractor may exploit commercially any publications arising from the Project.
18.5 If, within three years of its creation, any Foreground Intellectual Property has not been commercially exploited by the Contractor (and/or any potential subcontractors), and the Contractor (and/or any potential subcontractors) is not using its best endeavours to do so, or the Contractor (and/or any potential Subcontractor) is using the Foreground Intellectual Property to the detriment of public interest, the Contractor (and any potential subcontractors) shall if requested by the Authority assign the Foreground Intellectual Property rights to the Authority and the group of contracting authorities in the CHARM-PCP.
Appendix 2:

Example of keeping all the intellectual property rights: ARVODI 2011 (Dutch General Government Terms and Conditions for Public Service Contracts 2011)

23. Intellectual property
23.1 The Contracting Authority is the owner of all intellectual property rights that may be exercised now or in the future in relation to the results of the Services performed by the Contractor, irrespective of where and when they may be exercised. In pursuance of the Contract, the Contractor assigns these rights to the Contracting Authority as soon as they arise. The Contracting Authority hereby accepts the assignment of these rights.

23.2 In so far as the results referred to in paragraph 1 are achieved using existing intellectual property rights that do not accrue to the Contracting Authority, the Contractor grants the Contracting Authority a non-exclusive right of use for an indefinite period. In such an event, the Contractor guarantees that it is entitled to grant the aforesaid right of use.

23.3 In so far as a separate instrument needs to be executed for the assignment of the rights referred to in paragraph 1, the Contractor irrevocably authorises the Contracting Authority to draft such an instrument and sign it on the Contractor’s behalf, without prejudice to the Contractor’s obligation to cooperate in the assignment of these rights as soon as the Contracting Authority requests it to do so, without attaching any conditions to its cooperation. In consequence, the Contractor irrevocably authorises the Contracting Authority to have the assignment of these intellectual property rights registered in so far as is necessary in the appropriate registers.

23.4 If there is a difference of opinion between the Parties on intellectual property rights in relation to the results of the Services performed, it will be assumed, in the absence of proof to the contrary, that the rights rest with the Contracting Authority. In all cases, the Contracting Authority may use the results for the purposes specified in the Contract.

23.5 The Contractor renounces vis-à-vis the Contracting Authority any moral rights vested in it, i.e. the Contractor, as referred to in the Copyright Act, in so far as the relevant regulations allow it to do so. Acting both in its own capacity and on behalf of the members of its Staff working on the Contract, and as authorised to this end, the Contractor renounces vis-à-vis the Contracting Authority any moral rights vested in these members of its Staff, in so far as the relevant regulations allow it to do so.

23.6 The Contractor may not make the results of the Services performed available to third parties in any form, or give third parties any information about them, unless the Contracting Authority has given its express consent. The Contracting Authority may attach conditions to its consent.

23.7 The Contractor indemnifies the Contracting Authority against all claims brought by third parties in respect of any breach of their intellectual property rights, including equivalent claims relating to knowledge, unlawful competition and suchlike. The Contractor is obliged to take any action that may help to prevent stagnation and to limit the additional costs or losses incurred as a result of such breaches, and to do so at its own expense.

23.8 Without prejudice to the above provisions, the Contracting Authority may, if a third party holds the Contractor liable for a breach of its intellectual property rights, dissolve the Contract in writing, in full or in part, out of court. The Contracting Authority will not exercise its right to dissolve the Contract until it has first consulted the Contractor.