



Government Office for
Technology Transfer

The Rose Book **Annex D**

Knowledge Assets in
Procurement

Annex D

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- D.1 Significant amounts of Knowledge Assets are generated and used in the procurement process, and some of these assets may have substantial value. It is important that organisations ensure that this value is properly realised and protected if appropriate. It is necessary to recognise that the public sector may not automatically have the right to use the Knowledge Assets it funds, so contracts should address ownership and rights in IP clearly.
- D2. As a general principle, the public sector should ensure that it has ownership or sufficient user rights in the Knowledge Assets it funds to ensure that it doesn't have to pay for the same Knowledge Asset more than once. It should be noted that Knowledge Assets can have a number of different applications, in different fields, and within different organisations.
- D3. The government policy is to use competition in public procurement wherever possible to secure best value for money for the taxpayer. IP in Knowledge Assets can provide monopoly rights, so if they are not managed properly, they can lock the public sector into using a single supplier for all future work. You should therefore be careful to ensure that the Knowledge Assets you fund through public procurement do not act to deter competition of public sector contracts in future. The way to do this is to identify the rights and ownership of IP you need as part of your Knowledge Assets Management Strategy and ensure that you secure those rights in all of your procurement contracts.
- D4. The following guidance note is aimed at commercial, finance, project delivery, and other professionals across the public sector who are involved in the planning and delivery of procurement and contract management activities. It follows the procurement lifecycle and identifies the key decision points to ensure effective Knowledge Asset management and optimise overall value for money of operations and service delivery. It provides insights and good practice into the identification and exploitation of Knowledge Assets within procurement – and should inform the procurement policies of organisations across the public sector.

Knowledge Assets strategy in public procurement

Key considerations through the procurement cycle

- D5. This section sets out the key elements and responsibilities to consider when procuring and managing contracts with potential Knowledge Asset implications to deliver maximum economic, financial, and social benefits for the taxpayer – for example by supporting innovation and economic growth; generating a financial return for public bodies; and improving the delivery of public services.
- D6. The guidance should inform the development of organisational Knowledge Asset and Procurement policies and should be used alongside wider procurement guidance set out in the Commercial Functional Standard, the Commercial Playbooks, and Cabinet Office procurement and contract management guidance.

1. Right at the start

- D7. It is important to identify existing and potential Knowledge Assets (including Foreground and Background IP¹) at the start to reflect ownership rights, ensure deliverability of the contract, protect freedom to operate and maintain the potential for exploitation in the procurement strategy.

Identification

- Think about what existing Knowledge Assets might be used and new ones generated in the delivery of the contract and what value they have within your organisation, the wider public sector, the market, and to the public.
- It is important to consider the potential wider economic and social value of the Knowledge Asset – as well as any potential direct financial benefits to your organisation. See guidance on [GOV.UK](https://www.gov.uk) on using the Social Value Model to evaluate social value within public sector contracts.
- Where organisations are considering exploitation of a Knowledge Asset, it may also be necessary to seek a legal opinion on whether you have freedom to operate (use, sell or transfer) the asset without infringing on another party's intellectual property rights.

¹ “Background IP” is IP that existed prior to the contract and “Foreground IP” is IP that is generated as part of the contract work.

Engaging the market

- Early engagement with the market can help inform decisions on Knowledge Asset rights and better define the potential value that might be created from the contract. Engaging with the market can also help you to understand the supplier's objectives and constraints to come to a solution that delivers the best procurement outcome. You may find that suppliers do not value aspects of the Knowledge Asset as highly as the public sector (and vice versa) and therefore you may be able to agree a mutually beneficial way of breaking down the rights. Market engagement can also provide an insight into the potential value of the Knowledge Asset and IP associated with the project.
- For existing public sector Background IP or Knowledge Assets that may need to be used in the delivery of the contract – check whether they are protected appropriately or whether any IP rights need to be registered. In some cases, non-disclosure agreements (NDA) may also need to be implemented prior to entering into any 3rd party discussions, or you may find that disclosure means that they cannot be protected and are considered to be already disclosed. See guidance on [Managing Intellectual Property and Confidentiality](#) for more information.
- When considering licensing out Knowledge Assets, you should also determine whether any national security requirements may apply before engaging with the market. See [guidance](#) from the National Protective Security Authority (NPSA) for more information on securing innovation, including managing National Security Investment (Act) and Export Controls regulations.

Ownership rights

- Once you have identified and estimated the potential value of the Knowledge Asset, you should consider:
 - Who needs access to Background IP and Foreground IP and for what purpose, for how long and consider what process is required to terminate the contract and retrieve the project assets.
 - Whether the public sector or the contractor should own the Knowledge Assets generated under the contract. Remember some IP has automatic rights such as Copyright. If the contractor produces Copyrighted assets as part of the project deliverables, they will need to agree to assign them to the organisation procuring the work. If this is not done, then the contractor will own these kinds of assets from the project as an automatic right. This is particularly important for intangible assets such as reports and software.
 - See guidance on [Intellectual Property Basics](#) for more information.
- Different approaches will suit different circumstances on Knowledge Asset ownership and should be considered on a case-by-case basis to meet government objectives and maximise long-term value and social/ economic/ financial benefits. The approach to ownership can influence both the cost of the agreement and the future exploitation and innovation of the Knowledge Asset. It is important to also ensure that the terms of ownership enable you to have freedom to operate and achieve the purpose of the procurement.

Table D1 sets out the factors to consider in deciding Knowledge Asset ownership.

Factors in favour of public sector ownership of the Knowledge Asset

The work is central to the development of government policy or strategy.

The work builds on existing Knowledge Assets owned by the public sector or by a third party that is not the contractor.

Ownership of Knowledge Assets by the contractor would disadvantage HMG or future bidders in subsequent contractual competitions.

The work is of a highly sensitive nature (for example is subject to a national security classification) and the public sector needs to own the Knowledge Asset to control its disclosure and use.

Public sector ownership of the Knowledge Asset is necessary to control misuse and manage reputational risks, but exploitation is best led by the contractor – therefore the best route for exploitation is to license the asset out to the contractor for an agreed fee.

The work needs to be used or may be of value to multiple departments or agencies within HMG, and Crown or departmental ownership of the IP will facilitate sharing and transfer between public sector entities.

The work relates to the preparation of procurement specifications and user requirements documents for future public sector contracts, or to assistance with tender evaluation.

The work involves test and evaluation work of public sector or third-party products.

The contract is for consultancy or independent advice relating to a public sector organisation or its activities.

The Knowledge Asset represents a key enabling technology that should be made broadly available to encourage competition and market development.

The work relates to the development, creation or writing of national or international standards, or is intended to be published (including open-source, Open Government Licence etc.)

The contract is for the operation of a public sector-owned facility.

The contract involves processing of public sector data, including personal data.

Factors in favour of public sector ownership of the Knowledge Asset

The contract is with an individual or company for the provision of individuals to be embedded within a public sector organisation.

The public sector is best placed to exploit the Knowledge Assets commercially and has arrangements in place to support that.

The contractor has stated that it is either unwilling or unable to exploit the Knowledge Assets arising from the contract.

Other circumstances exist which make it reasonable and justified for the public sector to own the Knowledge Assets.

Factors in favour of contractor ownership of the Knowledge Asset

The work builds on existing Knowledge Assets owned by the contractor.

Public sector ownership may make the contract unattractive and dissuade innovative suppliers from bidding for the work.

The most effective route for exploitation of the Knowledge Asset and financial return to the public sector organisation is for the original contractor to own the asset and use it to make sales to other customers – with the public sector organisation receiving a royalty or levy on those sales.

Adequate user rights to enable all future public sector competitions can be provided under the contract.

The contractor can offer a demonstrably lower contract price which outweighs the benefits of public sector ownership of the Knowledge Asset.

Ownership of the Knowledge Asset by the contractor is important to encourage them to invest further in its development.

The public sector lacks the resources to protect, manage and exploit the Knowledge Asset effectively.

The contractor is best placed to exploit the Knowledge Assets commercially and has arrangements in place to support that.

Other circumstances exist that make it reasonable and justified for the contractor to own the Knowledge Assets.

- A given public sector body may wish to set a default policy to pursue one or other of these options, but each contract should be considered on its individual merits to arrive at the optimum arrangements – taking into account the purpose of the contract and whether any future issues (such as continued access and use of the Knowledge Assets) need to be managed.
- It is also possible to apply different provisions to different deliverables within the same contract, provided this is justified and set out clearly in the contract provisions. Remember that these will need to be managed during and post contract for the lifecycle of the Knowledge Asset.
- When working with suppliers based in overseas territories, you may wish to seek legal advice on which model best suits government aims.
- Where new Knowledge Asset ownership is assigned to the public sector, they should be recorded on the organisation's Knowledge Asset register alongside any potential exploitation opportunities.

Background and foreground Intellectual Property

- It is common practice in contracting to separate IP that existed prior to the contract ('Background IP') from those that are generated as part of the contract work ('Foreground IP'). Generally, you can expect ownership or much more extensive rights in Foreground IP that it has funded or commissioned, and more limited rights in existing contractor-owned Background IP. You should also consider what Background IP your organisation holds that may be relevant to the contract
- Background IP will often have taken significant investment to build up and represents a company's commercial advantage. Taking ownership or extensive rights in Background IP is therefore generally impractical and undesirable and could be very expensive or dissuade innovative contractors from working with the public sector.
- Nevertheless, you will need sufficient rights of access in Background IP to ensure you can achieve the purpose of the contract, and enable future activities, including wider exploitation. Where products form part of wider systems, rights may also be needed in interface information to enable systems to interoperate – however this need can also be met by requiring contractors to use standard or 'open' interfaces wherever appropriate.
- When you contract with a supplier to provide goods or services, you will also want to ensure you (and the supplier) can legally use any existing IP owned by another party who is not involved in the contract ("Third Party IP") that the supplier may need to access to fulfil your requirement. This may involve making sure that they have the right to let you use the Third-Party IP or having warranties and liabilities in place to offer protection in the event of any breaches in obligations. You will also need to ensure flow through of these terms to subcontracts and ensure they are applicable across relevant territories.

- Additionally, you should also consider whether any relevant IP could be generated during the term of a project, but outside of it (“Sideground IP”), or after the contract ends (“Postground IP”) and whether any mitigations need to be put in place to protect the public sector’s freedom to operate. Seek legal advice if in doubt.
- IP management is a through-life task and not just something to consider at initial contract award. The parties’ respective responsibilities towards IP in the conditions of contract need to be reflected appropriately and proportionately in a contract management plan. You will need mechanisms in place to ensure information on any gainshare or levy arrangements is reported, monitored and collected. If in doubt, seek legal advice.

2. Going to the market

- D8. To attract high-quality responses and achieve best value for money, it is important to be clear and transparent regarding your expectations and aspirations about Knowledge Assets throughout the tendering process.

Preparing your competition

- Be clear about existing and desired Knowledge Asset rights at the start of the competition, including how far you wish to retain flexibility to negotiate on this once the procurement is underway (care should be given to ensure compliance with procurement regulations and not give any supplier an unfair advantage of preferential terms – seek legal advice where necessary). Lack of clarity on this, or an initial position that the market could perceive as heavy-handed, could deter suppliers from bidding and adversely impact your competition. If you have deferred negotiations on ownership, this should be settled before contract award.
- If you have taken the decision to give suppliers ownership or rights to exploit the Knowledge Asset, you may wish to flag this point in procurement notices and in the procurement documentation to further help drive the market outcomes you are seeking to achieve.
- Include questions in the invitation to tender to clarify what Knowledge Assets are likely to be generated as part of the contract – as well as where sub-contractors or subsidiaries may be involved in the development of these.

Contractual options

- Be clear on your contract model when going to the market to ensure clarity on the conditions that are being bid under. The standard government Terms & Conditions (T&Cs) including the [Mid-Tier Contract](#) and [Model Services Contract](#) includes the following options:
 - Where it is decided that the public sector organisation is best placed to retain ownership and exploit the Knowledge Asset, contract approaches may include:
 - ♦ Sole public sector ownership of any innovation created. In this scenario, the supplier would have no right to use or exploit the Knowledge Asset going forward. This option may be more suitable where an organisation requires enhanced control of the Knowledge Asset and the public sector organisation is capable of exploiting the Knowledge Asset on its own as it provides a lot of the existing IP, for example - when seeking to transfer the Knowledge Asset across the wider public sector to support other programmes of work or where software code will be made open source.
 - ♦ Providing the supplier with a licence. This would provide the contractor with greater ability to benefit from the Knowledge Asset, whilst retaining overarching ownership under the public sector. This may be most appropriate where public sector ownership is likely to mitigate risks or be business critical to the organisation, but continued collaboration with the supplier provides opportunities to deliver benefits for the public sector, private sector and wider society. Whilst an exclusive licence may be seen as more beneficial from a supplier's point of view, it is generally not recommended due to the balance of risks and benefits to the public sector. However, there may be certain circumstances where you may want (with legal advice) to reconsider this position.
 - If you leave ownership of Knowledge Assets with the contractor, the contract should secure clear rights of use for government, including for transparency purposes such as a compliance with statutory access rights under the Freedom of Information Act (FOIA) and Environmental Information Regulations. Exclusive rights for contractors over public sector funded Knowledge Assets will rarely be appropriate. You may wish to also include an obligation in the contract for the supplier to inform you of any patent or design applications they file for, to enable you to record your licence rights at the relevant patent or intellectual property office.

- Alternative model clauses to consider may include:
 - ♦ Gain-share. In this scenario, the public sector and supplier would agree to share financial gains resulting from exploitation of the Knowledge Asset. This is likely to be most suitable where the public sector has invested significant resource or funding in the development of the Knowledge Asset and intends to seek a return on that investment.
 - ♦ Sub-licensing at “market rates”. In this scenario, neither party has exclusive rights, meaning third parties are able to purchase a licence under market conditions. This is to ensure that there is maximum opportunity for the innovation to be commercialised by other parties, thereby mitigating the risk of falling foul of competition rules. This model may be most appropriate where supplier ownership would best support exploitation of the Knowledge Asset, but, through funding, the public sector has enabled the innovation and therefore risks breaching competition or subsidy control rules if the supplier is granted exclusive rights.
- Organisations should consider updating their contract templates to include these approaches where they do not already exist.
- See guidance on [Intellectual Property Rights](#) for more information on managing IPR in contracts.

3. Exploitation

- D9. Knowledge Assets should continue to be managed throughout the contract lifecycle to exploit their full economic and social benefits and maximise value for the taxpayer.
- D10. Where it is decided that the public sector will retain ownership of the Knowledge Asset (or rights to it), the project team and Knowledge Asset officer (where relevant) will typically be responsible for its future use, including any commercialisation or transfer across the wider public sector (though this may vary by organisation), and the management of any accompanying risks and benefits. The Government Office for Technology Transfer can provide specific advice and guidance on this.
- D11. You should continue to monitor for IP and Knowledge Asset developments throughout the contract, bearing in mind that it is a dynamic process. To promote these behaviours, it may be appropriate to establish regular touchpoints where client and supplier teams can review Knowledge Assets periodically and keep the door open to contract variations in light of lessons learned. Maintaining a shared list of knowledge used and developed in the delivery of the contract with the contractor can help this.
- D12. You should also regularly update your organisation’s own Knowledge Asset register with any new Knowledge Assets generated during and after the contract.
- D13. When developing options for re-procurement, you should consider what Knowledge Assets might be used or generated in the contract and, therefore, whether the ownership and licensing rights agreed under the previous contracts will facilitate the intended use or development.

Roles and responsibilities across the procurement cycle

- D14. Knowledge Asset management within procurement requires the input of a range of government functions – necessitating defined responsibilities and joined-up ways of working.
- D15. Figure 1 maps the key stages which are described in this guidance against functional groups using the Ownership, Knowledge, Understanding, Awareness (OKUA) framework (see definition in next paragraph). This mapping supports organisations to implement the guidance and final responsibilities may vary between organisations.
- D16. The OKUA descriptions are:
- **Ownership (O)**. Individuals within the function lead the activity and have overall responsibility for it. Joint-O is used where responsibilities are shared across multiple functions.
 - **Knowledge (K)**. Individuals within the function are the subject matter experts on at least one element of the activity.
 - **Understanding (U)**. Individuals within the function understand what the activity is and what good looks like.
 - **Awareness (A)**. Individuals within the function know what activities are required and who is responsible.

Figure 1: Analysis of roles and responsibilities across key procurement stages

Key stages						
	1. Right at the start			2. Going to the market		3. Maximising value throughout
	1. Identification	1.2 Engaging the market	1.3 Ownership rights	2.1 Preparing your publication	2.2 Contractual Options	3.1 Exploitation
Commercial	K	J-O	J-O	J-O	J-O	K
Finance	K	A	U	U	U	K
Project / programme team	O	J-O	J-O	J-O	J-O	O
HR	K	A	A	A	A	U
Knowledge Asset Officer* If applicable	K	U	K	U	A	K
Legal	Legal need awareness of the legal obligations and ensure they are contractually captured (where appropriate)					
Other functions including audit, comms, security, policy	Other functions will depend on individual projects					

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