

# Intellectual property rights and public procurement

Three new models for Rijkswaterstaat

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2. Why Rijkswaterstaat is in trouble
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# 1. What are IP rights?



IP law = competition law

Industrial property rights are there to govern competition.

*Not* to frustrate companies.

To the contrary, they are a **stimulus** for creativity and innovation.



## Intellectual property rights

- **copyright**
- related rights
- database rights
- **patents and utility models**
- **industrial designs**
- **repression of unfair competition**
- **trade secrets**
- trademarks
- trade names
- layout-designs of integrated circuits
- plant variety rights
- geographical indications
- designation of origins



## Strategies to maximize profits from IP rights

- selling product in the market and keep it exclusive
- exclusive licence (not going on the market yourself)
- selling patent (per country, so keep your own country)
- **open licence policy** (IBM, Philips)



## Patents are totally useless for the government

- Will the government enter the market?  
(Note: patents are about competition in the market)
- Does the government grant licences?
- At what price? Exclusive or not?
- And what to do with infringement?
  
- What to with foreign patents?
- Patents cost money!



## 2. Problems Rijkswaterstaat

- RWS: contractors don't come up with innovative solutions
- Contractors: become frustrated by RWS (Rijkswaterstaat) because RWS always just takes away their inventions



## Problems at Rijkswaterstaat

- Acting of Rijkswaterstaat damps down innovation
- Contracts based on **risk management**
  - Obtaining all patents of the contractor
- For example
  - Bellows dam in Kampen
  - Second Heinoord tunnel
  - High strength concrete Moerdijk bridge



## Problems with tendering

- Technical solutions which are patented, cannot (in general) be demanded in a tender
- However, patented inventions are often the most interesting solutions
- Contractors patent technologies to earn back their R&D expenses
- **Stalemate**



## And so ...

- Miniconference CROW  
(mei 2007)
  - Philips
  - Instituts for Construction Law
  - Contractors
  - Engineering agency's
  - SMEs
- Agreement of Maarssen  
(nov 2007)
  - Netherlands Patent Office
  - CROW
  - Constructors (Bouwend Nederland)
  - Engineering agency's (ONRI)
  - Rijkswaterstaat



**IE** | INTELLECTUEEL EIGENDOM



# Agreement of Maarssen

- Rules of attitude
  - Think in opportunities
- Instruments
  - New contracts, pilot projects and contests
  - Mediation by Stichting Bouwreflectie
  - Information by CROW en NPO
- Implementations
  - Pilot projects
  - Education and training



### 3. Three new models

Have an eye for each other's needs

- contractors want to make profits
- government doesn't want any trouble afterwards

*New balance*

Keep in mind: patents are useless for governments



## M1: Inventions 'on the project'

The patent is for the inventor

Invention done by:

1. contractor: don't claim the patent
2. government: no patent, just let it go



## M1: Inventions 'on the project'

Invention done by

3. contractor & government together:

solutoin opposed interests

i) patent for the contractor

ii) broad licence for the government

(will not pay for its own invention)



## M2: 'Design & construct' – contracts

Tender: abstract and functional demands

Patent remains with the contractor


Licence for the government:

- for all IP rights
- limited to the constructed work



# Example

- Government wants new, much safer crash barrier
- This patent is e.g. owned by TNO (research centre)
- Can this be solved?



Bureau voor de Industriële Eigendom  
Nederland

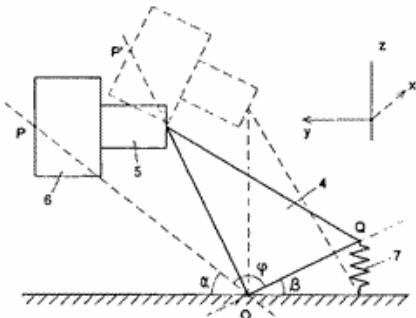
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<p>21 Aanvraag om octrooi: 1010776</p> <p>22 Ingediend: 10.12.1998</p> <p>41 Ingeschreven: 19.06.2000</p> <p>47 Dagtekening: 19.06.2000</p> <p>45 Uitgegeven: 01.08.2000 i.e. 2000/08</p>	<p>51 Int.Cl.<sup>7</sup> E01F15/04, E01F15/02</p> <p>73 Octrooihouder(s): Nederlandse Organisatie voor Toegepast-Natuurwetenschappelijk Onderzoek TNO te Delft.</p> <p>72 Uitvinder(s): Laurentius Maria Johannes Antonia Hoebergen te Den Hoorn Frederik Johan Wiltink te Haarlem</p> <p>74 Gemachtigde: Mr. Ir. A.W. Prins c.s. te 2508 DH Den Haag.</p>
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54 Vangrailconstructie.

57 Een vangrailconstructie is voorzien van opzij van een weg aan te brengen ondersteuningselementen en een hieraan bevestigd vangorgaan, waarbij, wanneer een voertuig met het vangorgaan in en nabij het botspunt daarvan in aanraking komt, een of meer ondersteuningselementen in achterwaartse richting ten opzichte van de weg kunnen draaien om een draaipunt en althans een deel van de botsingsenergie kunnen absorberen. De vangrailconstructie kan zover in achterwaartse richting kan draaien tot deze met een afsteunpunt op de grond kan afsteunen. De hoek  $\varphi$  tussen de lijn door het draaipunt en het botspunt en de lijn door het draaipunt en het afsteunpunt is daarbij groter dan  $90^\circ$ .



## M3: Open licences

Separate design and construct (build)

- 1) Firstly, government buys technology (licences).
- 2) Secondly, government buys construction power.

*Ergo: tendering in two rounds*



## The first tender

Tender: abstract en functional demands

Bid: a technical solution

- information, test results, drawings
- list of all IP rights
- the royalty wanted, for an open licence

Government chooses on basis of performance/price



## The second tender

Government pays royalties for future construction.

Tender: precise and specific

Bids: constructors

Government chooses



## Advantages splitting up

Government gets a wide choice of inventions

from            small constructors;  
                  universities;  
                  research centers;  
                  engineering agencies;  
                  foreign constructors;  
                  foreign universities;  
                  foreign research centers;  
                  foreign engineering agencies

so more innovation



## Advantages splitting up (2)

- Innovation market becomes more dynamic
- 'Constructor' earns also if he doesn't get the job
- Stimulates to look at foreign solutions
- Small constructors have a bigger chance also to get part of the work



## Disadvantages splitting up

- Tendering in two rounds is costly
- Technology *has to be* patented (expensive)
- Bad for large constructors (?)

*Alternative: contest*



## Implementation of the models

- Transform into contract terms
- Changing the Guidelines for tenders
  - in cooperation with lawyers
  - who are specialist in tenders



## Questions, suggestions or remarks

- ...

