

CROSSRAIL LIMITED

PROCUREMENT SUB-COMMITTEE

SUBJECT: Main Civils Contract – NEC Conditions of Contract – Paper 5

SPONSOR: [REDACTED]

MEETING: 07 July 2010

Purpose

The purpose of this paper is to present to the Procurement Sub-Committee the revised approach to the rights of set-off contained in the conditions of contract.

Recommendation

It is recommended that Procurement Sub-committee NOTES the approach set out below.

Background

This is the fifth paper presented to PSC relating to the conditions of contract proposed for the main civils contracts. PSC previously approved a recommendation that CRL's main works contracts ought to include a right to set off against monies owed to the *Contractor* any amounts which the *Contractor* owes to an employer under any other contract with a member of the TfL group. Such a provision is standard in TfL and LUL contracts.

The standard TfL drafting for this provision was subsequently included in the conditions of contract which have been issued in the tunnel contract ITTs. Having reviewed the clause further, it was considered that the TfL drafting was likely to give rise to qualifications. Some concerns have already been raised by tenderers in pre-tender comments. The provision has therefore been modified to reduce its scope to the circumstances in which CRL considers the right of set-off may be exercised in practice.

There are two limbs to the set-off clause:

1. A right for CRL to set off monies across other CRL contracts. The revised clause clarifies that CRL should have the right to set off monies under a contract where those monies are owing to CRL under another contract with:
 - (a) the same *Contractor* i.e. where CRL has two contracts with the same company or the same set of companies comprising a joint venture. It is not proposed that CRL should be able to set off monies owed under another contract with e.g. only one member of the joint venture, or a joint venture with a different composition;
 - (b) a group company of the *Contractor*, and

- (c) a joint venture which is comprised of companies within the same company groups.
2. A right for CRL to set off monies owed by the *Contractor* to another member of TfL Group. The revised clause limits this right as follows:
- The right extends only to monies which are owed under another contract;
 - The right only applies where the other TfL contract is with the same *Contractor* or a group company of the *Contractor* i.e. (a) and (b) above; and
 - The right is only exercisable where the *Contractor* has committed an “Act of Insolvency” (where the definition of “Act of Insolvency” reflects the insolvency situations which entitle CRL to terminate its contract).

The second limb of the TfL provision which had been included previously is significantly wider than this:

- It permits set-off to recover losses which have been incurred by a TfL group member not only under another contract but also in tort e.g. if LUL suffered a loss as a consequence of an act of one of our contractors.
- It is exercisable in any situation, not confined to insolvency.

These extended rights are not considered to be appropriate. Whilst CRL would have no obligation to exercise these rights, their existence would be likely to concern tenderers and may have an effect on tender prices. The drafting has therefore been amended to reflect the more limited circumstances in which CRL envisages that it might actually exercise the right. This revised drafting has been issued to tenderers.

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