Light at the end of the highways tunnel?

Highways England has suffered some well-known procurement related growing pains since being formed in 2015. But Will Buckby and Andrew Croft of Beale & Company Solicitors LLP see sound reasons to be cheerful for the future of UK roads procurement.

KEY POINTS
- Creation of Highways England gave the highways industry hope with significant investment announced
- However, Highways England procurement is in practice not meeting industry expectations
- There are also concerns that the highways industry is falling behind in respect of technology
- New contracts announced in 2018 and the approach to the Road Investment Strategy 2 provide ‘hope’
- Collaboration and innovation will be key in the highways industry going forwards

Following the creation of Highways England to take over from the Highways Agency in managing motorways and major A roads in 2015, there was significant optimism in the industry in respect of the procurement of new projects. This was prompted by, amongst other things, the £15 billion Road Investment Strategy 1 (RIS1) to improve the network between 2015–2020. However, as highlighted in the National Audit Office’s (NAO) spending review in 2017, the transfer to Highways England has not been seamless and there is concern in the highways industry regarding RIS1 going forward, investment in technology and Road Investment Strategy 2 (RIS2) (beyond 2020).

That said, following very recent announcements and the fact that a more considered approach is being taken to RIS2, is there light at the end of the tunnel for procurement in the highways industry? The answer is probably ‘yes’.

Road Investment Strategy 1

Highways England’s RIS1 was announced as part of the transition from the Highways Agency to a publicly owned private company, Highways England, in 2015. This anticipated £15 billion of expenditure for the procurement of over 100 major schemes, and therefore suggested a positive 5 years ahead for the highways industry.

However, a NAO review and report in March 2017 provided some food for thought for Highways England procurement. Whilst the NAO stated that RIS1 was a significant improvement, with £1.2 billion efficiencies expected, it highlighted some real concerns as to how RIS1 had been implemented in practice. These included that value for money was not being provided by RIS1, as it had been reported that by August 2016, forecasted capital costs had exceeded funding by £841 million. The NAO stated:

‘Highways England need to agree a more realistic and affordable plan if they are to provide optimal value from the Road Investment Strategy.’

The programming of RIS1 was also highlighted as a concern. 54 of the 100 schemes were scheduled to start in 2019–20, causing significant disruption to the road network, increasing prices and putting real pressure on Highways England’s resources.

In addition, a number of the schemes in RIS1 were at a very early stage and required further review and progress before they could be procured. This created significant delays in the planned schemes being brought to market. One
such project has been the long awaited plan to implement a tunnel under Stonehenge. This has continually divided opinion and has been in the pipeline for decades.

It is hoped that some of those lessons have now been learnt for RIS2.

**Collaborative Delivery Framework and local authorities**

Another recent example in the highways industry of procurement plans not meeting industry expectations is the Collaborative Delivery Framework (CDF).

The CDF was intended to be a cost effective way for the Highways Agency to procure investment in England’s motorways and major roads. Further, the CDF provided some real hope to the industry as £5.2 billion was anticipated to be spent on the procurement of highways projects by 2017. In addition, the intention to collaborate with those on the framework suggested a more transparent and forward thinking approach to procurement under the framework.

Unfortunately, the general opinion is that the CDF also failed from a procurement perspective. For example, in March 2017 it was reported that only £2.72 billion had been spent on the design and delivery of construction projects under the CDF. In addition, those on the framework were concerned about the costs of tendering for secondary bids once appointed on a lot.

There are also concerns that RIS1 and CDF have resulted in the significant neglect of local authorities. The Local Government Association has hit out at the government stating that it is ‘wrong’ that funding for local roads is miles behind the country’s strategic road network. It was reported that the government provided councils with just £21,000 per mile for the procurement of local road projects to 2020 (21 times less that is spent on the strategic road network). This has also caused concern in the industry, with limited resources available for local authorities to maintain their highways.

**Technology**

The procurement of technology is another ‘hot topic’ in the industry. There has recently been a real uptake in the use of digital technology and digital ways of working both by highways operators and users and those involved in design and construction.

Highways England is keen to invest in new technology and innovation, as indicated by the 2016 Innovation Technology and Research Strategy. This seeks to support the government’s 2040 vision to become a ‘key economic enabler, supporting breakthrough vehicle technologies and maximising capacity’, through innovation. The strategy commits £150m to innovation capital projects that includes trials of autonomous vehicle technologies and motorway traffic management schemes. Additional funding is also to be provided by Highways England’s research and development programme and the strategy seeks to realise the huge potential of ‘Big data’ (the significant volume of data available to Highways England) in order to achieve smooth flow of traffic and improving safety.

Highways England has also been in talks with its supply chain in respect of the use of technology through the Engagement Council. This provides for Highways England’s suppliers to be better incentivised to deliver better quality on time and within budget services through new types of contracts, clear instructions, improved partnering and a more predictable work flow.

Despite these very positive aims, there has not generally been a consistent approach to the procurement of technology in the industry. It also has not been entirely clear how the 2016 strategy is being put into place. The highways industry has been proactive in suggesting how the industry can benefit from technology. However, traditional approaches to procurement and contracts, which do not clearly identify what is required in relation to technology or require the adoption of digital ways of working, have continue to be used.

There is apprehension therefore that the industry may ‘fall behind’. In addition, the standard approach to intellectual property rights in highways contracts, whereby all rights will be transferred to Highways England, does not incentivise the industry to innovate and in fact may be a barrier to progress.

Nevertheless, it is not all doom and gloom. There has been some progress, such as the development of smart motorways, which use traffic management systems to monitor traffic and deploy methods such as varying speed limits or opening the hard shoulder in order to reduce congestion and increase capacity.

The National Roads Telecommunications Services 2 is also another step forward, which is
to deploy a next-generation network to monitor roads and allow active traffic management. It will also enable development of services such as ‘connected vehicles’ and 5G. The new contract is intended to go live in March 2018 for seven years.

But, if the UK is compared to other developed countries, it is behind in the use of technology in infrastructure, particularly in the highways space. For example, Australia is already using technology to track movement.

It is also thought that SMART motorways are not doing enough and there are some concerns about the procurement of NRTS 2.

**Highways procurement – positive signs going forward**

There are other hopes for the industry following recent announcements. At the start of 2018, Highways England unveiled a new Regional Development Partnership (RDP) procurement model to replace the Collaborative Delivery Framework. Under the new RDP arrangement, contractors will be Delivery Integration Partners (DIP), designing and constructing motorways and major A-roads under the new NEC4 standard form contracts (with appropriate amendments).

In addition, Highways England also appear to have responded to calls for increased and clearer collaboration. Whilst the CDF had good intentions in this regard, we understand that the extent of actual collaboration and the steps expected from the supply chain has been unclear. Behaviours throughout the supply chain will generally drive collaboration. Where collaborative contracts are set up right and the right behaviours are demonstrated, there are generally less disputes, which means the delivery of the project is right.

On the RDP, DIP contractors will be expected to contribute to the planned national and regional Centres of Excellence and the establishment of a Sustainable Improvement Hub which will promote innovation and facilitate the delivery of the procurement pipeline. This suggests that practical collaboration and innovation will be encouraged under the RDP.

On the RDP itself, there are mini-competitions. Firms have repeatedly complained about the high cost of secondary bidding on an individual project by project basis – after having spent a lot of time and large sums bidding for places on the CDF.

The use of the NEC4 contracts under the RDP is also a positive step in our view. It is one of the first high profile contracts to use the NEC4 forms. The NEC4 contracts contain a number of tools to encourage collaboration (including a partnering option and an alliancing form) and reflect the use of technology (such as the new BIM Secondary Option). It is therefore hoped that the RDP will be a real positive step forward for highways procurement.

A second £300m procurement phase of the RDP will also be issued in Autumn 2018 which will support the development of route options, which is further positive news.

At the start of 2018, Highways England also announced that it is to start the £550m Area 10 maintenance contract tender by holding a suppliers’ day ahead of inviting bids in March. This will see Highways England take a lead role in managing routine maintenance and delivery of capital renewal and improvement schemes, while appointing a principal maintenance and response contractor.

In addition, Highways England have announced that at the end of 2018, a new model will be launched for delivery of smart motorways for which Highways England will continue to engage with the supply chain to develop a model.

Finally, the approach that Highways England is taking to RIS2 provides some real comfort in relation to highways procurement after 2020. Highways England in undertaking six strategic studies before finalising the programme for this strategy, which is expected to include works on the A66 and A69 corridors, a new Trans-Pennine tunnel linking Manchester to Sheffield and an Oxford to Cambridge expressway, amongst other things. This provides hope that RIS2 will not encounter the same issues as highlighted by the RAO in relation to RIS1.

**Conclusion**

It has been a turbulent few years for highways procurement, with RIS1, the CDF and Highways England’s Innovation Technology and Research Strategy 2016 providing some real hope. Unfortunately, none of these appear to have met the industry’s expectation or in the case of RIS1, Highways England’s aims. Nevertheless, there are some real positive signs following the start of 2018 and a more measured approach being taken to RIS2 which provides hope that the growing pains following Highways England’s creation will be a sign of the past. **CL**