CMA Market Study: Civil Engineering in Rail and Road – Invitation to Comment

Response by Amey

Company overview:

Amey is a leading UK provider of full lifecycle engineering, operations and decarbonisation solutions for transport infrastructure and complex facilities. We have delivered expert infrastructure services for more than 100 years, employ approximately 11,000 people across all areas of our business, and reach every corner of the UK with our engineering expertise.

We combine the construction, maintenance, and operation of assets with leading edge design and digital services that provide innovative and deliverable solutions to some of the most pressing infrastructure challenges facing the UK.

1. Do you agree with our articulation of the characteristics of a well-functioning market as set out in paragraph 1.11? If not, what could be changed and why?

Yes.

2. Do you agree with our proposed scope (both the product and geographic scope) and themes for this market study, as set out in Section 3? If not, what areas would you suggest we include, exclude or prioritise, and why?

Yes, and we welcome the opportunity to engage with the CMA on this study.

3. What, if any, are the key differences in the markets for the supply of roads and railways across the 4 nations of the UK that should be reflected in our analysis?

We are reviewing this question and will come back to you in due course with our response.

4. Please suggest any rail and road infrastructure projects across the UK that could be useful case studies to inform our market study.

We are reviewing this and will come back to you in due course with any proposals for case studies.

5. How does public procurement and contracting in the markets for the supply of roads and railways contribute to, or undermine, the characteristics of a well-functioning market?

Please see our responses below to each of the specific points listed in the question:

(a) engagement between the procuring body and potential suppliers during the early stages of project design;

Early engagement with potential suppliers on project design, delivery options, and contracting terms can contribute to best value being achieved, shorten timescales for procurement and project delivery, reduce risk and produce other benefits.

(b) the use of different types of procedures (eg open competition, frameworks);

We tend to see what was previously termed restricted procedures (now 'competitive flexible procedures') used by our clients for the types of projects which are the subject of the CMA's market study. With the appropriate level of pre-planning and engagement, these procedures can in our experience help to ensure that potential suppliers (i) have the required skills, experience, and capacity to effectively deliver large and complex infrastructure projects and (ii) have the requisite knowledge to bid effectively.

We find that frameworks are an effective tool for procuring infrastructure works, and as such that they contribute to the proper functioning of the relevant markets. Frameworks with clearly defined commissioning processes can, in our experience, avoid the need for costly and time-consuming public procurement exercises. At the same time, competition between framework suppliers is maintained through the use of 'mini-competitions' and/or mechanisms which tie the amount of work directly allocated to each supplier according to their performance against agreed KPIs.

(c) the design of tenders, including the number and type of requirements and the use of quantitative (eg price) and qualitative evaluation criteria;

Whilst recognising the budgetary constraints faced by contracting authorities in the relevant markets, we believe that an appropriate balance must be achieved between price and quality so that delivery and innovation are not stifled.

(d) the approach to risk allocation across different parties; and

Appropriate risk allocation, as reflected in the contractual terms and delivery models (e.g. single contractor, alliance) is an important factor. In this regard, we welcome the increasing use of the New Engineering Contract (NEC) by contracting authorities in the rail and road sectors. We believe the relevant NEC forms of contract offer a fair and balanced allocation of risk between client and contractor, and their modular nature allows risk allocation to be calibrated to individual projects. The use of NEC contracts has other benefits, in that they reduce the time and other resources required to review, price, and bid for contracts, particularly where a limited approach is taken to amendments to these contracts. We would also welcome more use of the Sourcing Playbooks published by the Cabinet Office.

(e) the use of contract mechanisms (eg insurance provisions) and pricing mechanisms (eg fixed price, cost plus).

The following are some of the contract mechanisms that, in our experience, can contribute to or undermine the characteristics of a well-functioning market:

- Insurance – we see client/employer-provided insurance policies as a positive in that they avoid the need for potential suppliers to procure and price for what can be expensive policies. They can also obviate the need for subcontractors to do the same, resulting in better value throughout the supply chain;

- Fair payment – the use of fair payment terms (including the non-use of retentions) improves value for money, particularly where fair payment requirements are flowed down to the supply chain;

- Limits of liability – appropriate limits of liability, including appropriate sub-caps for liquidated delay damages etc., improve value for money by reducing undue ‘risk pricing’, potentially widening the market by attracting potential bidders who would not otherwise tender for contracts with unlimited/high liability terms;

- Warranted data – whilst typically design and build contracts provide for the risk in the existing site to be the contractor’s risk, more complex projects could benefit from a level of basic client-warranted information from the outset, potentially with collateral warranties from the client’s surveyors.

In terms of pricing mechanisms, the use of cost reimbursable contracts can be an effective way of managing risk for larger and more complex projects, particularly where the supplier is contracted to undertake the design and construction stages against an incomplete scope or specification – this can be achieved through successive stages where the parties then agree a ‘target’ or

fixed cost for the remaining works. The use of target cost contracts generally, in which the client and contractor share proportionately in any variance from the target price ('pain' or 'gain'), can provide an effective incentive for the parties to work efficiently and collaboratively in delivering the project.

6. To what extent do you think the structure of the industry contributes to, or undermines, the outcomes of a well-functioning market? In your response, please comment on:

Please see our responses below to each of the specific points listed in the question:

(a) differences in the size and degree of specialism of different companies;

We note that some companies operating in the relevant markets, like Amey, combine design and wider professional services with construction expertise, whereas others focus on one or the other. We believe that the integration of design and construction capabilities improves value for money and provides contracting authorities in the relevant markets with opportunities for innovation, which they might not necessarily otherwise have to the same extent if they were to contract for these services separately. Integrating these capabilities further avoids the need for complex joint venture or supply chain arrangements. While separating design and construction is not without its advantages, we believe that the choice available to contracting authorities, between integrated and non-integrated providers of design/construction services, contributes to the outcomes of a well-functioning market.

(b) the tiered nature of the supply chain and use of subcontracting; and

Subcontracting with specialist subcontractors, including many SMEs, is an important part of the way we deliver many of our projects. We believe the existence of a stable and active pool of Tier 2 and 3 contractors is important to the proper functioning of the relevant markets. Among other things, such contractors allow Tier 1 companies to flow down and share project risks, and their specialists capabilities can increase opportunities for innovation.

(c) financial arrangements, such as payment periods and the use of retentions.

We welcome the increasing use of 'fair payment' clauses in contracts used by contracting authorities in the relevant markets. We note that these clauses are now reinforced by the provisions around implied payment terms contained in the Procurement Act 2023. We believe the use of fair payment terms contributes to the proper functioning of the relevant markets, including by ensuring that smaller contractors operating below Tier 1 are paid in a transparent and timely manner.

As the question notes, one aspect of fair payment is the use of retentions. Our experience is that many contracting authorities in the relevant markets have discontinued their use of retentions and prohibit their use by contractors in relation to their supply chain. We welcome this development and recommend that it be adopted more widely and consistently by contracting authorities.

7. What, if any, are the significant procurement, planning or other regulatory barriers that inhibit the performance of this market? What could be changed and why?

Planning and regulatory barriers tend to be more frequently associated with large civil engineering projects. As we do not generally undertake these types of projects, we do not believe our experience is relevant to this aspect of the question. In terms of procurement barriers, please see our response to question 5 above.

8. What are the opportunities for further innovation in the markets for the supply of roads and railways across the UK? If yes, what are the barriers to achieving these and how might they be overcome?

Opportunities for further innovation in the relevant markets include:

- greater use of early market engagement during the procurement and pre-procurement phase; and
- integrated forms of collaborative contracting, e.g. through the use of alliancing and early contract involvement, offer another potential way of overcoming these barriers.

We have identified the following barriers so far:

- over-specification during the procurement phase;
- whilst recognising the value and importance of the use of competitive tendering mechanisms in the Procurement Act 2023, the over-sharing of bidders' solutions submitted during the tendering process can act as a disincentive to innovation;
- disproportionate weight being given to price in tender evaluation criteria;
- unilateral changes to the scope or specification of a project after delivery has commenced; and
- lack of or insufficient early engagement with potential suppliers.

We will give further consideration to how these barriers might be overcome, providing a further response to the CMA on this point in due course.