



# **Simplifying public procurement**

## **Will the Procurement Bill deliver the Government's objectives?**

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## Contents

What is Procurement? .....	1
History of Procurement.....	1
PPE Scandal.....	3
Timeline .....	3
History of consultations and responses .....	4
Industry responses .....	5
Law firm responses .....	6
Key Parliamentary players .....	7
Main elements of the Procurement Bill and the Second Reading.....	8
Future timings.....	11
Conclusion.....	11
Next Steps: What Can DRD Offer? .....	12

## Simplifying public procurement

Changes to procurement law have been promised by the Government since the UK officially left the European Union (EU) in January 2016 and debate has intensified with issues such as the PPE Scandal during Covid-19. The Procurement Bill, which was introduced into the House of Lords following last month's Queen's Speech, provides the legislation to enable the Government to create the UK's own legal framework.

In the words of Lord True (Con): *"The Bill will reform the UK's public procurement regime, making it quicker, simpler, more transparent and better able to meet the UK's needs, while remaining compliant with our international obligations."*<sup>1</sup> Making public procurement fair to access is integral to wider government aims such as levelling-up as nearly £1 in every £3 of public money – £300 billion – is spent on public procurement contracts.<sup>2</sup>

Small and medium-sized enterprises (SMEs) have traditionally found the public procurement process intimidating and inaccessible. To mitigate this effect, the main element of the Bill aims to avoid contracting authorities creating unnecessary barriers to suppliers' participation in a tender process.<sup>3</sup> This includes ensuring that prompt 30-day payment terms will be passed down through public sector supply chains, ensuring small businesses receive prompt payment.<sup>4</sup>

### What is Procurement?

Procurement law regulates purchases made by the public sector in the UK, including contracts for works and services, as well as goods. In the UK, public procurement previously fell under EU law, but since 2010 the Cabinet Office separately led procurement reform. This has been done in collaboration with government departments with the aim of improving efficiency and delivering a centralised service.

### History of Procurement

Following the end of the transition period under the EU-UK Withdrawal Agreement, the UK was no longer required to observe the EU Directives on Public Procurement including the following rules:

1. Non-discrimination
2. Free movement of goods
3. Freedom to provide services

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<sup>1</sup> [Lord True, Procurement Bill 2<sup>nd</sup> reading \[HL\], May 2022](#)

<sup>2</sup> [CBI, SMEs and Public Procurement, April 2022](#)

<sup>3</sup> [Page 21, Procurement Bill Explanatory Notes, May 2022](#)

<sup>4</sup> [Page 8, Procurement Bill Explanatory Notes, May 2022](#)

#### 4. Freedom of establishment

Campaigners who wanted to leave the European Union had long cited the argument that not having to apply EU procurement rules would enable the UK to save £1.6bn a year in procurement costs. The UK Government lobbied to reform some of these procurement directives with the aim that by 2015, 25% of government spending would be with SMEs. This has now been updated to 33% by 2022.

Following Britain's exit from the EU, in December 2020, the Government's long awaited Green Paper: 'Transforming Public Procurement' was published<sup>5</sup>. The Green Paper highlighted that the new principles were consistent with those in the Treasury's Managing Public Money framework. One of the particularly significant changes is the introduction of a new National Procurement Policy Statement which is set to outline the Government's strategic priorities. Authorities will be required to adopt these priorities to comply with the broader principles.

The Green Paper also stated that the UK has now joined the WTO Agreement on Government Procurement, giving the Government greater flexibility and control in introducing a new procurement regime. Following the publication of the Green Paper, the Government opened up a consultation that closed on 10 March 2021.

On 6 December 2021<sup>6</sup>, the Cabinet Office published its official response to the consultation. In general, the majority of its response kept the initial proposals intact. However, it suggested the following major changes:

1. Reform to general principles
2. Introduction of an additional objective to emphasise the importance of open and fair connection
3. Changes to remedies
4. Create a new Procurement Review Unit
5. Consolidation of existing legal instruments
6. Reducing the number of procurement procedures
7. Changes to transparency

It became clear from both the Green Paper and the Government's consultation response that proposed reform of procurement rules intended to bring about a comprehensive change in procurement processes and behaviours. The Green Paper outlines in the Executive Summary that the purpose of reforms are to:

*'Speed up and simplify our procurement processes, place value for money at their heart, and unleash opportunities for small businesses, charities and social enterprises to innovate in public service delivery.'*

<sup>5</sup> [Cabinet Office. "Green Paper: Transforming Public Procurement." GOV.UK. December 6, 2021.](#)

<sup>6</sup> [Cabinet Office. Transforming Public Procurement: Government response to consultation, December 6, 2021.](#)

## PPE Scandal

During Covid-19, the usual rules and scrutiny of Parliament were foregone for swift measures that would act to mitigate the consequences of the pandemic<sup>7</sup>. Usually, when the Government needs to buy something, it must start a 'competitive tendering process' whereby it checks that companies will be able to provide the required product or service and signs a contract with the one offering the best value for money.

However, on 2 April 2020 the Government introduced a 'high priority lane' which allowed it to make direct awards through a 'VIP Lane' to suppliers. This meant that contracts were able to go to a preferred supplier without any competition. In total, more than 32bn items of PPE with a value of £14bn were bought through directly awarded and negotiated contracts<sup>8</sup>.

The Good Law Project and EveryDoctor brought a judicial review against the Government and claimed that the Department of Health and Social Care (DHSC) unlawfully awarded contracts to supply PPE to Ayanda Capital and PestFix, who were awarded £252m and £340m in contracts respectively.

DHSC was accused of awarding these companies contracts due to 'who they knew, not what they could deliver.' On 12 January 2022, a judge in a high court ruled that the Government's use of a 'VIP lane' for suppliers of PPE was unlawful.

## Timeline

Date	What happened?
<b>23 June 2016</b>	UK votes to leave the European Union. From then on there has been intense speculation over what Brexit would mean for British businesses.
<b>1 January 2020</b>	The UK officially exits the European Union.
<b>2 April 2020</b>	The Government introduced a VIP lane.
<b>7 October 2020</b>	The UK Government agreed to join the Government Procurement Agreement (GPA).
<b>6 December 2020</b>	'Green Paper: Transforming public procurement' is published and the consultation opens.
<b>1 January 2021</b>	The UK officially became part of the WTO procurement pact.
<b>10 March 2021</b>	Consultation closes.
<b>11 May 2021</b>	A Procurement Bill was introduced in the Queen's speech.
<b>16 August 2021</b>	As of the WTO agreement, major healthcare buyers are reclassified as central government authorities.

<sup>7</sup> [Patrick Parkin. "Government Releases Long-Awaited Green Paper - 'Transforming Public Procurement' Burges Salmon, December 2020](#)

<sup>8</sup> [John Houlden. "Transforming Public Procurement" Burges Salmon, March 2022](#)

<b>6 December 2021</b>	The Government published its response to its consultation ' <a href="#">Transforming Public Procurement</a> .'
<b>12 January 2022</b>	A judge in a high court ruled that the government's use of a 'VIP lane' for supplier of PPE was unlawful.
<b>29 April 2022</b>	The UK Government stated 'New legislation is introducing a reformed public procurement regime that will come into effect in 2023.'
<b>10<sup>th</sup> May 2022</b>	The Queen's Speech includes the Procurement Bill as one of the Bill's on the Government's legislative agenda for the coming year.
<b>11<sup>th</sup> May 2022</b>	First Reading of the Procurement Bill took place in the House of Lords.
<b>25<sup>th</sup> May 2022</b>	Second Reading of the Procurement Bill took place in the House of Lords.
<b>June 2022</b>	Committee Stage of the Procurement Bill begins.
<b>Autumn 2022</b>	Bill to start passage through the House of Commons.
<b>Early 2023</b>	The Procurement Bill will likely receive Royal Assent.
<b>Summer 2023</b>	'Go-live' period ends.

## History of consultations and responses

The public consultation on the Green Paper opened on 15 December 2020 and closed on 10 March 2021. The Government's response to the consultation was published in December 2021.

The consultation elicited 619 replies<sup>9</sup>, evenly distributed among public sector purchasing teams, industry suppliers, and other interested parties (such as trade associations, academics, members of the public and legal advisors).

The Cabinet Office's response set the basis for the introduction of the Procurement Bill following this year's Queen's Speech, with the stated objective of introducing primary legislation first, followed by secondary regulation to put specific components of the new system into effect.

While the Cabinet Office did not feel confident enough to commit to a specific implementation timeline, there is acknowledgment that the reforms are significant and that the sector will need time to adjust to the new environment. The new schedule calls for a six-month notice of 'go-live' regardless of what happens; the Cabinet Office has also agreed to give a series of training sessions and resources to help with the transition. 'The new regime is unlikely to come into force until 2023 at the earliest,' we are told in principle.

The following are the primary themes that emerged from the responses to the consultation document:

- A persistent intention to consolidate the current legal framework for public procurement regulation into a single, uniform regulatory framework as far as possible,

<sup>9</sup> [Cabinet Office. Transforming Public Procurement: Government response to consultation, December 6, 2021.](#)

while taking into account a number of expressed worries about the law of unintended consequences unwittingly introducing complications.

- Retaining the light touch approach, albeit with some tweaks to its scope and application that will be visible later this year. Keep in mind that, with the introduction of the Health & Care Bill, which received Royal Assent in April 2022, health care services for the purposes of the NHS will be removed from the scope of the Public Contracts Regulations 2015.
- A new exclusions framework will be implemented to make it simpler, clearer, and more focused on suppliers who pose unacceptable risks to the public sector supply chain.
- The release of specific instructions for contracting authorities to help them better understand how to apply transparency requirements proportionally.
- After substantial concerns were voiced, the original idea to cap damages in procurement challenges, which was considered as critical to disincentivise tactical challenges delaying contract awarding, has now been scrapped.

## Industry responses

Contracting authorities, who will be responsible for procuring under the proposed regime, and suppliers to the public sector, who will be competing on procurements and delivering under contracts under the proposed regime, provided an even response. Contracting authorities responded 226 times, suppliers responded 269 times, and other interested parties such as academics, legal experts, and members of the public responded 124 times.

Regarding the industry response to the consultation, the Government noted that SMEs and voluntary, community and social enterprises (VCSEs) were well-represented among the 269 answers from industry. The government's strategic suppliers responded with 21 responses. The utilities industry provided 44 responses.

There were areas of concern identified in the industry consultation responses where further detail or thinking would be required by the Government. These included<sup>10</sup>:

- Providing independence, effectiveness, and data-driven oversight to the new Procurement Review Unit.
- Reforming the UK's procurement complaints system, which is desperately needed because the existing framework stifles innovation.
- How the proposed £2 million barrier for the release of redacted contracts from all UK authorities would work (and that contract redactions will be in the public interest).

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<sup>10</sup> [Cabinet Office. Transforming Public Procurement: Government response to consultation, December 6, 2021.](#)

- How the new statutory emergency declaration powers will function, although there was support for the idea of encouraging faster contests rather than relying on sole sourcing.

## Law firm responses

While law firms<sup>11</sup> made up a small amount of the over 600 consultation responses, legal voices are still a significant voice in the next stage of how the legislation develops.

The general consensus from law firms is that now is an exciting time for public procurement law in the UK, and many of the proposals contained in the Green Paper represent very positive developments for the way in which public money is spent. On the whole, the proposals, in the view of the legal sector, could lead to costs savings for authorities and bidders alike, reduce bureaucracy and increase innovation.

For example, law firms felt the simplification of the nature and number of available procurement procedures was a positive step, as were the proposals for embedding transparency throughout a procurement process and the improvements envisaged for the way in which procurement challenges are managed, making them quicker and less costly.

There were other areas, however, where issues were flagged and as a whole the sector believed that the Government could have gone further, and some where there were concerns over the practical viability of the proposals set out in the Green Paper. The rules relating to 'open' framework agreements and the proposal for removing standstill letters are two such examples.

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<sup>11</sup> [Cabinet Office. Transforming Public Procurement: Government response to consultation, December 6, 2021.](#)



## Key Parliamentary players

Lord Agnew (Con) was the Cabinet Office Minister responsible for the Procurement Bill, expected to lead its passage through the Lords. He had committed to a 'light touch review' of the Bill and to reserving procurements for specified services to be kept in line with the current Public Contracts Regulations. Agnew also committed to key focuses of the Bill including supporting SMEs and VCSEs in the UK and "to reinforce the Government's commitment to taking account of social value in procurement."<sup>12</sup>

However, Lord Agnew resigned his position dramatically during a Lords debate attacking the Government's handling of fraudulent Covid business loans and accusing the Treasury of having "little interest in the consequences of fraud to our society."<sup>13</sup> Following Agnew's resignation, the Bill is now overseen by Jacob Rees Mogg MP (Con), the Minister of State for Brexit Opportunities and Government Efficiency with Lord True (Con) overseeing its progression in the Lords.

As Shadow Minister of State in the Cabinet Office, Fleur Anderson MP (Lab) was a significant voice in the Commons for the need to introduce a Procurement Bill in 2021. Anderson argued that public procurement entails far more than simply purchasing the best products at the best price. It is inextricably linked to social value, aiding our pandemic recovery, international human and labour rights, environmental standards, and providing quality public services at home in the public interest and free of mandatory marketisation and outsourcing.<sup>14</sup>

In a similar vein Bill Esterton MP (Lab), Shadow Secretary for International Trade, called on the Government to ensure proper legal action is being taken against UK companies found to be doing business with overseas PPE suppliers accused of "abhorrent" modern slavery practices.<sup>15</sup>

Fleur Anderson switched responsibilities within the Shadow Cabinet Office team in late 2021, being replaced by Rachel Hopkins MP (Lab) on procurement issues. Hopkins has been keen to raise the issue of government contracts and the location of companies awarded them. Around 70% of all central Government contracts in 2021 went to suppliers in the south of England, with almost half of those going to companies in London. Hopkins argued in early 2022 that "the Conservative Government's procurement strategy could not be more at odds with the stated aims of their levelling-up agenda. They have made big promises but they are failing to deliver. We must see proper investment in our communities to create good-quality jobs and opportunities across the country and to boost local economies."<sup>16</sup>

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<sup>12</sup> [Lord Agnew. "New Plans Set out to Transform Procurement, Providing More Value for Money and Benefitting Small Business.", December 2020.](#)

<sup>13</sup> [BBC. "Conservative Minister Resigns in Anger over Covid Fraud." January, 2022.](#)

<sup>14</sup> [Fleur Anderson, Draft Public Procurement \(international trade agreements\) \(amendment\) regulations 2021, June 2021](#)

<sup>15</sup> [Bill Esterton. "Labour Calls on Government to Punish UK Firms Linked to PPE Suppliers Accused of Modern Slavery." March 2020.](#)

<sup>16</sup> [Rachel Hopkins, Covid-19 Contracts, March 2022](#)

## Main elements of the Procurement Bill and the Second Reading

The following section details **six** key points of the Bill as well as areas of contention that are likely to arise as the Bill makes its way through the Lords and subsequently into the Commons in the Autumn.

### 1. A Procurement “appropriate authority” but no more Procurement Review Unit (PRU)

The Government Green Paper response on the Procurement consultation promised legislation to propose the creation of the ‘Procurement Review Unit’ (PRU). A new monitoring body would have kept a watchful eye for any breaches of the procurement regulations and recommended sanctions to the Minister of the Cabinet Office.

Since the Bill has been published, the PRU has now been dropped, instead downgrading it to an “*appropriate authority*” as detailed in Part 10 of the Bill.<sup>17</sup> It replaces and builds on existing powers for investigation held by the Minister for the Cabinet Office or Secretary of State under the Small Business, Enterprise and Employment Act 2015.<sup>18</sup>

From the 2<sup>nd</sup> Reading of the Bill in the Lords, many Peers such as Lord Aberdare (Crossbench)<sup>19</sup> and Lord Coaker (Lab)<sup>20</sup> have put pressure on the government to be clearer on how the new authority will enforce procurement regulations given that its recommendations will not be binding.

### 2. Putting procurement principles on a statutory basis.

Part 2 of the Bill sets out the ‘Procurement Principles’ which will underlie the awarding of any public contract.<sup>21</sup> A contracting authority must have regard to the importance of: delivering value for money, maximising public benefit, sharing information for the purpose of allowing suppliers and others to understand the authority’s procurement policies and decisions, and to be seen to act with integrity. This extends further than just the steps taken to award a contract and includes steps relating to contract management through to the exit from a contract.

The ongoing debate will iron out what further principles could be added to the set. While the current set notes improved standards and principle guided procurement, Lord Fox (Lib Dem)<sup>22</sup>, notes that there is a distinct lack of coverage on the issue of supplier ethics and human rights in assigning contracts.

<sup>17</sup> [Page 60, Procurement Bill, May 2022](#)

<sup>18</sup> [Page 52, Procurement Bill Explanatory Notes, May 2022](#)

<sup>19</sup> [Lord Aberdare, Procurement Bill 2<sup>nd</sup> reading \[HL\], May 2022](#)

<sup>20</sup> [Lord Coaker, Procurement Bill 2<sup>nd</sup> reading \[HL\], May 2022](#)

<sup>21</sup> [Page 8, Procurement Bill, May 2022](#)

<sup>22</sup> [Lord Fox, Procurement Bill 2<sup>nd</sup> reading \[HL\], May 2022](#)

In addition, with Net Zero playing a larger role in government policy, a gap still exists for the implementation of a principle on climate change that would put the issue at the centre of how public money is spent. Sustainable procurement is likely to form part of the final set of 'procurement principles' and is one to watch.

### 3. Diversify supplier base by establishing a single digital platform for registration

All contracting authorities will be required to use a single digital platform for supplier registration. Businesses will only have to submit certain types of information to demonstrate their credentials once to be considered for a public sector procurement. This platform would act as a central online transparency platform that will allow suppliers to see all contract opportunities in one place. This component of the Bill would help to accelerate spending with SMEs.

However, as expressed by the Labour Lord leading on the Bill, Baroness Hayman,<sup>23</sup> it is important to note that the published Bill includes very little to outline how this platform will be created.

### 4. Embedding transparency throughout the commercial lifecycle from planning of procurement to completion of a contract.

In the 2<sup>nd</sup> Reading of the Bill, Lord True (Con)<sup>24</sup> noted that transparency has been a key topic of debate in the House and detailed that the Bill now aims to implement the open contracting data standard by publishing data across the public sector. This will allow for comparison at a contract and category level, as well as at an international level, which will lead to improved commercial outcomes. Data analysis tools will be made available to contracting authorities, which will ensure that they can then use the data available to drive value for money. Increased openness of data within procurement will create time-savings with greater accountability and transparency.

### 5. Social value and regard for wider economic, social and environmental outcomes of procurement throughout the procurement process.

A point of contention, and likely a hot topic of debate in future sessions, is the huge gap that has been left in the Bill on its commitment to social value. An area of great relevance to the Government's levelling-up goals, and recognised in the Green Paper proposals, this has been noted within the Lords by Baroness Hayman (Lab)<sup>25</sup> and Lord Lansley (Con).<sup>26</sup>

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<sup>23</sup> [Baroness Hayman, Procurement Bill 2<sup>nd</sup> reading \[HL\], May 2022](#)

<sup>24</sup> [Lord True, Procurement Bill 2<sup>nd</sup> reading \[HL\], May 2022](#)

<sup>25</sup> [Baroness Hayman, Procurement Bill 2<sup>nd</sup> reading \[HL\], May 2022](#)

<sup>26</sup> [Lord Lansley, Procurement Bill 2<sup>nd</sup> reading \[HL\], May 2022](#)

Lord True<sup>27</sup> touched on this in a response to his Peers where he teased future Government intentions to this effect, *“Social value in procurement is not about a large corporate’s environmental, social and governance policies but about how the contract can be delivered in such a way that it delivers additional outcomes, such as upskilling prison leavers”*. While social value is not at the forefront of the Bill, it remains one to watch as the Bill makes its way through Parliament.

6. Raising the standard of suppliers by considering their past performance and preventing unacceptable behaviour such as fraud.

The Bill aims to make it easier for buyers to take account of previous poor performance by suppliers. There are clearer and broader grounds to allow for the exclusion of suppliers who pose unacceptable performance risks. It also includes provision for a centralised debarment list of suppliers which the Government considers should be excluded from procurements.<sup>28</sup>

An overarching aim of improving procurement standards as detailed in Part 2 — Part 1, Schedule 6 of the Bill includes a list of mandatory exclusion grounds, which include conviction for corporate manslaughter or corporate homicide, fraud, bribery, slavery and human trafficking, organised crime and tax offences.<sup>29</sup> A supplier who is found to have committed, incited, attempted or conspired to commit any of the mandatory ground offences will be excluded from procurements.<sup>30</sup>

This is an integral part of the Bill that Peers are keen to have implemented since such rules have not been enforced in the past.<sup>31</sup>

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<sup>27</sup> [Lord True, Procurement Bill 2<sup>nd</sup> reading \[HL\], May 2022](#)

<sup>28</sup> [Page 8, Procurement Bill Explanatory Notes, May 2022](#)

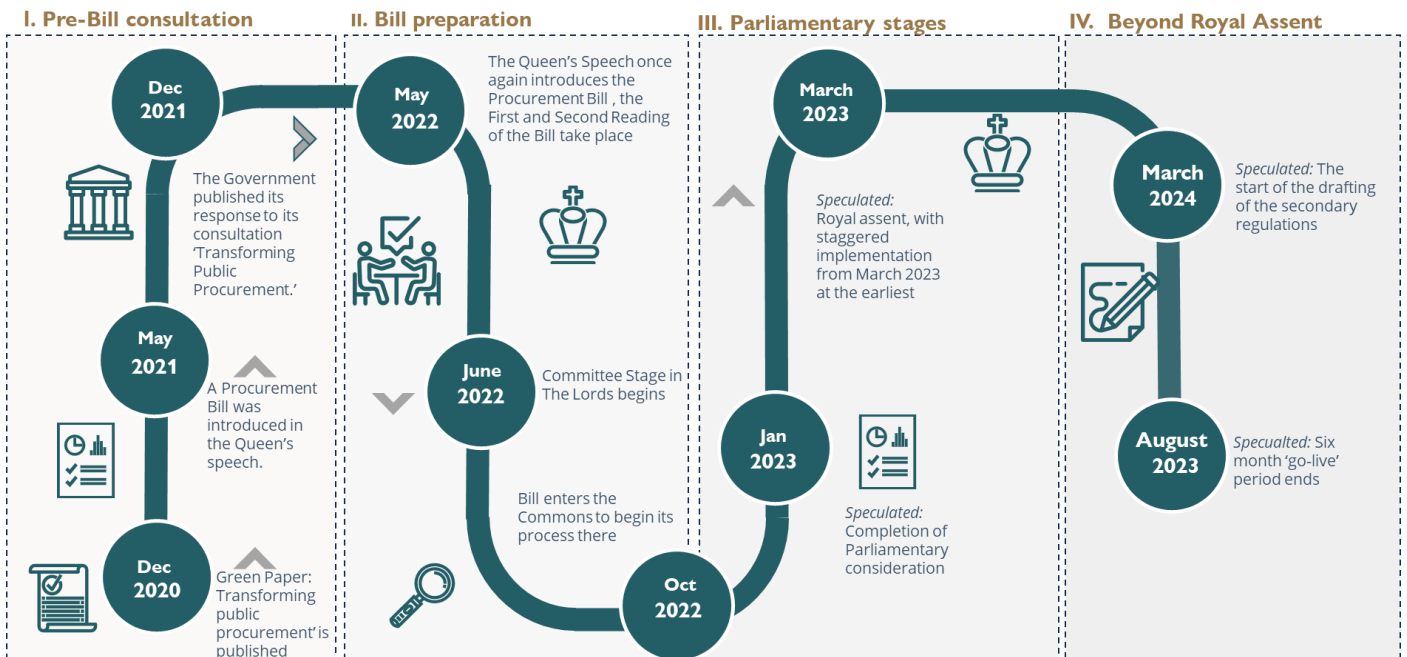
<sup>29</sup> [Page 91, Procurement Bill, May 2022](#)

<sup>30</sup> [Page 69, Procurement Bill Explanatory Notes, May 2022](#)

<sup>31</sup> [Lord Fox, Procurement Bill 2<sup>nd</sup> reading \[HL\], May 2022](#)

## Future timings

### Legislative process – speculative timeline



It is important to note that the Bill has begun its journey in the House of Lords, a choice that indicates that the Government believes that the Bill will not receive much contention during its course through Parliament.

## Conclusion

Changes to the UK's procurement regime are long overdue and recent events during the pandemic have given the issue an added urgency. As such, the Procurement Bill now presents a welcome opportunity to put in a more rigorous regime that delivers new legislation that is simpler and more flexible.

The Government's objectives for the reforms made under the Bill aim to speed up and simplify public procurement processes while placing value for money at the centre of publicly procured contracts.

The Bill will also have some overall benefits for levelling-up the UK by taking into account national strategic policies. This provides relevance for many different UK sectors. In particular, SMEs stand to benefit from greater opportunities to secure public procurement contracts.

Whilst the fundamentals of the Bill are unlikely to change during its Parliamentary passage over the coming months, the detail may well do so if there is sufficient pressure from key stakeholders in potential areas of contention, such as the lack of Social Value in the Bill and how the new "appropriate authority" will enforce procurement regulations.

## **Next Steps: What Can DRD Offer?**

The time from when the Bill is laid before Parliament until its ultimate Royal Assent next year presents an opportunity for stakeholders to act and shape the key issues that matter to them. DRD is ready and equipped to run your campaign and make contact with key policymakers and influencers.

As the Procurement Bill continues its parliamentary process, there is a variety of services DRD can offer in preparation for this and beyond as part of a sustained legislative strategy.

### **Case-Making**

DRD can support the development of evidence-based responses to the consultation paper, working closely with the client team to deploy research as part of an ongoing dialogue with policymakers in Whitehall and Westminster.

DRD can develop messaging for client needs based on a wide amount of research and internal messaging development so issues can be articulated to stakeholders effectively.

DRD regularly works with think tanks and economic institutes to develop research on behalf of our clients and their areas of concern. This research has been reported on in the national press and can push the national conversation on, should it stall.

### **Audience Mapping and Engagement**

DRD can develop and deploy stakeholder mapping, engagement and mobilisation in support of the client's case.

DRD has previous experience building alliances across sectors to ensure that issues are addressed by stakeholders and are heard on behalf of the broader business community rather than a lone voice.

### **Channel Strategy**

DRD can provide a detailed case-by-case plan for issues that clients may face and how to address them based on previous messaging that has been developed.

DRD can also provide support on how to engage with stakeholders and the press, should any issues come to light.

### **Campaign Execution**

Before, during and after the proposals' legislative passage, we provide services designed to mobilise, execute and follow through on legislative campaigns, including close quarters interaction with the legislative process itself, as well as the critical stages that lie beyond enactment, including coming into force and the applications of second legislation.