



A refresher:

Frameworks and dynamic markets

under the Procurement Act 2023


Introduction...



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Agenda

- Issues that arise
- What the new rules are – “closed” frameworks, open frameworks and dynamic markets
- Comparison table – what tool will be best for us?
- Practical tips for calling off a framework
- Practical tips for setting up a framework
- Audience Q and A



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Contractual structure of a framework:

Framework
start date

Framework
end date

Framework

Call-off

Call-off

Call-off

Call-off

Call-off

Call-off

Frameworks - Some issues that arise at present...

- Framework value reached/exceeded, but authorities still calling off (potentially problematic in light of case law from Europe)
- Call-off pricing not in line with framework pricing (see for example *Consultant Connect*)
- Call off terms not suitable (see for example *Dukes Bailiffs* case) or fit for purpose
- Mini-competitions not conducted in line with process set out in framework agreement/original tender documents
- Bidders trying to change contract terms at point of call-off

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Frameworks - Some issues that arise at present...

- Call-off order forms completed without input/checking by legal teams
- Misunderstanding re contractual structure: call-offs are separate, *individual* contracts. Potential issues around termination, novation etc (see later)
- Losing bidders in mini-competition not always provided with adequate reasons (see for example OCS case)
- Above case part of increasing trend of legal challenges to framework call-offs

Transitional arrangements

- Procurements commenced under previous rules
- Contracts awarded under previous rules

will continue to be governed by **previous rules**

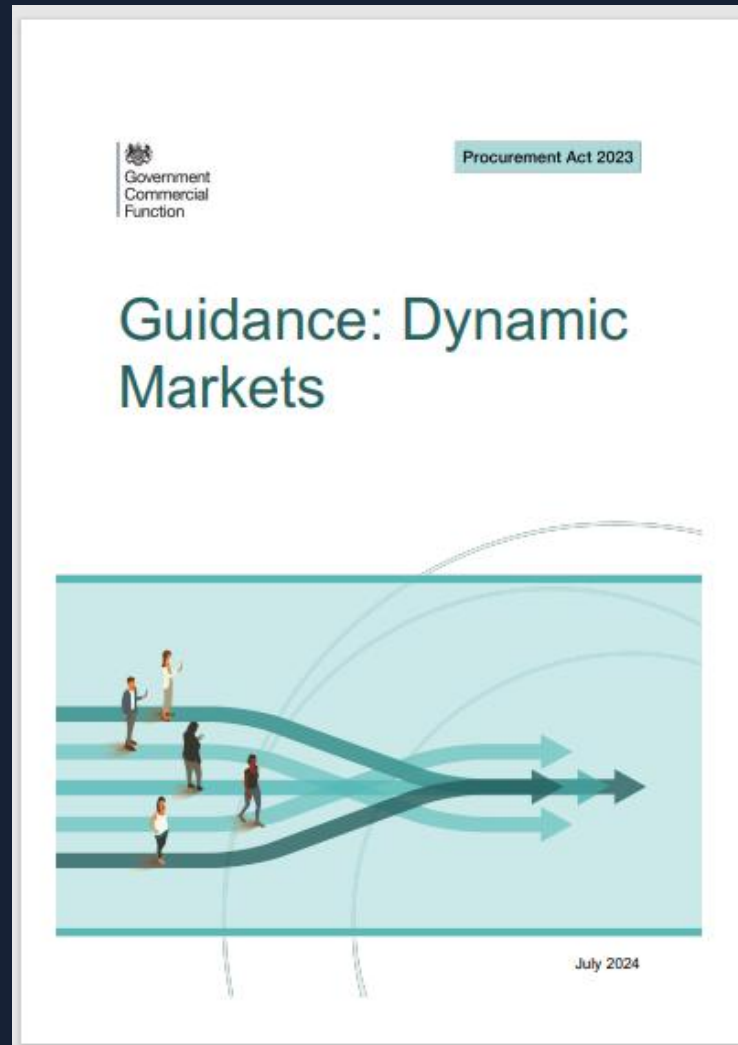
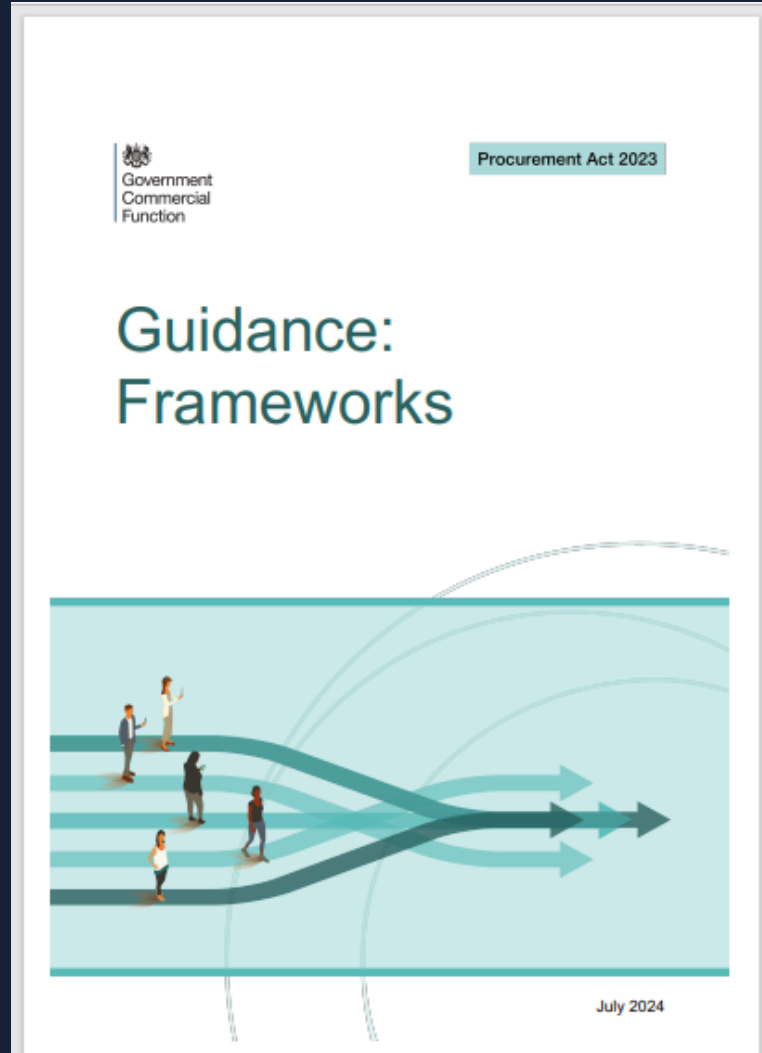
- Procurements commenced under the new rules
- Contracts awarded under the new rules

will be governed by **new rules**

Transitional arrangements - worked example

- Crown Commercial Services (CCS) set up a 4-year framework agreement in 2023
- Home Group call off the framework in November 2025
- In 2026, provider asks Home Group to amend the specification in the call-off contract and give them a 10% price increase due to supply chain pressures
- The request would need considered against the rules in Regulation 72 of the Public Contracts Regulations 2015, **not** the Procurement Act

Relevant guidance for today's session



Frameworks – an open and closed case...

- The Act introduces new “open” frameworks
- Traditional closed frameworks also remain



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Frameworks under the Procurement Act

Defined as a:

“contract between a contracting authority and one or more suppliers that provides for the future award of contracts by a contracting authority to the supplier or suppliers.”

(section 45(2))

A framework sets out the provisions under which *future* contracts for the supply of goods, services and/or works are to be awarded.

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Frameworks under the Procurement Act

- Changes from the previous rules:
- The Act provides that 'conditions of participation' (i.e. selection criteria) can be applied as part of the process for award of a call-off
- Act implies a term into every framework that a contracting authority is permitted to exclude a supplier that becomes an **excluded** or **excludable** supplier from participating in any selection process (which includes any selection process to award without further competition) for the award of a call-off contract
- Now need to publish contract award notice following the award of a call-off

Frameworks under the Procurement Act - Requirements

for complying with the Act when carrying out a procurement and awarding a call-off contract under the

(5) A framework must include the following information—

- (a) a description of goods, services or works to be provided under contracts awarded in accordance with the framework;
- (b) the price payable, or mechanism for determining the price payable, under such contracts;
- (c) the estimated value of the framework;
- (d) any selection process to be applied on the award of contracts;
- (e) the term of the framework (see section 47);
- (f) the contracting authorities entitled to award public contracts in accordance with the framework;
- (g) whether the framework is awarded under an open framework (see section 49).

Frameworks under the Procurement Act - Valuation

- Estimated value of framework (i.e. all call-offs) must be included in the tender notice
- Value cannot be exceeded
- However, may be possible to amend either the estimated value of the framework if the framework value, or that of an individual lot, is being approached
- In such cases need to firstly consider modification rules in section 74 (*see slides from my previous session on contract management and modification*)

Frameworks under the Procurement Act - Fees

- Can only be charged to suppliers that have been awarded a call-off contract
- Must be set as a fixed % of the estimated value of the call-off contract
- Fees may not change during the lifetime of the framework
- Not permissible to charge suppliers to gain access to a framework or any other fees associated with the management of the framework.
- Fees can only be charged if the details are set out in the framework (section 45(7)) and the tender or transparency notice (regulations 20(2)(k) and 26(2)(w)).

Frameworks under the Procurement Act - Length

- For Councils and Housing Associations maximum term of framework generally **4 years** (*although see later re light touch frameworks*)
- However, that 4 year maximum term does **not** apply:

“where the contracting authority considers the nature of the goods, services, or works to be supplied under the call-off contracts to be awarded under the framework means that a longer term is required”

(section 47(2))

Frameworks under the Procurement Act - Length

Guidance gives following examples of when framework of longer than 4 years may be justifiable:

- a. large construction or infrastructure projects where a variety of call-off contracts are awarded under a framework throughout the life of a development; or
- b. upfront investment by a supplier to deliver the call-off contracts, for example IT system development, where return on that investment would require call-offs to be awarded over a longer term; or
- c. funding cycle for the project exceeded the maximum term (assuming the development of the project to be provided under the framework was tied to the funding cycle).

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Frameworks under the Procurement Act – Award process

- Choice between:
 - (i) Direct award; or
 - (ii) “Competitive selection process” (i.e. mini-competition); or
 - (iii) Mixture of both

- Direct award only allowed if the framework sets out:
 - (i) the core terms of the public contract, and
 - (ii) an objective mechanism for supplier selection

Frameworks under the Procurement Act - Pricing

- A framework must include:
the price payable; or
“mechanism for determining the price payable”
under such contracts
- Appears to be more flexible than previous rules
- Remember section 12 objectives, including
“having regard to the importance of value for money”

Frameworks under the Procurement Act – Users

- Tender notice must identify:

“all contracting authorities that may award call-off contracts under the framework during its term. This can be done either by listing the names of those authorities, or by describing categories of authorities, for example 'all local authorities within Norfolk', or 'all central government authorities as defined in the Procurement Act 2023', or 'all NHS Foundation Trusts’”

Frameworks under the Procurement Act - Debrief

- The guidance states that:

“Assessment summaries are not required to be provided to suppliers following the award of a call-off contract. However, contracting authorities are encouraged to provide them as a matter of best practice”

- In light of OCS case (see earlier) until such times as new case law suggests, would appear prudent to give adequate reasons
- Voluntary standstill applies to call-offs
- Must publish contract award notice (before award) and contract details notice (post award)

Frameworks under the Procurement Act - Liability

- Where does liability sit for (i) framework setup and (ii) calling off?
- Where centralised procurement authority has setup the framework. guidance says:

“the centralised procurement authority is responsible for complying with the Act when setting up the framework. However, the contracting authority procuring under the framework will be responsible for complying with the Act when carrying out a procurement and awarding a call-off contract under the framework”

- So, taking a CCS framework for example. CCS responsible (i) at point of setup, you are then responsible (ii) at point you call-off.

Frameworks under the Procurement Act - Liability

- Where does liability sit for (i) framework setup and (ii) calling off?
- Where for example another Council/housing association has setup the framework, guidance says:

“Where.....setting up frameworks that other contracting authorities can use, then contracting authorities cannot delegate any part of their obligation to comply with the Act and remain fully liable for any unlawful award made by them as a consequence of the arrangement. In terms of frameworks established by a contracting authority for use by itself and other contracting authorities, this means that the contracting authority procuring under the framework must be satisfied that the framework itself complies with the Act as it will be liable both for compliance with the Act when establishing the framework and when carrying out a procurement and awarding a call-off contract under the framework”

- Liability position possibly less clear cut (although may just be unclear drafting...). Either way, be wary of *reputational* risk (if it's your framework that a call-off is being challenged from)

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Light touch frameworks

- The rules are less strict for light touch (such as a social care or education framework)
- No maximum length – could be 5, 6, 7, 8 years etc
- More flexibility around the mini-competition process (see section 46). For example greater scope to change award criteria at point of call-off (rather than simply “refine” it)
- Modification rules do not apply to light touch contracts (including frameworks), although section 12 objectives must be had regard to the importance of
- Therefore considerable scope to modify light touch framework – for example to add on additional services, extend length of term etc.

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New open frameworks

“a scheme of frameworks that provides for the award of successive frameworks on substantially the same terms”

- **8-year** maximum term
- Award 1st framework
- Must award 2nd framework **within first 3 years**
- Must award 3rd framework **within 5 years** of award of 2nd framework
- Previous framework ends when new one awarded
- Unlimited number of suppliers permitted



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New open frameworks

'substantially the same terms' requires there to be no substantial amendments to the tender or transparency notice for the successive frameworks in the scheme, this includes to the award criteria for the award of the framework.

What happens to existing framework providers at point of re-opening?

Where **unlimited** number of suppliers on the framework, 3 choices:

1. the supplier simply remains on the open framework; or
2. the re-assessment of a tender relating to an earlier award; or
3. the assessment of a new tender relating to the new framework

Where number of framework appointees is **limited**, only options 2 and 3 above apply at point of reopening

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Quiz time: open frameworks

Q. Which of the following open frameworks are legally compliant?

Open Framework A: Opens once a year, for 6 years

Open Framework B: Open once a year, for 8 years

Open Framework C: Opens after 4 years, then closes again. Total term of 8 years.

Open Framework D: Opens after 5 years, then closes again. Total term of 8 years

A. Open frameworks A and B are compliant.

As required, they both open within the first 3 years.

Dynamic markets (the new DPS)

- Dynamic Purchasing Systems (DPS) have been replaced with new “dynamic markets”

What are dynamic markets?

1. A dynamic market under the Procurement Act 2023 (Act) is a list of qualified suppliers (i.e. suppliers who have met the ‘conditions for membership’ of the dynamic market (see paragraph 15 below)) who are eligible to participate in future procurements. A dynamic market may be split into categories (referred to as ‘parts’ in the Act), with suppliers only eligible to participate in the parts for which they have qualified. (In this guidance, references to a dynamic market include references to a part of a dynamic market.)

These can be used for **anything**, unlike previous regime where DPS can only be used for:

“commonly used purchases the characteristics of which, as generally available on the market, meet their requirements”



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Dynamic markets (the new DPS)

- Like a DPS, **always open** to new suppliers
- Unlike DPS, now able to charge fees
- All awards via competitive tender (amongst only the members of the dynamic market)
- Need to publish a Tender Notice for each award from the dynamic market
- Below-threshold awards from a dynamic market are **not permitted** (In England)



Dynamics markets -

- Fees can only be charged to suppliers that have been awarded a contract
- Fees must be set as a fixed % of the estimated value of the call-off contract
- Have their own set of notices (“dynamic market notices”) for establishing, modifying, ceasing the dynamic market etc.
- Unlimited number of suppliers
- Conditions for membership cannot be changed during the life of the dynamic market.

What happens to the pseudo DPS?

- A “Pseudo DPS” is a light touch dynamic purchasing system established under the previous regime
- Concept explained in Crown Commercial Services (CCS) guidance
- Used by many local authorities
- No real equivalent under the Procurement Act – no express provision for light touch dynamic markets...
- Noting restriction on below threshold awards under the Act, worth considering whether you might wish to extend existing pseudo DPS arrangements

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Concession contracts

- Note that you **cannot** award a concession contract from a framework or a dynamic market
- Slightly different rules for utilities, but not relevant to today's audience

Comparison table – frameworks (closed), open frameworks and dynamic markets....

	Framework	Open framework	Dynamic market
Where in the Procurement Act are the rules set out?	Sections 45 to 48	Sections 45-46 & 48-49	Sections 34 to 40
Equivalent under PCR 2015?	Framework	n/a – new concept	Dynamic purchasing system (DPS)
Permitted duration?	Up to 4 years*	Up to 8 years**	No express limit
Open to new suppliers? If so, when?	Never	Must open at least once in first 3 years, then at least once in next 5 years	Always open
Are direct awards allowed?	Yes	Yes	No
Below threshold awards?	Yes	Yes	No
What fees can be charged?	Fixed percentage of the estimated value of any contract awarded	Fixed percentage of the estimated value of any contract awarded	Fixed percentage of the estimated value of any contract awarded

Note: Table reflects rules in England only. It does not reflect the rules on light touch frameworks, defence and security or utilities frameworks, or utilities dynamic markets. Different rules apply in those cases.

* Unless authority considers “nature of the goods, services or works to be supplied” means that a longer term is required.

** Drafting indicates **fixed** term, but guidance suggest rather than maximum

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Your views...

Q. Which purchasing tool do you envisage your authority setting up most frequently?

A. Framework

B. Open framework

C. Dynamic market

Contractual structure of a framework:

Framework
start date

Framework
end date

Framework

Call-off

Call-off

Call-off

Call-off

Call-off

Call-off

Contractual structure of a framework

- Framework agreement, and a call-off contract are ***separate*** contracts
- Keep that in mind when, for example, you are novating or terminating a contract.
- **Scenario 1:** Framework Provider A has a call-off contract terminated immediate for serious breach of contract.
- Consider also whether you wish to take any action under the framework agreement, to prevent them winning future call-offs – check the terms but may be scope to suspend, terminate their appointment etc.

Contractual structure of a framework

- **Scenario 2:** Framework Provider A wants to novate to another company (“Company B”) following a corporate restructure.
- Along with novating the actual framework agreement, you would need to novate any individual call-offs that Framework Provider A has.

Top tips...

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Top tips when calling off...

- ✓ Check whether PCR 2015 or Procurement Act rules apply
- ✓ Check a bona fide contracting authority has established the framework *(for example a local authority, or a “centralised procurement authority” (such as CCS)*
- ✓ Check you’re a permitted user
- ✓ Check your needs are within scope
- ✓ Check whether the maximum framework value has been exceeded
- ✓ Check the call-off terms and conditions are acceptable

Top tips when calling off...

- ✓ Check how call-offs are to be made – direct award, mini-competition, or a mixture of both?
- ✓ Ascertain what role the framework operator will play
- ✓ Give adequate reasons to any losing bidders in a mini-competition
- ✓ Ensure call-off price is the price, or pricing mechanism, from original framework
- ✓ If there is an order form, run it past your legal team
- ✓ Remember new notices under the Act – need to publish contract award notice (pre award) and contract details notice (post award)

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Top tips when setting up...

- ✓ Check which authorities might want to use it
- ✓ Clearly describe other potential users
- ✓ Be careful not to underestimate the value
- ✓ Where other users, try to get indication of frequency/value of call-offs
- ✓ Consider creating and issuing a User Guide

Top tips when setting up...

- ✓ Consider creating and issuing template order form (and possibly even template invitation to tender for mini-comps)
- ✓ Get appropriate terms and conditions (both for the framework agreement and the call-offs)
- ✓ Set out clearly how call-offs are to be made – direct award, mini-competition, or a mixture of both?
- ✓ Ensure price, or a pricing mechanism, is clearly set out

Final thoughts....

- Framework agreements likely to remain popular
- However, do exercise caution – call-off from a framework is subject to challenge like any other procurement
- Consider implementing internal processes (such as a checklist) for establishing, or calling-off frameworks
- Dynamic markets unlikely to be used by housing associations/local authorities. Ensure colleagues aware of restriction on below threshold awards.

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Thank you for listening!

Feel free to keep in touch – you can connect on LinkedIn here:
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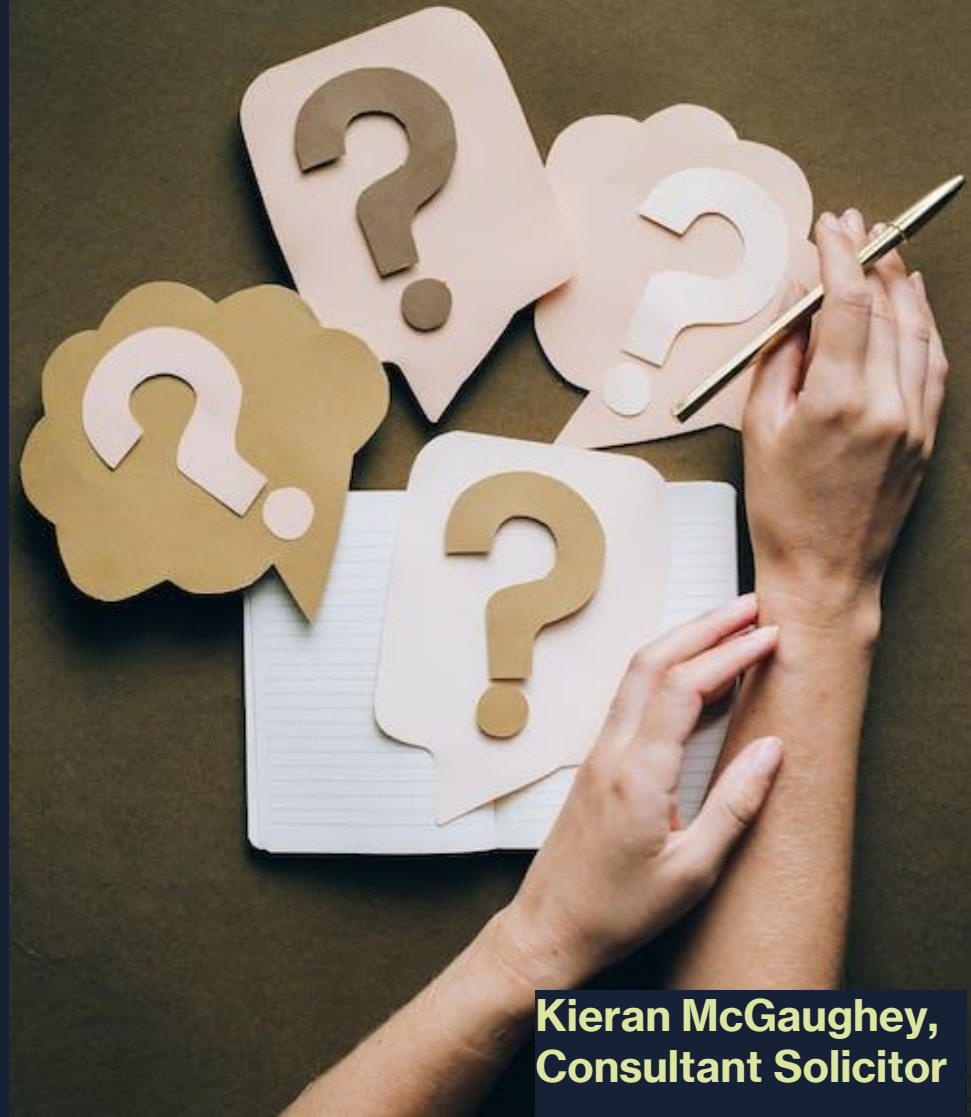
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**Any
questions?**



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