

Construction Webinar Series:

Legal Implications of
Contract Breaches in
Construction Contracts

Thursday, 27 February 2025



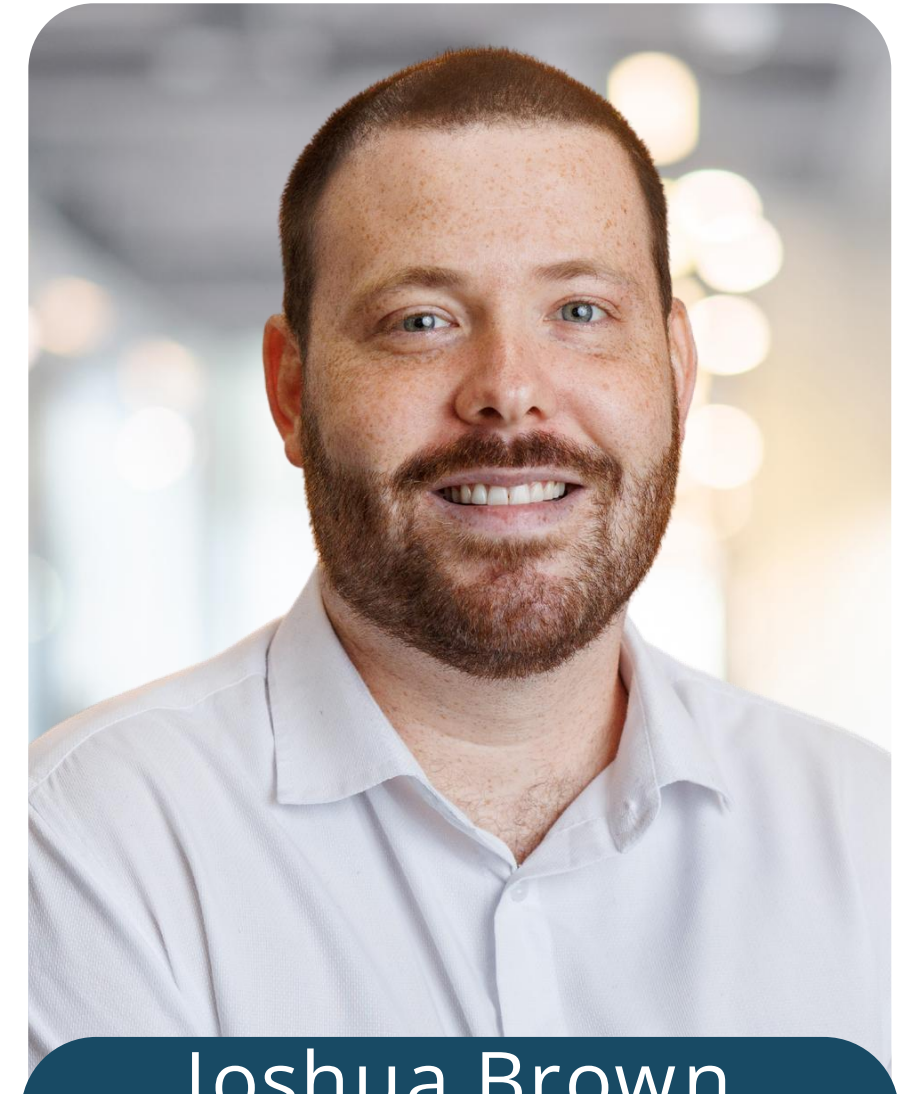
MEET OUR TEAM



Emma Peters
Head of
Engagement



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Category Manager



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Who is Local Buy?



Advancing Queensland Procurement

Local Buy is a wholly owned subsidiary of the Local Government Association of Queensland (LGAQ).

Created in 2001 to assist councils streamline procurement.

A profit-for-purpose organisation we return all profits to LGAQ who use these funds to provide member services to Queensland Councils.

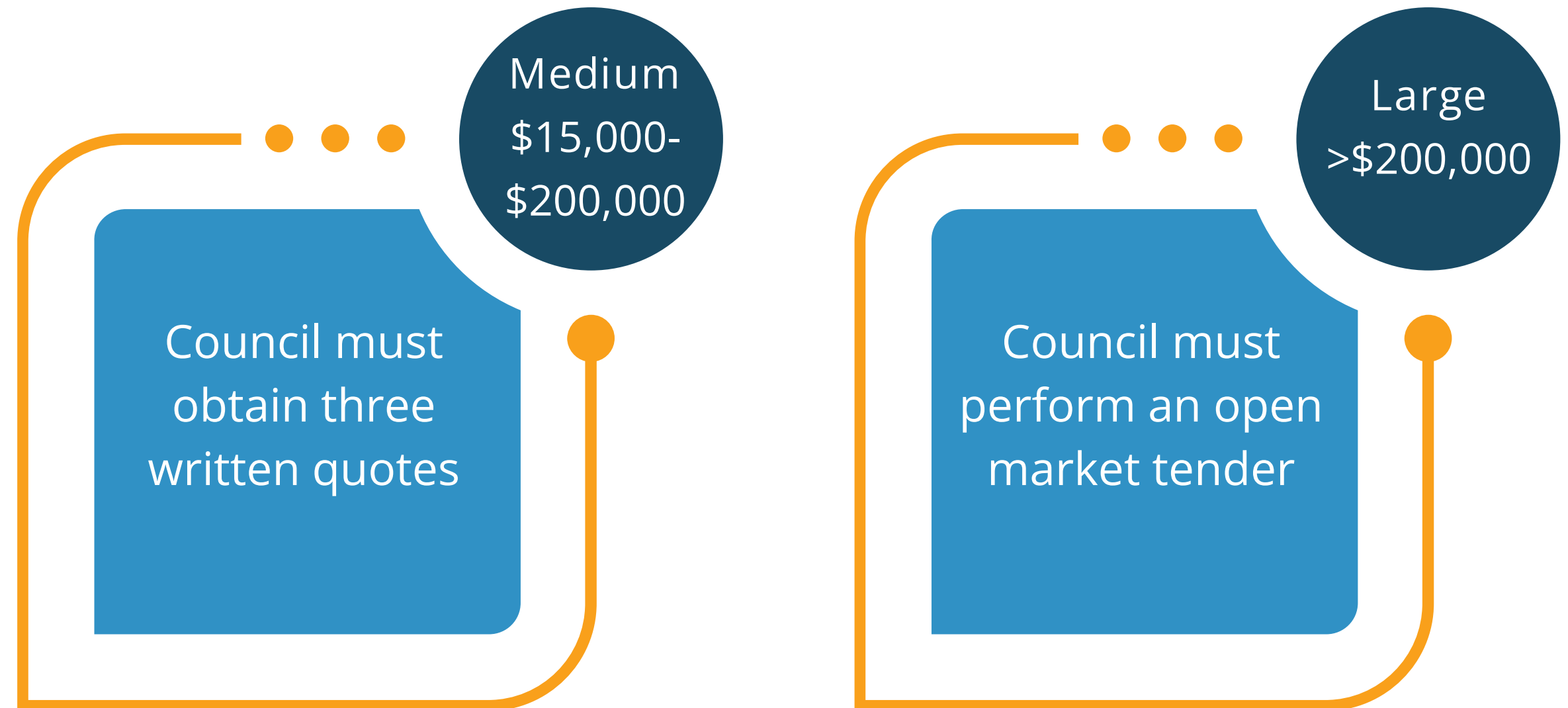
We also work in partnership with LGANT.



Queensland Default Procurement Rules



Thresholds are accumulative, for the life of a contract or a Financial Year with a Supplier for similar goods or services.



Local Government Regulation 2012
Part 3 - Default Contracting Procedures

Northern Territory Thresholds

Contract Value	Default Rule	LGR Reference
<\$10,000	Subject to council's policies, council do not need to obtain quotations for the provision of suppliers where the contract is less than \$10,000	Section 34(1)
\$10,000-\$100,000	Council must either obtain: a. Quotes from at least three suppliers, with council choosing the successful suppliers based on those submitted quotes*; or b. Public quotations per section 35 of the LGR; or c. Tenders under section 36 of the LGR.	Section 34(2)
\$100,000-\$150,000	Council must make a public request for quotations.	Section 35(2)
>\$150,000	Council must obtain a written tenders in accordance with Section 36.	Section 36(1)(b)

If not practicable to obtain at least three quotes, council must obtain as many quotes as practicable (and must record why three quotes were not obtained).

Tendering is a long and arduous process for both buyers and suppliers!



Preparation of Tender Documentation & Contracts.



Open for at least 21 days (Local Government).



All Tenders must be evaluated, and many responses may be received.



A risk that the preferred tenderer may be from outside the council area.



The cost of tendering is around \$20,000 per tender for Local Government and \$5,000 for suppliers to respond.

Tendering



Using Local Buy = No Tenders

How do we do that?

Local Buy has the legislative right to establish Arrangements that are compliant with the Local Government Regulations 2012. Local Buy Arrangements are an exception under s.234 of the Local Government Regulations for purchases of any size.

Local Buy Arrangements are considered tendered, and councils can use them for \$1 - \$100m+ without conducting their own tender.

Council's and government authorities can purchase a broad range of products and services from prequalified/preferred suppliers, without needing more complex quotation or tender processes.



Why use Local Buy?

Local Buy simplifies Local Government Procurement.

Councils can procure through a Local Buy Arrangement to directly request quotes from our suppliers, rather than going to tender themselves through our exception in the Regulations.

Significantly reduces time and resources in complying with legislation through our exemption under the Local Government Regulations 2012.

Local Buy has formed 54 Pre-qualified Supplier Arrangements, tailored to Local Government needs.

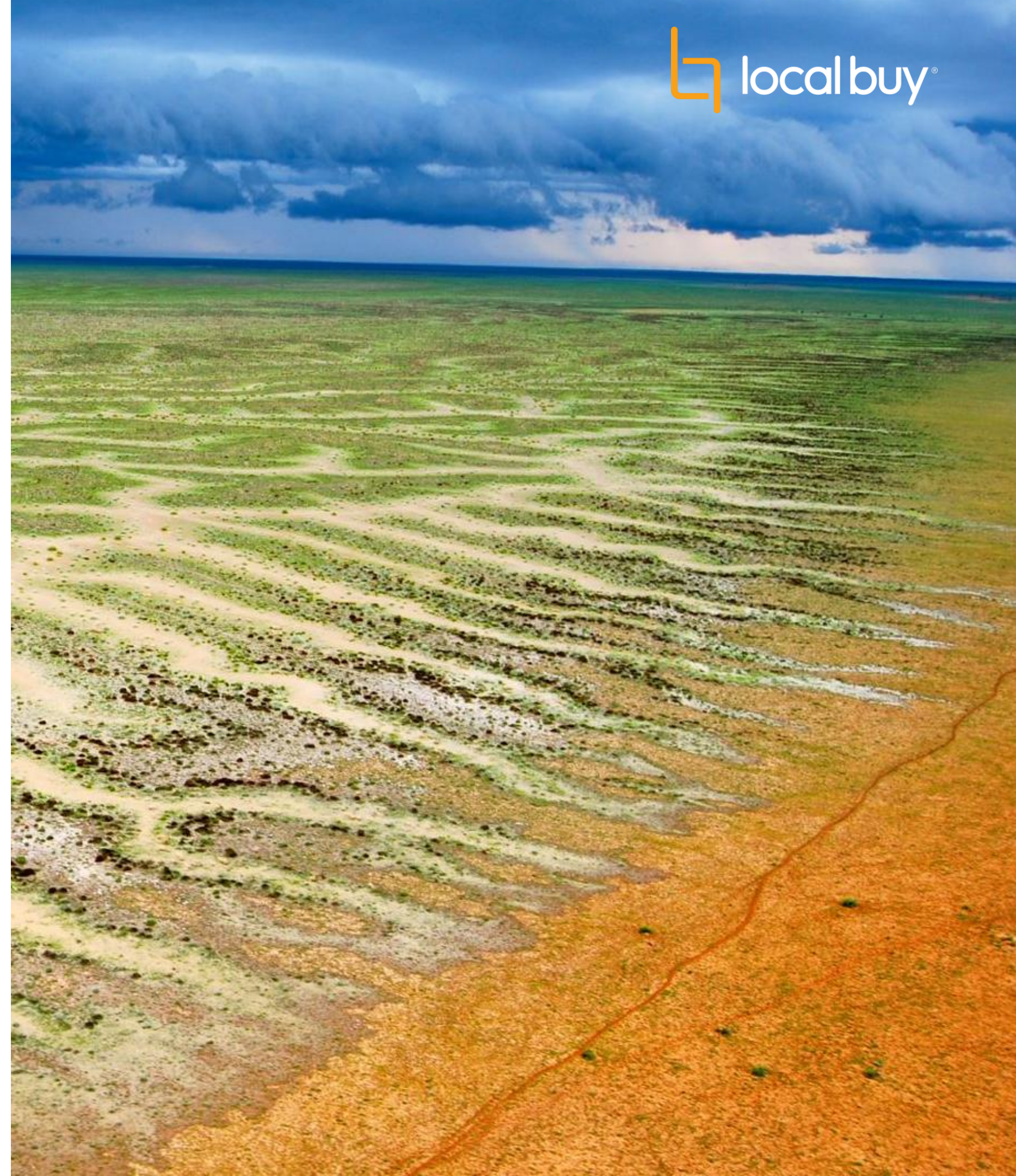
Local Buy Arrangements have pre-agreed terms and conditions for each arrangement, which form the contract between the council and the supplier.



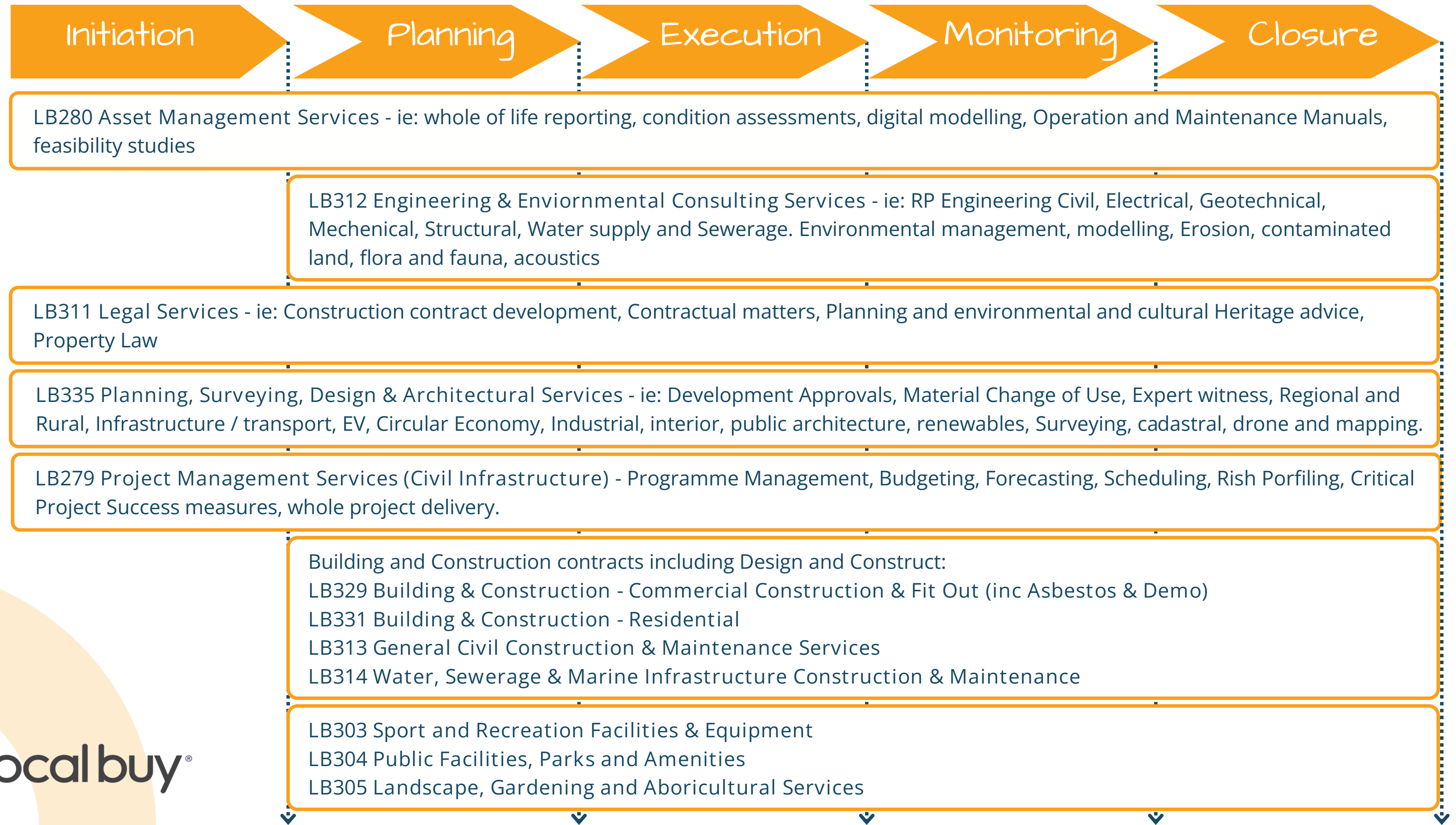
Why use Local Buy (Non-Local Government)

Which includes State Government, Federal Government, Not-for-Profit Entities, Charities, Educational Establishments and Government Owned Corporations.

- Best Practice
- Governance
- Probity
- Ease of Access to robustly pre-qualified suppliers
- Insurances, licenses, qualifications, and quality management provided
- Rate Cards for some arrangements
- Negates the need to perform tenders



WHOLE OF PROJECT SOLUTIONS



New Infrastructure Arrangements

The new Local Buy Infrastructure Arrangements:

- ✓ LB329 – Building & Construction – Commercial Construction & Fit Out (inc: Asbestos and Demolition)
- ✓ LB331 – Building & Construction – Residential
- ✓ LB313 – Road and General Civil Construction *
- ✓ LB314 – Water, Sewerage & Stormwater Infrastructure *

Please note, LB329 & LB331 are not available for NT Councils

** LB313 & LB314 replaced the old BUS270 Road, Water, Sewerage and Civil Works which expired 30 June 2024*



General Purchaser Agreement Conditions of Contract

The Purchaser Agreement Conditions of Contract (PACC) are conditions of contract the parties enter into under certain Local Buy arrangements.

The Purchaser can utilise any of the following PACC's:

- ✓ Local Buy's suite of PACC's:
 - Minor Work
 - Medium Works
 - Major Works
 - Or any other contracts as introduced by Local Buy.
- ✓ The Purchasers own suite of contract conditions
- ✓ Australian Standards Contracts
- ✓ Suppliers contract conditions
- ✓ Industry body contract conditions.

Did you know that you can use these bespoke contracts on other Local Buy arrangements?

It is the responsibility of the Purchaser to determine and document which contract conditions are most appropriate or required, having regard to the project particulars and risks associated under a Purchaser Agreement.

Contract Documents

Construction Contract Template:

Local Buy bespoke contracts:

- Minor Works
- Medium Works
- Major Works

Supporting documents include:

- Guidance Notes
- Contract selection Matrix

(Free to use)



Supporting Materials



Guidance Notes & Contract Selection Matrix

Guidance Notes

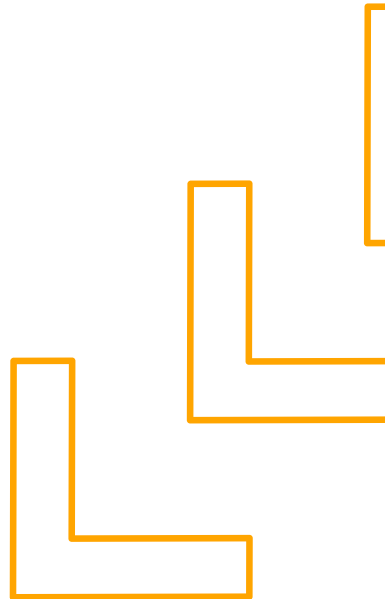
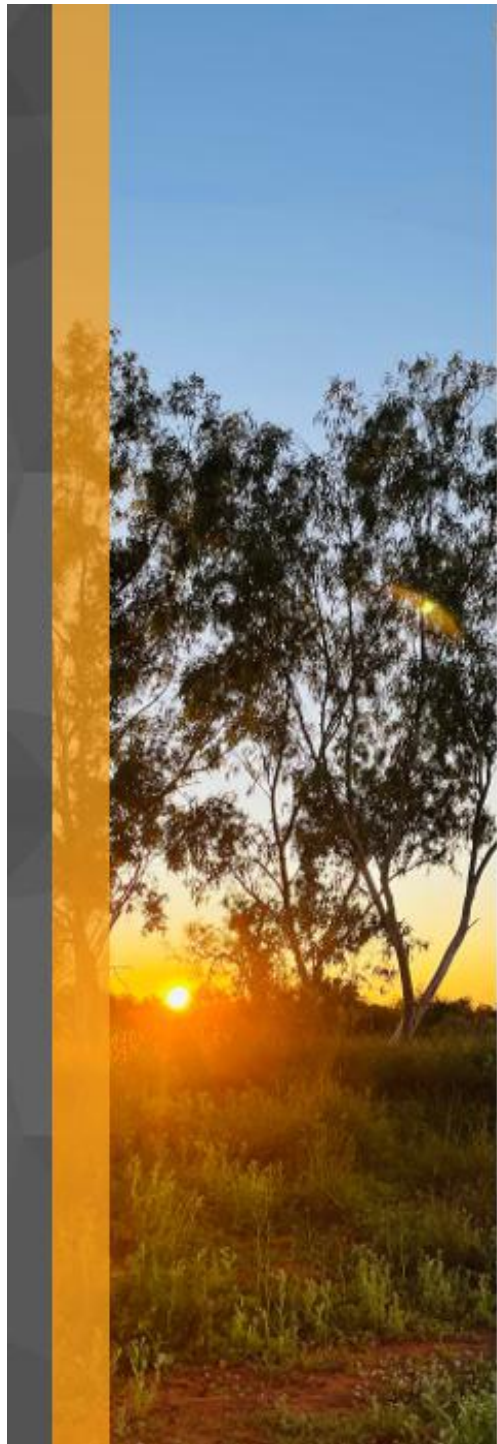
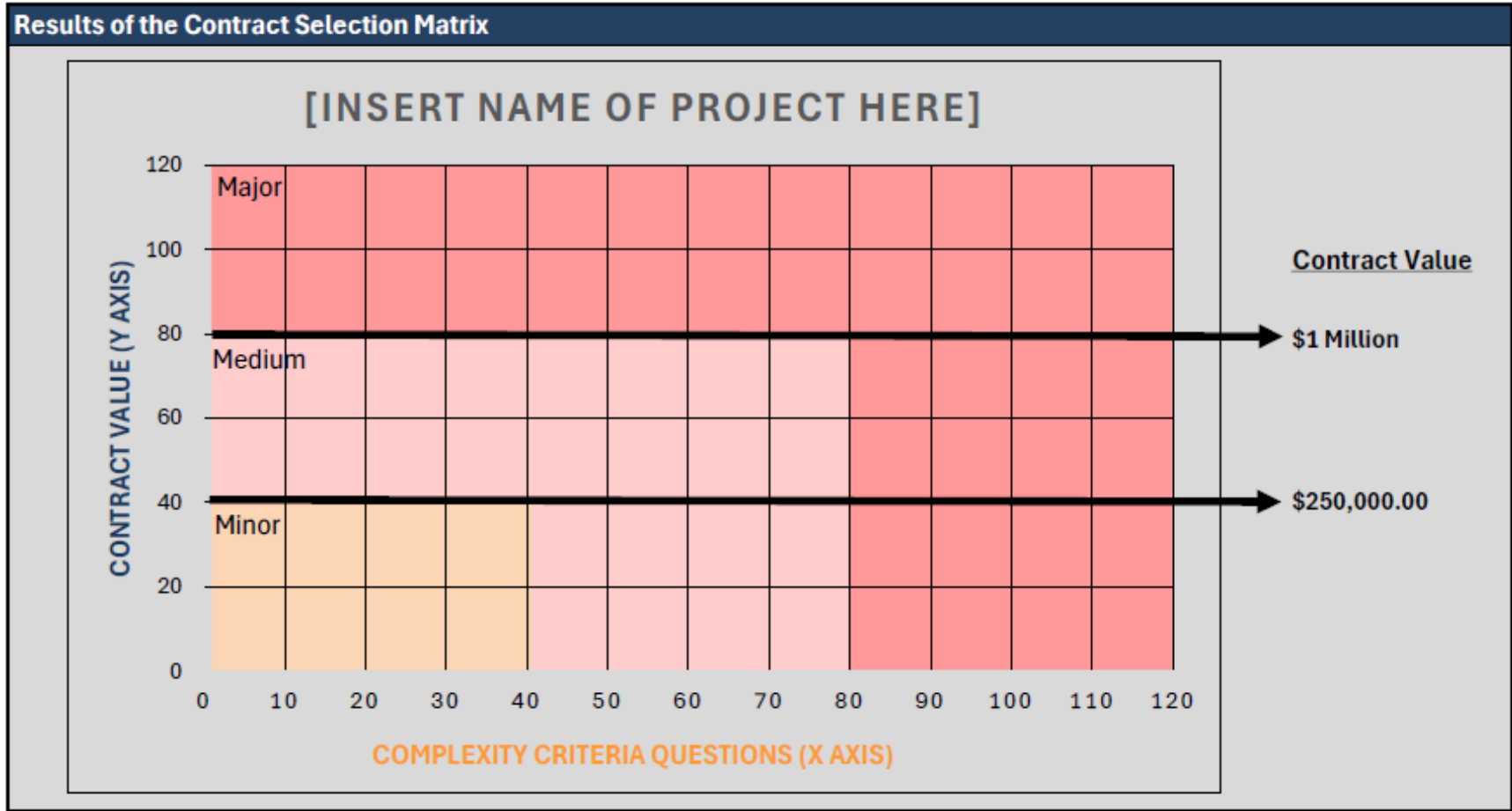
Construction Contracts for Arrangements:

LB313 – Road & General Civil Infrastructure

LB314 – Water, Sewerage & Stormwater Products

LB329 – Building & Construction – Commercial
Construction & Fit Out (inc: Asbestos, Demo)

LB331 – Building & Construction – Residential



Check off List

Example of some of the support in the guidance notes

Schedule G – Contract Completion Checklist

Contract Completion Checklist

This checklist provides step-by-step guidance for Principals to complete the contract document efficiently and in compliance with the requirements of the Contract. Follow these steps in order to ensure all necessary details are completed and verified.

This completion checklist assumes that the parties have agreed upon the form of contract and its terms.

Step 1: Filling in the blanks

1. Formal Instrument of Agreement (FIA)

- Complete the details on the cover page of the FIA, including:
 - the Principal;
 - whether the contract is a Major, Medium or Minor Contract;
 - the contract title;
 - the contract number;
 - the Contractor (including ACN/ABN);
 - the contract TRIM reference;
 - the panel Arrangement;
 - the template version;
 - the security label;
- Remove the notice to the Principal on the cover page of the FIA;
- Complete the description of the project at clause 1.1(4) of the FIA;
- Complete the Contract Sum at clause 2(1) of the FIA;
- Consider the list of Contract Documents (and their order) at clause 5.1 of the FIA (refer to comments in Schedule B, C or D above regarding the Contract Documents);
- Consider the list of documents not forming part of the contract at clause 5.3 (refer to comments in Schedule B, C or D above regarding the Contract Documents);
- Retain the QBCC acknowledgment at clause 6 if applicable for the project (see comments above);
- Consider the appropriate execution block for the Principal and the Contractor. This might be execution under the Corporations Act 2001 (Cth), by a duly authorised representative of the party, under a power of attorney, or other authorised means of execution; and
- Ensure each schedule and appendix (including, as applicable, the Methodology and Resourcing Documents (Appendix A) and the Contractor's

Schedule E – Optional Clause Bank

The below table explains all the optional clauses that may be applicable to a particular contract type, including reasoning for when they may need to be enlivened.

The table also sets out which contract (Major, Medium and Minor) the optional clause is contained.

Optional clause	Description of the clause	Major	Medium	Minor
Work on, to or impacting Adjoining Properties or Existing Improvements	This clause is only applicable to LB329. This clause obligates the Contractor to prevent and remedy any damage or disruption to neighbouring properties and Existing Improvements, ensuring minimal interference with the daily operation of the Site and compliance with relevant Legal Requirements. It applies if Item 1.5 of Annexure A does not exclude it, requiring the Contractor to carry out the Works in a manner that avoids breaching property law obligations and promptly make good any damage to adjoining properties or Existing Improvements.	Included as an optional clause	Included as an optional clause	Included as an optional clause
NGERS	This clause would be enlivened and brought into the Contract when the Principal is required to comply with obligations under the National Greenhouse and Energy Reporting Scheme (NGERS), and the Contractor's activities under the Contract may involve emissions reporting or energy use. This clause is used to ensure the Contractor supports the Principal's compliance by maintaining accurate records of greenhouse gas emissions and energy usage and providing access to these records as required.	Included as an optional clause	Included as an optional clause	Not included as an optional clause
Design Obligations	This clause would be enlivened and brought into the Contract when the Contractor is responsible for carrying out or completing any part	Included as an optional clause	Included as an optional clause	The clause can be stated

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Joseph is a Senior Associate with extensive experience acting for private and government clients in a broad range of both front and back-end construction and infrastructure matters and general litigation. Joseph is heavily involved in construction litigation, acting for governments and private company clients involved in complex disputes concerning the construction, maintenance, and asset management services on major construction projects. He regularly acts for clients involved in construction litigation in the Supreme and lower Courts in Queensland and New South Wales, the Queensland Civil and Administrative Tribunal and adjudication disputes concerning security of payment across all Australian jurisdictions. Joseph also has extensive experience acting for private clients across a broad range of commercial disputes including breaches of Australian Consumer Law, misleading and deceptive conduct as well as directors and shareholders disputes.

Joseph also regularly assists both principal, contractor and subcontractor clients with the preparation, negotiation and finalisation of a wide variety of construction contracts and project related documentation. Joseph ensures that his clients are adequately protected from risk whilst also delivering contracts swiftly so that his clients can get underway on their projects.

MUSCAT TANZER



Joseph Sammut
Senior Associate

Local Buy Construction Webinar Series | 27 February 2025

Contractual Compliance

The Legal Implications of Construction Contract Breaches

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Overview

- 01 Common types and causes of construction contract breaches
- 02 The legal implications of contractual breaches
- 03 Actions in response to contractual breaches
- 04 Defences to breach claims
- 05 Case studies of contract breaches

Common types and causes.



Minor Breach.

What is it?

A small breach that does not (or does not have the potential to) substantially impact the contract's purpose.

Common Causes

- A contractor delivers materials late.
- A document is given a day later than the contracted timeframe.

Material Breach.

What is it?

A substantial failure to fulfil contractual obligations, allowing the aggrieved party to seek damages and terminate the contract.

Common Causes

- A party falls into liquidation.
- A party fails to comply with an essential term of a contract i.e. fails to deliver a product on time, where time is of the essence.

Anticipatory Breach.

What is it?

Occurs when one party indicates they will not fulfil (or will be unable to fulfil) their contractual obligations before a due date specified by the contract.

Common Causes

A contractor informs the principal they will not be able to fulfil the work specified under the contract by the required time, typically due to other delays caused by the contractor.

Involuntary Breach.

What is it?

A breach that occurs due to circumstances which are beyond the breaching party's control such as natural disasters, changes in law or unforeseen events.

Common Causes

A construction project is halted due to a government-mandated shutdown in response to a public health crisis, preventing the contractor from progressing or completing the works under the contract.

Common causes of breaches.

1

Non-performance

This can arise from insolvency, operational mismanagement or unforeseen circumstances which prevents a contract from being completed.

2

Late performance

Often results from inadequate project management, supply chain disruptions or unforeseen delays that affect the timely delivery or completion of the contract.

3

Quality issues

Deliverables that fail to meet the specified quality standards can lead to disputes (particularly when the contracted party has failed to rectify them), impacting the recipient's operations and financial outcomes.

4

Supply chain issues

Delays caused by supply issues, for instance resulting from the impacts of COVID and the Russian-Ukrainian War.

5

Money problems

Failure to progress a contract due to the financial issues of the breaching party.

6

General mismanagement

Breaches caused by the failure to properly administer the contract, for instance a failure to obtain the required building certification documentation prior to site handover.

The Legal Implications.



Legal Implications.

1

Damages

2

Specific Performance

3

Termination



Damages.

Compensatory Damages

Definition: Designed to compensate the aggrieved party for actual losses resulting from the breach.

Calculation: Damages caused directly from the breach.

Most common and relevant.

Consequential Damages

Definition: Damages that are not caused directly from the breach but are a consequence of it.

Example: reputational damage, loss of business due to business interruption.

Contractors often try to contract out of consequential damages.

Punitive Damages

Definition: Intended to punish the breaching party for egregious conduct and deter similar in the future.

Example: If a party intentionally delivers defective goods with the knowledge that it would harm the other party, punitive damages may be considered on top of compensatory damages.

Punitive damages are **not typically awarded in contract cases.**

Specific Performance.

- Court orders can be sought requiring a party to fulfil their obligations under the Contract.
- This avenue is usually pursued in cases which involve a unique good or service or real estate where just monetary damages would be insufficient to cover the loss suffered by the damaged party.

Termination.

- Depending on the breach, the non-breaching party may terminate the contract. Often, the party who has terminated the contract will seek damages caused by the other party's breach, which will typically **include** the **extra cost** required to have a new contractor complete the contract.
- Consider the mechanisms for, and effects of both:
 - termination under the contract; and
 - termination at common law (i.e. for breach of substantial terms, serious breach of a non-essential term, and/or for repudiation).



Factors affecting the consequence.

1

Nature of the breach

A minor breach may result in nominal damages (if any), while material breaches may lead to significant damages being awarded against the breaching party.

2

Contract terms

Specific clauses within a contract may limit or expand the available remedies (e.g. limitation of liability clauses, limitations of claims for consequential loss). Contracts may also include mandatory arbitration or mediation clauses that may affect the approach to dispute resolution.

Action for breach under the Contract.



**Notices to
remedy.**



The Notice.

- Most construction contracts typically include a clause requiring a Notice to Remedy to be served on the breaching party before the other party can pursue remedies (usually except for breaches which are very serious or which cannot be remedied, like liquidation).
- A Notice to Remedy will give the breaching party the opportunity to remedy the breach prior to the non-breaching party taking action either by termination or remedying the breach themselves.



The Contents.

- Usually a Notice to Remedy will need to contain a description of the breach clearly outlining what the breach is and how it deviates from the party's contractual obligations.
- Typically must state the specific clauses or provisions within the contract that the breaching party has breached.
- Usually must request that the breaching party rectifies or remedies its breach or breaches within a reasonable timeframe or within a timeframe specified under the contract, failing which the non-breaching party may take further action.



Failure to remedy.



What if a notice of breach is not complied with?

- If the breach isn't remedied by the time stipulated in the Notice to Remedy, the non-breaching party will often be entitled to:
 - terminate the contract and claim damages for the breach and termination; or
 - take the subject work out of the hands of the Contractor, do it themselves, and charge the Contractor for it (possibly having recourse to security if necessary).

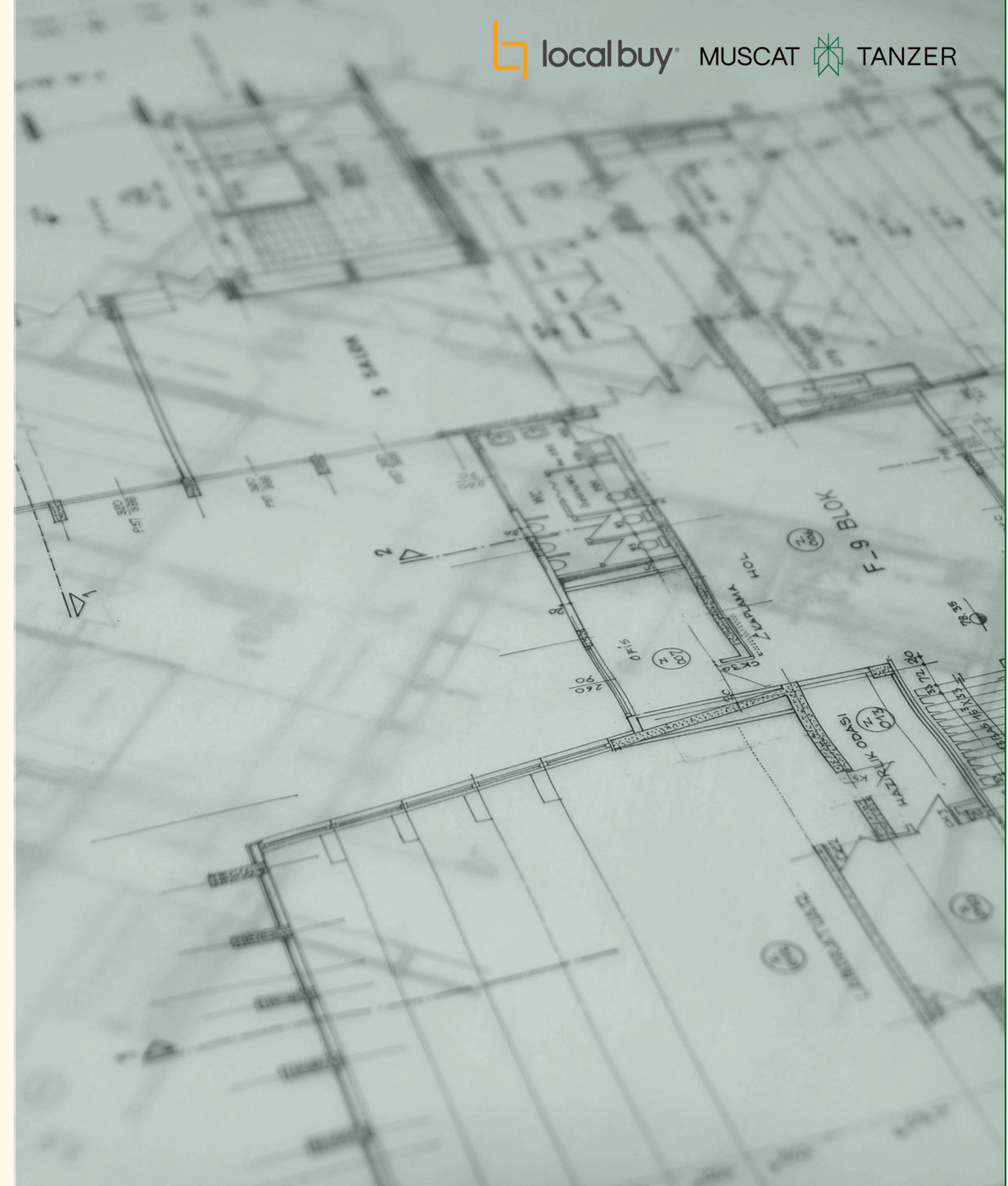


**Careful
Consideration.**



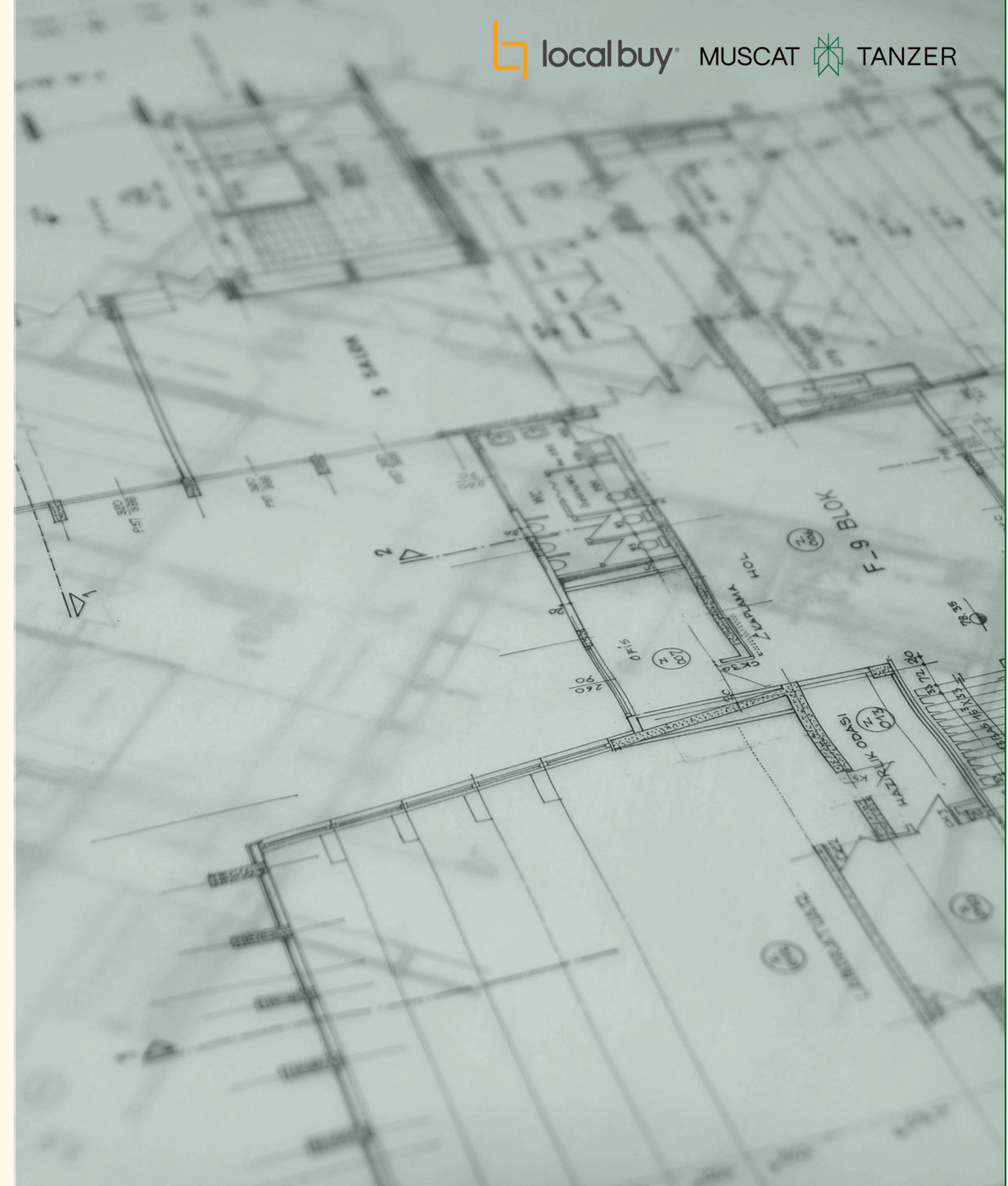
Things to consider.

- What will the positions of the parties be after you take your action? What does the contract say about damages as a result of termination? The parties' rights and obligations arising before termination may still exist.
- Are there dispute resolution mechanisms under the contract which you need to comply with?



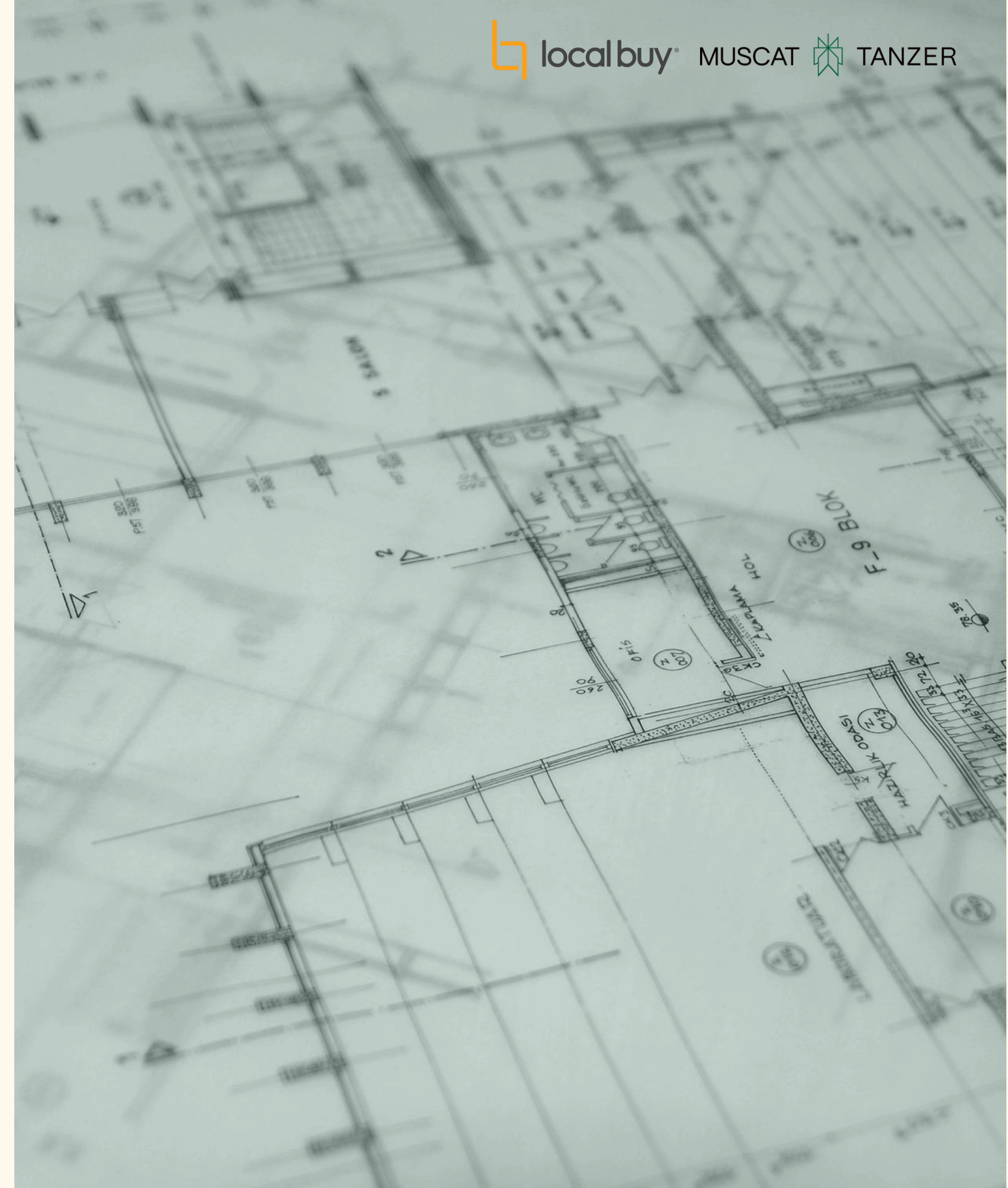
Things to consider.

- If you do terminate, is there anything urgent you will need to have sorted immediately post termination? Insurance of a site? WHS issues? Public services?
- Procurement processes for replacement contractor? How long will that take? Often can't even **start** while original contract is on foot because doing so would likely be repudiation.



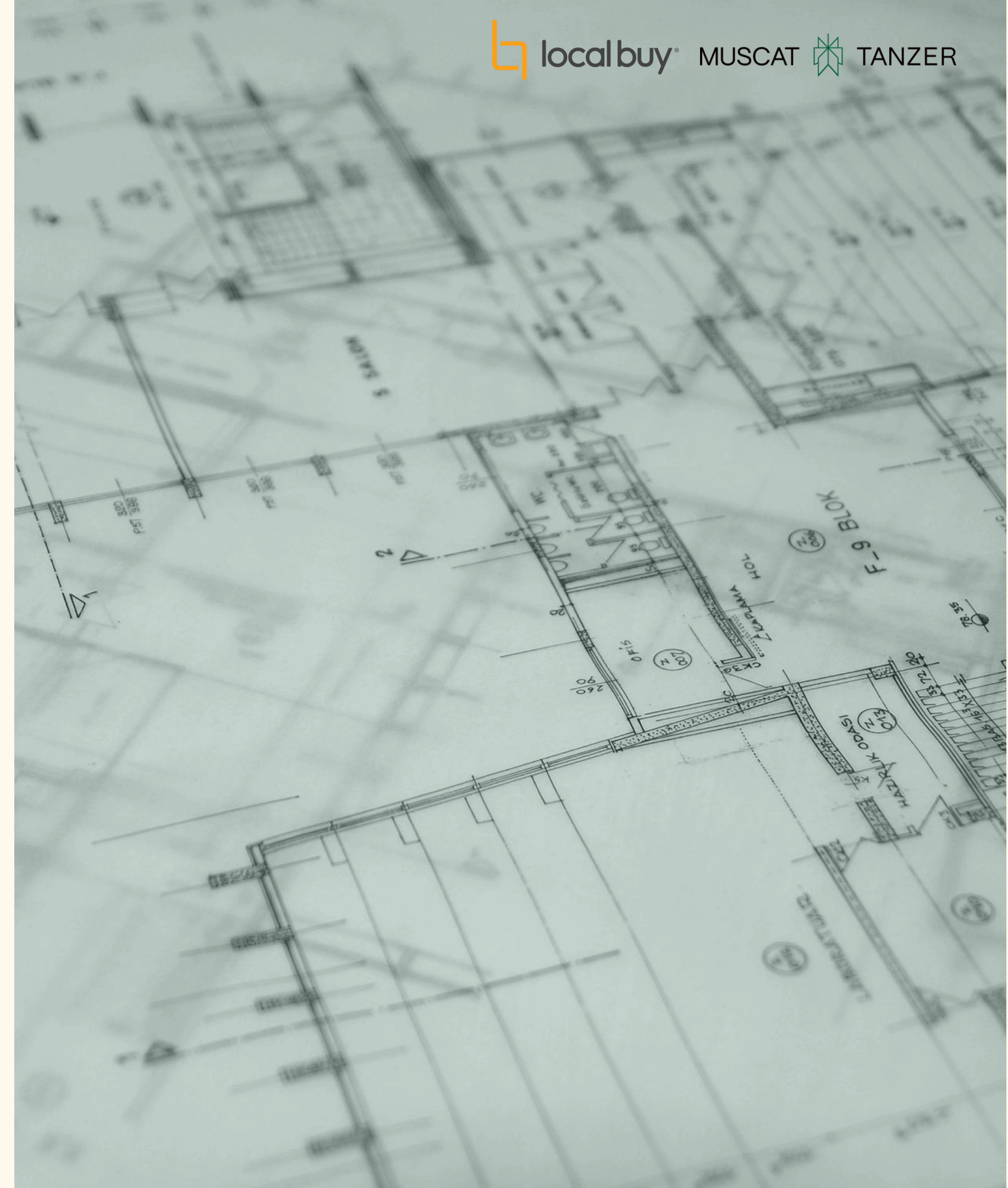
Things to consider.

- Noting the considerations above, is it actually in your best interests to terminate or take work out of the Contractor's hands?
- Termination, especially, is high risk. Dot your i's, cross your t's. Do you **definitely** have a valid basis to terminate? Seek legal advice.



Things to consider.

- If your notice of breach was not valid and you terminate or take work out of the Contractor's hands, you could yourself repudiate the Contract. That can make you liable for **significant** damages. You need to come to the termination with "clean hands".
- If taking work out of their hands, don't overreach. The existing contractor is **still engaged** for the balance of the work. Like the above, if you engage a new contractor to do a part of that work without following the correct process under the Contract, you could repudiate the Contract yourself.



IpsO Facto Rule.

- A party entering into liquidation may entitle the other party to terminate the contract, **but not always**.
- An 'ipso facto' (meaning 'by the fact itself') clause is a contractual provision that triggers a right to terminate a contract simply because a party becomes insolvent or if a specified insolvency related events occurs, even if there has otherwise been no breach of the contract by the breaching party.
- Pursuant to the ipso facto rule, which applies to certain contracts entered into on or after 1 July 2018, certain contractual rights become unenforceable against the breaching party during a specified period after the commencement of certain insolvency events, for instance voluntary administration.
- As such, be careful that you are not in breach of the ipso facto rule (if it applies to your contract) when considering terminating following the Contractor entering into liquidation.



**Terminating at
common law.**



Terminating at common law.

- Can terminate for breach of an essential term (also known as a condition).
- Can terminate for a sufficiently serious breach of a non-essential term.
- Can terminate for repudiation.
- These often overlap.



Things to be careful of.

- Same considerations as termination under contract – but need to consider parties' positions after termination at common law (may be different to what contractual position would be – but often similar).



Things to be careful of.

- Consider whether or not you want to (or if your contract requires to you to) use negotiation/mediation/arbitration before terminating and/or before litigating.
- Termination, especially, is high risk. Dot your i's, cross your t's. Do you **definitely** have a valid basis to terminate? Is it actually in your best interests to do so? Seek legal advice.
- If you terminate, is there anything urgent you will need to have sorted immediately post termination? Insurance of a site? WHS issues? Public services?
- Procurement processes for replacement contractor? How long will that take? Often can't even **start** while original contract is on foot because doing so would likely be repudiation.



Defences to breach claims.



Common Defences.

1

No breach (factually).

2

Waiver or Estoppel.

3

Frustration.

4

Statute of Limitations.

5

Limitation of liability/exclusion of consequential loss.

No breach.

- Factual issue.
- Common example is one party says that works are defective, and the other party says they aren't. If the works are not in fact defective, then no breach is likely to have occurred.



Waiver and Estoppel.

- Waiver is an intentional act done by a party to dismiss or “waive” a particular right it may have under the contract, including a right to take action under the contract for breach of contract.
- Estoppel typically involves a party being precluded from asserting something contrary to what is implied by a previous action or statement by that party, especially where another party has relied upon that action or statement to their detriment.





Frustration.

- Occurs when a contractual obligation becomes incapable of being performed due to circumstances that would render the performance radically different from what was agreed upon.
- Applicable when an unforeseen event, not caused by either party, fundamentally changes the nature of the contractual obligations. Contract clauses re frustration and force majeure *maybe* relevant (but not always – depends on their wording).
- E.g. change in law makes contract unenforceable or illegal.
- E.g. purchase contract for house is signed. Earthquake destroys house. Vendor likely won't be liable for the failure to provide the house to the purchaser.



Statute of Limitations.

- Laws that set the maximum time after an event within which legal proceedings may be initiated by a party (see *Limitation of Actions Act 1974* (Qld)).
- The limitation bars a party from initiating proceeding outside of the timeframe and is commonly used as a defence for proceedings started a long time after the completion of a contract, or the occurrence of the breach.
- E.g. breach of contract – 6 years from cause of action arising.
- E.g. personal injury claim – 3 years from cause of action arising.

Limitation of liability/exclusion of consequential loss.

- Positions agreed under the Contract.
- Case law says that for negligence to be included in the limitation, the clause must refer specifically to exclusion of liability for negligence.
- Consider contract wording carefully – often there are carve outs for things like personal injury, and sometimes for amounts which are covered by an insurer.
- Just because your contract includes exclusions for liability does not mean that those exclusions will be enforceable.



**Mitigating your
own risk of breach.**



Mitigating your own risk of breach.

- Robust review of Contract before signing.
- Know and comply with the Contract.
- Clear and open dialogue with counterparty.



**Maintaining your
ability to claim.**



Maintaining your ability to claim.

- Know and comply with the Contract.
- Particularly re, for example, responding to variation claims and EOT claims, and giving clear instructions to effect a variation.
- Even when it might seem finnick, maintain compliance or give clear reason why you accept deviation from the Contract that time, but are not otherwise waiving its requirements. You don't want to give rise to an argument for waiver or estoppel against you.
- Take action swiftly (with legal advice if necessary) – often things can be managed and rectified without litigation if dealt with before things are too far gone.



Case Studies.



Case Study 1.

Council and a Contractor enter into a Design and Construct Contract with a Date for Practical Completion in a year's time.

6 months in, the Contractor realises that a piece of equipment they ordered will not arrive for 6 weeks longer than they anticipated (due to unanticipated and newly commenced piracy in relevant international waters).

Under this particular Contract, the Contractor is entitled to extensions of time for causes of delay which are outside of the control of the Contractor and should not have been foreseen by a reasonable Contractor in their situation at the outset of the Project.



Case Study 1.

Contractor therefore claims an EOT for 6 weeks.

Council considers the EOT claim, tells the Contractor that they agree the Contractor is entitled to an EOT, but that they think the critical path of the works will only be delayed by 4 weeks, because the Contractor can progress other work while waiting for the equipment. The date for PC is therefore extended by 4 weeks.

Contractor understands and progresses accordingly, working to meet the amended date, which is now understood by both parties.

There is no breach, because both parties understood and complied with the Contract.



Case Study 2.

Council and a Contractor enter into a Design and Construct Contract for the construction of a new Council building.

Near the end of the build, some of the windows installed by the Contractor start to leak.

Council sends a notice to remedy issued under the Contract to the Contractor to fix the leaky windows within 14 days.



Case Study 2.

The Contractor does not fix the leaky windows within the 14 day time period, but continues to progress the rest of the Project.

After the 14 day period ends, Council gives the Contractor notice that they are taking the work to rectify the leaky windows out of the Contractor's hands, the costs of which shall be recovered from the Contractor.

Council engages and pays a different contractor to fix the windows, but makes sure not to engage them to do anything else on the Project or to get in the first Contractor's way.



Case Study 2.

The original Contractor finishes the rest of the Project, and the new window Contractor fixes the leaky windows.

Council gives notice to the original Contractor under the Contract that Council will have recourse to security for the monies paid to the window Contractor to fix the windows.

The Contractor does not dispute this, Council recovers the window rectification monies out of the Security held under the Contract, and otherwise the Contractor is paid the balance of their contract sum.

The building is finished on time, with no further dispute required.



Case Study 3.

Council and a Contractor enter into a Design and Construct Contract for the construction of a new Council building.

Near the end of the build, some of the windows installed by the Contractor start to leak.

Council sends a notice to remedy to the Contractor to fix the leaky windows within 14 days.



Case Study 3.

The Contractor is in the process of fixing the leaky windows within the 14-day period when Council notices that, in a different area of the building, some of the floor tiles are drummy (and are therefore defective).

Council sends a letter to the Contractor saying 'We've now found drummy floor tiles in the East bathrooms. We are sick of your shoddy workmanship and are terminating the Contract. We will now engage someone else to finish this job, and you will have to pay us any extra costs.'



Case Study 3.

The Contractor replies saying that Council has repudiated the Contract, and that they accept Council's repudiation and elect to terminate the Contract.

The Contractor stops work because now **they** have validly terminated the Contract. Council has to go through a procurement process (or use an applicable exception) to get a new Contractor to finish the Project. That new Contractor costs significantly more and Council can't claim against the first Contractor for the costs because Council themselves repudiated the Contract.

The Contractor sues Council for the remaining profit they would have earned if they had been allowed to finish the job, and by repudiating the Contract, Council gave up its right to claim against the Contractor for the additional costs.



Questions?

Meet the Muscat Tanzer team.



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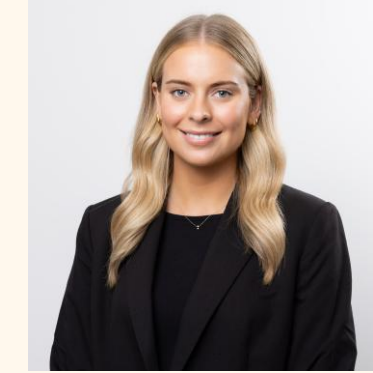
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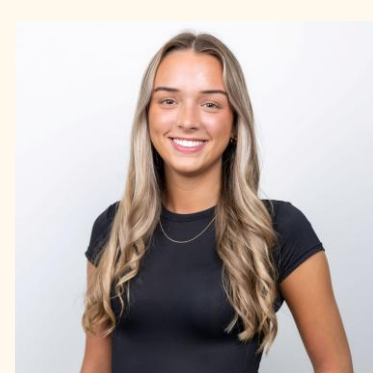
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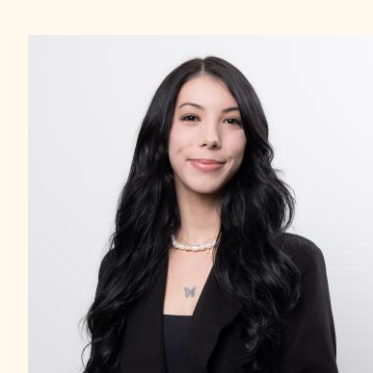
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Q&A ASK AWAY

If you have any questions regarding Local Buy or how you can take advantage of its benefits, feel free to ask our friendly team now.

Alternatively, you can contact our team at any time.



Upcoming Events



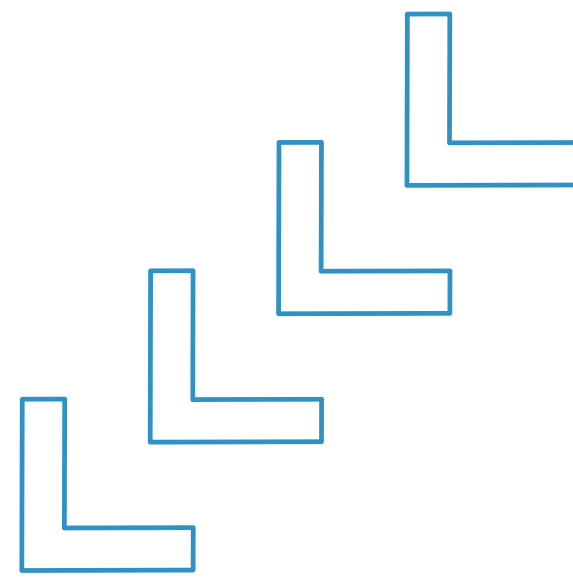
We invite you to check out our events page and explore all the exciting events we have arranged.

- *Local Buy Training & VendorPanel Demonstration*
- *Construction Series - Three more engaging webinars*
- *Prospective Local Buy Supplier Information Sessions*
- *FNQ Procurement Summit (Cairns in March)*



localbuy.net.au/events-news-faq/event-calendar





We value your feedback!

If you have a moment today, we would greatly appreciate it if you could fill out our survey.

Your input helps us understand how we can keep delivering the best possible experience.



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