



# The Art of Risk Transfer

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DIFFERENT WORKS

RLI Design Professionals  
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# Course Description

## **Risk** noun

- Possibility of loss or injury. Peril.

## **Transfer** verb

- To convey from one person, place, or situation to another.
- To cause to pass from one to another. Transmit.

Merriam-Webster

# Learning Objectives

## Participants in this session will:

- 1** Gain an understanding of the different risk transfer measures in the construction industry;
- 2** Learn about the benefits of risk transfer and how they can impact a situation and your business;
- 3** Review specific examples of risk transfer including contract language; and
- 4** Examine techniques to successfully include risk transfer into your risk management program and contract negotiations.

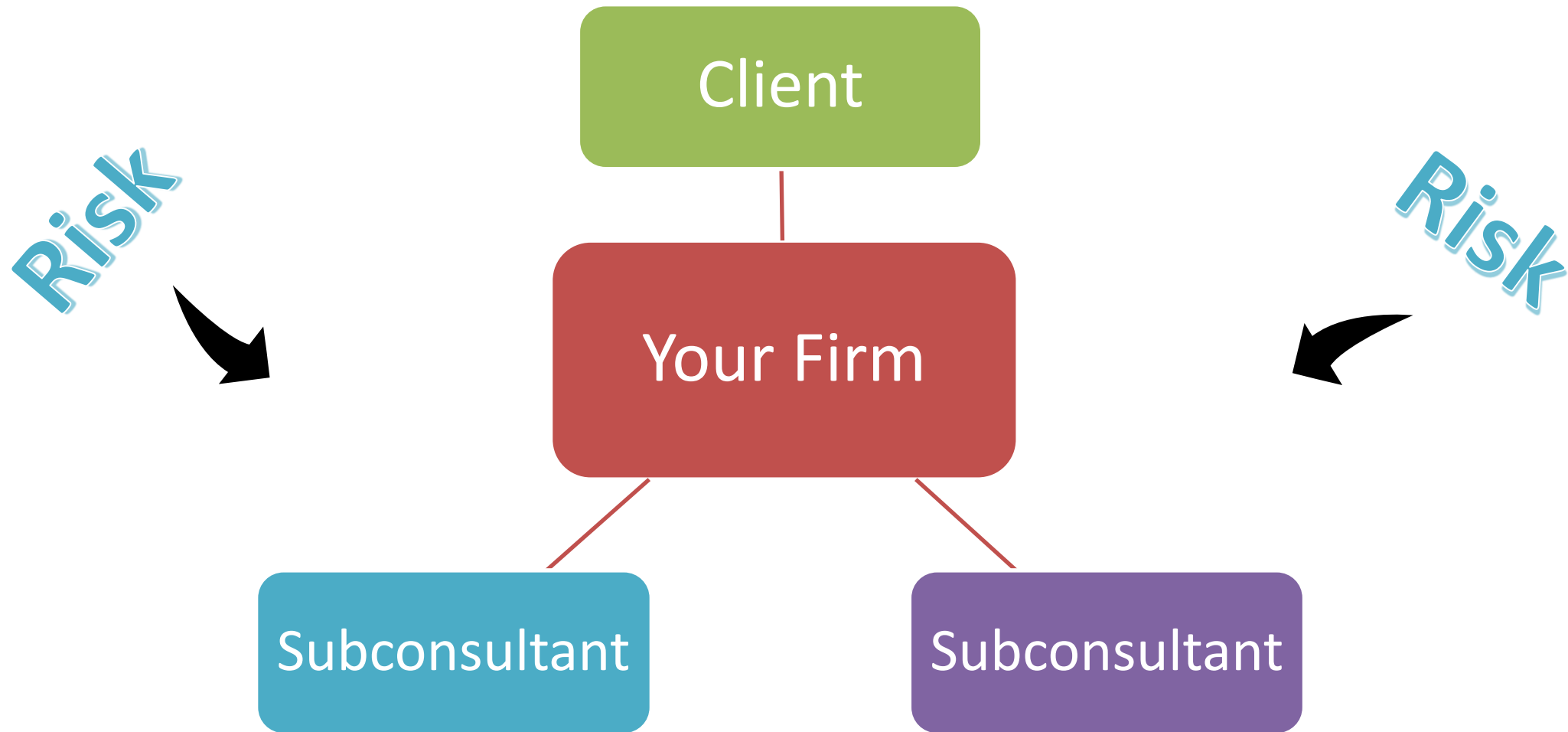


# Overview

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# Overview





# Your Firm's Exposure

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# Holistic Coverage





# Client Contract



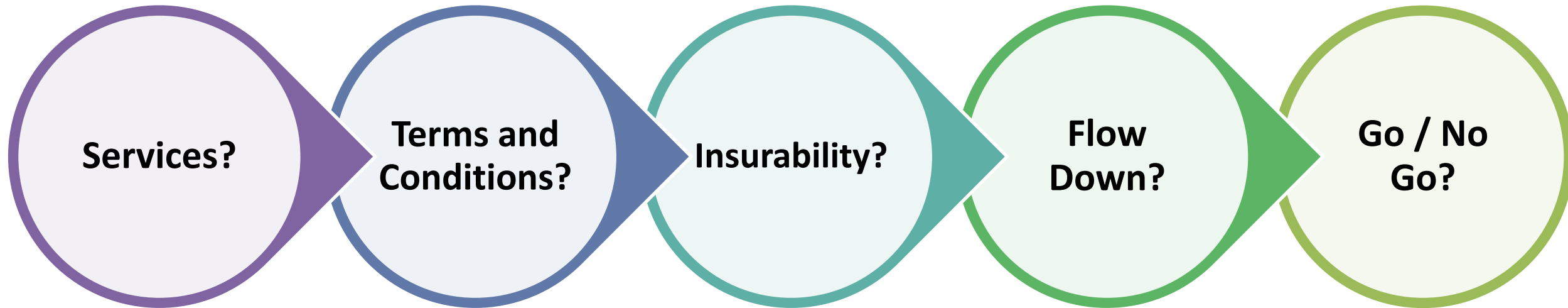
**Your Standard Agreement**

**Client Drafted Agreement**





# Client Contract



# Your Responsibilities

**Scope of Services**

**Standard of Care**

**Insurance**

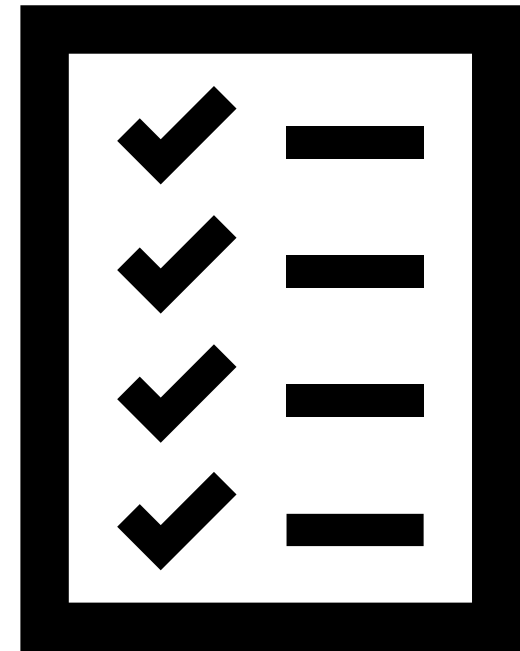
**Right to Rely/Site  
Conditions**

# Scope of Services

Be Specific

Disclaimers

Options





# Scope of Services

## Be Specific

YOUR  
Services  
vs. Fee

Exposure

Other  
Parties

Site  
Visits

## Disclaimers



Jobsite  
Safety



Hazardous  
Materials



Other  
Services

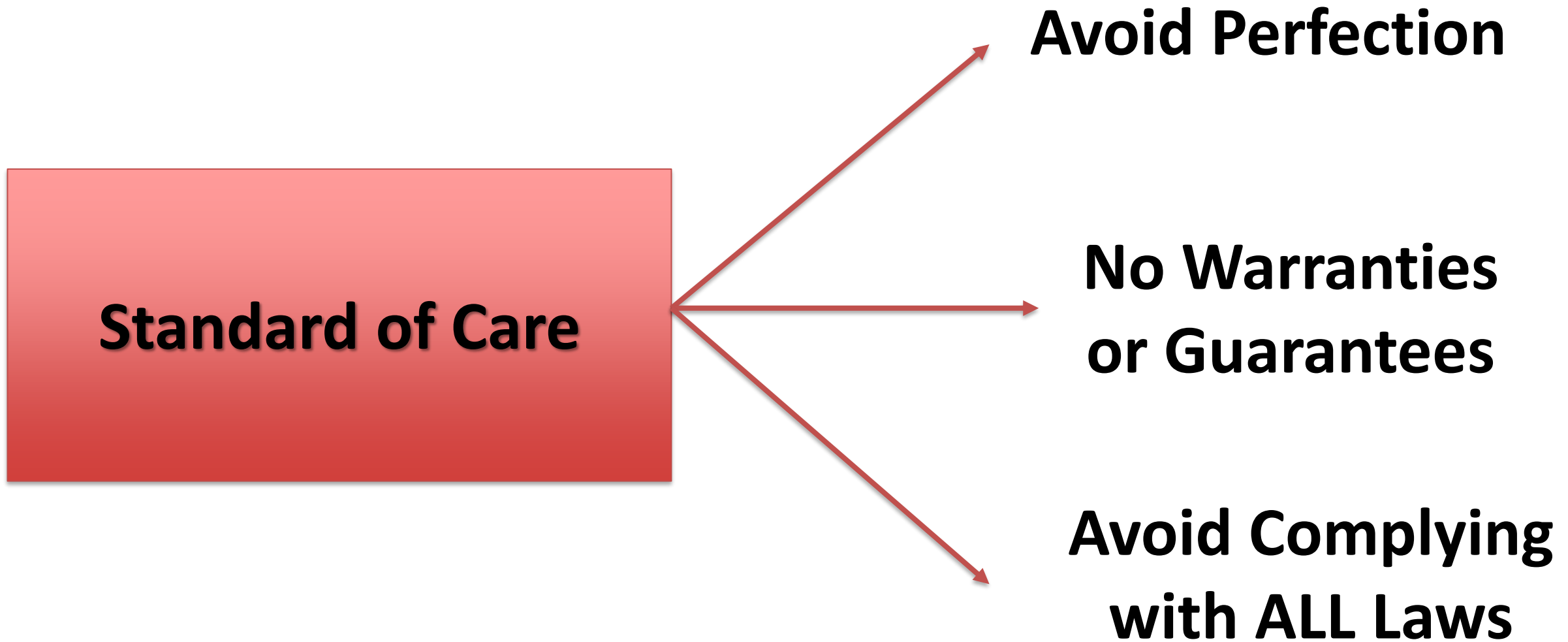
## Options

***Additional  
Services for a Fee***





# Standard of Care



# Standard of Care

## Standard of Care Sample Provision

AIA B101-2017 §2.2

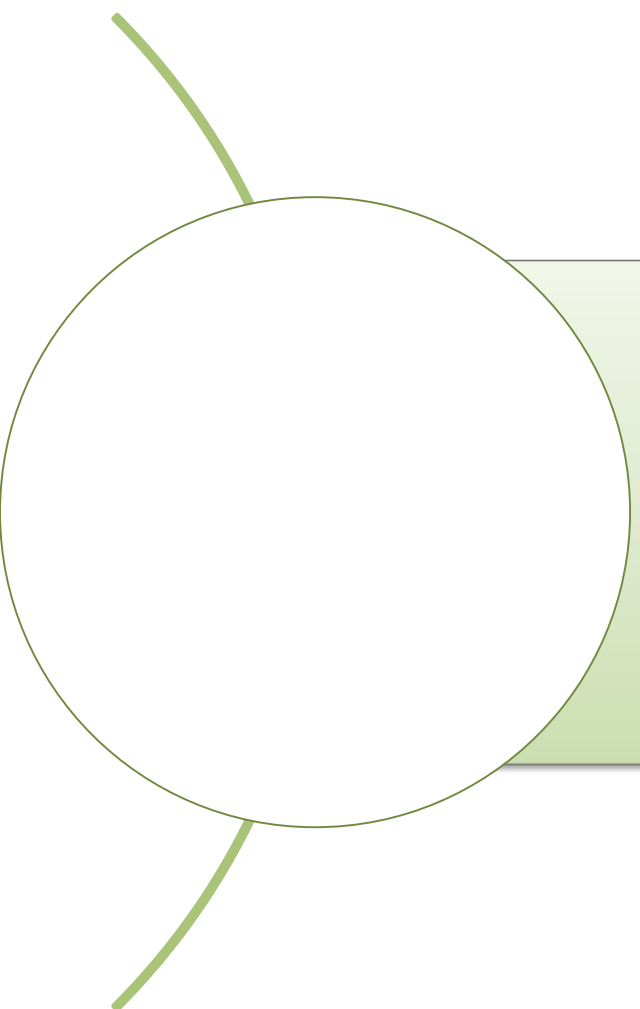
The [Design Professional] shall perform their services consistent with the professional **skill and care ordinarily provided** by [Design Professionals] practicing **in the same or similar locality under the same or similar circumstances...**

# Right to Rely/Site Conditions

## Right to Rely/Site Conditions

- Detail Your Rights
- Within Your Control
- Avoid Hazardous Materials

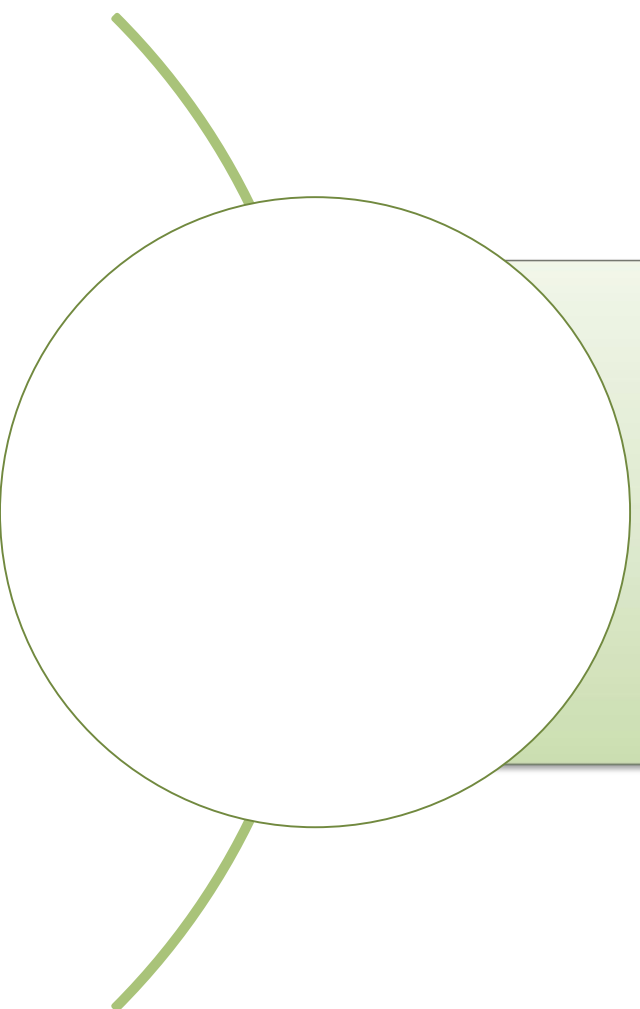
# Right to Rely/Site Conditions



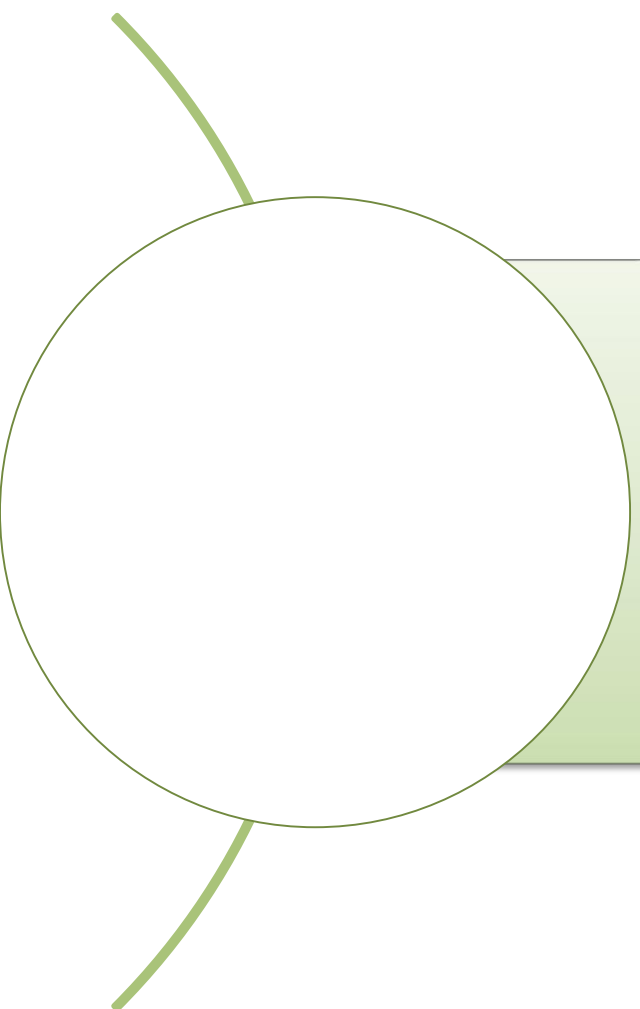
**Detail Your Rights**



# Right to Rely/Site Conditions

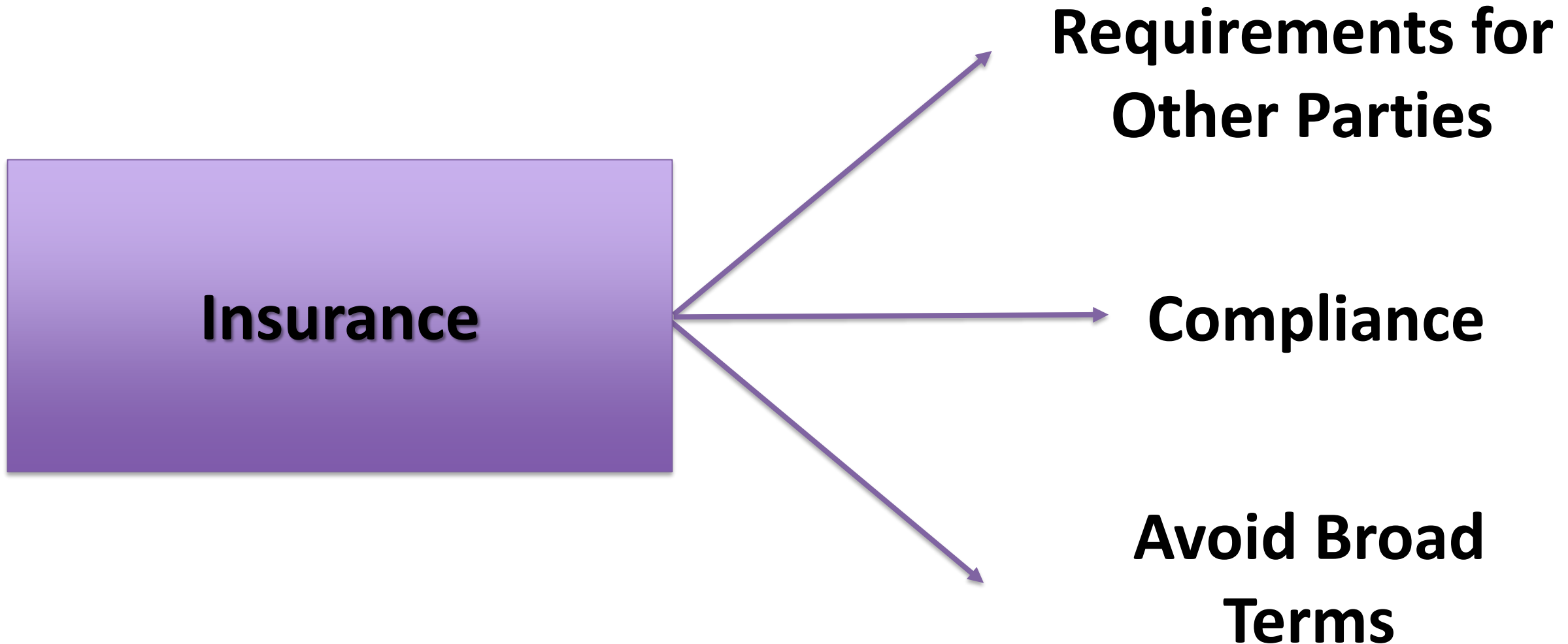


**Within Your Control**

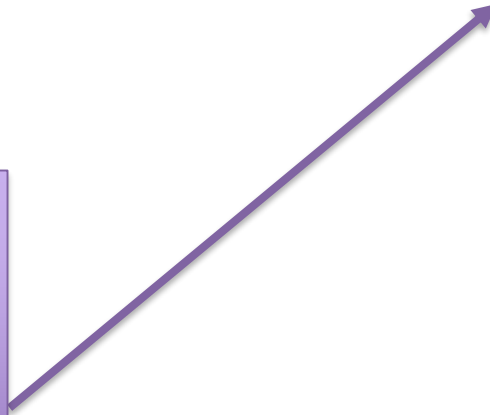


**Avoid Hazardous  
Materials**

# Insurance



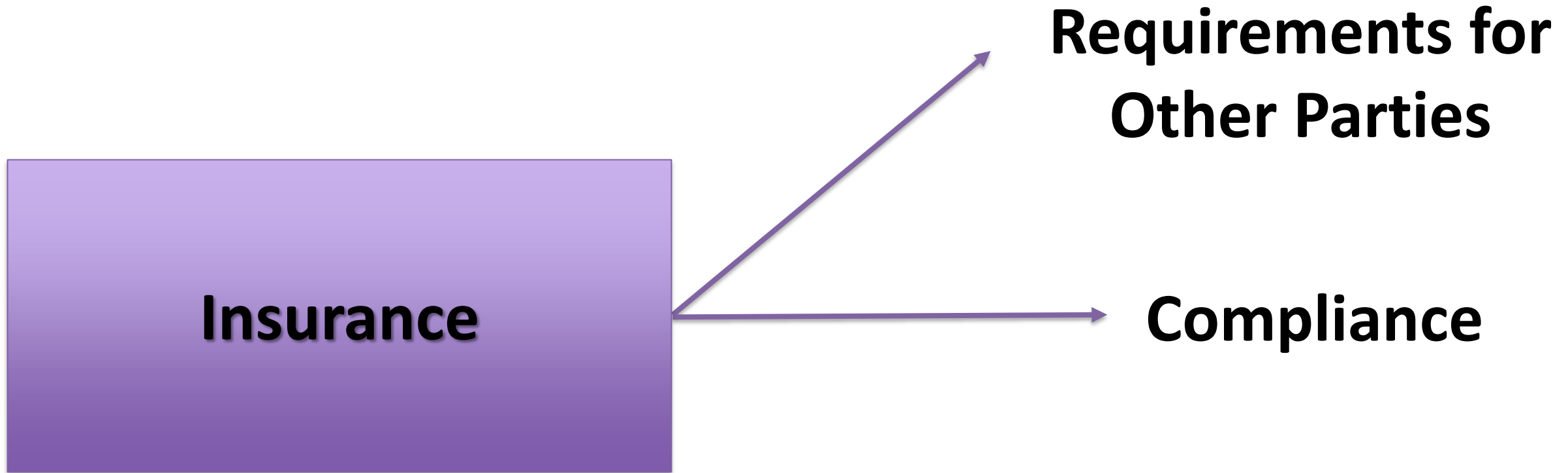
# Insurance



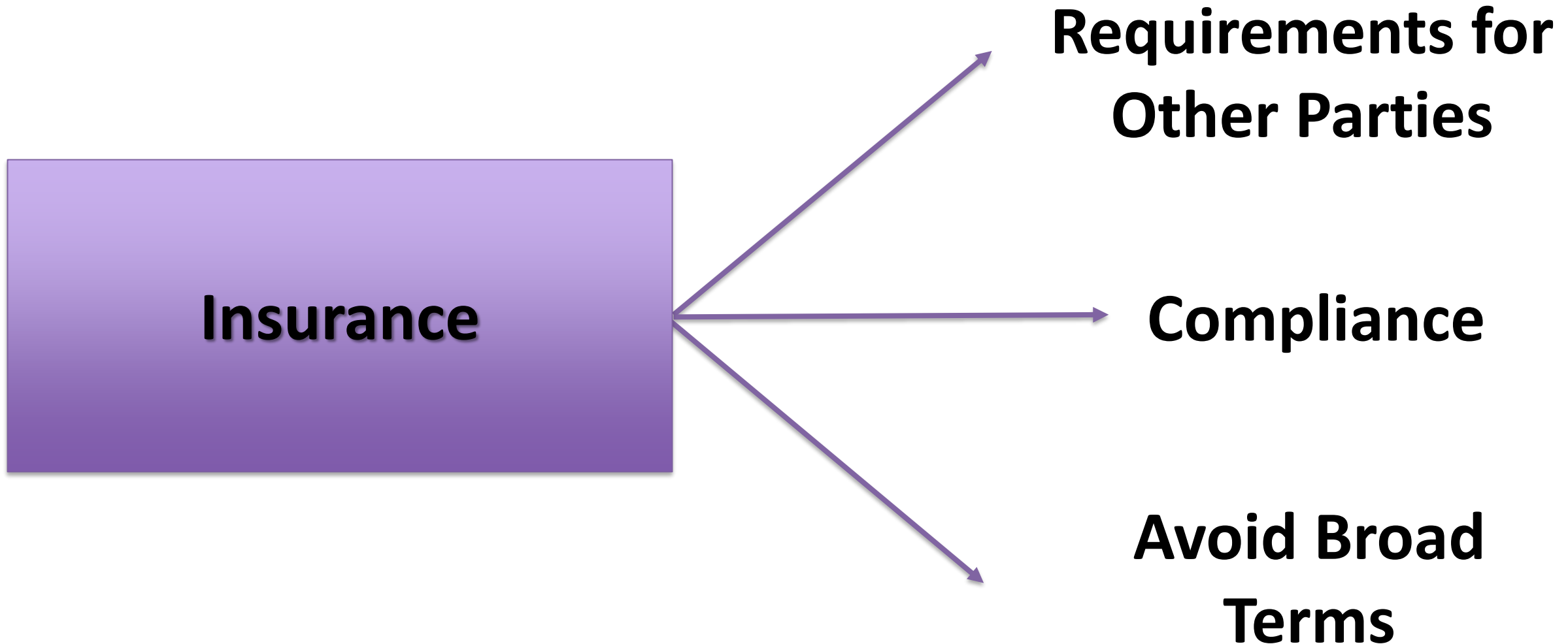
**Requirements for  
Other Parties**



# Insurance



# Insurance



# Insurance – Avoid Broad Terms

AVOID Coverage for ALL  
Claims

Additional Insureds:  
AVOID  
subsidiaries, agents,  
representatives...

Waivers of Subrogation:  
AVOID  
entities other than the  
client

AVOID  
Contractual Liability

# Indemnification

“ Consultant [CH2M Hill] shall indemnify and hold Owner, Developer ...free and harmless from and **against any and all** claims...losses and expenses of any kind, including reasonable fees of attorneys fees... **to the extent they arise out of or are in any way connected with** any negligent act or omission by Consultant...whether such claims, liens, demands, damages, losses or expenses are based upon a contract...or upon **any other legal or equitable theory** whatsoever. Consultant agrees, at his own expense and upon written request by Developer or Owner of the Subject Property, to **defend any suit, action or demand** brought against Developer or Owner **on any claim or demand covered herein....**”



# Indemnification

~~Overbroad  
Parties~~

~~Overbroad  
Claims~~

~~Duty to  
Defend~~

# No Third-Party Beneficiaries

Lender

Owner

Your Firm

Contractor

Developer

# Limitation of Liability

1

Set Fee

**“not to exceed \$\_\_ amount.”**

shall not exceed the total amount of \$\_\_\_\_ or the total compensation received by Engineer under this Agreement, whichever is greater. Higher limits are available for an additional fee.

2

Contract Price

**“not to exceed contract price.”**

shall not exceed the total compensation received by Engineer under this Agreement.

3

Insurance Coverage

**“to the extent such provisions or indemnity is covered by the design professional’s professional liability insurance.”**

shall not exceed the total insurance proceeds paid on behalf of or to Engineer by Engineer’s insurers in settlement or satisfaction of Owner’s Claims under the terms and conditions of Engineer’s insurance policies applicable thereto (excluding fees, costs and expenses of investigation, claims adjustment, defense, and appeal).



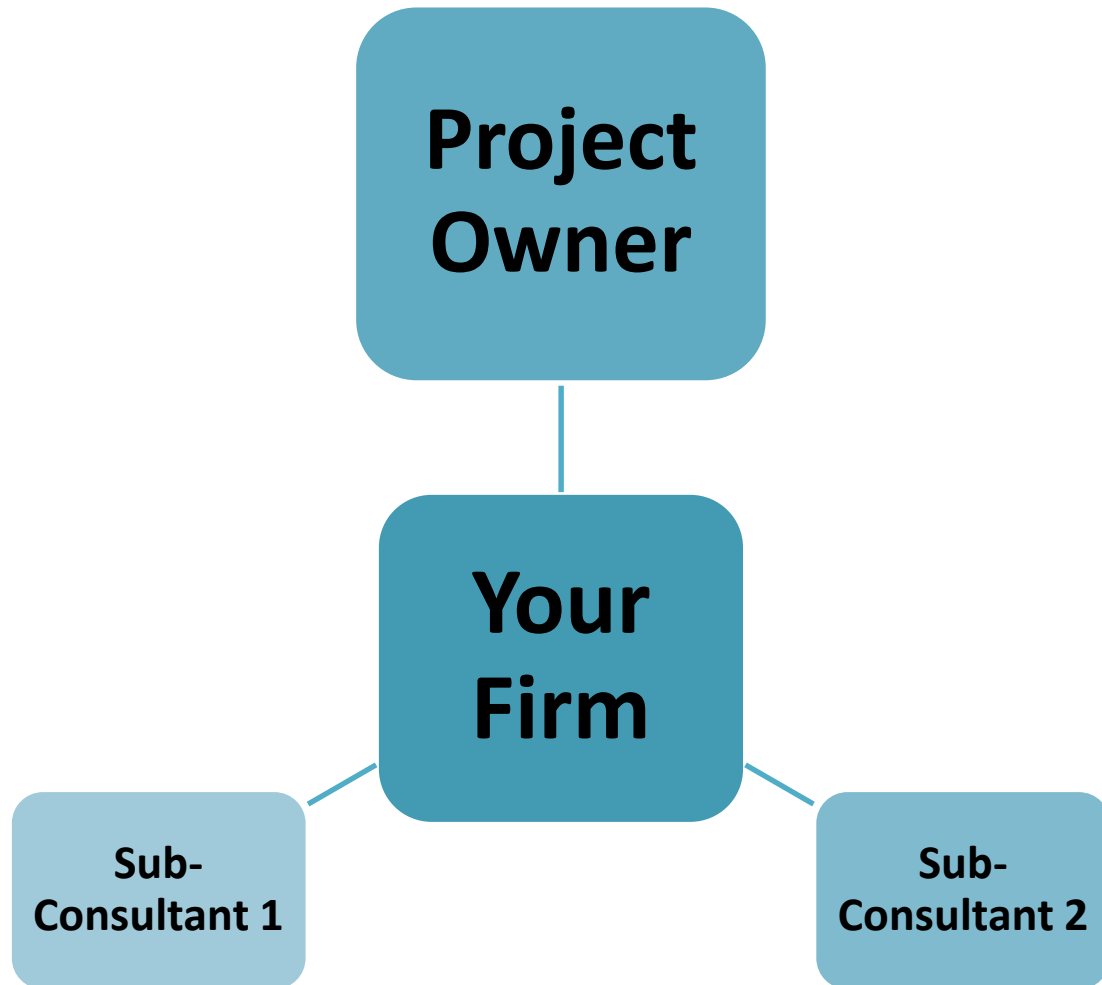
# Your Subconsultants

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# Subconsultant Exposures



- ✓ ***Vicarious Liability***
- ✓ ***Uninsured or Underinsured Exposures***
- ✓ ***Flow Down***

# Case Law

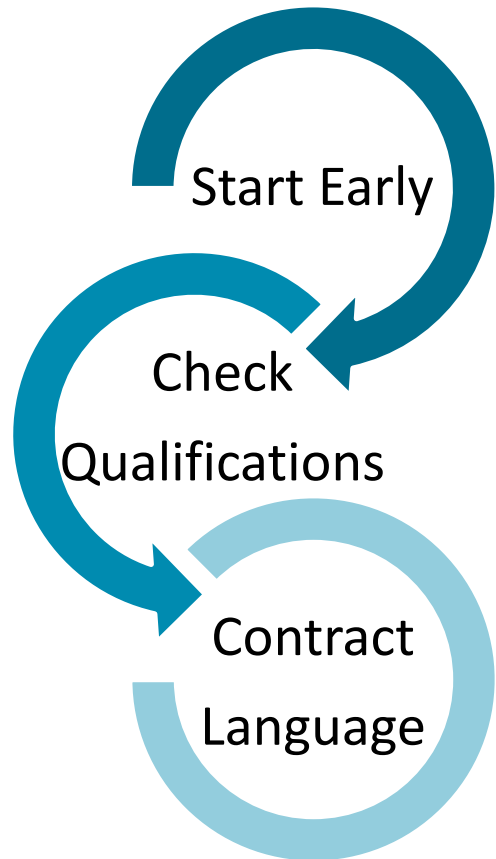
Prime held vicariously liable for **\$1.3 million in damages caused by the subcontractor's work**, 7 years after completion of the project.

\*This award was later amended to just over \$976k.



# Choosing the Right Partners

## 3 Steps to Creating the Dream Team



Start Early

The earlier you start the selection process the better.

Check

Qualifications

Is the sub consultant qualified for this type of project?

Contract

Language

What to include in the contract.

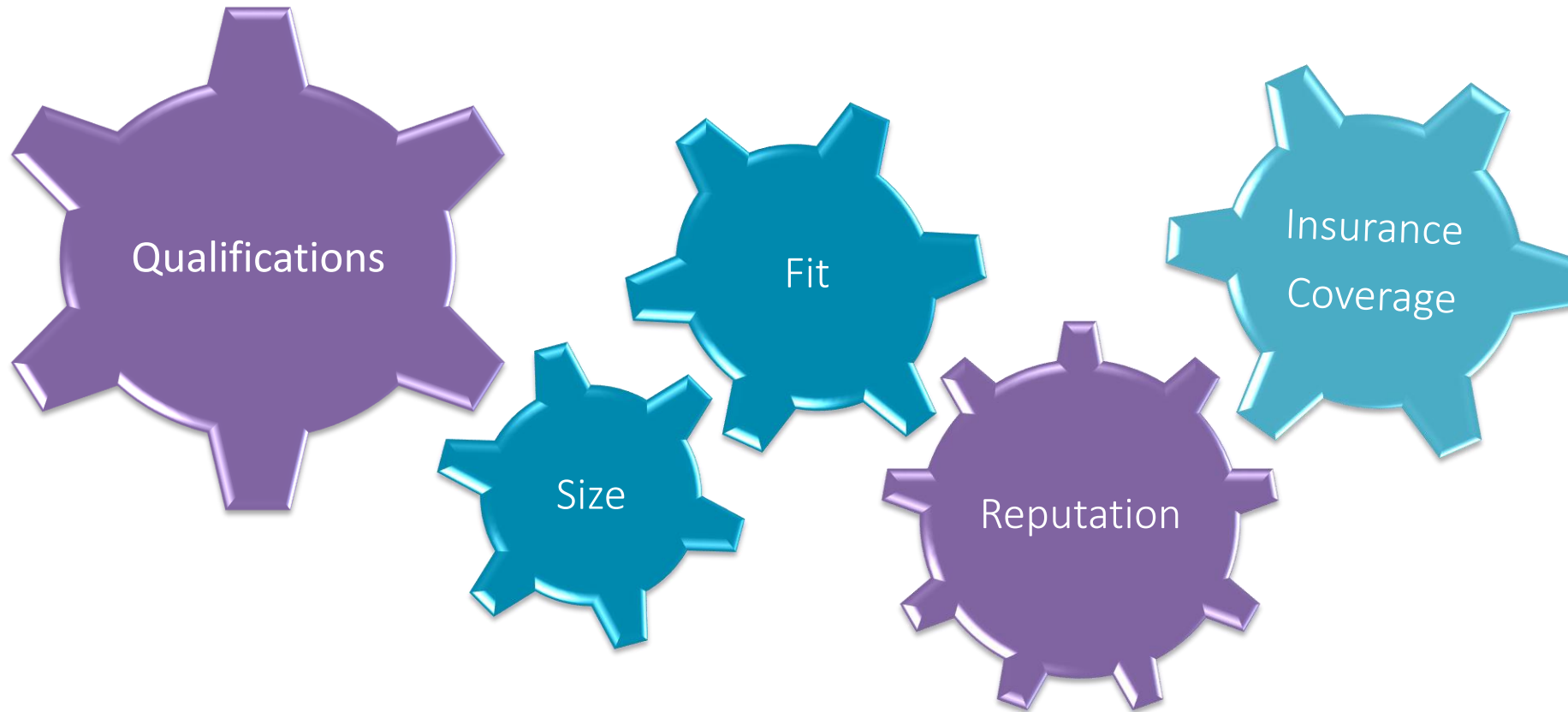
# Finding Subs

## Strategies to finding a sub consultant

- ✓ Previous working relationship
- ✓ Referrals
- ✓ Request for proposals (RFP)
- ✓ Professional organization database

# Subs: Check Qualifications

Is the Sub Right For This Project?



# Contract Language



## Flow Down Clause

Aka “pass through clause”.  
Incorporates the terms of the Prime Agreement into lower tier agreements.

# Contract Language

## Flow Down Contract Requirements

Examples of contract provisions to flow down:

Standard of care

Payment terms

Insurance

Indemnity

Dispute resolution



# Double Check the Insurance!

Check your sub consultant's insurance for:



## Coverage

Make sure your sub consultant has adequate insurance before a project starts.

## Duration

Make sure your sub consultant's insurance lasts for the time of the statute of limitation in that jurisdiction or requirements of the Prime Agreement, whichever is longer.

**Helpful hint:** Require notification of cancellation, renewal, nonrenewal or any changes in the policy.

# Additional Insured Obligations

AIA B103-2017 §2.5.7

“To the fullest extent permitted by the law, the [**Architect**] shall cause the primary and excess or umbrella policies for Commercial General Liability and Automobile Liability to include the [**Owner**] as an additional insured for claims caused in whole or in part by the [**Architect’s**] negligent acts or omissions. The additional insured coverage shall be primary and non-contributory to any of the [**Owner’s**] insurance policies and shall apply to both ongoing and completed operations.”

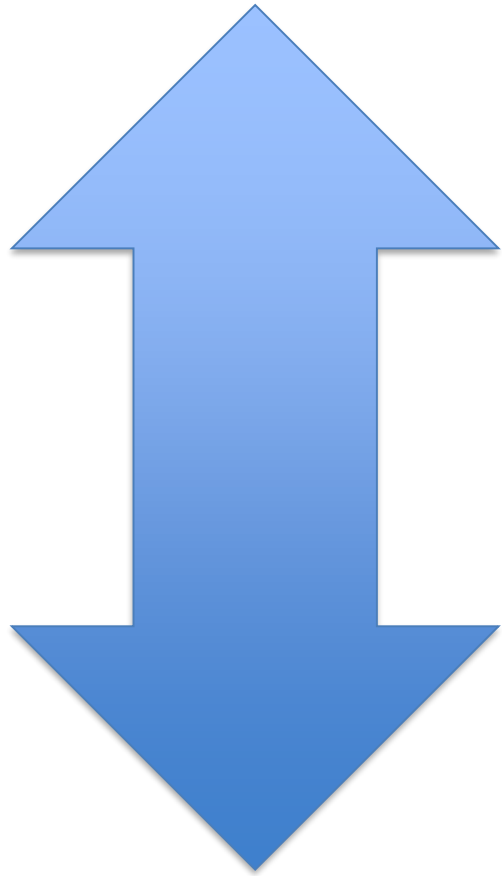
# Indemnification



*The obligation of one party to provide compensation for a loss suffered by another party*

***Your subconsultant should  
indemnify and hold your  
firm harmless***

# Dispute Resolution



**CONSISTENCY!**



# Negotiation

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# Go-No-Go Matrix



DESIGN PROFESSIONALS RESOURCES

RISK MANAGEMENT

ENROLLMENT FORM

DESIGN PROFESSIONALS LEARNING EVENTS (DPLE)

DPLE COURSES

CONTACT DESIGN PROFESSIONALS

## Design Professionals Risk Management

Every A&E business faces risks, and they can never be entirely prevented. They can, however, be minimized through risk management programs. Our goal is to help you reduce the likelihood of losses resulting from most risks design professionals face.

### Risk Management Programs

#### DPLE SERIES

Our continuing education program provides the education resources design firms need. The DPLE series offers more than 125 courses that have been approved by the AIA for continuing education learning units. Learn more about our [DPLE Series](#).

Click here to access RLI's Go No-Go Matrix



### PROJECT MANAGEMENT

This program includes a dynamic [project risk management matrix](#) and to help A&E firms effectively identify, assess, manage and control the risks associated with the projects they engage in. Guidelines for using the matrix and additional risk management best practices are provided in the project [risk management matrix instruction guide](#).

Visit <https://www.rlicorp.com/dp-risk-management>



# Negotiation

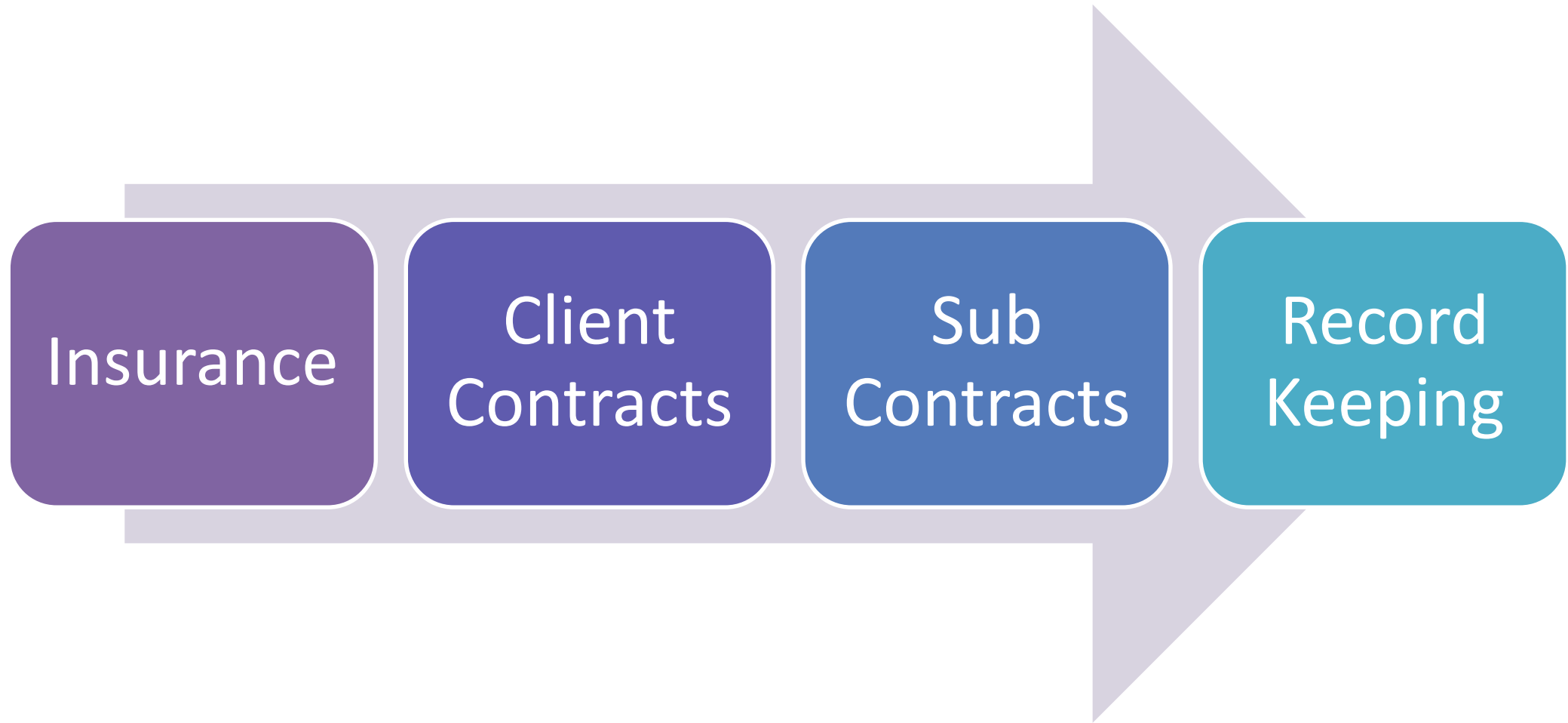
## Client Contract

- Highlight Insurability Issues
- Ask Questions
- Provide Options

## Subconsultant Contract

- Flow Down Requirements
- Highlight risks and rewards of the project

# Wrap-up



Thank you for your time!

# QUESTIONS?

This concludes The American Institute of Architects  
Continuing Education Systems Program

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