



The Art of Risk Transfer

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DIFFERENT WORKS

RLI Design Professionals
DPLE 317
May 25, 2022

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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:

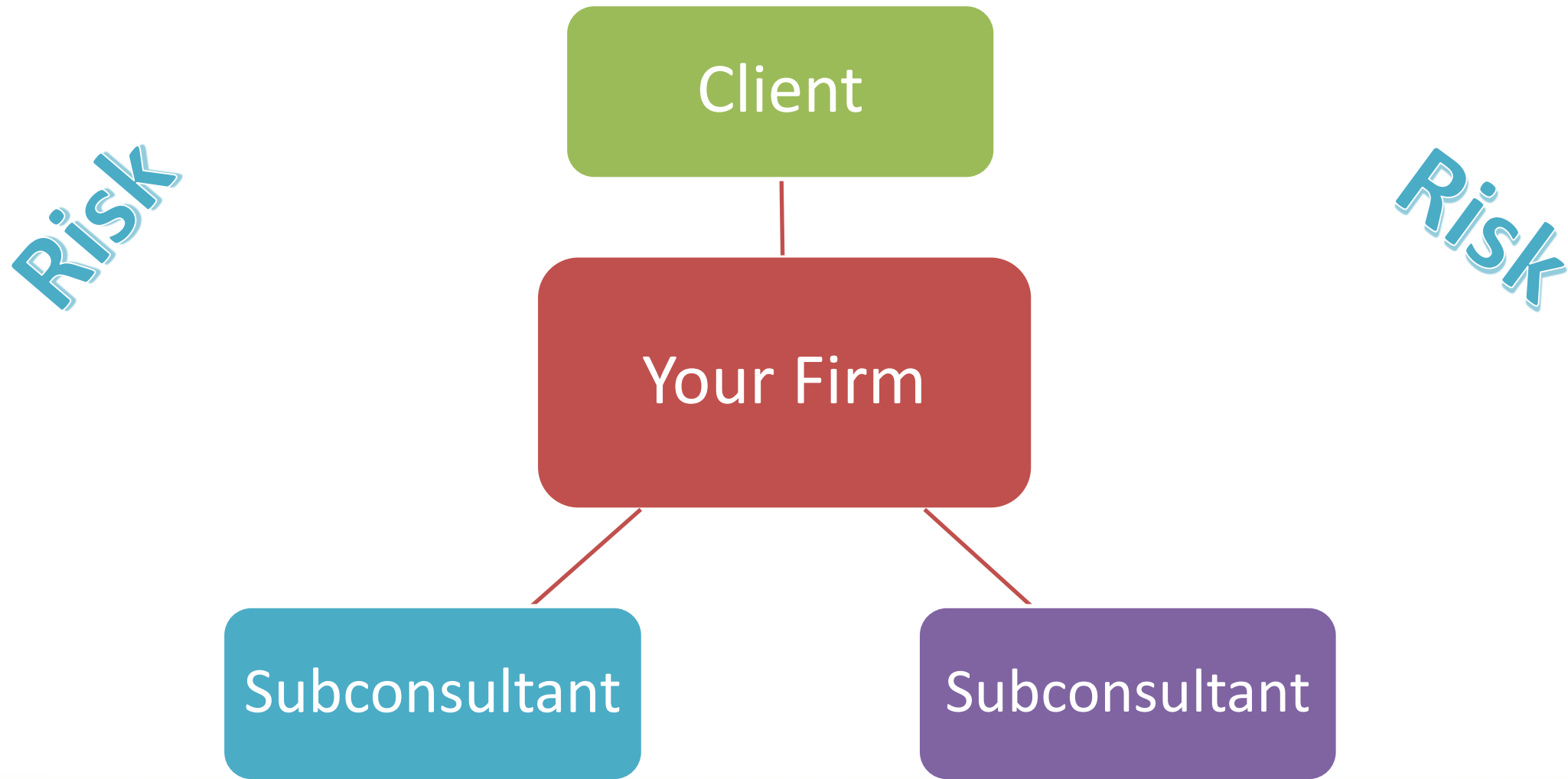
- 1** Gain an understanding of the different risk transfer measures in the construction industry;
- 2** Learn about the benefits of risk transfer and how they can impact a situation and your business;
- 3** Review specific examples of risk transfer including contract language; and
- 4** Examine techniques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

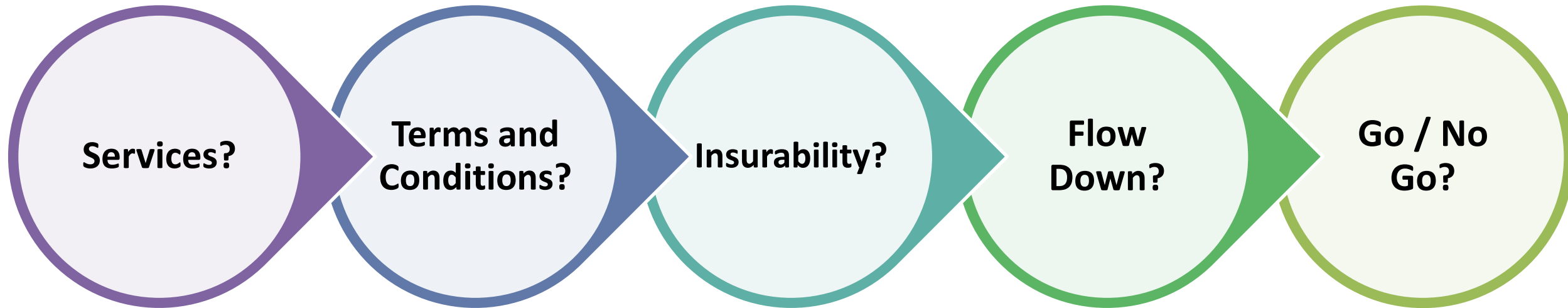


Your Standard Agreement

Client Drafted Agreement



Client Contract



Your Responsibilities

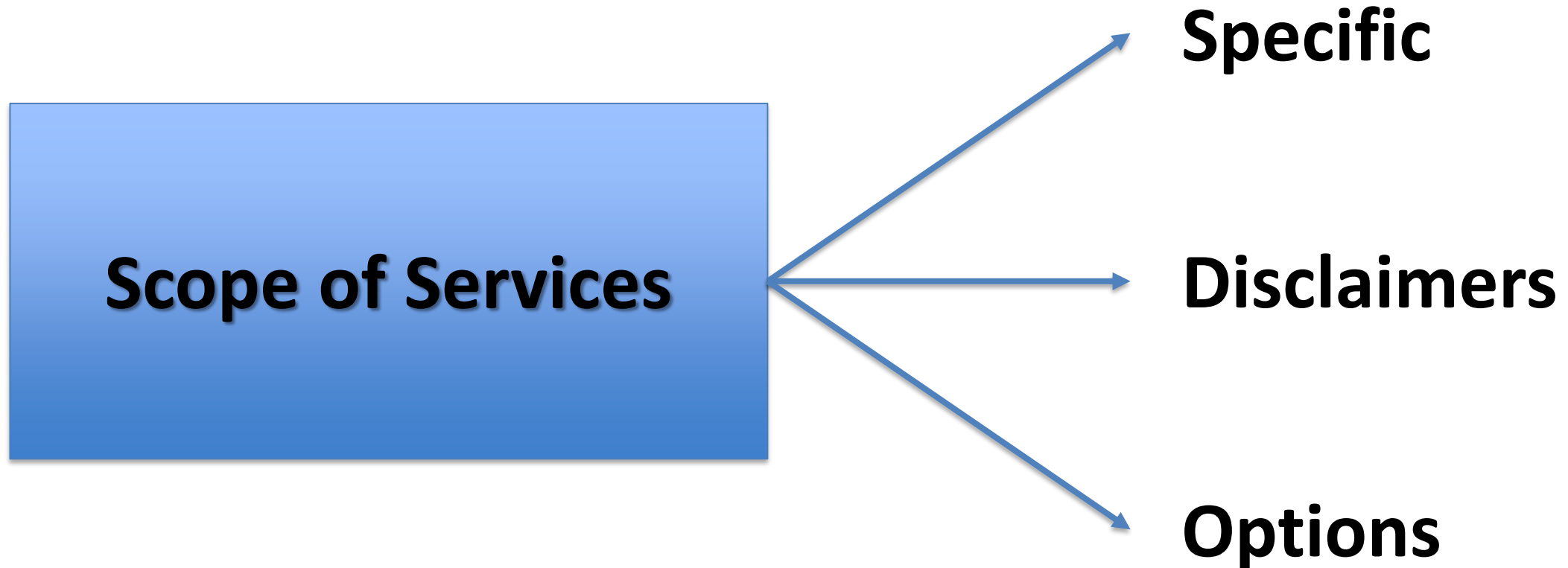
Scope of Services

Standard of Care

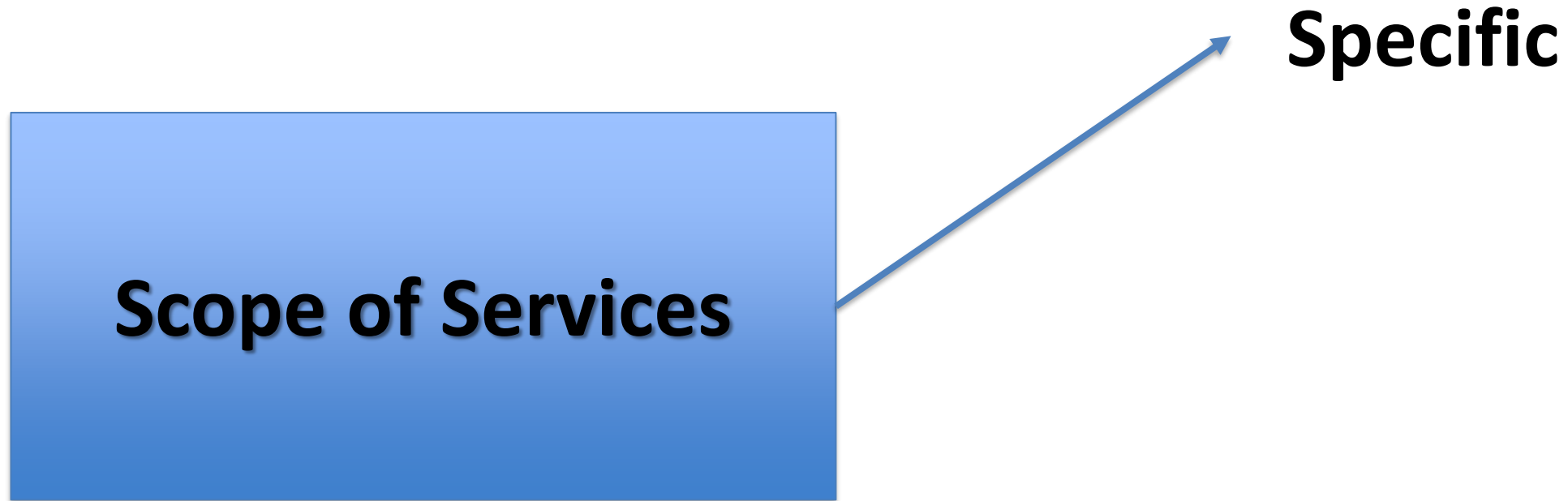
Insurance

**Right to Rely/Site
Conditions**

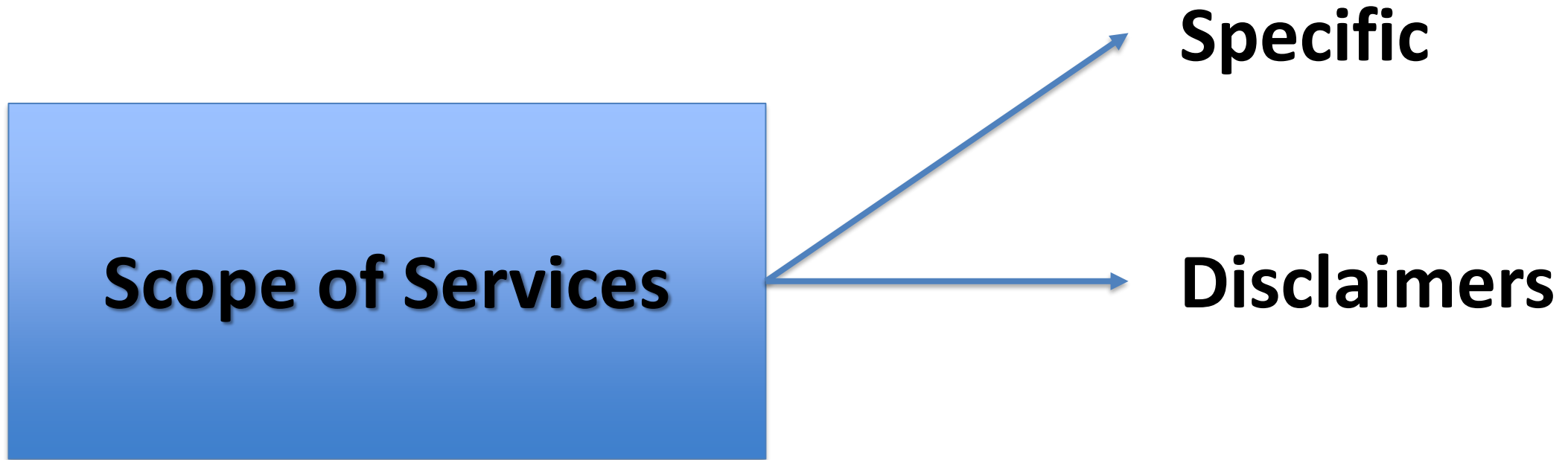
Scope of Services



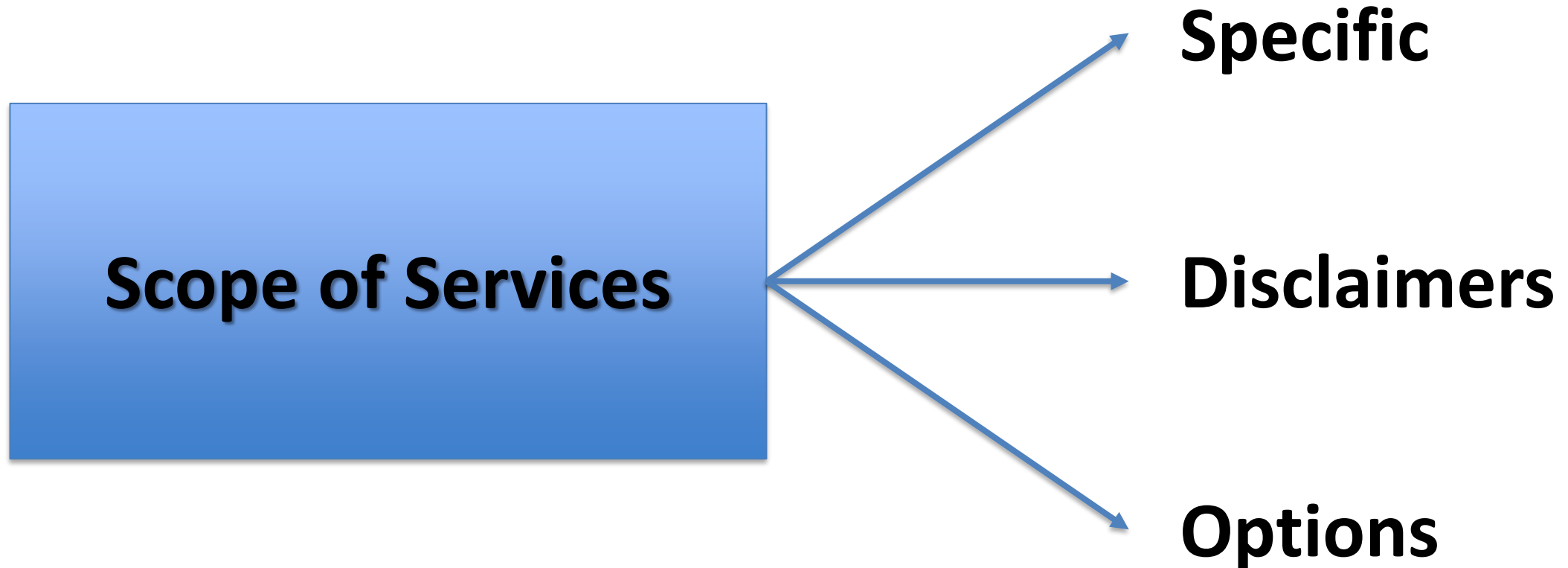
Scope of Services



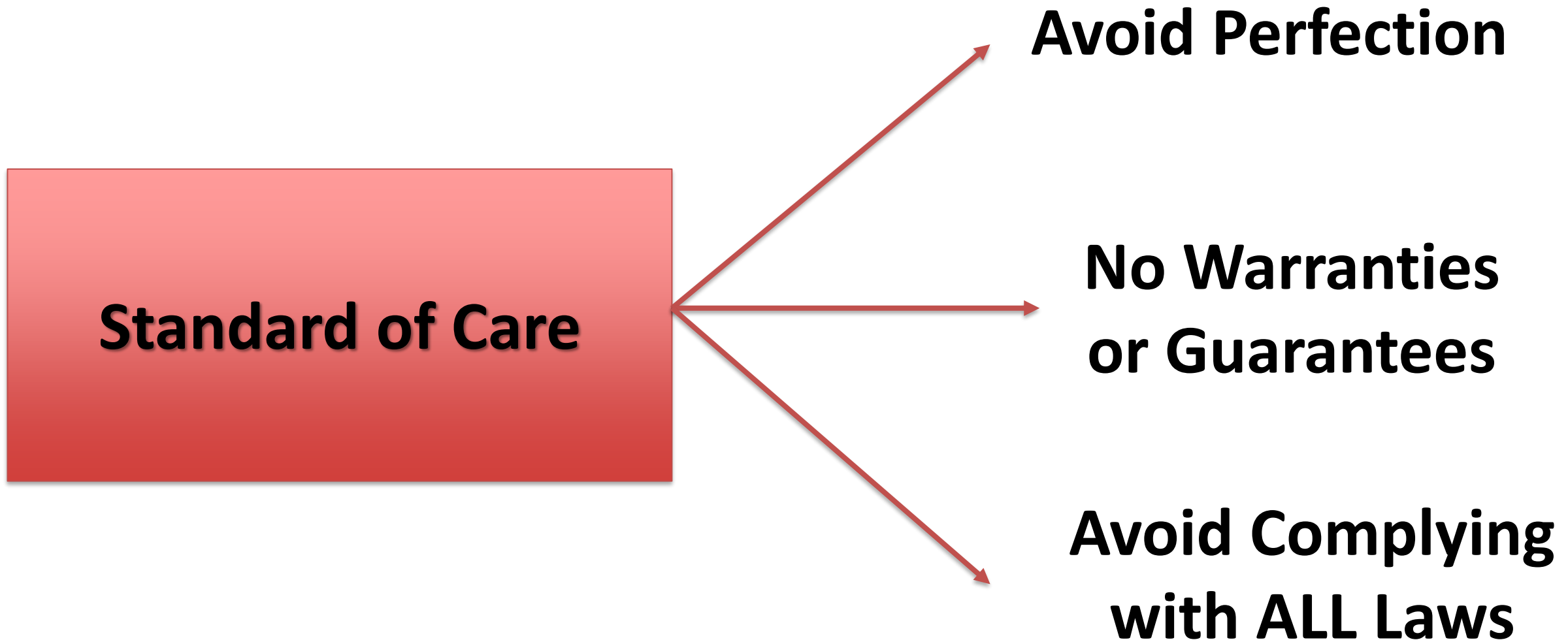
Scope of Services



Scope of Services



Standard of Care



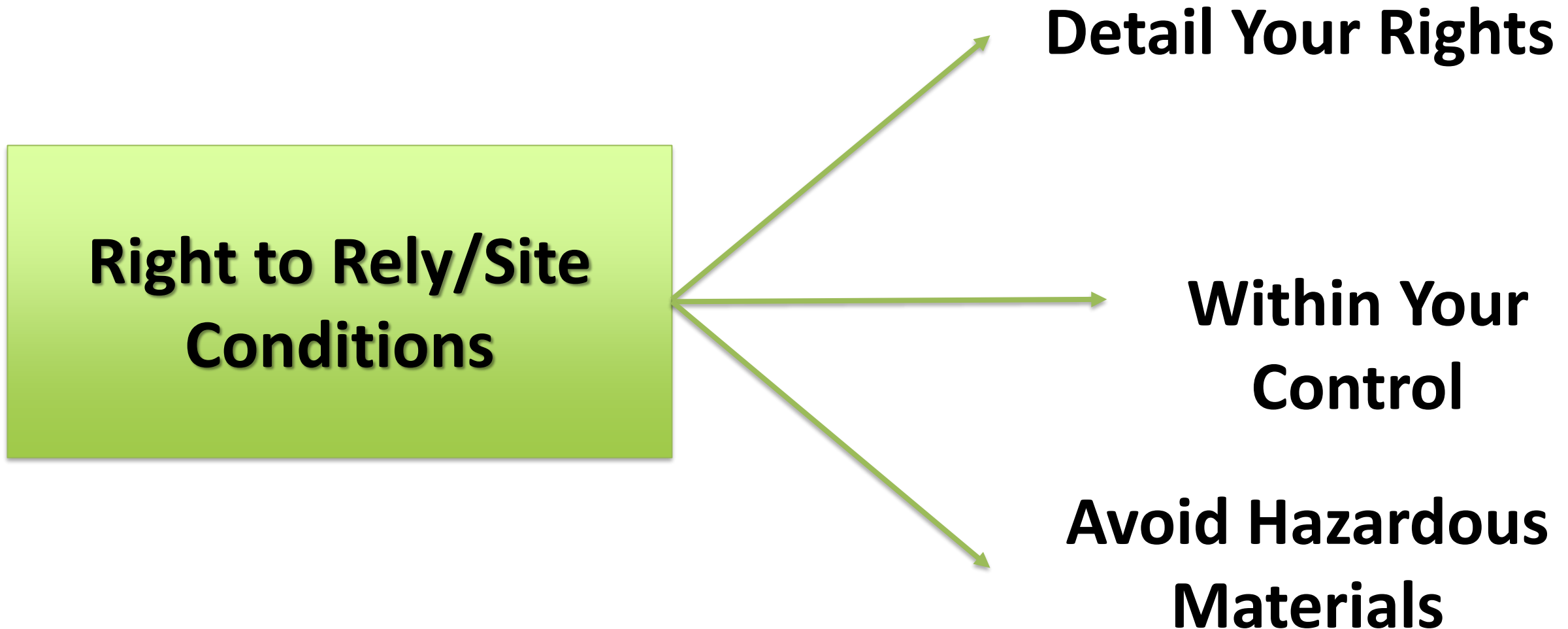
Standard of Care

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



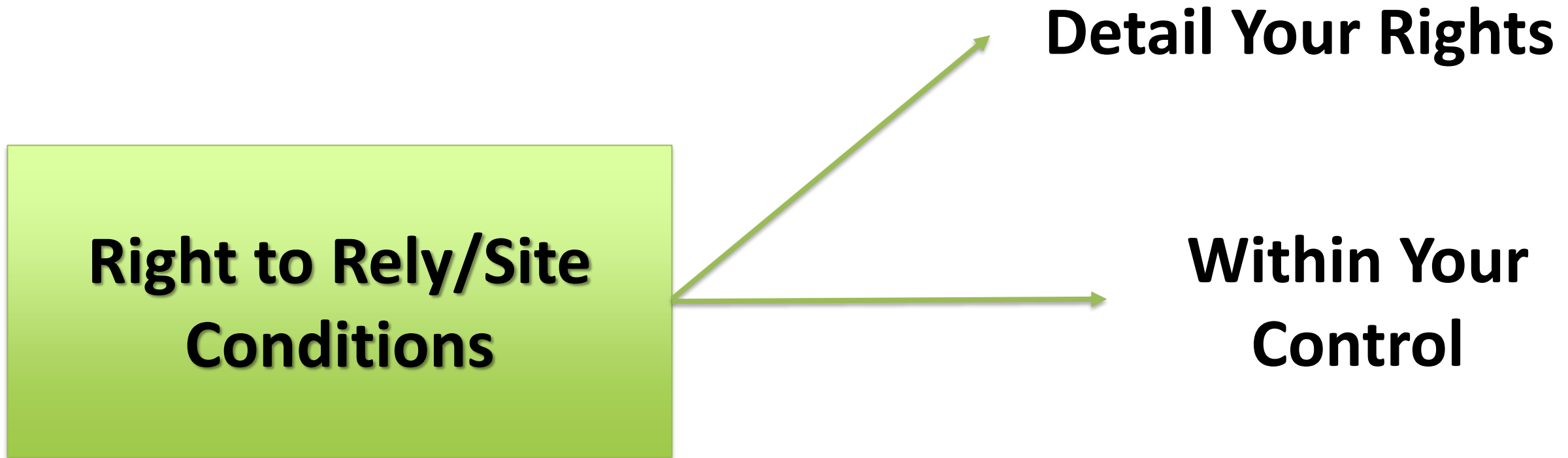
Right to Rely/Site Conditions

Detail Your Rights

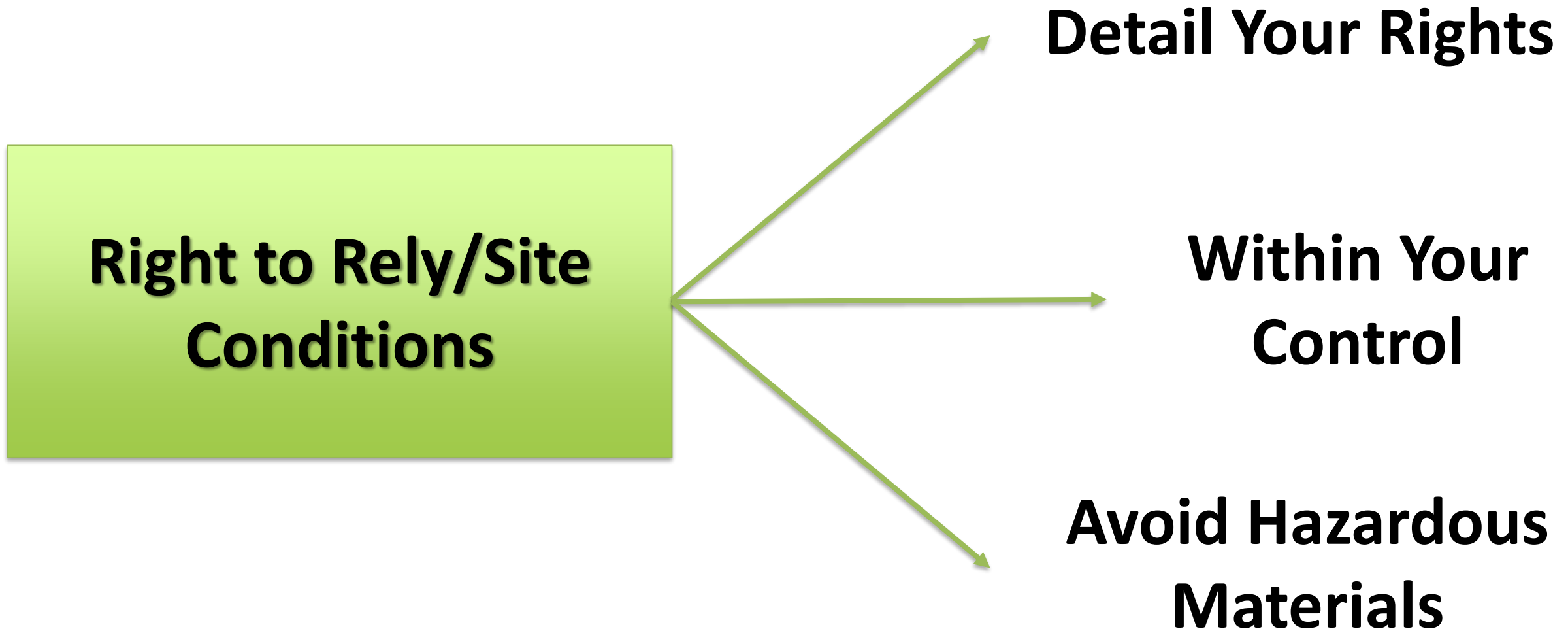


**Right to Rely/Site
Conditions**

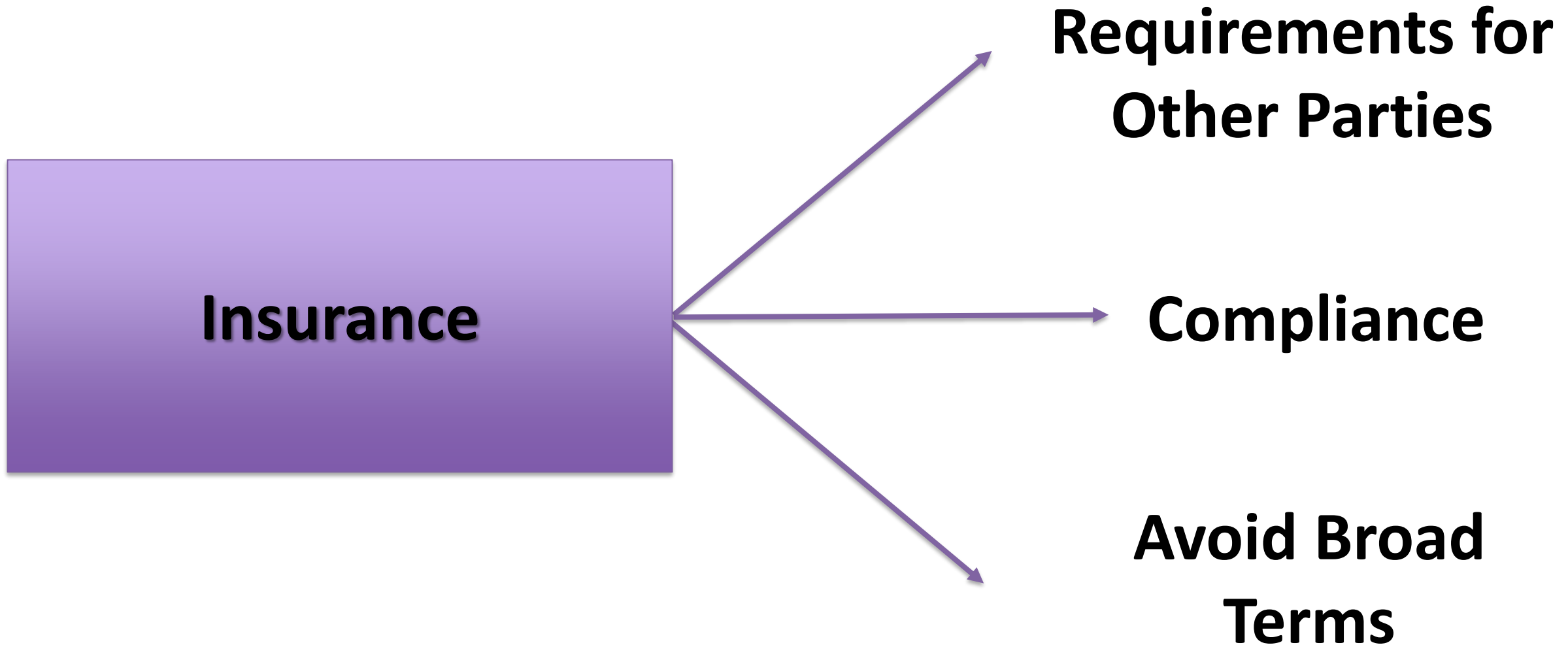
Right to Rely/Site Conditions

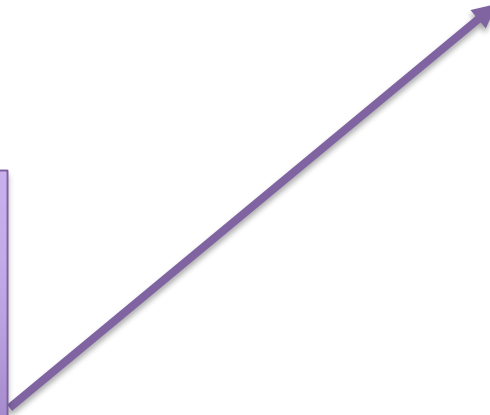


Right to Rely/Site Conditions



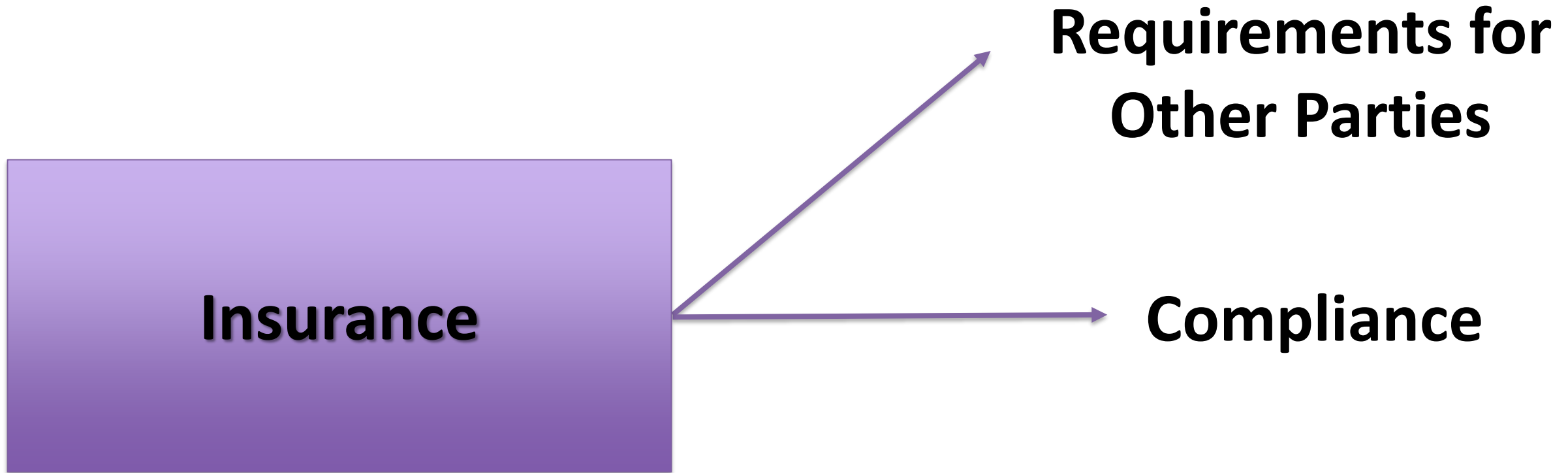
Insurance



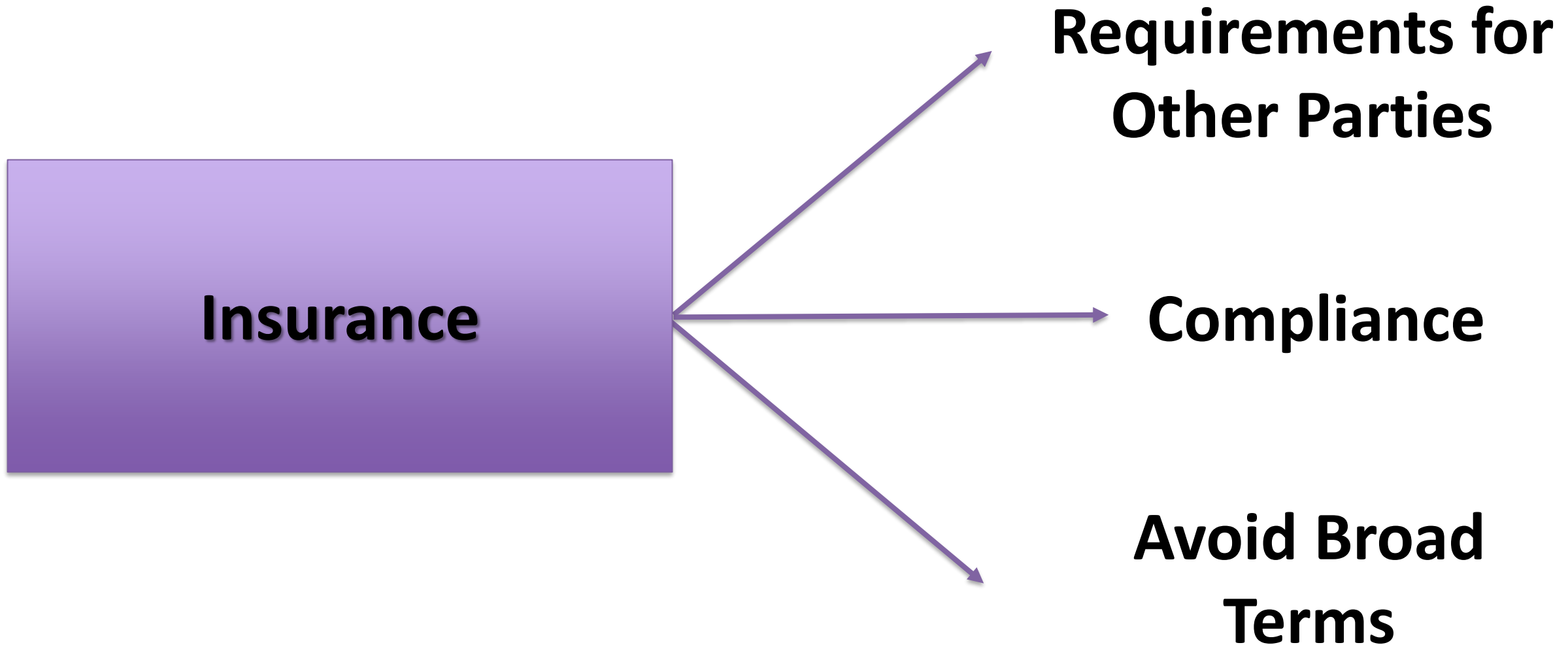


**Requirements for
Other Parties**

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....** ”

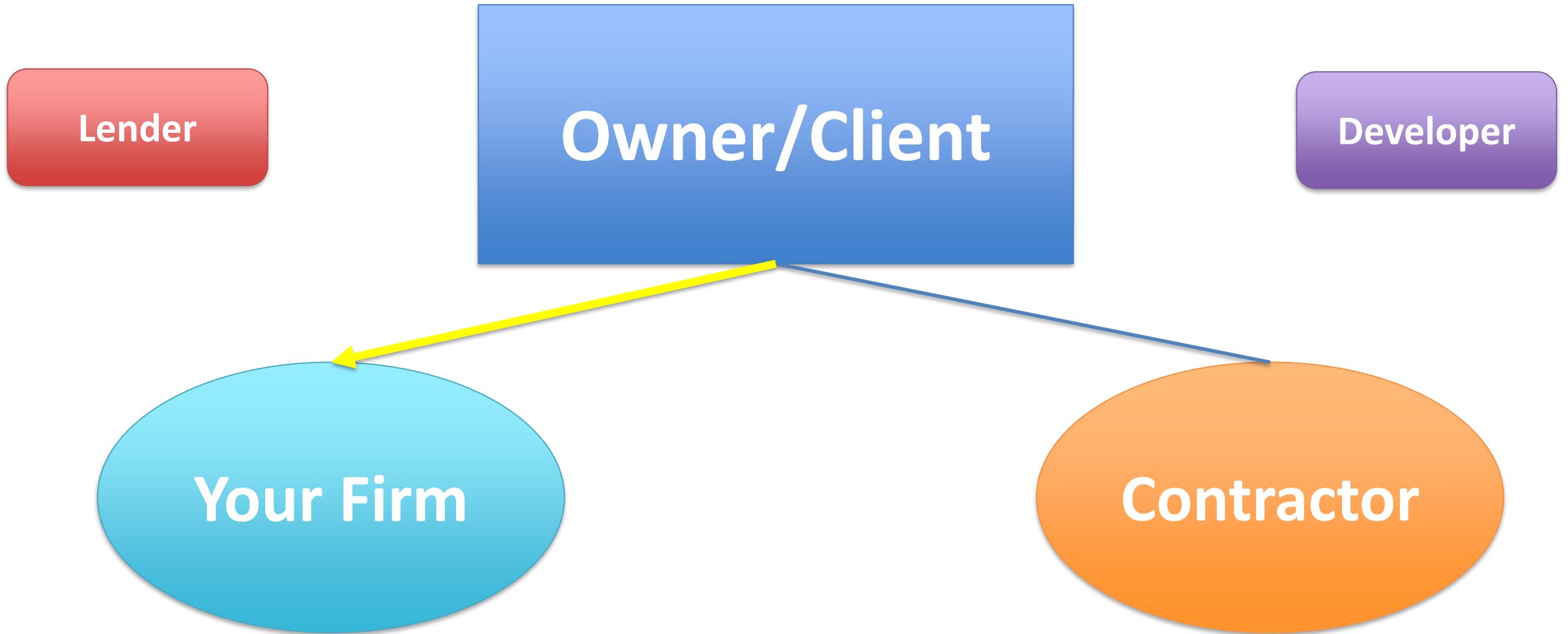
Indemnification

~~Overbroad
Parties~~

~~Overbroad
Claims~~

~~Duty to
Defend~~

No Third-Party Beneficiaries



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.”

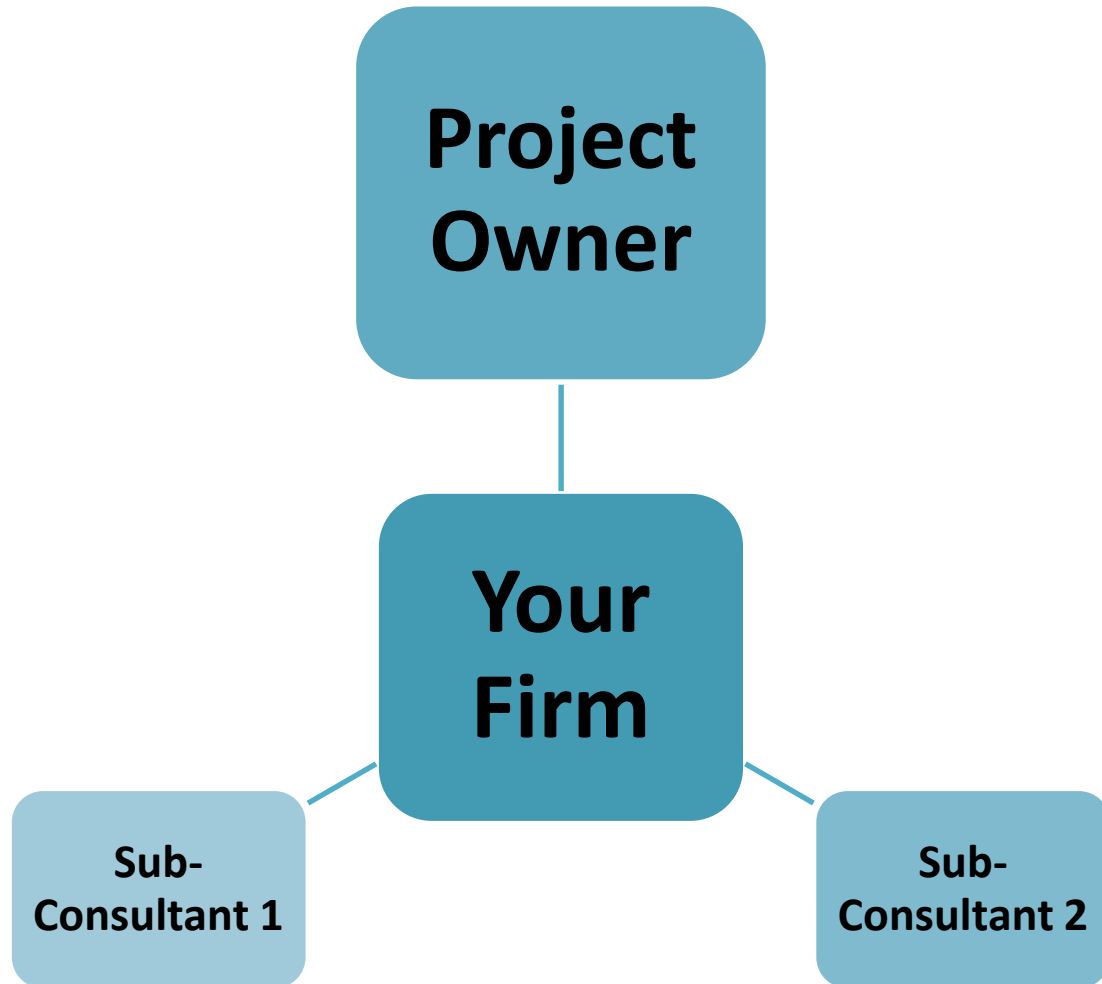
shall not exceed the total insurance proceeds paid on behalf of or to Engineer by Engineer’s insurers in settlement or satisfaction of Owner’s Claims under the terms and conditions of Engineer’s insurance policies applicable thereto (excluding fees, costs and expenses of investigation, claims adjustment,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

Your Subconsultants

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Subconsultant Exposures



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

Case Law

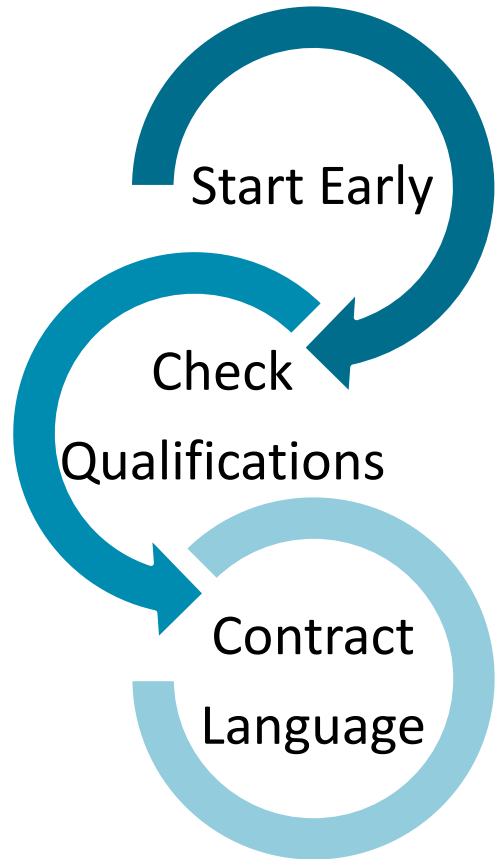
Prime held vicariously liable for **\$1.3 million in damages caused by the subcontractor's work**, 7 years after completion of the project.

*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.

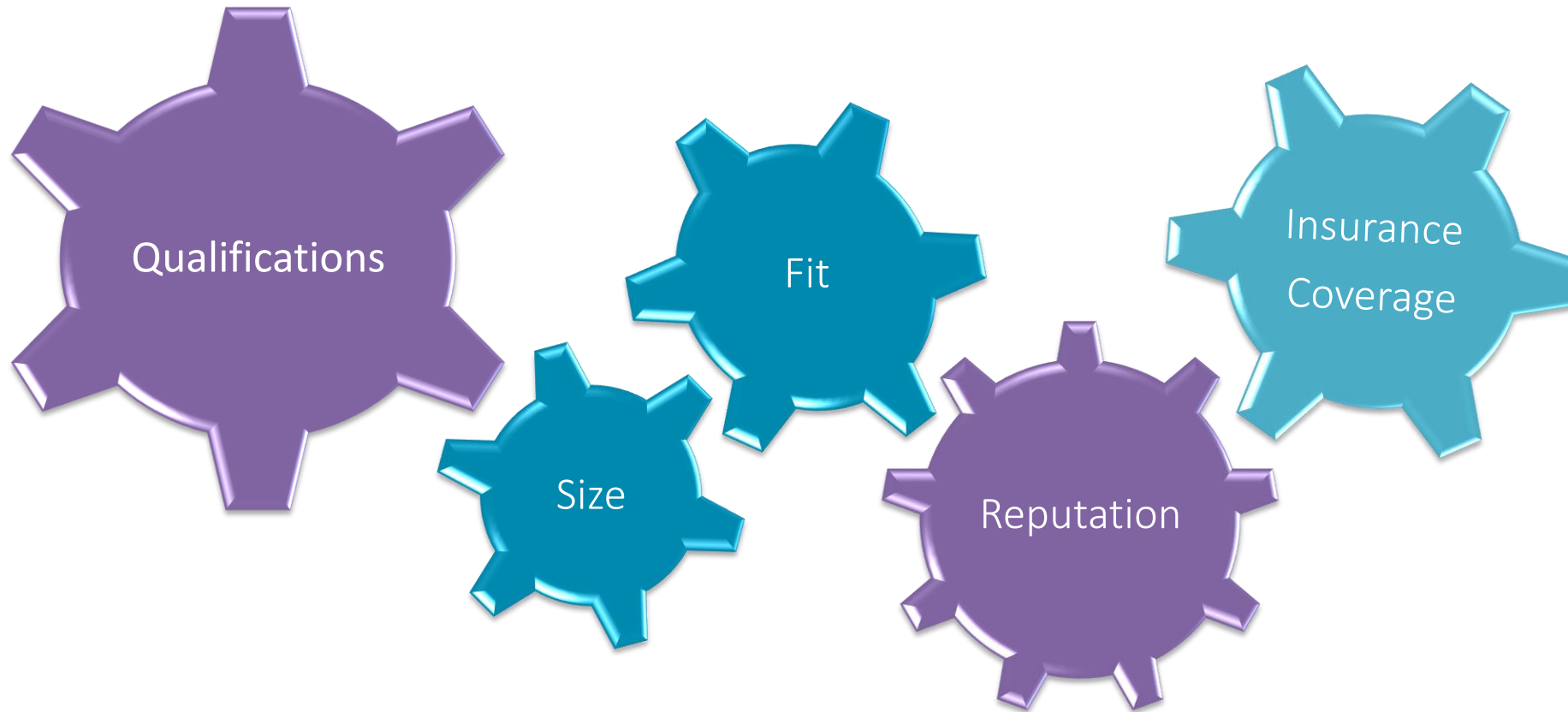
Finding Subs

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.”

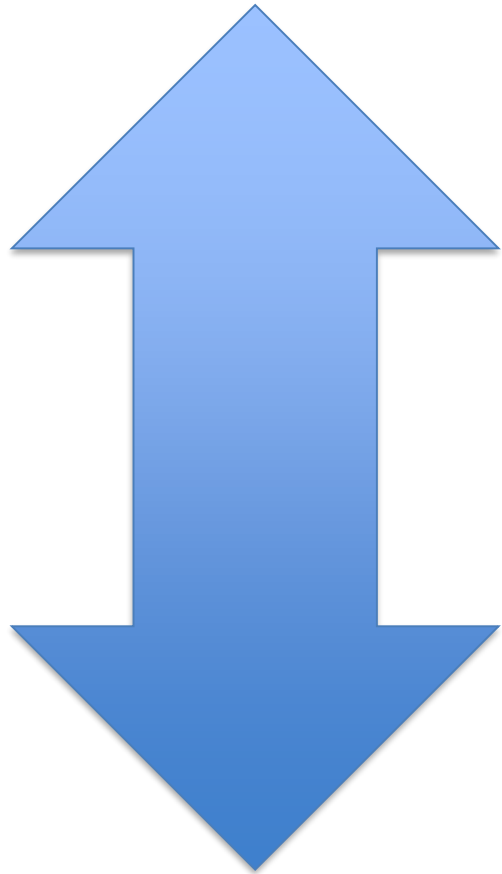
Indemnification



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



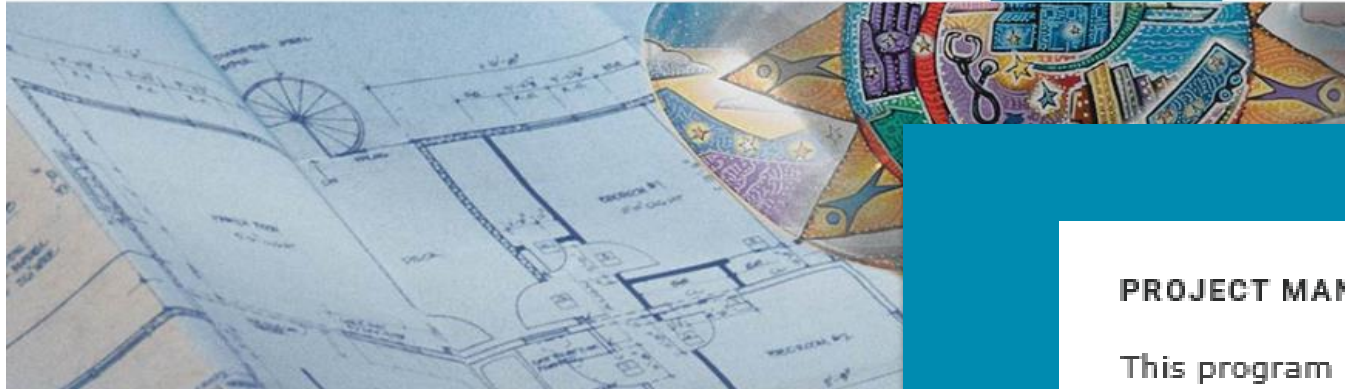
CONSISTENCY!

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

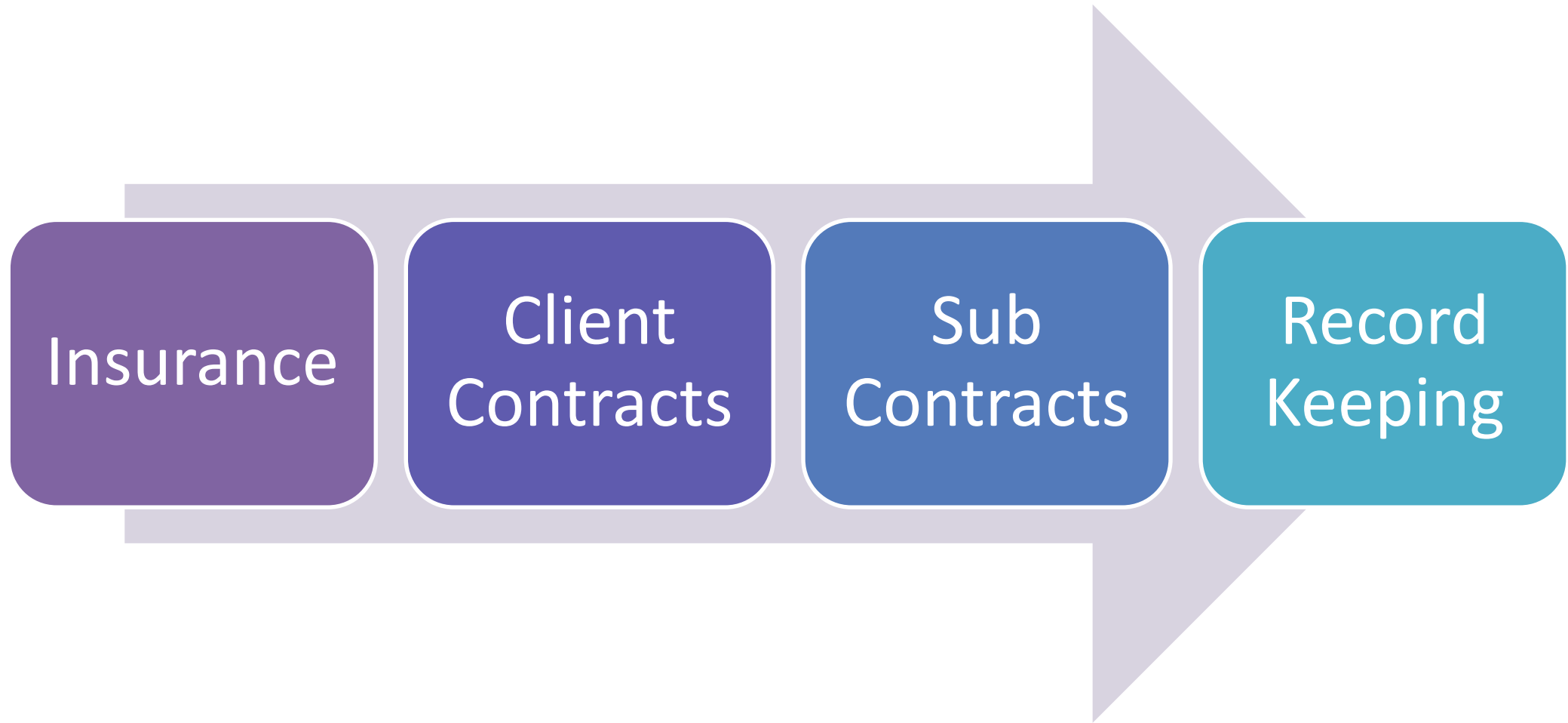
Client Contract

- 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

Ellen Wechsler, Operations Representative
Ellen.Wechsler@rlicorp.com

Laura Malloy, Loss Control Director
Laura.Malloy@rlicorp.com

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