



Construction Phase Services: Pitfalls, Perils and Payment

DPLE 147

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Course Description

Expectations of perfection and other misconceptions result in clients viewing design professionals as a source of cost recovery on projects that have run over budget, have encountered changed conditions, or have a construction contractor that submits change orders to increase their own compensation. This course will explore the pitfalls design professionals face when providing construction phase services. We will identify the sources of these pitfalls as well as how design professionals can mitigate them without compromising public health, safety and welfare.

Learning Objectives

Participants will:

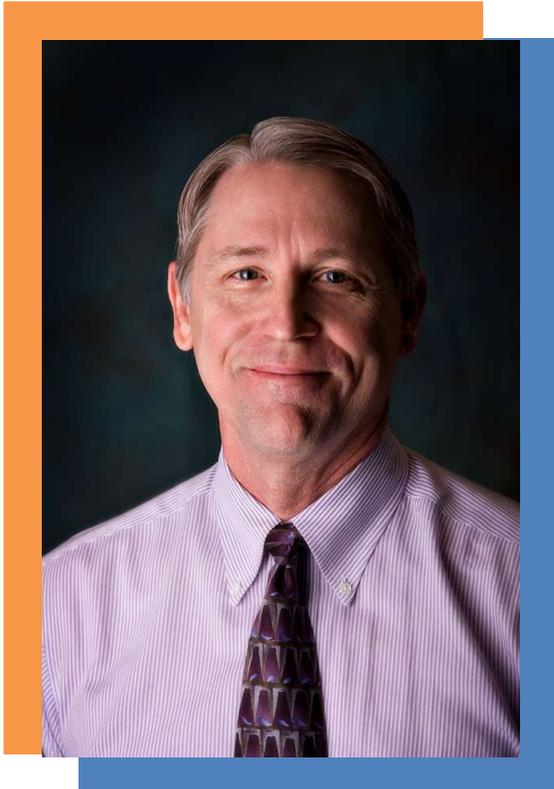
Learn about the drivers that promote unreasonable expectations, and what design professionals can do to manage client expectations for the benefit of both the project and the community at large

Gain an understanding of how to manage construction phase services in an ethical manner while protecting public health, safety, and welfare

Explore how contracts and other communications can more clearly address client expectations to protect the parties as well as the public

Review ways in which design professionals can better manage payment provisions to reduce their exposure to inadequate compensation

Today's Presentation Features



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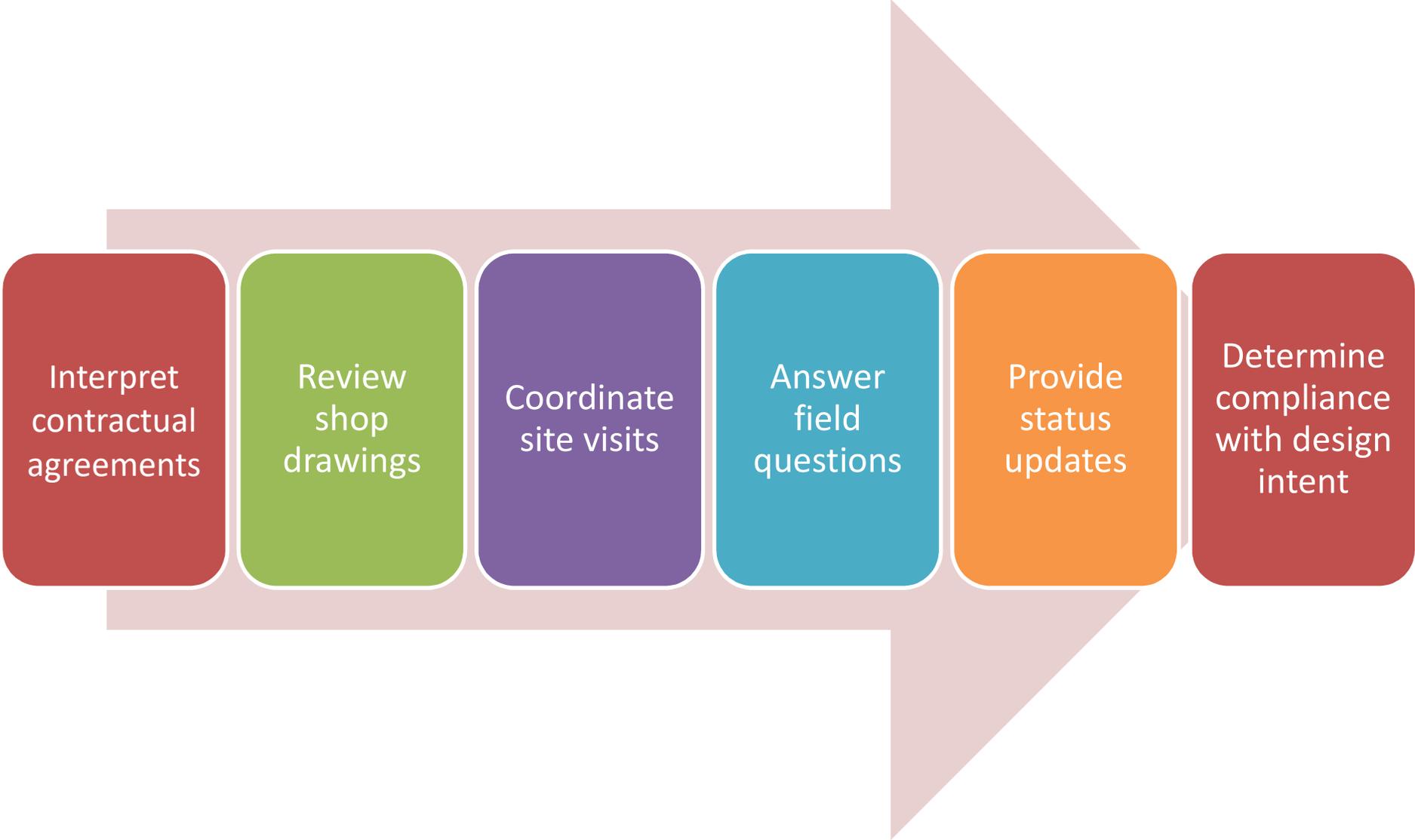
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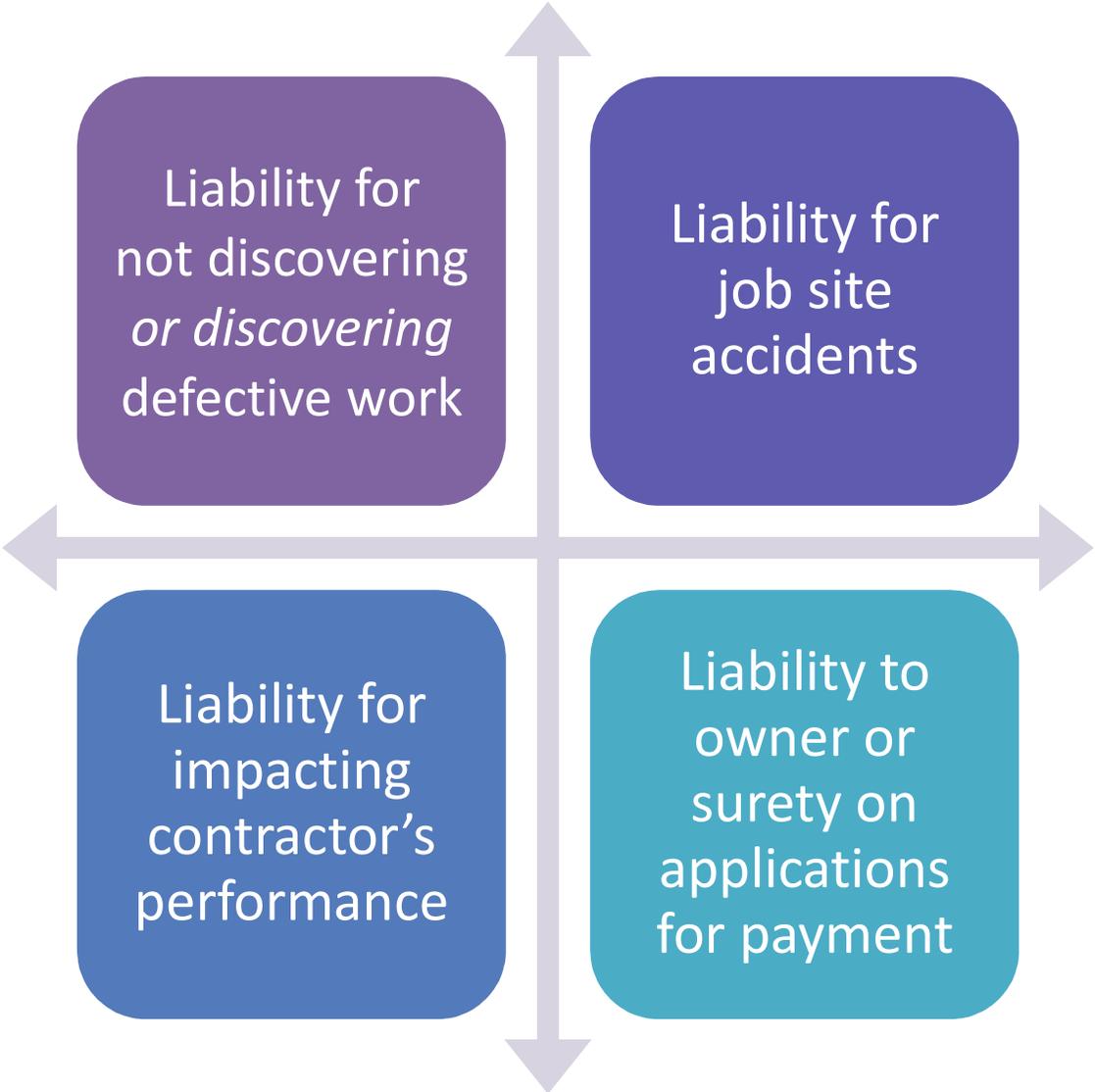
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Construction Phase Services



Construction Contract Administration Liabilities





Risk Management Tip #1: Identify Drivers that Promote Unreasonable Expectations

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Standard of Care

Common Law – Negligence Standard

- Responsible to your client to meet the standard of care for your *profession*
- Design professionals don't manufacture products; projects are one-of-a-kind

Perfection is not contemplated

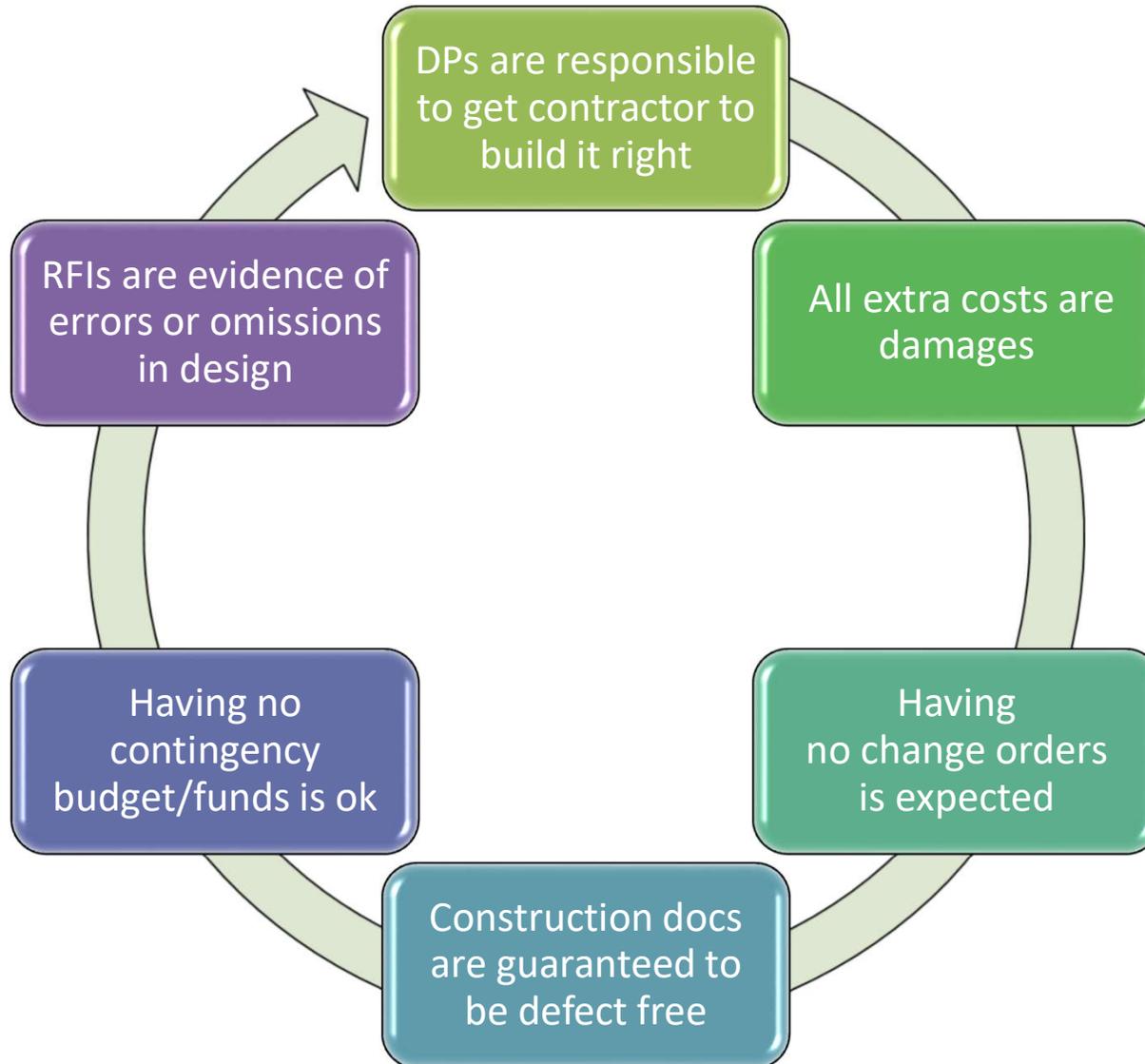
- Those who sell services for guidance of others in their economic, financial and personal affairs *are not liable* in absence of negligence or intentional misconduct

Standard of Care

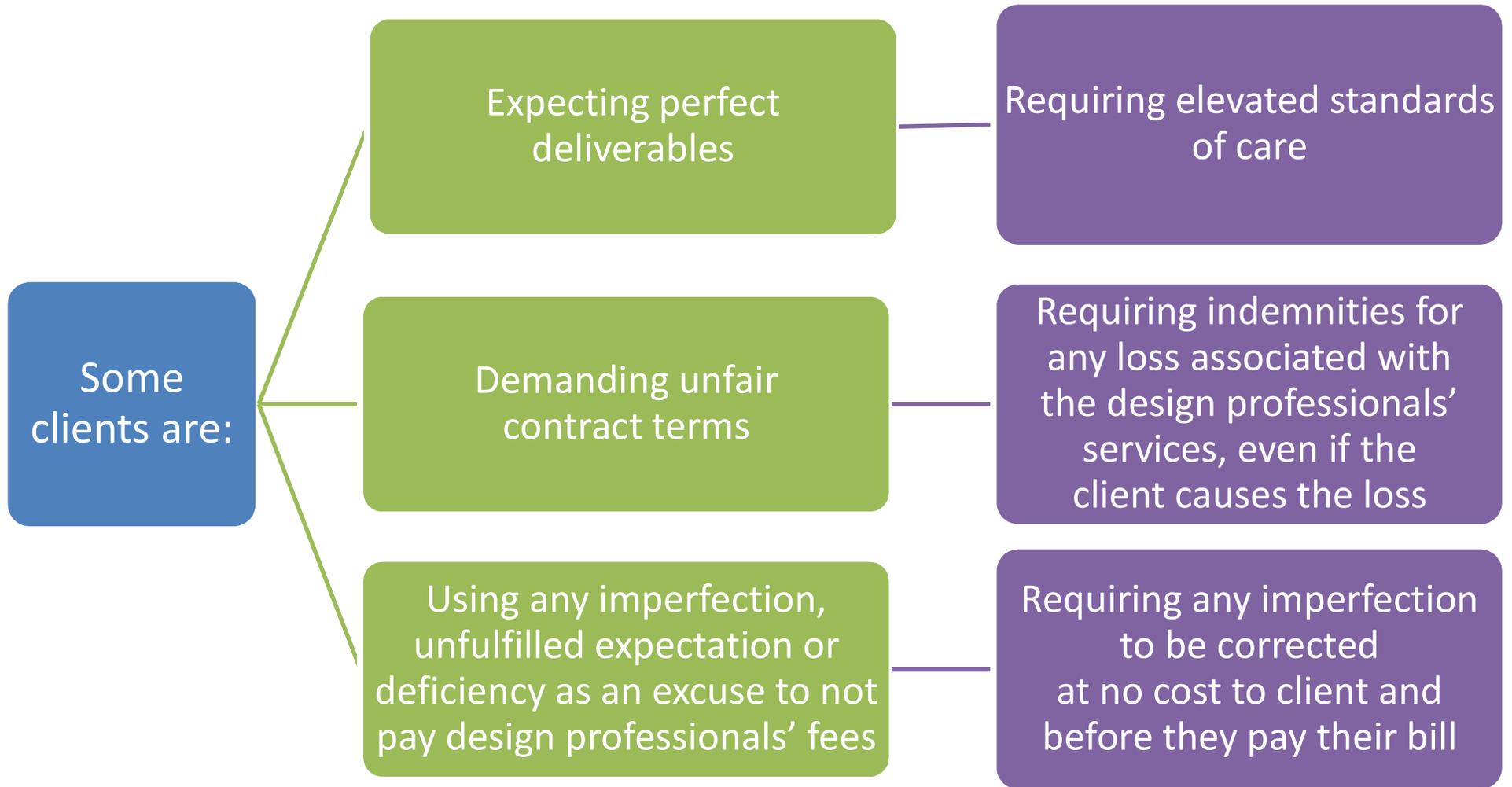
§ 2.2 The Architect shall perform its services consistent with the professional skill and care ordinarily provided by architects practicing in the same or similar locality under the same or similar circumstances. The Architect shall perform its services as expeditiously as is consistent with such professional skill and care and the orderly progress of the Project.

AIA Document B101-2017

Misconceptions



Problems





Risk Management Tip #2: Manage Construction Phase Services

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Requests for Information

Proper attention and tracking will help to determine if:

The answer is already in the contract documents

The request is otherwise duplicative

There a latent field condition

The RFI is really:

- a statement, not a question
- a request for a substitution
- an unrequested design change
- betterment

The contractor is building a claim

Submittals

Sources of Problems

Failure to adequately describe the scope of your review in the contract; relying on shop drawings and stamp is not sufficient

See AIA B-101 2017

§ 3.6.4.2 The Architect shall review and approve, or take other appropriate action upon, the Contractor's submittals such as Shop Drawings, Product Data and Samples, but only for the **limited purpose of checking for conformance with information given and the design concept expressed in the Contract Documents**. Review of such submittals is **not for the purpose of determining the accuracy and completeness of other information** such as dimensions, quantities, and installation or performance of equipment or systems, which are the Contractor's responsibility. The Architect's review shall **not constitute approval of safety precautions or**, unless otherwise specifically stated by the Architect, **of any construction means, methods, techniques, sequences or procedures**. The Architect's **approval of a specific item** shall not **indicate approval of an assembly** of which the item is a component.

Submittals

Sources of More Problems

Failure to **demand a schedule of submittals** from the contractor.

Failure to review submittals in accordance with **requirements of the Contract Documents.**

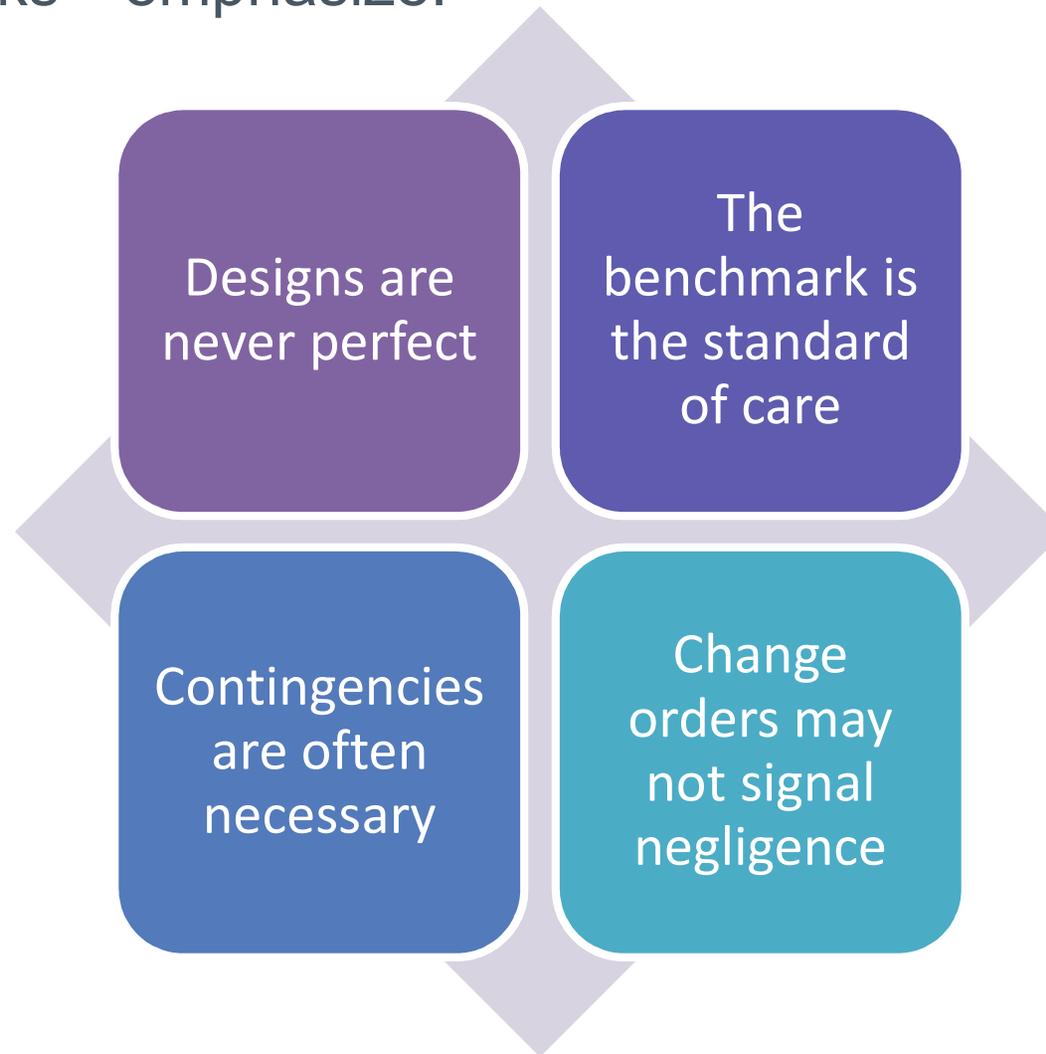
Failure to maintain **detailed records of the review** related to timing and actions.

Reviewing submittals where the **Contract Documents do not require submission.**

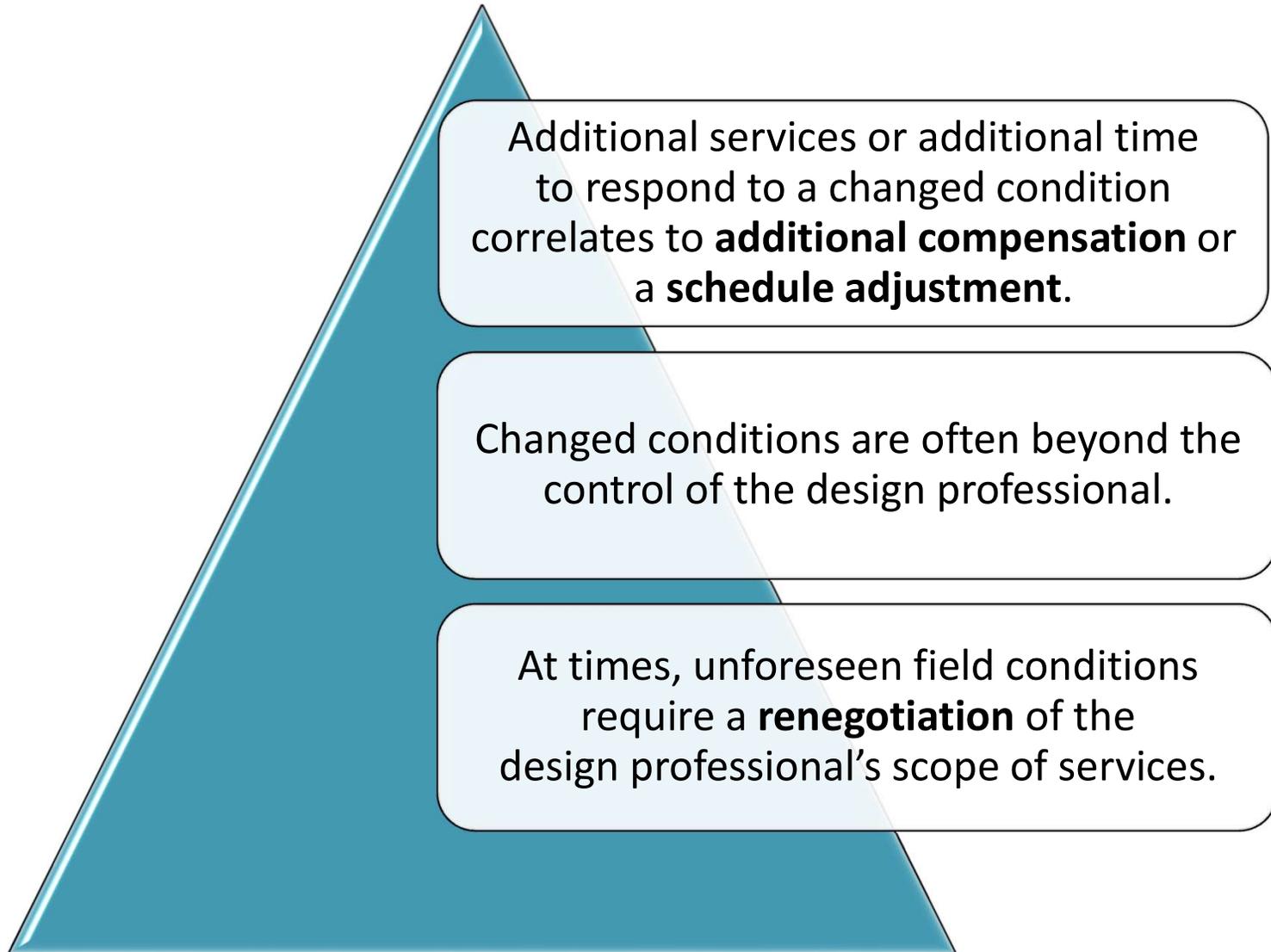
Failure to **demand compliance** of the contractor with the **procedural requirements** of Contract Documents.

Change Orders

Mitigating risks—emphasize:



Changed Conditions



Defective or Non-Compliant Work



Job Site Safety



Safety is typically **not part of a design professional's contractual duties**



Sole responsibility for safety of all individuals and property generally rests **with contractor**



Regardless of contractual safeguards, there is **still risk to design professionals**

Job Site Safety—Dos and Don'ts

Give immediate verbal notification of the specific hazard to the party with overall safety responsibility.



Address only the specific safety hazard posing an imminent risk of serious harm.



Do not give a recommended solution.



Thereafter, give written notification to the owner (or your client) with a copy to contractor.



Explain in writing that you do not have safety responsibility; however, this serious circumstance came to your attention and you are writing on a *one time basis*.



Risk Management Tip #3: Communicate and Document

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Communicate

- Set expectations up front
 - “we’re not perfect”
- Specifics that can lead to problems:
 - Designing out of sequence
 - Fast-track schedule
 - Unrealistic budget
- Keep talking to client, and help when a problem occurs
- Identify the issues, and solve them quickly



Project Communications

Centralize Communications

- Confirm direction of the Contractor
- Provide written copies to Client

Prepare Written Minutes of Meetings

- Prepare promptly
- Distribute to all parties
- Require parties who disagree to respond

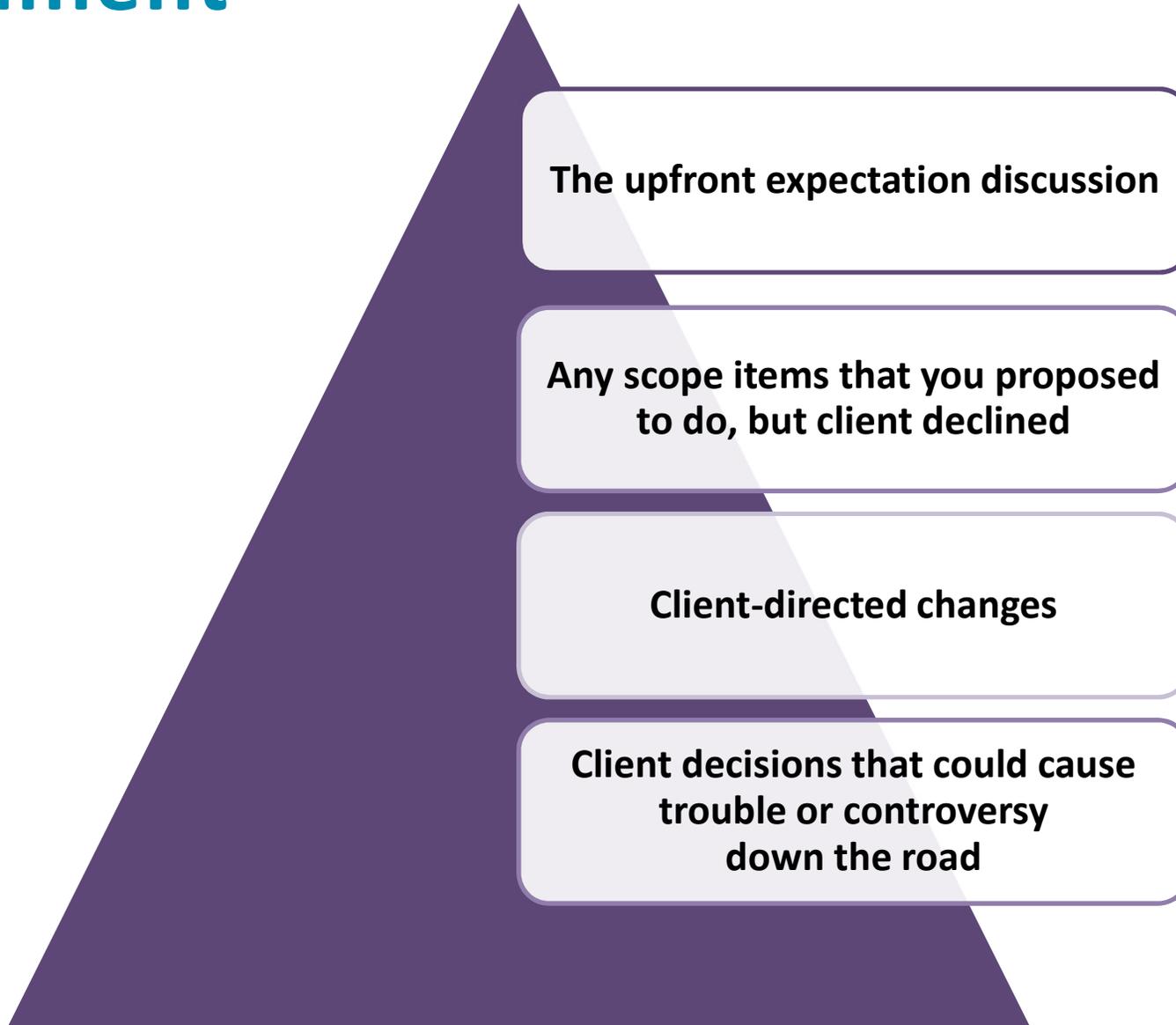
Standardize Communications

- Site observation reports
- Minutes
- Incident reports

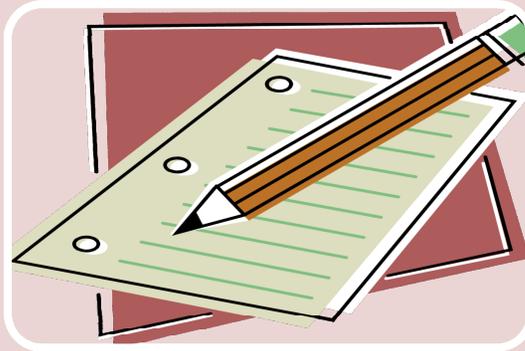
Segregate Communications

- Potential claims

Document



Documentation Includes...



Written
Records

Photographs

Computer
Records

Risk Management Tip #4: Pay Attention to Payment

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Fair Payment Terms for the Design Team

Set up in the initial contract:

§ 11.10 PAYMENTS TO THE ARCHITECT

§ 11.10.1 An *initial payment* of \$_____ shall be made upon execution of this Agreement and is the minimum payment under this Agreement. It shall be credited to the Owner's account in the final invoice.

...

§ 11.10.2.2 The *Owner shall not withhold amounts from the Architect's compensation* to impose a penalty or liquidated damages on the Architect, or to offset sums requested by or paid to contractors for the cost of changes in the Work *unless the Architect agrees or has been found liable* for the amounts in a binding dispute resolution proceeding.

§ 11.10.2.3 *Records of Reimbursable Expenses*, expenses pertaining to Supplemental and Additional Services, and services performed on the basis of hourly rates *shall be available to the Owner* at mutually convenient times.

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Non-Payment/Withholding Payment to the DP

Follow the contract terms:

§ 9.2 If the **Owner suspends the Project**, the **Architect shall be compensated for services performed** prior to notice of such suspension. When the Project is resumed, the **Architect shall be compensated for expenses** incurred in the **interruption and resumption of the Architect's services**. The Architect's **fees** for the remaining services and the **time schedules** shall be **equitably adjusted**.

...

§ 9.6 If the **Owner terminates** this Agreement for its convenience pursuant to Section 9.5, or the **Architect terminates** this Agreement pursuant to Section 9.3, the **Owner shall compensate the Architect for services performed prior to termination, Reimbursable Expenses** incurred, and costs attributable to termination, including the **costs attributable to the Architect's termination of consultant agreements**.

§ 9.7 In addition to any amounts paid under Section 9.6, if the **Owner terminates** this Agreement for its convenience pursuant to Section 9.5, or the **Architect terminates** this Agreement pursuant to Section 9.3, the Owner shall pay to the Architect [**specified termination fees and licensing fees**].

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Non-Payment/Withholding Payment to the DP

Enforce the contract terms:

§ 9.1 *If the Owner fails to make payments to the Architect in accordance with this Agreement, such failure shall be considered substantial nonperformance and cause for termination or, at the Architect's option, cause for suspension of performance of services under this Agreement.* If the Architect elects to suspend services, the Architect shall give *seven days' written notice* to the Owner before suspending services. In the event of a suspension of services, the ***Architect shall have no liability to the Owner for delay or damage caused the Owner because of such suspension of services.*** Before resuming services, the Owner shall pay the Architect all sums due prior to suspension and any expenses incurred in the interruption and resumption of the Architect's services. The Architect's fees for the remaining services and the time schedules shall be equitably adjusted.

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Progress Payments to the Contractor

Common problems:

- **Contractor is overpaid**
 - Less work completed than represented
 - Completed work is defective
- **Design Professional fails to comply with “Prompt Payment” laws**
- **Potential for significant exposure to:**
 - Owner
 - Surety

Review of Contractor's Payment Applications

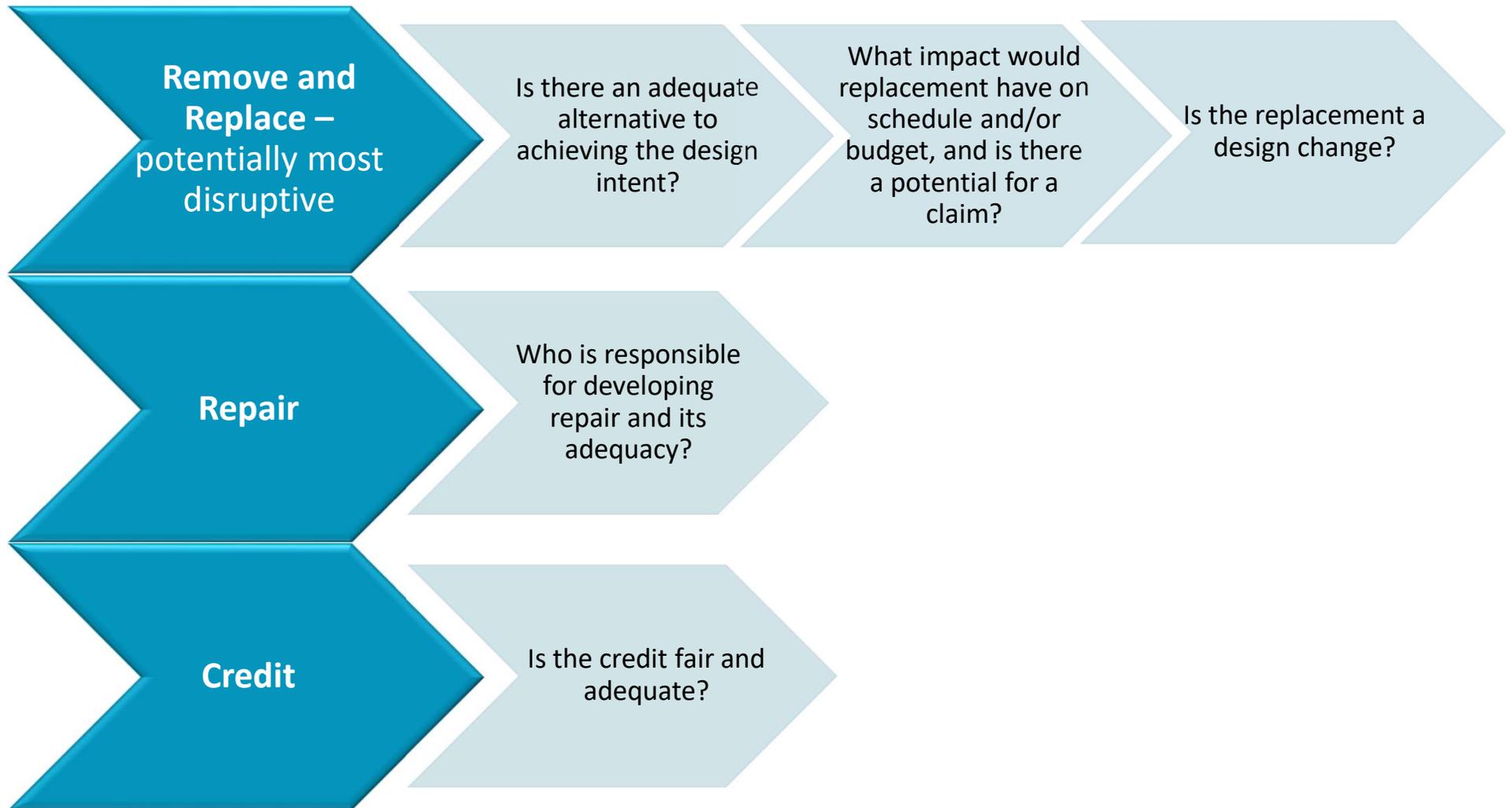
Risk Mitigation:

- Define in your contract the scope of your review
- Train your staff on:
 - Risks
 - Obligations
 - Contractual
 - Legal
- Provide timely review
- Document decisions



Non-Payment/Withholding Payment to the Contractor

Remedies for Non-Compliant Work



Risk Management Tip #5: Implement Solutions

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Educate Clients

Design and construction are never perfect

Set expectations EARLY

Need for contingency budgets

Unforeseen site conditions

Designer involvement through the construction phase

Design intent should be interpreted by designer (RFIs)

Early notification of possible error, discrepancy, omission

Contract and Scope Language

Reasonable
standard of care

No warranties

No ensuring
error-free plans

No formulas for
paying for
errors or omissions

No liquidated or
consequential
damages

No “fit for
intended purpose”

Indemnification
tied to
negligence

Communicate and Document

Set expectations up front

Identify issues, and solve them quickly

Centralize, standardize, and segregate communications

Document communications in writing

Thank you for your time!

QUESTIONS??

**This concludes The American Institute of Architects
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