

RLI[®]

DIFFERENT WORKS

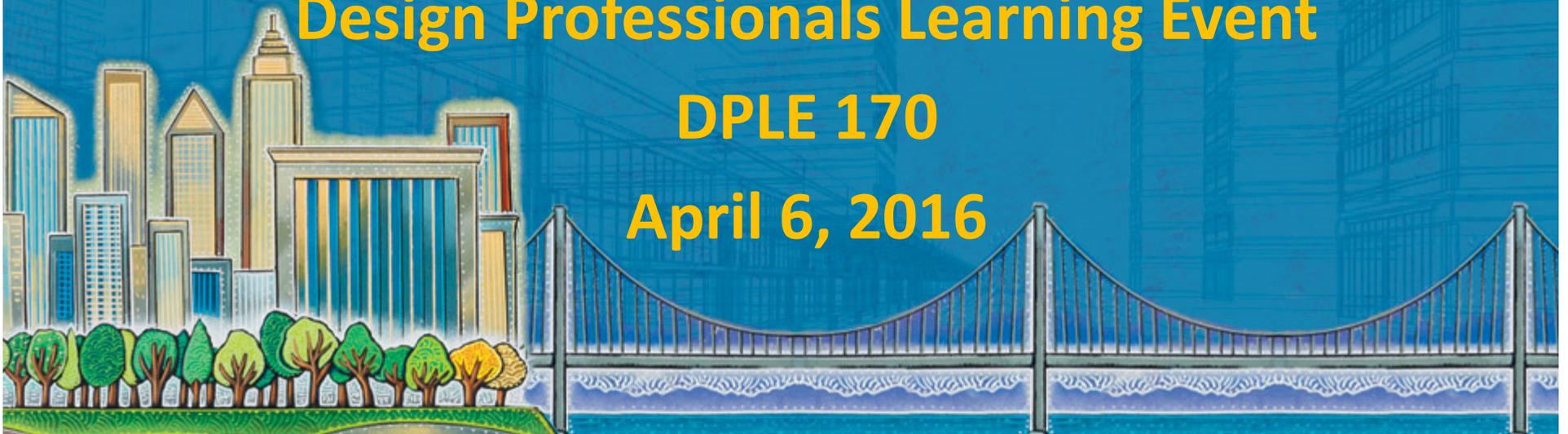
There's No 'I' In Team, But There's One in Risk

RLI Design Professionals

Design Professionals Learning Event

DPLE 170

April 6, 2016



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■ Your Speaker

An Interview with:

Kaitlyn Mello

Subject Matter Expert



■ Course Description

This presentation will identify several loose forms of association that are common in the design professional industry and will point out the potential legal and insurance coverage implications associated with each.

We'll also suggest some best practices intended to help you avoid these pitfalls.



■ Learning Objectives

Participants Will:

1. Learn to identify several loose forms of association that are common in the A/E industry.

2. Develop a general understanding of the legal duties and liabilities incurred when one of these loose associations is established.

3. Gain exposure to insurance coverage risks associated with each type of association.

4. Learn some techniques to help mitigate those risks.



■ Ignorance is Bliss...



...until it punches you in the face!



■ Key Concepts

- Design-Bid-Build vs. Design-Build Arrangements
- Joint Ventures
- Non-Traditional Employees
 - Independent Contractors
 - Leased Employees



■ Design-Build vs. Design-Bid-Build

DESIGN-BUILD MODEL



DESIGN-BID-BUILD MODEL

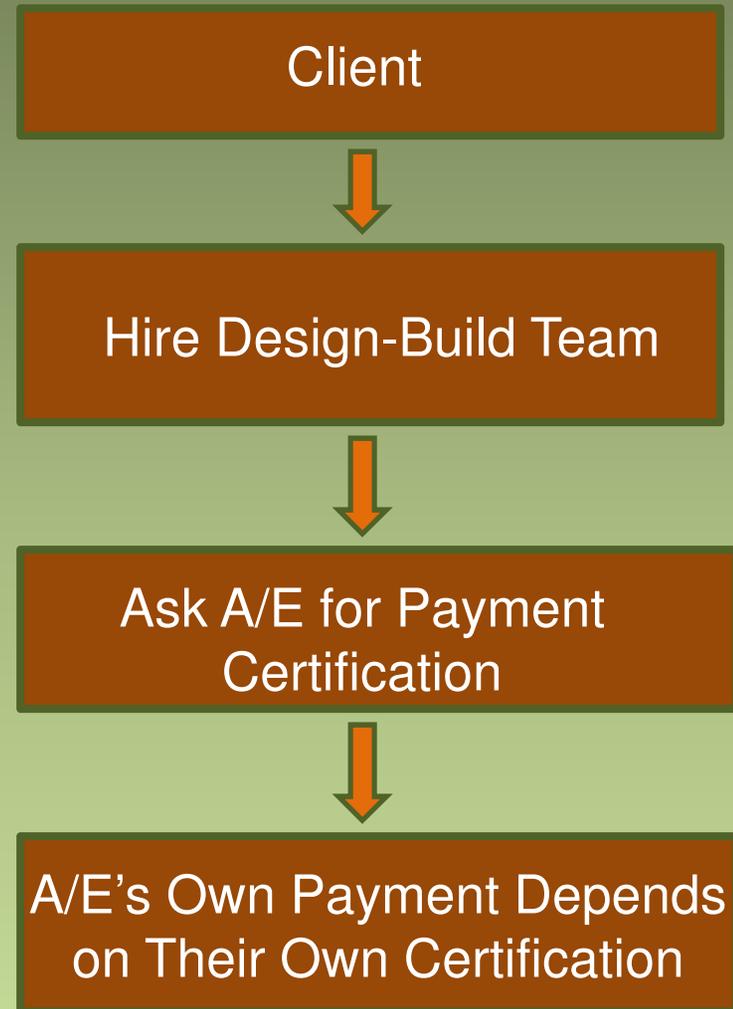


■ Helpful Illustration

Design-Bid-Build



Design-Build

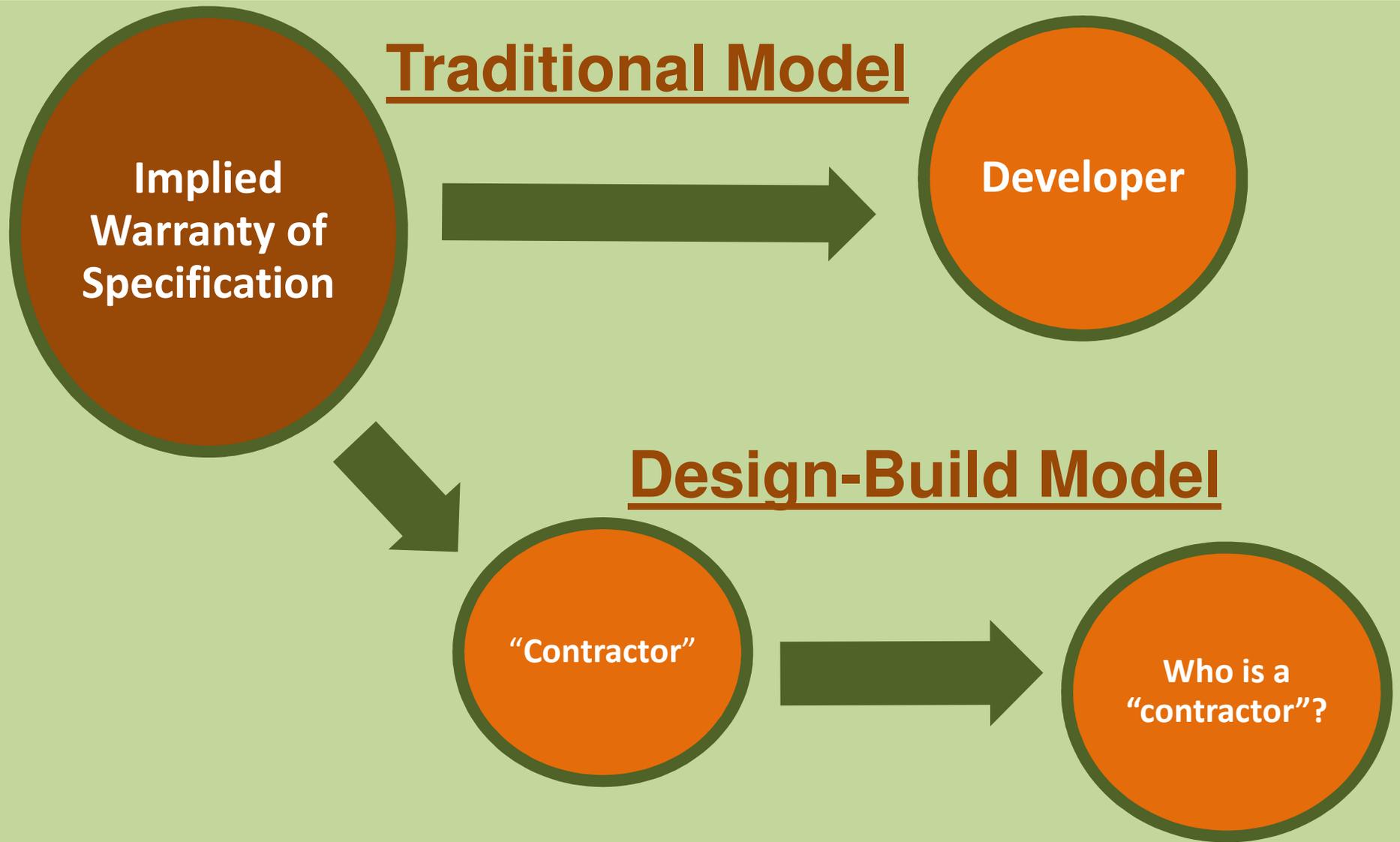


■ Some Preliminary Information

- Implied Warranty
- Standard of Care
- Implied Warranty of Specification



■ Proceed With Caution



■ Project-Specific Policies



Clients and Design-Build Teams may both want a project-specific policy when using the design-build project delivery method, but their motivations will often differ.

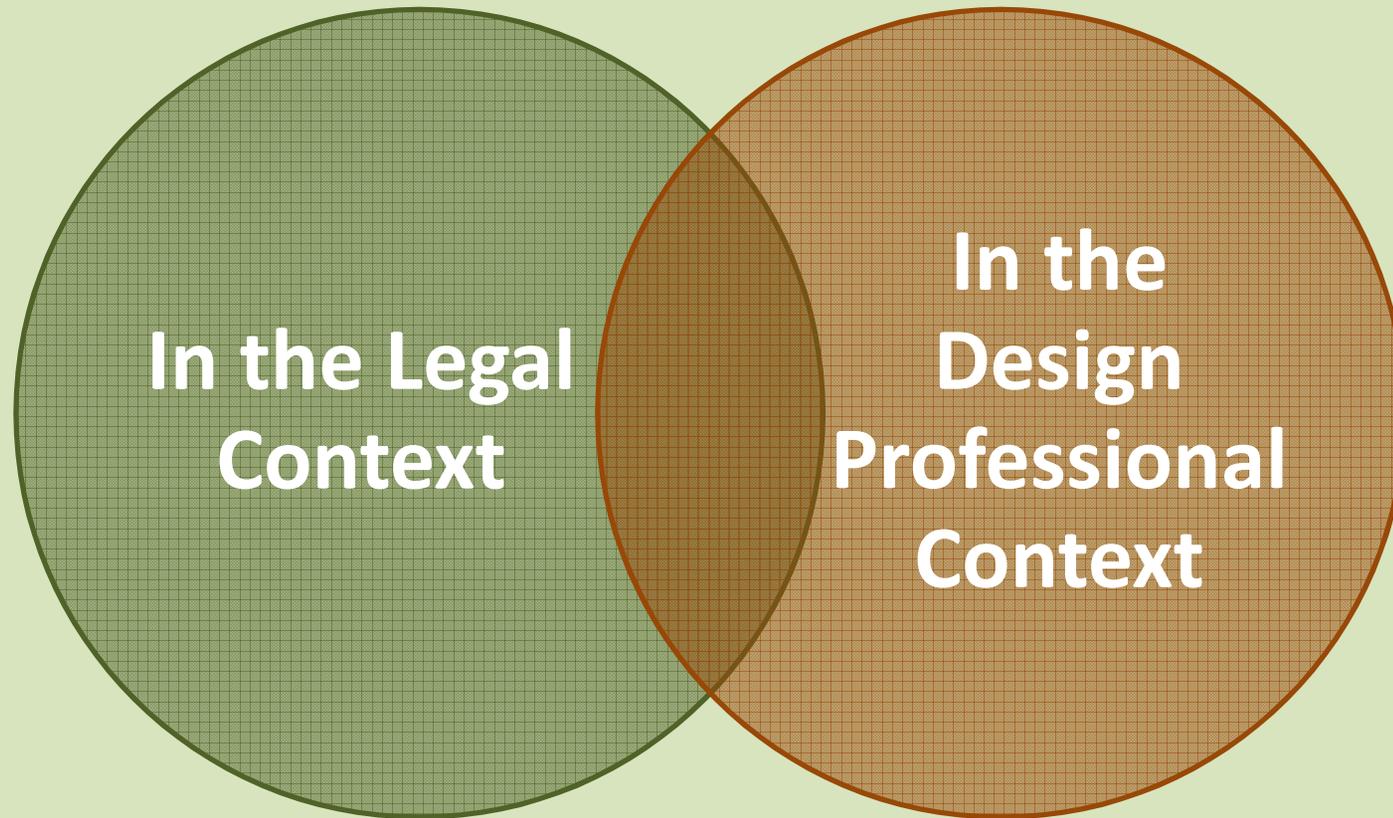


■ Best Practice Suggestions

- Address specific needs of the Design-Build Process
- Carefully draft and negotiate contracts with subconsultants
- Communicate effectively & often with other members of the Design-Build Team



■ Joint Venture

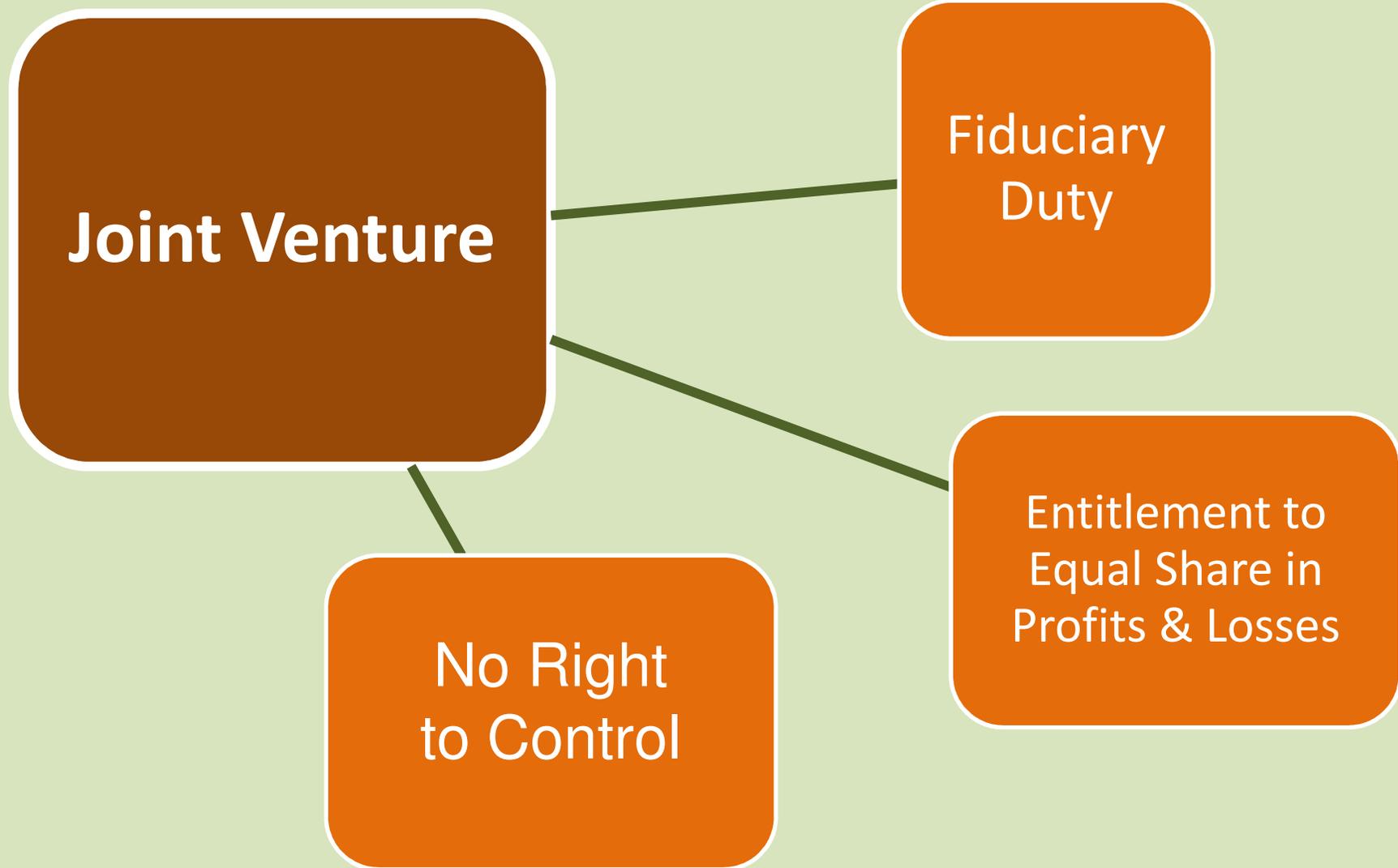


■ Defining Joint Venture

“An association of persons with the intent to engage in and carry out a single business venture for joint profit, for which purpose they combine their efforts, property, money, skills, and knowledge, pursuant to an agreement that there will be a community of interest among them as to the purpose of the project and that each participant will stand in relation of principal as well as agent, to each other, with an equal right to control the means employed to effect the common purpose of the venture.”



■ Rights & Liabilities of JVs



■ Insurance Issues with JVs

Parties to the joint venture will often have **different** coverage limits and deductibles.

The ideal scenario is for both parties to have **matching** policies.



- **SAFE HARBOR (at least in part)**

YOU CAN
CONTRACT
AROUND THESE
PROVISIONS!



■ AIA C101-1993

Standard Form Contract for Joint Ventures for Professional Services



1. Negotiate
2. Agree
3. Incorporate into Contract

■ Key Issues Addressed in the C101



- Expense Sharing → § 18
- Allocation of Risk → § 9
- Dispute Resolution → § 12
- Formation of Decision-Making Body → § 3



■ There's Some Problems Even a Good Contract Can't Solve...

Joint & Several Liability

- Damages
- Construed as single entity

Licensing Requirements

- Definitional problems
- Varies state by state

■ Joint & Several Liability



...but that
wasn't my fault



■ Contrary Intent Clauses

Between Prime & Sub:



“Subconsultant acknowledges and understands that at no point during the Project will Build-Me, LLC and Help-U-Out, Inc. form a joint venture. This Agreement is intended to form a contract for services between Build-Me, LLC and Help-U-Out, Inc. who shall stand in relation of prime consultant and subconsultant, respectively.”

Between Prime & Client:



“Client acknowledges and understands that while Build-Me, LLC may engage subconsultants to assist with portions of the Project, Build-Me, LLC’s subconsultants have no business relationship with Client. Furthermore, Client acknowledges and understands that at all times, Build-Me, LLC will stand as prime consultant in relation to its subconsultants and at no point will a joint venture exist between Build-Me, LLC and any of its subconsultants.”

■ Licensing Issues

What is an architect?

What is an engineer?

What is a contractor?



■ What's in a Name?



**Your insurance coverage,
actually.**



■ A Proposal

Prime signs contract with client.

Prime recruits subconsultants to help with project.

Prime is responsible for *ALL* aspects of the project with respect to the client.

Subconsultants are responsible for their services on the project with respect to the prime.

→ **Prime deals with the client**

→ **Subs deal with the prime**

■ Seasonal, Temporary & Leased “Employees”

“[...] directors, officers, principals, partners, members, or employees of the named insured while acting on behalf of the named insured.”

“[...] temporary or leased personnel of the named insured, but only while acting under the direct supervision and on behalf of the named insured.”



■ Employee Classification

Employee
or
Independent
Contractor?



It's an **IMPORTANT** distinction!



■ Important Factors

1. Behavioral Control
2. Financial Control
3. Relationship of the Parties



■ The Risks of Misclassifying

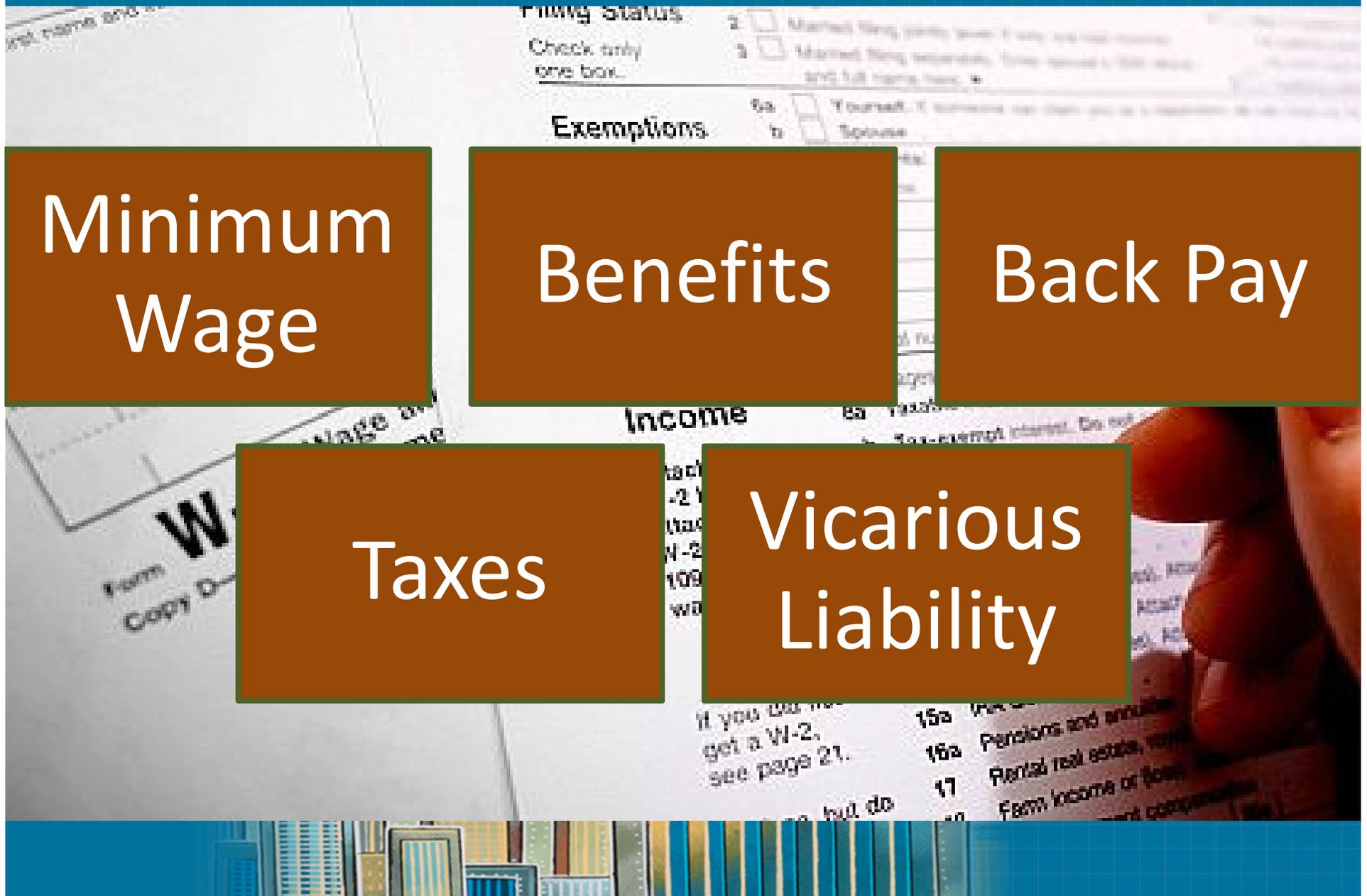
Minimum Wage

Benefits

Back Pay

Taxes

Vicarious Liability



■ Ask Yourself:



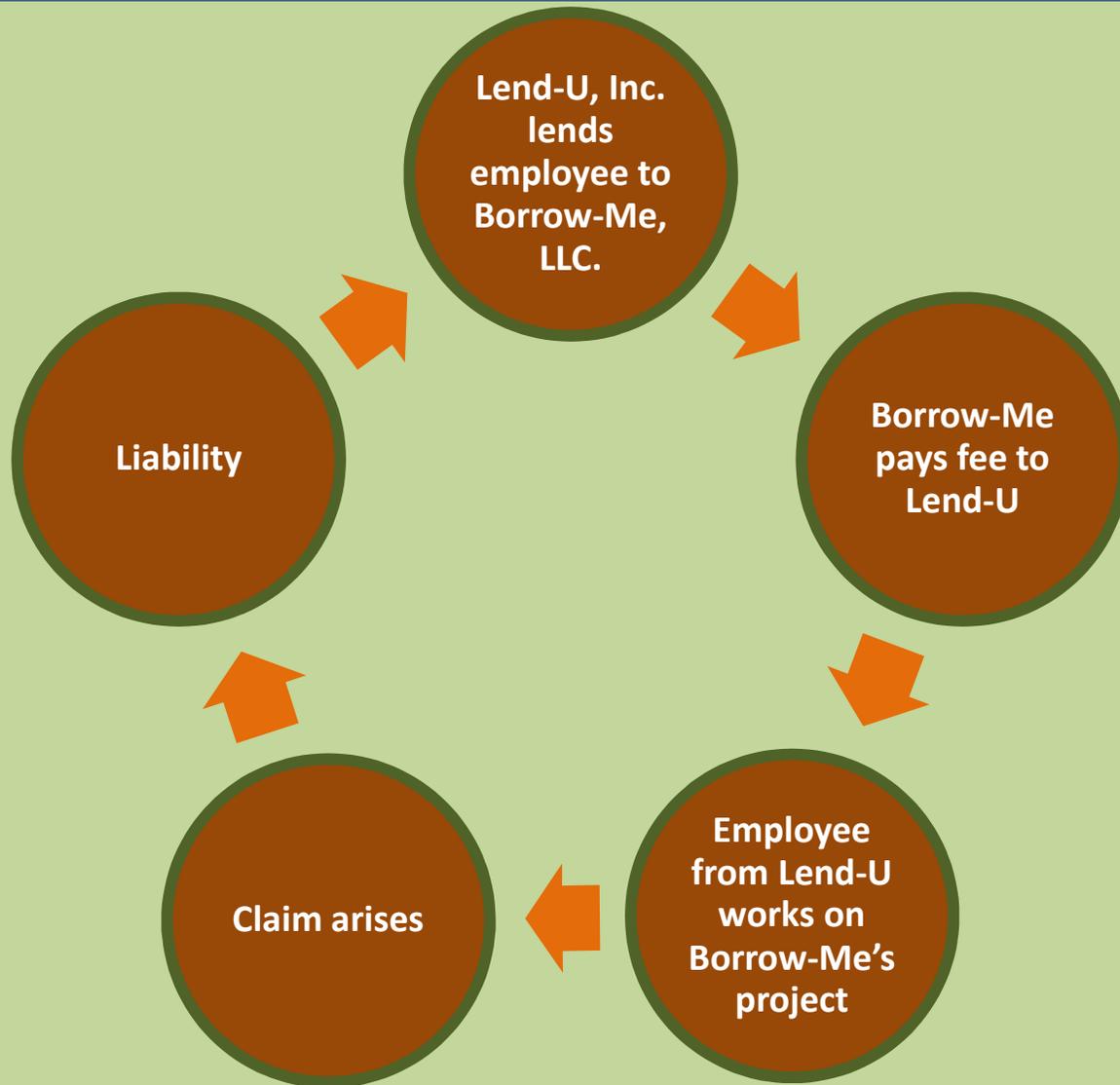
Do I need to have the right to control more than just the result of the work done by the contract worker?

■ An Additional Wrinkle

Worker's Compensation statutes often don't reach independent contractors, leaving you open to suits for injuries on the job.



■ Leased Employees



■ Special Employer Doctrine

1. Has the employee made a contract of hire – either expressly or impliedly – with the special employer?
2. Is the work being done essentially that of the leasing firm?
3. Does the leasing firm have the right to control the details of the work?



■ Best Practices

Step #1 → Choose an Option

Step #2 → Negotiate

OPTION #1

Lend-U, Inc.'s employee remains an employee of Lend-U, Inc. for the duration of the project.

OPTION #2

Lend-U, Inc.'s employee becomes an employee of Borrow-Me, LLC for the duration of the project.

■ Takeaways

1. Be aware of the risks.
2. Always have a good contract.
3. Don't get comfortable.
4. Consider the impact on your insurance.





Thank you for your time!

QUESTIONS??

This concludes The American Institute of Architects
Continuing Education Systems Program

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