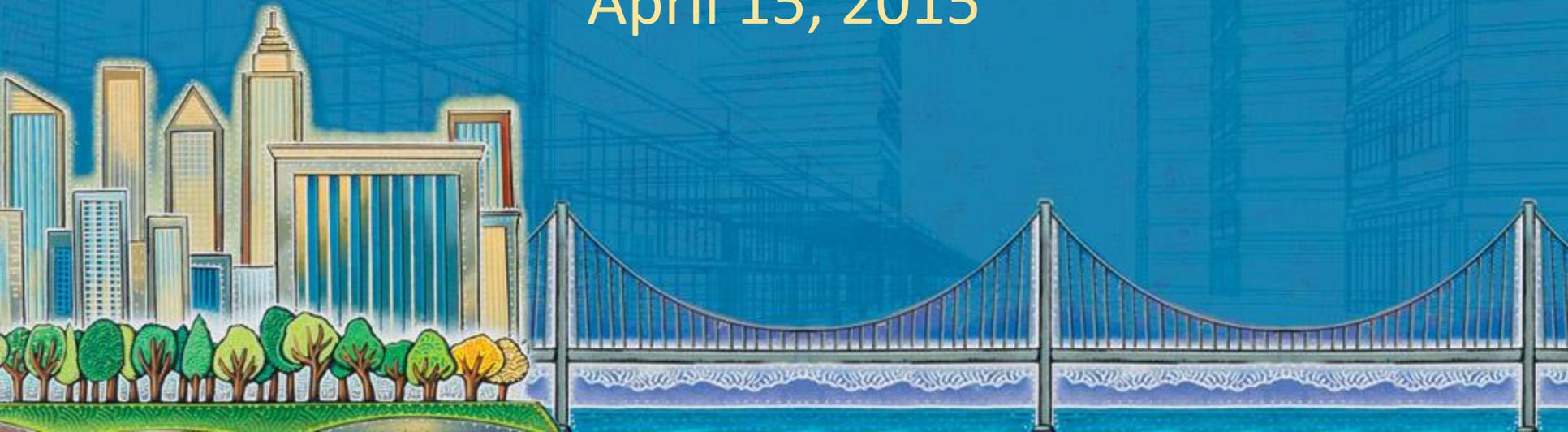




Common Mistakes that Add Up to Big Claims

DPLE 153

April 15, 2015



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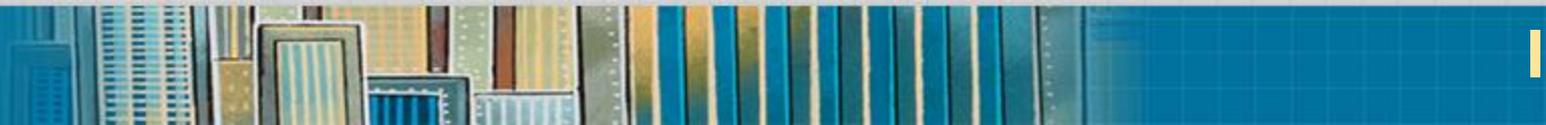


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■ Course Description

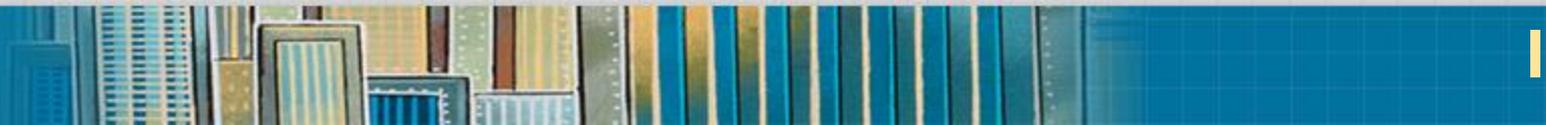
When asked about large claims, one thing we can often say is that none of us saw them coming at the beginning – not our insureds, their lawyers, their brokers, our underwriters, nor our claim attorneys. Often, it's more of a situation where small things add up to one big problem. In this course, we'll explore some of those small things and what your firm can do about them preventatively.



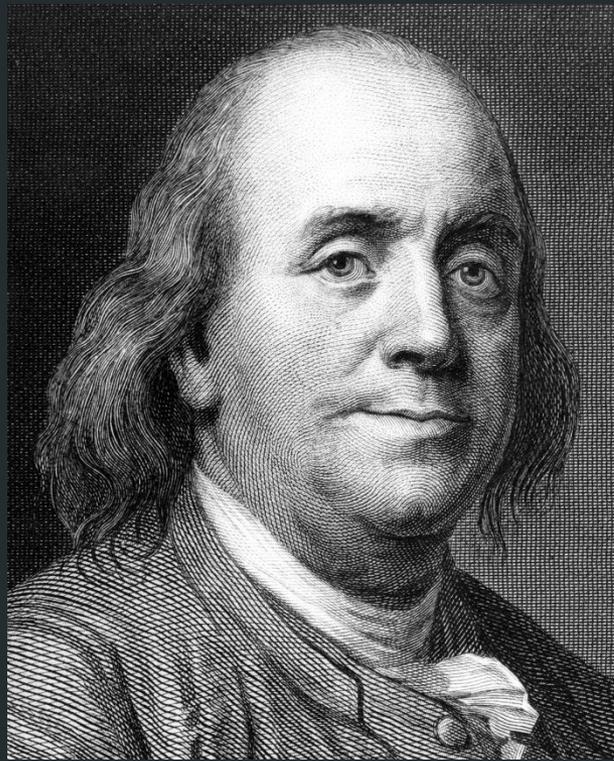
■ Learning Objectives

Participants will:

- See that even a “simple” request, such as the production of documents from an attorney, can lead to a six-figure claim – and why it’s important to understand how to handle those requests properly;
- Review the importance of a clear and definitive scope of services – which can later help to define a claim or even extricate a design professional from that claim entirely;
- Consider the need to accurately track and manage extra costs as they’re incurred – in order to avoid unpleasant surprises and unnecessary battles; and
- Refresh their understanding of a few key contract provisions including:
 - Insurance requirements
 - Dispute resolution
 - Project and design coordination
 - Uninsurable obligations



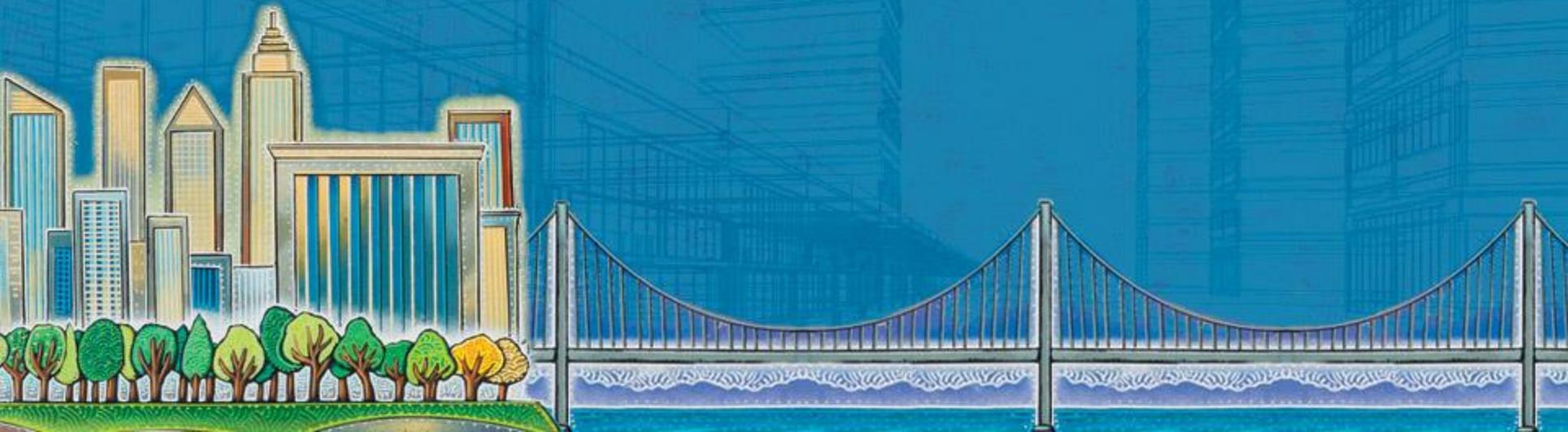
“An ounce of prevention is worth a pound of cure”



-Benjamin Franklin

Example #1

Production of Documents



■ Production of Documents

**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
IN THE COURT OF COMMON PLEAS OF PHILADELPHIA**

PLAINTIFF(S)	CIVIL TRIAL DIVISION
v.	Compulsory Arbitration Program
DEFENDANT(S)	COURT TERM:
	NO.

**PLAINTIFF(S) REQUEST FOR PRODUCTION
OF DOCUMENTS DIRECTED TO DEFENDANT(S)**

You are requested to produce, in accordance with Pennsylvania Rule of Civil Procedure 4009, the originals or clear, readable copies of the below listed documents and/or items unless protected by attorney-client privilege or work-product doctrine. These documents and/or items will be examined and/or photocopied; photograph negatives will be processed and photographs reproduced, videotapes and audiotapes shall be viewed and/or heard and a copy made. The below listed documents and/or items are to be produced at Plaintiff's counsel's office on or before thirty (30) days from the date of service herein. Such request is continuing up to and at the time of trial.

■ Production of Documents—Some Risks in Responding

Creating insurance coverage issues

- Up to and including denial of coverage

Oversharing

- Providing damaging evidence not otherwise required
- Opening the door for new/additional allegations

Not recognizing a threat

- Informal requests
- “You have nothing to worry about”

Benefits of Reporting Pre-Claims

Decrease
in
exposure

Quick
resolution

Not
counted
in loss
history

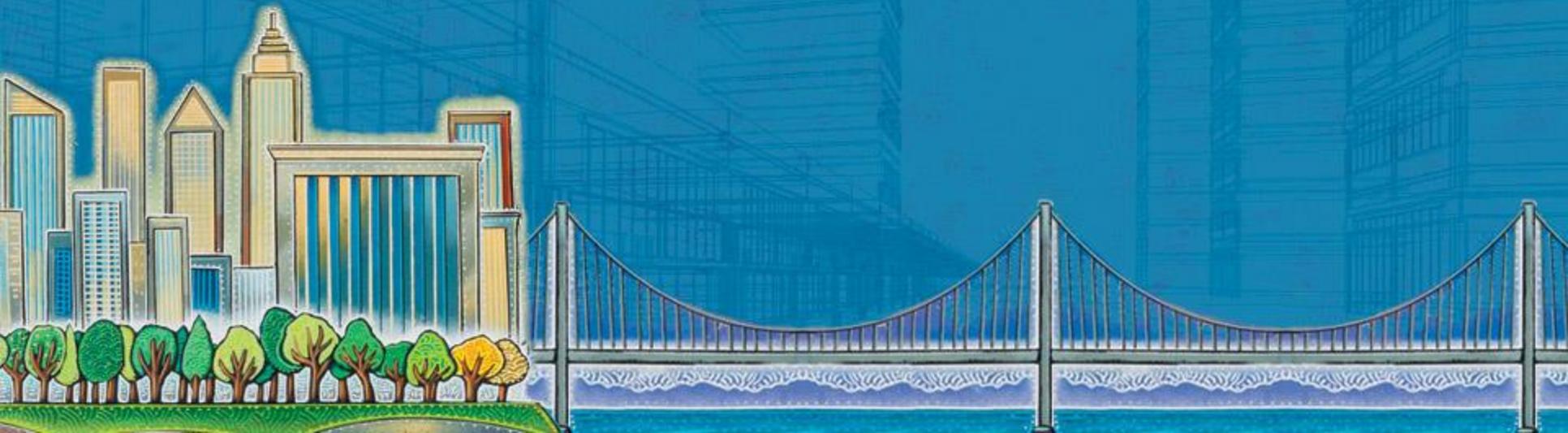
■ Reporting a Pre-Claim



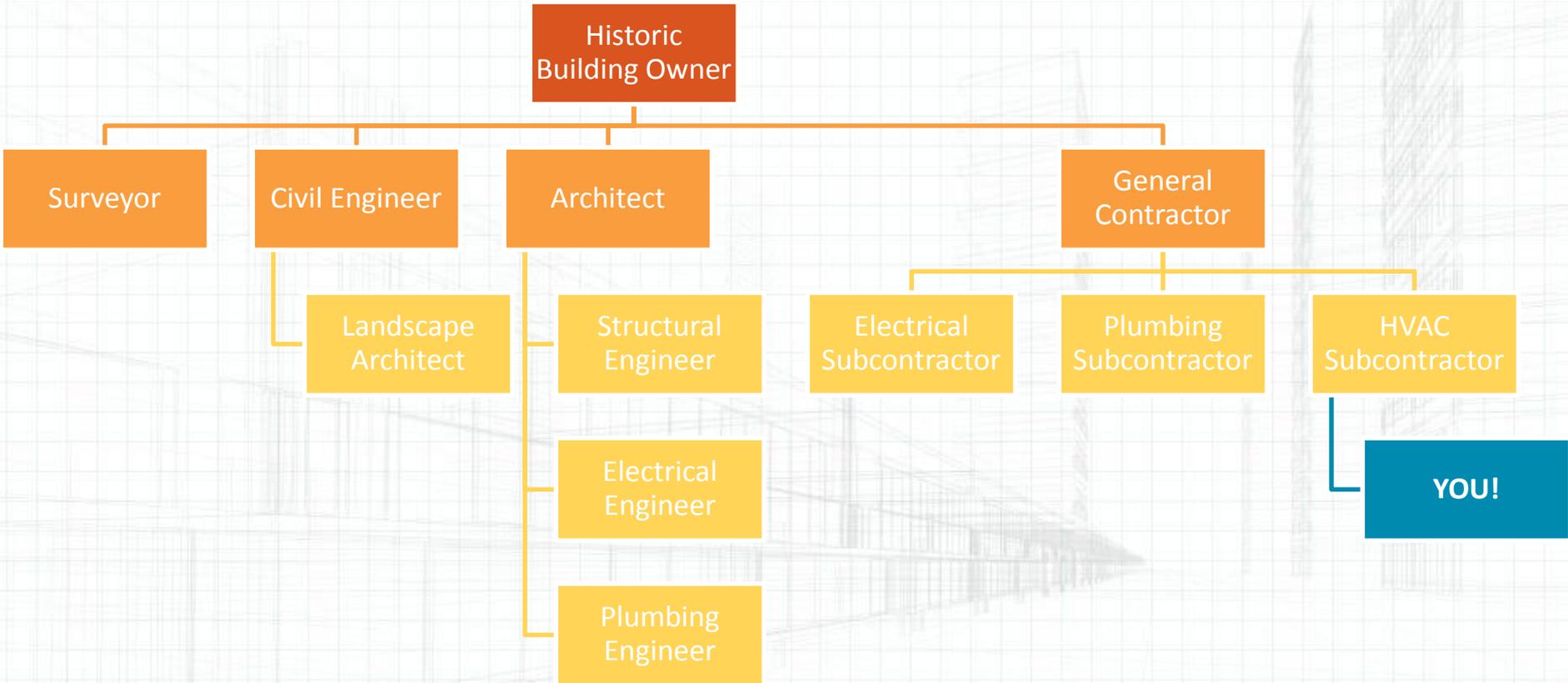
- Written notice
- Specifics of what happened
- Description of the services performed
- Names of individuals and entities that may have suffered harm
- What potential damages or injuries may have occurred

Example 2

Defining Your Scope of Services



Setting Expectations—Roles and Scopes of Service



■ Setting Expectations – Scope of Services

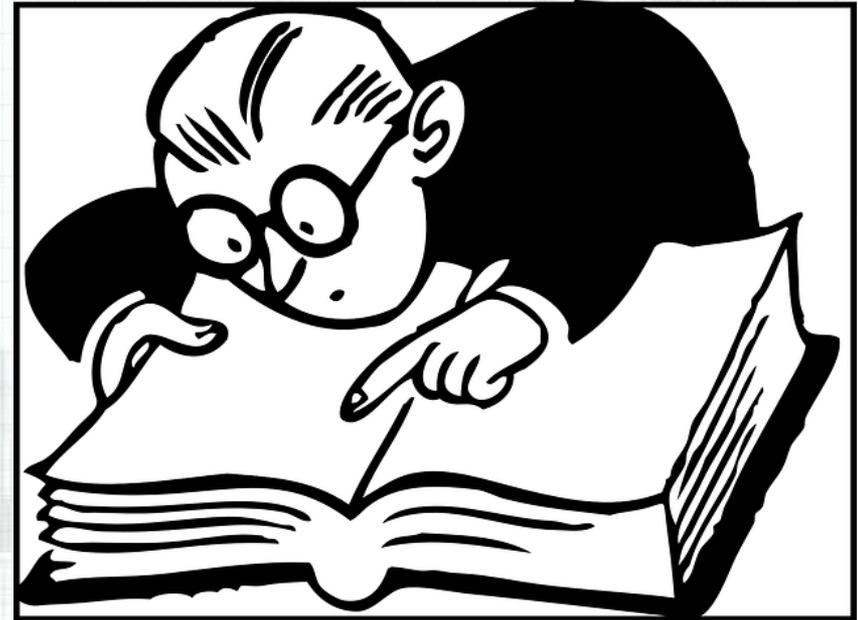
A formal agreement that specifies all the criteria of a contract between a service provider and the customer

A well defined scope has:

Deliverables and milestones

Duties of both parties

Additional and excluded services

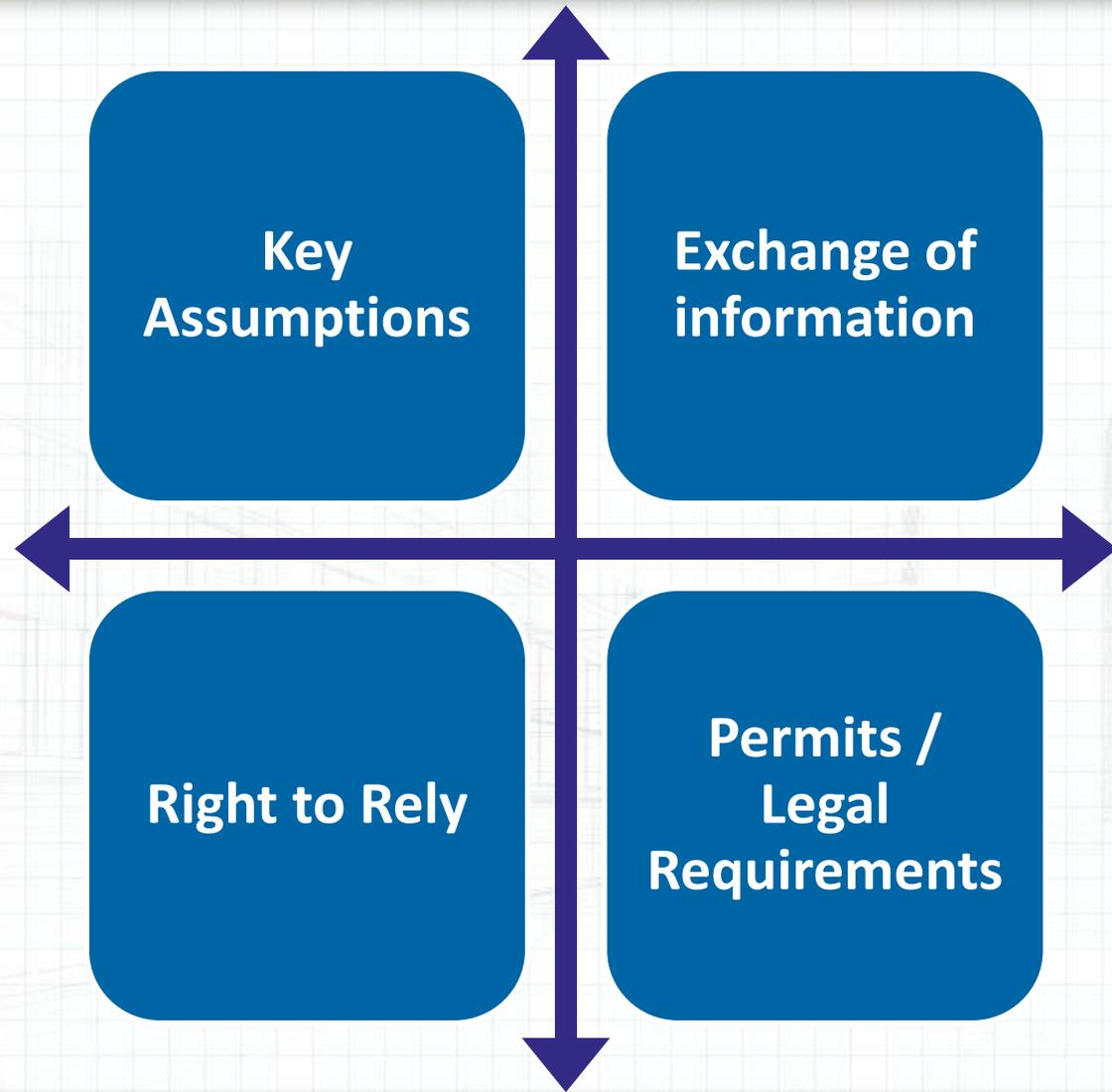


■ Setting Expectations - Deliverables

Tangible, measurable outcome that must be produced to successfully complete the project



■ Setting Expectations – Duties of Both Parties



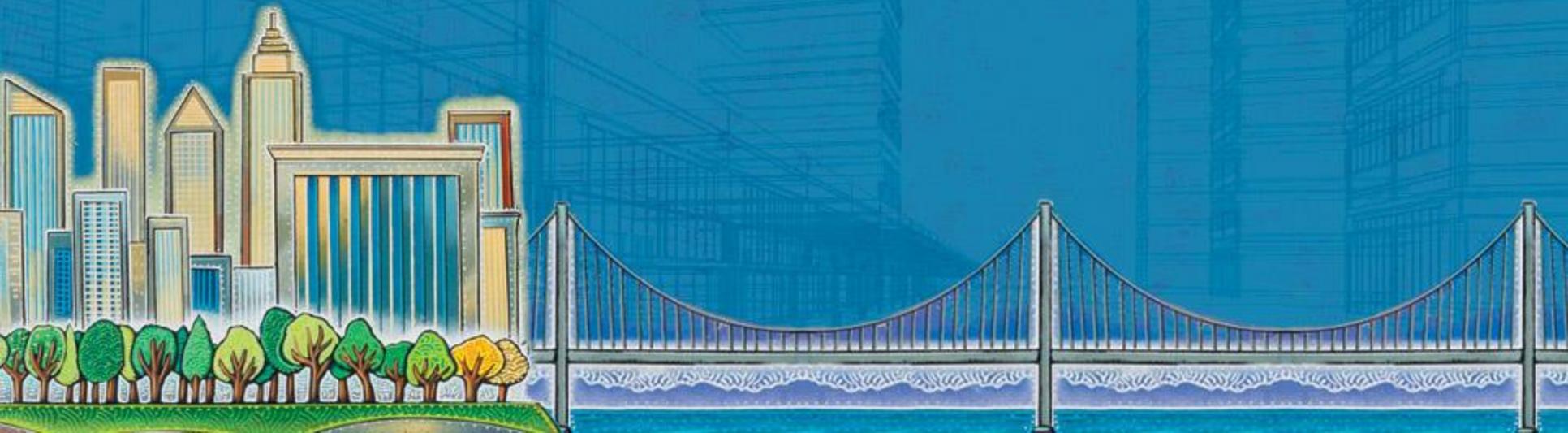
Setting Expectations – Additional and Excluded Services



- Services that you will provide at an additional cost
 - How the additional cost will be calculated
 - How the timeline will change due to the increase in scope
- Services that you are qualified to provide, but are specifically excluded from the agreement

Example 3

Delays and Extras



“Blackboarding” Damages

Direct Damages

- Additional Labor Costs
- Added Equipment Expenses
- Material Escalation Costs

Indirect Damages

- Lost Productivity
- Additional Site Utilities and Support
- Increased Overhead Expenses

Consequential Damages

- Loss of Use
- Lost Revenue
- Financing and Interest Costs

Punitive/Exemplary Damages

- Recklessness
- Bad Faith
- Fraud
- Gross Negligence
- Willful Misconduct

Liquidated Damages

- Contractually-stipulated amount
- Uncertain or Difficult to Prove Actual Damages

Diminution in Value

- May be used when:
 - Repair isn't Feasible
 - Cost of Repair is Out of Proportion

Attorneys and Experts Fees

- Prevailing Party Contract Provisions
- Arbitration Agreements
- Consumer Protection

Loss of Bonding Capacity

- Wrongful Termination
- Consequences were Contemplated
- Reasonable Calculation of Damages

Loss of Reputation

- Lost Business Opportunities
- Defamation
- Other Inconveniences

■ Delays in Performance

Excusable

- Due to circumstances beyond the control of the design professional
- Design professional is entitled to a time extension to complete the contract

Inexcusable

- Fault of the design professional or subcontractor
- Owner may demand design professional accelerate performance – or recover actual or liquidated damages

■ Delays in Performance – Case Law

Inexcusable

Contractor agrees to complete project in 400 days

Contractor fails to complete work on time

Court concludes that some bad weather was foreseeable

DeSombre v. Bickle, 18 Wis. 2d 390

Excusable

Owner modifies plans and specifications

Contractor fails to complete work on time

Court concludes owner waived the materiality of time

Kaltoft v. Nielsen, 106 N.W.2d 597

■ Delays in Performance - Defenses

Waiver

Exculpatory
Clauses

■ Liquidated Damages

Liquidated damages must be:

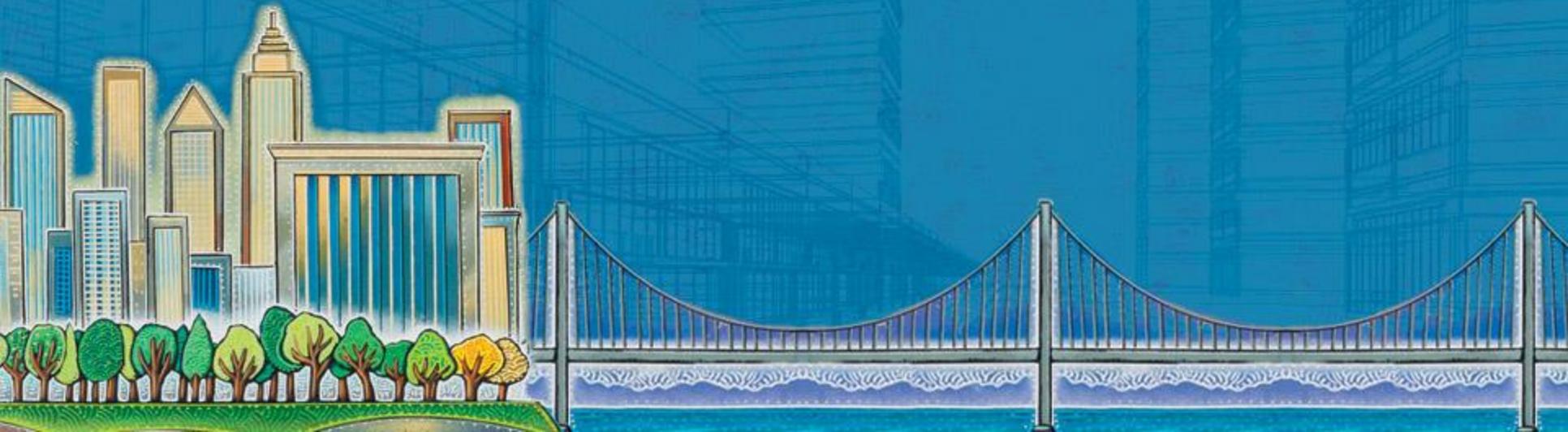
- Reasonable in light of anticipated or actual harm
- Intended to compensate rather than punish
- Used only in the event obtaining an otherwise adequate remedy is inconvenient or loss is difficult to prove

Damages whose amount the parties designate during the formation of a contract



Example 4

Contractual Obligations



■ Uninsurable Obligations—Reservation of Rights

[Insurance Company]
[Company Address & Phone Number]

[Date]

[Name & Address]

RE: Our Insured:
 Policy Number:
 Date of Loss:
 Claim Number:

Dear [Insured]:

We have received notice of a claim, which took place in [City, State] on [Date of Loss]. As a result of this claim, coverage has been requested under [Policy Number] which was issued to [Named Insured] by [Insurance Company]. There is a question whether coverage under this policy applies to this claim. The nature of this coverage question is as follows:

**WE DON'T WANT THIS ANY MORE THAN YOU DO!
So how do we avoid it?....**

■ Uninsurable Obligations



Read the fine print

■ Payment



- Fixed fee vs hourly rate
- Reimbursable expenses
- Timing of application for payment
- Criteria to determine percentage of work completed
- Payment due date
- Interest on unpaid work
- Right to suspend work or terminate agreement for nonpayment

■ Payment – Withholding and Back Charging

Uninsurable

Insurable

Withholding
Payment

Alleged
Negligence

Valid Claim



Thank you for your time!

QUESTIONS??

This concludes The American Institute of Architects Continuing Education Systems Program

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