

Surviving CDM 2015

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'If you aren't worried you haven't been paying attention'

CDM 2015 was supposed to do two things: incorporate domestic projects and make the existing regulations less complicated and bureaucratic. However what has been produced is very different: the requirements are more complicated and potentially more onerous than CDM 2007. CDM 2015 creates new roles and responsibilities and potentially requires a complete reorganisation of the construction industry. However whereas there was widespread discussion and consultation for CDM 2007 and the HSE listened to many comments made, CDM 2015 has been rushed through with little discussion and the professional institutions have failed to realise the radical nature of the changes and their potential implications.

Whereas CDM 2007 was accompanied by comprehensive guidance in an ACoP, there is no ACoP for CDM 2015, so there are many unanswered questions about how the new regulations should be interpreted. As a result, few people in the industry have realised the scale of the changes and there is no common understanding of what needs to be done to comply with them. When I asked a CITB representative about the meaning of some clauses he declined to answer, suggesting instead that I should ask a solicitor for advice and adding helpfully that we shall have to wait for the Courts to clarify the 'finer points'.

Bizarrely, although the Regulations themselves emphasise the need to allocate sufficient time and resources for a project to be carried out, the final text of the Regulations was published on April 2nd and they came into force on ... April 6th. The HSE apparently believed that the four days of the Easter holiday weekend would be sufficient time to allow for the restructuring of the construction industry required by the new Regulations. To make matters worse, CDM 2015 extends the requirements to all construction projects, no matter how small, and a vast number of projects where they have never been applied before must now go through full CDM procedures.

It is absurd, unfair and unreasonable but it is the law, so clients, architects, engineers, surveyors and contractors must work out quickly what to do. Because of the lack of clarity about the meaning of many of the new requirements and how they should be applied and uncertainty over what HSE's enforcement and prosecution policy will be, the comments and suggestions made below are intended to be helpful but are offered without any guarantees or assurances - what you do is your responsibility. If you want advice you can rely on in Court, consult a lawyer or the HSE.

Transition

The only significant transitional provision in CDM 2015 is that if a CDM Coordinator has been appointed before April 6th under the 2007 Regulations, the project can continue on this basis until 5th October. For projects where a CDM Coordinator was appointed before April 6th, this gives some breathing space before having to carry out jobs under the new Regulations and also secures the services of the CDM consultant, who are likely to be in short supply once people discover the implications of the new Regulations.

Frequently Asked Question

Q. If there is only a single contractor, the Regulations do not require a Principal Designer. What does 'a single contractor' mean?

A. If a single contractor is appointed and all the work is carried out by his own directly-employed workers, then (no matter how big the contractor and project) this counts as 'a single contractor' and no Principal Designer is required. However if the contractor subcontracts any of the work then (no matter how small the contractors and project) this counts as 'more than one contractor' and there must be a Principal Designer.

Clients

CDM 2007 placed onerous new duties on clients which very few clients would be competent carry out. However a CDM Coordinator was also created, with a duty to assist the client, which eased the situation. Under CDM 2015 the Client has a problem: he still has these duties but there is no longer a CDM Coordinator to assist him.

Designers

In CDM 2015 the duties of designers are worded differently from CDM 2007. However there is no ACoP to explain how CDM 2015 should be applied in practice, so it is not clear whether the new wording changes what designers are required to do and, if so, in what way. It will not be clear whether the new requirements are stricter and more onerous than CDM 2007 until the HSE clarifies this, either in print or in Court.

Principal Designer

CDM 2015 transfers the design duties of the CDM Coordinator to the new 'Principal Designer', whose duties are defined in strict and demanding terms. The Principal Designer must be appointed in writing by the Client and should be the designer who is in control of the design of the project. However few project architects or engineers will have the time and expertise to carry out the duties and once construction starts there is a major problem, as the Principal Designer must oversee all temporary works design. This is important because temporary works design has more effect than permanent works design on site safety. Not only is the permanent works designer unlikely to have the expertise to oversee temporary works design but it will not be under his control, as temporary works are the Contractor's responsibility.

When I asked the CITB whether there could be two Principal Designers, one for permanent works and one for temporary works (as is done in Eire), I was told

that the Regulations only permit a single Principal Designer, which left unanswered the question of how the Client is supposed to comply with the Regulations on a project which has both permanent works and temporary works (i.e. most projects).

On a Design & Build job, the design team is employed by the Contractor, so how can the Client appoint the Principal Designer? The only logical solution is to appoint the Principal Contractor as Principal Designer. I was told by the CITB that this would be acceptable.

What should designers do?

1. Design & Build Projects

- (a) The design team is employed by the Contractor, so a member of the team cannot also be appointed by the Client as his Principal Designer (remember the legal principle 'a dog cannot serve two masters'). The Client should appoint the Main Contractor to act as both Principal Contractor and Principal Designer.
- (b) On a D&B project, engineers and architects should be wary of a request by the Contractor to act as Principal Designer for him, because of the potential conflict of interest in trying to be both a design engineer working for the Contractor and a Principal Designer working for the Client at the same time. There is also the problem of temporary works, which the permanent works designer is not responsible for. It will be much better if the Contractor either carries out the role himself (which is what the Regulations intend) or else if he appoints a separate specialist to assist him with his Principal Designer duties.

2. Consultant-led projects

- (a) On a consultant-led project, if the Client decides to appoint the project Architect as Principal Designer and the architect accepts, leave them to it and wish them luck. Similarly, although it is of dubious legality, if the Client decides to appoint the Project Manager or a former CDM-C as 'Principal Designer' leave them to it and wish them luck.
- (b) If you are in the position of leading a design team, first of all send the client a copy of the Regulations, draw to his attention the onerous 'client duties' and suggest that he appoints a Client CDM Adviser to help him with these. Under Regulation 5(3), if the client 'fails to appoint a Principal Designer', the PD duties will revert to the Client, in which case the Client's CDM Adviser can also carry them out. This may turn out to be the best approach to adopt: the duties of the Client's CDM Advisers will become essentially the same as the old CDM Coordinator (making ex-CDM-Cs happy) and the designer will be relieved of CDM duties (making him happy too). The other possible option, advocated by the Association for Project Safety, is for the Client to appoint an ex-CDM-C directly as Principal Designer but the justification for this relies on a rather creative legal interpretation of the Regulations.
- (c) If it is not possible to get the Client to follow either of the options in (b), a designer may get stuck with PD duties. These are very onerous and being a PD could be risky, especially in the early years of the Regulations when the

interpretation and meaning of the Regulations is being tested in Court. As in previous CDM Regulations, it will be difficult for an engineer to do the design and also do the PD duties at the same time without making mistakes (remember the problem with blokes multitasking). Therefore if a designer has to be Principal Designer, it would be a good idea to hire a separate CDM Adviser to carry out the PD duties, charging extra to cover the additional fee.

3. Temporary works

- (a) Regardless of whether 2(b) or (c) is adopted, on a consultant-led project the problem of temporary works design must be addressed: design of temporary works is controlled by the Contractor, not the permanent works designer. The most practical solution will probably be to include items in the Schedule of Works for the main contractor to act as both CDM Principal Contractor and CDM Principal Designer for the construction phase. Explain to him that the latter is necessary because he controls the design of temporary works. When it is time to appoint the Contractor, the person acting as Principal Designer can then resign from the position and the Client can appoint the Contractor as Principal Designer for the construction phase.
- (b) This may seem complicated but it is the only practical way to reconcile the CDM 2015 requirements that on one hand the Principal Designer should be the person with control over the relevant design work but on the other hand at any one time the project can only have one Principal Designer.

4. Domestic projects

- (a) These are tricky. Firstly, the Regulations pass the Client's duties to the Contractor when the latter is appointed but they do not say who carries them out before then. Logically it must be the Client - but as the CDM Regulations come under the Health & Safety at Work Act, they can only impose duties on people at work. It is therefore questionable whether the CDM Regs can legally impose any duties on a domestic Client - and therefore whether there can actually be any 'domestic client duties' to be passed on to the Contractor. Perhaps one day the courts will sort this out. The second problem is that on a job for a domestic client, the Regulations require the main designer to carry out the duties of Principal Designer even if the Client has not asked him or paid him to do them. Be very careful about giving free design advice early in a project!
- (b) Therefore when designing a domestic project (no matter how small) one of the designers will need to cover the CDM Principal Designer duties and add the cost to his fees. The Client must also be told that the permanent works designer will resign as Principal Designer before construction starts and he must appoint the Principal Contractor as Principal Designer for the construction phase. If tenders for the work are being obtained, a cost item for this should be included in the Schedule of Works and, as contractors may well be unfamiliar with the new Regulations, the covering letter should explain that this is necessary because the Regulations require the designer with control over the design to carry out the role and the Contractor is responsible for temporary works design.

5. Contractors

- (a) Large contractors on Design & Build projects may assume that CDM 2015 will have little effect on them - in which case they may find it a surprise to learn that the job of Principal Designer belongs to them.
- (b) Contractors on consultant-led projects may also be surprised to learn that they have to act as Principal Designer for the construction phase of the project. Once the logic is explained to them they will find it hard to argue against it but most will probably need to hire a CDM adviser to help them with the duties.
- (c) Contractors on domestic projects face the biggest changes: not only will they have CDM Principal Contractor duties to perform on the smallest domestic project but they will also have the Client's duties and the Principal Designer's duties for the construction phase. For people who are usually not great at paperwork and not familiar with all the requirements of CDM, all this will come as a major shock. To comply with the Regulations, they will have to hire CDM advisers and try to persuade their clients to pay the extra cost. Many will be tempted to carry on as usual and hope for the best. Thus responsible small builders will face an uncomfortable choice: either pull out of the domestic market, or else hire CDM advisers and try to comply with CDM 2015 but risk being driven out of business by competitors undercutting their prices.
- (d) On domestic projects the HSE faces a dilemma. If it does not enforce the new Regulations, nothing will change. However if it does enforce the Regulations firmly, this could have the effect of driving responsible contractors out of the domestic market, which will not improve safety. Our old friend the 'Law of Unintended Consequences' needs to be considered.

6. Changing a light bulb

- (a) How many people will it take to change a light bulb? CDM 2015 extends the principles of CDM to even the smallest job and under Regulation 2(1) 'construction work' includes (e) '...electrical services ... which are normally fixed to a structure ...'. Therefore, if a light bulb is changed by someone in the course of their work or business, the CDM Regulations apply.
- (b) The Client duties in Regulation 4 are onerous and beyond the knowledge of most clients, so a CDM health and safety adviser will probably be necessary. If the bulb is to be changed by a member of staff, or by a directly appointed electrical contractor, then this is a 'single contractor' and under Regulation 4(1) the Client must first 'make suitable arrangements for managing a project, including the allocation of sufficient time and other resources' and then, under Regulation 12(1) 'During the pre-construction phase, and before setting up a construction site, the principal contractor must draw up a construction phase plan or make arrangements for a construction phase plan to be drawn up'. Then the light bulb can be changed.
- (c) If another contractor is working on site at the same time, or the electrical contractor is not appointed directly (e.g. if he is appointed by a maintenance contractor), it is more complicated. As there is 'more than one

contractor', under Regulation 5(1) the Client must appoint (in writing) a Principal Designer and a Principal Contractor for the 'project'. Then, under Regulation 12(5), 'During the pre-construction phase, the principal designer must prepare a health and safety file appropriate to the characteristics of the project which must contain information relating to the project which is likely to be needed during any subsequent project to ensure the health and safety of any person'. Then the Principal Contractor must draw up the construction phase plan required by Regulation 12(1). Then, finally, the light bulb can be changed, which should be reasonably straightforward ... unless the Principal Designer or Principal Contractor has banned the use of ladders for work at height.

(d) I understand that the HSE will be producing wordprocessor templates to help small companies to produce the necessary paperwork and the CITB has produced an Android phone app which can be downloaded from its website, with an iPhone version promised shortly. This is not a joke.

7. How has this happened?

You could not make it up: in its dying days a Government which previously ridiculed 'health and safety gone mad' really has passed Regulations which are likely to surpass all their predecessors for 'bonkers health and safety'. The changes in CDM 2015 seem to have slipped through 'under the radar', with few people in the construction industry realising the radical nature of the changes proposed. This has happened partly because the consultation period was short and not highly publicised - and partly because most people assumed the changes would be minor and did not bother to look.

Before blaming it all on the EU, we should note that the EU Directive has not changed - what has changed is the UK legislation implementing it and, as is so often the case, instead of being simply implemented as they are, the EU requirements have been embellished and enlarged in the UK legislation.

To make matters worse, the Regulations break a basic principle of safety management: responsibilities should be defined clearly and responsibility for managing risk should be allocated to the person who is in the best position to control it. CDM 2015 makes the Client responsible for things that he does not have the knowledge to deal with and has no control over. Similarly the intention appears to have been to make the permanent works designer responsible for coordinating temporary works design, despite the fact that this is the responsibility of the contractor and the permanent works designer is unlikely to have any control over it.

There is also the fallacy that it is easy to eliminate or reduce construction risks by making simple changes to the permanent works design. In reality, although this is sometimes possible, the scope is limited and in most cases the option of eliminating risk does not exist - the designer can only choose between alternatives, all of which have risks. In fact the EU study which led to the EU Directive and the CDM Regulations estimated that only 6% of construction accidents could be eliminated by changing permanent works design [1].

The next few years are likely to be challenging for anyone involved in construction. Predictions?

- * Rather than former CDM-Cs becoming unemployed, there is likely to be a boom in demand for their services and a shortage of competent CDM advisers by autumn.
- * There may also be a shortage of paper and filing cabinets and an increase in back injuries among staff dealing with the paperwork.
- * There may be an increase in personal injuries to people tripping over furniture in rooms where defective light bulbs have not been replaced.

Good luck!

References

1. 'CDM Regulations:12 years of pain but little gain', *Proceedings of ICE: Civil Engineering*, vol. 160 May 2007, pp. 82-88, Paper 14431 – available at www.anbeal.co.uk