

Construction Design and Management Regulations 2007 - Clients' Perspective

A significant change to construction health and safety legislation is due to come into force in April 2007 with the introduction of the Construction (Design and Management) Regulations 2007 ("CDM2007"). The current CDM Regulations will be replaced and merged with the Construction (Health, Safety and Welfare) Regulations 1996. There is little change to the content of the 1996 Regulations but there are significant changes to the CDM part.

The aim of the new regulations is to simplify and clarify the law and to raise health and safety standards by improving the planning and management of construction projects. This change follows a lengthy review and consultation phase and amendments have been made to address some stakeholders' concerns. However the changes for certain groups, in particular, clients are significant.

The new regulations will be supported by an Approved Code of Practice (ACoP) and industry produced guidance. The ACoP and industry guidance will be key to duty holders understanding the detail of what is required. The ACoP is in draft form but has not been formally published. Although the ACoP was expected to be published more than three months in advance of the regulations coming into force it is now thought it might not be published until mid-February 2007 giving little time for duty holders to consider the full impact of the new regulations.

The purpose of this briefing note is to highlight in overview the main changes. Changes which affect all duty holders are explained first followed by duty holder specific changes. The briefing does however focus on the changes for clients as the impact on them may be more significant than for other duty holders. The Regulations place different requirements on projects which last for more than 30 working days or involve more than 500 person days including notification to the Health & Safety Executive ("HSE"). However, this note does not specifically distinguish between projects which are notifiable or not as the principles are the same, although in a non notifiable project there is no requirement to appoint a CDM Coordinator or a Principal Contractor.

Competence, Cooperation & Coordination

Competence, cooperation and coordination are the three underlying requirements on all duty holders (Clients, Designers, CDM Coordinators, Principal Contractors and Contractors). Duty holders must:

- take reasonable steps to ensure competence of those they appoint and their own competence;
- proactively cooperate and be reactive to allow other duty holders to discharge their duties; and

- coordinate work to ensure health and safety during construction.

The requirements to cooperate or coordinate apply regardless of whether there is a contractual requirement.

The ACoP and relevant industry guidance will assist when assessing competence. Essentially however assessments should focus on the particular project and be proportionate to the risk, size and complexity of the work. A duty holder is required to make reasonable enquiries to check that the organisation or individual appointed to carry out a role is competent to do the relevant work and can allocate adequate resources to it.

Clients

The Health and Safety Commission ("HSC") see the role of clients as fundamental in achieving its aim of improving the health and safety of workers and consequently some of the most significant changes under the new regulations focus on clients. The intention behind the regulations is that the duties imposed on clients should match their level of influence on the project that they are commissioning and therefore the standard and effort required will vary.

Key to the HSC's thinking is that making the clients responsible for appointing competent contractors and designers will improve the standard of those duty holders. So for example a client cannot appoint a Principal Contractor without assessing whether it has similar or suitable experience of the type of project and that it is adequately resourced. A CDM Coordinator (the replacement for the planning supervisor under the old CDM regulations) will be able to advise clients about the competence of a potential principal contractor and the other duty holders but the responsibility remains with the client.

Appointment of other duty holders

For notifiable projects the trigger for appointing a CDM Coordinator happens earlier than for a planning supervisor and given the increased emphasis on clients to choose competent designers and contractors this is perhaps not surprising. However the trigger is when initial design work starts. This means feasibility studies can be done but not the

preparation of initial concept design or implementation of a strategic brief without a CDM Coordinator. The trigger for appointing the Principal Contractor is when you know enough so that they can contribute to the project and assist with buildability and maintainability. If a client does not appoint duty holders when it should it will attract that duty holder's responsibilities and, if it is not competent, will also be guilty of an offence.

Other responsibilities

Clients are also required to ensure there are suitable management arrangements for the project including welfare facilities. They must allow sufficient time and resources for all stages and provide information to designers and contractors. Clients must also tell contractors how much time has been allowed for work to be planned and carried out.

Clients must always take care to ensure that they do not inadvertently go beyond the scope of their normal role by specifying materials and approaches to be taken during the construction project and so attracting additional duties as a designer or contractor.

No client's agent provision

One of the most commented on features under the new regulations is the removal of the clients' agent provision. The HSC do not see this as controversial because regardless of the agent's provisions in the old CDM Regulations, a client was still potentially liable under the Health and Safety at Work Act 1974 and the Management of Health and Safety at Work Regulations 1999 to manage a project appropriately. That view is not likely to be shared by most clients probably because historically clients did not receive much scrutiny from the HSE following an incident. However with the shift in emphasis in CDM 2007 that is likely to change.

PPP and PFI

The ACoP in its draft form does provide some clarification on the position in PFI and PPP projects. The project originator will legally be the client at the start of the project and should appoint the CDM coordinator as soon as possible. The project originator cannot wait until someone else, for example a special purpose vehicle, takes over the client role. However if there is potentially more than one client it is possible (and probably desirable) for the clients to elect one as client for the purposes of CDM2007.

Designer

The main change under the new regulations is that designers are now specifically required to carry out designs to eliminate hazards and reduce risks which occur during the construction, use and decommissioning phases. Whilst HSE has confirmed that this does not mean designers must carry out design risk assessments it is not clear how a designer will record how it has achieved its obligations. Another key feature is that the design of any structure which is to be used for a workplace must comply with the Workplace (Health, Safety and Welfare) Regulations 1992.

CDM Coordinator

Clearly the main change is the move from this duty holder being identified as the planning supervisor to a CDM Coordinator. The change in name reflects the key difference between the two roles as the coordinator is also required to advise and assist the client in the discharge of his duties, in particular, to advise on the adequacy of other duty holders' arrangements for controlling risk arising from the project.

Principal Contractor

The Principal Contractors role has developed slightly to include a monitoring remit of the construction phase. There are also specific obligations on the Principal Constructor to ensure all workers (whether employed by him or not) receive site induction, training from their employer including any specific training to carry out the particular project.

Civil Liability

CDM 2007 contains an interesting development on civil liability clauses in health & safety regulations. Although in part ambiguous it appears that anyone involved in carrying out construction work (rather than just employees) will be able to bring a claim for breach of statutory duty against any duty holder in the event that breach has caused some harm. The HSC consulted on this issue receiving conflicting views on whether it was appropriate.

Implementation

These new regulations form a key element of the HSC's strategy to improve health and safety on construction sites. We can therefore expect there to be a significant focus on those elements which the HSC see as key and it is likely that there may be a shift towards the review of all the duty holders involved in the projects when incidents occur and not just the usual suspects.

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As of 7/02/07 the regulations had not been signed by the minister responsible. However the regulations are still expected to come into force in April 2007.

Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

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