



As you have probably heard, new CDM Regulations are coming into force on 6 April 2015. From that date a new CDM regime will apply to virtually everyone in the UK who procures or provides construction works and services of any significance. There is already plenty of information freely available online (including in the HSE's own **guidance**) which explains the key changes – the demise of the CDM Coordinator, the new role of principal designer, domestic work now covered by CDM, the enhanced role of the client etc. etc.

So rather than repeat what is already available we thought it would be more useful to look at a number of issues raised by the new regs which are less clear cut.

### How much of the design is the principal designer responsible for?

The decision to call the new duty holder the principal designer has raised concerns in some quarters. To construction people involved in complex projects where there is likely to be a team of consultants all contributing to an overall design (architects, structural engineers, M&E engineers etc.) the phrase suggests someone who will check each element of that design and be responsible for the overall technical performance of the completed works. However, while the new role undoubtedly has design responsibility (in contrast to that of the CDM Coordinator under the old rules), it does not go as far as many in the industry seem to think.

Although the principal designer must be a "designer" for the purpose of the regs, the role is largely one of management and coordination. The principal designer is not necessarily required to do any original design itself but, rather, must *"coordinate matters relating to health and safety...to ensure that, as far as reasonably practicable, the project is carried out without risks to health and safety"*.

The principal designer is helped in this task by the fact that each of the other designers have positive obligations to *"take into account the general principles of prevention...to eliminate, so far as is reasonably practicable, foreseeable risks"* when carrying out their element of the design. The principal designer must ensure that this is being done. In practice this will mean that the principal designer puts in place appropriate arrangements for the monitoring, sharing and coordination of design information between the designers (and client). This is most likely to occur through regular design review meetings. During those meetings the principal designer must work with the other designers to check how risks are being identified and how the designs eliminate, reduce or control them. The principal designer will also act as a conduit between the designers and the principal contractor to explain risks that cannot be eliminated at the design stage.

In reality, the role of principal designer is unlikely to be standalone. It will make practical sense for the "lead" consultant on any given project to assume the role of principal designer alongside its other responsibilities (an architect on a building project perhaps or a process engineer on a piece of process plant).

Any principal designer who continues to be concerned about the extent of its design responsibility should make it clear in its terms of appointment that it agrees to carry out the duties of principal designer under the CDM regs but, subject to that, not to be on the hook for the technical performance of the works as a whole.

### How long is the "construction phase" and when do projects "come to an end"?

Many of the duties under the new regs last until completion of the "construction phase" of a project. *"Construction phase"* is defined as *"the period of time...ending when construction work in that project is completed"*.

The obvious assumption is that this means practical completion of the works. However, the definition of *"construction work"* is broadly defined and includes all the things you would expect it to cover but also *"commissioning", "upkeep", "demolition" and "maintenance, repair or removal of mechanical...services which are normally fixed within...a structure"*.

It follows that the completion of the "construction phase" could mean:

- practical completion of the works; or
- the end of the defects notification period (depending on the defects encountered, the work done during the DNP could range from fixing a dripping tap to major remedial works to repair inadequately designed foundations); or
- some much later date (eg if the project anticipates the planned, periodic replacement of major items of plant in a power station).

To confuse things further, the transitional arrangements (which deal with projects that have already been started at the time the new regs come into force) say that the existing CDM Coordinator does not need to be replaced by a principal designer if *"the project comes to an end"* before 6 October 2015. First, it is unclear why legislators chose to introduce this new phrase rather than making use of the defined term *"construction phase"*. It is possible, on one interpretation, to conclude that when *"the project comes to an end"* is a synonym for completion of the *"construction phase"*.

In any event, it has been suggested that the **guidance** to the new CDM regs published by HSE clarifies this point by saying that the regs *"apply to construction projects as a whole – that is, the whole construction process from concept to completion"*. Unfortunately this takes us no further forward as neither the guidance nor the regs tell us what is meant by *"completion"*.

One view is that those drafting the regs and the HSE guidance deliberately made the terms flexible as they recognised that there would need to be sufficient versatility to cover projects ranging from a house extension to a nuclear power station. A possible solution for simple projects is that the principal contractor takes over the responsibilities from the principal designer from practical completion until the end

of the DNP (which mainly involves completing and handing over the health and safety file). If major works are required during the DNP (eg the foundations need to be rebuilt) then a new principal designer is very likely to be needed to coordinate the design of any new temporary and permanent works.

On more complex projects it is likely that both the principal designer and principal contractor will need to be retained until at least the end of the defects notification period. If by that point an operator of the project has been appointed with long term maintenance obligations (eg the periodic replacement of major pieces of plant) then the principal designer and principal contractor duties could be transferred to the operator at that point. On a practical level, it is likely that the HSE will look at the "output" in terms of design and construction work being undertaken rather than contractual arrangements.

## Alignment of CDM and contractual obligations

It is not possible to "contract out" of CDM. Even if the contract does not mention CDM the parties still have to comply with any duties they may have under the regs. However, it is not unusual for contracts to include an obligation on consultants and contractors to comply with their CDM obligations so that any breaches are not only a breach of CDM (to be dealt with by the HSE) but also a breach of contract (giving the client potential rights against the wrongdoer).

The new regs throw up a couple of areas in which clients should consider what CDM compliance means from a contractual point of view.

Firstly, for existing projects that will continue beyond 6 October 2015 the CDM Coordinator will need to be replaced by a principal designer. Under construction contracts and appointments the client usually retains the risk of changes in law so even if the current CDM

Coordinator has the skill and experience to take on the role of principal designer this is likely to require a variation to the appointment, with cost and possibly time implications for the client. Alternatively the CDM Coordinator's appointment may need to be terminated and a new principal designer appointed in its place. Again, this has potential time and cost implications for the client.

Less significantly, but something to be aware of, is the slight change in role of the principal contractor if it takes on the role of principal designer after practical completion as considered above. This won't require the replacement of the principal contractor, but may result in claims for additional cost to cover the enhanced health and safety obligations.

Secondly, the regs require duty holders to "ensure" that others behave in a certain way. For example, the principal designer must ensure that "all persons working in relation to the pre-construction phase cooperate with the client, the principal designer and each other". However, the principal designer (in this example) will have no means of compelling such performance. He will not have a contract with any of those people (other than the client) so will be powerless to force them to act. One (drastic) solution is to put in place a multi-party interface agreement between each of the participants under which they have rights against each other to compel performance. However, this is unlikely to be feasible or attractive in anything other than the most complex projects. Instead, the client should ensure (as suggested above) that all professional appointments and construction contracts contain obligations on the consultants and contractors to comply with their CDM responsibilities. Then, if the principal designer meets with resistance from one of the delivery team he can inform the client who will have the contractual muscle to compel performance by the recalcitrant party.

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