



Welcome to the March 2015 edition of *Insight*, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

**This issue considers the application of the new CDM Regulations and the transitional arrangements that will be in place, reviews the key changes that are expected to be introduced and discusses the impact of the new CDM Regulations on the domestic standard forms.**

# Insight

## All you need to know about the new CDM Regulations

This 45th issue of *Insight* (i) considers the application of the new CDM Regulations and the transitional arrangements that will be in place; (ii) reviews the key changes that are expected to be introduced; (iii) discusses the impact of the new CDM Regulations on the domestic standard forms; and (iv) provides some practical tips on how to ease the transition from the 2007 Regulations to the new CDM Regulations.

On Easter Monday 2015, the Construction (Design and Management) Regulations 2015 ("the new CDM Regulations") and the accompanying new guidance will come into force, replacing the current Construction (Design and Management) Regulations 2007 ("the 2007 Regulations") and the Approved Code of Practice. The new CDM Regulations will apply to the management of health, safety and welfare of almost all construction projects in England and are expected to provide for a new division of responsibilities between duty holders, giving the client increased overall responsibility and replacing the current CDM coordinator with a new principal designer role.

### Application of the new CDM Regulations

In circumstances where: (i) a CDM coordinator was appointed before 6 April 2015 (i.e. before the Easter break); (ii) work started on site before 6 April 2015; and (iii) completion is to be before 6 October 2015, the new CDM Regulations will not apply and you should continue to comply with the 2007 Regulations.

For projects where work started on site after 6 April 2015, the new CDM Regulations will apply in full.

### Transitional arrangements

Transitional arrangements will be in place between the period 6 April and 6 October 2015 and will vary according to whether a CDM coordinator has been appointed, and whether the construction phase has started. There are three different scenarios:

(1) If a CDM coordinator has not been appointed by 6 April 2015 and the construction phase has not started, the client must appoint a principal designer (as to which see further below) as soon as practicable.

(2) Where a CDM coordinator has not been appointed by 6 April 2015 and the construction phase has already started, the client may appoint a principal designer, but it is not required to do so. If no principal designer is appointed, the principal contractor will be responsible for the health and safety file.

Where a CDM coordinator has been appointed prior to the transitional period, the client must appoint a principal designer by 6 October 2015, after which the CDM coordinator will have no further role.

That is the theory. In practice, however, the principal designer role may need to be sub-contracted to the architect during the transitional period. This is because the Health and Safety Executive ("HSE") guidance notes<sup>2</sup> make it clear that the principal designer must be a designer who is responsible for preparing or modifying the design, and any existing CDM coordinators who are not designers will, strictly speaking, not be qualified to be appointed as principal designers.

### Key changes

#### Increased responsibility for client

The most striking change in the new CDM Regulations is that it is likely there will be increased responsibility on the part of the client. Going forward, the client will probably have to make suitable arrangements for managing projects to ensure that construction work can be carried out, so far as is reasonably practicable, without risk to the health and safety of any person affected by the project.

In particular, the client is expected to be responsible for (i) notifying the HSE of a notifiable project; (ii) appointing a principal designer and contractor in writing; (iii) taking reasonable steps to ensure that the principal designer



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and principal contractor comply with their duties under the new CDM Regulations; (iv) ensuring a construction phase health and safety plan is prepared by the principal contractor; and (v) ensuring a health and safety file is prepared by the principal designer.

If the client fails to appoint a principal designer where one is required, then the client must carry out the principal designer role itself, but in practice it is very likely that many, if not all, of these duties will be delegated by the client to others during the course of the project. Ultimate responsibility for any breach of duty, however, will probably rest with the client and criminal liability may attach to any breach. The consequences of the client not complying with the new CDM Regulations are therefore serious.

### CDM coordinator role abolished and replaced with new principal designer role

As indicated above, the role of the CDM coordinator will probably be abolished and its function divided between the client, principal contractor and the new role of principal designer who will be responsible for ensuring that all designers comply with their duties under the new CDM Regulations.<sup>3</sup>

The principal designer will assume the greatest part of the previous CDM coordinator role, and will have primary responsibility for coordinating health and safety during the pre-construction phase, as well as liaising closely with the principal contractor, any other designers and the client during the construction phase in order to provide ongoing design-led

health and safety input as the works progress.<sup>4</sup>

In practice, it will most likely be the architect who was involved with the design from the concept stage who will take on the role of principal designer. That said, it is unusual for design and build contractors to be involved at the design concept stage which may necessitate the appointment of one of the members of the design team to act as principal designer to deal with the pre-construction phase. This may increase costs. Where the principal contractor is also a designer, the principal contractor may undertake the dual role of principal designer and principal contractor.

### Notification

The threshold for notification of projects to the HSE has been raised slightly in that notification is now required in circumstances where (i) there are more than 20 people working on site simultaneously at any point during the project and (ii) the project has a duration in excess of 500 person days (i.e. 50 people working for over 10 days). Currently, only projects that are expected to last more than 30 working days, or involve in excess of 500 person days, have to be notified.

Further, notification will no longer trigger additional duties. Currently, the appointments of CDM coordinator and principal contractor are dependent upon a project being notifiable, whereas the duty to appoint the new principal designer and principal contractor is expected to be triggered on all projects where there is (or it is reasonably foreseeable that a project will use) more than one contractor.

### New written construction phase plans for all projects

Written construction phase plans<sup>5</sup> will now be required to be drawn up and kept under constant review by the

principal contractor (supported by the principal designer) for all construction projects, as opposed to just notifiable projects prior to setting up the construction site, in order that best practice can be taken into account during the setting-up phase. This requirement is most likely to impact upon smaller non-notifiable projects which previously had no need for a written construction phase plan.

### Reduced emphasis on competence

The requirement that the client checks the competence and resources of all appointees has been removed from the new CDM Regulations and replaced with a duty for the client to take reasonable steps to satisfy itself that any designer or contractor it appoints will be competent. In practice, this is likely to translate to a general requirement to ensure all appointees have appropriate training and information: the competency of industry professionals will probably be a matter for the relevant professional governing body.

### Domestic work

The definition of "client" under the new CDM Regulations is expected to include not only non-domestic or "commercial" clients, but also domestic clients (i.e. clients for whom a construction project is carried out which is not done in connection with a business). However, the impact of this change will likely be minimised by permitting domestic clients to delegate the majority of their duties to a principal designer or principal contractor. Default provisions are also expected to be put in place whereby the designer in control of the pre-construction phase will be the principal designer, and the contractor in control of the construction phase will be the principal contractor in the event that the domestic client fails to arrange the necessary professional appointments.



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### Amendments to the standard forms

#### JCT

Amendment sheets to the JCT suite of contracts to take account of the drafting changes that are needed to accommodate the new CDM Regulations will be on the JCT website shortly. In the most part, they are expected to require compliance with the new CDM Regulations and should not be contentious.

#### NEC3

The NEC3 suite of contracts does not contain express provisions relating to the 2007 Regulations (or any legislation for that matter), and, as such, it is unlikely that the NEC will publish any official amendments relating to the new CDM Regulations. Parties, however, commonly amend NEC3 to include compliance with legislation, in which case any Z clause should be updated to refer to the new CDM Regulations.

#### Some practice points

- Make sure your project team is aware that changes are imminent.
- Vet your contracts and appointments. In particular: (i) check whether they comply with and reflect the new CDM Regulations; (ii) make sure provision is made for any additional time and cost that might arise as a result of the new CDM Regulations; and (iii) consider any new appointments or subcontracts that may be necessary.
- The new CDM Regulations apply to projects that are notifiable as well as those that are not notifiable. Clients, and any contractor

who has had the client's duties under the new CDM Regulations delegated to them, should review their non-notifiable projects to ascertain whether they will be caught by the new CDM Regulations.

- If the transitional arrangements apply to you, check that you are clear exactly what is expected and consider whether you need to make any adjustments to any existing CDM appointments.

#### Conclusion

It is the HSE's belief that the new CDM Regulations will simplify and streamline health and safety but they also have the capability to be confusing and costly, particularly during the transitional period. Removing the CDM coordinator with effect from 6 October 2015 rather than allowing the CDM coordinator to remain *in situ* until the end of the project will create two overlapping roles, and this, coupled with the fact that the new incoming principal designer is required to be someone who either prepared or modified the design (which is outside the remit of most CDM coordinator roles), may present challenges for some projects, in particular smaller projects where the project team may not have a dedicated designer who is also capable of fulfilling a health and safety role.

Whether the new CDM Regulations will achieve the HSE's aim of streamlining health and safety law remains to be seen.

#### Footnotes

1. The Health and Safety Executive has emphasised that the draft new CDM Regulations and the associated draft guidance may change during its passage through Parliament, but any changes are expected to be of a minor nature only.
2. Available on the HSE website [www.hse.gov.uk](http://www.hse.gov.uk)
3. A breach of the new CDM Regulations may render the client liable to a maximum of two years' imprisonment and/or an unlimited fine.
4. The principal contractor, on the other hand, will plan, manage and monitor the construction phase, and coordinate matters relating to health and safety during the construction phase to ensure that, so far as is reasonably practicable, construction work is carried out without risk to health or safety.
5. The construction phase plan is prepared by the principal contractor and is a document that must record: health and safety arrangements for the construction phase; site rules taking account, where necessary, of the industrial activities taking place on the construction site and, where relevant, specific measures concerning work that falls within one or more of the categories listed in Schedule 5 of the Regulation.