

CDM Regulations overhaul: a healthy change?

The Construction (Design and Management) Regulations 2015 (2015 Regulations) came into force on 6 April 2015, replacing the Construction (Design and Management) Regulations 2007 (2007 Regulations).

Principal designer

A new function of principal designer will replace the CDM co-ordinator role. The main difference between the CDM co-ordinator role and the principal designer role is that the principal designer must be a "designer" (but see below, not necessarily a designer in the normal sense of the word) and will be responsible for pre-construction co-ordination. The intention appears to be that the principal designer will therefore have greater influence over design than the old CDM co-ordinator.

The key function of the principal designer is to plan, manage, monitor and co-ordinate the pre-construction phase of the project (i.e. the time during which design or preparatory work is carried out) and specifically to take into account the general principles of risk prevention in eliminating or minimising health and safety risks throughout the project.

Redefining "client"

The 2015 Regulations apply to virtually all construction projects in Great Britain. The 2007 Regulations define a "client" as any person who "in the course or furtherance of a business, has or seeks to have construction work carried out". The effect of this is that owner occupiers are exempted from client duties. The 2015 Regulations remedy this inconsistency by defining "client" as "any person for whom a project is carried out". It remains the case that where there is more than one client in relation to a project (for example a developer and a tenant carrying out fit out works), a group of clients can elect one of their number to be treated as the sole "client" under the 2015 Regulations and must record this agreement in writing (for example in the agreement for lease).

Expanding client duties

Clients must now ensure that suitable arrangements are made for managing the health and safety of a project (including the allocation of sufficient time and other resources). Arrangements are deemed suitable if they ensure that construction work is carried out (in as far as is practicable) without risk to the health and safety of any person affected by the project and that the prescribed welfare facilities are provided.

Previously, a client was under an obligation to take reasonable steps to ensure that such arrangements were made by the CDM co-ordinator. Therefore, there is an increased burden on the client to manage their health and safety risks.

The client must also take "reasonable steps" to ensure that those appointed to fulfil duties prescribed by the 2015 Regulations properly discharge those duties.

Key implications

- The 2015 Regulations apply to virtually all construction projects in Great Britain with very limited exceptions.
- CDM co-ordinator role is abolished. The new role of principal designer imposes greater duties regarding pre-construction co-ordination and design than the previous CDM co-ordinator role.
- Clients will be under an obligation to make suitable arrangements for managing the health and safety aspects of a project (including the allocation of time and resource). Clients should ensure that they are effectively discharging this duty.
- Clients should consider terminating existing CDM co-ordinator appointments where a project is likely to continue after 6 October 2015, by which point a principal designer must be appointed.

Notification

Under the 2015 Regulations, a project becomes notifiable where work on a construction site is scheduled to last more than 30 working days and have more than 20 workers working simultaneously, or where it will exceed 500 person days.

The 2015 Regulations shift the responsibility for notification from the CDM co-ordinator to the client. The client is required to notify the HSE of the project as soon as practicable before the construction phase begins. However, the client is able to delegate responsibility for notification. Where a project was notified under the 2007 Regulations it appears that a fresh notification under the 2015 Regulations will not be required but it would be useful for this to be spelt out in the new guidance (see below re ACoP).

Competence

The 2015 Regulations have replaced explicit competency requirements with a generic requirement to ensure that anyone appointing a designer or contractor to carry out construction work must take reasonable steps to satisfy themselves that those being appointed have the "skills, knowledge and experience and, if they are an organisation, the organisational capability, necessary to fulfil the role that they are appointed to undertake."

Replacement of ACoP

The existing ACoP has been revoked. It is understood that a new ACoP will be published by the end of 2015. We are now in an interim period when the 2015 Regulations are supported by HSE and industry guidance alone.

Application to off-shore projects

As with the 2007 Regulations, the 2015 Regulations will also apply to off-shore energy projects (such as wind farms) within the territorial sea of Great Britain.

Transitional provisions

On a project where the construction phase (i.e. the time when construction work, including demolition work, has started and ending when the construction work is completed) had not yet started before 6 April 2015 and a CDM co-ordinator has not been appointed, the client must appoint a principal designer (in writing) as soon as is reasonably practicable.

Where a CDM co-ordinator has been appointed (regardless of whether or not the construction phase had started before 6 April 2015), the client has a choice not to appoint a principal designer and the existing CDM co-ordinator will be able to continue with their role for a maximum period of six months (i.e. until 6 October 2015), by which point a principal designer must be appointed. Until such time as a principal designer is appointed, the CDM co-ordinator must comply with the duties set out in Schedule 4 of the 2015 Regulations, which mirror the duties of the CDM co-ordinator under the 2007 Regulations.

Sanctions

Criminal sanctions will continue to apply to a breach of the 2015 Regulations through the Health and Safety at Work Act 1974 (maximum penalty is an unlimited fine or 2 years imprisonment, or both). If a client fails to appoint a principal designer or principal contractor, it will be responsible for fulfilling the respective duties of those roles under the 2015 Regulations.

Market view

Given the heavier emphasis on the 'design' input of the principal designer, some clients are considering appointing one of their design team as principal designer rather than a standalone specialist consultant (as was usually the case with CDM Co-ordinators under the 2007 Regulations). The choice of consultant to carry out the principal designer role is heavily influenced by the procurement route, with some clients requiring their design and build contractor to carry out the principal designer role, perhaps facilitated via consultant novations. Clients are seeking to ensure that construction contracts and appointments currently under negotiation do not permit additional costs to be imposed on the client as a result of the 2015 Regulations coming into force, and cater for a smooth transition from the 2007 to the 2015 regime.

Published standard forms

The JCT has published amendment sheets for each of the JCT contracts to cater for the 2015 Regulations. The amendments do not deviate substantively from the existing treatment of the 2007 Regulations under the JCT contracts, namely in that it continues to distinguish between duties of the contractor when they are the principal designer as opposed to when they are not carrying out such a role.

Clients should consider how best to amend their building contracts and appointments to cater for the 2015 Regulations.

Market trend

There appears to be growing confusion in the market regarding which type of consultant should be hired as a principal designer under the 2015 Regulations. Clients' approach to this conundrum shows a divergence between those who seek to maintain an existing CDM co-ordinator by recasting their services as principal designer services and those who seek to appoint a designer in the traditional sense to carry out the principal designer role. Neither approach is flawless; the former potentially suffers from a perceived lack of design input during the pre-construction phase, whereas the latter may not necessarily possess the health and safety expertise of a CDM co-ordinator.

As for what is permitted under the 2015 Regulations, a principal designer must be a "designer". A "designer" under the 2015 Regulations can either be the person who prepares the design or the person who is responsible for arranging or instructing any person under their control to do so. A "design" includes "drawings, design details, specifications and bills of quantities... and calculations". Therefore, the principal designer does not have to be a designer *per se*. It could potentially be a consultant who previously acted as CDM co-ordinator provided they have the capability to provide the required design input during the pre-construction phase.

The key consideration for clients is therefore likely to be whether the person or organisation appointed as principal designer has the necessary skills (and professional indemnity insurance) to be able to discharge their duties under the 2015 Regulations. Some further guidance from the HSE would be welcome.

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If you would like to know more about Clifford Chance's Construction Group in London or across our network, please contact David Metzger (david.metzger@cliffordchance.com), Tim Steadman (tim.steadman@cliffordchance.com), Sandy Hall (sandy.hall@cliffordchance.com), Matthew Buchanan (matthew.buchanan@cliffordchance.com), or your usual Clifford Chance contact.

CLIFFORD CHANCE LLP

Authors



David Metzger

Partner

T: +44 20 7006 4240
E: david.metzger@cliffordchance.com



Tim Steadman

Partner

T: +44 20 7006 4012
E: tim.steadman@cliffordchance.com



Marianne Toghil

Director

T: +44 20 7006 4373
E: marianne.toghill@cliffordchance.com



Ed Bretherton

Senior Associate

T: +44 20 7006 4856
E: edward.bretherton@cliffordchance.com



Harith Canna

Associate

T: +44 20 7006 1805
E: harith.canna@cliffordchance.com

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www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ

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