

# CHANGES TO THE CDM REGULATIONS

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## WHAT DEVELOPERS NEED TO KNOW

### INTRODUCTION

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

CDM 2015 apply to new projects and those which are already underway at 6 April 2015 (although the latter will be subject to transitional provisions (discussed further below)).

There are significant changes in CDM 2015, including:

- ♦ replacement of the CDM co-ordinator (CDMC) with a principal designer;
- ♦ increased client duties;
- ♦ application of regulations to all construction projects, whether or not they are notifiable; and
- ♦ new competency requirements.

The purpose of this briefing note is to highlight client duties under CDM 2015 which developers need to get to grips with.

Although CDM 2015 has been extended to apply to domestic clients (clients carrying out works to their own homes, but not in the course of a business) this note does not consider its application to domestic clients.

### REPLACEMENT OF A CDMC WITH A PRINCIPAL DESIGNER

The role of CDMC has been replaced by the role of principal designer in CDM 2015 and clients should appoint a principal designer regardless of whether the project is notifiable.

Principal designers are responsible for monitoring and co-ordinating design from a health and safety perspective, assembling pre-construction information at the outset of the project, preparing the health and safety file and (if still involved at this stage) handing it over to the client at the end of the project.

The aim of the change-over is to put responsibility for the management and co-ordination of health and safety issues at the heart of the design team. It seems lead consultants or architects/engineers will be the most appropriate consultant to take on the role, at least before the works start on site. On design and build projects, clients may however consider flipping the role to the main contractor once it is appointed.

Transitional provisions mean CDMCs appointed before 6 April 2015 can remain in place on existing projects until the earlier of a project coming to an end and 5 October 2015. The role will however disappear after this date. A hybrid set of obligations will apply to CDMCs who are retained during the transitional period.

Clients need to consider:

- ♦ who should take on the role of principal designer;
- ♦ the services a principal designer should be required to undertake; and
- ♦ for projects subject to the transitional provisions, at what stage (before 5 October 2015) a principal designer should be appointed and the CDMC removed.

For all projects commencing after 6 April 2015, a principal designer should be appointed as soon as practicable.

### CLIENT OBLIGATIONS

Client obligations have been updated under CDM 2015 and are now more onerous. These include:

#### Making suitable arrangements for managing a project

Clients are now under an absolute obligation to put in place suitable arrangements for managing a project, including the allocation of sufficient time and other resources. Under CDM 2007, a client was only required to "take reasonable steps" to ensure suitable arrangements were in place.

For the purposes of CDM 2015, arrangements will be suitable if they ensure that:

- ♦ work can be carried out, so far as is reasonably practicable, without risk to the health or safety of any person affected by the project; and
- ♦ minimum welfare facilities are provided to those carrying out the work.

A client is also under a separate absolute obligation to ensure that arrangements are maintained and reviewed throughout the project.

The HSE guidance refers to clients taking ownership of these arrangements. The express reference in the 2007 Approved Code of Practice to a client being able to rely upon

advice received from a CDMC (in the case of CDM 2015 this would probably be the principal designer) in making suitable arrangements is not replicated in the CDM 2015 guidance.

The HSE guidance specifies that arrangements made by a client should be proportionate to the size of the project and the risks arising from the works and should ensure that:

- ◆ roles, functions and responsibilities of the project team are clear;
- ◆ sufficient resources and time are allocated to each stage of the project;
- ◆ effective mechanisms are put in place for team members to communicate and co-operate; and
- ◆ structures are put in place to ensure that health and safety performance of designers and contractors is maintained throughout the project.

#### **Co-operation**

Any person with duties under CDM 2015 (including a client) has to co-operate with others working on the project (or on an adjoining construction site) to the extent necessary for that person to comply with their obligations. This is similar to a requirement under CDM 2007 although it is not entirely clear under CDM 2015 whether the requirement to co-operate applies to all obligations and duties others may have or just those in relation to CDM 2015.

#### **Appointing a principal contractor and principal designer**

A client is still expected to appoint a principal contractor. As mentioned above, the obligation to appoint a CDMC has been replaced with a requirement to appoint a principal designer. These obligations will apply if there is, or it is reasonably foreseeable that there will be, more than one contractor or trade on site (which will almost always be the case), as opposed to the obligation under CDM 2007 which only applied to notifiable projects.

The principal contractor and (subject to the transitional provisions) the principal designer have to be appointed as soon as is practicable and, in any event, before the construction phase of a project begins. As was the case under CDM 2007, if a client fails to appoint a principal contractor or principal designer (CDMC under CDM 2007), the client has to fulfil the relevant role (and assumes liability for any failure to do so).

#### **Assessing competency**

A client has to take reasonable steps to satisfy themselves that designers and contractors (including the principal contractor and principal designer) have the skills, knowledge and experience and, if they are an organisation, the organisational capability, required to fulfil their particular role in a manner that secures the health and safety of any person affected by the project. This is a slightly different obligation to the previous requirement under CDM 2007 to take reasonable steps to check that a designer or contractor was "competent".

A client has to check that a proposed team member has sufficient experience and a good track record in managing health and safety risks involved in construction projects. In doing so a client is entitled to give due weight to membership of an established professional body.

In assessing organisational capability, a client should consider the policies and systems that an organisation has in place to ensure compliance with law and the resources the organisation has to ensure that relevant health and safety standards are met. The HSE guidance suggests that using PAS91: 2013 pre-qualification health and safety questions is one way of assessing organisational capability.

#### **Pre-construction information**

A client has to provide pre-construction information as soon as is practicable to every designer and contractor appointed, or being considered for appointment, on a project. The principal designer is under an obligation to assist a client with complying with this requirement.

CDM 2015 clarifies that any information provided has to be in a comprehensible form. The HSE guidance suggests that if the circumstances require, this information may need to be translated so that it can be read and understood by all those involved on a project.

#### **Construction phase plan**

As per CDM 2007, a client has to ensure that a construction phase plan is prepared by the principal contractor (if appointed) before the construction phase commences.

If there is only one contractor or trade on site a client is under a new absolute obligation to ensure that that contractor prepares a construction phase plan. As this suggests, construction phase plans are now required on all projects, rather than just those which are notifiable (as was the case under CDM 2007).

### **Health and safety file**

Health and safety files are required for all projects involving (or anticipated to involve) more than one contractor or trade on site, rather than just those which are notifiable.

A client's duty in relation to the health and safety file has also changed. A client has to ensure that:

- ◆ the principal designer prepares the health and safety file, although this role will transfer to the principal contractor in certain circumstances;
- ◆ the file is revised from time to time to incorporate any new information; and
- ◆ the file is kept available for inspection.

Under CDM 2007, a client was simply required to provide the CDMC with information in the client's possession which was likely to be needed for inclusion in the health and safety file. A client was also only required to take reasonable steps to keep the health and safety file updated and available for inspection. This has been replaced with an absolute obligation.

### **Ensuring the principal contractor and principal designer comply with their obligations**

CDM 2015 requires a client to ensure:

- ◆ that a construction phase plan is drawn up before the works start on site (so essentially ensure that the principal contractor or contractor complies with this obligation); and
- ◆ that the principal designer prepares a health and safety file for the project.

The latter is a new absolute obligation on a client to make sure that another party complies with their statutory obligations.

In addition, a client has to take reasonable steps to ensure that the principal designer and the principal contractor comply with their other obligations under CDM 2015. This is a new obligation not found in CDM 2007. Clients need to consider how best to satisfy this requirement.

### **Notifying HSE of a project**

It is now a client's, rather than a CDMC's, responsibility to submit a notification to the HSE if a project is notifiable. The notice must include specific information and be displayed in the construction site office where it can be read by all workers.

### **Designs prepared or modified outside Great Britain**

The duties in relation to design prepared or modified outside Great Britain are very similar to those under CDM 2007. A person (and this can include a client) who commissions design to be prepared or modified outside Great Britain is responsible for ensuring that the overseas organisation complies with the duties of a designer under CDM 2015. If the person who commissions it (for example a consultant on behalf of a client) is not established in Great Britain then, as was the case under CDM 2007, a client has to ensure that the obligation is complied with.

As the overseas designer will not always accept responsibility for ensuring compliance with local law requirements and clients will seldom be able to satisfy themselves about such design, clients should ensure that the design is reviewed from a health and safety perspective by an appropriate member of the design team who is able to carry out such a review from a CDM perspective. This should be addressed in scopes of services where relevant.

### **NOTIFIABLE PROJECTS**

CDM 2015 applies to projects whether or not they are notifiable. This means that:

- ◆ a construction phase plan is required for all projects (even if there is only one contractor or trade involved);
- ◆ a principal contractor and principal designer should be appointed and a health and safety file produced for all projects involving (or anticipated to involve) more than one contractor or trade.

Under CDM 2007 these obligations only applied to notifiable projects.

The threshold for notifiable projects has also been updated; a project is notifiable if it is scheduled to last longer than 30 working days AND have more than 20 workers working simultaneously at any point in the project; or exceed 500 person days. This is a higher threshold in limb (1) than under CDM 2007.

### **TRANSITIONAL PROVISIONS**

CDM 2015 contain transitional provisions which vary some of the obligations and duties in CDM 2015 for projects already underway at 6 April 2015. This means that:

- ◆ principal contractors appointed before 6 April 2015 are treated as principal contractors for the purposes of CDM 2015;
- ◆ health and safety files, construction phase plans and pre-construction information produced under CDM 2007 are treated as having been prepared under CDM 2015;
- ◆ an F10 submitted under CDM 2007 satisfies the notification requirements under CDM 2015;
- ◆ as mentioned above, CDMCs appointed before 6 April 2015 can continue (although carrying out a hybrid set of services) until the earlier of a project coming to an end and 5 October 2015.

### **NEXT STEPS**

Clients should familiarise themselves with their revised duties under CDM 2015 so they are in a position to comply.

A slightly different approach will be required for projects which are underway on 6 April 2015 or which started on or after that date:

### **New projects started on / after 6 April 2015**

CDM 2015 apply in their entirety (and the transitional provisions are irrelevant).

Competency checks, tender questionnaires, appointments, schedules of services for the proposed principal designer and building contract terms and conditions should be reviewed and updated to reflect CDM 2015.

### **Projects underway as at 6 April 2015**

The appendix to this note contains an overview of the position for existing projects post 6 April 2015 depending on the stage they have reached as at 6 April.

In particular clients should consider when these projects are expected to complete as this will impact upon:

- ◆ the scope of services of any existing CDMC;
- ◆ the need to replace the CDMC with a principal designer and the timing of any such replacement;
- ◆ the potential extension of services of an architect or lead consultant to cover the principal designer role; and
- ◆ who should fulfill the role of principal designer once any building contract has been entered into.

### **CONCLUSION**

If you would like to discuss any of the issues considered in this note and / or how CDM 2015 may affect one of your projects please do not hesitate to get in touch with your usual contact or with:

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# TRANSITIONAL PROVISIONS UNDER CDM 2015

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## THE POSITION FOR PROJECTS UNDERWAY AT 6 APRIL 2015

### FOR ALL PROJECTS

Any pre-construction information, construction phase plan and / or health and safety file(s) prepared or notification submitted to HSE in accordance with CDM 2007 satisfy obligations in relation to those documents under CDM 2015.

In addition depending on what stage a project has reached:

### WHERE NO CDMC OR PRINCIPAL CONTRACTOR HAS BEEN APPOINTED

CDM 2015 applies and appointments / services / contracts should be drafted accordingly.

### WHERE THERE IS A CDMC AND A PRINCIPAL CONTRACTOR AND THE PROJECT IS DUE TO FINISH ON OR BEFORE 6 OCTOBER 2015

- ◆ CDM 2015 applies but a client does not have to appoint a principal designer.
- ◆ Any principal contractor appointed under CDM 2007 is treated as the principal contractor under CDM 2015.
- ◆ The CDMC should carry out the hybrid role in CDM 2015 and their appointment / services may need to be clarified to reflect this.

### WHERE THERE IS A CDMC BUT NOT A PRINCIPAL CONTRACTOR AND THE PROJECT IS DUE TO FINISH ON OR BEFORE 6 OCTOBER 2015

- ◆ CDM 2015 applies but a client does not have to appoint a principal designer.
- ◆ The CDMC should carry out the hybrid role in CDM 2015 and their appointment / services may need to be clarified to reflect this.
- ◆ A client should appoint a principal contractor in accordance with CDM 2015.

### WHERE THERE IS A CDMC AND A PRINCIPAL CONTRACTOR AND THE PROJECT IS DUE TO FINISH AFTER 6 OCTOBER 2015

- ◆ CDM 2015 applies but a principal designer does not need to be appointed until 5 October 2015.
- ◆ The CDMC should carry out the hybrid role in CDM 2015 until the earlier of 5 October 2015 and termination of their appointment and their appointment / services may need to

be clarified to reflect this. Any termination of the CDMC's appointment should dove-tail with the appointment of a principal designer.

- ◆ A principal designer should be appointed in accordance with CDM 2015 with services which reflect the requirements of CDM 2015 - an existing designer's terms of engagement should be varied or drafted to reflect this and any additional fees. The appointment can be put in place at any time between 6 April and 5 October 2015. All those involved on a project should be notified of the replacement of the CDMC by the principal designer at the relevant time.
- ◆ A principal contractor appointed under CDM 2007 is treated as principal contractor under CDM 2015.

### WHERE THERE IS A CDMC BUT NOT PRINCIPAL CONTRACTOR THE PROJECT IS DUE TO FINISH AFTER 6 OCTOBER 2015

- ◆ CDM 2015 applies but a principal designer does not need to be appointed until 5 October 2015.
- ◆ The CDMC will be expected to carry out the hybrid role in CDM 2015 until the earlier of 5 October 2015 and termination of their appointment and their appointment / services may need to be clarified to reflect this. Any termination of the CDMC's appointment should dove-tail with the appointment of a principal designer.
- ◆ A principal designer should be appointed in accordance with CDM 2015 with services which reflect the requirements of CDM 2015 - an existing designer's terms of engagement should be varied or drafted to reflect this and any additional fees. The appointment can be put in place at any time between 6 April and 5 October 2015. All those involved in a project should be notified of replacement of the CDMC by the principal designer at the relevant time.
- ◆ A client should appoint a principal contractor in accordance with CDM 2015 (which may be earlier than appointment of principal designer).

### CONTACT DETAILS

If you would like further information or specific advice please contact:

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This note is intended to provide general information about some recent and anticipated developments which may be of interest.

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