



WHAT MIGHT THE CHANGES TO THE CDM REGULATIONS MEAN FOR YOU?

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The new Construction (Design and Management) Regulations 2007 (“CDM Regulations”) came into force on 6 April 2007, replacing the existing 1994 Regulations. The Regulations are supplemented by a new Approved Code of Practice, titled ‘Managing health and safety in construction’ (also known as “ACoP”). These new Regulations strengthen the duties on all those involved in the design and construction of projects of every size. In particular the new regime imposes greater obligations on clients and employers who will no longer be able to assign their duties to agents. A failure to meet the duties can give rise to both criminal and civil liability.

The new Regulations are more comprehensive and aim to place clearer responsibilities on the parties in an attempt to oblige them to co-operate, communicate with each other and share information, reduce bureaucracy and comply with the regulations. Consequently it is intended that if a duty is breached, it will be easier to apportion blame and bring a prosecution. The HSE have justified the changes for the following reasons:

“Construction remains a disproportionately dangerous industry where improvements in health and safety are urgently needed. The improvements require significant and permanent changes in dutyholder attitudes and behaviour. Since the original CDM Regulations were introduced in 1994, concerns were raised that their complexity and the bureaucratic approach of many duty holders frustrated the Regulations’ underlying health and safety objectives. These views were supported by an industry-wide consultation in 2002 which resulted in the decision to revise the Regulations.”

The main changes are as follows:

- An enhanced duty on clients, which according to the HSE has been introduced to better reflect the influence that clients have (or perhaps should have) on health and safety standards on site;
- The removal of the facility for the client to transfer their liabilities to an agent;
- The introduction of a new duty holder, the Co-ordinator, to replace the existing Planning Supervisor; and
- Improved guidance for those who must assess the competence of persons and/or organisations before appointing them.

There are two types of project. Those projects likely to take more than 30 days or 500 man-days of construction work are known as notifiable projects. Other projects are non-notifiable. The new Regulations apply in their entirety on notifiable projects.

If your project was current as at April 2007, the client must within 12 months take reasonable steps to ensure that the Planning Supervisor and Principal Contractors are competent to act under the new Regulations.

The changes seem wide-ranging. The HSE is of the view that the overall cost effect will be minimal. Their rationale is that the costs of implementing the new Regulations will be offset by more efficient working practices and a reduction in the time lost due to accidents and the like. Whether this turns out to be optimistic or not remains to be seen.

Employers or Clients

Clients are not required to manage the work themselves but to make sure that others have arrangements in place to control the risks associated with construction sites. This duty is not delegable and accordingly as stated above, the revised obligations impose much wider responsibilities upon employers and clients.

Accordingly clients and employers must become more actively involved in ensuring a healthy and safe environment on site. Although a client can still appoint an agent to assist it with compliance with the regulations, liability for any breach of the client responsibilities will remain with the client. In projects where there is more than one client, for example consortiums or joint ventures, clients can elect in writing that only one will be treated as the client for the purposes of the regulations. If no election is made they will all be treated as a 'client' under the Regulations. Remember that the client has overall responsibility for checking that all parties, including workers who carry out the construction work, are competent to perform their duties.

The client must also ensure that the CDM co-ordinator, designer and contractor receive all information relevant to their tasks so as to eliminate risks to health and safety and also to meet the duties under the Regulations. Previously the client only had to supply information to the planning supervisor.

On notifiable projects, the client is required to ensure (i) the appointment of the CDM Co-ordinator as soon as is practicable after initial design work has begun and (ii) that the construction phase of the project does not start unless the principal contractor has prepared a compliant construction phase plan and the client is satisfied that the requirements for arrangements to be made for the provision of welfare facilities have been satisfied.

The Regulations do not apply to domestic projects. For example, if you are having work done in your own home, they will not apply to you. However, they will apply to the contractor carrying out the works.

The Co-ordinator

The main role of the co-ordinator is to advise and assist the client in complying with their duties under the regulations. If a project is notifiable then a CDM-co-ordinator and a principal contractor must be appointed. In particular, the co-ordinator must:

- Assist the client with the appointment of competent contractors and designers;
- Advise on the adequacy of other duty holders' arrangements for controlling risk arising from the project;
- Co-ordinate the design work, planning and other preparation for construction;
- Liaise with the principal contractor about design changes during construction;
- Notify HSE about the project; and
- Produce or update the health and safety file.

Contractor

The role of the contractor remains essentially the same. The contractor must ensure that suitable arrangements are in place for the management of health, safety and welfare issues. This may include training obligations. The contractor must also consider the extent to which the sub-contractors are also complying with the Regulations and their own health and safety obligations.

Further, the contractor should remember that all members of the project team are under a duty not to appoint anyone, for example a designer, under the Regulations who is not competent. Equally if you know you are not competent to undertake the necessary role under the Regulations you are under an obligation not to accept the appointment.

The Approved Code of Practice

The ACoP is intended to supplement the new Regulations and provide guidance in plain English. The ACoP has a special legal status. If you follow the provisions set out in the ACoP (and can demonstrate that you followed those provisions) you will be deemed to have complied with the law. In other words, if you are prosecuted for a breach of health and safety law, and you have not followed the ACoP, you will be deemed not to have complied with the CDM Regulations, unless you can prove compliance by other means.

The ACoP runs to 121 pages and costs just £15. It can be ordered via the HSE website.

Practical Impact

Indeed further information about the new Regulations can be found on the HSE website, www.hse.gov.uk.

It is important that you understand how the Regulations may affect your business. Appointments, contracts and warranties should reflect the changes brought in both in terminology and scope. Employers and contractors need to make sure that their contracts cover the new Regulations and the duties imposed. Everyone must consider their working

practices and procedures. It is not just a case of actually complying with the Regulations, you should carefully record the fact as well.

This is especially the case with standard terms and conditions. For example the planning supervisor should be referred to as CDM-co-ordinator. You should delete provisions that assign responsibilities to an agent. As an example, the JCT have replaced clause 3.25 of the SBC with the following:

“Each Party acknowledges that he is aware of and undertakes to the other that in relation to the Works and site he will duly comply with the CDM Regulations. Without limitation, where the project that comprises or includes the Works is notifiable:

- (i) The Employer shall ensure both that the CDM Co-ordinator carries out all his duties and, where the Contractor is not the Principal Contractor, that the Principal Contractor carries out all his duties under those regulations;*
- (ii) Where the Contractor is and while he remains the Principal Contractor, he shall ensure that:
 - (a) The Construction Phase Plan is prepared and received by the Employer before construction work under this Contract is commenced, and that any subsequent amendment to it by the Contractor is notified to the Employer, the CDM Co-ordinator and (where not the CDM Co-ordinator) the Architect/Contract Administrator; and*
 - (b) Welfare facilities complying with Schedule 2 of the CDM Regulations are provided from the commencement of construction work until the end of the construction phase.**
- (iii) Where the Contractor is not the Principal Contractor, he shall promptly inform the Principal Contractor of the identity of each sub-contractor that he appoints and each sub-subcontractor appointment notified to him;*
- (iv) Promptly upon the written request of the CDM co-ordinator, the Contractor shall provide, and shall ensure that any sub-contractor, through the Contractor, provides, to the CDM Co-ordinator (or, if the Contractor is not the Principal Contractor, to the Principal Contractor) such information as the CDM Co-ordinator reasonably requires for the preparation of the health and safety file.”*

However it should not just be a case of amending contracts, you must ensure that you understand what the new regulations require of you. The stated aims of the new regulation are to:

- “improve the planning and management of projects from the very start;*
- identify risks early on;*
- target effort where it can do the most good in terms of health and safety; and*
- discourage unnecessary bureaucracy.”*

It remains to be seen the extent to which these aims succeed. However, everyone must be aware that the Government through its health and safety legislation intends that health and safety matters are treated as an essential and normal part of every project - not an afterthought. Breaches will no doubt be treated accordingly.

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