CDM Regulations - Proceedings of the Workshop

held on 17 September 2012

Construction Industry Council

It was noted that there was a mix of designers, contractors and health and safety officials among the forty people present in the room.

Paul Bussey in giving his presentation cited the work done by a sub-group of the health and safety committee comprised of David Watson, Kevin Fear, and himself in relation to an analysis of the meaning of the parent EU "Temporary and Mobile Construction Sites Directive 1992".

He commented that the non-binding guidance in relation to this directive was much easier to read than the ACOP itself. The comment was made that there was in fact too much documentation in relation to the CDM 2007 Regulations.

There is no domestic client exemption and competence is not mentioned directly.

Gavin Bye noted that the CDM Regulations 2007 were evaluated after just three years as opposed to the normal seven year evaluation. The EU Commission has expressed concern that the TMCS Directive was not transposed into UK legislation properly. A test case by the Italians on this issue was supported by the Irish and UK authorities.

The domestic background at present is that anything which goes beyond a directive is now referred to as "gold-plating" and is unlikely to be implemented. The tenor of the Loftstedt report, the "red tape challenge" and the Young report is towards less regulation but there is also a realisation that construction is a higher risk area of work.

In relation to CDM Regulations 2014, it is likely that there will be public consultation on these new regulations in early 2013. The views of CONIAC have already been canvassed. There will be a package ready by the end of the year. There is an expert panel mirroring the CONIAC working group on this.

While the Directive is being looked at again HSE does not want to reduce standards. Key issues are what do we do in relation to co-ordination and

competence. Do we need an ACOP at all? Ought we to follow the directive more closely in relation to notification?

The union representative at the meeting expressed the opinion that there was not enough consultation taking place within the industry. He wanted statutory safety representatives on site. Gavin pointed out that there will be a normal twelve week consultation. He also said that there is a trade union representative on the expert working panel and on CONIAC.

One of the issues discussed was the challenge of maintaining an information flow to those who have to do the work, achieving buildability through regulation. Gavin Bye conceded that Regulation 11 "was not very good".

One delegate made the point that a lot of design is dealt with in the construction phase (i.e by contractors).

John Scholey asked whether we could have simpler regulations and contended that we do not need the ACOP. He suggested that ERIC should be put into the regulations. This acronym means : **E** – Eliminate risk; **R** – Reduce risk; **I** – if you cannot do **E** or **R** then you must **I** – Inform the appropriate parties who can take further action (often the contractor); **C** – Control the risk.

Gavin asked how would the design community feel about having the same responsibilities as principal contractors? Peter Caplehorn stated that this was often happened in any case.

Phil Baker said that principal contractors do not really do co-ordination, in contrast to the situation on mainland Europe.

James Ritchie contended that planning supervision has often been off- loaded by architects who wanted to concentrate on design issues.

A view was put forward that most firms of designers do not want to co-ordinate the health and safety aspects of design.

If the HSE throw out competence because it is not in the directive and "chuck it at the industry" how do we deal with this?

One delegate suggested that while large firms are “clued up” on these issues smaller ones were not.

Ian Watson queried whether institutions were monitoring health and safety co-ordination. A representative from ICE said that there is a little known register on health and safety compliance.

Kevin Fear put forward the view that the normal route to membership of a professional body should confer a knowledge of health and safety risk management issues. The fact that a register has been created is an acknowledgement that this is not the case. What about people who are not members of the institutions he asked?

Phil Baker stated that two hours of RIBA CPD every year (the only institution with mandatory CPD on this topic) in relation to these matters were hardly going to make much difference.

Gavin point forward the view that “no-one listens to someone who doesn’t control the works”. He contended that this was a particular issue in the pre-construction phase.

Problems of small sites

The questions deemed particularly relevant in relation to small sites were:

- What are the barriers to designers in small practices that prevent them from complying with the law? What can be done to overcome those barriers? How significant is this in the real world?

- Should regulations be simplified to ensure that small contractors and small design practices better understand their duties? Would “black and white regulation” stifle creativity and innovation or improve certainty and compliance?

- To what extent do designers in small practices require third party assistance to ensure that they meet their obligations under health and safety law? Are they willing to or capable of coordinating health and safety during the project preparation stage?

- Many small sites perform poorly. As the lead professionals within small projects, is there more that designers could or should do, to influence the health and safety performance of small projects? Could this be influenced by regulation?

In discussing this issue, James Ritchie said that he wanted to focus on small design practices rather than small sites as such. He noted that often HSE have problems with smaller construction sites which themselves have smaller firms of designers and contractors working on them.

He said that there is a enduring perception that domestic projects do not come under CDM regulations. Although a domestic client does not have duties under these regulations, those who work for them on construction projects do.

At the end of the day, the main issue was about risk rather than an issue of whether a large practice or a small one is involved. The proportionality of risk is often a difficult question, Paul Bussey said.

It was pointed out that there is a direct relationship on small sites between compliance in relation to health and safety and with respect to the building regulations.

The report on the education of architecture students RR 925 , conducted two years ago, highlighted the need for architecture students to see what happens on site and link it to what is being designed.

Gavin commented that there are model plans in Europe for small jobs.

The comment was made that often builders do not understand about design. The view was expressed that a good CDMC is very useful in this situation.

The notion of licensing was put forward by the trade union representative but this was described as “gold plating” by some present and was thought unlikely to go forward as an idea.

In terms of the dynamics of the relationships on small projects one of the problems can be that contractors are appointed first with design as an afterthought said David Watson.

Education was once again discussed as a major factor in the overall situation but it was a sector which was also currently under considerable pressure.

Kevin Fear commented that institutions are achieving progress in co-ordination in respect to BIM – so why not in relation to risk management and construction.

As Far as is Reasonably Practicable

Phil Baker gave a short summary in relation to AFARP.

The questions in relation to this session were :

- Should SFARP be retained?
- What does SFARP mean to you in practice?
- How do you demonstrate that you have discharged your duties to "eliminate/reduce" SFARP?

It was noted that "so far as reasonably practicable" was the principle underlying most health and safety legislation in this country since 1974. The idea does not exist in Europe.

It was conceded that in redrafting the CDM regulations, there is a need to consider how AFARP is brought in. There is no desire to create an absolute duty on designers, rather it should be a "qualified" duty which needs to be considered proportionately.

There is a need to "unpick" AFARP but also other levels of qualification in the regulations (e.g Regulation 11 (4) which it is conceded was poorly drafted in the first instance).

A view was expressed that a lot of designers prefer to make the issue "black and white" as they do not want to deal with it.

While Alan Gilbertson queried whether the word "reasonable" and what it actually meant is at the heart of the issue, Paul Bussey said that there was too much focus on designers, the emphasis should be on the team, the CDMC, the contractor etc.

It was pointed out that in the existing RIBA Plan of Work, health and safety was dealt with under Stage E – that is delegated to detailing.

It was noted out that ICE had published a document on AFARP.

It was also pointed out that guidance on AFARP is a legal standard set by case law so there is not a great deal which can be done about it. It may look odd but it is not so very different from standards governing the rest of working life.

Phil Baker said that part of the difficulty in understanding the idea may result from a perceived lack of immediacy.

One contributor stated that AFARP gives designers a lot of scope for creativity and is not a suffocating device, he contended.

Competence assessments – do they work?

Peter Campbell gave a presentation on competence assessments. Questions which were pertinent on this issue were:

- Should the government do more to enforce industry / government departments and Local Authorities to use of SSIP accreditations and government procurement guidance ?

- What is the purpose of the two stages and are these being used by industry as intended?

- Does the ACoP go far enough in Appendix 4 and should the HSE take charge of administration – similar to Gas Safe licences – standardisation / reduced bureaucracy?

Under CDM 2007 regulations there is a duty (both corporate and individual) to take "reasonable care" to ensure that persons appointed are competent. The assessment process should focus on the needs of the particular project in the context of the size and complexity of the work. Corporate competency is assessed by examining the company's arrangements for health and safety and their track record in this area. Individual competency is assessed by assessment of knowledge and past experience. The duties in the CDM regulations work in two ways. Persons making appointments have to take reasonable steps to ensure that those who are appointed are competent for what they are expected to do. Likewise those accepting such appointments

should only do so if they are competent to undertake the activity. Although CDM 2007 ACOP Appendix 4 provides practical advice to assist people in assessing competence, the ACOP cannot specify levels or degrees of competence for persons acting as a duty holder.

The role of the CDMC was examined and the issue raised as to whether the CDMC was being given the right information/training to ensure that they assess competency in the spirit of the regulations.

One of the issues raised in relation to competence was the perennial issue of training particularly in a climate of cost restraints. Are for instance the CDMCs being given the right information/ training to ensure that they assess competency in the spirit of the regulations?

One of the key messages to emerge was the need to manage the risks not the paperwork. It was also mentioned that the ICE report on this issue brought out the concept of team competence. It is not possible it was contended to separate people who are designers from the others. A lot of project teams are not in themselves, one entity. This is a complex picture which cannot be dealt with on a "tick box approach".

Competency schemes in which you do not have to prove your competency were described as ridiculous. An architect present also said that he was unwilling to be judged by someone who was not an architect.

In respect to the use of independent accreditation such as CHAS, Peter Campbell said that when we re-draft the CDM regulations we cannot persist with what we have to the moment.

The CDMC

James Ritchie discussed the role of the CDMC. The main questions in relation to this were:

- In terms of skills, knowledge and ability, who is best placed to co-ordinate design and construction health and safety throughout the project from inception to completion?

- Should the co-ordinator be there to provide advice and guidance to designers, if requested, and how would designers react to the CDMC as a co-ordinator of health and safety risk management 'consultant'?

- What benefits or otherwise would accrue if the CDM Co-ordinator was involved on 'domestic' projects?

- If the role is divided into design phase and construction stage, how do you ensure effective knowledge transfer?

Given that the ethos of CDM is less to do with health and safety and more about risk management how should co-ordination be done and who should it be done by?

To be effective it must happen early in the process and one of the key elements must be the concept of the "honest broker".

The comment was made that the vast majority of CDMCs were appointed too late. Between the design phase and the construction phase, the knowledge transfer point is important.

The Irish Health and Safety Regulations in which the CDMC is called the project supervisor were cited as a good model to follow.

The time of appointment of the CDMC can be critical. CDM 2007 requires appointment of coordinator to occur at the earliest once the preliminary designs or related groundwork for construction project has started. Clearly, appointment of the coordinator will require some form of judgement to be made in terms of whether or not a project is likely to be notifiable. As soon as is practicable is not defined, but the ACoP requires the coordinator to be in a position of aligning health and safety aspects of designs and recommend compatibility and suitability of this design work.

As a project progresses the level of difficulty for making changes increases which would reduce risks. The coordinator can be a company or an individual or appointed independently or a combination with other roles (such as project manager or designer). However, the ACoP states that where roles are

combined and performed by a single individual, it becomes critical for the CDM coordinator to have adequate independence for carrying out tasks in an effective manner. This can often be the case for larger projects, where tasks may be ‘shared out', but in these circumstances, it is significant to ensure that coordinator's duties are clearly laid out and discharged.

It was pointed out that some designers abdicate responsibility because they think they have a CDMC.

John Scholey questioned whether there was any benefit in laying the duty on the CDMC to police the designers.