



Risk Management Briefing

Construction (Design and Management) Regulations 2015

Revised - June 2017

Introduction

As from 6 April 2015, the Construction (Design and Management) (CDM) Regulations 2015, came into force in place of the 2007 CDM Regulations. This risk management briefing is based on the 2015 Regulations and the related HSE guidance, L153. It provides guidance on how the introduction of CDM 2015 affects the liability of designers in their potential role as principal designers, and clients. For more information on CIC's policy on health and safety see, for instance, CIC's document 'Client leadership on health and safety'.

There are various issues:

1. Duties as Designer

These are largely unchanged from those in CDM 2007.

2. Duties as Principal Designer

The principal designer is the designer with control over the pre-construction phase of the project needed for the purpose of ensuring, so far as is reasonably practicable,

that it is carried out without risks to health or safety. Principal designers are appointed by the client to control the health and safety aspects of the pre-construction phase within the context of the wider project. The principal designer's functions reflect those of the former role of CDM co-ordinator in CDM 2007, but change the focus. The principal designer must plan, manage and monitor the pre-construction phase and coordinate matters relating to health and safety during the pre-construction phase to ensure that, so far as is reasonably practicable, the project is carried out without risks to health or safety. The pre-construction phase is defined as the period when planning and preparation takes place, (e.g. design) and it is recognised that this period could (and usually will) last into the construction phase. Design by specialist sub-contractors and variations involving a design change during construction for instance, are both covered by the requirements of the pre-construction phase.

Only designers (defined in wide terms in CDM 2015 but including both individuals and organisations) can take on the function of principal designer. The principal designer is not explicitly required to carry out any design as part of this function, nor is the principal designer required to be one of the designers on the project, although they often will be. However, in fulfilling the duties above the principal designer must identify and eliminate or control, so far as is reasonably practicable, foreseeable and significant risks to health or safety, and this is a design process which involves working very closely with the designers. These obligations of the principal designer are deliberately worded in general terms to give flexibility, by allowing for a variety of procurement methods and the many different ways in which the pre-construction phase is organised.

The HSE guidance L153 makes it clear that the obligations on the principal designer in CDM 2015 to ensure all designers comply with their duties under the Regulations, and to ensure that everyone working in relation to the pre-construction phase co-operates with everyone else, are subject to the qualification of "so far as is reasonably practicable".

It is useful to make the appointment of the principal designer function subject to the usual standard of reasonable skill and care, as otherwise it could be interpreted as imposing strict liability on the principal designer to whoever is appointing them, as a matter of civil law, which may not be covered by the principal designer's professional indemnity insurance.

Designers must not start work on a project unless they are satisfied that the client is aware of their CDM duties and the principal designer has no duty to assist the client in performing the client's functions, except in helping the client to provide health and safety-related pre-construction information to those who need it. The principal designer is also expected to provide health and safety-related pre-construction information to designers and contractors, but only so far as the principal designer has that information. There is no obligation to commission reports or surveys, for instance. That is a duty on the client, as appropriate for the project, although the principal designer would usually advise the client if they considered there was a need for a particular survey.

In addition, the principal designer must liaise with the principal contractor and share with them design information relevant to planning, management, monitoring and co-ordination of health and safety during the construction phase – this duty would of course cease if the appointment is terminated before the construction phase; e.g. if a D&B contractor is appointed to act as both principal designer and principal contractor. The original principal designer would be liable only for their performance up to the date of termination. This should be stated in the appointment.

The principal designer is also responsible for the preparation and updating of the health and safety file throughout the project period, and its ultimate handover to the client, unless the client terminates the principal designer's appointment before the completion of the project.

The client is required to appoint a person or organisation with the relevant "skills, knowledge and experience" to be the principal designer. The HSE recognises that some training may also be required in order to understand fully how to carry out the function. The lead designer may already have the necessary skills, knowledge and experience and some of the professional bodies, for eg. ICE, RIBA, CIAT, RICS, have established criteria for the function. The HSE encourages a proportionate approach, to take into account health and safety risks alongside other relevant factors such as cost, fitness for purpose, aesthetics and environmental impact.

If a client is insistent that the principal designer function is taken by a lead designer who feels they do not yet have the necessary expertise, the lead designer must either gain the appropriate skills, knowledge and experience in time to act as principal designer for the project, or must engage a sub-consultant to assist them to perform the principal designer function. In that situation, the lead designer will still retain its statutory liability for the performance of the principal designer functions (and also civil liability for the same if their CDM obligations are reflected in their appointment), but those functions will then be carried out, in whole or in part, by the sub-consultant.

3. Duties as Client

A client is required to make "suitable arrangements" for managing the project and the Regulations state that these suitable arrangements must include the allocation of sufficient time and other resources. These "other resources" will of course include financial resources, e.g. paying for the principal designer's obligations to be fulfilled.

In addition, arrangements are considered suitable under the Regulations if they ensure that construction work can be carried out, so far as is reasonably practicable, without risks to anyone's health or safety. Not all clients will be able to make an informed decision on whether their arrangements are "suitable", and the responsibility of seeing that the construction phase plan is prepared before work starts on site now rests with the client, as well as the duty to notify the HSE where appropriate. Some clients may therefore take specialist health and safety advice on

suitable arrangements and the technical aspects of the draft construction phase plan, but this does not overlap with the principal designer function.

If a non-domestic client does not appoint a principal designer, the client will be treated as the principal designer.

4. Appointing a Principal Designer

Because principal designers are taking on obligations additional to those of a designer, they cannot be expected to do so without payment specifically for the performance of that function. At the very least the fees formerly allocated to a CDM co-ordinator should be available for this purpose but should reflect the new duties and methods required. If the principal designer is also acting as a designer or other consultant on the project, the extra payment may be easier to achieve if the principal designer appointment is separate. A separate appointment document could also concentrate the parties' minds on the significance of the function. The principal designer must always be appointed directly by the client, even if there is a novation at the start of the construction phase; a principal designer function will be required during the construction phase.

The principal designer's appointment by the client should be governed by the usual standard of reasonable skill and care. This does not affect the principal designer's statutory duties and liabilities under CDM 2015. Because the duties of a principal designer go beyond those of a designer or lead designer, a principal designer should also notify their professional indemnity insurers that they are taking on this function, which should not give rise to any difficulty.

5. Principal Designer to be appointed on all projects

The obligation to appoint a principal designer applies to all projects, except for those projects where there is only one contractor (ie no sub-contractors and all workers directly employed by the contractor). This means that the majority of projects which previously fell below the notification threshold of CDM 2007 and thus did not require a CDM co-ordinator, will now require a principal designer and a principal contractor to be appointed. It is extremely rare for one contractor only to be appointed to work on a project, as sub-contracting is so common. However, it is accepted that on a small, low risk project adopting a proportionate approach to these roles means that they should not be unduly onerous or time-consuming.

6. Domestic projects

Where a project is carried out on behalf of individuals who are not acting in the course of a business, they will now have CDM duties. In normal circumstances these are to be carried out by the principal contractor unless the client has expressly appointed the principal designer to carry out the client duties. There is a default position which designers should be aware of; if the domestic client does not appoint a principal designer or a principal contractor, the designer in control of the pre-construction phase is deemed to be the principal designer and the Contractor in

control of the construction phase is deemed to be the principal contractor, whether they have the necessary skills, knowledge and experience to fulfil those roles or not. A designer who becomes a principal designer by default, but lacks the skills etc to carry out the function successfully, will therefore need to obtain some support and expertise from an external source such as a health and safety consultant, and/or quickly undertake the necessary training to acquire the skills and knowledge needed. More detailed advice can be obtained from the websites of some of the construction industry institutions such as the RIBA and the ICE.

This Risk Management Briefing is for general guidance only and legal advice should be sought to cover any particular situation.

This briefing was compiled by Gillian Birkby of Fladgate LLP in conjunction with the CIC Liability Panel and the CIC Health and Safety Committee in May 2017.

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