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CDM Regulations 2015 - FAQs

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Introductions

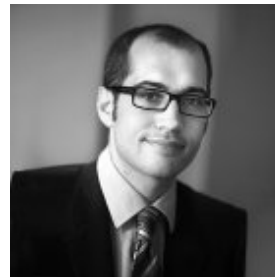
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Outline

- + Introduction – Industry reaction to CDM 2015;
- + Developments since CDM 2015 came into force;
- + FAQs – Key queries in relation to:
 - Risks of Principal Designer role;
 - How CDM 2015 fits in with construction procurement;
 - PD and construction phase
- + CDM and Forms of Appointment; and
- + Sentencing.

Introduction (1) – Brief Summary of CDM 2015

- + Construction Design and Management Regulations 2015 (“CDM 2015”) 6 April 2015.
- + Transitional measures applied until 6 October 2015.
- + Fully in force!
- + CDM 2015 applies to most construction projects carried out in England, Wales and Scotland.
- + Key changes under CDM 2015:
 - Principal designer role.
 - “More than one contractor”.
 - Domestic clients.
 - Competence.
 - Notification.



Introduction (2) – Why FAQs?

- No ACOP
- Duty holders: need to understand roles and how they inter-relate on real life projects
- L153 Guidance: help but not a definitive guide by which compliance is guaranteed
- CONIAC guidance

Recent Developments – Possible Changes?

- + CDM 2015 part of Government's drive to cut red tape – has it cut enough?
- + Recent Autumn Statement aimed to boost house building - £7bn being injected to deliver 400,000 new homes by 2019
- + Department for Business Innovation and Skills launched cutting red tape review for house building industry
- + Review closed 13 January – anticipated that smaller house builders will seek relaxation of CDM 2015 for them to speed up the design process (where generic house designs are being used) and reduce the cost of implementing CDM 2015
- + Any change has to be balanced with aims and objectives of health and safety law

FAQs - Summary

+ **Risks associated with PD role:**

- Who can be a principal designer (PD)?
- Are PD's duties qualified?

+ **CDM 2015 & procurement:**

- What is PD role on design and build project?
- Can you refuse to take on PD role?
- Can you sub-consult the PD role?

+ **PD Role and Construction Phase:**

- What are the PD's duties during the Construction Phase?
- How does CDM apply to Ground Investigation Surveys?
- What if a designer appoints a contractor?
- When does a Project start and finish under CDM 2015?

(1) Who can be a Principal Designer?

- + Client must appoint *in writing* “a designer with control over the pre-construction phase” as principal designer...
- +if there is more than one contractor (or this is reasonably foreseeable).
- + Contractor is very widely defined, so this will include all but the smallest projects.
- + The new role was justified in consultation for three reasons:
 - it means the role is delivered through the pre-existing project team;
 - the co-ordination of information and liaison between parties is a role already being carried out by a designer; and
 - significant savings are expected to be generated (HSE estimates £30 million per annum for the construction sector).
- + Doesn't need to be a designer on that project, but if not, will it have “*control*”?

(2) Are the PD's duties qualified?

- + General duty (11(1))

*“to ensure that **so far as is reasonably practicable**, the project is carried out without risks to health or safety.”*

- + Other obligations include:

- ensure all designers comply with their duties (11(4));
- ensure that all persons working re the pre-construction phase co-operate (11(5)); and
- prepare health and safety file (12(5)) and ensure it is reviewed, updated and revised (12(6)).

- + In our view some of the obligations of the principal designer are not qualified.

- + “*so far as reasonably practicable*” a high standard.

- + Civil vs Criminal Liability – insurance?

(3) CDM 2015 and Design and Build

- + On a design and build project the contractor is likely to be “a designer”. Will they take on the role?
- + Novated consultant or sub-consultant could perform role for contractor, although contractor would retain risk of criminal prosecution.
- + Principal designer role may be “retained” by the client on novation. If so:
 - make sure you will have “control”;
 - clear procedure would be needed for resolving conflicts.
- + In our view retaining the PD role very difficult to manage.
- + PC will most likely be PD.

(4) Can you refuse to take on the PD role?

- + Yes – Principal Designer must be “appointed in writing”.
- + A number of consultants are refusing to take on the role.
- + **BUT:**
 - + Domestic clients – a designer could be PD without realising; and
 - + Risks if no PD appointed in writing.
- + Key = Establish who is PD before you start work .

(5) Can the PD role be sub-contracted?

- + PD must be appointed by the client - statutory role cannot be sub-contracted.
- + PD retains criminal liability;
- + Adviser to the Principal Designer;
- + CITB /HSE:
 - the law “*does not allow the PD to delegate their responsibilities elsewhere.*”
 - It is expected that the CDM adviser role will “*provide a temporary mechanism of support*”.
- + Real risks for principal designers who rely upon CDM advisers.



(6) PD and Construction Phase

- + “Designer” includes temporary works designer.
- + PD responsible for “pre-construction phase”.
- + Any time during which design carried out
- + PD must be in place when temporary works design is carried out.
- + PD is responsible for co-ordinating health and safety with all designers.
- + PD duties re health and safety file until end of project/appointment.
- + Liaise with principal contractor re temporary works to establish process for co-ordinating design.
- + Hand over PD role to PC after construction starts (if PC has sufficient SKE)?



(6) Temporary works

- + Principal Designer has control over the pre-construction phase
- + This includes any time when design carried out
- + “Design” includes a temporary works design so a PD must be appointed when being done, even if the first task on a job e.g. site investigation
- + PD must co-ordinate temporary works design

(7) CDM 2015 and Ground Investigation

- + Exclusion of “site surveys” from CDM 2015.
- + “Penetrative” works = not site survey, so CDM applies.
- + Even if hand tools used.
- + Ground Investigation Survey may need PD and PC if foreseeable that more than one contractor = wide.
- + Need to be clear whether involvement = only site survey (i.e. not any subsequent project).

(8) What if a Designer appoints a Contractor?

- + Is Designer a Contractor under CDM?
- + If they “carry out, control or manage” construction work, yes.
- + May also be PD and PC as designer and contractor – more than one contractor!
- + Take care if appointing a contractor.
- + Encourage client to appoint them directly

(9) Could there be two PDs/PCs on a site at the same time?

- + Project = all planning, design and management until end of construction phase.
- + New/additional work required before construction finished, prob the same project.
- + Could be some circumstances where there is more than one project on the same site and therefore more than one PD/PC.
- + Underlines the importance of clear roles and clear lines of responsibility.
- + If project changes understand implications and best approach re CDM.



CDM and Contracts

- + APS only standard form of PD appointment - risks;
- + Limited other amends to standard forms.
- + PD role being “shoehorned” into contracts.
- + Scope of services of PD role needs careful consideration.
- + Consider bespoke PD appointment.

Sentencing

- + New Guidelines in force 1 February 2016 for health and safety offences and Corporate Manslaughter

- + Stage process to get to a range of fines

- + For companies convicted of a health and safety offence:
 - Harm and culpability assessed against a table of possibilities
 - Turnover of the company relevant
 - Both these factors then considered against a matrix of fines



Next Webinar

- + **27th January 2016** - Post Merger Integration (PMI) – hosted by Beale & Company, The ACE and WK Corporate Finance.
- + Register at www.beale-law.com/events
- + **February 2016** – NEC Engineering and Construction Contract webinar



Any Questions?

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