

The Construction (Design and Management) Regulations 2007

Introduction

Statistics show that the construction industry is one of the most dangerous. In 2005/2006 there were 59 deaths and approximately 3600 major injuries. Part of the Government's drive to reduce injuries has been focused on revising legislation. One of the key pieces of legislation subject to revision is The Construction (Design and Management) Regulations 1994 (CDM 1994) which first came into force over ten years ago in March 1995.

The Construction (Design and Management) Regulations 2007 (CDM 2007) came into force on 6th April 2007. Compared with CDM 1994, CDM 2007 are intended to be clearer; more flexible; and place greater emphasis on communication, co-ordination, planning and management (rather than treating the paperwork as an end in itself). It is anticipated that CDM 2007 are likely to have the greatest effect on clients and those taking on the role of CDM co-ordinator (akin to the role of planning supervisor under CDM 1994) but the changes are far reaching and everyone involved in construction and development needs to be aware of their roles and responsibilities under CDM 2007.

The Construction (Design and Management) Regulations 2007 (CDM 2007) apply to projects that would not previously have been caught by the Construction (Design and Management) Regulations 1994 (CDM 1994), which the CDM 2007 replace. Concerns have been raised in many quarters that CDM 1994 were failing to promote health and safety and CDM 2007 aim to address these shortcomings.

The CDM 2007 applies to almost all construction projects and criminal sanctions apply to a breach of the CDM 2007 through the Health and Safety at Work Act 1974. There may also be liability under the civil law.

The CDM 2007 apply to all "construction work" from 6 April 2007, whether or not the construction work has already started by that date. There are exclusions from the CDM 2007, however these are limited and will apply to very few commercial projects.

There are two types of project relevant to the CDM 2007: notifiable or non-notifiable. A notifiable is one where the construction work is likely to take more than 30 days or involve more than 500 person days. If the project is notifiable, all of the duties under CDM 2007 will apply. For non-notifiable projects the number of duties is reduced.

The CDM 2007 must be read in conjunction with the Approved Code of Practice (ACoP). ACoP is a practical guide and emphasises the need for proportionality and good management. If a duty holder (see below) complies with ACoP, this will generally be considered sufficient to comply with the law under CDM 2007.

Duty Holders

The effect of the CDM 2007 is that it imposes duties on 5 categories of persons connected with any construction project as follows:

- Clients (defined as a person who, in the course of business, either carries out a project itself or appoints another person to carry out a project).
- Designers (anyone who, in the course of business, prepares or modifies a design, or has someone under their control prepare or modify a design. The definition may make people designers for the purpose of the CDM 2007 who, at first sight, might not be thought of as designers: for example, a contractor specifying a type or grade of concrete, a client influencing design by specifying a material, or a project manager or quantity surveyor preparing or modifying a specification or bill of quantities).
- Contractors (any person who, in the course of business, manages or carries out construction work. The definition will therefore include sub-contractors).
- CDM Co-ordinators (the client must appoint a CDM Co-ordinator on all notifiable projects).
- Principal Contractors (the client must appoint a Principal Contractor on all notifiable projects).

General Duties

There are 4 general duties that must be complied with by each of the above 5 duty holders as follows:

- Duty to address competence. The duty relates to health and safety competence and not to other aspects of design or construction competence.
- Duty to co-operate i.e. seek the co-operation of others and actively co-operate with others to allow all duty holders to meet the requirements of CDM 2007.
- Duty to co-ordinate their activities with each other and ensure so far as reasonably practicable the health and safety of those carrying out construction works and those affected by construction work.
- Duty to apply the principles of prevention. For example, these are to avoid risks, evaluate risk that cannot be avoided, combat risk at its source etc.

In addition to the above general duties, there are specific duties which are unique to each of the 5 duty holders. The specific duties are detailed. The most noteworthy changes are to the duties on "clients" under the CDM 2007.

Who is the "client"?

A client is a person who, in the course of business, either carries out a project itself or appoints another person to carry out a project. There may be more than one client. For example, if a site owner appoints a developer to develop the owner's site, both the site owner and developer will be a client for the purpose of CDM 2007 because it is the developer who carries out the project and the site owner who appoints the developer to carry out the project.

Appointing another person to carry out a project may be construed widely. For example, a bank with a legal charge over a property may carry out the development of the charged site by the exercise of step-in rights, if the borrower is insolvent.

The increased duties of clients

The key duties are enshrined in the general duties (see above) and can be summarised as the duty to ensure that arrangements are in place (whether put in place by the client or others) to control risks and promote health and safety. The client is required to act reasonably in judging whether arrangements are adequate and have been implemented properly. Additional specific duties on the client are as follows:

- Duty to appoint a CDM Co-ordinator and principal contractor as soon as practicable "after initial design work or other preparation for construction work has begun" (in the case of the CDM Co-ordinator) and "after the client knows enough about the project to be able to select a suitable person for such appointment" (in relation to the Principal Contractor). The appointments should be in writing. If no such persons are appointed then the client must themselves comply with the duties imposed on a CDM Co-ordinator and Principal Contractor. The client should avoid commencing works on site before formal appointments and building contracts are entered into because, if an accident occurs during site preparation, a client could be deemed to be the Principal Contractor and/or the CDM Co-ordinator if health and safety relationships are not properly documented.
- Duty to ensure that a construction phase plan is in place before construction begins. The client must ensure that the Principal Contractor has prepared a construction phase plan and that site welfare requirements will be met through the construction phase.
- Duty to provide information for the health and safety file and ensure that the file is maintained after construction. The client must provide information to the CDM Co-ordinator for the health and safety file and in connection with the project. The client should ensure that separate structures or separate sites covered by the same health and safety file are separately identified in the file. The client should also ensure that the health and safety file is maintained after construction and passed to anyone acquiring the client's interest in the site.
- Duty to manage arrangements to:
 - carry out construction work without risk to the health and safety of any person so far as reasonably practicable;
 - provide for site welfare;
 - take account of the Workplace (Health, Safety and Welfare) Regulations 1992 in the design of the project and the use of materials;
 - the client must take reasonable steps to review and maintain the management arrangements and any regular project meetings to review safety arrangements should address this duty and involve all duty holders, including the client.
- Duty to collate and supply information including:
 - any information on the intended or current use of the project as a workplace;
 - an existing health and safety file;
 - a duty to deliver all such information to all designers, the CDM Co-ordinator and all contractors.
- Duty to give time for preparation and planning.

Other duty holders

There are a number of specific duties on the other 4 duty holders although it is probably fair to say that the changes are not as significant as the changes to the duties of clients. Details are set out in CDM 2007 and ACoP. A consideration of the specific duties for each duty holder is too detailed for the purposes of this summary. The ACoP is a good starting point for further research.

Practical implications

Unlike the CDM 2004, it is important to appreciate that whilst duties can be delegated to others, it is not possible to transfer liabilities arising under CDM 2007. It is therefore important for each person in the industry to have a familiarity with and act in accordance with the CDM 2007.

The CDM 2007 apply to projects that would not have previously have been caught by the CDM 1994 and introduce changes that affect:

- Appointments of design and management construction professionals (including the appointment of the new role of CDM Co-ordinator).
- Building and engineering contracts and sub-contracts.
- Agreements for lease and sale of buildings under construction or recently constructed.
- Development agreements.
- Development finance or project finance agreements.
- Public private partnership project agreements including private finance initiative construction sub-contracts.
- Term contracts and maintenance agreements.

The extent to which the CDM 2007 should be expressly addressed in agreements will depend on the role of the parties to the agreement and the extent to which the CDM 2007 applies to them.

The Construction team at IBB is able to provide you with no nonsense advice in relation to all aspects of construction and development work: the selection of the best procurement method; the drafting and negotiation of documents; compliance with CDM 2007 (and the myriad of other regulations relevant to the construction industry); issues which can sometimes arise during the progress of works (including access issues, payment disputes, practical completion, warranties and defects rectification); and other pre and post completion matters including the assembly of the construction package for the funding and acquisition or sale of developments. Please contact us for further information.

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