

One year on

30 August 2016

Paul Lennon discusses issues raised by the changes to the Construction (Design and Management) Regulations 2015

It is fair to say that, one year on, the [Construction \(Design and Management\)](#) or CDM Regulations 2015 have received a mixed response. Some believe the new iteration is the best thing to have happened to the CDM Regulations for many years. For others the predominant view is: why change something that is not broken?

The ethos and emphasis of the regulations are to implement [EU Directive 92/57/EEC](#), the Construction Sites Directive, and ensure the principles of prevention are being applied by all duty holders across every construction project. For some, though, the regulations are seen as added bureaucracy in an already over-legislated field.

Building surveyor queries

At Baily Garner, we have endorsed the changes to the regulations, which in broad terms have simplified the regulations. However, a number of building surveyors have requested clarification on the regulations. Questions have included the following.

- As a 'designer', can I act as a principal designer (PD), and more importantly, do I have the skills, knowledge and experience to fulfil this new role? In addition, can the holder of the now-defunct construction, design and management coordinator (CDMC) role become the PD?
- Some design and build contractors are reluctant to take on PD duties, and in certain cases even refuse to do so. Can they do that when they take a lead on the design process?
- The role and duty of the PD can also change depending on the procurement route and stage of the project; i.e. from concept and early design to planning. This has also prompted questions around timing and who should pick up the role of PD. Is this a viable and practical option?
- Depending on the procurement route, some clients see a conflict of interest if the design and build contractor is also the PD. Why?
- The number of projects requiring additional duty holders ? specifically a PD and principal contractor ? has now increased, particularly where there is likely to be more than one contractor engaged. This will therefore include more maintenance and day-to-day repair contracts. How can duty holders be appointed, in the light of the fluid and quick-moving targets those duties now impose on such schemes?

Client queries

Other questions posed relate to the client, as the CDM Regulations 2015 now place 'significant' extra duties on them compared with the 2007 iteration. The role of the CDMC has been phased out, which means our clients do not have the benefit of their advice. Questions raised by clients include the following.

- How can I ensure compliance if I do not possess the relevant skills, knowledge or

- experience to carry out these additional duties?
- What are my liabilities?
- Can I appoint someone to help me discharge these duties?
- How can I ensure the construction phase plan is drawn up?
- How do I ensure the PD and principal contractor fulfil their duties?

It is fair to say that building surveyors are the first people that our clients approach, and understandably surveyors want to give their clients the best advice. Depending on the complexity of the project, we would advise on the appointment of a CDM advisor to help clients with their duties and thus satisfy their extra obligations. The new duties still require the construction phase plan to be 'drawn up', but what does this mean? What is the impact if it is not suitable and what ? more importantly to our clients ? is the liability on them as individuals or businesses?

You can see why there is an opportunity for clients to seek support and comfort by instructing a health and safety practitioner with CDM experience in this field. There is certainly still a role for former CDMCs to provide advice and add value on larger projects as identified in the guidance.

This has led to clients retaining a CDM advisor to ensure due diligence and implementation of the regulations on a number of construction projects.

Doubling up

Further questions have been raised around a possible dual role incorporating both CDM advisor and PD, which the majority of our clients prefer. But how would this work, and is it not an inherent conflict of interest?

I would suggest that it is not, as this is exactly the situation that would arise if the client did not appoint a PD. Both duties would fall to the client themselves, so there would be one organisation acting in both capacities.

It is clear that the client has an enhanced duty, which has resulted in a number of health and safety advisors and former CDMCs now offering support in the form of a CDM advisor, in order to fulfil these new duties. The Association for Project Safety has subsequently produced terms and conditions for the appointment of a CDM compliance advisor, and this has been welcomed by a number of our clients.

It is seen as a positive move by those clients who recognise that a key part of their business is to ensure compliance and lead by example. Building surveyors should also look for help and advice where necessary to ensure they are likewise providing their clients with the best health and safety advice.

It makes sense to combine both services and commissions as, ultimately, the aim and function of the regulations is to manage health and safety on a construction project. The PD's role and duties are to plan, manage and monitor the pre-construction phase and coordinate matters relating to health and safety only.

It is fair to say that, one year on, the CDM Regulations 2015 have received a mixed response.

The title 'designer' has confused some people, as the questions above demonstrate, given that it suggests they have to be the designer on the project itself. The [Health and Safety Executive \(HSE\)](#) has clarified this point on its website by indicating that the post holder has to be a designer or an organisation that provides design services, but that they do not have to be employed on the project in a design capacity.

Given that the 2015 legislation focuses on the principles of prevention, we likewise advise our clients that the PD must be a designer in some professional capacity but not necessarily the designer on the project.

The PD must plan and manage the flow of health and safety information, coordinate with the project team and monitor compliance with the CDM Regulations. Design and build contractors could and should take on the role if they have the relevant competencies, that is, the skills, knowledge and experience.

They can seek help from third parties to discharge their duties, but the contract must be between the client and design and build contractor as PD. This does not sit well with some client groups. As previously identified, a PD must be a direct appointment, which has prompted some clients to commission them on a stand-alone basis, and this is an acceptable approach.

The legislation is silent on the limitations regarding who can assume the role of PD when it comes to maintenance and day-to-day repair projects.

The view of and guidance from the HSE is that it should be proportionate to the risks involved. The title 'designer' under the [CDM Regulations 2015](#) is a generic definition and not specific to a particular project in question. Therefore, the key for any building professional taking on the role of PD is to ensure that they understand how health and safety is managed through the design process and on into the occupation, use and maintenance of the building. Knowledge of the principles of prevention is essential to fulfil the duties.

Continuous professional development is key to ensuring that we have the skills, knowledge and experience to provide our clients with clear advice to fulfil their obligations. It is therefore important that we make a professional and measured judgement on how to best manage our CDM projects and take an approach that is proportionate to the risks involved.

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Further information

- Related competencies include [Contract Administration](#) , [Contract Practice](#)
- This feature is taken from the RICS *Building surveying journal* (July/August 2016)