The change leaves safety consultants without design expertise bereft of a direct work stream they have relied on since the introduction of CDM in 1994.

Sheena Sood  Major revisions to the CDM regulations, brought in response to construction’s poor health and safety record, are expected to come into force in April. So are you ready?

Soon after the publication this month of the draft construction design and management (CDM) Regulations 2015, we had the 10th corporate manslaughter conviction. The Health and Safety Executive (HSE) reports that in 2013/14 there were 42 deaths in the industry with 2.3 million working days lost due to illness and workplace injuries. With the welcome upturn in construction work comes a resource and skills crisis; ingredients for an even bleaker picture for construction safety.

Have revisions to the regulations come at the right time? The new regulations follow public consultation last year. They are subject to change, but expected to come into force on 6 April 2015, with a six-month transition period for certain projects. Drafts have been issued now so duty holders can familiarise themselves with the changes before then. So what’s new?

Principal designer
One significant change is the introduction of the role of principal designer for certain projects in place of the current CDM co-ordinator. The role of CDM co-ordinator was itself introduced by the CDM Regulations 2007, replacing the planning supervisor. Under the draft a principal designer will be appointed by the client if more than one contractor is likely to work on the project. This is a change from the CDM Regulations 2007 which required a CDM co-ordinator if a project was notifiable.

Unlike the CDM co-ordinator, the principal designer will be an existing member of the design team from the pre-construction phase. This is a marked change, as the CDM co-ordinator and previously the planning supervisor, did not need design experience. It involves a member of the design team taking on health and safety co-ordination commonly taken on by specialist safety consultants. Designers must be sure they have the capability to deliver this service and price for any third party input that may be needed. They would be advised to check that their professional indemnity insurance covers them for this work.

The change also leaves safety consultants without design expertise bereft of a direct work stream they have relied on since the introduction of CDM in 1994.

Peter Wright  Recent amendments to two powerful pieces of legislation around recovery of costs in construction contract adjudication mean they contradict each other. So, which takes precedence?

TOP TRUMPS

**Construction and Regeneration Act 1996** (the Construction Act) and the Late Payment of Commercial Debts (Interest) Regulations 1998 (LPCDA).

On 16 March 2013, the Late Payment of Commercial Debts Regulations came into effect; they apply to all contracts entered into after that date and entitle creditors to the cost of debt recovery. They insert a new provision into the LPCDA which states: “If the reasonable costs of the supplier in recovering the debt are not met by the fixed sum, the supplier shall also be entitled to a sum equivalent to the difference between the fixed sum and those costs.”

The fixed sum in this case is the sum set out in the 2002 regulations and ranges from £40 for debts less than £1,000 to £100 for a debt of £10,000 or more. The new provision works, as does the rest of the LPCDA, by implying terms into any applicable contract.

This will be of interest to anyone who is involved in the adjudication process for construction contracts, as costs can be high, and have so far been held by the courts not to be claimable by referring parties seeking the payment of sums due under contract (see Northern Developments vs J&J Nichol). The amended LPCDA contradicts the provision inserted into the Construction Act at section 108A by section 141 of the Local Democracy Economic Development and Construction Act 2009, which bans the contractual allocation of the costs of adjudication (so called “Talent” clauses) by requiring that such clauses are made in writing and after the giving of notice of adjudication. The new LPCDA requirement is not made in writing; it is implied into the contract, and even if it could be argued that it is written in the act, it is not made
Designer
The duties of the designer, where not also fulfilling the principal designer role, remain largely the same as under the CDM Regulations 2007. The main changes include provision of information and emphasise the importance of co-ordination by all members of the design and construction team. All designers must be aware of the principal designer’s responsibilities as if there is only one designer on a project, they will be deemed to have additional health and safety responsibilities at all stages of the project.

Notification
Domestic clients no longer benefit from exemption to notify. Under the draft regulations a project must be notified when it is expected to last longer than 30 working days or exceed 500 person days and more than 20 workers will be on the project at any one time. Clients need to be aware of the obligation to notify but other duty holders must ensure domestic clients are aware of this requirement.

THE IMPACT OF THE NEW REGULATIONS WILL NOT BE FULLY KNOWN UNTIL THEY COME INTO FORCE AND THE INDUSTRY GETS USED TO YET FURTHER UPHEAVAL

ACOP
Following public consultation, the HSE reported that only 33% of respondents supported the replacement of the Approved Code of Practice (ACOP) with guidance. Nevertheless from 6 April 2015, the ACOP is withdrawn. The draft guidance is not an ACOP and it is yet to be seen whether a new ACOP will be issued. In the interim duty holders are advised to consider the draft industry guidance produced by the Construction Industry Advisory Committee in addition to the draft guidance to further understand their roles and responsibilities from 6 April 2015. Withdrawal of the current ACOP affects competency requirements under the draft regulations as “competency” risks becoming a floating standard. What is clear is that all designers and principal designers must have the necessary technical knowledge of the work being carried out and the related health and safety risks in order to provide services compliant with the regulations.

Summary
The impact of the new regulations will not be fully known until they come into force and the industry gets used to a yet further upheaval in the regulation of safety in construction. Perhaps the most interesting point with the new regulations is the focus on design as integral to safety. Designers are used to designing aware of risks to health and safety both during and post construction. Now we have yet deeper focus on the key role of a designer in co-ordinating and disseminating information to allow safe construction. A brave new world.

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after the giving of notice of intention to refer the dispute to adjudication.
Commentary so far has been that we need to wait for the question of whether the Construction Act or the LPCDA takes precedence to be decided in court. This article contends that the issue has long since been decided: in parliament in 1972 and in the Supreme Court in 2002.

The amendment to the LPCDA implements an EU directive, Directive 2011/77/EU. The directive requires, at Article 6: “The creditor shall... be entitled to obtain reasonable compensation from the debtor for any recovery costs exceeding that fixed sum and incurred due to the debtor’s late payment. This could include expenses incurred, interest, in instructing a lawyer or employing a debt collection agency.”

In order to understand how the LPCDA and the Construction Act should be interpreted in the event of any conflict, it is necessary to go back to the European Communities Act 1972 (ECA). This states: “All such rights (in European law) (my brackets) are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly.”

So any rights conferred on individuals by European Union directives are recognised by the English courts. The ECA then goes on to state that “any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section.”

The effect of this was explored in the “Metric Martyrs” case of Thoburn vs Sunderland (2002). Lord Justice Laws held that: “Community rights prevail over the express terms of any domestic law, including primary legislation, made or passed after the coming into force of the ECA, even in the face of plain inconsistency between the two.”

Any conflict between the new clause in the LPCDA and the Construction Act results in the latter being overruled as it is not consistent with the ECA. The Construction Act does not have equivalent status to the LPCDA in that it does not implement an EU directive. The cost of going to adjudication to recover data arising out of construction contracts must therefore be awarded to successful claimants.

This argument has been successfully used in adjudication to recover costs.

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