Construction (Design & Management) Regulations 2015

Frequently Asked Questions

1. Do the Construction (Design & Management) Regulations 2015 (“CDM 2015”) apply to services carried out in Great Britain for a project overseas?

CDM 2015 applies to all construction projects in Great Britain. Accordingly, if the project is not in Great Britain, CDM 2015 will not apply, even if services in relation to the project are carried out in Great Britain.

Appointments on projects overseas may however include obligations to comply with CDM 2015. Further, when assessing whether a consultant in the UK has breached its duty of care on an overseas project, non compliance with the principles of CDM 2015 may be taken into account, so UK based consultants should always consider the spirit of CDM 2015.

2. Are all the principal designer’s duties qualified?

Some of the principal designer’s duties, including the general duty, are expressly qualified by wording such as “so far as is reasonably practicable”. Other duties are not expressly qualified, such as the duty to “ensure” all designers comply with their duties.

The HSE L153 guidance describes these duties using the “so far as reasonably practicable” qualification and states that by following this guidance you will “normally be doing enough to comply with the law”. However, the regulations suggest that some of the principal designer’s duties are not qualified and therefore a court may also come to this conclusion. Liability for strict obligations may not be covered by PI insurance.
3. Can the principal designer be novated to the contractor on a Design and Build (“D&B”) project?

The principal designer must be appointed by the client and be a designer with control over the pre-construction phase. When a D&B contractor is appointed, it is likely to be difficult for another designer to be principal designer.

If the principal designer role is novated to a D&B contractor, the principal designer will no longer be appointed by the client, so cannot continue the role. If the principal designer is not novated, it will be difficult for the principal designer to retain control over the pre-construction phase. It is our view that the D&B contractor should be appointed as principal designer. Consultants continuing to act as principal designer following the appointment of a D&B contractor should consider their role carefully.

4. Can consultants refuse to be appointed as principal designer?

A consultant can refuse to accept the role of principal designer. Nevertheless, if you do refuse to take on the role of principal designer we recommend that you clarify which member of the project team will be appointed as principal designer. If the client does not appoint a principal designer, other than on domestic projects, the client will assume the role. If the client does take on the role you should consider whether the client has the necessary skills, knowledge and experience to do so. If not, warn the client that they should appoint a principal designer.

On domestic projects where a principal designer is required, if the client does not appoint a principal designer, the designer with control over the pre-construction phase will be the principal designer even if not appointed in writing. It is therefore very important to clarify who will be appointed as principal designer on any domestic project so that you do not assume the role by default.
5. Who can be a designer/principal designer under the CDM 2015?

Under CDM 2015 a “designer” is any person who prepares or modifies a design (including drawings, specifications and bills of quantities) relating to a structure (including scaffolding or a supporting structure), or a product or system intended for a structure. Any person who instructs a person within his control to do so is also a “designer”. “Designer” is therefore defined very widely.

The principal designer must be a) a designer and b) have control over the pre-construction phase. The principal designer needs to have sufficient competence in relation to design and health and safety. A former CDM Co-ordinator who is not also a designer is unlikely to have sufficient competence to be a principal designer.

6. Can you sub-contract the role of principal designer?

The principal designer must be appointed by the client, so the statutory role cannot be sub-contracted. Whilst it would be possible to enter into a sub-consultancy appointment under which the sub-consultant will carry out the duties of a principal designer, this would only cover civil liability in relation to the role – the potential criminal liability cannot be passed on.

The Association for Project Safety has published a form of appointment for Advisor to the Principal Designer. However, this essentially appoints the “advisor” to take on the principal designers role in full, which we do not consider reflects CDM 2015. Whilst the principal designer is free to appoint an “advisor” to assist it fulfil its duties, this should not result in the role effectively being handed over to the advisor.

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