Construction (Design and Management) Regulations 2015 – Common Queries

1. Do the Construction (Design and 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 Great Britain has breached its duty of care on an overseas project, non compliance with the principles of CDM 2015 may be taken into account, so consultants based in Great Britain should always consider the spirit of CDM 2015. Consultants with offices overseas which are involved in projects in Great Britain will need to ensure that those overseas offices are fully up to speed with CDM 2015 and comply with it.

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 (Reg 11(4)). Other duties, including the general duty (Reg 11(1)), are expressly qualified by wording such as “so far as is reasonably practicable”.

The HSE L153 guidance describes the duty under Reg 11(4) 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 client can also take on the role of principal designer in some circumstances. 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 Adviser to the Principal Designer. However, this essentially appoints the “adviser” 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 “adviser” to assist it fulfil its duties, this should not result in the role effectively being handed over to the adviser.

The CITB have published Q&As from the HSE here in relation to the CDM adviser role (Q&A 5). This confirms that 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”. This makes clear that there will be real risks for principal designers who rely upon CDM advisers, particularly after the industry has had time to adapt to CDM 2015.

7. How does CDM 2015 apply to temporary works?

Under CDM 2015 a “designer” is an organisation or individual that prepares or modifies a design for a construction project, including the design of temporary works.

The principal designer is required to have control of the pre-construction phase, which is any period of time during which design or preparatory work is carried out (and may overlap with the construction phase) and must ensure
that all designers (including temporary works designers) comply with CDM 2015. The CITB guidance on the principal designer role therefore makes clear that a principal designer must be in place when temporary works design is carried out and that the principal designer is responsible for co-ordinating health and safety with all designers, including temporary works designers.

On the basis that temporary works designers are often sub-contractors appointed by the main contractor and not necessarily a central part of the design process there is some real concern about the principal designer’s responsibilities in relation to temporary works. Given that the principal designer is responsible for coordinating the temporary works it is very important that the principal designer agrees with the client and the contractor how this will be managed on a practical level.

8. Does CDM 2015 apply to ground investigations?

The definition of “construction work” in CDM 2015 includes “site clearance, exploration, investigation and excavation” but not “site survey”. It is not entirely clear whether initial ground investigations constitute construction work and therefore fall under CDM 2015.

In an interview which is set out in this AGS article the HSE has suggested that the exclusion of “site survey” is very limited and will only include “non-intrusive works……. If the works involve penetrative works, even with hand tools, the work is classed as construction and the regulations apply”.

Whilst the HSE have stressed that CDM 2015 should be applied proportionately having regard to the level of risk involved, this does suggest that a principal designer and principal contractor is required for preliminary ground investigations if more than one contractor is involved on the project or it is anticipated that there will be. If appointed as principal designer or principal contractor on a project in such circumstances and your role is limited to those investigations, it is important to make clear that your appointment as principal designer/contractor is similarly limited and will not continue after the investigations are complete.

If you would like to discuss the above or have any other queries in relation to CDM 2015 please contact:

Sheena Sood on +44 (0) 20 7469 0402 or s.sood@beale-law.com

or

Andrew Croft on +44 (0) 20 7469 0412 or a.croft@beale-law.com