

Contrary to other new Regulations or amendments to Regulations that are being introduced previously, the HSE has to a large extent removed the normal arrangements relating to Transitional Provisions and is intending to make the new CDM Regulations retrospective. What they have stated is this:

Regulation 36 - Transitional Provisions

(1) – these Regulations apply to a project which began before they came into force, with the following modifications.

(2) where a project began before the coming into force of these Regulations, the Client must appoint a Principal Designer and, subject to paragraph (3), the Principal Contractor, as soon as is practicable.

The strict interpretation of this is that the HSE is expecting Clients to negate existing Contracts with CDM Co-ordinator that they have been legally obliged to appoint and to replace them with the new function of Principal Designer.

'As soon as is practicable', in essence means that there has to be a very good reason why this is not actioned immediately, however, the HSE needs to expand on this and explain exactly what Clients are meant to do with existing Contracts on projects where they have been legally obliged to appoint a CDM Co-ordinator. Previously, transitional arrangements for change of a CDM duty holder run for 5 years from when new Regulations come into force to take account of existing Contracts.

Client/Principal Designer

Where there is likely to be more than one Contractor working on the project, the Client has to formally appoint a Principal Designer.

In essence, the role of the Principal Designer is fundamentally similar to the current CDM Co-ordinator, with one very significant exception in that, apart from assisting the Client with the preparation of the Pre-Construction Information, the Principal Designer is not specifically required to give advice and guidance to the Client, whereas the CDM Co-ordinator has a statutory duty to do so.

It is also important to note that the Client has an absolute duty to ensure that the Principal Designer complies with the duties within Regulation 9.

Principal Designer – replaces CDM Co-ordinator

A key issue centres around the new function of '*Principal Designer*', which is the replacement during the Design Stage, for the current CDM Co-ordinator. The Transitional Provisions within Regulation 36 requires the Client to appoint a Principal Designer on existing projects, as soon as is practicable. Although there is no legal definition of the phrase '*as soon as is practicable*', the Collins English Dictionary defines '*practicable*' as: '*capable of being done; feasible*'.

This is potentially open to significant interpretation and a key question is, does it allow for taking into account the existing contractual arrangements where CDM Co-ordinators have already been appointed? Or, is the Client under a duty to terminate the CDM Co-ordinator's appointment and replace that with the Principal Designer?

The HSE have defined '*Principal Designer*' as meaning the Designer in control of the Pre-Construction Phase, appointed under Regulation 6(1)(a), which is a formal appointment by the Client, in that the Principal Designer has to undertake the duties as outlined within Regulation 9, *Duties of a Principal Designer for Health & Safety at the Pre-Construction Phase*.

The key function of the Principal Designer is to plan, manage, monitor and co-ordinate the Pre-Construction Phase of the project and specifically take into account the General Principles of Prevention to ensure that:

CDM Regulation 9

Duties of a Principal Designer for health & safety at the Pre-Construction Phase

- (i) The project can be carried out without undue risk to health or safety;
- (ii) To assist the Client in the preparation of the Pre-Construction Information;
- (iii) To identify, eliminate, or control (mitigate), as far as is reasonably practicable foreseeable risks to the health and safety of those:
 - (a) undertaking the construction work or liable to be affected by construction activities;
 - (b) maintaining or cleaning the structure/building;
 - (c) compliance of the design with the Workplace (Health, Safety & Welfare) Regulations.

Additional duties include:

- (iv) ensuring co-operation amongst all those working on the project;
- (v) Designers' compliance with their duties within CDM Regulation 10, Duties of Designers;
- (vi) Preparation and update as necessary, of a Health & Safety File, which must contain information relating to the project, which is likely to be needed as Pre-Construction Information for any future construction work;
- (vii) Providing the Pre-Construction Information (which primarily the Client is responsible for the provision of) in a convenient form to:
 - (a) the Design Team; (b) Contractors appointed by the Client;
- (viii) Liaison with the Principal Contractor, as appropriate, for the duration of the project and in particular, relating to any information which a Principal Contractor may need to prepare their Construction Phase Plan or other information which could affect the planning and management of the construction work.

Principal Contractor & Principal Designer inter-relationship

It is also important to note that the Principal Contractor has a reciprocal responsibility to liaise with the Principal Designer as appropriate, for the duration of the project and in particular, regarding any information which the Principal Designer may need to prepare the Health & Safety File or which may affect the planning and management of the Pre-Construction phase. It is difficult to understand how a Principal Contractor, appointed following the Pre-Construction phase can actually provide information to the Principal Designer.

Additionally, the Principal Contractor also has a duty to ensure that the Health & Safety File is appropriately updated, reviewed and revised from time to time, to take account of the site work and any changes that have occurred.

Regulation 14 – Duties of Contractors

There is an interesting requirement included within Regulation 14, *Duties of Contractors*, in that there is a statutory obligation for any Contractor to comply with any directions given by the Principal Designer or the Principal Contractor.

This implies that the Principal Designer has a safety function related to construction works and is able to directly instruct Contractors. There is no explanation regarding this provided by the HSE within the current ancillary information.

Regulation 10 – Duties of Designers

In connection with Designer duties, there is major emphasis on applying the General Principles of Prevention (details appended) to the design, as well as using any available Pre-Construction Information to eliminate, so far as is reasonably practicable, foreseeable risk to health and safety of:

- (i) those carrying out construction work or affected by it;
- (ii) maintaining or cleaning the structure/building; or
- (iii) using the building as a workplace (Workplace (Health, Safety & Welfare) Regulations compliance).

Additionally, if the Designer is unable to eliminate foreseeable risks associated with construction, maintenance, or future use of the building (workplace), the Designer has to make reasonable effort to:

- (i) *Reduce and control risks through subsequent design development;*
- (ii) *Provide information regarding residual risks to the Principal Designer; and*
- (iii) *Ensure that appropriate information is provided for inclusion within the Health & Safety File.*

In general terms, it appears that Designers will have a statutory obligation to make considerable effort to resolve buildability or maintainability issues, and that this is an ongoing requirement throughout all design stages.

General Principles of Prevention

A fundamental emphasis within the duties of Designers, Principal Designer, and the Principal Contractor, is the application of the General Principles of Prevention as an ongoing requirement related to these particular roles.

This is a fundamental requirement of the EU Temporary and Mobile Construction Sites Directive, which the new CDM Regulations are primarily based upon.

Another important point to note is that the Principal Designer and Designers' duties are prefixed by the requirement of: *'so far as reasonably practicable'*,

Designers have to eliminate foreseeable risks to health and safety of any person who will be affected by their design, whether this is the construction team, those affected by the construction works, those maintaining or cleaning the future building, or those using it, if it is a workplace.

'Reasonably practicable' has been defined by the Court of Appeal and they have stated:

" 'Reasonably practicable' is a narrower term than 'physically possible' ... a computation must be made by the owner in which the quantum of risk is placed on one scale and the sacrifice involved in the measures necessary for averting the risk (whether in money, time or trouble) is placed in the other, and that, if it be shown that there is a gross disproportion between them – the risk being insignificant in relation to the sacrifice – the defendants discharge the onus on them".

In essence, this means that any design decision has to be overtly biased and influenced in favour of reducing health and safety risk, unless to do so would require totally unreasonable or grossly disproportionate effort in comparison to the benefits that would be achieved.

Construction (Design & Management) Regulations 2014 Management of Health & Safety at Work Regulation 1999

Schedule 1 General Principles of Prevention

Regulation 4

(This Schedule specifies the general principles of prevention set out in Article 6(2) of Council Directive 89/391/EEC)

- (a) Avoiding risks;
- (b) Evaluating the risks which cannot be avoided;
- (c) Combating the risks at source;
- (d) Adapting the work to the individual, especially as regards the design of workplaces, the choice of work equipment and the choice of working and production methods, with a view, in particular, to alleviating monotonous work and work at a predetermined work-rate and to reducing their effect on health;
- (e) Adapting to technical progress;
- (f) Replacing the dangerous by the non-dangerous or the less dangerous;
- (g) Developing a coherent overall prevention policy which covers technology, organisation of work, working conditions, social relationships and the influence of factors relating to the working environment;
- (h) Giving collective protective measure priority over individual protective measures; and
- (i) Giving appropriate instructions to employees.

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