

## **NEC contracts and the Construction (Design and Management) Regulations 2015**

The Construction (Design and Management) Regulations 2015 (CDM 2015) came into force on 6 April 2015, replacing the 2007 regulations. CDM 2015 creates a new role of principal designer and does away with the former CDM coordinator role, which has implications for NEC3 Engineering and Construction Contracts (ECC) in the UK. Other CDM roles, including the principal contractor, remain unchanged.

Responsibility for co-ordination of work in (or 'safety during') the pre-construction phase – which is crucial to the management of any successful ECC project – now rests with the CDM principal designer. The role will typically be taken by the lead designer for the project. The role is complimentary to but distinct from the physical and technical co-ordination of design elements produced by various teams and specialists on a project.

### **Pre-construction information**

CDM requires the client (ECC employer) to pass on to bidders 'pre-construction information', which includes residual risks known to those preparing the bid documents. Under CDM 2015 the principal designer has to 'assist' the employer with preparing the pre-construction information. At this stage it is likely that the principal designer will be the employer's lead designer.

The pre-construction information will contain some information that should be in the ECC works information and some that should be in the ECC site information. Good practice is to put the information that should be works information or site information in the relevant ECC documents and refer them from the pre-construction information document.

### **Selecting the principal designer**

As soon as design work is being carried out, the Employer is required by CDM to appoint the principal designer. The appointment must be in writing. The principal designer could be a standalone role or could be part of a wider appointment for design. If the Employer has to appoint an external organisation it could use the NEC Professional Services Contract or the NEC Professional Services Short Contract.

The ECC works information should name the CDM principal designer. In a contract with significant design by the contractor it is likely to be appropriate, but not essential, for the contractor to take over the role of principal designer.

Where there is significant design to be done after award by both the contractor and employer (e.g. for different parts of the works), the principal designer role might be given to the employer's designer. Split design responsibilities after award of contract may make the CDM principal designer role particularly difficult, not least as the contractor and employer remain responsible for their own designs while the principal designer has responsibilities regarding the health and safety of both designs. This also applies to temporary works design where the principal designer must ensure the contractor's designer has access to all relevant health and safety information to inform their design, and receives health and safety information back from them to ensure it is made available to other designers and contractors. There would also

need to be technical interaction between the temporary works designer and the designer of any permanent works that could be affected by it.

Bidders for a contract involving contractor design where design is carried out as part of the bid have to act as coordinators of designers, effectively carrying out the role of the CDM principal designer in respect of their bid design. This is so even if the employer's designer has retained the formal principal designer role, as will normally be the case.

If a bidder's designer wants more information about health and safety issues during the bid stage they should be asking the incumbent principal designer. This will normally be via the process for requesting information set out in the Instructions to bidders. However, direct involvement of the principal designer may be difficult in the bid stage because of the need for commercial confidentiality. It should be noted CDM 2015 gives no 'concession' to the role of the principal designer in the bid period.

### **Selecting the principal contractor**

The appointment of the principal contractor must be in writing. The works information should include either:

- the name and contact details of the principal contractor (if that is not the contractor) or
- a statement that the contractor is to be the principal contractor.

### **Design submission after award of contract**

In ECC design and building contracts the project manager has to accept stated 'particulars of the contractor's design' to be submitted after award of contract. This is for the project manager to have a chance to reject the design if it does not comply with the requirements of the works information or the law. Any such 'particulars of the contractor's design' to be submitted must be set out in the works information (clause 21.2).

If the CDM principal designer is the same organisation as the ECC project manager, then the project manager will logically carry out the principal designer duties in parallel with their ECC obligations to accept or not accept designs under the contract. The organisation which is both project manager and principal designer should be very clear who it appoints to carry out each role. It is recommended that the roles are not carried out by the same individual, except perhaps on a very small project.

If the CDM principal designer is the ECC contractor then the ECC works information should state that the contractor's designs should be reviewed by the principal designer prior to submission to the project manager. The works information should require evidence of such a review to be included with the submission of designs for project manager acceptance.

If the CDM principal designer is neither the ECC contractor or from the same organisation as the project manager, and is also responsible for reviewing design for compliance with the Employer's requirements, then the Employer would normally have his project manager pass the designs he receives from the Contractor to the principal designer for comment prior to the project manager accepting or not accepting those designs.

However, he may set out in the works information that the contractor's designs should be reviewed by the principal designer prior to submission to the project manager. This is more likely if the principal designer has no other design role in relation to the contract. The works information should require evidence of such a review to be included with the submission of designs for project manager acceptance.

### **Construction phase plan**

CDM 2015 requires the construction phase plan to be 'sufficient to ensure that construction work is carried out, so far as is reasonably practicable, without risks to health or safety' before the Contractor starts construction. The principal designer is required to liaise with the principal contractor regarding a 'construction phase plan'. In the 2007 version, the CDM coordinator was required to confirm that the plan was adequate prior to construction being allowed to start. This is no longer the case – CDM 2015 puts responsibility for the construction phase plan's adequacy squarely on the contractor, with the client now only having a duty to ensure there is one before construction works commence.

In an ideal world it would be sufficient for a competent contractor to assess and manage risks themselves without external checks, but experience with CDM 2007 suggests otherwise. Some employers may still wish to have the principal contractor's construction phase plan independently reviewed prior to a start on site.

The ECC works information could usefully reinforce the importance of the construction phase plan by stating that construction can not start until the principal contractor has formally confirmed to the project manager that the construction phase plan is adequate. An alternative is to make the 'access date' (stated in contract data part one) conditional on the formal confirmation from the CDM principal contractor that its construction phase plan is adequate.

### **Health and safety file**

CDM requires a 'health and safety' file to be prepared to help the employer safely use, maintain and alter the assets delivered by the contract. To comply with the Health and Safety at Work Act, the Employer must be able to make available relevant health and safety information, including the health and safety file to anyone, including his own staff, who are using or maintaining the asset. Under CDM 2015 the principal designer is required to prepare and update the file as design and construction proceeds.

The ECC works information will normally require the contractor to submit for project-manager acceptance the as-built drawings and operation and maintenance manuals (if there is contractor design). Under CDM 2015 the principal contractor is only required to provide 'other information' required by principal designer to prepare health and safety file.

It is essential therefore to make the contractor's provision of information required for the health and safety file a requirement for completion under ECC. If the design is complete and the employer chooses to end the appointment of the principal designer prior to completion, the employer can pass on to the contractor the direct obligation to complete the health and safety file. If this is foreseen at the tender it should, of course, be included in the ECC works Information.

**Conclusion**

NEC users in the UK all need to be aware of CDM. The changes in CDM 2015 may take a little time to get used to. Those preparing and managing ECC contracts need to be aware of and properly manage the interactions between CDM and the contract.

Further information will be available on the [NEC website](#).

This is summary of a paper by the authors on the same subject to be published in the [ICE journal, Management, Procurement and Law](#).

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