



ARTICLE

Safety First

What are Your Health & Safety Duties on Your Construction Project?

Risk is everywhere in construction projects, which is heavily influenced by factors such as site or ground conditions. According to the Health and Safety Executive (HSE), fatality rates in the construction industry are more than four times higher than in other sectors.¹ As Main Contractors are most at risk of injury and ill-health², they must be competent and experienced enough to carry out and supervise the works.

Managing risks and hazards — who are the key players?

The Construction, Design and Management Regulations (CDM)³ came into force on 6 April 2015, which propose a methodologic approach to the management and implementation of health and safety (H&S) from the outset of a construction project to its completion. The approach identifies the risks and hazards across the project lifecycle (design, construction, maintenance, and eventual demolition) with the goal to eliminate them if possible, or manage and reduce them to protect the workers when it's not possible. To achieve this goal, the CDM identifies three key players: Employer or Client, Designers (including Principal Designer) and Contractors (Main and Subcontractors).

The CDM regulations are part of some standard UK contracts, such as the JCT Standard Building Contract 2016 clause 3.23 or JCT Design and Build 2016 clause 3.16. NEC3 and 4 do not specifically deal with CDM regulations;

however, clause 27.4 sets out the requirement to act in accordance with the H&S requirements stated in the works information, and clause 31.2 requires that any programme submitted for acceptance must show provisions for H&S requirements. Depending on the procurement route selected by the parties, the CDM responsibilities will be allocated accordingly.

What are the key duties as a Principal Contractor under CDM?

The primary duty of the Contractor is the management of H&S during the construction phase. Contractors must plan, manage and coordinate to ensure, as far as is reasonably practicable, the project is carried out without risk to H&S.⁴ The Contractor must prepare the construction phase plan and appoint a Supervisor with the skills, training, knowledge and experience to carry out the role. They must also ensure that the correct contractual relationships are in place with all Subcontractors, supply

¹ HSE, Construction statistics in Great Britain 2021 <http://www.hse.gov.uk/statistics/industry/construction.pdf> (page 15).

² MacRoberts on Scottish Construction Contracts 20.4.9.

³ Construction (Design and Management) Regulations 2015 (SI 2015/51).

⁴ Construction (Design and Management) Regulations 2015 (SI 2015/51) regulations 13(1) and 15(2).

chain and intervening parties on H&S to support the core targets. Furthermore, other primary duties include:

- Ensuring suitable site inductions are provided.
- Taking reasonable steps to prevent unauthorised access.
- Consulting and engaging workers in securing their H&S.
- Providing welfare facilities.

In addition to the CDM Regulations, the Contractor is responsible for complying with the Corporate Manslaughter and Homicide Act⁵ in so far as a company is concerned. The Company is also responsible for organising and managing the activities on-site. In a case of fatality, the Company could be responsible for a gross breach of a relevant duty of care owed to the worker deceased.

Finally, under common law, the Contractor needs to establish proper precautions and maximise awareness of the need for safety to ensure the construction work is carried out without harm.⁶ They must ensure the place of work is safe for all workers⁷ as well as visitors (for example, deliveries⁸ by suppliers). Further obligations include keeping safe and maintaining access and egress for workers and public pedestrians in so far as is reasonably practicable. Contractor employers, however, are not under a duty to exhort their employees to use safety equipment. For example, a Contractor was not liable for a worker's accident when he decided not to wear the safety gear provided by the Contractor.⁹

The obligations to comply with the CDM regulations, Health and Safety at Work Act 1974 (HSWA¹⁰) or other secondary legislation (Statutory Instruments — SIs¹¹) enforced by the HSE and Local Authorities (LA) are more onerous than a reasonable duty of care¹² under common law. Breaching these regulations will likely constitute a breach of contract and a breach of the H&S legislation with associated consequences for damages and liability in tort and/or criminal law via prosecution by the state (HSE or LA). A Company may receive penalties upon conviction under the HSWA, including an unlimited fine, victim surcharge, prosecution costs, and remedial, publicity and compensation orders.

What are the general duties of prevention for the key players?

There is a general duty of prevention on each of the parties (players) involved in a project that underpins the regulations' approach. This general duty is imposed irrespective of being a Contractor or Principal Designer/Project Manager. The general principles of prevention are:

- Avoiding risk and hazards.
- Assessing the risk that cannot be eliminated and managed.
- Fighting the risk at source.
- Adapting the work to the individual to alleviate monotonous works to reduce their effect on health.
- Adapting to new technologies and technical progress, such as BIM or Artificial Intelligence.
- Minimising dangerous situations (BIM could be a useful tool to prevent hazardous working methods during the design stage).
- Developing an overall prevention policy covering technology, working conditions, organisation of work, social relationships and environment at work.
- Implementing site operating procedures to protect the workforce during COVID-19.
- Prioritising collective measures over individual measures of protection (i.e. balustrades or nets in lieu of safety harnesses).
- Providing appropriate instructions to workers.
- Using prefabrication methods to manufacture items off-site so they are ready to be incorporated on-site; this could reduce the risk of working at height, which represents 50% of fatal injuries.¹³

Likewise, the CDM imposes equal obligations to all the key parties, overlapping their responsibilities on many occasions. This is another component of the regulation that underpins its approach to reducing risk and hazards.

5 Corporate Manslaughter and Homicide Act 2007 c. 19. Operative from 6 April 2008.

6 *Anglian Water Services Ltd v Crawshaw Robbins & Co Ltd* [2001] BLR 173 at 184 [34], per Sr Stanley Burnton.

7 *Horton v Taplin Contracts Ltd* at 76 [13]–[16], per Bodey J (CA).

8 *Moon v Garrett* [2006] BLR 402.

9 *McWilliams v Sir William Arrol* by Viscount Kilmuir, [1962] 1 W.L.R. 295.

10 HSE, Health and Safety at Work etc Act 1974 <https://www.hse.gov.uk/legislation/hswa.htm>

11 HSE, Statutory Instruments owned and enforced by HSE/local authorities <https://www.hse.gov.uk/legislation/statinstruments.htm>

12 *Trott v WE Smith (Erectors) Ltd* [1957] 1 WLR 1154 at 1158, per Jenkins LJ.

13 HSE, Construction statistics in Great Britain 2021 <http://www.hse.gov.uk/statistics/industry/construction.pdf> (page 05).

What are the general duties of the Client?

According to the CDM, “Client means any person for whom a project is carried out”.¹⁴ The Client has overall control of the project; as such, it has a key role in ensuring the CDM regulations are followed, and its project is managed correctly across all stages. The two key obligations on clients are making suitable¹⁵ arrangements for managing a project, including the allocation of sufficient time and resources, and also for the appointment and management of the Principal Designer and the Principal Contractor.¹⁶

Managing the project includes providing pre-construction information to other players, ensuring the H&S plan is prepared and taking reasonable steps to ensure the Principal Contractor and Designer comply with their duties. Under JCT SBC/DB¹⁷, the Employer will appoint an Employer’s Agent acting in a delegated capacity and the CDM Coordinator is specified in article 5 (in this case, it would be the Contractor). Under the NEC4¹⁸, the Employer should specify the details of the Project Manager and the Supervisor in part one of the contract data.

Who is responsible for H&S in Design & Build (D&B) projects?

On a D&B project, where the same Company is acting as Principal Designer and Contractor towards the Employer, both roles are combined to assist with the integration of H&S on the project. Its key additional responsibilities (on top of those as Principal Contractor) are:

- Ensure the Client’s awareness of their duties regarding H&S.
- Eliminate risk as far as reasonably practicable.
- Provide design information of significant risk to other people to meet their obligations.
- Act as CDM Coordinator.
- Appoint and manage the Principal Designer, ensuring it complies with their duties.

The Principal Designer¹⁹ must focus on coordinating, planning, managing, and monitoring the project, as far as

is reasonably practicable, to ensure the project is carried out without risk to H&S.²⁰ Its duties focus more on the pre-construction phase, controlling foreseeable risks and ensuring the core building safety requirements are met. In addition, primary responsibilities include:²¹

- Liaising with the Principal Contractor for the duration of the appointment.
- Preparing the H&S file appropriate to the characteristics of the project.
- Ensuring all other Designers cooperate and comply with their duties.
- Providing pre-construction information to Designers, the Principal Contractor and Subcontractors.
- Assisting the Client in identifying, obtaining and collating the pre-construction.

The Principal Designer’s position on the H&S duties on a project is paramount to comply with CDM Regulations and safeguard H&S. It would be perilous to embark on complex projects on a D&B basis without an experienced Contractor and external advice on project management when the Employer does not have the capacity to comply with CDM demands. A Client may be held vicariously liable in negligence for employing an incompetent Contractor.

When using a standard building contract or D&B, the Employers must provide competent staff, a proper H&S system of work, suitable supervision, adequate materials and a safe place of work²² to comply with the statutory duties and tort law. Professionals who do not comply with the standard expected under CDM Regulations are at risk of committing professional negligence.²³

What about Companies’ obligations and duties?

The Company must have H&S systems and practices that comply with the regulations and the HSWA. In failing to do so, there will be a risk of penalties on conviction.²⁴ Its Directors must be aware of their responsibilities as Principal Contractors as opposed to Principal Designers because the responsibilities in the

14 Construction (Design and Management) Regulations 2015 (SI 2015/51).

15 4(2) sets out that “suitability” means that the work is done without risk (as far as reasonably practicable) and that the right facilities are provided.

16 Regulations 4 and 5 of the 2015 CDM regulations. See the guideline for full obligations of clients.

17 Joint Contracts Tribunal Limited Standard Building Contract 2016 design and build.

18 New Engineering and Construction Contract family third edition.

19 Usually a multidisciplinary designer engaged by the Contractor or separate designers led by one of them, i.e. Architecture designer.

20 Construction (Design and Management) Regulations 2015 (SI 2015/51) regulation 11(1).

21 CDM2015, Construction (Design and Management) Regulations 2015.

22 Wilsons and Clyde Coal Co. Ltd v. English (1983).

23 Montgomery v Lanarkshire Health Board [2015] UKSC 11 at [83]–[84], Stanton v Callaghan [2000] 1 QB 75.

24 Corporate Manslaughter and Homicide Act 2007.

case of fatalities are different. As per the sentencing guidelines, the fines are high and could severely impact the Company on a prosecution case, resulting in the Company entering into liquidation.²⁵

According to the HSE: “for a self-regulatory regime to work, duty holders must have a clear understanding of what they must do to comply with their legal obligations”.²⁶ The Company may face criminal prosecution under the HSWA and CDM Regulations due to a “gross breach of health and safety legislation or a relevant duty of care”²⁷ when leading to death. Nevertheless, charges under common law for manslaughter are infrequent; instead, Companies will be convicted and fined under the Corporate Manslaughter and Corporate Homicide Act.²⁸

Individuals remain liable for their actions under common law for gross negligence and manslaughter, as well as breach of the HSWA. The personnel deployed by a Company as Supervisors, Project Managers and Site Engineers must be highly experienced on projects of a similar size and complexity. The Company may be vicariously liable for the torts committed by its own employees or Subcontractors.

Are there any other alternatives?

A modern approach towards H&S avoids adversarial practices and demarcation of individual responsibilities. The key players could adopt the New Guidance on Collaborative Procurement for Design and Construction to Support Building Safety²⁹ (produced by Professor David Mosey on behalf of King’s College London CCL with Russell Poynter-Brown of On-Pole Ltd) published by DLUHC³⁰, which promotes collaborative procurement practices to support building safety.

Key takeaways

A Principal Contractor assumes a primary ownership duty throughout the construction phase, with direct obligations towards the safety of the workers on-site and its Subcontractors. On the other hand, a Principal Designer maintains the ownership during pre-construction to ensure the risk is eliminated or addressed. The Client

or Employer has an overarching duty that the project is managed safely across all phases.

Before accepting the appointment, the CDM requires that all players fulfil their role, namely, to have skills, knowledge and experience, and organisational capability to safeguard all persons on a project.

It isn’t easy to fulfil both roles within the same organisation. When a Client decides to embark on a D&B project, the Principal Contractor will have to engage with a professional Designer (or Designers) to fulfil the Designer’s skills, knowledge, and experience. The Contractor will manage and integrate the design with the construction. The Client, in turn, must engage with a professional Employer Representative or Project Manager to fulfil its duties. Contractually, the Client, Contractor and Designer will have to agree on the contract conditions to clearly define the CDM Regulations on each party, including the obligations that will be passed down to their supply chain. Standard forms of contract such as the JCT or NEC families are recommended to avoid liability gaps.

When (or if) there is a claim for a breach of H&S duties or negligence, the parties will have to seek external legal advice regarding the issues and points of law on the dispute and expert witness advice to assess the damages or contractual entitlements incurred as a result.

After the tragedy of Grenfell Tower in June 2017, the UK Government is working on a new Building Safety Act that will enhance the current HSWA with the intention to enter them into effect in 2022.³¹ Dame Judith Hackitt presented a report to Parliament in light of the catastrophe with a proposal to review the current legislation on building safety to make it fit for purpose. Nevertheless, her view on the CDM was positive: “The CDM Regulations are enforced by the HSE and provide a framework that clearly sets out key roles and responsibilities throughout the lifecycle of a construction project, with a strong focus on health and safety outcomes... to drive culture change. This is the approach that now needs to occur in respect of building safety too.”³²

25 R. v Cotswold Geotechnical Holding.

26 Reducing Risk, Protecting People: HSE’s decision-making process (R2P2-2001, para 12).

27 Bailey Julian, *Construction Law third edition* para 21.34.

28 John Uff, *Construction Law 13th Edition*, manslaughter. Case *R v Cotswold Geotechnical Holding unreported* 17 February 2011.

29 Collaborative procurement guidance for design and construction to support building safety <https://www.gov.uk/government/publications/collaborative-procurement-guidance-for-design-and-construction-to-support-building-safety>

30 Department for Levelling Up, Housing & Communities.

31 Bill started in the House of Commons at report stage 10 January 2022.

32 Judith Hackitt, *Building a Safer Future Independent Review of Building Regulations and Fire Safety: Final Report*. May 2018.

The Fire Safety Act 2021 obtained Royal Assent on 29 April 2021 and is in force in England and Wales. It remains to be seen how the next Building Safety Act will affect the HSWA and potentially the CDM Regulations. Will it modify the individual responsibilities of the Designers or Clients during the design and construction phase? Only time will tell.



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For more information on how you can manage the H&S risks on your project, please contact Javier on the details below.

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