

CDM IN COMPETITIVE DIALOGUE:

A GUIDANCE RELATING TO THE CONSTRUCTION (DESIGN AND MANAGEMENT) REGULATIONS 2007 AND THEIR IMPACT ON PROCURING PPP/PFI AND OTHER COMPLEX PUBLIC PROJECTS

This paper provides guidance on the impact of the Construction (Design and Management) Regulations 2007 (CDM 2007) upon complex publicly procured projects. CDM 2007 governs the management of health and safety on construction projects.

Its purposes include:

- improving the planning and management of projects from the outset
- identifying, eliminating and/or reducing hazards at design/planning stage and managing residual risks
- targeting effort in relation to health and safety to significant areas or stages of work

The paper focuses on the duties and obligations of the 'client', as defined by CDM 2007, in the period from project conception through the Competitive Dialogue process.

CDM 2007 places a significantly increased emphasis on the role of the client in relation to health and safety in the design and construction process. The duties of the client cannot be transferred to a third party until the end of the procurement process, at or shortly before financial close. This is much later than was the case under the old CDM Regulations 1994, under which a client could appoint an 'agent' at any time to act on its behalf. Under CDM 2007, the client is no longer able to appoint an agent.

CDM 2007 includes an Approved Code of Practice (ACOP) which aims to provide guidance on practical ways of complying with CDM 2007. Importantly, the client is required to follow the ACOP or be able to demonstrate compliance with CDM 2007 in some other way. The ACOP is published by the Health and Safety Commission.



As all projects will differ in complexity, value and programme length, this paper can provide only headline guidance. Careful consideration needs to be given, on a project-specific basis, as to client obligations throughout Competitive Dialogue.

THE ROLE OF THE CLIENT

It is important first to look at the definition and role of the client under CDM 2007. CDM 2007 defines the client as the organisation for which a construction project is carried out. Health and Safety Executive (HSE) guidance specifically includes PFI project originators (which include local authorities (LAs) and other public bodies) as clients.

The principal duties of a client under CDM 2007 are summarised as follows:

- appoint a CDM coordinator and principal contractor
- check competence and resources of all appointees
- ensure there are suitable management arrangements in place
- allow sufficient time and resources for all stages of design and construction
- provide pre-construction information to designers and contractors
- ensure there are suitable welfare facilities and there is a construction phase plan in place prior to the start of the construction phase

- provide information relating to the health and safety file to the CDM coordinator
- retain and provide access to the health and safety file

Where there are two parties falling within the definition of client under CDM 2007, they should elect that only one acts as client for CDM purposes. This may be the case, for example, for Joint Service Centre projects. However, it will also become the case around financial close, at which point the Preferred Bidder/Special Purpose Vehicle (SPV) will also fall within the definition.

This guidance focuses on the duties and responsibilities of the client and the CDM coordinator under CDM 2007. However, there are two other parties identified in CDM 2007 with statutory obligations, namely designers and the principal contractor.

The ACOP confirms that any party involved in preparing designs for construction work is a designer for the purpose of CDM 2007.

The principal contractor will usually be the main or managing contractor for the project. For the purposes of CDM 2007, there can only be one principal contractor for a project.

CLIENT RESPONSIBILITIES AT PROJECT CONCEPTION

CDM 1994 stated merely that the client was obliged to appoint a planning supervisor 'as early as possible'. This led to confusion as to precisely when in the design process the appointment was required. CDM 2007 is more prescriptive in that the client must appoint a competent, adequately resourced CDM coordinator (the successor to the planning supervisor) "as soon as practicable after initial design work or other preparations for construction work have begun."

In practice, the point at which an LA needs to appoint a CDM coordinator is likely to vary considerably between projects. Matters such as appraisal of the needs and objectives of a project by the LA, preparation of a business case and assessment of project viability may in some cases be undertaken without appointing a CDM coordinator, provided no initial design work is undertaken. However, the CDM coordinator will need to be appointed prior to the development of the initial concept design and implementation of any strategic brief. In relation to projects which include early works or reference schemes, the CDM coordinator will need to be appointed prior to the design or preparation of such elements. Equally, option appraisal or choice of suitable site may involve consideration of HSE risks and, if so, should require the appointment of the CDM coordinator at that early stage.

Once the LA has appointed the CDM coordinator, its key role will be to provide suitable and sufficient advice and assistance to the LA to enable it to comply with each of its CDM duties as defined above. As well as providing initial advice to the client in this regard, at this stage the CDM coordinator will be able to make preparations for, and advise the LA of, other CDM duties which will need to be discharged at later stages of the project, for example preparation of the Health and Safety (H&S) File and collation of the Pre-construction Information.

The LA as client is required to satisfy itself that the CDM coordinator is competent to undertake its duties under CDM 2007. To assist in carrying out this competency assessment, the ACOP for CDM 2007 contains a set of Core Criteria which the LA should use.

It is important that the CDM coordinator is appointed using a consultancy agreement/deed of appointment document, in a similar way to any other professional consultant appointment in relation to construction work. The agreement must include a comprehensive schedule of the services to be undertaken by the CDM coordinator. While there are standard form schedules available in the market, these will need substantive amendment, given the particular requirements of the CDM coordinator throughout the procurement process. Project-specific legal advice should be obtained.

It may be appropriate or necessary for the LA to appoint other consultants or advisors from the conception of a project to assist with the business case and in assessing whether or not to go ahead with the project. To the extent that the LA uses such consultants to carry out initial design work, these consultants will be deemed designers for the purposes of CDM 2007. The impact of this for the LA as CDM client will be that, as with the appointment of the CDM coordinator, the LA will need to ensure that such consultants are competent for the purposes of CDM 2007. Again, the Core Criteria in the ACOP should be used in this

regard. The CDM coordinator should also provide all necessary guidance and assistance to the LA.

In practice, the consultants/advisors appointed by the LA as designers may also have suitable competence and experience to perform the role of CDM coordinator, and there is no reason why such a consultant could not also be appointed to fulfil the CDM coordinator role. However, the LA must still satisfy itself that such a consultant is competent to undertake this role by using the Core Criteria.

There is no reason in principle why an LA could not appoint one of its employees as CDM coordinator. However, it must be satisfied as to that person's competence in the same manner as if the appointment was external. Additionally, issues of risk transfer and legal liability and cost may need to be considered in deciding whether an internal appointment should be made. Generally, an external appointment is favourable.

COMPETITIVE DIALOGUE – SUMMARY OF THE PROCESS

In understanding the LA's client duties under CDM 2007, it is useful to summarise the five key stages of Competitive Dialogue.

At the first stage the bidders complete a Pre-Qualification Questionnaire (PQQ) on the basis of which a longlist is determined of bidders who will proceed to the next stage. This stage is focused upon the bidder (competence, experience, capability and so on) as opposed to any solutions for the project in question.

At the second stage, dialogue on particular project solutions with the selected bidders will commence via the issuing of the Invitation to Submit Outline Solutions (ISOS).

The procurement process then moves into another round of dialogue, usually with a more limited pool of bidders. This stage commences with the Invitation to Submit Detailed Solutions (ISDS). The dialogue closes when the LA is satisfied that it has identified one or more solutions which are capable of meeting its needs. At that stage, a Call for Final Tenders (CFT) will be issued.

The final, fifth stage is the Preferred Bidder stage. In a PPP/PFI procurement, the bidder whose final tender in response to the CFT is the 'most economically advantageous tender' will be selected as Preferred Bidder. At this point, the LA has selected its preferred contractual partner and is limited to clarifying and confirming commitments in the final tender before, if it chooses to do so, concluding the contract.

The Competitive Dialogue stages, which are important from a CDM perspective, are looked at in more detail below. The identities of the stages used in this guidance note are those generally adopted by 4ps. Some public bodies have adopted other names for each stage.

CDM CLIENT OBLIGATIONS IN COMPETITIVE DIALOGUE

It is important first to be aware that ongoing consideration of health and safety issues is an issue of central importance in the entire project procurement process, in light of the enhanced client obligations under CDM 2007. The LA project board, or similar, should as a matter of best practice take responsibility for this, and health and safety should remain a standing item for review at board meetings.

PQQ

As soon as bidders begin preparing designs during the dialogue phase of Competitive Dialogue they will be deemed to be designers for the purposes of CDM 2007. Bidders should be required at the PQQ stage to provide information demonstrating how their own policy, organisation and arrangements meet the Core Criteria. Alternatively, bidders may use an independent accreditation organisation to assess their competence against the elements of the Core Criteria. In either case, unless the LA has the internal competence to create suitable health and safety evaluation criteria for bidder submissions, it will need to have the CDM coordinator in place at that early stage to provide suitable advice and input. Health and safety evaluation against the Core Criteria should be given appropriate weighting at PQQ, given its importance. Furthermore, it is appropriate to set an evaluation threshold below which a bid must fail and above which bids can be assessed competitively.

As the bidder will appoint a related construction supply chain in the event that the bid is successful, the LA should also assess the bidder's proposals as to the discharge of the duties of principal contractor under CDM 2007.

Again, this should be by reference to the Core Criteria.

CDM 2007 provides that, where there are two or more CDM clients, they should elect that one party takes this role. It is usual practice for the successful bidder/SPV to take the client role. In the PQQ, the LA should notify bidders that this will be a requirement. Given that the successful bidder/SPV will eventually become the CDM client, the LA should make an assessment of the bidder's overall competence, its proposed allocation of resources and how seriously it takes its health and safety responsibilities.

If the LA evaluates that a particular bidder has not achieved the required evaluation threshold, the bidder in question should not be selected to continue with Competitive Dialogue.

The LA must provide any designers and contractors which are bidding for work with "project-specific health and safety information needed to identify hazards and risks associated with the design and construction work" (the Pre-construction Information). This should, if possible, be provided in the PQQ to enable bidders to determine what resources and other considerations are appropriate for the project. Topics which will need to be considered when preparing the Pre-construction Information are set out in the ACOP.

If the LA already has an H&S File from previous work carried out on the relevant site and/or the LA has previously carried out relevant surveys, including geotechnical/contamination investigations, assessments and plans, these should be disclosed in the Pre-construction Information. Advice should always be sought from the CDM coordinator to consider the adequacy of information provided and whether, for example, the LA may be required to commission further surveys.

As the LA, as project originator, is deemed to be the CDM client at least until after the appointment of a Preferred Bidder, individual bidders will have no duty to appoint a CDM coordinator at any point prior to Preferred Bidder appointment. HSE has confirmed that it will always look to the 'principal lead' in a project to undertake and discharge the duties of the client, and this will be the LA in the early stages of the project.

As a result, the role of the CDM coordinator appointed by the LA will need to extend to involvement in each of the bids through the Competitive Dialogue, assuming design work or preparation for

construction work is being undertaken by the bidder.

It may be the case that appointment of a single CDM coordinator by the LA in relation to competing bids raises questions of conflict of interest and/or commercial confidentiality. For this reason, it is advisable that the PQQ clearly states that it proposes to proceed in this matter. If any of the bidders, or indeed the CDM coordinator, raise any issues in this regard, these can be dealt with at this early stage. If this were to happen, a possible alternative course would be for the LA to appoint a separate CDM coordinator for each bid, though this would clearly have financial and administrative implications.

CFT AND EVALUATION

While CDM competence must be a prerequisite to selection of bidders at PQQ, the LA may choose also to reward bidders for going beyond that threshold. If that is the case, the LA will need to determine a method for transparently and fairly evaluating bidders' relative CDM competencies in a manner which is verifiable (in the event that there is a complaint in this regard). To promote transparency, the method should be published to bidders with the CFT, at the latest, so that bidders can frame their final tenders appropriately.

The LA should give proper thought to the scoring and weightings to be allocated to such CDM sub-award criteria when compared to the other award criteria. The LA should also be clear with bidders as to which overarching award criteria (set out in the initial OJEU notice and/or in the earlier procurement documents) the CDM sub-award criteria fall under. For example, it could be a component of a wider award criterion of technical ability. The LA should take advice from the CDM coordinator in this regard.

SELECTION OF PREFERRED BIDDER

Under CDM 1994, it was usual practice in PFI/PPP projects for the duties of the client to transfer from the LA to the successful bidder/SPV at financial close. Under CDM 2007, the ACOP recognises (specifically in relation to PFI projects) that the role and responsibilities of the LA as CDM client can be transferred as the PFI project proceeds, which is



“normally the case when the SPV is appointed to carry out detailed specification and delivery of the project.”

This raises the question of when in the procurement timetable this transfer can occur. The Project Agreement (or similar document) will require the SPV to undertake the role of CDM client from financial close. However, if it is the case that the Preferred Bidder will proceed to carry out detailed specification, it may be appropriate for the LA to require the Preferred Bidder (or the SPV itself, if this has already been formed) to become the client for the purposes of CDM 2007 once the Preferred Bidder has been selected.

The LA should take advice from the CDM coordinator in this regard. Where there is likely to be a relatively lengthy period between appointment of Preferred Bidder and financial close, there may be commercial incentive for the LA to elect the Preferred Bidder/SPV at the earlier stage. However, a more conservative approach would be to elect only when it is certain that the Preferred Bidder/SPV will ultimately take forward the client role, at financial close. As a general rule, the latter approach is to be preferred.

The transfer of client duties is effected by written election by the parties, in this case confirming that the Preferred Bidder/SPV is the sole client for the purposes of CDM 2007. If the election is to be made upon appointment of Preferred Bidder, it should be included in the Preferred Bidder Letter. If the transfer is to take place at financial close, the election will be included in the Project Agreement (or similar document).

Upon the election by the Preferred Bidder/SPV, it will assume the principal duties and responsibilities of the CDM client. This will therefore include the appointment of a CDM coordinator. Although not required by CDM 2007, the Preferred Bidder/SPV, as client, may wish to have the appointment of the CDM coordinator by the LA novated. This will have advantages for the project in terms of consistency of approach as well as potential financial benefits. If the LA wishes to novate the CDM coordinator, this must be provided for both in the CDM coordinator's deed of appointment as well as in the tender documentation from PQQ onwards. Both the CDM coordinator and the Preferred Bidder/SPV must enter into a deed of novation effecting the transfer. The CDM coordinator may have had access to commercially sensitive material prior to novation. If so, this may need to be provided for in the consultancy agreement/deed of appointment. Legal advice should be sought in this regard.

CONSTRUCTION PHASE

Notwithstanding an election by the Preferred Bidder/SPV to be the CDM client, the LA will still retain some responsibilities. These require the LA to cooperate with any persons with duties under the CDM Regulations and provide any relevant health and safety information that is in its possession or which is reasonably obtainable. With the exception of these responsibilities, all client obligations under CDM 2007 will pass from the LA to the Preferred Bidder/SPV upon written election.

OPERATIONAL PHASE

Construction work is defined by CDM 2007 as including maintenance and repair of buildings. CDM 2007 will therefore continue to apply in the operational phase of a PPP/PFI project. Those obligations retained by the LA will therefore continue to apply through the operational phase, though the SPV will continue to have the elected role of client.

EXISTING PROJECTS – TRANSITIONAL ARRANGEMENTS

CDM 2007 will now apply to all construction work (including construction work that commenced prior to 6 April 2007), save for some transitional provisions which are summarised below:

- If the appropriate time under CDM 2007 for appointing the CDM coordinator or principal contractor occurred before 6 April 2007, the CDM client should now appoint the CDM coordinator and/or the principal contractor as soon as is practicable. This provision acknowledges that the appropriate time for appointing a planning supervisor under CDM 1994 may have been different to the appropriate time to appoint a CDM coordinator under CDM 2007.

- A planning supervisor and a principal contractor previously appointed under CDM 1994 will now be treated as being the CDM coordinator and the principal contractor respectively under CDM 2007. The CDM client has 12 months from 6 April 2007 to take steps to ensure these parties are competent to discharge the requirements of CDM 2007.
- Any agent appointed by a client under CDM 1994 may, if requested by the client and if the agent consents, continue to act as agent of that client unless and until either the appointment is revoked by the client, the project comes to an end or until five years from 6 April 2007 (whichever arises first).

The CDM duties retained by the LA will depend on the particular project in question, how the project has been procured and the stage the project has reached. For this reason we strongly recommend that a review is undertaken for all current projects to ensure that the LA is not failing to meet any of its duties under CDM 2007. Where appropriate the LA should seek advice from the CDM coordinator/planning supervisor appointed on the particular project or obtain separate legal advice.

Where financial close has been reached, it may be that most of the responsibilities of the LA have already been passed to the SPV. However, where the SPV has been appointed as an agent under Regulation 4 of CDM 1994 the LA should be required to make a further election to become the only client in accordance with Regulation 8 of CDM 2007. As a minimum, the LA and SPV will need to agree in writing that the SPV will continue to act as the agent for the LA.

PENALTIES FOR BREACH

Aside from any criminal and/or civil offences committed by a breach of the Regulations, HSE publishes a list of all those convicted of health and safety offences in the previous year, known as the offenders' database.

HSE takes a proportionate approach to any breach – in less serious cases, the HSE inspector will explain how the duty holder is not complying with the law and advise them how to put the problem right. The inspector will explain legal requirements and good practice. However, failure to follow advice from HSE inspectors is often taken into account by the courts if that failure results in harm.

Sanctions for breach of CDM 2007 are governed by the Health and Safety at Work Act 1974, enforceable by criminal law and carrying a maximum penalty of an unlimited fine and/or up to two years' imprisonment. In England and Wales, the courts may also order the defendant to pay the prosecution costs.

According to HSE, sentences imposed by the courts take into account a wide range of factors unique to the circumstances and context of the particular case and defendant: there are no standard tariffs for health and safety offences.

As CDM 2007 has been in force for a short period, there have been few reported concluded prosecutions. However, an LA client found to be in breach of CDM 1994 by failing to ensure a Construction Phase Plan (Health and Safety Plan) was in place, which resulted in an onsite fatality, was fined £10,000 plus £10,000 costs.

Additionally, there may be civil liability where there has been a breach of CDM 2007. There is generally no right of civil action against a duty holder other than a relation to site welfare of employees, subject to certain exceptions, including demolition.

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