

Regulation 9 – Ignoring independence may cost your project more money than you save

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The Background

A growing trend is appearing within the construction industry for organisations to themselves offer (or offer through related company structures) their services in relation to both works and approval on the same project. This seems to have, at first glance, clear advantages for principal contractors in terms of project efficiency and cost savings.

However, increasing concern exists within certain corners of the industry as to whether such organisations performing this dual role will remain compliant with the legal and regulatory regime surrounding the role of Approved Inspectors, and more particularly, their independence from the designs and other works they are inspecting, thus leaving project teams potentially exposed.

For contractors appointing Approved Inspectors who were found to be non-compliant with this independence requirement, the risks would include project delays with associated costs, (depending on the terms of the same) breaches of both their own project contracts and the terms of their professional insurance cover, and potential revocation of any certificates of approval that had been issued by the Approved Inspector in question.

It is also important for contractors to recall that Approved Inspectors bear no design responsibility or liability to the extent that advice they give remains within the realms of their building control remit (and thus there will be no contractual protection afforded in respect of projects where things go wrong). Where that “*advice*” is limited to how a contractor and their team can demonstrate compliance with the minimum legal requirements for the project, the responsibility for ensuring such compliance rests with the contractor.

So where a contractor expects an Approved Inspector to contribute proactive advice in respect of a project as part of its appointed role, appointing the same organisation as has provided the design could potentially leave the contractor in an unprotected position, either by virtue of a regulatory conflict of interest or through the Approved Inspector needing to ensure that its advice does not cross over into the realms of design to protect its own position.

It must be noted that much of this area is, as yet, untested before the courts but the piece below analyses the potential interpretations that would be adopted to the relevant issues should litigation arise from a project to which those issues applied.

The Regulations

The performance of building control services by an Approved Inspector (the “**Approval Services**”) is governed by the Building (Approved Inspectors etc) Regulations 2010 (the “**Regulations**”). The provisions of the Regulations relating specifically to independence of those Approved Inspectors from participation in the works that they are responsible for inspecting are set out in Regulation 9.

Regulation 9 prevents one person from providing both works and Approval Services on the same project (a “**Dual Service**”) by requiring that an Approved Inspector must *not* have a “*professional or financial interest in the work they supervise unless it is minor work*” (an “**Interest**”).

Under the Regulations, an Interest would be established if the person (which can include a corporate entity registered as an Approved Inspector) carrying out the Approval Services;

- A. “*is or has been responsible for the design or construction of any of the works in any capacity*”;
- B. “*is, or any nominee of the person is, a member, officer or employee of a company or other body which has a professional or financial interest in the works*”; or
- C. “*is a partner or is in the employment of a person who has a professional or financial interest in the works*”.

The Code of Conduct

In addition to the Regulations, there are a number of provisions set out in the Construction Industry Council’s own Code of Conduct (“**the Code of Conduct**”) which seek to prevent a conflict of interest situation arising. The most specific example is set out at provision 2.6.2 of the Code of Conduct which states that:

“An Approved Inspector who during the Project finds any [Financial or Professional Interest in the Project] shall immediately notify the Client of such interest and cease to act.”

In the context of the Code of Conduct, the definition of Financial or Professional Interest refers back to the Regulations but states that it should be a “*strict following*” of that definition, and actually disregards minor works, meaning that the Code of Conduct is more restrictive than the Regulations when it comes to professional conflicts of interest arising.

The Code of Conduct also requires compliance with all “*statutes and statutory provisions which are applicable to the functions of Approved Inspectors*” meaning that any breach of the Regulations would potentially constitute a breach of the Code of Conduct.

Interpreting the Regulations / Code of Conduct

What does this then mean as regards organisations looking to provide the Dual Service? It is reasonably clear that the provision of both elements of a Dual Service on the same project by one legal entity would constitute a breach of Regulation 9 and the Code of Conduct.

What is less clear is whether or to what extent it would be possible for two companies within the same group to perform both aspects of a Dual Service on the same project without a risk of a prohibited Interest arising. The risk would arise in the context of part (B) of the definition above, and would most likely depend on factors such as the group structure within which the two companies were operating, any commonality of shareholding or directorships between the two companies and any commonality of interest between the two companies and their officers / shareholders in relevant project contracts.

Sadly, no clear guidance is available on this point from the authorities with responsibility for the Regulations and their enforcement. In the absence of any such guidance, it will remain for the parties involved in appointing an Approved Inspector to their project to make their own assessment and interpretation of whether the Approved Inspector is compliant with the provisions of the Regulations and the Code of Conduct.

Advice versus Design

An additional risk factor to consider is the scope of activity that an Approved Inspector might be able to perform without risking the creation of a prohibited Interest. It is commonly understood that the role of an Approved Inspector will involve the provision of professional advice in relation to a project and its design. But where does the line stop before advice starts to become design, thus caught by the definition from the Regulations noted above?

The Regulations themselves do not specifically define what they mean by “*design*”. One parallel to draw would be the definitions of “*design*” and “*designer*” set out in the recent Construction (Design and Management) Regulations 2015:

“design includes drawings, design details, specifications and bills of quantities (including specification of articles or substances) relating to a structure, and calculations prepared for the purpose of a design”

“designer means any person (including a client, contractor or other person referred to in these Regulations) who in the course or furtherance of a business—

(a) prepares or modifies a design; or

(b) arranges for, or instructs, any person under their control to do so,

relating to a structure, or to a product or mechanical or electrical system intended for a particular structure, and a person is deemed to prepare a design where a design is prepared by a person under their control'

This is not a conclusive statement as to how the Regulations would be interpreted but it highlights another potential grey area to be considered by Approved Inspectors and contractors appointing them. In particular, if it were ever determined that an Approved Inspector who modified an existing design thus became a designer in their own right (and that was done in the course of their business for financial benefit), it is hard to see how this could not be deemed to create a prohibited Interest for the purposes of the Regulations.

Conclusions

For Approved Inspectors, the risks are quite clear. If a prohibited Interest arose on a project, they would be duty bound under the Code of Conduct to declare that Interest to the client and to cease acting on the project. If they failed to do this, they would be in breach of the Code of Conduct and potentially in breach of Regulation 9 also. The consequences of a breach of the Code of Conduct and Regulation 9 could potentially include loss of their status as an Approved Inspector, disciplinary proceedings and sanctions being brought against them under the Code of Conduct and (depending on the terms of the same) breaches of both their contracts of appointment and the terms of their professional insurance cover.

For contractors, the risks are as already noted above.

Unfortunately, this is currently quite a grey area of the law, and much is left to the interpretation of the parties involved, which can lead to differing approaches on different projects. The clearest and safest way to deal with the potential issue is to require distinct separation between an Approved Inspector appointed to a project and other professionals responsible for the work that the Approved Inspector is inspecting. Until further clarification and guidance is issued by the relevant authorities, other approaches will seemingly continue to retain an element of risk for all involved and may require the points to be argued out through costly and time-consuming litigation.