**Pre-Action Protocol for Construction and Engineering Disputes – Forms**

1. The new Pre-Action Protocol for Construction and Engineering Disputes, which is presently expected to come into force on 9 November 2016, can be downloaded **here**.
2. The accompanying Protocol Referee Procedure can be downloaded **here**.

**Pre-Action Protocol for Construction and Engineering Disputes – Details**

1. Several changes have been introduced by the new Pre-Action Protocol for Construction and Engineering Disputes.
2. The parties may now consent not to use the Protocol (paragraph 2).
3. The objectives of the Protocol have been reformulated so that the parties no longer need to provide “full” information, but merely sufficient information broadly to allow the parties to understand each other’s position and make informed decisions about settlement and how to proceed, and to make appropriate attempts to resolve the matter, in particular to consider ADR (paragraph 3).
4. Only in exceptional circumstances, such as flagrant or very significant disregard of the Protocol, will the Court impose costs consequences for non compliances (paragraph 4).
5. The requirement to keep the letter of claim simple and the costs of both sides modest has been broadened from lower value claims to “many cases, including those of modest value” (paragraph 5).
6. The general aim of the Protocol has been modified so that only the “outline” of parties’ cases must be made known, so that the parties only “usually” should meet, so that the aim of defining and agreeing the issues between the parties had been removed and so that the parties should be put in a position where they may be able to settle cases not merely early and fairly as before, but inexpensively too (paragraph 6).
7. The requirements of the Letter of Claim have been modified so that the letter contains a brief summary of claims and relief (proportionate to the claim) and expressly provides that experts reports are neither expected nor required, although in cases where they are central it is observed that they can help explain the Claimant’s position. The requirement for a Claimant whose claim has previously been made and rejected to deal with the grounds for rejection has been removed. Finally, the Claimant should say whether it wishes the Protocol Referee Procedure to apply (paragraph 7).
8. The Defendant’s acknowledgment must now confirm whether it wishes the Protocol Referee Procedure to apply (paragraph 8).
9. The requirements of the Letter of Response have also been modified so that only a brief and proportionate summary of the Defendant’s response to the claim or claims and (if applicable) a brief summary of any counterclaim is required. The detailed former requirements – to state agreement or disagreement with the facts set out in the Letter of Claim, to state which claims are accepted or rejected and the basis of rejection, to state (where a claim is accepted in whole or part) whether the damages, sums or extensions of time are accepted or rejected and of rejected the basis of rejection and to state the facts if contributory negligence is relied on – are all removed. Also added is a requirement to identify any third parties which the Defendant is considering submitting to a pre-action protocol process (paragraph 8.5).
10. A response to counterclaim shall now be a brief and proportionate summary (paragraph 8.7).
11. The parties should now normally meet 21 days after Letter of Response (or response to counterclaim). Provision is added for the meeting to take the form of an ADR process such as mediation. The previous requirement – that if the parties are unable to agree a means of resolving the dispute other than by litigation, they should use their best endeavours to agree how the issues should be defined – has been removed (paragraph 9).
12. The parties may by consent agree longer periods for the relevant steps save that the maximum extension for any step shall not exceed 28 days in aggregate. There is new provision for the Protocol action to be concluded automatically at the completion of the pre-action meeting, or 14 days after expiry of the period within which the meeting should have taken place (paragraph 10).
13. The parties may agree to engage in the Protocol Referee Procedure (see below).

**Pre-Action Protocol for Construction and Engineering Disputes – Protocol Referee Procedure**

1. The following is a brief summary of the key points of the Protocol Referee Procedure. Reference should of course be made to the Procedure itself.
2. The parties must have agreed to engage with the Protocol Referee Procedure for it to apply. If it applies, either party may apply to the Chairman of TeCSA for the nomination and appointment of a Protocol Referee. The Protocol Referee shall be a senior member of TECBAR or TeCSA authorised so to act, and the application shall be accompanied by the Application Fee of £3,500 plus VAT.
3. The application shall set out briefly details of the directions sought by the Applicant in order to assist the parties in participating in and complying with the Protocol; and/or the nature of the non-compliance (no more than 4 sides of A4 pages) together with such other documents as the Applicant intends to rely upon (no more than 1 lever arch folder, single sided copying). Provision is made for a response within 5 working days of the notice of appointment, and a reply within 2 working days thereafter.
4. The Protocol Referee reaches a written decision no later than 10 working days after receipt of the notice of appointment (unless extended) setting out any appropriate directions for future conduct of the Protocol process; and/or whether there has been non-compliance with the Protocol and, if so, whether the non-compliance demonstrated a flagrant or significant disregard for the terms of the Protocol and, if so, to what extent. The decision is binding and must be complied with until the dispute is determined by legal proceedings or by agreement.
5. There are several procedural forms relating to the appointment process, and a flowchart to show how the process is intended to operate. These can all be found on TeCSA’s website (since they will be administering the process) – see the links below:
   1. Application Form – **here**
   2. Declaration Form – **here**
   3. Nomination Form – **here**
   4. Form of Appointment / Undertaking – **here**
   5. Flowchart of appointment process – **here**