‘New’ Pre-action Protocol for Construction and Engineering Disputes

Modifications introduced in the New Pre-Action Protocol, which is expected to come into force today, aims to encourage early and fair resolution of construction and engineering disputes without disproportionate costs being incurred.

The existing Pre-action Protocol for Construction and Engineering Disputes (the “Existing Protocol”) governs the actions and conduct of parties in dispute before formal court proceedings are issued; it is generally seen as a valuable pre-action mechanism for resolving disputes in the construction industry, without the need for formal proceedings.

The Technology and Construction Bar Association (“TeCBAR”) and the Technology Construction Solicitors Association (“TeCSA”) last week launched the second edition of the Pre-action Protocol for Construction and Engineering Disputes (the “New Protocol”) which is expected to come into force from today. The New Protocol stems from a series of concerns regarding the Existing Protocol following a survey conducted by TeCSA, in particular, that the Existing Protocol slows the litigation process and increases costs. These concerns were also raised by construction lawyers prior to Lord Justice Jackson’s final report into civil litigation costs published in December 2009.

Several changes have been introduced to the New Protocol which are seemingly in line with the new objective, not only to put parties in a position where they may be able to settle cases early and fairly, as before, “but inexpensively too”.

The New Protocol has been modified with a clear emphasis on simplicity so that only the “outline” of parties cases must be made known. Parties are now required to provide “sufficient” rather than “full” information and this has been extended from lower value claims to “many cases, including those of modest
value”. The Letter of Claim and Letter of Response now require a “brief summary” which is “proportionate” to the claim rather than detailed particulars as required by the Existing Protocol.

A significant amendment to the New Protocol is the introduction of an entirely contractual and voluntary ‘Protocol Referee Procedure’ (the “Procedure”). On agreement by the parties to engage in the Procedure, an application will be made to TeCBAR or TeSCA accompanied by an Application Fee of £3,500 plus VAT. The nominated referee will then oversee compliance with the New Protocol. The aim of the Procedure is to deal with concerns of abuse of process and non-compliance with the Existing Protocol.

Timescales of various steps have been modified to enable a quicker pre-action process as set out in the table. Under the New Protocol, the parties may now agree longer period of time for compliance with any of the steps described in the New Protocol, save that no extension in respect of any step shall exceed 28 days in the aggregate. (Please note, unless specified otherwise in the table below, the number of days are from the date of receipt of the Letter of Claim.)

<table>
<thead>
<tr>
<th></th>
<th>Existing Protocol</th>
<th>New Protocol</th>
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</thead>
<tbody>
<tr>
<td>Acknowledgment Letter</td>
<td>14 days</td>
<td>14 days</td>
</tr>
<tr>
<td>Letter of Response (“LoR”)</td>
<td>28 days</td>
<td>28 days</td>
</tr>
<tr>
<td>Counterclaim</td>
<td>Equivalent period allowed to the Defendant for LoR</td>
<td>21 days from LoR</td>
</tr>
<tr>
<td>Pre-action meeting</td>
<td>28 days following receipt of LoR (or Counterclaim)</td>
<td>21 days from receipt of LoR (or Counterclaim)</td>
</tr>
<tr>
<td>Extension</td>
<td>Extension to LoR only: maximum of 3 months</td>
<td>Extension to any step: parties may agree longer periods of time for compliance of any step up to maximum of 28 days in the aggregate per step</td>
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</tbody>
</table>
Further key changes implemented in the New Protocol include:

+ parties can now agree by consent to opt out of the New Protocol;
+ costs consequences for non-compliance have been narrowed and will only be imposed by the Court in exceptional circumstances such as “flagrant or very significant disregard for the terms of the Protocol”;
+ an automatic completion date for the New Protocol has been introduced – at the completion of the pre-action meeting or 14 days after the period the meeting should have taken place; and
+ to avoid front loading of costs; long expert reports and disclosure of vast documents are not encouraged.

The New Protocol, which has been endorsed by the Technology and Construction Court judges, was described by Mr Justice Coulson at the launch last week as a definite improvement to what has been and become a lot of longstanding problems with the Existing Protocol.

Our view

If parties continue to ‘opt in’ and use the New Protocol:

+ we do not consider that the new timeframes will result in a significant change to pre-action contact generally especially given the reduction in costs sanctions for non compliance;
+ further, we do not foresee that the Procedure will be implemented by many parties, in particular, given the additional costs involved; and
+ the biggest change we predict centres on the parties’ ability to now ‘opt out’ of the New Protocol.

The Existing Protocol was a useful mechanism for avoiding litigation. The TeCSA survey results indicated that 41% of those disputes subject to the Protocol settled without the need for formal proceedings; it will therefore be interesting to see the number and reasons for parties opting out of the New Protocol.

9 November 2016