New Pre-action Protocol for Construction and Engineering Disputes – Some Practical Tips

The Master of the Rolls has approved the New Pre-action Protocol for Construction and Engineering Disputes which came into force on 14 November 2016 (the “New Protocol”).

Several changes have been introduced into the New Protocol to try to address the trend of protracted and disproportionately expensive protocol periods that were becoming commonplace under the previous Pre-action Protocol for Construction and Engineering Disputes. These changes include that:

1. Parties can now agree to opt out of the New Protocol altogether. This is probably the biggest change. If parties do decide to opt out, please note that such an ‘opt out’ does not extend to Practice Direction on Pre-action Conduct which still applies to all cases.

2. An automatic completion date for the New Protocol is now fixed – the New Protocol is now deemed to have ended following the protocol meeting or 14 days after the period when the protocol meeting should have taken place.

3. A New Protocol referee system has been introduced. The parties can appoint a protocol referee for a fee of £3,500 plus VAT (which is paid by the applicant party) to oversee compliance with the New Protocol. This is also a new initiative.

4. The overall process is shorter, much more stringent and intended to be less expensive. The two key differences here are:

   a. The Protocol meeting is now required to take place within 21 days from receipt of the letter of response (it was 28 days under the old protocol but it wasn’t unusual for the protocol meeting to finally take place many months after the letter of response was served); and

   b. Parties may only agree longer periods of time for compliance of any step up to maximum of 28 days in the aggregate. This means the New Protocol can only last a maximum of 91 days from start to finish.
5. Costs sanctions for non-compliance with the New Protocol have been relaxed such that only flagrant or significant disregard of New Protocol will trigger cost consequences for non-compliance. Previously, any non-compliance with the protocol would more likely than not lead to the Court making adverse costs order against the defaulting party.

Sheena Sood and Ian Masser, Partners at Beale & Company, outline their predictions for how the New Protocol could operate and offer some practical tips that should be taken in to consideration going forwards:

**Practical Tips**

1. We think we will see more parties seeking to opt out of the New Protocol on the larger value, multi party disputes that we often see in construction claims. Our prediction is that the parties will view the costs of protocol compliance on such disputes as a duplication of the costs of filing and serving pleadings in litigation. With a strict 91 day total time period under the New Protocol and an emphasis being placed on letters of claim only having to provide a “brief summary of the claims”, our view is that the technical expert evidence will simply not be advanced enough to allow the parties to take a view on respective risks and possible settlement. As such, the parties could be far better proceeding straight to formal litigation and an exchange of detailed pleadings followed by a stay to consider ADR once pleadings have closed. We can see clauses starting to appear in contracts/appointments dealing with whether or not the New Protocol is to be adopted/excluded as part of the contractual dispute resolution procedure. On lower value disputes, we can see the New Protocol being useful if an early and pragmatic commercial approach to resolution is adopted. Back in 2009, a TeCSA survey indicated that 41% of those disputes subject to the Protocol settled without the need for formal proceedings. So it does work if operated correctly on suitable cases.

2. We can’t see the New Protocol referee process being used extensively. The cost (although modest) will probably act as a deterrent. We do not see why parties would need the input of a third party to manage the New Protocol procedure when you have a clear prescribed process from start to finish (including permitted extensions of time) set out already. If you are a defaulting party, why would you agree to refer the default to a protocol referee, especially when you are now only going to face possible court sanctions for flagrant non-compliance? We have already seen several letters of claim under the New Protocol and each one has stated that the claimant does not want to use the New Protocol referee system. Early days but a possible sign of things to come.

3. We still think you are going to have claimants who are reluctant to spend large sums of money in increased court fees. As such, even with these changes re. a defined end
date to the New Protocol, the overall pre action period will still last as long as it takes a claimant to issue proceedings. Strictly speaking the formal protocol process may have come to an end after the protocol meeting but a ‘pre action’ period could continue for many months/years until a claimant decides to issue proceedings. It will be interesting to see how the courts view such conduct when dealing with cost budgets at the first CMC because we predict that this issue could provoke some interesting costs arguments.

If you would like to discuss any of the points covered in this article in further detail, you can contact Ian Masser (on +44 (0) 20 7469 0439 or i.masser@beale-law.com) or Sheena Sood (on +44 (0) 20 7469 0402 or s.sood@beale-law.com).

Further information on the above can also be found on Beale & Company’s website here.

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