

Key features of the new Pre-action Protocol for Construction and Engineering Disputes, 2nd Edition

Protocol Referee Procedure

An important new feature of the Protocol is the introduction of the Protocol Referee Procedure (the "PRP"). If the parties have agreed the PRP shall apply, a party may apply to the Chairman of TeCSA for a nomination of a Protocol Referee. Full details of the procedure are now available on the TeCSA website (click [here](#)) but in summary:

1. The Application shall:
 - a. Set out details of the directions sought to enable compliance with the Protocol and/or details of the nature of non-compliance of the Protocol.
 - b. Include the Application Fee of £3,500.
2. The Chairman of TeCSA will appoint a Protocol Referee, who will be a senior member of TeCSA or TECBAR. The Protocol Referee shall immediately give written notice of their acceptance of appointment to all Parties (the "Notice of Appointment").
3. Once a Protocol Referee has been appointed:
 - a. the responding party shall submit its response to the Application no later than 5 working days from the date of the Notice of Appointment.
 - b. The Applicant shall be entitled to submit a reply no later than 2 working days from receipt of the Response.
 - c. The Protocol Referee shall reach a decision no later than 10 working days (the parties may agree to extend this period) after the date of the Notice of Appointment.
4. The Decision shall:
 - a. Set 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.
 - b. provide brief reasons for the Decision, which shall be binding on the parties and they shall comply with it until the dispute is finally determined by legal proceedings or by agreement between them. In subsequent legal proceedings the Court shall give due weight to the Decision of the Protocol Referee but shall not be bound by it.

Other amendments to the Protocol

Section	Amended Protocol	Previous Protocol
Exceptions	A Claimant shall no longer be required to comply with the Protocol if all parties to the proposed proceedings expressly agree so in writing (clause 2.2).	New to the amended Protocol.
Objectives	To exchange sufficient information about the proposed proceedings broadly to allow the parties to understand each other’s position and make informed decisions about settlement and how to proceed (clause 3.1.1) and to make appropriate attempts to resolve the matter without starting proceedings and, in particular, to consider the use of ADR in order to do so (clause 3.1.3)	The exchange of early and full information about the prospective legal claim (clause 1.3(i)).
Compliance	Only in exceptional circumstances, such as a flagrant or very significant disregard for the terms of the Protocol, that the Court will impose cost consequences on a party for non-compliance with the Protocol (clause 4.1)	The court will be concerned with substantial compliance with the Protocol and not minor departures (clause 1.4).
Proportionality	In many cases, including those of modest value, the letter of claim and the response can be simple and the costs of both sides should be kept to a modest level (clause 5.1).	In lower value claims (such as those likely to proceed in the county court) the letter of claim and the response should be simple and the costs of both sides should be kept to a modest level (clause 1.5).
Letter of Claim Prior to commencing proceedings, the Claimant or his solicitor shall send to each proposed Defendant (if appropriate to	A brief summary of the claim or claims including where applicable the monetary value of any claim with a proportionate level of breakdown. Generally it is not expected or required that expert reports should be provided but in cases where they are succinct and central to the claim, they can form a helpful way of explaining the Claimant’s position (clause 7.1.3).	A clear summary of the facts on which each claim is based including if damages are claimed a breakdown showing how the damages have been quantified (clause 3(iii)).

<p>his registered address) a copy of a letter of claim which shall contain:</p>	<p>The Claimant's confirmation as to whether or not it wishes the Protocol Referee Procedure to apply.</p>	
<p>Defendant's response</p> <p>The Defendant shall send a letter of response to the Claimant which shall include, amongst other things:</p>	<p>A brief and proportionate summary of the Defendant's response to the claim or claims and, if the Defendant intends to make a Counterclaim (clause 8.5.1) and the names of any third parties the Defendant intends to/is considering submitting to a Pre-Action Protocol process (clause 8.5.3).</p>	<ol style="list-style-type: none"> 1. the facts set out in the letter of claim which are agreed or not agreed, and if not agreed, the basis of the disagreement (clause 4.3.1(i)); 2. which claims are accepted and which are rejected, and if rejected, the basis of the rejection (clause 4.3.1(ii)); 3. if a claim is accepted in whole or in part, whether the damages, sums or extensions of time claimed are accepted or rejected, and if rejected, the basis of the rejection (clause 4.3.1(iii)).
<p>Deadlines</p>	<ol style="list-style-type: none"> 1. Within 14 calendar days of receipt of the letter of claim, the Defendant should acknowledge its receipt in writing and may give the name and address of his insurer (if any) and shall also confirm whether or not it wishes the Protocol Referee Procedure as provided at paragraph 11 to apply (clause 8.1). 2. Within 28 days from the date of receipt of the letter of claim, or such other period as the parties may reasonably agree (up to a maximum of 3 months), the Defendant shall send a letter of response to the Claimant (clause 8.5). 3. The Claimant shall provide a Response to any Counterclaim within 21 days of the Defendant's Letter of Response (clause 8.7) 	<ol style="list-style-type: none"> 1. Within 14 calendar days of receipt of the letter of claim, the Defendant should acknowledge its receipt in writing and may give the name and address of his insurer (if any) (clause 4.1). 2. Within 28 days from the date of receipt of the letter of claim, or such other period as the parties may reasonably agree (up to a maximum of 3 months), the Defendant shall send a letter of response to the Claimant (clause 4.3.1(i)). 3. The Claimant shall provide a response to any counterclaim within the equivalent period allowed to the Defendant to respond to the letter of claim (clause 4.4).

	<p>4. Within 21 days after receipt by the Claimant of the Defendant's letter of response, or (if the Claimant intends to respond to the counterclaim) after receipt by the Defendant of the Claimant's letter of response to the counterclaim, the parties should normally meet (clause 9.1).</p> <p>The parties may now agree longer periods of time for compliance with any of the steps of the Protocol save that no extension in respect of any step shall exceed 28 days in the aggregate (clause 10.1).</p>	<p>4. Within 28 days after receipt by the Claimant of the Defendant's letter of response, or (if the Claimant intends to respond to the counterclaim) after receipt by the Defendant of the Claimant's letter of response to the counterclaim, the parties should normally meet (clause 5.1).</p> <p>New to the amended Protocol.</p>
Pre-Action Meeting	<p>Within 21 days after receipt by the Claimant of the Defendant's letter of response, or (if the Claimant intends to respond to the Counterclaim) after receipt by the Defendant of the Claimant's letter of response to the Counterclaim, the parties should normally meet (clause 9.1).</p> <p>The meeting can itself take the form of an ADR process such as mediation (clause 9.3).</p>	<p>Within 28 days after receipt by the Claimant of the Defendant's letter of response, or (if the Claimant intends to respond to the Counterclaim) after receipt by the Defendant of the Claimant's letter of response to the Counterclaim, the parties should normally meet (clause 5.1).</p> <p>The parties should consider whether some form of alternative dispute resolution procedure would be more suitable than litigation, and if so, endeavour to agree which form to adopt. It is expressly recognised that no party can or should be forced to mediate or enter into any form of alternative dispute resolution (clause 5.4).</p>
Conclusion of the Protocol	<p>The Protocol process will be concluded at the completion of the pre-action meeting or, if no meeting takes place, 14 days after the expiry of the period in which the meeting should otherwise have taken place (clause 10.2).</p>	<p>New to the amended Protocol.</p>