

Guide to the Pre-Action Protocol

For Construction and Engineering Disputes 2nd Edition (the Protocol)

July 2017

Key Points:

- Came into force 14 November 2016.
 - Parties can agree not to use the Protocol (see paragraph 2).
 - The objectives of the Protocol are:
 - 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;
 - to make appropriate attempts to resolve the matter without starting proceedings and, in particular, to consider the use of an appropriate form of ADR in order to do so.
- So the parties do not need to provide "full" information – they simply need to provide "sufficient" information (see paragraph 3).
- The Courts will only impose costs consequences for non-compliance only in exceptional circumstances such as flagrant or very significant disregard of the Protocol (see paragraph 4).
 - Extensions of time to deadlines may be agreed save that no extension in respect of any step shall exceed 28 days in the aggregate (see paragraph 10.1).
 - New Protocol Referee Procedure introduced to assist the parties in participating in and complying with the Protocol. Click here for details: [Pre-Action Protocol Referee Procedure](#).

The Letter of Claim checklist

- In many cases, including those of modest value, the letter of claim can be simple (see paragraph 5)
- Shall contain the following information (see paragraph 7):
 - the Claimant's full name and address;
 - the full name and address of each proposed Defendant;
 - a brief summary of the claim or claims including (a) a list of principal contractual or statutory provisions relied on (b) a summary of the relief claimed including, where applicable, the monetary value of any claim or claims with a proportionate level of breakdown. The extent of the brief summary should be proportionate to the claim. 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;
 - the names of any experts already instructed by the Claimant on whose evidence he intends to rely identifying the issues to which that evidence will be directed; and
 - the Claimant's confirmation as to whether or not it wishes the Protocol Referee Procedure to apply as provided at paragraph 11 below.

The Defendant's acknowledgment checklist

- Within 14 calendar days of receipt of the letter of claim;
- needs to be in writing;
- may give the name and address of his insurer (if any); and
- shall confirm whether or not Defendant wishes the Protocol Referee Procedure.

Note: If there has been no acknowledgment within 14 days, the Claimant will be entitled to commence proceedings without further compliance.

If the Defendant's wishes to object to contest jurisdiction checklist

- Only applies if Defendant intends to object to all or any part of the Claim on the basis that:
 - Court lacks jurisdiction;
 - matter should be referred to arbitration;
 - wrong Defendant named in Letter of Claim.
- Within 28 days after receipt of Letter of Claim;
- Letter of objection should:
 - specify the parts of the Claim to which the objection relates;
 - set out the grounds relied upon;
 - (if appropriate and if known) identify the correct Defendant.

Note: Any failure to take such objection does not waive the Defendant's rights to object in subsequent proceedings but there may be cost consequences.

The Defendant's Letter of Response checklist

- Within 28 calendar days of receipt of the letter of claim;
- Needs to contain:
 - brief and proportionate summary;
 - brief summary of counterclaim if counterclaim is to be advanced;
 - name of any experts already instructed identifying the issues to which that evidence will be directed; and
 - names of any third parties the Defendant intends to/is considering submitting to a Protocol Process.

Note: If there has been no Letter of Response within 28 days, the Claimant will be entitled to commence proceedings without further compliance.

The Claimant Response to Counterclaim (if any)

- within 14 calendar days of receipt of the letter of response;
- needs to contain brief and proportionate summary of Claimant's Response.

Pre Action Meeting

Aim of the meeting: for the parties to agree what are the main issues in the case, to identify the root cause of disagreement, and to consider (i) whether, and if so how, the case might be resolved without recourse to litigation, and (ii) if litigation is unavoidable, what steps should be taken to ensure that it is conducted in accordance with the overriding objective.

- Can be a mediation;
- within 21 days of Letter of Response or after receipt of response to Counterclaim;
- the Court will normally expect that those attending will include:
 - where the party is an individual, that individual, and where the party is a corporate body, a representative of that body who has authority to settle or recommend settlement of the dispute;
 - a legal representative of each party (if one has been instructed);
 - where the involvement of insurers has been disclosed, a representative of the insurer (who may be its legal representative); and
 - where a claim is made or defended on behalf of some other party (such as, for example, a claim made by a main contractor pursuant to a contractual obligation to pass on subcontractor claims), the party on whose behalf the claim is made or defended and/or his legal representatives.
- If the parties are unable to agree on a means of resolving the dispute other than by litigation they should seek to agree:
 - if there is any area where expert evidence is likely to be required, how expert evidence is to be dealt with including whether a joint expert might be appointed, and if so, who that should be; and (so far as is practicable);
 - the extent of disclosure of documents with a view to saving costs and to the use of the e-disclosure protocol; and
 - the conduct of the litigation with the aim of minimising cost and delay.
- Everything said at the meeting will be without prejudice other than any party who attended any pre-action meeting shall be at liberty and may be required to disclose to the Court:
 - that the meeting took place, when and who attended;
 - the identity of any party who refused to attend, and the grounds for such refusal;

- if the meeting did not take place, why not;
- any agreements concluded between the parties; and
- the fact of whether alternative means of resolving the dispute were considered or agreed.

Click here for copy of the Protocol [Pre-Action Protocol for Construction and Engineering Disputes - Civil Procedure Rules](#)

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