

JCLI Practice Note No 8

JCLI Practice Note No 8 May 2008

Notes This JCLI Practice Note No 8 supersedes No 1 issued April 1978, No 2 issued April 1982, No 3 issued April 1985 (and all subsequent revisions), No 5 issued June 1996 (and all subsequent revisions) and No 6 issued April 2007.

This document should be read in conjunction with the JCLI Landscape Works Contract 2008 Edition, including its footnotes and Guidance Notes; or the JCLI Landscape Works Contract with Contractor's Design 2008 Edition.

Care has been taken in preparing this Practice Note but it should not be treated as a definitive legal interpretation or commentary. Users are reminded that the effect in law of the provisions of the JCLI Landscape Works Contract 2008 Edition and the LCLI Landscape Works Contract with Contractor's Design 2008 Edition is, in the event of a dispute as to that effect, a matter for decision in adjudication, arbitration or litigation.

The items below are applicable to both JCLI LWC and JCLI LWCD (except item 14) although the clause/Recital numbers may be different in the two contracts (as noted in the item headings).

Model Certificates and Other Forms for use with JCLI LWC and LWCD are available free from www.landscapeinstitute.org. Additionally, documents highlighting the differences between JCLI LWC 2008 and JCT MW 2007, the differences between JCLI LWCD 2008 and JCLI LWC 2008, and the differences between JCLI LWC 2008 and JCLI LW 2002 are available free from www.landscapeinstitute.org

Superseded

1 Which Contract

The JCLI Landscape Works Contract (JCLI LWC) and JCLI Landscape Works Contract with Contractor's Design (JCLI LWCD) are specifically for landscape projects which include soft landscape works. However, they are not appropriate for use on projects requiring named sub-contractors, planned phased completion, as well as not being appropriate for projects of over approximately £200,000. For projects involving elements requiring contractor's design the JCLI Landscape Works Contract with Contractor's Design (JCLI LWCD) should be used rather than JCLI LWC. However, JCLI LWCD is not appropriate for design and build projects. For other circumstances other standard forms of contract should be used; eg. JCT, ICE or NEC contracts. In the case of JCT contracts the JCT Practice Note: "Deciding on the appropriate JCT Contract" advises on which JCT contracts are appropriate in different circumstances (and is available as a free download from www.jctcontracts.com).

The JCLI Landscape Maintenance Works Contract (JCLI LMWC) is appropriate for landscape maintenance during the establishment period following a landscape construction contract as well as being appropriate for all other types of landscape maintenance projects. See JCLI Practice Note No 9.

2 Work Schedules/Bills of Quantities (Second Recital in JCLI LWC – Third Recital in JCLI LWCD)

Work Schedules should adequately quantify the work and either a standard method of measurement (eg. SMM7) used and stated in the document, or if a standard method is not used the rules used in carrying out the measurement should be stated.

3 CDM Regulations (Fifth Recital in JCLI LWC – Sixth Recital in JCLI LWCD)

The following advice is based on the CDM Regulations 2007 (CDM 2007), the associated Approved Code of Practice (ACoP) "Managing Health and Safety in Construction" published by the Health and Safety Commission and written advice from the Health and Safety Executive (HSE). Note that this advice varies from previous advice.

The CDM Regulations 2007 apply to "construction work" as defined in the Regulations and the ACoP. Paragraph 13 of the ACoP states that tree planting and general horticultural work are not "construction work".

The HSE have advised that "construction work" as defined in the CDM Regulations 2007 includes earthworks, all hard landscape works, installation of pipes and pipelines, demolition, dismantling, and preparation for such works (including site clearance and excavation). Demolition, dismantling and site clearance of "construction work" are "construction work" even when undertaken in preparation for tree planting and general horticultural work.

The HSE have advised that tree planting and general horticultural work includes topsoiling, grading, amelioration, planting, grassing, agricultural fencing, tree work, soft landscape maintenance and associated preparation (including excavation and site clearance but excluding site clearance of "construction work"). These works are therefore not "construction work" and the CDM Regulations 2007 do not apply to them, even if they are part of a larger project which includes "construction work". The HSE have advised that where such works are carried out as part of a larger project including "construction work" the tree planting and general horticultural work can be addressed separately.

However, even if the CDM Regulations do not apply the Health and Safety at Work Act (HSW Act) and other Health and Safety Regulations (eg. the Management of Health and Safety at Work Regulations) apply.

In the JCLI Contracts, the extent to which the CDM Regulations 2007 apply to the project is to be stated in the Contract Particulars. The JCT Minor Building Works Contract 2007 includes two options but JCLI LWC 2007 (and LWCD) includes three:

- (a) The CDM Regulations do not apply, is for projects where none of the work is "construction work" as defined in the CDM Regulations 2007.

See the guidance above concerning the definition of "construction work".

The wording in the Contract Particulars, Articles 4 and 5, clauses 3.9 and 3.10 (and 2.1.4 in JCLI LWCD) allows for the possibility that circumstances may change (for example the addition of work to which the CDM Regulations apply). Hence Articles 4 and 5, clauses 3.9 and 3.10 should not be deleted.

(b) The CDM Regulations apply and the project is not notifiable, is for projects which include "construction work" as defined in the CDM Regulations 2007, but which are not notifiable to HSE. Projects are notifiable if the construction phase is likely to involve more than 30 days or 500 person days of "construction work". Projects which include "construction work" of any size for a domestic client (see below) are not notifiable.

Although "client" is defined in the Regulations, "domestic client" is not defined, but the ACoP Paragraph 29 states that they "are people who have work done on their own home or the home of a family member, that does not relate to a trade or business, whether for profit or not." Domestic clients are a special case and do not have duties under the CDM Regulations 2007. However the designer and contractor duties in Part 2 (General Management Duties applying to Construction Projects) and Part 4 (Duties Relating to Health and Safety on Construction Sites) of the CDM Regulations 2007 still apply to projects for domestic clients which involving "construction work".

Items of work in the project which are not "construction work" should not be counted in the assessment of whether the project is notifiable (ie. not included in the 30 days or 500 person days).

See the guidance above concerning the definition of "construction work".

Although JCT MW advises that Articles 4 and 5 should be deleted if the project is not notifiable, JCLI LWC includes wording to avoid deletion in case circumstances change so that they apply (eg, an instruction for additional work extends the duration of the "construction work" considerably over 30 working days).

Part 3 (Additional Duties where Project is Notifiable) of the CDM Regulations 2007 does not apply and hence a CDM Co-ordinator, Principal Contractor, Construction Phase Plan and a Health and Safety File are not required for non-notifiable projects.

(c) The CDM Regulations apply and the project is notifiable, is for projects which include "construction work" and the construction phase is likely to exceed 30 days or 500 person days of "construction work", but this option is not applicable to a project for a domestic client (see b above).

Items of work in the project which are not "construction work" should not be counted in the assessment of whether the project is notifiable (ie. not included in the 30 days or 500 person days).

See the guidance above concerning the definition of "construction work".

All of the CDM Regulations 2007 apply and a CDM Co-ordinator, Principal Contractor, Construction Phase Plan and a Health and Safety File are all required for notifiable projects.

Additionally, in some circumstances when another contractor (or contractors) who is carrying out "construction work" as defined in the Regulations is using the same (or adjoining) areas as the landscape contractor (or the same access), the landscape contractor may come under the control for the purposes of health and safety of a Principal Contractor appointed for the "construction work". In this case the landscape contractor must comply with the CDM Regulations. Wherever possible the landscape contractor should be advised in the tender documents of any particular situation where this may occur. Additionally, the "designers" responsible for preparing the tender documents for the "construction work" should minimise the conflicts with other contractors (eg. landscape and/or maintenance contractors) by the segregation of sites, accesses, etc. Also in similar project circumstances the "designer" for the landscape contract may have to comply with the CDM Regulations and the requirements of a CDM Co-ordinator appointed for a different project.

4 Correction of inconsistencies (clause 2.4 in JCLI LWC – clause 2.5 in JCLI LWCD)

This does not provide that every correction is to be treated as a variation.

Where there are priced Work Schedules any correction which results in a revision to the quantities and/or rates in the Work Schedules will result in a variation.

Where there are no priced Work Schedules it may be necessary for the Landscape Architect/Contract Administrator to determine which of two inconsistent documents is the ruling document or which of two inconsistent statements prevails and such determination shall be treated as a variation under clause 3.6 if the ruling document/statement is changed.

5 Liquidated Damages (clause 2.8 in JCLI LWC – clause 2.9 in JCLI LWCD)

Liquidated damages should be calculated prior to tender and the tenderers advised of the amount. The calculation should be the sum of three figures, an amount for the cost of administering the contract during the period of delay (ie. professional fees), an amount for notional interest lost, and any expected loss flowing from late completion.

It is not possible to estimate accurately the loss of interest an Employer will suffer when a contract is delayed, but a reasonable estimate can be made by multiplying the estimated contract value by the bank Base Rate plus 2% and dividing by 52 to give a weekly rate.

eg. Estimated Contract Value	£75,000
Base Rate + 2%	9%
Interest =	$\frac{£75,000 \times 9\%}{52} = £129.80$

Liquidated damages in this case would be £129.80 per week plus a pre-estimate of the weekly cost of professional fees, plus any expected loss per week.

6 Defects and Establishment of Plants (clauses 2.10A/2.10B in JCLI LWC – clauses 2.11A/2.11B in JCLI LWCD)

It is essential for a successful soft landscape scheme to have an establishment period during which maintenance of the soft landscape is carried out by the same landscape contractor as installed the soft landscape works. This ensures that plants (including grass) which fail to thrive for whatever reason (other than theft and malicious damage, vehicular damage) are replaced at no cost (for the contract duration) provided such a requirement is included in the maintenance specification. Using the same contractor for installation and establishment maintenance gives the contractor significant incentive to undertake the installation to a high standard, particularly if the maintenance contract lasts for 5 years.

If the establishment maintenance is not undertaken by the same landscape contractor as installed the soft landscape then there can be no Rectification Period for the plants (including grass) and no replacement of plants/grass which fail to thrive post practical completion by the contractor that installed the soft landscape.

The JCLI LWC includes two options as clauses 2.10A and 2.10B

(a) Clause 2.10A should apply and clause 2.10B be deleted where the same Contractor is to do the installation and the establishment maintenance. The establishment maintenance work is carried out under a separate maintenance contract and the JCLI Landscape Maintenance Works Contract (JCLI LMWC) has been developed for this purpose (as well as for any other landscape maintenance works). The Contractor is then responsible for replacing all plants proving defective due to materials and workmanship not in accordance with the Contract Documents during the Rectification Period under the installation contract. Additionally the establishment Maintenance Contract specification should include the requirement to replace all plants which fail to thrive for whatever reason (other than theft, malicious and vehicular damage) for the duration of the maintenance contract. In this situation there is no need for the Rectification Period to be longer than 12 months. The establishment maintenance contract commences at practical completion of the installation contract.

The duration of the establishment maintenance contract should not be less than the Rectification Period on the installation contract. Ideally where trees are included in the scheme the establishment maintenance contract should last 5 years. However, the recommended minimums are:

For soft landscape schemes not including trees	1 year
For those including trees	2 years

See JCLI LMWC and JCLI Practice Note No 9

(b) Clause 2.10B should apply and clause 2.10A be deleted where the same contractor is not to be used for establishment maintenance post practical completion. The Employer is then responsible for the establishment maintenance and replacement of any plants which fail to thrive following practical completion. The Contractor is relieved of all further obligations to replace defective plants other than those identified as incomplete work on the Certificate of Practical Completion. See item 23 of the Guidance Notes in JCLI LWC and the Model Certificate of Practical Completion (www.landscapeinstitute.org). This option is not recommended because of the lack of a plant guarantee and due to the difficulty in assessing plant failures at practical completion particularly when practical completion follows just after planting in the dormant season.

7 Malicious Damage (clause 2.13 in JCLI LWC – clause 2.14 in JCLI LWCD)

The normal contractual situation is that the Contractor is entirely responsible for work arising from any theft or malicious damage prior to practical completion.

Clause 2.13 enables a provisional sum to be included in the contract for expenditure on instruction by the Landscape Architect/Contract Administrator to reinstate work, replace plants etc resulting from theft or malicious damage beyond the control of the Contractor prior to practical completion. This clause should only be used in circumstances where the Contractor will be unable to secure the site and significant damage/losses are anticipated; for example, for a project to reinstate planting on a fully occupied and operational retail park in an area of high vandalism/theft. This clause only applies if a provisional sum is stated in the Contract Particulars. If this clause is used the Contractor should be required by the specification to report losses from malicious damage or theft as they occur, for verification by the Landscape Architect/Contract Administrator. The Landscape Architect/Contract Administrator may issue the necessary instructions for their replacement.

8 Retention (clauses 4.3 and 4.5)

It may be appropriate to increase the percentage retention in the Contract Particulars for clause 4.3 for projects involving a high proportion of planting or individual plants of high value where the amount retained could be less than the value of 'normal' losses.

If the Contractor will be undertaking the establishment maintenance the retention in the Contract Particulars for clause 4.5 should be increased if the retention in clause 4.3 is increased. The retention for clause 4.5 should not be greater than the retention for clause 4.3.

9 Temporary Protection

Temporary protective measures prior to practical completion are the responsibility of the Contractor but any requirements and details should be specified in the specification; for example, the risk and requirements for segregation of the public from the site for health and safety reasons should be specified.

If protective fencing is required and is to be retained after practical completion, it must be clearly stated and quantified at tender stage. It will be part of the Works and owned by the Employer and not 'temporary works' (owned by the Contractor).

10 Watering

Watering prior to practical completion is the responsibility of the Contractor. The Specification (preliminaries) should include details of watering points, irrigation system, who pays for water including during periods when restrictions on watering apply and any other relevant information. Watering and liability for losses due to lack of water after practical completion do not form part of this contract but will form part of any subsequent establishment maintenance contract.

11 Frost Damage

Severe winter weather conditions can cause considerable damage to plant material. The Contractor is entirely responsible for the replacement of plants which fail before practical completion due to weather conditions. Protection from frost and liability for losses due to frost after practical completion do not form part of this contract but will form part of any subsequent maintenance contract.

12 Plants/Specification

Several initiatives to improve performance, quality and standardisation within the Landscape Industry were implemented in 1997/8. The JCLI recommends that plants should be specified and supplied in accordance with the National Plant Specification (available at www.gohelios.com). Specifiers should include the wording 'plants are to be supplied in accordance with the National Plant Specification' on plant lists, work schedules, specifications and drawings (particularly in each location where plants are listed with total numbers).

NBS Landscape has also been developed (in conjunction with the LI Technical Committee) to improve standardisation of specification for landscape works and it supports the JCLI Landscape Works Contract, the JCLI Landscape Works Contract with Contractor's Design and the JCLI Landscape Maintenance Works Contract. JCLI would like to see NBS used widely for specifications in the Landscape Industry and particularly when the JCLI Contracts are used (www.thenbs.com).

13 Amendments

Amendments to the JCLI Landscape Works Contract and JCLI Landscape Works Contract with Contractor's Design are occasionally issued by JCLI. The latest revision of the appropriate Contract should always be used with the latest Amendments current at the time of tender. Amendments are available free from the Landscape Institute web-site, www.landscapeinstitute.org

Amendments should be incorporated into the Agreement by adding an Article and attaching the Amendment. (For an example see JCLI Practice Note No 9)

14 Contractor's Design

Where elements of the Works are to be designed by the Contractor the JCLI Landscape Works Contract with Contractor's Design (JCLI LWCD) should be used. However it is not appropriate as a Design and Build Contract. The main differences between JCLI LWCD and LWC are:

Addition of the Second Recital listing the Works to be designed and constructed (and renumbering subsequent Recitals);

Expansion of clause 2.1 to cover the Contractor's obligations in relation to the Contractor's Design Portion (CDP Works);

Addition of clause 2.2 incorporating 2.1.2 and 2.1.3 from JCLI LWC and adding a sentence covering quality of materials and standards of workmanship for CDP Works (and renumbering subsequent clauses);

Necessary modifications throughout to include CDP Works.

All of the differences are highlighted in the document titled "Differences between JCLI LWCD 2008 and JCLI LWC 2008" available free from www.landscapeinstitute.org

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