



JCLI PRACTICE NOTE No. 8

Revision 1: June 2012

**Practice Notes for the 2012 Editions of
JCLI Landscape Works Contract (JCLI LWC)
and
JCLI Landscape Works Contract with Contractor's Design
(JCLI LWCD)**

Notes:

This JCLI Practice Note No 8 Revision 1 supersedes JCLI Practice Notes 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), No 6 issued April 2007 and No 8, May 2008.

This document should be read in conjunction with the JCLI Landscape Works Contract 2012 Edition, including its footnotes and Guidance Notes; or the JCLI Landscape Works Contract with Contractor's Design 2012 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 2012 Edition and the LCLI Landscape Works Contract with Contractor's Design 2012 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 16) 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 2012 and LWCD 2012, with guidance, are available free from www.landscapeinstitute.org. Additionally, any Amendments and/or Corrections documents for JCLI LWC and LWCD 2012 (see item 15 below); documents indicating the differences between JCLI LWC 2012 and JCT MW 2011, the differences between JCLI LWCD 2012 and JCLI LWC 2012, and the differences between JCLI LWC 2012 and JCLI LWC 2008 are available free from www.landscapeinstitute.org

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 or nominated sub-contractors, planned phased commencement and/or completion, as well as not being appropriate for projects of over approximately £200,000. For projects requiring elements to be designed by the Contractor 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, ICC 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 2012 (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 Revision 1: June 2012.

The JCLI Homeowner Landscape Contracts and Consultancy Agreement 2011 have been developed for 'domestic' garden projects and are available, with the associated free JCLI Practice Note No 10 and Model Forms documents, from www.sgd.org.uk. They are based on the JCT Homeowner Contracts and Consultancy Agreement.

2. Work Schedules (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).

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 LWC and LWCD, 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 2011 includes two options but JCLI LWC 2012 (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 involve “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. However, Parts 2 and 4 of the Regulations apply giving duties to clients, designers, contractors and all workers.

- 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 (e.g. 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. **Principal Contractor (Article 5, clauses 3.9 and 3.10)**

The Site Waste Management Plan Regulations 2008 (SWMP Regulations) also include a Principal Contractor appointed by the Employer for all projects with an estimated cost of over £300,000 (excluding VAT). Since the JCLI LWC and LWCD contracts are intended for smaller projects the SWMP Regulations are not mentioned in the contracts. See also Guidance Note 9 at the back of JCLI LWC and 10 in LWCD. However, the procedures in the SWMP Regulations are good practice and apply to the design stages as well as the construction stage. Many clients and/or specifiers may require the application of the principles in the SWMP Regulations to smaller projects by including the requirements in the specification. [Note that the Government has announced (March 2012) that they intend to scrap the SWMP Regulations].

5. **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.

6. **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 (i.e. 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 current at the time of the calculation plus 2% and dividing by 52 to give a weekly rate.

e.g. Estimated Contract Value	£75,000
Base Rate + 2%	2.5%
Interest = $\frac{£75,000 \times 2.5\%}{52}$	= £36.06

Liquidated damages in this case would be £36.06 per week plus a pre-estimate of the weekly cost of professional fees, plus any expected loss per week.

7. 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 maintenance contract duration) provided such a requirement is included in the maintenance contract 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 (clauses 2.11A and 2.11B in JCLI LWCD)

- 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 Guidance Note 26 in JCLI LWC (28 in LWCD) and the model Certificate of Practical Completion in the JCLI Model Certificates and Other Forms for use with JCLI LWC 2012 and LWCD 2012 document. 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.

8. 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.

9. Payment: Section 4

The Construction part of the Local Democracy, Economic Development and Construction Act 2009 (which came into force on 1 October 2011) amends the Construction part of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). The revisions have resulted in significant changes to Section 4 of the 2012 editions of the JCLI LWC and JCLI LWCD contracts.

The Eighth Recital has been added to the JCLI LWC and LWCD 2012 to name the Landscape Architect/Contract Administrator as the 'specified person' referred to in the amended HGCRA. The Act allows the client (Employer) to name a 'specified person' to issue payment notices (certificates) and payless notices.

The periods of days stated in JCLI LWC and LWCD and below include weekends (but exclude public holidays).

The main revisions in Section 4 due to the amended HGCRA are that:

- Payment certificates have to be issued within 5 days of the payment due date (rather than on the payment due date) and a late certificate is invalid (unless agreed otherwise by the Parties). A certificate has to be issued even if the amount due is £0.
- If a payment certificate is not issued on time the Contractor can issue a payment notice (at any time after the 5 day period stated above). The final date for payment is extended by the number of days between the end of the 5 day period above and the date of the Contractor's notice. Hence, since the final date for payment in JCLI Contracts is 14 days after the due date, the final date for payment is extended to 9 days after the date of the Contractor's notice. The amount notified as due on the Contractor's notice has to be paid by the Employer (subject to a payless notice if issued).
- The Landscape Architect/Contract Administrator can issue a payless notice not less than 5 days before the final date for payment, against either a payment certificate or a Contractor's notice. The payless notice states the amount due at the date of the notice and has to be paid by the Employer by the final date for payment, instead of the amount on the certificate or Contractor's notice. The Contractor can issue a payless notice if the final certificate is negative. (Payless notices replace the previous withholding notices).

Guidance on the issue of payment certificates and payless notices, as well as model forms for both, is given in the Model Certificates and Other Forms document for the JCLI LWC and LWCD 2012 which is available free at www.landscapeinstitute.org.

That guidance should be strictly followed by Landscape Architects/Contract Administrators in order to avoid problems. The guidance is essentially to:

- Issue all payment certificates on time.
- Ensure that all payment certificates and notices state the basis of the calculation of the amount due.
- If the Employer wishes to deduct anything from amounts certified, in order to avoid a revaluation to include the value of work done between the due date and the date of the payless notice, issue the payment certificate and the associated payless notice together on the payment due date (not within 5 and 9 days respectively of the payment due date). The payless notice must not be issued before the certificate.
- Deductions on a payless notice issued against a payment certificate should only involve deductions the Employer wishes to make which are not appropriate for deduction on certificates (eg liquidated damages and contra-charges). Only include such deductions on a payless notice

after receiving written authorisation from the Employer for each individual deduction with the reason for each individual deduction.

- If a payment certificate is not issued on time do not issue it late unless the Contractor has not issued a payment notice and the Contractor and Employer both agree to the late issue of the certificate (otherwise it will be invalid).
- If the Contractor issues a payment notice due to a payment certificate not being issued on time, which is for more than the Contractor would be due at the date of the payless notice, then issue a payless notice against the Contractor's notice at least 5 days before the final date for payment, ie for JCLI Contracts within 4 days of the Contractor's notice; see the Model Certificates and Forms document (which include payless notices) with the associated guidance. On a payless notice against a Contractor's notice, do not include any deductions the Employer might wish to make against the payment which are not appropriate for deduction on certificates (eg liquidated damages). If such deductions are made then the wording of clauses 4.3 and 4.4 means that the deducted amounts will be paid to the Contractor on the next payment certificate.

Note that if the Contractor has issued one or more payment notices (which may or may not have been reduced by associated payless notices) then the calculation for subsequent certificates will be more complicated; see clauses 4.3 and 4.4 in JCLI LWC and LWCD.

10. Retention (clauses 4.3 and 4.4)

It may be appropriate to increase the percentage retention (ie decrease the percentage stated) 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 4.4 should be increased if the retention in clause 4.3 is increased. The retention for clause 4.4 should not be greater than the retention for clause 4.3.

11. 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).

12. 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.

13. 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.

14. 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 LWC, LWCD and LMWC are used (www.thenbs.com).

15. 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

Minor amendments can be incorporated by marking up the contract pre-signature but more significant amendments should be incorporated into the Agreement by adding an Article and attaching the Amendment. (For an example see JCLI Practice Note No 9 item 16)

16. 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 differences are included in the document titled "Differences between JCLI LWCD 2012 and JCLI LWC 2012" available free from www.landscapeinstitute.org

Revisions in JCLI Practice Note No 8 Revision 1: June 2012

- 1 Updates throughout, but particularly in the introduction, to update from the 2008 editions to the 2012 editions/revisions of JCLI documents and JCT MW 2007 to 2011. Updates to cross references to other documents.
- 2 Item 1: JCLI Homeowner documents added
- 3 Item 4 added and item 9 added with consequential revisions to item numbers and cross references.
- 4 Item 6: Base Rate reduced from 7% to 0.5%
- 5 Item 16 reduced to remove detail repeated in greater detail in a 'Differences' document.
- 6 Minor clarification additions or omissions, eg. previous last sentence of first paragraph of item 3 deleted, phrase in brackets in first paragraph of item 10 added, phrase in brackets in the last paragraph (b) of item 7 added.

This Practice Note is issued by the **JCLI Contracts Forum** comprising:

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