



**JCLI PRACTICE NOTE No. 9**

**Revision 1: June 2012**

**Practice Notes for the 2012 Edition of  
JCLI Landscape Maintenance Works Contract (JCLI LMWC)**

**Notes:**

This JCLI Practice Note No 9 Revision 1 supersedes No 7 issued December 1998 (and all subsequent revisions) and No 9, August 2008.

This document should be read in conjunction with the JCLI Landscape Maintenance Works Contract 2012 Edition, including its footnotes and Guidance Notes.

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 Maintenance Works Contract 2012 Edition is, in the event of a dispute as to that effect, a matter for decision in adjudication, arbitration or litigation.

Model Certificates and Other Forms for use with JCLI LMWC 2012, with guidance, are available free from [www.landscapeinstitute.org](http://www.landscapeinstitute.org). Additionally, the two novation agreements in Schedules 3 and 4 are available as separate free documents (see item 8 below); and any Amendments and/or Corrections documents for JCLI LMWC (see item 27 below); documents indicating the differences between JCLI LMWC 2012 and JCLI LWC 2012, and the differences between JCLI LMWC 2012 and JCLI LMWC 2008 are available free from [www.landscapeinstitute.org](http://www.landscapeinstitute.org)

**1. JCLI Landscape Maintenance Works Contract**

The JCLI Landscape Maintenance Works Contract (JCLI LMWC) is appropriate for all types of landscape maintenance projects of any value.

It incorporates considerable flexibility to accommodate varying circumstances. One particular circumstance is that it can be used for the establishment maintenance of a project during the rectification period after practical completion of a landscape construction contract undertaken under the JCLI Landscape Works Contract, the JCLI Landscape Works Contract with Contractor's Design, JCT, ICC, or other standard forms of construction contract.

The JCLI Landscape Works Contract (JCLI LWC) and JCLI Landscape Works Contract with Contractor's Design (JCLI LWCD) specifically omit the maintenance of plants after practical completion. If a rectification period is required for the plants (clause 2.10A in JCLI LWC and clause 2.11A in JCLI LWCD) a separate contract between the Contractor and Employer is required to cover the care of plants during the rectification period after practical completion. The JCLI Landscape Maintenance Works Contract (JCLI LMWC) is recommended for this situation.

Where the JCLI LMWC is to be used in conjunction with a landscape construction contract:

- the maintenance contract should last for at least the rectification period in the construction contract;
- if partial possession is implemented it will cause phased commencement of the maintenance contract, but the end of the maintenance should be the same for all parts. Such phased commencement will constitute a variation which may or may not have cost implications depending on the circumstances;
- the construction and maintenance tender documents and contracts should be separate but tendered together, accepted together and signed at the same time;
- the same contractor must be used for both contracts in order to maintain the plant guarantee.

The JCLI LMWC makes no provision for implementing landscape construction works as part of the maintenance contract, for example there is no provision for commencement and completion date for the construction work, extension of time, liquidated damages for late completion, a rectification period or retention. If significant landscape construction work is required it should be implemented as a separate contract using the JCLI LWC, or similar construction works contract.

## **2. Contract Documents (Second Recital)**

The list of documents which comprise the Contract Documents includes options for a List of Items of Maintenance Work and a Schedule of Liquidated Damages as well as Drawings, Specification, Work Schedules and Schedule of Rates.

Work Schedules means a list of items giving quantities, as necessary, and descriptions of work required, prepared in accordance with an appropriate method of measurement (defined in the tender documents) which will be priced by tenderers and subsequently form part of the contract. Detailed information on materials and workmanship should be contained in the specification.

The List of Items of Maintenance Work may be appropriate as a less detailed (and unpriced) alternative to Work Schedules.

The Schedule of Liquidated Damages should list liquidated damages for various types of work (see item 13 below).

### **3. CDM Regulations (Fourth Recital)**

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, preparation for such works (including site clearance and excavation) and the maintenance of such works. 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 JCLI LMWC the extent to which the CDM Regulations 2007 apply to the project is to be stated in the Contract Particulars. The Contract includes the same 3 options as the JCLI LWC:

- 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. This option will only apply to projects which only include the maintenance of soft landscape works (ie do not include the maintenance of any "construction work").

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 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".

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

The interpretation of the extent to which the Regulations apply to maintenance contracts which include the maintenance of hard landscape, drainage or buildings depends on whether the maintenance contract is considered as a project or whether different elements of work are considered as 'projects'. The current interpretation is that the Regulations do not apply to the contract as a whole but that items of "construction work" or maintenance of "construction work" included in a landscape maintenance contract (e.g. a small new footpath, resurfacing footpaths, painting the tractor shed, clearing out drainage system) should be considered as 'projects' in themselves for the purposes of the Regulations. These elements will normally not exceed the criteria for notification (ie 30 days or 500 person days of "construction work"), but if they do exceed these criteria they should be notified. A construction project should not be split up and absorbed into a maintenance contract in order to avoid the Regulations because the Regulations will apply; Also the Conditions of Contract for the JCLI Landscape Maintenance Contract do not include adequate provisions for construction work (for example: no start or completion dates, liquidated damages, insurance of the works, rectification period or retention).

The wording in Articles 4 and 5 and clauses 3.9 and 3.10 allows for the possibility that circumstances might change so that if part of the work is notifiable (eg, due to an instruction for additional work) the relevant provisions in the Contract will be available to use. Hence Articles 4 and 5 and clause 3.10 should not be deleted. Clause 3.9 applies to this option.

Part 3 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 maintenance contracts which include one or more items of "construction work" one or more of which 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).

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

All the CDM Regulations apply to any notifiable item of "construction work" 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 maintenance contractor (or the same access), the maintenance 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 maintenance contractor must comply with the CDM Regulations. Wherever possible the maintenance 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. maintenance contractors) by the segregation of sites, accesses, etc. Also in similar project circumstances the "designer" for the maintenance contract may have to comply with the CDM Regulations and the requirements of a CDM Co-ordinator appointed for a different project.

#### **4. Contract Sum (Article 2)**

Article 2 includes two options for the contract sum: either A, a sum divided as required (e.g. £x/year divided into equal instalments), or B, a sum calculated from the Work Schedules or Schedule of Rates.

Option A has flexibility to vary the instalments relative to seasons as appropriate for the project by completing the space provided, or to vary the annual sums where the amount of work varies from year to year (typically during establishment). For example: Year 1 £x; Year 2 £y; Year 3 £z ...each divided into equal instalments. The frequency of instalments is stated in the Contract Particulars against Clause 4.2.

Where the contract sum is a lump sum divided as required (i.e. option A) the tender documents must clearly state whether any provisional sums/items (and provisions for inflation, bonus and contingencies) are to be included in the lump sums or not. Inflation adjustment, bonus and contingency would not normally be included in the sums. Therefore, if the provisional sums are not included in the lump sums, the annual budget for the work will generally not be simply the

contract annual sum but will need to be the contract annual sum plus allowances for bonus, inflation adjustment, provisional sums/items and contingency as appropriate.

For option A the tender documents must advise on how the sums will be divided for payment and the frequency stated in the Contract Particulars against clause 4.2.1, as well as require the tenderers to submit tender sums in the format required to complete Article 2.

## **5. Principal Contractor (Article 5, clauses 3.9 and 3.10)**

The Site Waste Management Plan Regulations 2008 (SWMP Regulations) which apply to construction projects also include a Principal Contractor appointed by the Employer for all projects with an estimated cost of over £300,000 (excluding VAT). Current advice is that the SWMP Regulations do not apply to landscape maintenance contracts. However, the procedures in the SWMP Regulations are good practice and apply to the design/specification stages as well as the implementation stage. Effective waste management for landscape maintenance can both save money and benefit the landscape and biodiversity. Many clients and/or specifiers may require the application of the principles in the SWMP Regulations to landscape maintenance contracts by including the requirements in the specification. Note that the Government has announced (March 2012) that they intend to scrap the SWMP Regulations.

## **6. Commencement and duration (clause 2.2)**

Maintenance contracts are normally let for between 3 and 5 years. However, when the contract is let in conjunction with a construction contract, commencement should be the date of practical completion of the construction contract and the maintenance contract should continue at least until the end of the rectification period in the construction contract.

The Contract Particulars should be completed with the commencement date (either the actual date if known or 'the date of practical completion of the landscape works contract') and the end date or the duration.

## **7. Correction of inconsistencies (clause 2.4)**

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.

## **8. Novation (clause 3.1)**

It is more essential in maintenance contracts than in construction contracts for the Employer to be able to hand over the contract to a third party, for example for situations when a developer hands over to a tenant or landowner or when tenants change. This concept of passing over all of the benefits of the contract (eg the right to have the Contractor carry out the landscape maintenance works) as well as all of the Employers obligations (eg the obligation to continue to pay the Contractor for the landscape maintenance works) to another party is novation (not assignment as only the benefit of a contract can be assigned and not the obligations).

In order for novation to be effective the 3 parties (ie the 2 existing parties to the contract and the party taking the novation) should enter into a novation agreement. Agreements for Novation by Employer and Novation by Contractor are included as Schedule 3 and Schedule 4 respectively in the JCLI LMWC 2012. By signing the Contract with Schedule 3 and Schedule 4 attached the Contractor and Employer agree to the terms of the Novation Agreements. By signing one of the Novation Agreements each party confirms that all the benefits and obligations of the Contract have passed to the party taking the novation and the Contractor (or Substitute Contractor if it is Novation by Contractor) confirms his agreement to carry out the works for the Substitute Employer (or Employer if it is Novation by Contractor).

The Novation Agreements in Schedules 3 and 4 are available free from [www.landscapeinstitute.org](http://www.landscapeinstitute.org) as separate documents, JCLI Standard Form of Agreement for Novation by Employer and JCLI Standard Form of Agreement for Novation by Contractor. These documents include notes on completion of the Agreements.

The Novation Agreements are worded so that it is not necessary for an annual account to be prepared at the date of novation but any work carried out during the current year of maintenance but not yet certified for payment is included on the next periodic payment certificate. At the time of novation payment should have been made of all outstanding amounts certified by periodic payment certificates and annual certificates. Additionally, the parties novating and taking the novation should agree the apportionment of the cost of the maintenance works for the year in which the assignment takes place and in the case of Novation by Employer the party novating should pay the party taking the novation (or visa versa in the case of Novation by Contractor) any outstanding amount of his contribution in full and final settlement of his obligations.

In the case of Novation by Employer, clause 3.1.4 gives the party taking the novation (the Substitute Employer) the opportunity to terminate the Contract by giving 3 months notice within 14 days of novation. See also item 16 below.

## **9. Non-compliance with Instructions (clause 3.5)**

Clause 3.5 is the same as in the JCLI Landscape Works Contract except that the period for the contractor to respond to the notice requiring compliance with an instruction can be varied in the Contract Particulars if the default (5 Business

Days) is too long for the particular project. In the case of maintenance work, if the Contractor is not doing work adequately (i.e. not in accordance with the Contract Documents) and fails to respond to initial verbal requests to correct the work such work should be scheduled and the Contractor instructed to carry it out within a certain period. Continued failure to respond enables use of the procedure of notification and using another contractor in accordance with clause 3.5. This procedure can be shortened where the specification is a performance specification by instructing the Contractor at commencement to carry out the works in accordance with the Contract Documents, then any subsequent failure can result in the issue of a notice under clause 3.5 following a lack of response to verbal requests to correct the work.

## 10. 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 edition of JCT MW and the 2012 editions of JCLI LWC, LWCD and LMWC. Although the amended HGCRA applies to construction projects and not to soft landscape contracts or soft landscape maintenance contracts, the provisions in JCLI LMWC have been drafted to comply with the spirit of the amended HGCRA. (The potential issues of non-compliance arise due to the segregation of payment certificates and notices between annual account periods.)

The Seventh Recital has been added to the JCLI LMWC 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 LMWC and below include weekends (but exclude public holidays).

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

- Payment certificates (periodic or annual) 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 for JCLI LMWC 2012 document available free at [www.landscapeinstitute.org](http://www.landscapeinstitute.org).

There are significant differences in the way that JCLI LMWC 2012 deals with the issues associated with the amended HGCRAs compared to the way they are dealt with in JCLI LWC and JCLI LWCD 2012. The differences originate because valuations are undertaken differently. For example, there are 3 model payless notices rather than the 2 for JCLI LWC. See also item 11 below.

The guidance in the Model Certificates document should be strictly followed by the Landscape Architect/Contract Administrator 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 valuation 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.
- If the Employer wishes to make any deductions which are not appropriate for deduction on certificates (eg contra-charges) they can be made on a payless notice issued against a payment certificate or one issued against a Contractor's payment notice. 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 includes payless notices) with the associated guidance.

## **11. Periodic payments (clause 4.2)**

The selection of payment period (which is to be stated in the Contract Particulars) normally depend on the value of the Works. Smaller value contracts tend to have longer periods between payments. Longer periods increase tender prices, shorter periods increase the Employer's and Landscape Architect/Contract Administrator's administrative costs.

See item 10 above.

Clause 4.2.1 enables periodic payments for works properly executed at the intervals stated in the Contract Particulars. Clauses 4.2.2 and 4.2.3 ensure that payment certificates and notices for any particular period only include work undertaken during that period.

Where option A applies in Article 2 the value of any work which has not been properly executed in the payment period should be deducted (and any provisional sums/items not used during that period, if such provisional sums/items are included in the lump sums, should also be deducted) from the defined payment, as well as the other deductions listed in clause 4.2.1.2. See the guidance in the Model Certificates document.

If the Contractor has issued one or more payment notices (which may or may not have been reduced by associated payless notices) since the last Periodic Certificate then the calculation for the next Periodic Certificate in that year and the Annual Certificates will be more complicated, see clause 4.2.1 and 4.4 in JCLI LMWC 2012.

Note that valuations and certificates for periodic payments are only for work done since the last valuation (rather than being all work done to date minus previous amounts certified, which is the case for construction contracts). This also means that the restrictions on which type of deductions can be made on different types of payless notice which apply for JCLI LWC 2012 do not apply for JCLI LMWC 2012.

Also note that liquidated damages are deducted on certificates (rather than being deducted at the discretion of the Employer from the certified amount using a payless notice issued against the certificate by the Landscape Architect/Contract Administrator, which is the case for construction contracts).

## **12. Annual accounts (clause 4.4)**

See item 10 above.

This Contract has annual accounts which are final for the year concerned and an annual account at the end of the Contract Period which may not be for a full year but is final for the period concerned.

Note that the annual account includes any bonus and liquidated damages as well as inflation, variations, etc. but is only for works properly executed.

## **13. Liquidated damages (clause 4.7)**

The approach to liquidated damages allows flexibility in the items to which damages can apply and how the damages apply. For example:

- £x per hectare of grass not cut to the length specified
- £y per football pitch not prepared for a match
- £z per day late that a particular item is carried out (e.g. snow clearance).

Hence the Schedule of Liquidated Damages can be tailored to provide a whole range of damages across a wide range of items of maintenance. However, the liquidated damages procedure should only be used in respect of items where it is clear whether or not the Contractor is in breach. It is possible to clearly establish that there has been a breach if there is a deadline by which the work must be carried out, for example the date of the football match, or if work must be carried out within a particular timescale, for example snow must be cleared within 1 day of notification. This becomes more difficult if it is applied to, for example, cutting grass to the length stated in the specification as it is difficult to measure the grass and breach is not as clear, for example if the grass is measured at 1 centimetre longer than stated in the specification this would technically be a breach but it would be difficult to show that that breach had caused the Employer losses.

The amount of liquidated damages should not represent a penalty but must be a genuine pre-estimate of the loss which will be suffered by the Employer due to the Contractor's failure. If the Employer would not suffer any losses due to a particular breach liquidated damages should not be used, for example the Employer may want snow cleared within 1 day of notification of its presence but if the Employer would not suffer any losses if the snow was not cleared until 2 days after notification applying liquidated damages would be construed as a penalty. An estimation of losses can include professional fees (additional checking, telephone calls, letters, notices, etc) and should also include any other loss the Employer may incur (e.g. loss of revenue from a cancelled football game). A detailed note of the pre-estimate calculations should be filed.

## **14. Bonuses (clause 4.8)**

A bonus payment on each annual account is payable provided that the Contractor has performed well, which is measured by the number of Failure Events during the account period, i.e. the number of notices issued requiring compliance with an instruction under clause 3.5 and the number of items

resulting in deductions under clause 4.7 (liquidated damages). See also Guidance Note 20 in JCLI LMWC 2012

Note that one failure could result in both a notice under clause 3.5 and a deduction under clause 4.7 and hence would count as two Failure Events.

## **15. Inflation adjustment (clause 4.9)**

The most recently published Retail Price Index percentage change for the previous year is available from [www.ons.gov.uk](http://www.ons.gov.uk). An alternative published index appropriate for landscape maintenance works may be used by entering it in the Contract Particulars. If the alternative index fully takes account of contribution, levy and tax changes then JCLI LMWC clause 4.11 should be deleted

## **16. Termination (Section 6)**

Clause 6.4.3 enables termination by the Employer if the Contractor persistently fails to perform. The number of Failure Events and the period as appropriate for the particular project need to be completed in the Contract Particulars. This is likely to depend on the size of the project, the extent of the Schedule of Liquidated Damages, and the importance of performance for the particular project. Note that one failure could constitute two Failure Events for the purposes of this clause. (See items 9, 13 and 14 above).

Clauses 6.8.2 and 6.10.1 refer to the Contract Particulars for the suspension period so that a longer period than the standard one month can be chosen for small maintenance projects which may on occasions involve no work within a one month period.

When the maintenance contract is for maintenance following a construction contract using the same contractor, clause 6.12 enables termination if the contractor's employment under the construction contract is terminated. In order to get the benefit of clause 6.12 the Employer for the construction and maintenance contracts needs to be the same at least until practical completion of the construction contract.

Some Employers may wish to have the option to terminate the maintenance contract before the end date. Various factors should be considered before adding such a clause. For example:

- For a maintenance contract following a construction contract it is advantageous to accept a tender for a 5 year maintenance contract and terminate after 2, 3 or 4 years if desired;
- The option to terminate early may affect the viability of large maintenance contracts because of the investment necessary by the Contractor, in which case the option to terminate may only be appropriate after at least 3 years;

- The period of notice needs to reflect the size of the maintenance contract but 3 months should be a minimum;
- The option to terminate after novation is included in clause 3.1.4 (see item 8 above).

Any additional clause(s) should be included as an additional Article and an Amendment attached to the Agreement. For example:

Add after Article 9:

*"Article 10: The conditions shall have effect as modified by Amendment A attached hereto."*

Amendment A might be:

*"Amendment A*

*Add clause:*

*Employer's option to terminate*

*6.13 Without prejudice to any other right contained in this Contract the Employer may terminate this Contract at any time after ..... from the Commencement Date on giving ..... months notice to the Contractor.*

*Any notice given under this clause 6.13 shall be delivered in accordance with clause 6.2. In the event of this Contract being terminated under this clause 6.13 an annual account shall be prepared in accordance with clause 4.4."*

## **17. Supplemental Provisions (Schedule 5)**

The Supplemental Provisions in JCLI LMWC 2012 are, except for minor modifications due to the different type of work, the same as those in JCLI LWC 2012 and are additions in the 2012 contracts (originating from JCT MW 2005 Rev 2 2009 as incorporated in JCT MW 2011). See Guidance Note 17 at the back of JCLI LMWC 2012.

Several of these provisions, in combination with specification requirements, are extremely useful for medium and long term landscape maintenance contracts, particularly:

- Collaborative working is essential to achieve the objectives of a 3-5 year maintenance contract, including continuous improvement, performance and best value.
- Cost savings and value improvements: This provision enables the contractor to suggest alternative ways of achieving the objectives and include reducing cost and frequency (and sharing the saving).

- Sustainability and environmental considerations: This provision enables the contractor to suggest changes to achieve better environmental or more sustainable performance and it links with the cost saving and value improvements provision.
- Performance indicators and monitoring. Performance indicators are extremely useful for landscape maintenance contracts and this provision enables them to be specified and monitored. Performance against such indicators can also be rewarded by bonus by adding to clause 4.8 and its associated Contract Particulars entry (and any other consequent modifications). Revisions should only be made to the Conditions after consulting a solicitor.
- Notification and negotiation of disputes. Early notification and swift resolution of potential disputes is very desirable in a landscape maintenance contract in order for performance to continue without faltering.

## **18. Temporary Protection**

Temporary protective measures are the responsibility of the Contractor but any specific requirements should be specified; for example, the risk and requirements for segregation of the public (or others) from particular items of work for health and safety reasons.

## **19. Plant Replacement**

Any requirement for the replacement of plants which fail to thrive and the extent of the responsibility needs to be clearly defined in the Contract Documents (normally in the specification preliminaries). The Contractor can either be paid for any replacements which are necessary (typical for many contracts for maintaining an established scheme) or the Contractor is responsible for replacements often excluding theft, vandalism, vehicle damage and the like (typical for a maintenance contract following a construction contract carried out by the same contractor, or a performance specification for an established scheme). See also item 20 Watering and item 21 Frost Damage below.

The criteria for replacement also need to be stated, e.g. all trees and individual specimen shrubs which fail to thrive to be replaced, shrub and groundcover replacements only to fill gaps, plant sizes to be the same as originally planted (or to match the size of adjacent plants of the same species). The frequency of replacement should be stated with the time between inspection and replacement, e.g. annually with inspection October and replacement before Christmas, or monthly inspection with replacement within a month, or even weekly/weekly for highly prestigious projects (which may need a stock of replacement plants maintained off site).

## **20. Watering**

Any requirements for watering (e.g. to ensure establishment, to ensure plant survival, or to maintain a bowling green playable and green) need to be clearly specified and the responsibility and requirements for replacement resulting from losses due to failure to water need to be clearly defined both for normal circumstances and when restrictions on watering apply.

A Landscape Institute Technical Bulletin on Water Restrictions and Watering Specification was issued in May 1996, and is available from the Landscape Institute web-site [www.landscapeinstitute.org](http://www.landscapeinstitute.org). If this Bulletin is updated or replaced then the new guidance should be followed. The 1996 Bulletin gives 3 options for specifying watering so at the time of preparing the tender documents a decision must be made as to which of the three options will apply to the particular contract:

- i. Performance: the Contractor is entirely responsible for watering and for plant losses with no provision for the Employer to pay for extra watering.
- ii. Performance plus: the Contractor is entirely responsible for normal watering to ensure plant survival and for plant losses but additional watering may (or may not) be instructed when restrictions on watering apply.
- iii. Operation: watering is specified and paid for by operation.

The advantages and disadvantages of each option and appropriateness for particular projects are outlined in the 1996 Bulletin as are water quantities and a typical method of measurement for watering by operation.

## **21. Frost Damage**

Any requirements for the protection of plant material against frost need to be clearly specified and the responsibility and requirements for replacement resulting from losses due to failure to protect plants from frost need to be clearly defined. This should either be by performance or operation, for example:

- i. Performance: the Contractor is entirely responsible for providing protection as necessary and for replacing plants which are significantly damaged by frost.
- ii. Operation: protection is specified for specific plants and the Contractor is not responsible for replacing plants which are damaged by frost, unless the protection is not installed as specified.

## **22. Design/Management Objectives**

A design/management objectives statement and/or a mission statement can be included with tender documents. Typically it would outline the objectives in terms of the evolution of the landscape and in terms of the provision of a service to public/users/occupiers/client, etc. See also item 17 above.

## **23. TUPE**

This Contract makes no provision for the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) or the Acquired Rights Directive 1977. If applicable or if they are likely to be applicable the Employer and tenderers/ Contractor should take legal advice.

## **24. Programme**

This Contract does not require the provision of a programme but one should be required by the specification (preliminaries). The specification should also include any programme constraints and requirements. For larger projects a draft programme should be provided by tenderers with their tender (which should be included as a requirement in the instructions to tenderers). In some situations the application of liquidated damages will operate by measuring performance against an agreed programme.

## **25. Use of Employer's Premises/Equipment**

If the Contractor will be using the Employer's premises, (e.g. a shed for storage) and/or the Employer's equipment and/or services (water, electricity, etc.) in order to undertake the Works, details should be provided in the preliminaries but revisions/additions may also be required to the Conditions (e.g. the insurance provisions). In this situation a solicitor should always be consulted because other issues may be involved. Additionally, revisions should only be made to the Conditions after consulting a solicitor.

## **26. Use of site**

During maintenance contracts the site is in constant use by others (Employer, public, other contractors etc). The extent of such use needs to be explained in the specification (preliminaries). In some situations it may be necessary to have procedures for access, e.g. notification for security reasons or to check that it is not inconvenient for the work to be done. While in other circumstances it may be necessary to specify and subsequently agree standards for dealing with the public (e.g. mowing round sunbathers). As much information as possible concerning such constraints should be included in the specification.

## **27. Amendments**

Amendments to the JCLI Agreement for Landscape Maintenance Works are occasionally issued by JCLI. The latest revision of the Contract should always be used with the latest Amendments current at the time of tender. The latest Amendments can be downloaded free from the Landscape Institute web-site [www.landscapeinstitute.org](http://www.landscapeinstitute.org)

Amendments should be incorporated into the Contract by adding an Article and attaching the Amendment as described in item 16 above.



## Revisions in JCLI Practice Note No 9 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. Updates to cross references to other documents.
- 2 Items 5, 10 and 17 added; item 9 in 2008 version moved to item 13; with consequential revisions to item numbers and cross references.
- 3 Extensive modifications to item 11.
- 4 Minor clarification, additions or omissions, eg. in items 1 and 20 and to a lesser extent in other items.

This document is issued by the **JCLI Contracts Forum** comprising:

Association of Professional Landscapers  
British Association of Landscape Industries  
Institute of Chartered Foresters  
Landscape Institute  
Society of Garden Designers



Published for the JCLI Contracts Forum by the Landscape Institute  
Charles Darwin House 12 Roger Street London WC1N 2JU

Available to download free from the Landscape Institute web-site  
[www.landscapeinstitute.org](http://www.landscapeinstitute.org)

© Landscape Institute June 2012