



JCLI PRACTICE NOTE No. 8

Revision 2: April 2017

**Practice Notes for the 2017 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 2 supersedes JCLI Practice Notes No 1 (April 1978), No 2 (April 1982), No 3 (April 1985 and all subsequent revisions), No 5 (June 1996 and all subsequent revisions), No 6 (April 2007), No 8 (May 2008) and No 8 Revision 1 (June 2012 and its Amendment 1 April 2015).

This document should be read in conjunction with the JCLI Landscape Works Contract 2017 Edition (JCLI LWC 2017), including its footnotes and Guidance Notes; or the JCLI Landscape Works Contract with Contractor's Design 2017 Edition (JCLI LWCD 2017).

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 2017 Edition and the LCLI Landscape Works Contract with Contractor's Design 2017 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 15) although the clause / Recital numbers may be different in the two contracts (as noted in the item headings). This Practice Note and the Model Forms document for the JCLI LWC and LWCD 2017 are also applicable to the JCLI Scottish LWA and LWAD 2017, other than as noted in the Guidance in the Scottish Agreements.

This Practice Note and the following documents related to the JCLI LWC 2017 and LWCD 2017 are available free from the JCLI pages at www.landscapeinstitute.org: Model Certificates and Other Forms for use with JCLI LWC 2017 and LWCD 2017, with guidance; the JCLI Scottish Landscape Works Agreement 2017 and Scottish Landscape Works Agreement with Contractor's Design 2017; any Amendments and/or Corrections documents for the Contracts and Scottish Agreements (see item 14 below); and a document indicating the differences between JCLI LWC 2017 and JCT MW 2016. Additionally, documents indicating the differences between JCLI LWC 2017 and JCLI LWC 2012, and the differences between JCLI LWCD 2017 and JCLI LWC 2017, are available free to purchasers of the JCLI LWC or LWCD 2017.

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 £250,000. 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 (see item 15 below). They are generally not appropriate for 'domestic' projects unless modified. For other circumstances other standard forms of contract should be used; e.g. JCT, RIBA 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.jctltd.co.uk).

For sites located in Scotland the 2017 editions of JCLI Scottish Landscape Works Agreement (JCLI SLWA) or the JCLI Scottish Landscape Works Agreement with Contractor's Design (JCLI SLWAD) should be used. Additionally SBCC (Scottish Building Contracts Committee, www.sbcconline.com) produces Scottish versions of JCT Contracts.

The JCLI Landscape Maintenance Works Contract 2017 (JCLI LMWC 2017) 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 2.

The JCLI Homeowner Landscape Contracts and Consultancy Agreement have been developed for 'domestic' garden projects and are available, with the associated free JCLI Practice Note No 10, Model Forms and Scottish Amendment 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 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 has been agreed with the Health and Safety Executive (HSE) and is based on the Construction (Design and Management) Regulations 2015 (CDM Regulations 2015), the associated document "Managing Health and Safety in Construction: Construction (Design and Management) Regulations 2015: Guidance on Regulations L153" published by the HSE, and written advice from the HSE.

The CDM Regulations 2015 apply to "construction work" as defined in the Regulations. Additionally, HSE has advised that planting and general horticultural work are not "construction work".

The HSE has advised that "construction work" as defined in the CDM Regulations 2015 includes earthworks, all hard landscape works, installation of pipes and pipelines, demolition, dismantling, and preparation for such works (including site

clearance and excavation) and the maintenance of such works. Demolition, dismantling and site clearance are “construction work” when the items concerned are within the scope of the “construction work” definition in the CDM Regulations, even when undertaken in preparation for planting and general horticultural work.

The HSE has advised that 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 2015 do not apply to them.

However, even if the CDM Regulations do not apply, the Health and Safety at Work Act (HASAW Act) and other Health and Safety Regulations made under the HASAW Act (e.g. the Management of Health and Safety at Work Regulations) will still apply. The requirements of the HASAW Act and the other Regulations are very similar to those of the CDM Regulations, except for the specific appointments made under the CDM Regulations. The HSE has advised that where good health and safety practice is being followed the differences between a project where the CDM Regulations apply and one where they do not are likely to be minimal.

When soft landscape work is part of a construction project, unless the soft landscape work can be segregated from the “construction work” physically or by time, it will be part of the construction project. Therefore, although there will be no duties under the CDM Regulations associated with the soft landscape work, there will be duties relating to health and safety on the construction site.

Therefore, for example, in circumstances when another contractor (or contractors) who is carrying out "construction work" as defined in the Regulations is using the same (or adjoining) areas or the same access as a landscape contractor who is undertaking work to which the Regulations do not apply, the landscape contractor would need to comply with health and safety instructions from the Principal Contractor appointed for the "construction work". Wherever possible the landscape contractor should be advised in the tender documents of any particular situation where it is expected 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 these circumstances the “designer” for the landscape contract would need to cooperate and coordinate with the Principal Designer appointed for the other project in order to minimise and manage health and safety risks.

The CDM Regulations 2015 have special arrangements concerning domestic clients, i.e. clients who have work done on their own home (or garden) or the home of a family member, which is not done in connection with a business. However, without modification the JCLI Landscape Works Contract (JCLI LWC) and JCLI Landscape Works Contract with Contractor’s Design (JCLI LWCD) are not appropriate for projects for domestic clients. The JCLI Homeowner contracts are appropriate for projects for domestic clients.

In the JCLI LWC and LWCD, the extent to which the CDM Regulations apply to the project is to be stated in the Contract Particulars. The JCT Minor Building Works Contracts 2016 includes two options, which are whether the project is notifiable to HSE or not. The JCLI LWC 2017 and LWCD 2017 include three additional options:

- a. The CDM Regulations do not apply, is for projects where none of the work is "construction work" as defined in the CDM Regulations 2015.

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

The wording in the Contract Particulars, Articles 4 and 5 and clause 3.9 (and 2.1.2.1 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 and clause 3.9 (and 2.1.2.1 in JCLI LWCD) should not be deleted.

- b. The CDM Regulations apply but only one contractor will be required on site at any one time, is for projects which include "construction work" as defined in the CDM Regulations 2015, but where there will be only one contractor on site undertaking "construction work" at any one time. Sub-contractors are counted as contractors for this assessment.

This means that if there will be two (or more) contractors only one of whom is doing "construction work" then there is only one contractor in terms of the CDM Regulations, whether one is a sub-contractor to the other or not.

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

The wording in the Contract Particulars, Articles 4 and 5 and clause 3.9 allows for the possibility that circumstances may change (for example an instruction for additional "construction work" which necessitates the use of a sub-contractor). Hence Articles 4 and 5 should not be deleted.

A Principal Designer, Principal Contractor, and a Health and Safety File are not required for projects with only one contractor. However, a Construction Phase (Health and Safety) Plan is required.

- c. The CDM Regulations apply and there will be more than one contractor on site, is for projects which include "construction work" and at some time during construction there will be more than one contractor undertaking "construction work". Sub-contractors are counted as contractors for this assessment.

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

A Principal Designer, Principal Contractor, a Construction Phase (Health and Safety) Plan and a Health and Safety File are all required for projects with more than one contractor.

Regardless of how many contractors are involved doing "construction work", a project is notifiable to HSE if it involves:

either, more than 30 days of "construction work" and more than 20 persons carrying out "construction work" simultaneously at any time during the project;
or, more than 500 person days of "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.

Since notification of a project to HSE might apply to both options b and c above, the JCLI LWC and LWCD 2017 also include an item to indicate whether the project is notifiable to HSE or not.

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) is 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 Revision 2.

- 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 2017 and LWCD 2017 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.

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. Payment: Section 4

The Construction part of the Local Democracy, Economic Development and Construction Act 2009 (which came into force on 1 October 2011) amended the Construction part of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA). The revisions resulted in significant changes to Section 4 of the 2012 editions of the JCLI LWC and JCLI LWCD contracts, which in some respects were not the same as the revisions in JCT MW 2011. The changes were explained in JCLI Practice Note No 8 Revision 1 June 2012. The JCLI LWC and LWCD 2017 payment provisions continue to be different from those in JCT MW 2016.

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

The main revisions in Section 4 (Payment) of JCLI LWC and LWCD 2017 compared to the 2012 editions are that:

- Payment certificates must state the amount of each adjustment, and adjustments are defined as amounts under clauses 3.6 (variations), 3.7 (provisional sums), 4.7 (suspension) and fluctuations. Additionally, deductions under clauses 2.10A/2.10B (2.11A/2.11B in LWCD), 3.5 and any other items deducted (except the total of previous amounts certified) should also be considered as adjustments. This is accommodated on the 2017 Model Forms for payment (including pay less notices) by reference to an attachment where each adjustment should be listed.
- The payment certificate clauses (4.3, 4.4, 4.8) have been clarified concerning how fluctuations, deductions under clauses 2.10A (for defects that are not to be corrected), 2.10B (ditto) and deductions under clause 3.5 (additional costs due to non compliance with instruction) are dealt with.
- Detail included in clause 4.8 for calculation of Final Certificate.
- Interim certificates after the interim certificate at practical completion are to be issued within 5 days of the due date rather than on the due date.

Guidance on the issue of payment certificates and pay less notices, as well as model forms for both, is given in the Model Certificates and Other Forms document for the JCLI LWC and LWCD 2017 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 including the amount of each adjustment.

- 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 pay less notice, issue the payment certificate and the associated pay less notice together on the payment due date (not within 5 and 9 days respectively of the payment due date). The pay less notice must not be issued before the certificate.
- Deductions on a pay less notice issued against a payment certificate should only involve deductions the Employer wishes to make which are not appropriate for deduction on certificates (e.g. liquidated damages and contra-charges). Only include such deductions on a pay less 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 pay less notice, then issue a pay less notice against the Contractor's notice at least 5 days before the final date for payment, i.e. within 4 days of the Contractor's notice; see the Model Certificates and Forms document (which include pay less notices) with the associated guidance. On a pay less 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 (e.g. 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 pay less notices) then the calculation for subsequent certificates will be more complicated; see clauses 4.3 and 4.4 in JCLI LWC and LWCD.

9. Retention (clauses 4.3 and 4.4)

It may be appropriate to increase the percentage retention (i.e. 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.

10. 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 or for security 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).

11. 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. However, if there is significant maintenance work included in a contract before practical completion then using one of the options for watering in item 19 of JCLI Practice Note No 9 Revision 2 might be appropriate.

12. Frost Damage

Severe winter weather conditions can cause considerable damage to plant material especially prior to planting and when recently planted. The Contractor is normally 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.

13. Plants / Specification

Several initiatives to improve performance, quality and standardisation within the Landscape Industry were implemented in 1997/8. The JCLI Contracts Forum recommends that plants should be specified and supplied in accordance with the National Plant Specification (available at www.csdhub.com/national-plant-specification/what-is-the-nps). 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 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).

The Society of Garden Designers (www.sgd.org.uk) has also developed Heather's Model Specification for Landscape and Garden Construction. It supports the JCLI Homeowner Contracts and JCLI Landscape Works Contract (including the Scottish versions of each) and by adaption JCLI LWCD.

14. Amendments

Amendments to the JCLI Landscape Works Contract and JCLI Landscape Works Contract with Contractor's Design are occasionally issued by the JCLI Contracts Forum. 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 Revision 2 item 15)

15. Contractor's Design

Where some discrete parts 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 2017 and JCLI LWC 2017" available free to purchasers of JCLI LWC and LWCD 2017.

Revisions in JCLI Practice Note No 8 Revision 2: April 2017

- 1 Updates throughout, but particularly in the introduction, to update from the 2012 editions to the 2017 editions/revisions of JCLI documents and JCT MW 2011 to 2016. Updates to cross references to other documents.
- 2 Item 1: JCLI Scottish Agreements added, and other minor amendments.
- 3 Item 3: Updated for CDM 2015 by incorporating Amendment 1 to JCLI PN8 Rev 1 (June 2012).
- 4 Item 4 in PN8 Rev 1 (Principal Contractor): deleted and subsequent items renumbered.
- 5 Item 5: Second paragraph revised and last two paragraphs added.
- 6 Item 8: End of first paragraph added, second deleted, third (previously fourth) revised to reduce details of 2012 revisions to payment clauses and add 2017 revisions.
- 7 Item 11: last sentence added.
- 8 Item 13: last paragraph added.
- 9 Minor clarification additions or omissions, e.g. in item 12.

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

Association of Professional Landscapers
British Association of Landscape Industries
Horticultural Trades Association
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