



**JCLI PRACTICE NOTE No. 9**

**Revision 2: April 2017**

## **Practice Notes for the 2017 Edition of JCLI Landscape Maintenance Works Contract (JCLI LMWC)**

### **Notes:**

This JCLI Practice Note No 9 Revision 2 supersedes No 7 (December 1998, and all subsequent revisions), No 9 (August 2008) and No 9 Revision 1 (June 2012 and its Amendment 1 April 2015).

This document should be read in conjunction with the JCLI Landscape Maintenance Works Contract 2017 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 2017 Edition is, in the event of a dispute as to that effect, a matter for decision in adjudication, arbitration or litigation.

This Practice Note and the Model Forms document for the JCLI LMWC 2017 are also applicable to the JCLI Scottish LMWA 2017, other than as noted in the Guidance in the Scottish Agreement.

This Practice Note and the following documents related to the JCLI LMWC 2017 are available free from the JCLI pages at [www.landscapeinstitute.org](http://www.landscapeinstitute.org): Model Certificates and Other Forms for use with JCLI LMWC 2017, with guidance; the two Novation Agreements in Schedules 3 and 4 as separate documents (see item 7 below); the JCLI Scottish Landscape Maintenance Works Agreement 2017 and the two Scottish Novation Agreements; and any Amendments and/or Corrections documents for the Contract and Scottish Agreement (see item 26 below); and a document indicating the differences between JCLI LMWC 2017 and JCLI LMWC 2012. Additionally a document indicating the differences between JCLI LMWC 2017 and JCLI LWC 2017 is available free to purchasers of the JCLI LWC, LWCD or LMWC 2017.

### **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, RIBA, NEC, 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 (but ideally 5 years);
- 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. See also item 18 Plant Replacement below.

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.

For sites located in Scotland the JCLI Scottish Landscape Maintenance Works Agreement (JCLI SLMWA) should be used.

## **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 12 below).

### 3. CDM Regulations (Fourth Recital)

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 maintenance work is part of a construction project, unless the soft landscape maintenance 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 maintenance 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 maintenance contractor who is undertaking work to which the Regulations do not apply, the landscape maintenance contractor would need to comply with health and safety instructions from the Principal Contractor appointed for the "construction work". Wherever possible the landscape maintenance 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 maintenance

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 Maintenance Works Contract (JCLI LMWC) is not appropriate for projects for domestic clients.

The interpretation of the extent to which the Regulations apply to maintenance contracts which include "construction work" (e.g. 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. If only one contractor will be involved with an item of "construction work" then option b below applies, but if more than one contractor is required to do the item then option c below applies. These individual items of "construction work" will normally not exceed the criteria for notification (see below).

A construction project should not be split up and absorbed into a maintenance contract in order to avoid the CDM Regulations 2015 because the Regulations will apply. Also the Conditions of Contract in JCLI LMWC 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).

In the JCLI LMWC, the extent to which the CDM Regulations apply to the project is to be stated in the Contract Particulars. The JCT Minor Building Works Contract 2016 includes two options, which are whether the project is notifiable to HSE or not. The JCLI LMWC 2017 includes 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. This option will only apply to projects which only include the maintenance of soft landscape (i.e. 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 and clause 3.9 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 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” and the application of the Regulations to landscape maintenance contracts.

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 items of “construction work” requiring only one contractor. However, a Construction Phase (Health and Safety) Plan is required for each item of “construction work”.

- c. The CDM Regulations apply and there will be more than one contractor on site, is for projects which include one or more items of "construction work" and at least one of these items will require more than one contractor. Sub-contractors are counted as contractors for this assessment.

See the guidance above concerning the definition of “construction work” and the application of the Regulations to landscape maintenance contracts.

A Principal Designer, Principal Contractor, a Construction Phase (Health and Safety) Plan and a Health and Safety File are all required for items of “construction work” requiring more than one contractor.

Regardless of how many contractors are involved doing an item of “construction work”, the item of work 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”.

Since notification of one or more items of “construction work” to HSE might apply to both options b and c above, the JCLI LMWC 2017 also includes an item to indicate whether the project is notifiable to HSE or not. Any items of “construction work” for which notification is envisaged should be listed (or reference made to a list in a contract document) in the space provided in the Contract Particulars. The list should be reviewed with the Contractor prior to commencement and regularly during the duration of the contract.

#### **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. 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, but at least for 1 year and ideally for 5 years particularly when trees are included 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.

## **6. 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.

## **7. 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 (e.g. the right to have the Contractor carry out the landscape maintenance works) as well as all of the Employers obligations (e.g. 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 (i.e. the 2 existing parties to the contract and the party taking the novation) should enter into a novation agreement. Agreements for Employer Novation and Contractor Novation are included as Schedule 3 and Schedule 4 respectively in the JCLI LMWC 2017. 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 Contractor Novation) confirms his agreement to carry out the works

for the Substitute Employer (or Employer if it is Contractor Novation).

The Novation Agreements in Schedules 3 and 4 are available free from [www.landscapeinstitute.org](http://www.landscapeinstitute.org) as separate documents, JCLI Employer Novation Agreement and JCLI Contractor Novation Agreement. 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 novation takes place and in the case of Employer Novation the party novating should pay the party taking the novation (or visa versa in the case of Contractor Novation) any outstanding amount of his contribution in full and final settlement of his obligations.

In the case of Employer Novation, 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 15 below.

## **8. 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.

## **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 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.)

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

The main revision in Section 4 (Payment) of JCLI LMWC 2017 compared to the 2012 edition is that payment certificates must state the amount of each adjustment.

Adjustments are defined as amounts under clauses 3.5 (additional costs due to non compliance with instruction), 3.6 (variations), 3.7 (provisional sums), 4.6 (suspension), 4.7 (liquidated damages), 4.9 and 4.10 (inflation and fluctuations). Additionally, for the annual certificates adjustments include amounts under clause 4.8 (bonus). This is accommodated (including information on other adjustments) on the 2017 Model Forms for payment (including pay less notices) by reference to an attachment where each adjustment should be listed.

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 for JCLI LMWC 2017 document available free at [www.landscapeinstitute.org](http://www.landscapeinstitute.org).

There are significant differences in the way that JCLI LMWC 2017 deals with the issues associated with the amended HGCRA compared to the way they are dealt with in JCLI LWC and JCLI LWCD 2017. The differences originate because valuations are undertaken differently. For example, there are 3 model pay less notices rather than the 2 for JCLI LWC. See also item 10 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 including the amount of each adjustment.
- 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 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.
- If the Employer wishes to make any deductions which are not appropriate for deduction on certificates (e.g. contra-charges) they can be made on a pay less notice issued against a payment certificate or one issued against a Contractor's payment notice. 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. for JCLI Contracts within 4 days of the Contractor's notice; see the Model Certificates and Forms document (which includes pay less notices) with the associated guidance.



## **10. 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 9 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 pay less 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 2017.

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 pay less notice which apply for JCLI LWC 2017 do not apply for JCLI LMWC 2017.

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 pay less notice issued against the certificate by the Landscape Architect/Contract Administrator, which is the case for construction contracts).

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

See item 9 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.

## **12. 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.

### **13. 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 2017.

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.

### **14. 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.

### **15. 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 8, 12 and 13 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 7 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."*

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

The Supplemental Provisions in JCLI LMWC 2017 are, except for minor modifications due to the different type of work, the same as those in JCLI LWC 2017. See Guidance Note 17 at the back of JCLI LMWC 2017.

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.

## **17. 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.

## **18. 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 19 Watering and item 20 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).

## **19. 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.

The Landscape Institute Technical Bulletin on Water Restrictions and Watering Specification (May 1996) will be revised shortly to bring it up to date. However, the Landscape Industry has generally accepted the approach of 3 options for specifying watering which was in the Bulletin. At the time of preparing the tender documents a decision should 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 whatever the circumstances, 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 whatever the circumstances, but additional watering may (or may not) be instructed during periods of very dry weather and/or 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 were outlined in the 1996 Bulletin as were water quantities and a typical method of measurement for watering by operation.

## **20. 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 or an intermediate approach, 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. Performance plus: protection is specified for specific plants and the Contractor is not responsible for replacing any of the specifically protected plants due to frost damage (unless the protection is not installed as specified), but is responsible for replacing any other plants which are significantly damaged by frost (and can protect any of the other plants if he wishes).
- iii. 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.

## **21. 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 16 above.

## **22. 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.

## **23. 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.

## **24. 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 (and in the case of insurance, the Employer's and Contractor's insurance brokers) should always be consulted because other issues may be involved. Additionally, revisions should only be made to the Conditions after consulting a solicitor.

## **25. 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.

## **26. Amendments**

Amendments to the JCLI Landscape Maintenance Works Contract 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 15 above.

## Revisions in JCLI Practice Note No 9 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. Addition of references to JCLI Scottish documents added and updates to cross references to other documents.
- 2 Item 1: JCLI Scottish Agreement added , and other minor amendments.
- 3 Item 3: Updated for CDM 2015 by incorporating Amendment 1 to JCLI PN9 Rev1 (June 2012)..
- 4 Item 5 in PN8 Rev1 (Principal Contractor): deleted and subsequent items renumbered.
- 5 Item 9: Details to 2012 revisions to payment clauses reduced and 2017 revisions added.
- 6 item 19: second paragraph revised including modification to options I and ii.
- 7 Item 20: option ii added.
- 8 Item 24: additional phrase in brackets added concerning insurance in penultimate sentence.
- 9 Minor clarification, additions or omissions, e.g. in items 1 and 20 and to a lesser extent in other items.

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

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