

PROFESSIONAL PRACTICE

CONTRACTS
Landscape Construction
Landscape Maintenance
Garden Construction

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Colin Moore

CONSTRUCTION CONTRACTS

Standard Forms of Construction Contract generally comprising Agreement and Conditions have been developed to accommodate the circumstances which regularly arise when a client wants something built by a contractor. Different Standard Forms have been developed for different types of work, eg. Buildings (eg JCT), Engineering Works (eg ICE now ICC, NEC), Landscape Works (JCLI), Landscape Maintenance Works (JCLI), Garden Construction (JCLI) etc.

There are also different types of contract relating to different procurement methods in the construction industry, eg Traditional, Measurement, Cost Reimbursement, Management, Construction Management, Design and Build, Serial, Package Deal, Measured Term, Framework Agreements, PFI, PPP etc. Many of the organisations that produce Standard Forms produce different ones for the different types (eg JCT, ICC and NEC)

The advantage of Standard Forms is that everyone who uses them regularly knows exactly what they say. This certainty can only be maintained if the Forms are published documents so that any revisions specific for the project are clearly identifiable by everyone concerned (traditionally hand written and initialled by both parties). Computerisation threatens this certainty hence Standard Forms are not available on the internet as pdf's but are only available as a printed published document or electronically in very secure formats to ensure none of the clauses can be revised except in specific locations where project specific information must be added. Loss of this certainty would destroy the credibility of the Standard Form.

JCLI LANDSCAPE CONTRACTS

JCLI Landscape Works Contract (JCLI LWC) latest edition 2012; based on JCT Minor Works Building Contract (JCT MW 2011); produced by Landscape Institute and available for them, also many associated free documents associated with the contract are available as free downloads from the LI website (eg JCLI Practice Note No 8, Model Certificates and Forms)

JCLI Landscape Works Contract with Contractor's Design (JCLI LWCD 2012); based on JCT MWD; produced by and available from LI

JCLI Landscape Maintenance Works Contract (JCLI LMWC) latest edition 2012; loosely based on JCT MW 2011; produced by and available from LI with associated free documents as free downloads from website (eg JCLI Practice Note No 9, Model Certificates and Forms)

JCLI Landscape Contract for a Home owner/occupier with consultant (JCLI HLC/C 2011; based on JCT Building Contract for Homeowner ...; produced by Society of Garden Designers, see their website, with associated free documents as free downloads from website (eg JCLI Practice Note No 10, Model Certificates and Forms). Also a JCLI Consultancy Agreement for Homeowner (JCLI HCA); all specifically for domestic client's garden projects

SOFT LANDSCAPE WORKS

Soft landscape works fundamentally different from building/engineering works:

- Living materials (plants, soils, ...)
- Seasons affect works (some plants only available at limited times of year)
- Weather affects works (particularly causes inappropriate ground conditions)
- Planting is the beginning not the end, practical completion is the start of establishment, growth and development to maturity (means that an establishment maintenance period is required, preferably of 3-5 years duration, when additional maintenance is required to ensure establishment)

Which is why JCLI landscape contracts are needed rather than using building contracts.

Soft landscape construction work which forms part of a building or engineering project implemented in one of two ways:

- Sub-contract to the building/engineering contract. Main contract typically a JCT, NEC or ICC Standard Form. These Standard Forms do not necessarily accommodate soft landscape works very well, particularly establishment maintenance although such maintenance is often implemented as part of the building/engineering contracts after practical completion.
- A separate direct contract between Employer and Landscape Contractor. Typically JCLI LWC or LWCD or for larger projects JCT or NEC. Ideal solution, and it is also easy to use JCLI LMWC for establishment maintenance using the same contractor for construction and maintenance (preserving plant guarantee) ie back-to-back contracts.

JCLI LANDSCAPE WORKS CONTRACT

REQUIREMENTS OF PARTIES	HOW ACCOMMODATED IN JCLI LWC
<p>Obligations</p> <p>Employer/Client: What are my obligations?</p> <p>Contractor What are my obligations?</p>	<p>Pay the appropriate amounts at the agreed times And others like</p> <p>Make site available at the appropriate time; Several obligations under CDM Regulations</p> <p>Build the project in accordance with the contract documents And many others like</p> <p>Complete on time; Carry out instructions; Competent person on site at all times; Insurance.</p>

	<p>All valuations are for the value of work done properly since the date work commenced, hence if previous work included on a previous valuation proves to be defective later but before practical completion then the value is not included in the valuation after discovery of the problem, hence avoiding over certification. Payment certificates are for the valuation minus retention minus amounts previously certified. Payments are instalments against the final total (not for any specific work included in a valuation). Also payment is typically on average a month after the work was done and more work will have been done so always well in arrears.</p>
<p>Liabilities / insurance</p> <p>Employer/Contractor/CA</p> <p>What if children get into the site at night and one is seriously injured?</p> <p>What happens about theft, fire, etc damaging the works before practical completion?</p> <p>What happens if an existing structure is damaged (existing pre-works and not damaged by Contractor)?</p> <p>What happens if the Contractor cuts the electricity supply to the office next door?</p> <p>What if the scaffolding collapses into the road and injures a pedestrian?</p> <p>How ensure that all parties comply with their Health & Safety duties including CDM?</p>	<p>Contractor is responsible for security, insurance etc of the site from commencement to practical completion and indemnifies Employer. (Possession of the site is not given to the Contractor in JCLI LWC or JCT MW but is in many other Standard Forms of Contract, for some projects it is not possible to define the site very well and/or not possible/practical to secure it) – see below</p> <p>Insurance of the works by Contractor. In some situations eg extension of existing building, Employer may insure the works. Employer insures existing structures.</p> <p>Contractor indemnifies employer and has Public Liability Insurance to cover damage to other peoples property and personal injury.</p> <p>Standard Forms include necessary provisions for the CDM Regs but there are other issues eg competence, adequate resources, provision of information etc which are part of the pre-contract procedures which are an essential part of compliance, not just what is in the Standard Forms. JCLI LWC has 3 options for the extent to which the CDM Regs apply, which is determined by the size and type of the project (JCT MW only has 2 options).</p>

<p>What happens if there is an accident on site and workmen are injured?</p>	<p>HSE investigation including CDM Regs compliance; compliance of those involved investigated (typically client, CDM Co-ordinator, designers, contract administrator, contractors and Principal Contractor) and fines/imprisonment can result even if non-compliance did not contribute to the accident!</p>
<p>Instructions / Variations</p> <p>Employer: What happens if I want to add additional work, omit or change work, suspend work?</p> <p>Contractor: What happens if I find discrepancies between the contract documents? How do I get paid for verbal instructions I receive from the CA on site? What do I do if the Employer tells me to do something which contradicts the drawings?</p> <p>CA: What happens if I need to ask the Contractor to do additional/different work due to circumstances on site being different than originally envisaged (or if I change my mind about something)?</p>	<p>The Employer has no power to instruct the Contractor (Employer advised pre tender about how the contract works). Contractor told at the beginning to refer any Employer instructions to CA and not act until CA instructs. CA issues instructions (if one has an implication on the cost of the contract it is a variation). It is a CA duty to issue instructions in writing. Verbal instructions to be confirmed in writing by CA within 2 days.</p> <p>Discrepancies to be reported to CA as soon as discovered and resolved by instruction, Conditions of Contract take precedence over everything else, usually drawings take precedence over specification and then BoQ but Standard Forms sometimes list precedence (JCLI ones don't).</p> <p>Unforeseen revisions/additions instructed are paid for out of the contingency. Contingency should not be used to hide CA mistakes/designers mistakes, nor for something you fancy doing differently, or something the Employer wants to do differently. (Additional money should be used for these).</p>
<p>Payment</p> <p>Employer: How much do I have to pay and when?</p> <p>Contractor: What happens if I don't get paid on time, how do I get my money, can I stop work? VAT? What about inflation? What if tax changes eg an increase in employer's National Insurance contribution raises my labour costs after tender? Or land-fill tax increases after tender?</p>	<p>The construction part of the Housing Grants, Construction and Regeneration Act as amended by the construction part of the Local Democracy, Economic Development and Construction Act 2009 (the latter came into force on 1 October 2011) requires all construction contracts to include specific provisions for payment (also includes contracts between consultants and clients where construction is the intention). If a contract fails to comply with one or more of the Act's requirements then the Scheme for Construction Contracts applies for the particular non-complying aspect. All Acts and the Scheme available on-line (Google the titles)</p> <p>Payment provisions in Standard Construction Contract Forms comply with the Act but vary between Forms. In JCLI LWC Contractor is due a payment for work done to date less retention less previous payments every 28 days, CA duty to issue certificate within 5 days</p>

CA	What do I have to do?	<p>after 'due date' showing amount due and how calculated, Employer pays by the 'final date for payment' which is 14 days from 'due date'; if Employer wishes to pay less than amount certified he has to go through a specific procedure (issuing a pay-less notice to the Contractor). If CA fails to issue a certificate then Contractor issues payment notice which Employer pays but if Employer wishes to pay less then can issue a payless notice. Time periods are strict and tight and the whole process has been complicated by the new Act.</p> <p>Golden rule is to issue certificates on time and follow the published guidance relevant to the Standard Form being used.</p> <p>If Employer fails to pay on time then provided Contractor goes through the procedures in the Standard Form he can get interest, suspend work, take the Employer to adjudication, terminate his employment (following notice of default etc).</p> <p>Issuing certificates on time is a very important CA duty, getting it wrong or late could be very expensive for the CA; Contractor takes Employer to adjudication and if successful Employer recovers cost from CA.</p> <p>VAT is additional to tenders, certificates etc and is generally a matter between the Employer and Contractor not involving the CA (unless Employer wants the CA to sort out VAT with the Contractor or HMR&C if necessary)</p> <p>Some Standard Forms (not JCLI LWC) have the option to include increases for inflation for contracts of significant duration, otherwise fixed price. Most contracts even if fixed price include provision for increases/decreases for tax changes which affect the Contractor's costs, but this provision is often deleted for short contracts (eg employer's NIC and Land Fill Tax).</p> <p>Payment certificate also done after practical completion (due date is 7 days after pc with CA issuing certificate within 5 days, and retention reduced by half). JCT and JCLI now include certificates during the rectification period. Certificates must be issued even if for £0</p> <p>At end of rectification period after issue of certificate certifying Contractor's obligations for rectification period complete, final payment certificate issued. In order to determine amount due a Final Account is usually prepared and hopefully agreed (between Contractor and CA – if Contractor disputes and CA disagrees then issue final certificate anyway and then Contractor will go through dispute resolution procedure if he wishes – depends on amount disputed), Contractor provides information as necessary.</p>

<p>Failure to Perform</p> <p>Employer: What happens if the Contractor turns out to be useless – can I get rid of him and get the job done by someone else – what if it costs me more to get it finished if I use someone else?</p> <p>What happens if the Contractor doesn't do the work but uses the site as a builder's yard?</p> <p>What happens if progress is just very slow and/or quality poor?</p> <p>All parties: Must not be unreasonable, vexatious etc.</p>	<p>Termination ('termination of the Contractor's employment under the contract', the contract is not terminated because if it were you could not apply the clauses which tell you what to do after termination); no further payment made until work finished by others; then tender the remaining work and appoint lowest, any additional cost charged to original contractor, very detailed provisions in Standard Forms, follow procedure to the letter and ensure strong reasons within those specified in the Conditions of Contract - Last resort, problematic. May have to go to court to get the Contractor off the site (thankfully rare).</p> <p>Also a provision in Conditions if Contractor fails to comply with an instruction can get another contractor to do the work on the instruction (using specific procedure).</p> <p>Don't pay for work not done. Apply liquidated damages if practical completion is late for reasons within the control of the Contractor.</p> <p>Monitoring progress is an important CA role. Contractor provides programme before work starts and progress monitored against it. CA has little power to affect progress but apply pressure, ultimately apply liquidated damages if practical completion delayed; and failure to proceed diligently is a reason listed for termination by Employer.</p> <p>Similarly poor quality work; highlight it early, condemn substandard work, do not include it in valuations until it is correct, do not give practical completion until it is correct.</p>
<p>Disputes</p> <p>Employer / Contractor</p> <p>What happens if we get into a dispute and are unable to agree a resolution between ourselves?</p>	<p>CA has a role in trying to resolve issues at an initial stage and in trying to prevent them escalating into disputes. The objective should be to avoid disputes because they cost everyone concerned a lot of money and rarely does anyone win (only the legal profession gets rich). Resolve all issues as early as possible and don't let them fester. The construction industry has traditionally been adversarial and it is an easy rut to fall into!</p> <p>The construction part of the Housing Grants, Construction and Regeneration Act (as amended) requires all construction contracts to include dispute resolution by adjudication, a fast track (rough justice) method of resolution which can be rapidly enforced (with recourse to arbitration or the courts later if necessary). If a construction contract does not comply with any of the adjudication requirements in the Act then the adjudication provisions in the Scheme for Construction Contracts apply in full (also applies to consultant/client contracts where construction envisaged) – see Payment section above.</p>

	<p>JCLI LWC includes different dispute resolution options as well as adjudication including mediation (before adjudication if both parties wish and aims to get parties to agree a compromise rather than having a settlement imposed), arbitration, the courts.</p>
<p>Liquidation</p> <p>Employer/Contractor What happens if the other party goes into liquidation or similar</p>	<p>Termination of the Contractor's employment under the contract occurs. Standard Forms include detailed provisions to use following termination. Note the contract is not terminated (the Contractor's employment is) otherwise the termination provisions in the contract could not be applied!). Many other reasons for termination are listed for each party</p>
<p>Other Issues</p> <p>Phasing of the contract with partial practical completion for the different phases, release of retention phased, end of defects phased etc. May be both phased commencement and phased completion or either commencement or completion phased. Not in JCLI LWC.</p> <p>Partial possession, if Employer wants to take over part of the works which are complete, before all the works are complete, similar to phasing but not pre-planned, not initiated by Contractor (although they try to regularly especially for landscape work, and Employer may be prepared to agree). Useful for soft landscape works due to the seasonal nature of some of the work, so included in JCLI LWC although it is not in JCT MW.</p> <p>Sub-contracting not allowed without CA consent (responsibility remains with Contractor).</p> <p>Neither party can assign the contract without agreement of the other party.</p> <p>Provisions for naming or nominating suppliers and/or sub-contractors, with complex provisions/forms etc. Not in JCLI LWC.</p> <p>Provisions to avoid income tax evasion by Contractor, sub-contractors and all self employed workers – the Construction Industry Scheme, in all construction contracts (except where client is 'domestic').</p> <p>Contractor to comply with all statutory requirements, if Contractor complies with contract documents but these contradict statutory requirements then Contractor not responsible.</p>	

Employer can cancel contract and recover costs if Contractor commits offence under Bribery Act.

Latest edition of JCLI LWC includes optional Supplemental Provisions covering collaborative working, health and safety, cost saving and value improvements, sustainable development and environmental considerations, performance indicators and monitoring, notification and negotiation of disputes; all in the interests of collaborative working (rather than adversarial).

LANDSCAPE MAINTENANCE WORKS

Soft landscape maintenance works fundamentally different from landscape construction works. Still working with living materials and work influenced by seasons and weather, but differences need to be accommodated in maintenance Standard Forms of Contract:

- Repetitive operations, no defects, rectification period, or retention; the work is done, not done or inadequately or incorrectly done; some failures can't be corrected;
- Completion date, extension of time and liquidated damages for failure to complete on time are irrelevant;
- Duration typically 3-5 years; Commencement date and end date or duration, with extension by agreement;
- Need redress for not doing important item of work on time, eg failure to prepare the cricket pitch for the game on Sunday (its no good doing it Monday);
- Defaults in performance need resolving as well as financial adjustment; "penalty" point systems, rectification notices, default notices, damages for defaults all common but negative – bonus for doing well?
- Inflation: annual increase in rates/annual sum needed;
- Annual Accounts better than Final Account;
- Interaction with public and/or owner. Contractor doesn't have possession of site; mowing round sunbathers? Maintenance at a girls school! Collection of money from the public for events/activities in parks?
- Use of Employer's buildings, equipment?
- Need to establish standards of work and performance (preferably pre-tender).

JCLI LMWC can be used for any landscape maintenance contract including establishment maintenance back-to-back with a construction contract (but not so easily back-to-back with a landscape sub-contract to a building/engineering contract)

JCLI LANDSCAPE MAINTENANCE WORKS CONTRACT

REQUIREMENTS OF PARTIES	HOW ACCOMMODATED IN JCLI LMWC
<p>Obligations</p> <p>Employer: What are my obligations?</p>	<p>Pay the appropriate amounts at the agreed times And others like Make site available at the appropriate time(s)</p>

<p>Contractor What are my obligations?</p> <p>Contract Administrator What are my duties / powers / obligations?</p> <p>Note: The client (referred to as Employer) and the Contractor are the 2 parties to the contract. Until recently nobody else had any rights under the contract (privity of contract). However since the Contracts (Rights of Third Parties) Act 1999 anybody who can prove an interest can have rights under the contract. But JCLI LMWC opts out of the Act (third parties are given rights using collateral warranties if required, but rare in maintenance contracts).</p>	<p>Carry out the works in accordance with the contract documents And many others like Carry out instructions; Competent person on site at all reasonable times; Insurance</p> <p>Administer the contract to the limit of the powers given the CA by the contract. Eg. Issue certificates, issue instructions in writing, issue further information, etc. Some powers are obligatory although some obligatory ones may only be necessary if the particular circumstances arise, some powers can be used if the CA wishes.</p> <p>Like JCLI LWC the maintenance contract has no specific requirement for CA to visit site in the Standard Form, other than that implied by the duties to certify payment for work done properly. The requirement to inspect the works comes from the CA's Agreement with his client where the extent of inspection should be stated.</p> <p>The CA's obligation to act impartially between the parties (particularly for certifying payment, bonus, liquidated damages, valuing variations and extension of time) comes from his professional code of conduct. Clients using a CA who is not bound by such a code or whose code does not include this requirement should require it in their Agreement with the CA. Otherwise CA is agent of the Employer.</p>
<p>Time</p> <p>Employer: When will the Contractor start? Contractor when must I start, when finish and how is work programmed?</p> <p>Employer What if the Contractor fails to prepare pitches for matches and they have to be cancelled and I incur costs?</p>	<p>Commencement and Duration or End Date stated in tender documents. If linked to a construction contract then commencement is 'practical completion of the construction contract', with a duration of x years. Otherwise the day after the end of the previous maintenance contract (state date) with a duration or end date. Can be extended by agreement. Work programme agreed (not required in JCLI LMWC but in specification) often tenderers required to submit a draft programme with their tender, subsequently refined and updated.</p> <p>Liquidated Damages determined by Employer/CA pre tender, realistic assessment of loss by Employer if Contractor does not carry out a specific item of work where failure is definite, rate per event or whatever is appropriate, Schedule of Liquidated Damages is included in tender</p>

<p>Contractor What if I am delayed by things beyond my control? – eg abnormally adverse weather conditions delaying work, additional work instructed, delayed handover of site, ...</p> <p>Employer: When will I have to provide access for the Contractor?</p> <p>Contractor How is access arranged?</p>	<p>docs so Contractor knows obligation, and it is a contract document. Optional and many maintenance contracts do not have liquidated damages because nothing is so critical or no financial loss. Deducted on certificates by CA, which is not the case for liquidated damages in JCLI LWC which are deducted by Employer if he wishes (using a pay-less notice).</p> <p>Not as critical as for construction contract. Work is re-programmed or in some cases it may not be done (and not paid for).</p> <p>Access arrangements depend on the particular project as do security arrangements etc. Covered by specification and then by discussion etc.</p>
<p>Liabilities / insurance</p> <p>Employer/Contractor/CA</p> <p>What if children get into the site at night and one is seriously injured?</p> <p>What happens if vandals damage the Contractor's equipment?</p> <p>What happens about theft, fire, etc damaging the site?</p> <p>What happens if the Contractor cuts the electricity supply to the office next door?</p> <p>What if the Contractor damages a building on the site?</p> <p>How ensure that all parties comply with their Health & Safety duties including CDM</p>	<p>Contractor is not responsible for the site. Employer insures the site. Unlike construction works there are no 'works' to insure.</p> <p>Contractor responsible for his own equipment (usually insures it).</p> <p>Contractor indemnifies Employer and has Public Liability Insurance to cover damage to other people's property and personal injury, including damage to buildings on site.</p> <p>Contractor liable for injury to persons if caused by him, otherwise Employer.</p> <p>CDM Regs apply to the maintenance of hard landscape works and the maintenance of all other 'construction' but not to soft landscape maintenance. See JCLI Practice Note No 9 for the extent of the application of the Regs. Everyone involved must comply with all appropriate H&S legislation, and individually responsible for doing so. Employer responsible for appointment of competent designers, contractors etc.</p>

<p>What happens if there is an accident on site and workmen are injured</p>	<p>HSE investigation including CDM Regs compliance; compliance of those involved is investigated typically, Employer, (CDM Co-ordinator), designers, contract administrator, (Principal Contractor) and contractors and fines/imprisonment can result even if non-compliance did not contribute to the accident!</p>
<p>Instructions / Variations</p> <p>Employer: What happens if I want to add additional work, omit or change work, or change timing of work?</p> <p>Contractor: What happens if I find discrepancies between the contract documents? How do I get paid for verbal instructions I receive from the CA on site? What do I do if the Employer tells me to do something which contradicts the drawings?</p> <p>CA: What happens if I need to ask the Contractor to do additional/different work due to circumstances on site being different than originally envisaged (or if I change my mind about something)?</p>	<p>The Employer has no power to instruct the Contractor (unless the Employer is also the CA). Contractor told at the beginning to refer any Employer instructions to CA and not act until CA instructs. CA issues instructions (if one has an implication on the cost of the contract it is a variation). It is a CA duty to issue instructions in writing. Verbal instructions to be confirmed in writing by CA within 2 days.</p> <p>Discrepancies to be reported to CA as soon as discovered and resolved by instruction, Conditions of Contract take precedence over everything else, for maintenance work specification should take precedence over drawings (which have much less significance than in construction contracts) and then any measurement document.</p> <p>Unforeseen revisions/additions instructed are paid for out of the contingency. Contingency should not be used to hide CA mistakes/designers mistakes, nor for something you fancy doing differently, or something the Employer wants to do differently. (Additional money should be used for these).</p> <p>Instructions (and certificates) are related to the year concerned (due to annual accounting, see below).</p>
<p>Payment</p> <p>Employer: How much do I have to pay and when?</p> <p>Contractor: What happens if I don't get paid on time, how do I get my money, can I stop work? VAT? What about inflation? What if tax changes eg a National Insurance increase raises my labour costs after tender?</p>	<p>The construction part of the Housing Grants, Construction and Regeneration Act as amended by the construction part of the Local Democracy, Economic Development and Construction Act 2009 (the latter came into force on 1 October 2011) requires all construction contracts to include specific provisions for payment (also includes contracts between consultants and clients where construction is the intention). If a contract fails to comply with one or more of the Act's requirements then the Scheme for Construction Contracts applies for the particular non-complying aspect. Maintenance work does not fall within the definition of construction in the Act and so maintenance contracts need not comply with the Act. However the provisions of the Act are good practice and to be consistent with the JCLI LWC the JCLI LMWC</p>

CA What do I have to do?

complies with the Act.

The due dates for payment are monthly or quarterly (or whatever selected pre tender) from commencement, CA duty to issue certificate within 5 days of 'due date' showing amount due and how calculated, valuation is for the period only (unlike construction contracts) and includes deduction of liquidated damages for the period (if any); Employer pays within 14 days from due date (the 'final date for payment'), if Employer wishes to pay less than amount certified he has to go through a specific procedure (issuing a pay-less notice to the Contractor). If CA fails to issue a certificate then Contractor issues payment notice which Employer pays but if Employer wishes to pay less then can issue a pay-less notice. Time periods are strict and tight and the whole process has been complicated by the new Act.

Golden rule is to issue certificates on time and follow the guidance relevant to the Standard Form being used.

If Employer fails to pay on time then provided Contractor goes through the procedures in the Standard Form he can get interest, suspend work, take the Employer to adjudication, terminate his employment (following notice of default etc).

Issuing certificates on time is a very important CA duty, getting it wrong or late could be very expensive for the CA; Contractor takes Employer to adjudication and if successful Employer recovers cost from CA.

VAT is additional to tenders, certificates etc and is generally a matter between the Employer and Contractor not involving the CA (unless Employer wants the CA to sort out VAT with the Contractor).

JCLI LMWC includes annual increases for inflation using the Retail Price Index (or other selected index). Also includes provision for increases/decreases for tax changes which affect the Contractor's costs (eg employer's NIC and Land Fill Tax).

Annual accounting: Annual account prepared at end of each year from commencement (possibly only part of year at the end). Value of all work done for year, less liquidated damages for year, plus any bonus for year less amounts previously certified for year. Agree annual account with Contractor if possible (as with construction contract final account).

Certificates must be issued even if for £0.

An important pre-tender decision is whether the contract is to be on a performance or operations basis (or combination). It affects specification, the amount of CA inspection and administration, how tender sums are submitted and how valuations are calculated. Eg whether the contract sum is £X/year divided into 4 equal instalments paid quarterly or whether it is calculated by operations performed at rates provided. See JCLI PN9.

<p>Failure to Perform</p> <p>Employer: What happens if the Contractor turns out to be useless – can I get rid of him and get the work done by someone else – what if it costs me more if I use someone else? What happens if the Contractor does most of the work but the quality is consistently poor?</p> <p>All parties: Must not be unreasonable, vexatious etc.</p>	<p>Quality and performance are fundamental issues for maintenance contracts. Establishing the quality required and conveying it to tenderers pre tender (so that it is included in the price) and establishing the standards expected from the beginning of the contract are fundamental to the success of maintenance contracts. Almost impossible to recover from initial low standards if it is not highlighted and corrected quickly.</p> <p>Payment should not be made for work which is not up to standard.</p> <p>JCLI LMWC includes failure events which occur if liquidated damages are applied (every individual deduction) and/or if a notice is issued requiring the Contractor to comply with an instruction.</p> <p>Bonus reduces as the number of failure events increases.</p> <p>Another contractor can be used for an element of work if the Contractor fails to do it following instruction to do so and subsequent notice (such notice being a failure event whether another contractor is used or not).</p> <p>Termination can occur if there are more than x failure events in y months (x and y determined pre tender and depend on the project, see JCLI PN9). Termination ('termination of the Contractor's employment under the contract', the contract is not terminated because if it were you could not apply the clauses which tell you what to do after termination); then tender the remaining work and appoint lowest, any additional cost charged to original Contractor, very detailed provisions in JCLI LMWC - Last resort, problematic.</p>
<p>Disputes</p> <p>Employer / Contractor What happens if we get into a dispute and are unable to agree a resolution between ourselves?</p>	<p>CA has a role in trying to resolve issues at an initial stage and in trying to prevent them escalating into disputes. The objective should be to avoid disputes because they cost everyone concerned a lot of money and rarely does anyone win (only the legal profession gets rich). Resolve all issues as early as possible and don't let them fester. The construction industry has traditionally been adversarial and it is an easy rut to fall into!</p> <p>The construction part of the Housing Grants, Construction and Regeneration Act (as amended) requires all construction contracts to include dispute resolution by adjudication, a fast track (rough justice) method of resolution which can be rapidly enforced (with recourse to arbitration or the courts later if necessary). If a construction contract does not comply with</p>

	<p>any of the adjudication requirements in the Act then the adjudication provisions in the Scheme for Construction Contracts apply in full (also applies to consultant/client contracts where construction envisaged) – see Payment section above.</p> <p>JCLI LMWC includes different dispute resolution options as well as adjudication including mediation (before adjudication if both parties wish and aims to get parties to agree a compromise rather than having a settlement imposed), arbitration, the courts.</p>
<p>Liquidation</p> <p>Employer/Contractor What happens if the other party goes into liquidation or similar?</p>	<p>Termination of the Contractor's employment under the contract usually occurs, but depends on circumstances. Standard Forms include detailed provisions to use following termination. Note the contract is not terminated (the Contractor's employment is) otherwise the termination provisions in the contract could not be applied! Many other reasons for termination are also listed</p>

DOMESTIC GARDENS

JCLI Homeowner documentation is only appropriate for domestic projects where client is having work done on their own garden (or a garden of a close relative) in a personal not business capacity; ie not appropriate for garden for a business, charity, community group, authority and the like. If not domestic then use commercial agreement/contract eg Landscape Consultant’s Appointment documentation from LI and JCLI LWC.

The legal requirements associated with domestic projects are different from commercial ones, hence the different contracts; eg CDM doesn’t apply to domestic clients (but applies to domestic projects to the extent of a non-notifiable project and hence designers, contractors and all workers have duties). CIS does not apply, but consumer legislation applies.

JCLI Homeowner Consultancy Agreement should be used if the JCLI Homeowner Landscape Contract (with consultant) will be used because the agreement and contract coordinate together.

Heather’s Model Specification for Garden Construction SGD Edition 1: just updated and supports the JCLI Homeowner Contract (and JCLI LWC): available from Society of Garden Designers, see website

JCLI LANDSCAPE WORKS CONTRACT FOR A HOME OWNER/OCCUPIER who has appointed a consultant to oversee the work

REQUIREMENTS OF PARTIES	HOW ACCOMMODATED IN JCLI HLC/C
<p>Obligations</p> <p>Customer/Contractor/Consultant: What are my duties / powers / obligations?</p> <p>Note: The client (referred to as the Customer) and the Contractor are the 2 parties to the contract. Until 1999 nobody else had any rights under the contract (privity of contract). However since the Contracts</p>	<p>Customer: Pay the appropriate amounts at the agreed times And others like Make site available; provide access; don’t hinder Contractor etc.</p> <p>Contractor: Build the project in accordance with the contract documents And many others like Complete on time; Carry out instructions; Competent person on site at all times; Keep site clean and store away equipment etc.</p>

<p>(Rights of Third Parties) Act 1999 anybody who can prove an interest can have rights under the contract. But JCT HLC/C opts out of the Act.</p> <p>Terminology is very different in JCT HLC/C compared to other JCLI contracts, eg. Date when all the works are finished in JCLI HLC/C is Practical Completion in JCLI LWC (the avoidance of jargon leads to long winded phrases for completion and rectification period etc).</p>	<p>Consultant: Administer the contract to the limit of the powers given the Consultant by the contract. Eg issue payment certificates if paying by periodic instalments, issue instructions in writing, issue further information, certify stages finished if applicable, certify work finished, certify faults corrected, etc. Some powers are obligatory although some obligatory ones may only be necessary if the particular circumstances arise; some powers can be used if the Consultant wishes.</p> <p>As in other JCLI contracts the requirement to inspect the works comes from the Consultant's Agreement with his Customer where the extent of inspection should be stated.</p> <p>The Consultant acts for the Customer in administering the contract.</p>
<p>Time</p> <p>Customer: When/how soon will it be finished? Contractor: When will site be available for me to start? How long do I have to do the work?</p> <p>Customer: What if it isn't finished at the agreed time, I will be losing money if it is late?</p> <p>Contractor: What if I am delayed by things beyond my control? – eg abnormally adverse weather conditions delaying work, additional work instructed, delayed handover of site, ...</p>	<p>Agree Commencement and Completion dates pre contract signing (written in the contract), or state in tender documents</p> <p>There is no provision for compensation in these circumstances in JCLI HLC/C (no liquidated damages)</p> <p>Extension determined by c Consultant for delay due to changes to work or if Contractor can't finish on time due to delays beyond his control</p>
<p>Defects</p> <p>Customer: What happens if something falls apart after completion? Contractor: What is the extent of my liability for defective work after completion?</p>	<p>The Consultant issues a certificate when the works are finished (for each stage if applicable). The Contractor can put right faults which appear within a stated period, usually 6 months or 12 months. Consultant issues list of faults and Contractor corrects them (note, not problems due to a lack of maintenance); when everything put right Consultant issues certificate to say so. But this is not the end of the Contractor's liability for latent defects (6 years).</p>

<p>Customer What happens if work already paid for fails before completion, how avoid over payment incase the Contractor goes into liquidation?</p>	<p>Plant defects: Contractor not responsible for any plants that he does not supply even if he plants them (eg if any are supplied by the Customer or Consultant).</p> <p>Plant failures after Consultant certifies work finished are not responsibility of Contractor unless the same contractor is doing maintenance under separate contract (which should require replacement of all plants supplied by Contractor that fail to thrive). See JCLI PN10.</p> <p>5% retained on all amounts until after faults corrected. Payment is always well in arrears of when the work was done although a prepayment is possible if payment is by stage instalments.</p>
<p>Liabilities / insurance</p> <p>Customer/Contractor/Consultant What if children get into the site at night and one is seriously injured?</p> <p>What happens about theft, fire, etc damaging the works before works finished?</p> <p>What happens if the Contractor cuts the electricity supply to the office next door? What if the boundary wall scaffolding collapses into the road and injures a pedestrian?</p> <p>How ensure that all parties comply with their Health & Safety duties including CDM?</p>	<p>Customer generally responsible for site security unless Contractor's fault. Customer has householder insurance (insurers to be advised that work will take place) and Contractor also has Public Liability insurance. Contractor responsible for health and safety aspects of works (including security and not leaving hazards etc).</p> <p>Insurance of the works by Contractor.</p> <p>Contractor has public liability policy to cover damage to other peoples property and personal injury.</p> <p>Contractor responsible for his own compliance with health and safety legislation including CDM Regs. Designers responsible for their own compliance. Domestic clients have no duties under most health and safety legislation including CDM. Never a CDM Co-ordinator or Principal Contractor on a Domestic project (unless client is a business or otherwise not acting in a personal capacity).</p>

<p>What happens if there is an accident on site and workmen (or others) are injured/killed?</p>	<p>HSE investigation including CDM Regs compliance; designers and contractors compliance with regs investigated and fines/imprisonment can result even if non-compliance did not contribute to the accident!</p>
<p>Instructions / Variations</p> <p>Customer: What happens if I want to add additional work, omit or change work, suspend work?</p> <p>Contractor: What happens if I find discrepancies between the contract documents? How do I get paid for verbal instructions I receive from the Consultant on site? What do I do if the Customer tells me to do something which contradicts the drawings?</p> <p>Consultant: What happens if I want the Contractor to do additional/different work due to circumstances on site being different than originally envisaged (or if I change my mind)</p>	<p>The Customer has no power under the contract to instruct the Contractor (advise Customer accordingly before tender). Contractor told at the beginning to refer any Customer instructions to Consultant and not act until Consultant instructs. Contractor prices the proposed change and advises if additional time is required; if Customer agrees Consultant issues instruction.</p> <p>Not covered in contract but normal requirement that discrepancies to be reported to Consultant as soon as discovered and resolved by instruction.</p> <p>Unforeseen revisions/additions instructed are paid for out of the contingency (keep Customer advised). Contingency should not be used to hide Consultant mistakes/designers mistakes, nor for something you fancy doing differently, or something the Customer wants to do differently. (Additional money should be used for these). See Heather Specification re contingency (SGD Edition 1 November 2011 clause A320 and associated note).</p>
<p>Payment</p> <p>Customer: How much do I have to pay and when?</p> <p>Contractor: What happens if I don't get paid on time, how do I get my money, can I stop work? VAT? What about inflation? What if tax changes eg a National Insurance increase raises my labour costs after tender?</p> <p>Consultant: What do I have to do?</p>	<p>Three alternative methods for payment. Customer/Consultant decide which to use before tender.</p> <ol style="list-style-type: none"> 1 Contractor paid 95% when Consultant certifies work is finished and remaining 5% paid when Consultant certifies faults have been corrected; or 2 Stage instalments: each stage and it's instalment defined pre tender with the total amounting to 95%, each instalment paid when the Consultant certifies that the relevant stage is complete, with the final 5% paid when Consultant certifies faults have been corrected. [first stage could be a pre-payment before work starts]; or 3 Periodic instalments: every _____ weeks until the work is finished, amount due certified by Consultant as 95% of value of work done (since work commenced) less previous amounts certified, and the remainder certified by the Consultant after faults corrected. <p>Timing for the certifications and payments are defined in the contract.</p>

	<p>The construction part of the Housing Grants, Construction and Regeneration Act does not apply to projects for domestic clients.</p> <p>If Customer fails to pay on time then provided Contractor goes through the procedures in the Contract he can take the Customer to adjudication or the courts or end the contract (following written notice etc).</p> <p>VAT is included in all prices, rates, certificates etc.</p> <p>No allowance for increases in taxes or for inflation in JCLI HLC/C.</p>
<p>Failure to Perform</p> <p>Customer: What happens if the Contractor turns out to be useless – can I get rid of him and get the job done by someone else – what if it costs me more to get it finished if I use someone else?</p> <p>All parties: Must not be unreasonable, vexatious etc.</p>	<p>Customer can end the contract (written notice etc); then tender the remaining work and appoint lowest, any additional cost charged to original contractor, Last resort, problematic. Take legal advice before ending the contract</p> <p>Don't pay for work not done, including not paying for work not done properly.</p>
<p>Disputes</p> <p>Customer / Contractor What happens if we get into a dispute and are unable to agree a resolution between ourselves?</p>	<p>Consultant has a role in trying to resolve issues and trying to prevent them escalating into disputes. The objective should be to avoid disputes because they cost everyone concerned a lot of money and rarely does anyone win (only the legal professions get rich). Resolve all issues as early as possible and don't let them fester. The construction industry has traditionally been adversarial and it is an easy rut to fall into!</p> <p>Customers for domestic projects have the right to take disputes to court but the JCLI HLC/C includes the option of adjudication using the procedure administered by RIBA/RICS/NSCC which has been set up for the JCT Homeowner Building Contract.</p>

	<p>If the parties agree mediation or similar dispute resolution systems can be used to get the parties to agree a compromise (generally cheaper and does not impose a settlement on the parties).</p>
<p>Ending the contract</p> <p>Customer What if I change my mind shortly after signing the contract? Can I end the contract if the Contractor is useless or becomes insolvent?</p> <p>Contractor Can I end the contract if the Customer continually hinders me doing the work, or fails to pay, or becomes insolvent? What happens if the Consultant fails to perform his duties?</p>	<p>Consumers acting in a personal capacity have the right to cancel a contract within 7 days of signing it and this is included in JCLI HLC/C. The Contractor will only be paid for anything he has done in the 7 days if he has written instruction from the Customer to do it before the end of the 7 day period. Otherwise, the Contractor should not be expected to do anything until 7 days after the contract is signed.</p> <p>The Customer can end the contract if the Contractor fails to perform (various ways stated) and no further payment is made until after the work has been completed by another contractor. Requires a written warning to the Contractor and no subsequent action for 7 days then a written notice ending the contract.</p> <p>The Contractor can end the contract if the Customer fails to pay or obstructs the Contractor (with written warning, 7 days of no action then written notice). If the Contractor ends the contract then the Customer must pay for the work done.</p> <p>If the Consultant fails to perform it is the Customer's responsibility to sort it out. The Contractor can end the contract (by written notice) after 7 days of inaction after reporting the Consultant's failure to the Customer in writing.</p> <p>The contract ends if either the Customer or Contractor become insolvent, unless insolvency practitioner arranges for the work to continue.</p>