



## **CONTRACT GROWING GUIDANCE**

### **Guidance on the conditions of contract and other issues concerning the contract growing of plant material by nursery growers for their clients**

#### **1 Introduction**

- 1.1 Contract growing is the advance ordering of nursery stock so that the nursery grower can propagate and grow, or grow-on, the required plant material for a project and deliver to the required location at the required time at the specified size and in compliance with other specified requirements. The JCLI Contracts Forum members recommend the use of contract growing in all circumstances where there is adequate time for it to be practical.
- 1.2 This document is an update of the previous guidance on contract growing that was produced by the landscape industry, which was the CPSE/JCLI Guidance for the Advance Ordering or Contract Growing of Hardy Nursery Stock published by HTA in January 1999. Since then procurement direct by the public sector has declined and most of their requirements are now provided through landscape construction or maintenance contractors. Also, procurement in the construction industry has evolved considerably and much more complex procurement methods have become common for larger projects (for example, PFI, Early Contractor Involvement (ECI), Innovative Contractor Engagement (ICE)) and design-and-build has become prevalent for many smaller projects. However, most landscape only projects are still procured using the traditional method. With the adoption of more complex procurement, which often distances the landscape designer from the client, contract growing has not been widely adopted, despite it being most appropriate for large projects. However, there have been notable exceptions like the Olympic Park and HS1.
- 1.3 Contract growing has many advantages to both the client and the grower and the JCLI Contracts Forum believe that contract growing should be adopted on a much wider scale to give:
- more economical plant production and establishment;
  - reliable supply arrangements for the client;
  - better quality stock of the right species and the right size, at the right time;

- increased flexibility in relation to the project programme;
- protection of the planting design concept and budget for the plants from an early stage of the project;
- plants produced in accordance with best practice in the nursery industry, including the production of plants in sustainable growing media and improved phytosanitary and plant biosecurity procedures to limit the spread of undesirable pests and diseases (including quarantine for imported plants);
- improved planning, detailed planting design, quality of completed projects and speed of establishment;
- greater stability and confidence in the nursery industry if contract growing is adopted more widely;
- increased opportunity for 'local provenance' plant material where relevant.

1.4 To achieve these benefits there must be early commitment and planning of the planting, often at the stage when other details of the project are still undecided. However, detailed planting plans are frequently required for Planning Permission and are therefore produced early in project programmes. Additionally, many larger projects have long lead-in times before construction starts and also often a year or more from the start of the construction contract until some or all of the plants are needed on site. Such timescales mean that contract growing is viable provided it is planned at an early stage. Some types of plant are already regularly grown to order for landscape contractors (for example, aquatic/marginal plants, wildflower plug plants, bedding plants). As a general rule, a contract growing contract for hardy nursery stock should be signed at least 12 months in advance of the planned planting date, i.e. for planting in the traditional planting season, in the December prior to the next planting season. However, if the plants required take longer than a year to produce from propagation to the size required, or there are unusual species, special forms or mature plants required, then the contract growing contract should be arranged as early as possible in order to achieve maximum advantage. Early discussions with appropriate nurseries are advisable to ascertain what growing periods are appropriate and possible within the overall project programme. Specifying container grown plants (including trees) should be considered because it enables greater programming flexibility.

1.5 Clients may, quite understandably, be reluctant to let the contract so early in the development of a major project. However, in most cases the costs of the plants are very low compared with the total construction budget and the financial risks are minimal in relation to the potential benefits. Indeed, the risks of speculative buying at a later stage are much greater in terms of the quality of the completed project. Additionally, it is possible to arrange the contract growing contract to produce the bulk of the plants required from the beginning of the contract with a subsequent addition of additional plants at a later date (and if necessary omissions, see 4.2 below).

- 1.6 Although a number of different bespoke contracts have been used for contract growing, there is not a recognised standard form of contract or a model set of contract conditions. The JCLI Contracts Forum may in future produce a Standard Form Contract for Contract Growing and a Standard Vesting Agreement to create contract conditions which are fair for all parties, accommodate varying contractual circumstances, normalise the contract conditions for contract growing and save everyone concerned time and money if they chose to use the Standard documents.
- 1.7 Terminology can be very confusing when the same word is used for different purposes. For example, the term 'contractor' is used by many clients to mean any supplier of goods or services to them and hence a nursery, consultant and stationery supplier are all contractors. Similarly the term 'client' is often used to mean anyone being supplied with goods or services (also sometimes called the 'employer') although 'client' is also used to refer to the overall client for the project. This means that the client of a contract may actually be a contractor or a sub-contractor in the supply chain for the total project (or even a sub-sub-contractor ...). The meaning of such terms in this document is as follows:
- contractor: the party supplying goods or services under a contract;
  - nursery: the contractor growing and supplying plants;
  - landscape contractor: the contractor with a contract to plant the plants at the site of the project for which the nursery has supplied them;
  - main contractor: the contractor with a contract to build all or part of a project who, if not the landscape contractor, appoints the landscape contractor as a sub-contractor;
  - landscape designer: the contractor with a contract to advise his client, which includes advising on contract growing and monitoring (or for some contract growing contracts, administering) the contract growing contract. This role may be undertaken by a landscape architect, horticulturalist, garden designer or other organisation or person with suitable qualification and experience;
  - client: the party receiving goods or services under a contract, often called the employer in contract documents;
  - main client: the Authority, landowner, developer or similar who commissions the whole project.
- 1.8 The notes below are some recommendations on what the JCLI Contracts Forum consider should be included in any contract growing contract. The notes have been prepared as guidance only and are not designed to be used as part of a formal contract and do not cover all of the conditions that may have to be included.

## 2 The parties to the contract

2.1 Major development projects are likely to involve a large number of organisations with a wide range of roles, but there are generally only two parties to any contract or sub-contract. The most relevant organisations involved in contract growing are the following (although not all of them may exist or be relevant for any particular project):

- the main client, who may or may not be the client for the contract growing contract;
- the main contractor, who might be the client for the contract growing contract and/or might be the landscape contractor, (or neither);
- the landscape sub-contractor, who might be the client for the contract growing contract;
- the nursery;
- the professional advisers (for example, project manager, architect/engineer and various specialists including a landscape designer).

Some projects may have longer supply chains where there are one or more organisations between the main contractor and the main client. In all situations where the contract is not directly between the main client and the nursery the contract growing specification requirements must be included in the contracts of all the intermediaries.

There may be other stakeholders with interests in the project and associated contracts and sub-contracts, for example, funders, landowners (if not the main client), tenants (where the main client is a developer). This may involve the requirement for collateral warranties from the contractors and some sub-contractors (possibly including the nursery).

2.2 For sound business and practical reasons it is ideal if any contract growing contract is set up directly between the main client and the nursery, by or with the advice of the landscape designer. Ideally the contract growing contract will be arranged between the main client and the nursery before the other organisations in the landscape supply chain are appointed. In this case the contract documents for the others can include appropriate details about the contract growing contract, including the name of the nursery and the scope of the contract growing contract. This will enable them to make any appropriate allowances and forward plan for working with the nursery. For some projects it might be appropriate for the contract growing contract to be initially between the main client and the nursery and subsequently novated from the main client to the main contractor when the main contractor has been appointed.

2.3 When a contract growing contract is not between the main client and a nursery, all organisations in the project supply chain that are between the main client and the nursery must be advised and provided with appropriate details concerning the requirements for contract growing in their contracts. It is only appropriate for the landscape contractor to be the client for the contract growing contract if there is a long construction period before the plants are needed on site, which means that

when the landscape contract is a sub-contract the main contractor's contract must require very early appointment of the landscape sub-contractor.

- 2.4 In all situations the selection of the nursery should normally be on the basis of three or four competitive tenders from carefully selected nurseries (or more for high value contracts). The selection process may include the inspection of nurseries and the assessment of tenders should be on the basis of quality as well as cost. In the situation where a landscape or other contractor is the client for the contract growing contract either, the selected nursery should be nominated in the contract documents or, a list of three or four appropriate nurseries should be included for the landscape contractor to choose from and ideally the landscape designer should be involved in the assessment of the tenders from the nurseries.
- 2.5 It is common practice to use collaborative contracts and/or partnering agreements in the construction industry and any such project requirements should extend to the contract growing contract. Even if the project does not require collaboration it is advisable for it to be a requirement of any contract growing contract due to the nature of the work and the supply of living material.

### **3 Main contractual headings**

3.1 The client will (with the assistance of the landscape designer):

- clearly specify the plants required in the contract documents using the National Plant Specification terminology and plant list format. The National Plant Specification is available at <http://www.gohelios.co.uk/nps/nps.aspx>, comprising the specification terminology sections (free) with plant lists (subscription);
- clearly specify any special requirements such as the size of any bought in material, sizes at the key stages in the growing programme and any specific pruning or training;
- pay for the plants as set out in the schedule of payments in the contract documents. This may include stage payments if the contract period is more than a year, or it is envisaged that the nursery will have to make considerable investment to achieve the contract due to its size, or if the nursery has to buy in substantial quantities of plant material;
- accept and care for the plants once they are delivered. (If appropriate the responsibility for arranging delivery and accepting plants on delivery is sometimes passed to the contractor.)

3.2 The nursery will:

- grow and supply the plants in accordance with the specification;
- clearly identify the plants that are destined for the client, provide monthly reports with photographs and allow the plants to be inspected at any reasonable time by the client and/or landscape designer. (A schedule of

dates for procurement or propagation of the material and of formal inspections at critical stages in the growing cycles may be included in the contract specification or may be required from the nursery for agreement with the client.);

- deliver the plants to the client's site according to the delivery schedule in the specification and attend upon the landscape or other contractors to ensure a smooth handover of the plants;
- ensure that all the plants are handled in accordance with the relevant parts of the JCLI Recommendations for the Handling and Establishment of Landscape Plants (1995 edition), which is available free as part of the National Plant Specification at [http://www.gohelios.co.uk/nps/handling\\_establishment.aspx](http://www.gohelios.co.uk/nps/handling_establishment.aspx).

#### **4 Modifications, delays or omissions**

- 4.1 If the client declines or delays to accept the plants, other than for failure to meet the specification, additional payments will become due to the nursery to cover the cost of extra care and, for instance, the cost of growing on for another season. The extent of such extra costs should be quoted by the nursery at the time of tendering and included in the contract documents (for example, an additional percentage of the price of the plants per month, or part of a month, of delay).
- 4.2 If the client instructs the nursery that any plants specified in the contract are not required, the nursery should use their best endeavours to sell the plants within an agreed period and the client should pay the nursery any loss due to not achieving the price in the contract or being unable to sell the plants. Alternatively, before the contract is signed, the client and nursery could agree the final date(s) for cancellation and a percentage of the price in the contract which would be paid for plants cancelled thereafter.
- 4.3 In the event of the nursery failing to supply on time or to the specified quality or quantity, the client will be entitled to liquidated damages if an amount is stated in the contract, unless an extension of time has been granted by the client in respect of force majeure or exceptional weather conditions. The rate of such damages must be a reasonable pre-estimate of the client's financial loss due to late supply and be stated in the tender and contract documents as a sum per week or part thereof. Alternatively a bond might be used, see 5.2 below (third bullet point).
- 4.4 If the nursery is unable to supply part or all of the specified plants, it must, at its own expense, and subject to the agreement of the client, obtain and supply alternative material as close as is reasonably possible to the original specification. If the nursery is unable or unwilling to do so the client may buy the material elsewhere and charge the extra costs against any sums that are due to the nursery (or recover as a debt as appropriate).
- 4.5 If agreed alternatives are not available, the contract sum may be adjusted accordingly.

## 5 Other issues to consider

- 5.1 Both the nursery and the client should be able to terminate the contract, after giving proper notice, if the other party becomes insolvent or fails to abide by the conditions of the contract, for example, if scheduled payments are not forthcoming or the plants are not being properly grown or cared for by the nursery. If termination is due to failure of either party contracts usually include terms to ensure the other party is able to recover any loss resulting from the termination.
- 5.2 Many clients are concerned that if payments are made for plants that have not already been delivered then, if the nursery goes into liquidation the money or plants will not be recovered. There are several options to resolve this issue, and in some situations more than one option may be used (for example, a vesting agreement and a bond):
- Do not include payment for plants that have not been delivered. However, this is only appropriate for contracts of less than 12 months and of small value (in comparison to the turnover of the nursery).
  - A Vesting Agreement is signed by the main client and the nursery and all intermediaries in the supply chain (if any) so that payment can be made for plants in the nursery and the main client has the legal title to the plants.
  - The nursery provides a bond to cover any loss either due to insolvency or other failure to complete the contract. This is sometimes not a viable option.
  - The area of the nursery where the plants are grown is leased to the client (with a right of access) and the plants owned by the client. This alternative will only be appropriate for very large projects or where a client is contract growing plants for many projects.
- 5.3 The contract should include fair terms for payment, for example: the nursery invoices in accordance with the agreed schedule of payments; the client pays within 14 days of the date of a correct VAT invoice; any deductions by the client are advised (giving reasons) to the nursery before the scheduled invoice date; simple interest on late payments at 8% over base rate; rights concerning dispute resolution mechanisms (see 5.4 below), to suspend work, and to terminate (see 5.1 above).
- 5.4 The success of any contract growing contract depends on collaboration and communication between the parties concerned. Most failures arise due to inadequate collaboration and communication and frequently end in dispute (and everyone loses). The contract conditions should include requirements for collaboration and mechanisms for early resolution of issues by directors as well as the usual escalating mechanisms to resolve disputes (for example, mediation, adjudication and the pre-selected option of arbitration or courts)

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

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