

Bill No. 388
2021

By-law No. A.-

A by-law to authorize and approve an Agreement between Envirosuite Canada Inc. and The Corporation of the City of London and to authorize the Mayor and the City Clerk to execute the Agreement.

WHEREAS section 5(3) of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, provides that a municipal power shall be exercised by by-law;

AND WHEREAS section 9 of the *Municipal Act, 2001*, S.O. 2001, c. 25, as amended, provides that a municipality has the capacity, rights, powers and privileges of a natural person for the purpose of exercising its authority under this or any other Act;

AND WHEREAS it is deemed appropriate for The Corporation of the City of London (the "City") to enter into an Agreement with Envirosuite Canada Inc. for the procurement of air and odour monitoring equipment and technical reporting with respect to the W12A Landfill and the City's participation in the South London Air Monitoring Network Pilot Project as proposed by the Ministry of the Environment, Conservation and Parks;

AND WHEREAS it is deemed appropriate to authorize the Mayor and the City Clerk to execute the Agreement on behalf of the City;

NOW THEREFORE the Municipal Council of The Corporation of the City of London enacts as follows:

1. The Agreement between The Corporation of the City of London and the Envirosuite Canada Inc., attached as Schedule A to this by-law, is hereby authorized and approved.
2. The Mayor and the City Clerk are hereby authorized to execute the Agreement authorized and approved under section 1 of this by-law.
3. This by-law shall come into force and effect on the day it is passed.

PASSED in Open Council September 14, 2021.

Ed Holder
Mayor

Catharine Saunders
City Clerk

First Reading – September 14, 2021
Second Reading – September 14, 2021
Third Reading – September 14, 2021

SCHEDULE A

ENVIROSUITE SERVICE TERMS ("AGREEMENT")

1 Service

1.1 Parties

Envirosuite ("the Supplier") will provide the Services to the Customer set out in the Order Form ("Customer") on the terms of this Agreement.

1.2 Acceptance

Any use or access of the Services by the Customer constitutes acceptance of this Agreement.

1.3 Right to Use

The Supplier grants to the Customer a world-wide, non-exclusive, non-transferable right to use the Services and the Documentation for its internal business purposes.

2 Term

2.1 Initial Term

This Agreement commences on the Commencement Date and continues for the Initial Term unless otherwise terminated in accordance with the Agreement.

2.2 Extension

This Agreement will automatically extend for a further period of 12 months upon each anniversary of the Commencement Date unless either party provides at least 30 days prior notice. The Supplier will provide the Customer with reasonable notice of any changes to the pricing for the Services.

2.3 Change to Services

The Customer may request a change to the modules and scope of Services. In the event that pricing and scope of Services is agreed between the parties in writing, this Agreement will automatically apply to any such changes

3 Use of Subscription Services

3.1 Customer Obligations

The Customer must:

- a. comply with all applicable laws, regulations, licences, in relation to the Services;

- b. ensure that the Customer Data that resides on, and is transmitted and received via the Services does not infringe any Intellectual Property rights of a third party or breach any privacy laws;
- c. not use the Services to store or transmit any viruses or other malicious code;
- d. provide industry standard virus protection mechanisms for its applications;
- d. keep all account identification and log-in information, including passwords, secure and confidential to prevent unauthorised access to or use of the Services and promptly notify Supplier of any unauthorised access or use;
- e. use the Services only for its internal business purposes and not purport to re-sell or licence the Services;
- f. comply with all reasonable and lawful directions of Supplier; and
- g. ensure that any Authorised Users are properly trained in the use of the Services.

3.2 Suspension

The Supplier will have the right to suspend the Customer's access to the Services to prevent or mitigate damage to the Services or the systems of the Supplier.

4 Intellectual Property Rights

4.1 Ownership and use of Intellectual Property Rights

The parties agree that other than as provided in this clause 4 (Intellectual Property Rights), nothing in this Agreement transfers ownership in, or otherwise grants any rights in, any Intellectual Property Rights of a party.

4.2 Ownership in Services

In using the Services the Customer does not obtain any ownership or interest in the Services and the Customer acknowledges that the Supplier holds all Intellectual Property rights in the Services, including in any upgrade, enhancement or modification of the Services under this Agreement.

4.3 Data

The Supplier acknowledges that the Customer is the owner of the Intellectual Property Rights in the Customer Data. The Customer provides the Supplier with a

license to use the Customer Data to provide the Services.

4.4 Related Services

The Supplier will irrevocably and unconditionally assign to the Customer on payment, any Customer Specific New Material.

5 Warranties

5.1 Compliance with Specifications

The Supplier warrants that the Services will materially comply with the Specifications and the Documentation when used in accordance with this Agreement.

5.2 Changes to the Services

The Supplier may make changes, modifications or enhancements to the Services and the Documentation upon reasonable notice to the Customer.

5.3 Implied Warranties

If the Supplier is in breach of any non-excludable condition or warranty implied by any statute or law, the Supplier's liability is limited to:

1. where Supplier has supplied Services, the cost of having the Services supplied again; and
2. where the Supplier supplied Equipment, the repair or replacement of the Equipment or the supply of equivalent Equipment.

5.4 Disclaimer

Except as expressly provided in the Agreement, neither the Supplier nor its subcontractors make any representation or warranties, express or implied, statutory or otherwise, regarding any matter, including the merchantability, suitability, originality, or fitness for a particular use or purpose, non-infringement or results to be derived from the use of the Services provided under the Agreement, or that the operation of the Services will be secure, uninterrupted or error free.

6 Confidentiality

6.1 Treatment of Confidential Information

Each party undertakes to keep the Confidential Information of the other party secret and to protect and preserve the confidential nature of all Confidential

Information.

6.2 Use of Confidential Information

A Recipient may only use the Confidential Information of the Discloser for the purposes of performing the Recipient's obligations or exercising the Recipient's rights under this Agreement.

6.3 Disclosure of Confidential Information

A Recipient may not disclose Confidential Information of the Discloser to any person except to:

- a. Representatives of the Recipient who require it for the purposes of the Recipient performing its obligations or exercising its rights under this Agreement and then only on a need to know basis;
- b. with the prior written consent of the Discloser;
- c. if the Recipient is required to do so by law or a stock exchange; or
- d. if the Recipient is required to do so in connection with legal proceedings relating to this Agreement.

6.4 Disclosure by Recipient

A Recipient disclosing information under clause 6.3(a) or clause 6.3(b) must ensure that persons receiving Confidential Information are aware it is the other party's Confidential Information and not to disclose the information except in the circumstances permitted in clause 6.3.

6.5 Return of Confidential Information

Subject to clause 6.6, on the Discloser's request, the Recipient must, deliver to the Discloser or destroy, all documents or other materials containing or referring to the Discloser's Confidential Information in the Recipient's possession, power or control; or in the possession, power or control of persons who have received Confidential Information from the Recipient under clause 6.3(a) or clause 6.3(b).

6.6 Exceptions

The obligation in clause 6.5 does not apply to Confidential Information of the Discloser that the Recipient requires in order to perform its obligations under this Agreement or is otherwise entitled to retain.

Nothing in clause 6 prevents or restricts the Customer from using or disclosing Customer

Specific New Material, upon assignment thereof to the Customer pursuant to clause 4.4.

7 Fees & Taxes

7.1 Fees

The Supplier must provide the Services for the applicable Fee.

7.2 Fees inclusive of Taxes

All Fees exclude Taxes, whether increased, new or additional amounts and all freight, insurance, delivery and other expenses which may be incurred.

7.3 GST

- a. Unless otherwise expressly stated in this Agreement, prices or other sums payable or consideration to be provided under or in accordance with this Agreement are exclusive of GST.
- b. If a party makes a taxable supply under or in connection with this Agreement, the other party must pay to the supplier at the same time, and in addition to the GST-exclusive consideration, an amount equal to the GST payable on that supply.
- c. The supplier must, as a precondition to the payment of GST under clause 7.3(b), give the other party a tax invoice.
- d. If an adjustment event arises in connection with a supply made under this Agreement, the supplier must give the other party an adjustment note.
- e. If this Agreement requires one party to pay for, reimburse or contribute to any expense, loss or outgoing suffered or incurred by the other party, the amount required to be paid, reimbursed or contributed by the first party will be reduced by the amount of input tax credits (if any) to which the other party is entitled in respect of the reimbursable.

8 Invoicing and payment

8.1 Payment

- a. Customer will pay each invoice within thirty (30) days
- b. If Customer considers that an invoice is not correctly rendered, then Customer will notify the Supplier in writing setting out the

reasons why Customer considers that the invoice is not correctly rendered and identifying any amounts which are in dispute.

8.2 Invoice

For the purposes of this Agreement, an invoice is not correctly rendered unless:

- a. the amount specified in the invoice is correctly calculated in accordance with this Agreement; and
- b. the amount claimed in the invoice is due for payment.

9 Equipment

9.1 Equipment Supply

The Supplier will provide the Equipment as set out in an Order Form.

9.2 Title and risk

Title for any Equipment provided as managed Service will remain with the Supplier. The risk of loss or damage to the Equipment passes to Customers on the date the relevant Equipment is delivered to the delivery address. The Customer will ensure that the Equipment is covered by sufficient insurance to cover the full replacement value of the Equipment. The Customer will provide to the Supplier evidence of insurance coverage upon request by the Supplier.

11 Liability and indemnity

11.1 Liability

Subject to clause 11.2 (No limitation):

- a. neither party will be liable to the other party under or in respect of this Agreement for any Consequential Loss arising from negligence or breach of contract;
- b. the aggregate liability of either party whether in contract, tort (including negligence), statute or any other cause of action (other than the obligation to pay Fees) is limited to the amount paid by the Customer to the Supplier in the 12 months prior to the cause of action arising.

11.2 No limitation

Nothing in this Agreement operates to limit or exclude:

- a. liability that cannot be limited or excluded by law;

- b. Either party's liability in respect of the indemnity in clause 11.3 or 11.6; and
- c. Either party's liability resulting from its fraudulent or unlawful act or omission or any act or omission that results in personal injury, death or property damage.

11.3 Indemnity

- a. Supplier will defend Customer against claims brought by any third party alleging that Customer's use of the Services infringes any Intellectual Property Rights.
- b. The Supplier's obligations under Clause 11.3(a) will not apply to the extent the claim results from:
 - i. Customer's breach of the Agreement; or
 - ii. use of the Services in conjunction with any product or service not provided or recommended by the Supplier.
- c. In the event a claim is made or likely to be made, the Supplier may:
 - i. procure for Customer the right to continue using the Services under the terms of the Agreement, or
 - ii. replace or modify the Services to be non-infringing without material decrease in functionality.

11.4 Notification of a Claim

Customer will notify the Supplier in writing promptly after becoming aware of any Claim which might give rise to an indemnity by Supplier under clause 11.3 .

11.5 Customer obligations

In respect of any Claim notified under clause 11.4, Customer will provide the Supplier with reasonable assistance in conducting the defence of the Claim.

11.6 Customer and Supplier Indemnity

Each party will indemnify the other for any loss suffered by the other party or its Representatives, due to their negligence or breach of this Agreement.

11.7 Contribution

Any amount claimed by either party pursuant to the indemnities in clause 11.3 or 11.6 will be reduced proportionally to the extent the loss, damage, liability, claim or expense is directly caused by the negligence

or breach of this agreement of the other party or its Representatives.

12 Termination

12.1 Termination for cause

Either party may terminate in whole or in part this Agreement immediately by giving notice in writing to the other party if:

- a. the other party commits a breach of this Agreement and the breach is incapable of remedy;
- b. the other party commits a breach of this Agreement that is capable of remedy and does not rectify that breach within 7 Business Days of first party issuing a notice of the breach; or
- c. a party is Insolvent.

12.2 Termination for Convenience

After the Initial Term, the Customer may terminate this Agreement on 30 days' notice without cause.

12.3 No other right of either party to terminate.

Other than as set out in this Agreement neither party may terminate any Order Form or this Agreement.

13 Consequences of termination

13.1 Payments and obligations on expiry or termination

Upon termination of this Agreement or an Order Form by Customer under clause 12.1, the Supplier will reimburse the Customer for the unused portion of any Fees paid in advance by Customer. To avoid doubt, the Customer will have no right to be reimbursed the unused portion of any Fees paid in advance by Customer upon termination of this Agreement or an Order Form by Customer under clause 12.2.

13.2 Preservation of rights

- a. Termination of this Agreement for any reason does not extinguish or otherwise affect any rights or remedies of either party which arose prior to the time of termination, or the provisions of this Agreement which by their nature survive termination.
- b. Without limiting the above, clause 4 (Intellectual Property Rights), 6 (Confidentiality), 8 (Invoicing and payment), 11 (Liability and indemnity), 13

(Consequences of termination), 17 (Assignment), 18 (Governing law), 19 (General) and 20 (Interpretation) survive termination of this Agreement.

14 Force majeure

14.1 Effects of Event

A party does not breach this Agreement and is not liable to the other party for a delay or failure to perform an obligation to the extent it results from a Force Majeure Event.

14.2 Obligation of affected party

The party affected by the Force Majeure Event must notify the other party of the Force Majeure Event as soon as reasonably practicable and must take all reasonable steps to limit the effects of Force Majeure Event.

14.3 Termination

If a Force Majeure Event occurs and its effect continues for a period of 20 Business Days, the Services affected by the Force Majeure Event may Be terminated at any time thereafter by either party giving written notice to the other party.

15 Notices

15.1 Form

Unless expressly stated otherwise in this Agreement, all notices, certificates, consents, approvals, waivers and other communications in connection with this Agreement must be in writing, signed by the sender (if an individual) or a person appointed as an authorised officer of the sender and marked for the attention of the person identified by the other party as the contact person or, if the recipient has notified otherwise, then marked for attention in the way last notified.

15.2 Delivery

A communication must be:

- a. Left or mailed to the address notified by the recipient;
- b. sent by email to the email address notified by the recipient; or
- c. given in any other way permitted by law.

15.3 When effective

1. A communication will take effect from the time it is received unless a later time is specified.

2. If sent by post, a communication is taken to be received three days after posting (or seven days after posting if sent to or from a place outside Australia).
3. If sent by email, when the sender receives an automated message confirming delivery; or 30 minutes after the time sent (as recorded on the device from which the sender sent the email) unless the sender receives an automated message that the email has not been delivered, whichever happens first.

16 Disclosure or Promotion of this Agreement

The Customer agrees that the Supplier may from time to time disclose certain details regarding this Agreement (including but not limited to, the Customer's name, the Fees and a description of this Agreement):

1. as required by any stock exchange or law; or
2. for promotional purposes on the Supplier's website, in promotional materials, press releases or other documents. The Customer will have the opportunity to approve, in advance, any promotional material that will be posted by the Supplier involving this agreement.

17 Assignment

17.1 Consent

Subject to clause 17.2, Neither party can assign, transfer, novate, encumber or otherwise deal with all or part of its rights or obligations under this Agreement without the other party's prior written consent.

17.2 Void Assignments

Any purported assignment, transfer, novation or other dealing with the rights under this Agreement that does not comply with clause 17.1 is void and has no effect.

18 Governing law

This Agreement is governed by the law in force in the Province of Ontario, Canada. Each party submits to the non-exclusive jurisdiction of the courts of that place.

19 General

19.1 Discretion in exercising rights

A party may exercise a right or remedy or give or refuse its consent in any way it considers appropriate (including by imposing conditions), unless this Agreement expressly states otherwise.

19.2 Partial exercising of rights

If a party does not exercise a right or remedy fully or at a given time, the party may still exercise it later.

19.3 No liability for loss

A party is not liable for loss caused by the exercise or attempted exercise of, failure to exercise, or delay in exercising a right or remedy under this Agreement.

19.4 Approvals and consents

By giving its approval or consent a party does not make or give any warranty or representation as to any circumstance relating to the subject matter of the consent or approval

19.5 Remedies cumulative

The rights and remedies provided in this Agreement are in addition to other rights and remedies given by law independently of this Agreement.

19.6 Rights and obligations are unaffected

Rights given to the parties under this Agreement and the parties' liabilities under it are not affected by anything which might otherwise affect them by law.

19.7 Variation and waiver

A provision of this Agreement or a right created under it, may not be waived or varied except in writing, signed by the party or parties to be bound.

19.8 Indemnities

The indemnities in this Agreement are continuing obligations, independent from the other obligations of the Supplier under this Agreement and continue after this Agreement ends. It is not necessary for a party to incur expense or make payment before enforcing a right of indemnity under this Agreement.

19.9 Further steps

Each party agrees, at its own expense, to do

anything the other party asks (such as obtaining consents, signing and producing documents and getting documents completed and signed):

- a. to bind the party and any other person intended to be bound under this Agreement;
- b. to enable the party to exercise its rights; and
- c. to show whether the party is complying with this Agreement.

19.10 Prompt performance

If this Agreement specifies when the party agrees to perform an obligation, the party agrees to perform it by the time specified. Each party agrees to perform all other obligations promptly.

19.11 Construction

No rule of construction applies to the disadvantage of a party because that party was responsible for the preparation of, or seeks to rely on, this Agreement or any part of it.

19.12 Costs

The parties agree to pay their own legal and other costs and expenses in connection with the preparation, execution and completion of this Agreement and other related documentation except for stamp duty.

19.13 Entire agreement

This Agreement constitutes the entire agreement of the parties about its subject matter and supersedes all previous agreements, understandings and negotiations on that subject matter.

19.14 Severability

If the whole or any part of a provision of this Agreement is void, unenforceable or illegal in a jurisdiction it is severed for that jurisdiction. The remainder of this Agreement has full force and effect and the validity or enforceability of that provision in any other jurisdiction is not affected. This clause has no effect if the severance alters the basic nature of this agreement or is contrary to public policy.

19.15 No relationship

Nothing in this agreement will be taken to constitute the Supplier as an employee, agent, partner or joint venturer of Customer nor is the Supplier authorised to represent itself as acting, or to incur any obligation, on behalf of Customer.

20 Interpretation

20.1 Definitions

Authorised Users means the employees or contractors of the Customer who are entitled to use the Subscription Services.

Business Day means a day other than a Saturday, Sunday or public holiday in:

- a. the place of the Governing law; or
- b. where an obligation under this agreement is required to be performed in a particular place, that place.

Claim means any allegation, debt, cause of action, liability, claim, proceeding, suit or demand of any nature whatsoever arising and whether present or future, fixed or unascertained, actual or contingent whether at law, in equity, under statute or otherwise.

Commencement Date means the date specified under that heading in the Details. If there is no Commencement Date specified, then the Commencement Date is the date on which the last party executes this Agreement.

Confidential Information means:

- a. all confidential, non-public or proprietary information, regardless of how the information is stored or delivered, exchanged between the parties or their Representatives before, on or after the Commencement Date relating to the business, technology or other affairs of the Discloser of the information, including the details of the Services; and
- b. in the case of Customer, all Customer Data;

but does not include information:

- a. which is in or becomes part of the public domain other than through breach of this Agreement or an obligation of confidence owed to the Discloser; which the Recipient can prove by contemporaneous written documentation was;
- b. already known to it at the time of disclosure by the Discloser (unless such knowledge arose from disclosure of information in breach of an obligation of confidentiality); or
- c. independently developed by the Recipient without reference to the

Confidential Information of the Discloser; or

- d. which the Recipient acquires from a source other than the Discloser or any of its representatives where such source is entitled to disclose it on a non-confidential basis.

Consequential Loss means any indirect or consequential loss or damage which, although in the contemplation of the parties at the time they entered into this Agreement, is not a loss or damage which may fairly and reasonably be considered to arise naturally (that is, in the usual course of things) from the breach including, but not limited to, loss of profits, loss of data, loss of revenue, loss of opportunity or loss of goodwill.

Contract Representative means a person appointed by each party to be their representative for the purpose of managing this Agreement and any disputes arising under it.

Customer Data means all data, information, text, drawing or other material which is provided to the Supplier, or inputted into the Services, by the Customer.

Customer Specific New Material means any material created by the Supplier in the course of providing the Related Services that is based on or is a modification or enhancement of, the Customer Data.

Discloser means the party disclosing Confidential Information.

Documentation means any documentation provided by the Supplier which sets out the details of the Services.

Fee means the fee for the Services and any Equipment calculated in accordance with the Order Form.

Force Majeure Event means any of the following causes provided that they are outside the reasonable control of the affected party and could not have been prevented or avoided by that party taking all reasonable steps including:

Government Agency means any governmental, semi-governmental, administrative, fiscal, judicial or quasi-

judicial body, department, commission, authority, tribunal, agency or entity.

GST means any goods and services or value added tax.

A person is **Insolvent** if:

- a. it is (or states that it is) an insolvent under administration or insolvent;
- b. it is subject to any arrangement, assignment, moratorium or composition, protected from creditors under any statute or dissolved (in each case, other than to carry out a reconstruction or amalgamation while solvent on terms approved by the other parties to this Agreement); or an application or order has been made (and in the case of an application, it is not stayed, withdrawn or dismissed within 30 days), resolution passed, proposal put forward, or any other action taken, in each case in connection with that person, which is preparatory to or could result in any of (a), (b) or (c) above; or
- c. it is otherwise unable to pay its debts when they fall due; or
- d. something having a substantially similar effect to (a) to (d) happens in connection with that person under the law of any jurisdiction.

Initial Term means, unless stated otherwise in the Order Form, 12 months.

Intellectual Property Rights means all intellectual property rights including current and future registered and unregistered rights in respect of copyright, designs, circuit layouts, trade marks, trade secrets, know-how, confidential information, patents, invention and discoveries and all other intellectual property as defined in article 2 of the convention establishing the World Intellectual Property Organisation 1967.

Moral Rights means any moral rights including the rights described in Article 6b of the Berne Convention for Protection of Literary and Artistic Works 1886 (as amended and revised from time to time), being “droit moral” or other analogous rights arising under any statute that exist or that may come to exist, anywhere in the world.

Order Form means an order or proposal provided by the Supplier or the Reseller which sets out the details of the order to

which this Agreement applies.

Receiver includes a receiver or receiver and manager.

Recipient means the party receiving Confidential Information.

Related Services means the professional services agreed in an Order Form.

Representative of a party includes an employee, agent, officer, director, auditor, advisor, partner, consultant, contractor or sub-contractor of that party.

Reseller means an authorised reseller of the Supplier who has the direct relationship with the Customer.

Service Levels mean the Service Levels set out in the Documentation.

Services means all Subscription Services and Related Services required to be provided by the Supplier under this Agreement.

Subscription Services means the Software as a Service modules provided by the Supplier to the Customer as set out in the Order Form.

Taxes means taxes, levies, imposts, charges and duties (including stamp and transaction duties) imposed by any authority together with any related interest, penalties, fines and expenses in connection with them except if imposed on, or calculated having regard to, the net income of Supplier.

Term means the Initial Term as extended if applicable.

20.2 Headings

Headings are included for convenience only and are not to affect the interpretation of this Agreement.