

THE CORPORATION OF THE CITY OF PETERBOROUGH

BY-LAW NUMBER 08-161

BEING A BY-LAW TO AUTHORIZE THE EXECUTION OF AN AGREEMENT WITH LIMCAN WALKER LAKESHORE SERVICE EXPERTS, A DIVISION OF LENNOX CANADA INC.

THE CORPORATION OF THE CITY OF PETERBOROUGH BY THE COUNCIL THEREOF HEREBY ENACTS AS FOLLOWS:

1. That the Mayor and Clerk be hereby authorized to execute an agreement between the Corporation of the City of Peterborough and Limcan Walker Lakeshore Service Experts, a division of Lennox Canada Inc., in the form attached hereby as Schedule "A", and to affix the Seal of the Corporation thereto.

By-law read a first, second and third time this 6th day of October, 2008

(Sgd.) Henry Clarke, Deputy Mayor

(Sgd.) Leigh Doughty, Deputy Clerk

AGREEMENT dated the _____ day of _____, A.D. 2008

BETWEEN

THE CORPORATION OF THE CITY OF PETEBOROUGH
(the "City")

- AND -

**LIMCAN WALKER LAKESHORE SERVICE EXPERTS,
A DIVISION OF LENNOX CANADA INC.**
(the "Contractor")

WHEREAS the City has awarded T-38-08 High Efficiency Gas Piping Replacement Project – Various Locations (the "Project") to the Contractor;

AND WHEREAS the Contractor has agreed to provide its professional services to complete the Project in accordance with T-38-08;

NOW THEREFORE WITNESSETH that in consideration of the covenants contained herein, the City and the Contractor mutually agree as follows:

ARTICLE 1 – GENERAL CONDITIONS

1.1 Retainer

The City hereby retains the services of the Contractor in connection with the Project and the Contractor hereby agrees to provide the services described herein and in T-38-08 under the general direction and control of the City.

In this Agreement, the word Contractor means Limcan Walker Lakeshore Service Experts, a Division of Lennox Canada Inc. and any other professionals and other specialists as engaged by the City directly and whose names are party to this Agreement.

The Project, as more particularly described in T-3808, is for the removal of the existing black ABS exhaust vent piping and the supply and installation of new S636 vent piping for five (5) non-profit social housing providers involving the number of housing units identified in T-38-08 and any addendums thereto. Vent piping is for the high efficiency gas furnace and/or hot water heaters at each site. Each housing provider's included equipment is listed in **Attachment 1** to T-38-08.

1.2 Services

The services to be provided by the Contractor to the City for the Project are set forth in Article 2, as supplemented by Article 1.15, and by T-38-08 as such services are or may be changed, altered or added to under Article 1.5 are hereinafter called the "Services".

1.3 Payment

The City shall pay the Contractor in accordance with the payment schedule set forth in T-38-08 and in accordance with the terms and conditions set forth herein. (See Article 3.1 below)

1.4 Staff and Methods

The Contractor shall use current state of the art principles and shall skilfully and competently perform the Services and shall employ only skilled and competent staff who will be under the supervision of a senior member of the Contractor's staff with the approval of the City.

1.4 Records and Audit

- a. In order to provide data for the calculation of fees on a time basis, the Contractor shall keep a detailed record of the hours worked by and salaries paid to their staff employed for the Project.
- b. The City may inspect and audit the books, payrolls, accounts and records of the Contractor during regular office hours with respect to any item which the City is required to pay on a time scale or disbursement basis as a result of this Agreement.
- c. The Contractor, when requested by the City, shall provide copies of receipts with respect to any disbursement for which the Contractor claims payment under this Agreement.

1.5 Changes and Alterations and Additional Services

- a. The City, in consultation with the Contractor, may in writing, at any time after the execution of this Agreement, delete, extend, increase, vary or otherwise alter the Services required under this Agreement.
- b. In the event that the City increases the overall Services required, the City shall either, where appropriate, pay the Contractor for its additional fees and disbursements.
- c. In the event that the City decreases the overall Services required under this Agreement, the City may reduce the amounts prescribed, at its sole discretion, under Sub-article 3.1.

1.6 Suspension or Termination

The City may at any time by notice in writing to the Contractor suspend or terminate the services or any portion thereof at any stage of the Project. Upon receipt of such written notice, the Contractor shall perform no further Services other than those reasonably necessary to close out their Services. In such an event, the Contractor shall be entitled to payment for work related to the close out of services in accordance with Sub-article 3.1 for any of the Contractor's staff employed directly thereon.

1.7 Indemnification

The Contractor shall indemnify, save harmless and defend the City, their employees, officers and agents from and against all claims, actions, losses, expenses, costs or damages of every nature and kind whatsoever which the City, their employees, officers or agents may suffer as a result of the negligence of the Contractor, their employees, officers or agents in the performance of this Agreement.

1.8 Insurance

a. Comprehensive General Liability and Automobile Insurance

The Contractor shall maintain insurance for the duration of the contract. Coverage shall consist of a comprehensive policy of public liability and property damage insurance acceptable to the City in an amount not less than TWO MILLION DOLLARS (\$2,000,000.00) and automobile insurance for both owned and non-owned vehicles in an amount not less than TWO MILLIONS DOLLARS (\$2,000,000.00). The liability policy shall name the City as an additional insured thereunder and the Contractor shall forward proof of insurance as the City may direct. The said policy shall contain a cross-liability clause.

b. Change in Coverage

If the City requests to have the amount of coverage increased or to obtain other special insurance for the Project, then the Contractor shall endeavour forthwith to obtain such increased or special insurance at the City's expense.

It is understood and agreed that the coverage provided by these policies shall not be changed or amended in any way nor cancelled by the Contractor until thirty (30) days after written notice of such change or cancellations has been personally delivered to the City.

c. Prior to the commencement of the execution of the Project, the Contractor shall file a copy or certificate of such insurance policy or policies with the City. If the Contractor fails to provide or maintain the required insurance the City shall have the right to provide and maintain such insurance and give evidence to the Contractor. The Contractor shall pay the cost thereof to the City on demand or the City may deduct the amount which is due or may become due to the Contractor.

1.9 Assignment

Neither party may assign this Agreement without the prior consent in writing of the other.

1.10 Previous Agreements

This Agreement supersedes all previous agreements, arrangements or understandings between the parties whether written or oral in connection with or incidental to the Project.

1.11 Inspection

The City, or persons authorized by the City, shall have the right, at all reasonable times, to inspect or otherwise review the Services performed, or being performed, under the Project and the premises where they are being performed.

1.12 Publication

The Contractor agrees to obtain the consent in writing of the City before publishing or issuing any information regarding the Project.

1.13 Confidential Data

The Contractor shall not divulge any confidential information communicated to or acquired by them, or disclosed by the City in the course of carrying out the services provided for herein and no such information shall be used by the Contractor on any other project without the approval in writing of the City.

1.14 Time

The Contractor shall perform the Services expeditiously to meet the requirements of the City and shall complete any portion or portions of the services in such order as the City may require and the City shall have the right to take possession of and use any completed or partially completed portions of the Work notwithstanding any provisions expressed or implied to the contrary.

The City shall make any decisions which they are required to make in connection with the Project within a reasonable time so as not to delay the work of the Contractor.

1.15 Installation Schedule

The Contractor shall, within ten (10) business days of being awarded the contract, provide a schedule detailing the installation dates for each housing provider, including a date by which substantial and total completion shall be achieved. Any changes in the schedule are subject to approval by the City, such approval may be conditioned, withheld or delayed.

1.16 Monthly Reporting of Progress

When requested by the City, the Contractor shall provide a monthly report satisfactory in form and content to the City, acting reasonably, showing:

- a. The portion of the Services completed in the preceding month.
- b. Services completed to date.
- c. Remaining Services to be completed.

1.17 Federal and Provincial Requirements

The Contractor shall abide by all applicable Federal and Provincial Legislation and Regulations thereto as these may relate to, but not limited to, the employment of staff, compensation, Workplace Safety & Insurance Board (WSIB), etc.

1.18 Term of Project

It is acknowledged and agreed that the Term of the Project shall commence on the date the contract award is approved by City Council and end on December 19th, 2008.

1.19 Appendices

Appendix A – T-38-08, together with Proposal Submission, received by the City on 28 August 2008, prepared by, Limcan Walker Lakeshore Service Experts, a Division of Lennox Canada Inc. attached;

The Appendices supplement Article 2 ("Services to be Provided by the Contractor").

If any conflict exists between the Appendices and Article 2, the City shall, in first instance and in its sole discretion, act reasonably to resolve each such conflict. Failing agreement between the City and the Contractor, either party may refer such disagreement for arbitration, subject to the requirements of the **Arbitrations Act**.

1.20 Conflict of Interest

The Contractor shall disclose to the City prior to accepting an assignment, any potential conflict of interest. If such a conflict of interest does exist, the City may, at its discretion, withhold the assignment from the Contractor until the matter is suitably resolved.

ARTICLE 2 – SERVICES TO BE PROVIDED BY THE CONTRACTOR

2.1 Services and General Terms and Conditions to be satisfied by the Contractor pursuant to this agreement are outlined in subsections 6.1 to subsection 6.34 inclusive in T-38-08, in Attachments 1 through 4 inclusive as attached to T-38-08, and as set forth herein.

ARTICLE 3 – FEES AND DISBURSEMENTS

3.1 Basis of Payment

- a. The City shall pay the Contractor in accordance with the Bid Documents and Article 1.3 above on a lump sum basis inclusive of all fees and disbursements. Payment shall be made upon the substantial completion of the Services for each housing provider's total number of housing units. The ten percent (10%) hold-back shall be released upon the City being satisfied that any and all noted deficiencies have been addressed to the satisfaction of the City's Capital Planning Analyst.
- b. All time expended on this Project, whether in the Contractor's office, at the City's premises, or elsewhere, and including travel time, is included in the Bid Price and is subject to the Articles of this agreement.
- c. The Contractor must request and receive the written approval of the City before any additional services, not included in the original scope of work, are carried out.
- d. The Contractor shall submit an invoice to the City for all services completed for each of the housing providers. Payment of the invoice by the City will be made within thirty (30) days after the City has received the Contractor's invoice, and the work has been inspected and certified by the appropriate governing agency.

ARTICLE 4 – MISCELLANEOUS CLAUSES

4.1 Insurance And Workers' Compensation

- a. The Contractor shall provide, maintain, and pay for all insurance coverage and the duration of each insurance policy shall be from the date of commencement of the Project until the date of the final certificate for payment. Prior to commencement of the Project and upon the placement, renewal, amendment, or extension of all or any part of the insurance, the Contractor shall promptly provide the City with confirmation of coverage and, if required, a certified true copy of the policies certified by an authorized representative of the insurer together with copies of any amending endorsements.
- b. Without limiting the generality of the foregoing the Contractor, at its expense, shall be responsible for contributions required pursuant to the **Workplace Safety and Insurance Act** and other incidental expenses, and no extras will be allowed for such items.

4.2 Pure Economic Loss

Notwithstanding anything to the contrary in this Agreement, the City shall not be liable to the Contractor for any indirect or consequential damages or damages for pure economic loss.

4.3 Fines

The Contractor shall be liable for all fines and penalties however imposed upon the Contractor or the City as a result of any error, omission, wrongful act or negligence on the part of the Contractor or its agents, servants or officers, in the performance of the services required to complete the Project.

4.4 Failure to Comply and Late Payments

Failure of either party to enforce or insist upon compliance with any of the terms or provisions of this Agreement shall not constitute a general waiver or relinquishment of any such terms or provisions, but the same shall be and remain at all times in full force and effect.

4.5 Force Majeure

Save and except for the payment of any monies required hereunder, neither party shall be deemed to be in default of this Agreement where the failure to perform or the delay in performing any obligation is due wholly or in part to a cause beyond its reasonable control, including, but not limited to an act of God, an act of any federal, provincial, municipal or government authority, civil commotion, strikes, lockouts and other labour disputes, fires, floods, sabotage, earthquakes, storms, epidemics and an inability to perform due to causes beyond the reasonable control of the party. The party subject to such an event of force majeure shall promptly notify the other party of its inability to perform or of any delay in performing due to an event of force majeure and shall provide an estimate, as soon as practicable, as to when the obligation will be performed. The time for performing the obligation shall be extended for a period equal to the time during which the party was subject to the event of force majeure. Both parties shall explore all reasonable avenues available to avoid or resolve events of force majeure in the shortest time possible, but this requirement shall not oblige the party suffering the strike, lockout or labour dispute to compromise its position in such dispute.

4.6 Relationship of Parties

Nothing in this Agreement creates the relationship of principal and agent, employer and employee, partnership or joint venture between the parties. The parties agree that they are and will at all times remain independent and are not and shall not represent themselves to be the agent, employee, partner of, or in joint venture with, the other. No representations will be made or acts taken by either party which could establish any apparent relationship of agency, employment, partnership or joint venture and no party shall be bound in any manner whatsoever by any licenses, warranties or representations made by the other party to any other person nor with respect to any other action of the other party.

4.7 Notice

Any notice or other writing required or permitted to be given under this Agreement or for the purposes of it, to any party, shall be valid only if delivered in writing in accordance with this clause. Notices can be provided to:

In respect of the Contractor:

Name: Limcan Walker Lakeshore Service Experts, a Division of
Lennox Canada Inc.

Address: Mr. Ian Walker, General Manager
494 The Parkway, Unit 7B
Peterborough, ON K9J 7L9

Fax: 905.579.6636

In respect of the City:

Ms. Nancy Wright-Laking
City Clerk
City of Peterborough
500 George Street North
Peterborough, Ontario K9H 3R9

Fax: 705.742.3947

The Parties may change their respective addresses and addresses for delivery by delivering notices if such changes as provided below. Notice sent accordingly shall be deemed delivered and received:

- a. If delivered by hand, upon receipt;
- b. If delivered by facsimile, 48-hours after the time of transmission, excluding from the calculation weekends and public holidays;
- c. If delivered by overnight courier four (4) days after the couriating thereof; and
- d. If delivered by registered mail, six (6) days after the mailing thereof, provided that if there is a postal strike or lockout such notice shall be delivered by hand, courier or facsimile.

4.8 Severability

If any provision of this Agreement is declared invalid or unenforceable by any competent authority such provision shall be deemed severed and shall not affect the validity or enforceability of the remaining provisions of this Agreement, unless such invalidity or unenforceability renders the operation of this Agreement impossible.

4.9 Other Information

Each party shall at the other's party's request and expense execute and do all such further acts and things as may be necessary to carry out the full intent and meaning of this Agreement and the transactions contemplated thereby.

4.10 Counterparts

This Agreement may be executed in counterparts and the counterparts together shall constitute an original.

4.11 Reasonableness

Each party agrees that it shall at all times act reasonably in the performance of its obligations and the exercise of its rights under this Agreement.

4.12 Entire Agreement

This Agreement and any schedules and/or appendices attached hereto constitute the entire agreement between the City and Contractor with respect to the matters herein and supercede any and all prior oral or written representations and agreements. The City and the Contractor agree that each of them have received and thoroughly reviewed both Appendix "A" and Appendix "B" and that such appendices, whether attached hereto or not, form part of this agreement.

4.13 Ambiguities

The City and the Contractor agree and warrant that they have had the benefit of consultation with legal counsel prior to entering into this Agreement, such that all language herein, and in the appendices and/or schedules, shall be construed equally against the Parties, and the Contractor waives any right, claim, argument or defence that any language of this agreement should be construed strictly against the City.

4.14 Interpretation

Whenever a word importing the singular or plural is used in this Agreement, such word shall include the plural and singular respectively. Where any party is comprised of more than one entity, the obligations of each of such entities shall be joint and several. Words importing persons of either gender or firms or corporations shall include persons of the other gender and firms or corporations as applicable. Subject to the express provisions contained in this Agreement, words such as "hereof", "herein", "hereby", "hereafter and "hereunder" and all similar words or expressions shall refer to this Agreement as a whole and not to any particular article or portion hereof.

4.15 Headings

The Headings or captions of articles, sections or subsections used in this agreement are for convenience of reference only and are not intended to define or limit their contents, nor are they to affect the construction of or to be taken into consideration in interpreting this Agreement.

4.16 Consents and Approvals

Consents and approvals required under this agreement to be obtained from the City shall only be effective if given in writing by persons so authorized.

4.17 Approval by Other Authorities

Unless otherwise provided in this Agreement, where the work of the Contractor is subject to the approval or review of an authority, department of government, or agency other than the City, such applications for approval or review shall be the responsibility of the Contractor. Copies of all permits, inspection reports, and certificates of acceptance shall be provided to the City with each submitted invoice, failure to provide same may delay payment.

4.18 Day-to-Day Contact

For the purpose of taking direction concerning the performance of the Services, the Contractor shall contact the City's Capital Analyst at 742.7777 Ext 1440.

4.19 Certain Clauses to Survive

The Parties acknowledge and agree that the following articles, being Article 1.4, Articles 1.7 to 1.13 inclusive, Article 1.19, Articles 4.1 to 4.8 inclusive, Articles 4.10 to 4.15 inclusive, Article 4.18 and Article 4.19 shall survive the termination or expiry of this Agreement.

IN WITNESS THEREOF the parties hereto have caused to be executed those presents by their officers properly authorized in that behalf on the day and year first above written.

SIGNED, SEALED AND DELIVERED this _____ day of _____, 2008.

) **LIMCAN WALKER LAKESHORE**
) **SERVICE EXPERTS, A DIVISION**
) **OF LENNOX CANADA INC.**
)
)
) _____
) Signature of Authorized
) Official or Principal
)
) _____
) (Print Name and State Title)
)
) _____
) Signature of Authorized
) Official or Principal
)
) _____
) (Print Name and State Title)
) I/We have the authority to bind the Contractor
)
) **THE CORPORATION OF THE**
) **CITY OF PETERBOROUGH**
)
) _____
) D. Paul Ayotte, Mayor
)
) _____
) Nancy Wright-Laking, City Clerk