

## PROFESSIONAL SERVICES AGREEMENT

This Agreement ("Agreement") is entered into as of February 15, 2013 ("Effective Date") and will end on December 31, 2013, by and between the State of Delaware, Department of Natural Resources and Environmental Control, Office of the Secretary, Delaware Coastal Programs ("Delaware"), and Ocean Surveys, Inc., a solely US owned company, with offices at 129 Mill Rock Road East, Old Saybrook, CT, 06475 ("Ocean Surveys, Inc.").

WHEREAS, Delaware desires to obtain certain services to perform seabed and sub-bottom surveys of the Delaware Bay and near-shore Atlantic ocean; and

Ocean Surveys, Inc. desires to provide such services to Delaware on the terms set forth below;

WHEREAS, Delaware and Ocean Surveys, Inc. represent and warrant that each party has full right, power and authority to enter into and perform under this Agreement;

FOR AND IN CONSIDERATION OF the premises and mutual agreements herein, Delaware and Ocean Surveys, Inc. agree as follows:

### **1. Services.**

1.1 Ocean Surveys, Inc. shall perform for Delaware the services specified in the Appendices to this Agreement, attached hereto and made a part hereof.

1.2 Any conflict or inconsistency between the provisions of the following documents shall be resolved by giving precedence to such documents in the following order: (a) this Agreement (including any amendments or modifications thereto); (b) Delaware's request for proposals, attached hereto as Appendix A; and (c) Ocean Surveys, Inc.'s response to the request for proposals, attached hereto as Exhibit 1. The aforementioned documents are specifically incorporated into this Agreement and made a part hereof.

1.3 Delaware may, at any time, by written order, make changes in the scope of this Agreement and in the services or work to be performed. No services for which additional compensation may be charged by Ocean Surveys, Inc. shall be furnished without the written authorization of Delaware. When Delaware desires any addition or deletion to the deliverables or a change in the Services to be provided under this Agreement, it shall notify Ocean Surveys, Inc., who shall then submit to Delaware a "Change Order" for approval authorizing said change. The Change Order shall state whether the change shall cause an alteration in the price or the time required by Ocean Surveys, Inc. for any aspect of its performance under this Agreement. Pricing of changes shall be consistent with those established within

this Agreement.

1.4 Ocean Surveys, Inc. will not be required to make changes to its scope of work that result in Ocean Surveys, Inc.'s costs exceeding the current unencumbered budgeted appropriations for the services. Any claim of either party for an adjustment under Section 1 of this Agreement shall be asserted in the manner specified in the writing that authorizes the adjustment.

## **2. Payment for Services and Expenses.**

2.1 The term of the initial contract shall be from February 15, 2013 through December 31, 2013.

2.2 Delaware will pay Ocean Surveys, Inc. for the performance of services described in Appendix B, Scope of Services. The fee will be paid in accordance with the payment schedule attached hereto as part of Appendix C.

2.3 Delaware's obligation to pay Ocean Surveys, Inc. for the performance of services described in Appendix B, Statement of Services will not exceed the fixed fee amount of \$ 190,000. It is expressly understood that the work defined in the appendices to this Agreement must be completed by Ocean Surveys, Inc. and it shall be Ocean Surveys, Inc.'s responsibility to ensure that hours and tasks are properly budgeted so that all services are completed for the agreed upon fixed fee. Delaware's total liability for all charges for services that may become due under this Agreement is limited to the total maximum expenditure(s) authorized in Delaware's purchase order(s) to Ocean Surveys, Inc.

2.4 Ocean Surveys, Inc. shall submit monthly invoices to Delaware in sufficient detail to support the services provided during the previous month. Delaware agrees to pay those invoices within thirty (30) days of receipt. In the event Delaware disputes a portion of an invoice, Delaware agrees to pay the undisputed portion of the invoice within thirty (30) days of receipt and to provide Ocean Surveys, Inc. a detailed statement of Delaware's position on the disputed portion of the invoice within thirty (30) days of receipt. Delaware's failure to pay any amount of an invoice that is not the subject of a good-faith dispute within thirty (30) days of receipt shall entitle Ocean Surveys, Inc. to charge interest on the overdue portion at no more than 1.0% per month or 12% per annum. All payments should be sent to Ocean Surveys, Inc., 129 Mill Rock Road East, Old Saybrook, CT, 06475.

2.5 Unless provided otherwise in an Appendix, all expenses incurred in the performance of the services are to be paid by Ocean Surveys, Inc. If an Appendix specifically provides for expense reimbursement, Ocean Surveys, Inc. shall be reimbursed only for reasonable expenses incurred by Ocean Surveys, Inc. in the

performance of the services, including, but not necessarily limited to, travel and lodging expenses, communications charges, and computer time and supplies.

2.6 Delaware is a sovereign entity, and shall not be liable for the payment of federal, state and local sales, use and excise taxes, including any interest and penalties from any related deficiency, which may become due and payable as a consequence of this Agreement.

2.7 Delaware shall subtract from any payment made to Ocean Surveys, Inc. all damages, costs and expenses caused by Ocean Surveys, Inc.'s negligence, resulting from or arising out of errors or omissions in Ocean Surveys, Inc.'s work products, which have not been previously paid to Ocean Surveys, Inc..

2.8 Invoices shall be submitted to: Robert Scarborough, Delaware Coastal Programs, 5 East Reed Street, Suite 201, Dover DE, 19901.

### **3. Responsibilities of Ocean Surveys, Inc.**

3.1 Ocean Surveys, Inc. shall be responsible for the professional quality, technical accuracy, timely completion, and coordination of all services furnished by Ocean Surveys, Inc., its subcontractors and its and their principals, officers, employees and agents under this Agreement. In performing the specified services, Ocean Surveys, Inc. shall follow practices consistent with generally accepted professional and technical standards. Ocean Surveys, Inc. shall be responsible for ensuring that all services, products and deliverables furnished pursuant to this Agreement comply with the standards promulgated by the Department of Technology and Information ("DTI") published at <http://dti.delaware.gov/>, and as modified from time to time by DTI during the term of this Agreement. If any service, product or deliverable furnished pursuant to this Agreement does not conform to DTI standards, Ocean Surveys, Inc. shall, at its expense and option either (1) replace it with a conforming equivalent or (2) modify it to conform to DTI standards. Ocean Surveys, Inc. shall be and remain liable in accordance with the terms of this Agreement and applicable law for all damages to Delaware caused by Ocean Surveys, Inc.'s failure to ensure compliance with DTI standards.

3.2 It shall be the duty of the Ocean Surveys, Inc. to assure that all products of its effort are technically sound and in conformance with all pertinent federal, state and local statutes, codes, ordinances, resolutions and other regulations. Ocean Surveys, Inc. will not produce a work product that violates or infringes on any copyright or patent rights. Ocean Surveys, Inc. shall, without additional compensation, correct or revise any errors or omissions in its work products.

3.3 Permitted or required approval by Delaware of any products or services furnished by Ocean Surveys, Inc. shall not in any way relieve Ocean Surveys, Inc. of

responsibility for the professional and technical accuracy and adequacy of its work. Delaware's review, approval, acceptance, or payment for any of Ocean Surveys, Inc.'s services herein shall not be construed to operate as a waiver of any rights under this Agreement or of any cause of action arising out of the performance of this Agreement, and Ocean Surveys, Inc. shall be and remain liable in accordance with the terms of this Agreement and applicable law for all damages to Delaware caused by Ocean Surveys, Inc.'s performance or failure to perform under this Agreement.

3.4 Ocean Surveys, Inc. shall appoint a Project Manager who will manage the performance of services. All of the services specified by this Agreement shall be performed by the Project Manager, or by Ocean Surveys, Inc.'s associates and employees under the personal supervision of the Project Manager.

3.5 Designation of persons for each position is subject to review and approval by Delaware. Should the staff need to be diverted off the project for what are now unforeseeable circumstances, Ocean Surveys, Inc. will notify Delaware immediately and work out a transition plan that is acceptable to both parties, as well as agree to an acceptable replacement plan to fill or complete the work assigned to this project staff position. Replacement staff persons are subject to review and approval by Delaware. If Ocean Surveys, Inc. fails to make a required replacement within 30 days, Delaware may terminate this Agreement for default. Upon receipt of written notice from Delaware that an employee of Ocean Surveys, Inc. is unsuitable to Delaware for good cause, Ocean Surveys, Inc. shall remove such employee from the performance of services and substitute in his/her place a suitable employee.

3.6 Ocean Surveys, Inc. shall furnish to Delaware's designated representative copies of all correspondence to regulatory agencies for review prior to mailing such correspondence.

3.7 Ocean Surveys, Inc. agrees that its officers and employees will cooperate with Delaware in the performance of services under this Agreement and will be available for consultation with Delaware at such reasonable times with advance notice as to not conflict with their other responsibilities.

3.8 Ocean Surveys, Inc. has or will retain such employees as it may need to perform the services required by this Agreement. Such employees shall not be employed by Delaware or any other political subdivision of Delaware.

3.9 Ocean Surveys, Inc. will not use Delaware's name, either express or implied, in any of its advertising or sales materials without Delaware's express written consent.

3.10 The rights and remedies of Delaware provided for in this Agreement are in addition to any other rights and remedies provided by law.

#### **4. Time Schedule.**

4.1 The project must be completed by December 31, 2013.

4.2 Any delay of services or change in sequence of tasks must be approved in writing by Delaware.

4.3 In the event that Ocean Surveys, Inc. fails to complete the project or any phase thereof within the time specified in the Contract, or with such additional time as may be granted in writing by Delaware, or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this Agreement or any extensions thereof, Delaware shall suspend the payments scheduled as set forth in Appendix C.

#### **5. State Responsibilities.**

5.1 In connection with Ocean Surveys, Inc.'s provision of the Services, Delaware shall perform those tasks and fulfill those responsibilities specified in the appropriate Appendices.

5.2 Delaware agrees that its officers and employees will cooperate with Ocean Surveys, Inc. in the performance of services under this Agreement and will be available for consultation with Ocean Surveys, Inc. at such reasonable times with advance notice as to not conflict with their other responsibilities.

5.3 The services performed by Ocean Surveys, Inc. under this Agreement shall be subject to review for compliance with the terms of this Agreement by Delaware's designated representatives. Delaware representatives may delegate any or all responsibilities under the Agreement to appropriate staff members, and shall so inform Ocean Surveys, Inc. by written notice before the effective date of each such delegation.

5.4 The review comments of Delaware's designated representatives may be reported in writing as needed to Ocean Surveys, Inc. It is understood that Delaware's representatives' review comments do not relieve Ocean Surveys, Inc. from the responsibility for the professional and technical accuracy of all work delivered under this Agreement.

5.5 Delaware shall, without charge, furnish to or make available for examination or use by Ocean Surveys, Inc. as it may request, any data which Delaware has available, including as examples only and not as a limitation:

- a. Copies of reports, surveys, records, and other pertinent documents;

- b. Copies of previously prepared reports, job specifications, surveys, records, ordinances, codes, regulations, other document, and information related to the services specified by this Agreement.

Ocean Surveys, Inc. shall return any original data provided by Delaware.

5.6 Delaware shall assist Ocean Surveys, Inc. in obtaining data on documents from public officers or agencies and from private citizens and business firms whenever such material is necessary for the completion of the services specified by this Agreement.

5.7 Ocean Surveys, Inc. will not be responsible for accuracy of information or data supplied by Delaware or other sources to the extent such information or data would be relied upon by a reasonably prudent contractor.

5.8 Delaware agrees not to use Ocean Surveys, Inc.'s name, either express or implied, in any of its advertising or sales materials. Ocean Surveys, Inc. reserves the right to reuse the nonproprietary data and the analysis of industry-related information in its continuing analysis of the industries covered.

## **6. Work Product.**

6.1 All materials, information, documents, and reports, whether finished, unfinished, or draft, developed, prepared, completed, or acquired by Ocean Surveys, Inc. for Delaware relating to the services to be performed hereunder shall become the property of Delaware and shall be delivered to Delaware's designated representative upon completion or termination of this Agreement, whichever comes first. Ocean Surveys, Inc. shall not be liable for damages, claims, and losses arising out of any reuse of any work products on any other project conducted by Delaware. Delaware shall have the right to reproduce all documentation supplied pursuant to this Agreement.

6.2 Ocean Surveys, Inc. retains all title and interest to the data it furnished and/or generated pursuant to this Agreement. Retention of such title and interest does not conflict with Delaware's rights to the materials, information and documents developed in performing the project. Upon final payment, Delaware shall have a perpetual, nontransferable, non-exclusive paid-up right and license to use, copy, modify and prepare derivative works of all materials in which Ocean Surveys, Inc. retains title, whether individually by Ocean Surveys, Inc. or jointly with Delaware. Any and all source code developed in connection with the services provided will be provided to Delaware, and the aforementioned right and license shall apply to source code. The parties will cooperate with each other and execute such other documents as may be reasonably deemed necessary to achieve the objectives of this Section.

6.3 In no event shall Ocean Surveys, Inc. be precluded from developing for itself, or for others, materials that are competitive with the Deliverables, irrespective of their similarity to the Deliverables. In addition, Ocean Surveys, Inc. shall be free to use its general knowledge, skills and experience, and any ideas, concepts, know-how, and techniques within the scope of its consulting practice that are used in the course of providing the services.

6.4 Notwithstanding anything to the contrary contained herein or in any attachment hereto, any and all intellectual property or other proprietary data owned by Ocean Surveys, Inc. prior to the effective date of this Agreement ("Preexisting Information") shall remain the exclusive property of Ocean Surveys, Inc. even if such Preexisting Information is embedded or otherwise incorporated into materials or products first produced as a result of this Agreement or used to develop such materials or products. Delaware's rights under this section shall not apply to any Preexisting Information or any component thereof regardless of form or media.

## **7. Confidential Information.**

To the extent permissible under 29 *Del. C.* § 10001, et seq., the parties to this Agreement shall preserve in strict confidence any information, reports or documents obtained, assembled or prepared in connection with the performance of this Agreement.

## **8. Warranty.**

8.1 Ocean Surveys, Inc. warrants that its services will be performed in a good and workmanlike manner. Ocean Surveys, Inc. agrees to re-perform any work not in compliance with this warranty brought to its attention within a reasonable time after that work is performed.

8.2 Third-party products within the scope of this Agreement are warranted solely under the terms and conditions of the licenses or other agreements by which such products are governed. With respect to all third-party products and services purchased by Ocean Surveys, Inc. for Delaware in connection with the provision of the Services, Ocean Surveys, Inc. shall pass through or assign to Delaware the rights Ocean Surveys, Inc. obtains from the manufacturers and/or vendors of such products and services (including warranty and indemnification rights), all to the extent that such rights are assignable.

## **9. Indemnification; Limitation of Liability.**

9.1 Ocean Surveys, Inc. shall indemnify and hold harmless the State, its agents

and employees, from any and all liability, suits, actions or claims, together with all reasonable costs and expenses (including attorneys' fees) directly arising out of (A) the negligence or other wrongful conduct of the Ocean Surveys, Inc., its agents or employees, or (B) Ocean Surveys, Inc.'s breach of any material provision of this Agreement not cured after due notice and opportunity to cure, provided as to (A) or (B) that (i) Ocean Surveys, Inc. shall have been notified promptly in writing by Delaware of any notice of such claim; and (ii) Ocean Surveys, Inc. shall have the sole control of the defense of any action on such claim and all negotiations for its settlement or compromise.

9.2 If Delaware promptly notifies Ocean Surveys, Inc. in writing of a third party claim against Delaware that any Deliverable infringes a copyright or a trade secret of any third party, Ocean Surveys, Inc. will defend such claim at its expense and will pay any costs or damages that may be finally awarded against Delaware. Ocean Surveys, Inc. will not indemnify Delaware, however, if the claim of infringement is caused by (1) Delaware's misuse or modification of the Deliverable; (2) Delaware's failure to use corrections or enhancements made available by Ocean Surveys, Inc.; (3) Delaware's use of the Deliverable in combination with any product or information not owned or developed by Ocean Surveys, Inc.; (4) Delaware's distribution, marketing or use for the benefit of third parties of the Deliverable or (5) information, direction, specification or materials provided by Client or any third party. If any Deliverable is, or in Ocean Surveys, Inc.'s opinion is likely to be, held to be infringing, Ocean Surveys, Inc. shall at its expense and option either (a) procure the right for Delaware to continue using it, (b) replace it with a non-infringing equivalent, (c) modify it to make it non-infringing. The foregoing remedies constitute Delaware's sole and exclusive remedies and Ocean Surveys, Inc.'s entire liability with respect to infringement.

9.3 Delaware agrees that Ocean Surveys, Inc. total liability to Delaware for any and all damages whatsoever arising out of or in any way related to this Agreement from any cause, including but not limited to contract liability or Ocean Surveys, Inc. negligence, errors, omissions, strict liability, breach of contract or breach of warranty shall not, in the aggregate, exceed fees paid to Ocean Surveys, Inc..

In no event shall Ocean Surveys, Inc. be liable for special, indirect, incidental, economic, consequential or punitive damages, including but not limited to lost revenue, lost profits, replacement goods, loss of technology rights or services, loss of data, or interruption or loss of use of software or any portion thereof regardless of the legal theory under which such damages are sought, and even if Ocean Surveys, Inc. has been advised of the likelihood of such damages.

## **10. Employees.**

10.1 Ocean Surveys, Inc. has and shall retain the right to exercise full control over the employment, direction, compensation and discharge of all persons employed by Ocean Surveys, Inc. in the performance of the services hereunder; provided, however, that it will, subject to scheduling and staffing considerations, attempt to honor Delaware's request for specific individuals.

10.2 Except as the other party expressly authorizes in writing in advance, neither party shall solicit, offer work to, employ, or contract with, whether as a partner, employee or independent contractor, directly or indirectly, any of the other party's Personnel during their participation in the services or during the twelve (12) months thereafter. For purposes of this Section 10.2, "Personnel" includes any individual or company a party employs as a partner, employee or independent contractor and with which a party comes into direct contact in the course of the services.

10.3 Possession of a Security Clearance, as issued by the Delaware Department of Public Safety, may be required of any employee of Ocean Surveys, Inc. who will be assigned to this project.

## **11. Independent Contractor.**

11.1 It is understood that in the performance of the services herein provided for, Ocean Surveys, Inc. shall be, and is, an independent contractor, and is not an agent or employee of Delaware and shall furnish such services in its own manner and method except as required by this Agreement. Ocean Surveys, Inc. shall be solely responsible for, and shall indemnify, defend and save Delaware harmless from all matters relating to the payment of its employees, including compliance with social security, withholding and all other wages, salaries, benefits, taxes, exactions, and regulations of any nature whatsoever.

11.2 Ocean Surveys, Inc. acknowledges that Ocean Surveys, Inc. and any subcontractors, agents or employees employed by Ocean Surveys, Inc. shall not, under any circumstances, be considered employees of Delaware, and that they shall not be entitled to any of the benefits or rights afforded employees of Delaware, including, but not limited to, sick leave, vacation leave, holiday pay, Public Employees Retirement System benefits, or health, life, dental, long-term disability or workers' compensation insurance benefits. Delaware will not provide or pay for any liability or medical insurance, retirement contributions or any other benefits for or on behalf of Delaware or any of its officers, employees or other agents.

11.3 Ocean Surveys, Inc. shall be responsible for providing liability insurance for its personnel.

11.4 As an independent contractor, Ocean Surveys, Inc. has no authority to bind or commit Delaware. Nothing herein shall be deemed or construed to create a joint venture, partnership, fiduciary or agency relationship between the parties for any purpose.

**12. Suspension.**

12.1 Delaware may suspend performance by Ocean Surveys, Inc. under this Agreement for such period of time as Delaware, at its sole discretion, may prescribe by providing written notice to Ocean Surveys, Inc. at least 30 working days prior to the date on which Delaware wishes to suspend. Upon such suspension, Delaware shall pay Ocean Surveys, Inc. its compensation, based on the percentage of the project completed and earned until the effective date of suspension, less all previous payments. Ocean Surveys, Inc. shall not perform further work under this Agreement after the effective date of suspension. Ocean Surveys, Inc. shall not perform further work under this Agreement after the effective date of suspension until receipt of written notice from Delaware to resume performance.

12.2 In the event Delaware suspends performance by Ocean Surveys, Inc. for any cause other than the error or omission of the Ocean Surveys, Inc., for an aggregate period in excess of 30 days, Ocean Surveys, Inc. shall be entitled to an equitable adjustment of the compensation payable to Ocean Surveys, Inc. under this Agreement to reimburse Ocean Surveys, Inc. for additional costs occasioned as a result of such suspension of performance by Delaware based on appropriated funds and approval by Delaware.

**13. Termination.**

13.1 This Agreement may be terminated in whole or in part by either party in the event of substantial failure of the other party to fulfill its obligations under this Agreement through no fault of the terminating party; but only after the other party is given:

- a. Not less than 30 calendar days written notice of intent to terminate; and
- b. An opportunity for consultation with the terminating party prior to termination.

13.2 This Agreement may be terminated in whole or in part by Delaware for its convenience, but only after Ocean Surveys, Inc. is given:

- a. Not less than 30 calendar days written notice of intent to terminate; and
- b. An opportunity for consultation with Delaware prior to termination.

13.3 If termination for default is effected by Delaware, Delaware will pay Ocean Surveys, Inc. that portion of the compensation which has been earned as of the effective date of termination but:

- a. No amount shall be allowed for anticipated profit on performed or unperformed services or other work, and
- b. Any payment due to Ocean Surveys, Inc. at the time of termination may be adjusted to the extent of any additional costs occasioned to Delaware by reason of Ocean Surveys, Inc.'s default.
- c. Upon termination for default, Delaware may take over the work and prosecute the same to completion by agreement with another party or otherwise. In the event Ocean Surveys, Inc. shall cease conducting business, Delaware shall have the right to make an unsolicited offer of employment to any employees of Ocean Surveys, Inc. assigned to the performance of the Agreement, notwithstanding the provisions of Section 10.2.

13.4 If after termination for failure of Ocean Surveys, Inc. to fulfill contractual obligations it is determined that Ocean Surveys, Inc. has not so failed, the termination shall be deemed to have been effected for the convenience of Delaware.

13.5 The rights and remedies of Delaware and Ocean Surveys, Inc. provided in this section are in addition to any other rights and remedies provided by law or under this Agreement.

13.6 Gratuities.

13.6.1 Delaware may, by written notice to Ocean Surveys, Inc., terminate this Agreement if it is found after notice and hearing by Delaware that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by Ocean Surveys, Inc. or any agent or representative of Ocean Surveys, Inc. to any officer or employee of Delaware with a view toward securing a contract or securing favorable treatment with respect to the awarding or amending or making of any determinations with respect to the performance of this Agreement.

13.6.2 In the event this Agreement is terminated as provided in 13.6.1 hereof, Delaware shall be entitled to pursue the same remedies against Ocean Surveys, Inc. it could pursue in the event of a breach of this Agreement by Ocean Surveys, Inc.

13.6.3 The rights and remedies of Delaware provided in Section 13.6 shall

not be exclusive and are in addition to any other rights and remedies provided by law or under this Agreement.

**14. Severability.**

If any term or provision of this Agreement is found by a court of competent jurisdiction to be invalid, illegal or otherwise unenforceable, the same shall not affect the other terms or provisions hereof or the whole of this Agreement, but such term or provision shall be deemed modified to the extent necessary in the court's opinion to render such term or provision enforceable, and the rights and obligations of the parties shall be construed and enforced accordingly, preserving to the fullest permissible extent the intent and agreements of the parties herein set forth.

**15. Assignment; Subcontracts.**

15.1 Any attempt by Ocean Surveys, Inc. to assign or otherwise transfer any interest in this Agreement without the prior written consent of Delaware shall be void. Such consent shall not be unreasonably withheld.

15.2 Services specified by this Agreement shall not be subcontracted by Ocean Surveys, Inc., without prior written approval of Delaware.

15.3 Approval by Delaware of Ocean Surveys, Inc.'s request to subcontract or acceptance of or payment for subcontracted work by Delaware shall not in any way relieve Ocean Surveys, Inc. of responsibility for the professional and technical accuracy and adequacy of the work. All subcontractors shall adhere to all applicable provisions of this Agreement.

15.4 Ocean Surveys, Inc. shall be and remain liable for all damages to Delaware caused by negligent performance or non-performance of work under this Agreement by Ocean Surveys, Inc., its subcontractor or its sub-subcontractor.

15.5 The compensation due shall not be affected by Delaware's approval of the Ocean Surveys, Inc.'s request to subcontract.

**16. Force Majeure.**

Neither party shall be liable for any delays or failures in performance due to circumstances beyond its reasonable control.

**17. Non-Appropriation of Funds.**

17.1 Validity and enforcement of this Agreement is subject to appropriations by

the General Assembly of the specific funds necessary for contract performance. Should such funds not be so appropriated Delaware may immediately terminate this Agreement, and absent such action this Agreement shall be terminated as to any obligation of the State requiring the expenditure of money for which no specific appropriation is available, at the end of the last fiscal year for which no appropriation is available or upon the exhaustion of funds.

17.2 Notwithstanding any other provisions of this Agreement, this Agreement shall terminate and Delaware's obligations under it shall be extinguished at the end of the fiscal year in which Delaware fails to appropriate monies for the ensuing fiscal year sufficient for the payment of all amounts which will then become due.

**18. State of Delaware Business License.**

Ocean Surveys, Inc. and all subcontractors represent that they are properly licensed and authorized to transact business in the State of Delaware as provided in 30 *Del. C.* § 2301.

**19. Complete Agreement.**

19.1 This agreement and its Appendices shall constitute the entire agreement between Delaware and Ocean Surveys, Inc. with respect to the subject matter of this Agreement and shall not be modified or changed without the express written consent of the parties. The provisions of this agreement supersede all prior oral and written quotations, communications, agreements and understandings of the parties with respect to the subject matter of this Agreement.

19.2 If the scope of any provision of this Agreement is too broad in any respect whatsoever to permit enforcement to its full extent, then such provision shall be enforced to the maximum extent permitted by law, and the parties hereto consent and agree that such scope may be judicially modified accordingly and that the whole of such provisions of the Agreement shall not thereby fail, but the scope of such provision shall be curtailed only to the extent necessary to conform to the law.

19.3 Ocean Surveys, Inc. may not order any product requiring a purchase order prior to Delaware's issuance of such order. Each Appendix, except as its terms otherwise expressly provide, shall be a complete statement of its subject matter and shall supplement and modify the terms and conditions of this Agreement for the purposes of that engagement only. No other agreements, representations, warranties or other matters, whether oral or written, shall be deemed to bind the parties hereto with respect to the subject matter hereof.

**20. Miscellaneous Provisions.**

20.1 In performance of this Agreement, Ocean Surveys, Inc. shall comply with all applicable federal, state and local laws, ordinances, codes and regulations. Ocean Surveys, Inc. shall solely bear the costs of permits and other relevant costs required in the performance of this Agreement.

20.2 Neither this Agreement nor any appendix may be modified or amended except by the mutual written agreement of the parties. No waiver of any provision of this Agreement shall be effective unless it is in writing and signed by the party against which it is sought to be enforced.

20.3 The delay or failure by either party to exercise or enforce any of its rights under this Agreement shall not constitute or be deemed a waiver of that party's right thereafter to enforce those rights, nor shall any single or partial exercise of any such right preclude any other or further exercise thereof or the exercise of any other right.

20.4 Ocean Surveys, Inc. covenants that it presently has no interest and that it will not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance of services required to be performed under this Agreement. OCEAN SURVEYS, INC. NAME further covenants, to its knowledge and ability, that in the performance of said services no person having any such interest shall be employed.

20.5 Ocean Surveys, Inc. acknowledges that Delaware has an obligation to ensure that public funds are not used to subsidize private discrimination. Ocean Surveys, Inc. recognizes that if they refuse to hire or do business with an individual or company due to reasons of race, color, gender, ethnicity, disability, national origin, age, or any other protected status, Delaware may declare Ocean Surveys, Inc. in breach of the Agreement, terminate the Agreement, and designate Ocean Surveys, Inc. as non-responsible.

20.6 Ocean Surveys, Inc. warrants that no person or selling agency has been employed or retained to solicit or secure this Agreement upon an agreement or understanding for a commission, or a percentage, brokerage or contingent fee. For breach or violation of this warranty, Delaware shall have the right to annul this contract without liability or at its discretion deduct from the contract price or otherwise recover the full amount of such commission, percentage, brokerage or contingent fee.

20.7 This Agreement was drafted with the joint participation of both parties and shall be construed neither against nor in favor of either, but rather in accordance with the fair meaning thereof.

20.8 Ocean Surveys, Inc. shall maintain all public records, as defined by 29 *Del. C.* §

502(7), relating to this Agreement and its deliverables for the time and in the manner specified by the Delaware Division of Archives, pursuant to the Delaware Public Records Law, 29 Del. C. Ch. 5. During the term of this Agreement, authorized representatives of Delaware may inspect or audit Ocean Surveys, Inc.'s performance and records pertaining to this Agreement at the Ocean Surveys, Inc. business office during normal business hours.

## **21. Insurance.**

21.1 Ocean Surveys, Inc. shall maintain the following insurance during the term of this Agreement:

- A. Worker's Compensation and Employer's Liability Insurance in accordance with applicable law; and
- B. Comprehensive General Liability - \$1,000,000.00 per person/\$3,000,000 per occurrence; and
- C. Medical/Professional Liability - \$1,000,000.00 per person/\$3,000,000 per occurrence; or
- D. Miscellaneous Errors and Omissions - \$1,000,000.00 per person/\$3,000,000 per occurrence; or
- E. Product Liability - \$1,000,000.00 per person/\$3,000,000 per occurrence; and
- F. If required to transport state employees, Automotive Liability Insurance covering all automotive units used in the work with limits of not less than \$100,000 each person and \$300,000 each accident as to bodily injury and \$25,000 as to property damage to others.

21.2. Ocean Surveys, Inc. shall provide forty-five (45) days written notice of cancellation or material change of any policies.

21.3. Before any work is done pursuant to this Agreement, the Certificate of Insurance and/or copies of the insurance policies, referencing the contract number stated herein, shall be filed with the State. The certificate holder is as follows: Willis of Connecticut, LLC.

21.4. In no event shall the State of Delaware be named as an additional insured on any policy required under this agreement.

## **22. Assignment of Antitrust Claims.**

As consideration for the award and execution of this contract by the State, Ocean Surveys, Inc. hereby grants, conveys, sells, assigns, and transfers to Delaware all of its right, title and interest in and to all known or unknown causes of action it presently has or may now or hereafter acquire under the antitrust laws of the United States and the State of Delaware, relating to the particular goods or services purchased or acquired by the State pursuant to this contract.

**23. Governing Law.**

This Agreement shall be governed by and construed in accordance with the laws of the State of Delaware, except where Federal Law has precedence. Ocean Surveys, Inc. consents to jurisdiction venue in the State of Delaware.

**24. Notices.**

Any and all notices required by the provisions of this Agreement shall be in writing and shall be mailed, certified or registered mail, return receipt requested. All notices shall be sent to the following addresses:

TO Delaware: Robert Scarborough, Delaware Coastal Programs, 5 East Reed Street, Suite 201, Dover, DE, 19901

TO Ocean Surveys, Inc.: John Sullivan, Ocean Surveys, Inc., 129 Mill Rock Road East, Old Saybrook, CT, 06475

**25. NOAA Funding**

A. General:

- a. Ocean Surveys, Inc. shall comply with all applicable State and Federal laws and regulations. If applicable State and Federal laws and regulations conflict with the provisions of paragraph 15, then applicable laws and regulations supersede the provisions of paragraph 15. The provisions of paragraph 15 shall apply to the work to be performed under this Contract and such provisions shall supersede any conflicting provisions of this Contract.
- b. This Contract is funded by the Delaware Coastal Management Implementation grant from the NOAA under award number NA10NOS41900202, task number 309-1, award number NA11NOS41900109, task numbers 306-5 and 309-1, award number NA12NOS41900158, task number 306-5, and Catalog of Federal Domestic Assistance (CFDA) number 11.419. Neither the United States nor any of its departments, agencies, or employees is a party to this Contract.

- c. The rights and remedies of Delaware provided for in these clauses are in addition to any other rights and remedies provided by law or under this Contract.
  
- B. Remedies: Except as may be otherwise provided in this Contract all claims, counterclaims, disputes and other matters in question between Delaware and Ocean Surveys, Inc. arising out of or relating to this Contract or the breach thereof will be decided by arbitration if the parties hereto mutually agree, or in a court of competent jurisdiction within the State of Delaware.
  
- C. Audit; Access to Records: Ocean Surveys, Inc. shall maintain books, records, documents and other evidence directly pertinent to performance on NOAA grant work under this Contract in accordance with generally accepted accounting principles and practices. Ocean Surveys, Inc. shall also maintain the financial information and data used by Ocean Surveys, Inc. in the preparation or support of the cost submission, and a copy of the cost summary submitted to Delaware. The United States Department of Labor, Delaware (and the State of Delaware) or any of their duly authorized representatives shall have access to such books, records, documents and other evidence for the purpose of inspection, audit and copying. Ocean Surveys, Inc. will provide proper facilities for such access and inspection.
  
- D. Subcontracts: Any subcontractors and outside associates or consultants required by Ocean Surveys, Inc. in connection with the services covered by this Contract will be limited to such individuals or firms as were specifically identified and agreed to in writing during negotiations, or as are specifically authorized in writing by Delaware during the performance of this Contract. Any substitutions in or additions to such subcontractors, associates, or consultants will be subject to the prior written approval of Delaware.
  
- E. Equal Employment Opportunity: Ocean Surveys, Inc. agrees that it will not discriminate against any employee or applicant for employment because of race, religion, color, sex, age or national origin.
  
- F. Utilization of Small and Minority Business: Ocean Surveys, Inc. agrees that qualified small business and minority business enterprises shall have the maximum practicable opportunity to participate in the performance of NOAA grant-assisted contracts and subcontracts.
  
- G. Covenant Against Contingent Fees: Ocean Surveys, Inc. warrants that no person or selling agency has been employed or retained to solicit or secure this Contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees. For breach or violation of this warranty, Delaware shall have the right to

annul this Contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

H. Gratuities:

- a. If it is found, after notice and hearing, by Delaware that gratuities (in the form of entertainment, gifts, or otherwise) were offered or given by Ocean Surveys, Inc., or any agent of DEPARTMENT or of NOAA with a view toward securing a Contract or securing favorable treatment with respect to the awarding or amending, or the making of any determinations with respect to the performance of this Contract, Delaware may, by written notice to Ocean Surveys, Inc., terminate the right of Ocean Surveys, Inc. to proceed under this Contract and/or may pursue such other rights and remedies provided by law or under this agreement; provided that the existence of the facts upon which Delaware makes such findings shall be in issue and may be reviewed in proceedings pursuant to the Remedies clause of this Contract.
- b. In the event this Contract is terminated as provided in paragraph 13.H.1) hereof, Delaware shall be entitled (i) to pursue the same remedies against Ocean Surveys, Inc., and (ii) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by Delaware), which shall be not less than three nor more than ten times the costs incurred Ocean Surveys, Inc. in providing any such gratuities to any such officer or employee.

I. Patents: If this Contract involves research, developmental, experimental, or demonstration work and any discovery or invention arises or is developed in the course of or under this Contract, such invention or discovery shall be subject to the reporting and rights provisions of 37 C.F.R. Part 401, in effect on the date of execution of this Contract. In such case Ocean Surveys, Inc. shall report the discovery or invention to NOAA directly or through Delaware and shall otherwise comply with Delaware's responsibilities in accordance with 37 C.F.R. Part 401. Ocean Surveys, Inc. hereby agrees that the disposition of rights to inventions made under this Contract shall be in accordance with the terms and conditions of 37 C.F.R. Part 401. CONTRACTOR shall include provisions appropriate to effectuate the purposes of this condition in all subcontracts involving research, developmental, experimental, or demonstration work.

J. Debarment and Suspension: NOAA grant-assisted contracts and subcontracts are subject to Subpart C of 15 CFR Part 26, "Government wide Debarment and Suspension (Nonprocurement)."

K. Lobbying: NOAA grant-assisted contracts and subcontracts exceeding \$100,000 in Federal funds are subject to Section 319 of Public Law 101-121, which added Section 1352, regarding lobbying restrictions, to Chapter 13 of Title 31 of the United States Code as implemented at 15 CFR Part 28, "New Restrictions on Lobbying," in which case the Ocean Surveys, Inc. must submit a completed "Disclosure of Lobbying Activities" (Form SF-LLL) regarding the use of non-Federal funds for lobbying. The Form SF-LLL shall be submitted within 15 days following the end of the calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed. The Form SF-LLL shall be submitted to the Delaware.

**SIGNATURE PAGE TO FOLLOW**

IN WITNESS THEREOF, the Parties hereto have caused this Agreement to be duly executed as of the date and year first above written.

**STATE OF DELAWARE DEPARTMENT OF NATURAL RESOURCES AND ENVIRONMENTAL CONTROL**

\_\_\_\_\_  
Name

\_\_\_\_\_  
Date

\_\_\_\_\_  
Title

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Date

**Ocean Surveys, Inc.**

\_\_\_\_\_  
Name

\_\_\_\_\_  
Date

\_\_\_\_\_  
Title

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Date

Appendix A – Request for Proposals  
Coastal Delaware Benthic Mapping  
Contract #: DNREC\_DCP\_BENTHIC\_2013

Separate Document Titled:

DNREC\_DCP\_BENTHIC\_2013.pdf

## Appendix B - Scope of Services

The specific tasks will include but are not be limited to:

- 1) Benthic surveys of approximately 110 sq. miles of Delaware Bay bottom and 95 sq. miles of Atlantic Ocean bottom of the Delaware coast out to 3 miles. The surveys will consist of transects spaced 750 meters apart with cross-transects of 1500 & 2200 meter separation (see figures 1 & 2) These surveys will complete previous in-house mapping of the State waters of the Delaware Bay and Atlantic Ocean
  - a. Sub-bottom Surveys.
    - i. Ocean Surveys Inc. will be responsible for data collection of sub-bottom information using their equipment and personnel. Data to be collected must be compatible with previous State of Delaware data collected using an Edgetech X-STAR system with SB216 towfish and Chesapeake Technologies SonarWiz software.
  - b. Seabed Surveys
    - i. Ocean surveys Inc. will be responsible for data collection of seabed information using their equipment and personnel. Data collected must be done with single beam Sonavision RoxAnn Seabed classification system.
- 2) Verification Sampling: A statistically significant number of seabed samples will be taken to verify the bottom sediment. This will consist of 3-5 samples for each seabed classification. The sampler must be large enough to capture bottom sediments and other materials (shells, cobble, etc.) typically >0.5 sq. ft. sample size.

Deliverables will include:

- 1) All raw seabed classification and sub-bottom acoustic data with corresponding geographic location data, appropriate metadata and daily log sheets.
- 2) All sediment samples collected for seabed classification verification.

## Appendix C – Payment Schedule

A first payment, in the amount of **\$10,000.00**, shall be made upon satisfactory completion, in Delaware's sole discretion, of execution of the contract to cover the cost of Mobilization, and upon submission of an invoice by Ocean Surveys Inc. Subsequent payments, in the amount not to exceed a total of **\$160,000.00**, shall be made upon satisfactory completion of weekly survey data collection, in Delaware's sole discretion, as detailed in Scope of Services, and upon submission of an invoice by Ocean Surveys Inc. A final payment, not to exceed the amount of **\$20,000.00**, shall be made upon satisfactory completion, in Delaware's sole discretion, of submittal of all collected data and samples, as detailed in Scope of Services above, and upon submission of an invoice by Ocean Surveys Inc. Invoices shall be paid within 30 days after receipt by Delaware, if services are performed satisfactorily, in Delaware's sole discretion. Total Payments shall not exceed **\$190,000.00**

Exhibit 1 – Ocean Surveys Inc. Proposal

Separate Document Titled:

OSI\_Technical\_Proposal-Coastal\_Delaware\_Benthic\_Mapping\_1-10-13 COMBINED.pdf