

The State of New Hampshire
Department of Environmental Services

Thomas S. Burack, Commissioner

*Celebrating 25 Years of Protecting
 New Hampshire's Environment*



September 26, 2012

His Excellency, Governor John H. Lynch
 and The Honorable Council
 State House
 Concord, NH 03301

Sole Source

REQUESTED ACTION

Authorize the Department of Environmental Services (DES) to enter into a **sole source** contract with Environment Canada (Vendor Code 176528-B001), Moncton, NB, Canada, for a total of \$9,750 for laboratory analysis of mussel samples collected by the New Hampshire Gulfwatch Program, effective upon Governor and Council approval through December 31, 2012. 100% General Funds.

Funding is available in the account as follows:

	<u>FY 2013</u>
03-44-44-442010-15230000-102-500731	\$9,750

Dept Environmental Services, Shellfish Protection Program, Contracts for Program Services

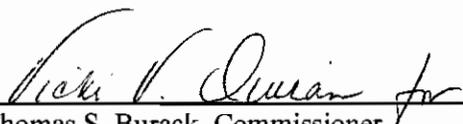
EXPLANATION

Gulfwatch is a marine environmental monitoring program established by the Gulf of Maine Council on the Marine Environment to monitor the status of water quality throughout the Gulf of Maine. Gulfwatch scientists collect blue mussels at sites around the Gulf in the US and Canada, and analyze the organisms' tissue for potentially harmful concentrations of toxic contaminants. DES is requesting approval to enter into a **sole source** contract with Environment Canada for laboratory analyses of Gulfwatch samples from New Hampshire because this laboratory is used for all of the other samples in the Gulfwatch Program. Using the same laboratory for all analyses is critically important because it ensures the comparability of the results between stations and jurisdictions.

DES has participated in the core Gulfwatch Program since its inception in 1991. Starting in 1998, DES has paid for additional mussel samples to be collected from locations in New Hampshire to increase the spatial coverage of data in our state and to enable DES to assess the suitability of selected shellfish waters for recreational and commercial harvest of shellfish. During the 2010-2011 Gulf of Maine Gulfwatch Program sampling scheme, DES collected thirteen extra mussel samples at locations in New Hampshire. The attached agreement between DES and Environment Canada will provide for analyses of the thirteen extra mussel samples.

The total project costs are budgeted at \$9,750. DES will provide 100% of the project costs through state general funds.

We respectfully request your approval.


 Thomas S. Burack, Commissioner

www.des.nh.gov

29 Hazen Drive • PO Box 95 • Concord, NH 03302-0095
 (603) 271-3503 • TDD Access: Relay NH 1-800-735-2964

Subject:

Laboratory Organics Analysis of NH Gulfwatch Samples

FORM NUMBER P-37 (version 1/09)

AGREEMENT

The State of New Hampshire and the Contractor hereby mutually agree as follows:

GENERAL PROVISIONS

I. IDENTIFICATION.

1.1 State Agency Name Department of Environmental Services		1.2 State Agency Address 29 Hazen Drive, PO Box 95, Concord, NH 03302-0095	
1.3 Contractor Name Environment Canada		1.4 Contractor Address Environmental Science Center, Moncton, NB E1A 3E9	
1.5 Contractor Phone Number (506) 851-2892	1.6 Account Number 442010-1523-102	1.7 Completion Date December 31, 2012	1.8 Price Limitation \$9,750
1.9 Contracting Officer for State Agency Philip Trowbridge, Watershed Management Bureau		1.10 State Agency Telephone Number (603) 271-8872	
1.11 Contractor Signature <i>Max J. J. for A/DG-WSAD</i>		1.12 Name and Title of Contractor Signatory Dr. David Boerner, Director General	
1.13 Acknowledgement: State of <u>Quebec</u> Province, County of <u>Gatineau</u> On _____, before the undersigned officer, personally appeared the person identified in block 1.12, or satisfactorily proven to be the person whose name is signed in block 1.11, and acknowledged that s/he executed this document in the capacity indicated in block 1.12.			
1.13.1 Signature of Notary Public or Justice of the Peace <i>R. Ralston</i> [Seal]		Québec Law Society member # 188649-5	
1.13.2 Name and Title of Notary or Justice of the Peace <i>Rachel Ralston</i>			
1.14 State Agency Signature <i>Vicki S. Clava for</i>		1.15 Name and Title of State Agency Signatory Thomas S. Burack, Commissioner	
1.16 Approval by the N.H. Department of Administration, Division of Personnel (if applicable) By: _____ Director, On: _____			
1.17 Approval by the Attorney General (Form, Substance and Execution) By: <i>[Signature]</i> On: <i>10-3-12</i>			
1.18 Approval by the Governor and Executive Council By: _____ On: _____			

2. EMPLOYMENT OF CONTRACTOR/SERVICES TO BE PERFORMED. The State of New Hampshire, acting through the agency identified in block 1.1 ("State"), engages contractor identified in block 1.3 ("Contractor") to perform, and the Contractor shall perform, the work or sale of goods, or both, identified and more particularly described in the attached EXHIBIT A which is incorporated herein by reference ("Services").

3. EFFECTIVE DATE/COMPLETION OF SERVICES.

3.1 Notwithstanding any provision of this Agreement to the contrary, and subject to the approval of the Governor and Executive Council of the State of New Hampshire, this Agreement, and all obligations of the parties hereunder, shall not become effective until the date the Governor and Executive Council approve this Agreement ("Effective Date").

3.2 If the Contractor commences the Services prior to the Effective Date, all Services performed by the Contractor prior to the Effective Date shall be performed at the sole risk of the Contractor, and in the event that this Agreement does not become effective, the State shall have no liability to the Contractor, including without limitation, any obligation to pay the Contractor for any costs incurred or Services performed. Contractor must complete all Services by the Completion Date specified in block 1.7.

4. CONDITIONAL NATURE OF AGREEMENT.

Notwithstanding any provision of this Agreement to the contrary, all obligations of the State hereunder, including, without limitation, the continuance of payments hereunder, are contingent upon the availability and continued appropriation of funds, and in no event shall the State be liable for any payments hereunder in excess of such available appropriated funds. In the event of a reduction or termination of appropriated funds, the State shall have the right to withhold payment until such funds become available, if ever, and shall have the right to terminate this Agreement immediately upon giving the Contractor notice of such termination. The State shall not be required to transfer funds from any other account to the Account identified in block 1.6 in the event funds in that Account are reduced or unavailable.

5. CONTRACT PRICE/PRICE LIMITATION/ PAYMENT.

5.1 The contract price, method of payment, and terms of payment are identified and more particularly described in EXHIBIT B which is incorporated herein by reference.

5.2 The payment by the State of the contract price shall be the only and the complete reimbursement to the Contractor for all expenses, of whatever nature incurred by the Contractor in the performance hereof, and shall be the only and the complete compensation to the Contractor for the Services. The State shall have no liability to the Contractor other than the contract price.

5.3 The State reserves the right to offset from any amounts otherwise payable to the Contractor under this Agreement those liquidated amounts required or permitted by N.H. RSA 80:7 through RSA 80:7-c or any other provision of law.

5.4 Notwithstanding any provision in this Agreement to the contrary, and notwithstanding unexpected circumstances, in no event shall the total of all payments authorized, or actually made hereunder, exceed the Price Limitation set forth in block 1.8.

6. COMPLIANCE BY CONTRACTOR WITH LAWS AND REGULATIONS/ EQUAL EMPLOYMENT OPPORTUNITY.

6.1 In connection with the performance of the Services, the Contractor shall comply with all statutes, laws, regulations, and orders of federal, state, county or municipal authorities which impose any obligation or duty upon the Contractor, including, but not limited to, civil rights and equal opportunity laws. In addition, the Contractor shall comply with all applicable copyright laws.

6.2 During the term of this Agreement, the Contractor shall not discriminate against employees or applicants for employment because of race, color, religion, creed, age, sex, handicap, sexual orientation, or national origin and will take affirmative action to prevent such discrimination.

6.3 If this Agreement is funded in any part by monies of the United States, the Contractor shall comply with all the provisions of Executive Order No. 11246 ("Equal Employment Opportunity"), as supplemented by the regulations of the United States Department of Labor (41 C.F.R. Part 60), and with any rules, regulations and guidelines as the State of New Hampshire or the United States issue to implement these regulations. The Contractor further agrees to permit the State or United States access to any of the Contractor's books, records and accounts for the purpose of ascertaining compliance with all rules, regulations and orders, and the covenants, terms and conditions of this Agreement.

7. PERSONNEL.

7.1 The Contractor shall at its own expense provide all personnel necessary to perform the Services. The Contractor warrants that all personnel engaged in the Services shall be qualified to perform the Services, and shall be properly licensed and otherwise authorized to do so under all applicable laws.

7.2 Unless otherwise authorized in writing, during the term of this Agreement, and for a period of six (6) months after the Completion Date in block 1.7, the Contractor shall not hire, and shall not permit any subcontractor or other person, firm or corporation with whom it is engaged in a combined effort to perform the Services to hire, any person who is a State employee or official, who is materially involved in the procurement, administration or performance of this Agreement. This provision shall survive termination of this Agreement.

7.3 The Contracting Officer specified in block 1.9, or his or her successor, shall be the State's representative. In the event of any dispute concerning the interpretation of this Agreement, the Contracting Officer's decision shall be final for the State.

8. EVENT OF DEFAULT/REMEDIES.

8.1 Any one or more of the following acts or omissions of the Contractor shall constitute an event of default hereunder ("Event of Default"):

- 8.1.1 failure to perform the Services satisfactorily or on schedule;
- 8.1.2 failure to submit any report required hereunder; and/or
- 8.1.3 failure to perform any other covenant, term or condition of this Agreement.

8.2 Upon the occurrence of any Event of Default, the State may take any one, or more, or all, of the following actions:

- 8.2.1 give the Contractor a written notice specifying the Event of Default and requiring it to be remedied within, in the absence of a greater or lesser specification of time, thirty (30) days from the date of the notice; and if the Event of Default is not timely remedied, terminate this Agreement, effective two (2) days after giving the Contractor notice of termination;
- 8.2.2 give the Contractor a written notice specifying the Event of Default and suspending all payments to be made under this Agreement and ordering that the portion of the contract price which would otherwise accrue to the Contractor during the period from the date of such notice until such time as the State determines that the Contractor has cured the Event of Default shall never be paid to the Contractor;
- 8.2.3 set off against any other obligations the State may owe to the Contractor any damages the State suffers by reason of any Event of Default; and/or
- 8.2.4 treat the Agreement as breached and pursue any of its remedies at law or in equity, or both.

9. DATA/ACCESS/CONFIDENTIALITY/PRESERVATION.

9.1 As used in this Agreement, the word "data" shall mean all information and things developed or obtained during the performance of, or acquired or developed by reason of, this Agreement, including, but not limited to, all studies, reports, files, formulae, surveys, maps, charts, sound recordings, video recordings, pictorial reproductions, drawings, analyses, graphic representations, computer programs, computer printouts, notes, letters, memoranda, papers, and documents, all whether finished or unfinished.

9.2 All data and any property which has been received from the State or purchased with funds provided for that purpose under this Agreement, shall be the property of the State, and shall be returned to the State upon demand or upon termination of this Agreement for any reason.

9.3 Confidentiality of data shall be governed by N.H. RSA chapter 91-A or other existing law. Disclosure of data requires prior written approval of the State.

10. TERMINATION. In the event of an early termination of this Agreement for any reason other than the completion of the Services, the Contractor shall deliver to the Contracting Officer, not later than fifteen (15) days after the date of termination, a report ("Termination Report") describing in detail all Services performed, and the contract price earned, to and including the date of termination. The form, subject matter, content, and number of copies of the Termination

Report shall be identical to those of any Final Report described in the attached EXHIBIT A.

11. CONTRACTOR'S RELATION TO THE STATE. In the performance of this Agreement the Contractor is in all respects an independent contractor, and is neither an agent nor an employee of the State. Neither the Contractor nor any of its officers, employees, agents or members shall have authority to bind the State or receive any benefits, workers' compensation or other emoluments provided by the State to its employees.

12. ASSIGNMENT/DELEGATION/SUBCONTRACTS.

The Contractor shall not assign, or otherwise transfer any interest in this Agreement without the prior written consent of the N.H. Department of Administrative Services. None of the Services shall be subcontracted by the Contractor without the prior written consent of the State.

13. INDEMNIFICATION. The Contractor shall defend, indemnify and hold harmless the State, its officers and employees, from and against any and all losses suffered by the State, its officers and employees, and any and all claims, liabilities or penalties asserted against the State, its officers and employees, by or on behalf of any person, on account of, based or resulting from, arising out of (or which may be claimed to arise out of) the acts or omissions of the Contractor. Notwithstanding the foregoing, nothing herein contained shall be deemed to constitute a waiver of the sovereign immunity of the State, which immunity is hereby reserved to the State. This covenant in paragraph 13 shall survive the termination of this Agreement.

14. INSURANCE.

14.1 The Contractor shall, at its sole expense, obtain and maintain in force, and shall require any subcontractor or assignee to obtain and maintain in force, the following insurance:

14.1.1 comprehensive general liability insurance against all claims of bodily injury, death or property damage, in amounts of not less than \$250,000 per claim and \$2,000,000 per occurrence; and

14.1.2 fire and extended coverage insurance covering all property subject to subparagraph 9.2 herein, in an amount not less than 80% of the whole replacement value of the property.

14.2 The policies described in subparagraph 14.1 herein shall be on policy forms and endorsements approved for use in the State of New Hampshire by the N.H. Department of Insurance, and issued by insurers licensed in the State of New Hampshire.

14.3 The Contractor shall furnish to the Contracting Officer identified in block 1.9, or his or her successor, a certificate(s) of insurance for all insurance required under this Agreement. Contractor shall also furnish to the Contracting Officer identified in block 1.9, or his or her successor, certificate(s) of insurance for all renewal(s) of insurance required under this Agreement no later than fifteen (15) days prior to the expiration date of each of the insurance policies. The certificate(s) of insurance and any renewals thereof shall be

attached and are incorporated herein by reference. Each certificate(s) of insurance shall contain a clause requiring the insurer to endeavor to provide the Contracting Officer identified in block 1.9, or his or her successor, no less than ten (10) days prior written notice of cancellation or modification of the policy.

15. WORKERS' COMPENSATION.

15.1 By signing this agreement, the Contractor agrees, certifies and warrants that the Contractor is in compliance with or exempt from, the requirements of N.H. RSA chapter 281-A ("*Workers' Compensation*").

15.2 To the extent the Contractor is subject to the requirements of N.H. RSA chapter 281-A, Contractor shall maintain, and require any subcontractor or assignee to secure and maintain, payment of Workers' Compensation in connection with activities which the person proposes to undertake pursuant to this Agreement. Contractor shall furnish the Contracting Officer identified in block 1.9, or his or her successor, proof of Workers' Compensation in the manner described in N.H. RSA chapter 281-A and any applicable renewal(s) thereof, which shall be attached and are incorporated herein by reference. The State shall not be responsible for payment of any Workers' Compensation premiums or for any other claim or benefit for Contractor, or any subcontractor or employee of Contractor, which might arise under applicable State of New Hampshire Workers' Compensation laws in connection with the performance of the Services under this Agreement.

16. WAIVER OF BREACH. No failure by the State to enforce any provisions hereof after any Event of Default shall be deemed a waiver of its rights with regard to that Event of Default, or any subsequent Event of Default. No express failure to enforce any Event of Default shall be deemed a waiver of the right of the State to enforce each and all of the provisions hereof upon any further or other Event of Default on the part of the Contractor.

17. NOTICE. Any notice by a party hereto to the other party shall be deemed to have been duly delivered or given at the time of mailing by certified mail, postage prepaid, in a United States Post Office addressed to the parties at the addresses given in blocks 1.2 and 1.4, herein.

18. AMENDMENT. This Agreement may be amended, waived or discharged only by an instrument in writing signed by the parties hereto and only after approval of such amendment, waiver or discharge by the Governor and Executive Council of the State of New Hampshire.

19. CONSTRUCTION OF AGREEMENT AND TERMS.

This Agreement shall be construed in accordance with the laws of the State of New Hampshire, and is binding upon and inures to the benefit of the parties and their respective successors and assigns. The wording used in this Agreement is the wording chosen by the parties to express their mutual

intent, and no rule of construction shall be applied against or in favor of any party.

20. THIRD PARTIES. The parties hereto do not intend to benefit any third parties and this Agreement shall not be construed to confer any such benefit.

21. HEADINGS. The headings throughout the Agreement are for reference purposes only, and the words contained therein shall in no way be held to explain, modify, amplify or aid in the interpretation, construction or meaning of the provisions of this Agreement.

22. SPECIAL PROVISIONS. Additional provisions set forth in the attached EXHIBIT C are incorporated herein by reference.

23. SEVERABILITY. In the event any of the provisions of this Agreement are held by a court of competent jurisdiction to be contrary to any state or federal law, the remaining provisions of this Agreement will remain in full force and effect.

24. ENTIRE AGREEMENT. This Agreement, which may be executed in a number of counterparts, each of which shall be deemed an original, constitutes the entire Agreement and understanding between the parties, and supersedes all prior Agreements and understandings relating hereto.

EXHIBIT A

Scope of Services

The Contractor shall:

1. Conduct sample analysis of a total of thirteen (13) shellfish tissue samples received from the State as well as two billable Quality Control samples for the following organic contaminants: 1) polycyclic aromatic hydrocarbons, 2) polychlorinated biphenyls, and 3) chlorinated pesticides. The samples were collected and archived for the 2010-2011 Gulf of Maine Gulfwatch Program sampling scheme.
2. The Final Report will consist of an Excel spreadsheet containing the results of the samples analysis for the organic contaminants of the thirteen (13) submitted shellfish tissue samples. The Final Report will be transmitted to the State in an electronic format.

EXHIBIT B

Contract Price, Payment and Method of Payment

1. In consideration of the performance of the Contractor Services outline in Exhibit A, the State shall pay to the Contractor the sum of \$9750.00 (USD) for thirteen (13) samples and two billable QC samples at a price of \$650 (USD) per sample.
2. The Contractor shall invoice the State for the total amount determined to be payable under paragraph 1 above.
3. The State shall make one payment for the total amount payable under paragraph 1 above within thirty (30) days after the date of the invoice.
4. Payment by the State shall be made in the form of a cheque or money order payable to the Receiver General for Canada. Payment should be sent to:

Environment Canada
c/o Laurie Szakacs
867 Lakeshore Road
Burlington, ON Canada
L7R 4A6

EXHIBIT C

Special Provisions to the Agreement

In **subparagraph 1.3** of the General Provisions, the full Contractor name shall be "Her Majesty the Queen in Right of Canada, as represented by the Minister of the Environment who is responsible for Environment Canada".

In **subparagraph 1.4** of the General Provisions, the full Contractor address shall be "Environment Canada, Environmental Science Center, Corner of Morton and Universite Avenue, Moncton, NB, Canada, E1A 3E9".

In **Subparagraph 1.12** of the General Provisions, the full Name and Title of the Contractor Signatory shall be "Dr. Darren Goetze, Acting Director General of the Water Science & Technology Directorate at Environment Canada".

In **subparagraph 6.1** of the General Provisions, the following sentence shall be added at the end, "Notwithstanding the foregoing, nothing herein contained shall be deemed to constitute a waiver of the sovereign immunity of the Contractor, which immunity is hereby reserved to the Contractor. This covenant shall survive the termination of the agreement."

In **subparagraph 7.2**, the term "knowingly" shall be added after the term "not" and before the term "hire" at the beginning of the sentence.

In **subparagraph 7.3** of the General Provisions, the following sentence shall be added at the end of the paragraph: "Any disputes regarding the interpretation of this agreement will be resolved by consultation between the Contracting Officer of the State and the Contractor or their representative."

Subparagraph 9.1 of the General Provisions shall be modified as follows:

"As used in this agreement, the word "Intellectual Properties Rights" means any intellectual property right recognized by the law, including any intellectual property right protected through legislation or arising from protection of information as a trade secret or as confidential information.

9.1.1 All Intellectual Property Rights arising from the carrying of the Services shall at all times vest with the Contractor or with such person as the Contractor so designates.

9.1.2 The Contractor hereby grants to the State a worldwide, fully paid, royalty-free, non-exclusive license to exercise the Contractor's Intellectual Property Rights arising out from the carrying out of the services."

In **subparagraph 9.3** of the General Provisions, the following sentence shall be added at the end of subparagraph 9.3: "The parties acknowledge that "other existing laws" in regards to confidentiality also refers to the *Access to Information Act*, R.S.C., 1985, c A-1, as amended and the *Privacy Act*, R.S.C. 1985, cP-21, as amended."

Subparagraph 11 of the General Provisions shall be modified as follows:

"In the performance of this agreement the Contractor is in all respects an independent contractor, and neither Party is an agent nor an employee of the other Party. Neither Party nor any of its officers, employees, agents or members shall have authority to bind the other Party or receive any benefits, worker's compensation or other emoluments provided by the Party to its employees."

Subparagraph 12 of the General Provisions shall be modified as follows:

"Neither Party may assign or otherwise transfer any interest in this agreement without the prior written consent of the other Party. None of the Services shall be delegated or subcontracted by the Contractor without the prior written consent of the State."

Subparagraph 13 of the General Provisions shall not apply in this Agreement. This analysis and reporting work to be performed by the Contractor present little or no risk of liability to the state.

Subparagraph 14 of the General Provisions shall not apply in this Agreement. The analysis and reporting work to be performed by the Contractor present little or no risk of liability to the State.

Subparagraph 16 of the General Provisions shall be modified as follows:

"No failure by either Party to enforce any provisions hereof after any Event of Default shall be deemed a waiver of that Party's rights with regard to that event, or any subsequent Event. No express failure of any Event of Default shall be deemed a waiver of the right of the State to enforce each and all of the provisions hereof upon any further or other default on the part of the Contractor."

Subparagraph 17 of the General Provisions shall be modified as follows:

"Any notice by the State hereto to the Contractor shall be deemed to have been duly delivered or given at the time of mailing by certified mail, postage prepaid, in the United States Post Office addressed to the Contractor at the addresses given in subparagraph 1.4 of this agreement. Any notice by the Contractor hereto to the State shall be deemed to have been duly delivered or given at the time of mailing by certified mail, postage prepaid, in a Canada Post Office addressed to the State at the addresses given in subparagraph 1.2 of this agreement.

Subparagraph 19 of the General Provisions shall not apply to this Agreement due to its international nature. In the event of a dispute, standard conflict of laws principles would apply to determine which jurisdiction's law applies.

In **subparagraph 24** of the General Provisions, the first part of the sentence should read as follows: "This agreement and all exhibits to the agreement, which may be executed in a number of counterparts, each of which shall be deemed an original, constitutes the entire agreement and understanding between the parties and supersedes all prior agreement and understanding related hereto. For greater clarity, the Special Provisions found in Exhibit C take precedence over any other provisions in the agreement".

SPECIMEN SIGNATURE RECORD for ACTING DELEGATION
FICHE DE SPÉCIMEN DE SIGNATURE pour la DÉLÉGATION INTÉrimAIRE

RÉCURRENTE / RECURRING / INTÉrimAIRE / ACTING

VALIDITY PERIOD: WITHIN THE CURRENT FISCAL YEAR
NOTE: An ACTING DELEGATION REQUEST is mandatory to activate an approved acting assignment whether on a one time basis or periodically within the specified timeframe of the acting Specimen Signature Record.

En vigueur le / Effective date: 2012/04/01

Nom du titulaire intérimaire / Name of acting incumbent: Marc Bernier

Signature du titulaire intérimaire / Signature of acting incumbent: *Marc Bernier*

Titre du poste intérimaire / Acting position title: DG Winter SAT

Niveau généralisé des postes intérimaires / Generic level of acting positions: 3

Je certifie le pouvoir qui m'a été délégué sur une base intérimaire, in respect de l'exercer, la responsabilité qui s'y rattache et les limites du pouvoir.
I am aware of the authority that has been delegated to me on an acting basis, the manner in which the authority is to be exercised, the responsibility that goes with it and any limitation in the authority.

PERIODE DE VALIDITE : AU COURS DE L'ANNÉE FISCALE ACTUELLE
NOTE: Une REQUÊTE de DÉLÉGATION INTÉrimAIRE est obligatoire pour activer une attribution intérimaire approuvée, soit pour une seule fois ou périodiquement, à l'intérieur des limites de temps de cette fiche de spécimen de signature.

Date d'expiration / Expiry Date: 2013/03/31