

Enservco Corp

Form S-8

January 19, 2018

As filed with the Securities and Exchange Commission on January 19, 2018

Registration No. 333-

UNITED STATES

SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM S-8

REGISTRATION STATEMENT

UNDER

THE SECURITIES ACT OF 1933

Enservco Corporation

(Exact name of Registrant as specified in its charter)

Delaware

(State or other jurisdiction of

incorporation or organization)

84-0811316

(I.R.S. employer identification no.)

501 S. Cherry Street, Suite 1000

Denver, CO 80246

(Address of Principal Executive Offices)(Zip Code)

Enservco Corporation 2016 Stock Incentive Plan

(Full title of the plan)

Ian Dickinson

Chief Executive Officer

501 S. Cherry Street, Suite 1000

Denver, CO 80246

(Name and address of agent for service)

(303) 333-3678

(Telephone Number, including area code, of agent for service)

The Commission is requested to send copies of all communications to:

Reid A. Godbolt, Esq.

Jones & Keller, P.C.

1999 Broadway, Suite 3150

Denver, Colorado 80202

Telephone: (303) 573-1600

Facsimile: (303) 573-8133

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Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of “large accelerated filer,” “accelerated filer” and “smaller reporting company” in Rule 12b-2 of the Exchange Act.

Large accelerated filer

Accelerated filer

Non-accelerated filer (Do not check if a smaller reporting company)

Smaller reporting company

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| Title of Securities to be Registered | Amount to be Registered ⁽¹⁾ | Proposed Maximum Offering Price Per Share ⁽²⁾ | Proposed Maximum Aggregate Offering Price | Amount of Registration Fee |
|---|---|---|--|-----------------------------------|
| Common Stock, \$0.005 Par Value | 10,391,711 ⁽³⁾ | \$0.95 | \$9,872,125.45 | \$1,229.08 |

Pursuant to Rule 416(a) under the Securities Act of 1933, as amended (the “**Securities Act**”), this Registration Statement shall also cover any additional shares of common stock, \$0.005 par value per share (“**Common Stock**”), of (1) Enservco Corporation, a Delaware corporation (the “**Registrant**”), as may be issued to prevent dilution from stock splits, stock dividends, and similar transactions.

Estimated solely for the purpose of calculating the registration fee pursuant to paragraphs (c) and (h) of Rule 457 (2) of the Securities Act on the basis of the average of the high and low prices of the Common Stock on the NYSE American on January 18, 2018, within five business days prior to filing.

(3) Represents securities that may be issued pursuant to the Enservco Corporation 2016 Stock Incentive Plan (the “**2016 Plan**”).

EXPLANATORY NOTE

On September 29, 2016, the Registrant’s shareholders approved the 2016 Plan. Effective upon the approval of the 2016 Plan by the Registrant’s Board of Directors, no additional awards are to be granted pursuant to the terms of the Registrant’s 2010 Stock Incentive Plan (the “**Prior Plan**”), and any shares of common stock available for future awards under the Prior Plan (“**Carried Forward Shares**”) are available for awards under the 2016 Plan. The Carried Forward Shares are deemed covered by this Registration Statement on Form S-8 (the “**Registration Statement**”) and are included in the calculation of the registration fee as stated above.

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PART I

INFORMATION REQUIRED IN THE SECTION 10(a) PROSPECTUS

The document(s) containing the information specified in “Item 1. Plan Information” and “Item 2. Registrant Information and Employee Plan Annual Information” of Form S-8 will be sent or given to participants of the Enservco Corporation 2016 Stock Incentive Plan, as specified by Rule 428(b)(1) under the Securities Act of 1933, as amended (the “**Securities Act**”). Such documents are not required to be, and are not, filed with the Securities and Exchange Commission (the “**Commission**”) either as part of this Registration Statement or as a prospectus or prospectus supplement pursuant to Rule 424 under the Securities Act. These documents and the documents incorporated by reference in this Registration Statement pursuant to Item 3 of Part II of Form S-8, taken together, constitute a prospectus that meets the requirements of Section 10(a) of the Securities Act.

PART II

INFORMATION REQUIRED IN THE REGISTRATION STATEMENT

Item 3. Incorporation of Documents by Reference

Enservco Corporation, a Delaware Corporation (the “**Company**” or the “**Registrant**”) is subject to the informational and reporting requirements of Sections 13(a), 14, and 15(d) of the Securities Exchange Act of 1934, as amended (the “**Exchange Act**”), and in accordance therewith files reports, proxy statements and other information with the Commission. The Registrant hereby incorporates by reference into this Registration Statement the following documents previously filed with the Commission:

- (a) Our Annual Report on Form 10-K for the fiscal year ended December 31, 2016 filed with the Commission on March 31, 2017, and Amendment No. 1 on Form 10-K/A filed with the Commission on May 2, 2017;
- (b) All other reports filed pursuant to Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by the document referred to in (a) above; and

(c) The description of the Registrant’s Common Stock included in the Registrant’s Registration Statement on Form S-1 (Reg. No. 333-188148), filed with the Commission on April 26, 2013, including any amendments or reports filed for the purpose of updating such descriptions.

In addition, all documents which we file with the Commission under Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act (other than, in each case, information furnished rather than filed) after the date hereof and prior to the filing of a post-effective amendment that indicates that all securities offered hereunder have been sold or that deregisters all securities then remaining unsold under this Registration Statement, shall be deemed to be incorporated by reference herein and to be part hereof from the respective dates of filing of such documents, provided that, unless specifically stated to the contrary, documents or information deemed to have been furnished and not filed in accordance with Commission rules shall not be deemed incorporated by reference into or otherwise included in this Registration Statement. Any statement contained herein or in a document incorporated herein by reference shall be deemed to be modified or superseded for purposes hereof to the extent that a statement contained herein or in any other subsequently filed document incorporated herein by reference modifies or supersedes such statement. Any such statement so modified or superseded shall not be deemed, except as so modified or superseded, to constitute a part of this Registration Statement.

Item 4. Description of Securities

Not applicable.

Item 5. Interests of Named Experts and Counsel

None.

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Item 6. Indemnification of Directors and Officers

We have the authority under the Delaware General Corporation Law to indemnify our directors and officers to the extent provided for under such statute. Set forth below is a discussion of Delaware law regarding indemnification that we believe discloses the material aspects of such law on this subject. The Delaware law provides, in part, that a corporation may indemnify a director or officer or other person who was, is or is threatened to be made a named defendant or respondent in a proceeding because such person is or was a director, officer, employee or agent of the corporation, if it is determined that such person:

- conducted himself or herself in good faith;

reasonably believed, in the case of conduct in his or her official capacity as a director or officer of the corporation,
- that his or her conduct was in the corporation's best interest and, in all other cases, that his or her conduct was at least not opposed to the corporation's best interests; and
- in the case of any criminal proceeding, had no reasonable cause to believe that his or her conduct was unlawful.

A corporation may indemnify a person under the Delaware law against judgments, penalties, including excise and similar taxes, fines, settlement, and unreasonable expenses actually incurred by the person in connection with the proceeding. If the person is found liable to the corporation or is found liable on the basis that personal benefit was improperly received by the person, the indemnification is limited to reasonable expenses actually incurred by the person in connection with the proceeding, and shall not be made in respect of any proceeding in which the person shall have been found liable for willful or intentional misconduct in the performance of his duty to the corporation. The corporation may also pay or reimburse expenses incurred by a person in connection with his or her appearance as a witness or other participation in a proceeding at a time when the person is not a named defendant or respondent in the proceeding.

Our Second Amended and Restated Certificate of Incorporation (the "**Certificate of Incorporation**") provides that none of our directors shall be personally liable to us or our stockholders for monetary damages for breach of a fiduciary duty as a director, except for: (a) a breach of the directors' duty of loyalty to us or our stockholders; (b) an act or omission not in good faith that constitutes a breach of duty of the director to us or an act or omission that involves intentional misconduct or a knowing violation of the law; (c) for violations of Section 174 of the Delaware General Corporation Law; or (d) a transaction from which the director received an improper benefit, whether or not the benefit resulted from an action taken within the scope of the director's office. Limitations on liability provided for in our Certificate of Incorporation do not restrict the availability of non-monetary remedies and do not affect a director's responsibility under any other law, such as the federal securities laws or state or federal environmental laws.

We believe that these provisions will assist us in attracting and retaining qualified individuals to serve as executive officers and directors. The inclusion of these provisions in our Certificate of Incorporation may have the effect of

reducing the likelihood of derivative litigation against our directors and may discourage or deter stockholders or management from bringing a lawsuit against directors for breach of their duty of care, even though such an action, if successful, might otherwise have benefitted us or our stockholders.

Our Bylaws provide that we will indemnify our directors to the fullest extent provided by the Delaware General Corporation Law and we may, if and to the extent authorized by our Board, so indemnify our officers and other persons whom we have the power to indemnify against liability, reasonable expense or other matters.

We have also entered into individual indemnification agreements with our directors and executive officers. These agreements indemnify those directors and officers to the fullest extent permitted by law against inordinate risks of claims and actions against them arising out of their service to and activities on our behalf.

Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of us pursuant to the foregoing provisions, or otherwise, we have been advised that in the opinion of the Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by us of expenses incurred or paid by a director, officer or controlling person of the Company in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, we will, unless in the opinion of our counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by the Company is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

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Item 7. Exemption from Registration Claimed

Not applicable.

Item 8. Exhibits

The following exhibits are filed as part of or incorporated by reference into this Registration Statement:

| Exhibit Number | Exhibit Title |
|-----------------------|---|
| 5.1* | <u>Opinion of Jones & Keller, P.C.</u> |
| 10.1 | <u>Enservco Corporation 2016 Stock Incentive Plan, incorporated by reference to Appendix B of the Registrant's Definitive Proxy Statement filed with the Commission on August 16, 2016.</u> |
| 23.1* | <u>Consent of EKS&H, LLLP.</u> |
| 23.5* | <u>Consent of Jones & Keller, P.C. (included in Exhibit 5.1).</u> |
| 24.1* | <u>Power of Attorney (included on signature page hereof).</u> |

* Filed herewith.

Item 9. Undertakings

(a) The undersigned registrant hereby undertakes:

(1) To file, during any period in which offers or sales are being made, a post-effective amendment to this registration statement:

(i) To include any prospectus required by section 10(a)(3) of the Securities Act of 1933 (the “**Securities Act**”);

(ii) To reflect in the prospectus any facts or events arising after the effective date of the registration statement (or the most recent post-effective amendment thereof) which, individually or in the aggregate, represent a fundamental change in the information set forth in the registration statement. Notwithstanding the foregoing, any increase or decrease in volume of securities offered (if the total dollar value of securities offered would not exceed that which was registered) and any deviation from the low or high end of the estimated maximum offering range may be reflected in the form of prospectus filed with the Commission pursuant to Rule 424(b) if, in the aggregate, the changes in volume and price represent no more than 20% change in the maximum aggregate offering price set forth in the “Calculation of Registration Fee” table in the effective registration statement; and

(iii) To include any material information with respect to the plan of distribution not previously disclosed in the registration statement or any material change to such information in the registration statement;

Provided, however, that Paragraphs (a)(1)(i) and (a)(1)(ii) do not apply if the information required to be included in a post-effective amendment by those paragraphs is contained in reports filed with or furnished to the Commission by the registrant pursuant to section 13 or section 15(d) of the Securities Exchange Act of 1934 (the “**Exchange Act**”) that are incorporated by reference in the registration statement.

(2) That, for the purpose of determining any liability under the Securities Act, each such post-effective amendment shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

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(3) To remove from registration by means of a post-effective amendment any of the securities being registered which remain unsold at the termination of the offering.

(b) The undersigned registrant hereby undertakes that, for purposes of determining any liability under the Securities Act, each filing of the registrant's annual report pursuant to section 13(a) or section 15(d) of the Exchange Act (and, where applicable, each filing of an employee benefit plan's annual report pursuant to section 15(d) of the Exchange Act) that is incorporated by reference in the registration statement shall be deemed to be a new registration statement relating to the securities offered therein, and the offering of such securities at that time shall be deemed to be the initial bona fide offering thereof.

(c) Insofar as indemnification for liabilities arising under the Securities Act may be permitted to directors, officers and controlling persons of the registrant pursuant to the foregoing provisions, or otherwise, the registrant has been advised that in the opinion of the Securities and Exchange Commission such indemnification is against public policy as expressed in the Securities Act and is, therefore, unenforceable. In the event that a claim for indemnification against such liabilities (other than the payment by the registrant of expenses incurred or paid by a director, officer or controlling person of the registrant in the successful defense of any action, suit or proceeding) is asserted by such director, officer or controlling person in connection with the securities being registered, the registrant will, unless in the opinion of its counsel the matter has been settled by controlling precedent, submit to a court of appropriate jurisdiction the question whether such indemnification by it is against public policy as expressed in the Securities Act and will be governed by the final adjudication of such issue.

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SIGNATURES

Pursuant to the requirements of the Securities Act of 1933, the Registrant certifies that it has reasonable grounds to believe that it meets all of the requirements for filing on Form S-8 and has duly caused this Registration Statement to be signed on its behalf by the undersigned, thereunto duly authorized, in the City and County of Denver, State of Colorado, on January 19, 2018.

ENSERVCO
CORPORATION (the
“Registrant”)

By: /s/ Ian Dickinson
Ian Dickinson

Chief Executive Officer

POWER OF ATTORNEY

KNOW ALL PERSONS BY THESE PRESENTS, that each person whose signature appears below hereby constitutes and appoints Ian Dickinson and Dustin Bradford as his true and lawful attorney-in-fact and agent, with full powers of substitution and re-substitution, for him in his name, place and stead, to sign in any and all capacities any and all amendments (including post-effective amendments) to this Registration Statement on Form S-8 and to file the same, with all exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, granting unto such attorneys-in-fact and agents, and each of them, full power and authority to do and perform each and every act and thing requisite and necessary to be done, as fully to all intents and purposes as he might or could do in person, hereby ratifying and confirming all that such attorneys-in-fact and agents, or any of them, may lawfully do or cause to be done by virtue hereof. This Power of Attorney may be signed in several counterparts.

Pursuant to the requirements of the Securities Act of 1933, this Registration Statement has been signed by the following persons in the capacities and on the date indicated.

| Signature | Title | Date |
|------------------------------------|---|------------------|
| /s/ Ian Dickinson Ian Dickinson | Chief Executive Officer (Principal Executive Officer) | January 19, 2018 |

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| | | |
|--|------------------------------------|------------------|
| /s/ Tucker L. Franciscus Tucker L. Franciscus | Principal Financial Officer | January 19, 2018 |
| /s/ Dustin Bradford Dustin Bradford | Principal Accounting Officer | January 19, 2018 |
| /s/ Richard A. Murphy Richard A. Murphy | Chairman of the Board of Directors | January 19, 2018 |
| /s/ Keith Behrens Keith Behrens | Director | January 19, 2018 |
| /s/ Robert Herlin Robert Herlin | Director | January 19, 2018 |
| /s/ William Jolly William Jolly | Director | January 19, 2018 |
| /s/ Christopher D. Haymons Christopher D. Haymons | Director | January 19, 2018 |

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INDEX TO EXHIBITS

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