

**PROFESSIONAL SERVICES AGREEMENT
ENGINEERING SERVICES AGREEMENT
FOR THE 2017 SEWARD STORM SURGE DAMAGE REPAIRS**

This Agreement, between the CITY OF SEWARD, an Alaska home rule municipal corporation (“City”), and PND ENGINEERS, INC. (“Engineer”), is effective February 12, 2019 for the provision of professional engineering services.

Notice shall be given to the Designated Representative of the contracting parties as follows:

Jeff Bridges, Interim City Manager
City of Seward, Alaska
P. O. Box 167
Seward, Alaska 99664

Doug Kenley, PE.
PND Engineers, Inc
1506 W. 36th Avenue
Anchorage, Alaska 99503

1. SCOPE OF WORK

1.1 PURPOSE OF AGREEMENT. The City seeks to retain engineering services related to the following project:

Professional Engineering Services for design, permitting, construction bid proposal, and project management for the 2017 Seward Storm Surge Damage Repairs Project, as more particularly described in the City of Seward RFP dated January 10, 2019, attached Exhibit 1.

The services provided by the Engineer will consist of planning, providing specifications, permitting, and preparing contract documents to bid the construction repairs, including design cost estimating, and project management as described in the above-mentioned RFP and Engineer's responsive bid.

2. GENERAL PROVISIONS

2.1 DEFINITIONS. The following terms shall have the meanings as defined below.

2.1.1 “Agreement” means this Agreement, including all amendments, modifications, and supplements hereto and any appendices, exhibits, or schedules to same, and refers to this Agreement as it may be in effect at the time such reference becomes operative. Together the documents form an agreement which represents the

entire and integrated agreement between the parties hereto, and supersedes prior negotiations or agreements, either written or oral. This Agreement is entered into solely for the purpose of the Project.

2.1.2 “Contract Documents” means and consists of (i) this Agreement signed by City and Engineer; (ii) Alaska Department of Labor and Workforce Development Pamphlet 600, which is incorporated herein as though fully set forth herein; (iii) all exhibits and schedules to this Agreement; and (iv) all change orders for changes in the Work issued after the execution of this Agreement.

2.1.3 “City’s Representative” means Mr. Doug Schoessler, Public Works Director; or the City Manager; or the City Manager’s designee.

2.1.4 “Work” means all labor, materials, equipment, and services provided by Engineer to fulfill Engineer’s obligations.

3. ENGINEER’S RESPONSIBILITIES

3.1 ENGINEERING SERVICES. Engineer shall be responsible for procuring engineering, planning, consulting, and design (collectively “Engineering”) of the Work described in the Task Orders and Contract Documents. Engineer shall exercise reasonable skill and judgment in the performance of the Work.

3.1.1 Engineer shall be responsible for taking and verifying field dimensions, providing tests, ordering materials, and all other actions as required to perform this Agreement.

3.1.2 Engineer shall submit for City’s written approval Drawings and Specifications based on the Contract Documents insuring proposed work meets with the FEMA guidelines for cost reimbursement. Drawings and Specifications shall set forth in detail the requirements for construction of the Work, and shall be based upon codes, laws, or regulations enacted at the time of their preparation.

3.2 SAFETY, LEGAL COMPLIANCE, AND RECORDKEEPING. Engineer shall take necessary precautions for the safety of its employees on the Project. Engineer shall not, however, be responsible for the elimination or abatement of safety hazards created or otherwise resulting from the work of City or its agents.

3.2.1 Engineer shall give adequate notices to authorities pertaining to its Work, and shall secure and pay for all permits, fees, assessments, inspections, and taxes necessary to complete the Work. Engineer shall comply with all laws and ordinances legally enacted at the date of execution of the Agreement which govern proper performance of the Work.

3.2.2 To the extent that Engineer retains or contracts with any mechanic or laborer during the Work, Engineer will comply with the Alaska Prevailing Wage Act,

AS 36.05.005 *et seq.*, and will pay any mechanic or laborer, including apprentices and trainees, the full amount of wages required under the Act. In the event that Engineer enters into contracts with Subcontractors for the provision of work by mechanics or laborers, Engineer will require the Subcontractor to pay its mechanics and laborers according to the terms of the Act.

3.2.3 Engineer shall maintain insurance policies as described in Article 9.

3.2.4 Engineer shall keep such full and detailed accounts as may be necessary for proper financial management under this Agreement. City shall be afforded access to all Engineer's records, books, correspondence, instructions, drawings, schedules, receipts, vouchers, memoranda, and similar data relating to Change Order work performed on the basis of actual cost. Engineer shall preserve all such records for a period of three years following final payment.

4. CITY'S RESPONSIBILITIES

4.1 INFORMATION. City shall provide information in a timely manner regarding requirements for each Task Order. Engineer shall be entitled to rely on the completeness and accuracy of information provided by City. City shall provide all necessary information describing the physical characteristics of the site, including surveys, site evaluations, legal descriptions, existing conditions, subsurface and environmental studies, reports, and investigations.

4.2 RESPONSIBILITIES DURING THE WORK

4.2.1 City shall review and approve further development of the drawings and specifications as set forth in Article 3.

4.2.2 City shall review the Schedule of Work and timely respond to City's obligations.

4.2.3 If City becomes aware of any error, omission, or failure to meet the requirements of the Contract Documents, or any fault or defect in the Work, City shall give prompt notice to Engineer.

4.2.4 City shall have no contractual obligations to any Subcontractors or suppliers.

4.2.5 Where the Engineer's work involves a project for construction, City shall provide insurance for the project as provided in Article 9.

4.3 CITY'S DESIGNATED REPRESENTATIVE. City's Designated Representative shall be fully acquainted with the Project, shall furnish information and services required of City pursuant to Paragraph 4.1 so as not to delay Engineer's Work,

and shall have authority to bind City in all matters requiring City's approval, authorization, or written notice.

5. SUBCONTRACTORS TO ENGINEER

5.1 SUBCONTRACTORS. Work not performed by Engineer with its own resources shall be performed by Subcontractors.

5.1.1 Engineer shall not retain any Subcontractor to whom City has a reasonable and timely objection, provided that City agrees to increase the Contract Price for any additional costs incurred by Engineer as a result of such objection.

5.1.2 Engineer shall be wholly responsible for the management of its Subcontractors in the performance of their work.

6. CONTRACT TIME

6.1 COMMENCEMENT. The Work shall commence upon the date of receipt of a written Notice to Proceed by the Engineer.

6.2 CONTRACT TERM. The term of this Agreement shall be until completed or otherwise legally terminated.

6.3 Time is of the essence in this Agreement.

6.3.1 If Engineer is delayed at any time in the progress of the Work by changes ordered in the Work, or by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, or other causes beyond Engineer's control, the Contract Time will be extended by Change Order to the extent that: (1) the delay will prevent Engineer from achieving Substantial Completion within the Contract Time, and (2) the performance of the Work is not delayed by any other cause for which Engineer is not entitled to an extension in the Contract Time under the Contract Documents. Adjustments to the Contract Time will be permitted for a delay only to the extent such delay (1) is not caused, or could not have been anticipated, by Engineer, (2) could not be limited or avoided by Engineer's timely notice to City of the delay, and (3) is of a duration not less than one day.

6.3.2 Final inspection and acceptance by City's Representative will not be made until all Work under this Agreement is completed. If unforeseeable causes beyond Engineer's control, and without Engineer's fault or negligence, delay progress of the Work, then Task Order Price and/or date of Task Order Completion shall be modified by Change Order as appropriate in accordance with the provisions of Article 8.

7. COMPENSATION OF ENGINEER

7.1 CONTRACT SUM; PAYMENT. For and in consideration of Engineer's performance of the Work, Engineer will receive: payment by unit price and actual quantities of work and materials provided in accordance with the bid prices in the attached Exhibit 2 (task estimate) and a Total Cost not to exceed \$234,440, and any authorized adjustments for additional work not anticipated by this contract. City's payment obligation will be subject to:

7.1.1 A reduction by any amount owed by Engineer to City at the time payment of the Contract Sum is due; or

7.1.2 Additions and/or deletions by Change Order.

7.2 ENGINEER'S INVOICES. Engineer will submit a single final invoice within thirty (30) days of the completion of Work.

7.3 REVIEW OF ENGINEER'S INVOICES. City's Representative will, within fifteen (15) days after receipt of any Engineer's invoice, approve payment for such amount as City's Representative determines is properly due, and notify Engineer in writing of the reasons for any withholding of payment in whole or in part.

7.4 PAYMENT BY ENGINEER

7.4.1 Engineer will promptly pay each person who supplies labor or materials to Engineer upon receipt of payment from City, out of the amount paid to Engineer.

7.4.2 City will have no responsibility for the payment of money to a person or entity who supplies labor or materials to Engineer.

7.4.3 A payment, or partial or entire use or occupancy of the Work by City, will not constitute acceptance of any Work not in accordance with the requirements of the Contract Documents.

7.4.4 If City is entitled to reimbursement or payment from Engineer under the Contract Documents, Engineer will make the payment promptly upon demand by City. Notwithstanding anything in the Contract Documents to the contrary, if Engineer fails promptly to make any payment due City, or City incurs costs and expenses to cure any default of Engineer or to correct defective Work, City will have an absolute right to offset the amount against the Contract Sum and may, in City's sole discretion, either (1) deduct an amount equal to the amount which is due City from any payment then or thereafter due Engineer from City, or (2) issue a written notice to Engineer reducing the Contract Sum by an amount equal to the amount which is due City.

7.5 FINAL COMPLETION AND FINAL PAYMENT. Upon receipt of a final Application for Payment, City's Representative will determine whether the final work is acceptable to City. City may withhold from the final payment to Engineer any amount that City determines is necessary to render the Work acceptable to City under the Contract Documents.

8. CHANGES IN THE WORK

8.1 CHANGE ORDERS. Changes in the Work which are within the general scope of this Agreement will be accomplished by Change Order, signed by both City and Engineer and stating the change and any adjustment in Task Order Price, Task Order Completion Date, and/or date of Substantial Completion.

8.2 UNILATERAL CHANGE ORDER. In the event City and Engineer cannot agree as to the amount of adjustment in Task Order Price, City shall issue a written order adjusting the Task Order Price determined by the reasonable expense and/or savings in the performance of the Work resulting from the Change. If such a change results in a net increase in Task Order Price, City shall make a reasonable adjustment in Engineer's overhead and profit. In the case of a net decrease in Task Order Price, City shall not make a reduction in overhead and profit. In the event of a disagreement between City and Engineer as to the amount of adjustment in Task Order Price, Engineer shall nonetheless continue to prosecute the Work.

8.3 CHANGED CONDITIONS. If in the performance of the Work Engineer finds latent, concealed, or subsurface physical conditions which differ from the conditions Engineer reasonably anticipated, or if physical conditions are materially different from those normally encountered and generally recognized as inherent in the kind of work provided for in this Agreement, Engineer shall immediately notify City in writing of such changed condition.

8.3.1 No adjustment in Task Order Price and/or Task Order Completion Date shall be claimed by Engineer due to changed conditions unless Engineer shall have timely notified City of the condition and made written request for such adjustment within three (3) days after such condition was encountered.

8.3.2 Adjustments to the Task Order Price and/or Task Order Completion Date, if any, resulting from changed conditions shall be set forth in a Change Order pursuant to this Article. No such adjustments shall be made for any changes performed by Engineer that have not been ordered by City in writing. Engineer expressly agrees that this requirement cannot be waived.

8.4 NOTICE REQUIREMENT. For any request for an adjustment of Task Order Price, Task Order Completion Date, and/or date of Substantial Completion, Engineer shall give City written notice of the request within twenty-one (21) days after the occurrence giving rise to the request or twenty-one (21) days after Engineer first recognized the condition giving rise to the claim, whichever is later.

8.5 EMERGENCIES. In any emergency affecting the safety of persons and/or property, Engineer shall act, at its discretion, to prevent threatened damage, injury, or loss. If such an emergency is anticipated to result in a request for an increase in Task Order Price, Task Order Completion Date, and/or date of Substantial Completion, notice shall be given to City before proceeding with the Work.

9. INDEMNITY, INSURANCE, AND WAIVER OF SUBROGATION

9.1 INDEMNITY. Engineer shall indemnify, defend, and hold harmless the City from and against any claim of, or liability for, negligent acts, errors, and omissions of Engineer under this Agreement. Engineer is not required to indemnify, defend, or hold harmless the City for a claim of, or liability for, the independent negligent acts, errors, and omissions of the City. If there is a claim of, or liability for, a joint negligent act, error, or omission of Engineer and the City, the indemnification, defense, and hold harmless obligation of this provision shall be apportioned on a comparative fault basis. In this provision, "Engineer" and "City" include the employees, agents, and contractors who are directly responsible, respectively, to each. In this provision, "independent negligent acts, errors, and omissions" means negligence other than in the City's selection, administration, monitoring, or controlling of Engineer, or in approving or accepting Engineer's work.

9.2 ENGINEER'S INSURANCE

9.2.1 Engineer will provide evidence of insurance with a carrier or carriers satisfactory to City covering injury to persons and/or property suffered by City or a third party as a result of operations by Engineer which arise both out of and during the course of this Agreement. This coverage will also provide protection against injuries to all employees of Engineer engaged in Work under this Agreement. The delivery to City of a written thirty (30) day notice is required before cancellation of any coverage or reduction in any limits of liability.

9.2.2 Engineer will maintain in force at all times during the performance of Work under this Agreement the following policies of insurance. Failure to maintain insurance may, at the option of City, be deemed Defective Work and remedied in accordance with the Contract Documents. Where specific limits and coverage are shown, it is understood that they will be the minimum acceptable. The requirements of this Paragraph will not limit the Engineer's responsibility to indemnify under Paragraph 9.1.

A. Comprehensive or Commercial General Liability Insurance: Engineer will provide and maintain either Comprehensive or Commercial General Liability Insurance to cover all operations by or on behalf of Engineer, and provide insurance for bodily injury and property damage liability including coverage for: premises and operations, products and completed operations, and personal injury liability. The minimum limits of liability will be:

- (1) If Engineer carries a Comprehensive General Liability policy, the limits of liability will not be less than a Combined Single Limit for bodily injury, property damage and Personal Injury Liability of \$1,000,000 each occurrence/\$1,000,000 aggregate.
- (2) If Engineer carries a Commercial General Liability policy, the limits of liability will not be less than \$1,000,000 each occurrence (Combined Single Limit for bodily injury and property damage), \$1,000,000 for Personal Injury Liability, \$1,000,000 aggregate for Products-Completed Operations, and \$1,000,000 general aggregate.

B. Professional Liability Insurance: Engineer will provide and maintain professional liability insurance for claims arising from negligent performance of professional services under this Agreement and shall be written for not less than \$1,000,000 per claim/\$1,000,000 aggregate, with such insurance maintained for a minimum of three years after the date of Task Order Completion.

C. Workers' Compensation Insurance: Engineer will provide and maintain, for all employees of Engineer engaged in work under this Agreement, Workers' Compensation insurance as required by AS 23.30.045, to include Employer's Liability Protection in the amount of \$1,000,000 per person/ \$1,000,000 per occurrence.

D. Automobile Liability Insurance: Engineer will provide and maintain for all owned, hired, and non-owned vehicles coverage in limits not less than the following: \$1,000,000 each occurrence (Combined Single Limit for bodily injury and property damage).

9.2.3 Certificates of Insurance acceptable to City will be filed with City. Certificates for all coverage will be provided before commencement of the Work. Each Certificate of Insurance will contain the following statement: "This is to certify that the policies described herein comply with all aspects of the insurance requirements of (Contract Name and Project Number)." Acceptance by City of a deficient Certificate of Insurance does not constitute a waiver of any requirement of insurance in the Contract Documents.

A. Engineer's insurance will be endorsed to provide that the insurers and underwriters on all policies waive their right of subrogation against City. Except for workers' compensation coverage described at 9.2.2, City will be named additional insured on all policies.

9.3 CITY'S INSURANCE

9.3.1 City shall be responsible for obtaining and maintaining its own liability insurance. Except as set forth below, insurance for claims arising out of the performance of this Agreement may be purchased and maintained at City's discretion.

9.3.2 In the event that Engineer's Work involves projects for construction undertaken by City, City shall obtain and maintain Builder's Risk insurance in a form acceptable to Engineer upon the entire project for the full cost of replacement at the time of any loss. The insurance shall include as named insureds City, Engineer, and any Architect/Engineers or Contractors. The insurance shall insure against loss from the perils of fire and extended coverage, and shall include "all risk" insurance for physical loss or damage, including without duplication of coverage: theft, vandalism, malicious mischief, transit, collapse, falsework, temporary buildings, debris removal, flood, earthquake, testing, and damages resulting from defective design, workmanship, or material. City shall increase limits of coverage, if necessary, to reflect estimated replacement cost. City shall be responsible for co-insurance penalties or deductibles.

9.4 WAIVER OF SUBROGATION

9.4.1 Engineer and City waive all rights against each other, and any of their respective employees, agents, consultants, and Subcontractors, for damages caused by risks covered by insurance provided in Paragraph 9.2 to the extent they are covered by that insurance, except such rights as they may have to the proceeds of such insurance held by Engineer or City as trustees. Engineer shall require similar waivers from any and all Contractors, and shall require each of them to include similar waivers in their subcontracts and consulting agreements.

9.4.2 If the policies of insurance referred to in this Paragraph require an endorsement to provide for continued coverage where there is a waiver of subrogation, the holder of such policies will cause them to be so endorsed.

9.5 SURVIVAL. Engineer's insurance and indemnity obligations hereunder will survive termination of this Agreement.

10. SUSPENSION OR TERMINATION OF AGREEMENT

10.1 SUSPENSION FOR CITY'S CONVENIENCE. City may order Engineer in writing to suspend, delay, or interrupt all or part of the Work for such period of time as may be determined to be appropriate for the convenience of City. Adjustments caused by suspension, delay, or interruption shall be made in Task Order Price and/or Task Order Completion Date. No adjustment shall be made if Engineer is responsible for the suspension, delay, or interruption of the Work, or if another provision of this Agreement is applied to create an adjustment.

10.2 TERMINATION FOR CITY'S CONVENIENCE. City may, at its sole and absolute discretion, terminate this Agreement for its own convenience. If City so elects, City shall be liable to Engineer for the reasonable value of work performed by Engineer

prior to termination of the Agreement, including reasonable profit and overhead, less prior payments made. Engineer shall not be entitled to prospective profits on unperformed work, or consequential damages.

10.3 TERMINATION BY CITY FOR CAUSE.

10.3.1 Upon seven (7) days' written notice to Engineer, City may terminate this Agreement for any of the following reasons:

1. Engineer persistently utilizes improper materials and/or inadequately skilled workers;
2. Engineer does not make proper payment to any laborers, materials suppliers, or Subcontractors;
3. Engineer persistently fails to abide by the orders, regulations, rules, ordinances, or laws of governmental authorities having jurisdiction;
4. Engineer files a petition under the Bankruptcy Code; or
5. Engineer otherwise materially breaches this Agreement.

10.3.2 In the event that City exercises its rights under Paragraph 10.3, City may, without prejudice to any other right or remedy against Engineer, take over and complete the performance of this Subcontract, or any part of it, at the expense of Engineer, or without taking over the work, may furnish the necessary materials and/or employ the workmen necessary to remedy the situation at the expense of Engineer.

10.3.3 If City takes over work pursuant to Subparagraph 10.3.2, it is specifically agreed that City may take possession of the premises and of all materials, tools, and equipment of Engineer at the site or for which Engineer has been paid for the purpose of completing the work of this Agreement. Engineer shall be liable to City for all costs, losses, damages, and extra expense, including overhead, incurred by City incident to such completion.

10.3.4 If City wrongfully exercises its rights under Paragraph 10.3, City shall be liable to Engineer solely for the costs owing to Engineer following a termination of this Agreement for City's convenience.

10.4 CITY'S RIGHT TO CARRY OUT THE WORK. If Engineer persistently fails to perform any of its obligations under this Agreement, City may, after seven (7) days' written notice, during which period Engineer fails to complete such obligation, undertake to perform such obligations without terminating this Agreement. The Task Order Price shall be reduced by the cost of City performing such obligations. In the event City

exercises its rights under this Paragraph, upon request of Engineer, City shall provide a detailed accounting of the cost incurred by City.

11. OWNERSHIP OF DOCUMENTS

Upon final payment or termination of this Agreement, Engineer and City own the property rights, except for copyrights, of all documents, drawings, specifications, electronic data, and information prepared, provided, or procured by Engineer or its Subcontractors and distributed to City for this Project ("Design-Build Documents") and shall have the right to use, reproduce, and make derivative works of the Design-Build Documents to complete the work and for subsequent renovation and remodeling of the work.

12. CLAIMS AND DISPUTES

12.1 CLAIMS. Except as otherwise provided in this Agreement, any claim or dispute concerning questions of fact which may arise under this Agreement will be presented to City in writing by Engineer.

12.1.1 In presenting a claim, Engineer will clearly and specifically state: (1) the Agreement provision under which the claim is made; (2) the item of Work on which the claim is based; and (3) the specific relief requested, including any additional time Engineer believes it is entitled to.

12.1.2 In presenting a claim, Engineer must provide a specific and detailed description of the basis for the claim, including the date of the event allegedly underlying the claim, all actions taken by Engineer in response to that event, and all actions taken by other parties in relation to that event. If Engineer seeks an adjustment in Task Order Price as a part of the claim, it must provide a detailed cost accounting, with copies of all receipts, invoices, or payment records in support of that accounting.

12.1.3 In presenting a claim requesting adjustment of Task Order Price due to delay of Work, Engineer must provide a detailed schedule explaining the delay. In the event that the claim purports a delay of work caused by City, Engineer must provide a detailed schedule analysis explaining the nature of any disruption in Work that serves as basis for the claim, why City is responsible for any disruption and ensuing delay, and that the alleged delay was not concurrent with some other delay in the Work.

12.1.4 If the amount of additional time to which Engineer is entitled cannot be readily ascertained at the time the claim is submitted, such calculations will be submitted as soon as they are discernible. In any case, the detailed claim, including all necessary supporting data, will be submitted to City's Representative no later than thirty (30) days after completing the item of Work on which the claim is based.

12.2 DISPUTE RESOLUTION. If a dispute arises out of or relates to this Agreement or its breach, the parties shall endeavor to settle the dispute first through

direct discussions. If the dispute cannot be settled through direct discussions, any actions arising under this Agreement shall be instituted at the Superior Court for the State of Alaska at Anchorage. This Agreement shall be governed by and construed in accordance with the laws of the State of Alaska. No claim, dispute, or controversy shall interfere with the progress and performance of Work required under this Agreement, and Engineer shall proceed as directed by City in all instances with its Work.

13. MISCELLANEOUS PROVISIONS

13.1 INTEGRATION. The Contract Documents represent the entire and integrated Agreement between the parties, and supersede prior negotiations, representations, or agreements, either written or oral. The Contract Documents may be amended or modified only by the procedure set forth herein.

13.2 INTERPRETATION. The rule of construction that terms of an agreement are construed against the party that drafted the agreement shall not apply to this Agreement.

13.3 INDEPENDENT ENGINEER. Engineer acts as an independent contractor to City and is not an agent, partner, or in a joint venture with the City in the performance of this Agreement. Engineer shall exercise exclusive control for the means, methods, techniques, and procedures in performance of the Work.

13.4 ASSIGNMENT. Neither City nor Engineer shall assign their interest in this Agreement without the written consent of the other except as to the assignment of proceeds.

13.5 SEVERABILITY. The partial or complete invalidity of any one or more provisions of this Agreement shall not affect the validity or continuing force and effect of any other provision.

13.6 COUNTERPARTS. This Agreement may be simultaneously executed in several counterparts, each of which will be an original and all of which will constitute but one and the same instrument.

13.7 TITLES. The titles given to the Articles and Paragraphs of this Agreement are for ease of reference only, and shall not be relied upon or cited for any other purpose.

IN WITNESS WHEREOF, this Agreement has been duly executed as of the date first written above.

CITY

CITY OF SEWARD

Date: _____

By: _____
Jeff Bridges, Interim City Manager


Attest:

Brenda Ballou, MMC, City Clerk

ENGINEER:

PND ENGINEERS, INC

Date: 2/8/19 _____

By:  _____
Printed Name: Paul Kendall _____
Its: Asst. Treasurer _____