INDEPENDENT CONSULTANT AGREEMENT FOR PROFESSIONAL SERVICES (Underground Utility Data Management)

This Independent Consultant Agreement for Professional Services ("Agreement") is made and entered into as of the 6th day of April, 2016 by and between the Solano Community College District, ("District") and UndergroundGIS, Inc. ("Consultant"), (together, "Parties").

WHEREAS, the District is authorized by section 53060 of the California Government Code to contract with and employ any persons for the furnishing of special services and advice in financial, economic, accounting, engineering, legal or administrative matters, if those persons are specially trained and experienced and competent to perform the special services required.

WHEREAS, the District complied with the requirements of section 53060 in selecting Consultant; and

WHEREAS, the District is in need of such services and advice related to work it will be performing at District ("Project"); and

WHEREAS, the Consultant is specially trained and experienced and competent to perform the services required by the District.

NOW, THEREFORE, the Parties agree as follows:

- 1. **Services**. The Consultant shall provide underground utility data management services as further described in **Exhibit "A,"** attached hereto and incorporated herein by this reference ("Services").
- 2. **Term**. Consultant shall commence providing services under this Agreement on April 6, 2016 and will diligently perform as required and complete performance by April 6, 2019, unless this Agreement is terminated and/or otherwise cancelled prior to that time.
- 3. **Submittal of Documents**. The Consultant shall not commence the Services under this Agreement until the Consultant has submitted and the District has approved the certificate(s) and affidavit(s), and the endorsement(s) of insurance required as indicated below:
 - X Signed Agreement
 - X Workers' Compensation Certification
 - X Insurance Certificates and Endorsements
 - <u>X</u> W-9 Form
 - Other:
- 4. **Compensation**. District agrees to pay the Consultant for Services satisfactorily rendered pursuant to this Agreement a total fee not to exceed Forty Five Thousand Dollars (\$45,000). District shall pay Consultant according to the following terms and conditions:
 - 4.1. The payment will be made in six (6) installments in the amount of \$7,500, unless there is a dispute based upon the Services rendered as determined by the District.
 - 4.2. Payment shall be made within thirty (30) days after the Consultant submits a proper invoice to the District for Services rendered and after the District's written approval of the invoice.
 - 4.3. The fee set forth in this Agreement shall be full compensation for all Services described in **Exhibit "A."**

- 4.4. Any services outside of the scope in **Exhibit "A**" shall constitute Additional Services. The District will only obligated to pay for Additional Services that have prior written authorization by the District's authorized representative and that have been satisfactorily completed.
- 5. **Expenses**. District shall not be liable to Consultant for any costs or expenses paid or incurred by Consultant in performing Services for District.
- 6. Independent Contractor. Consultant, in the performance of this Agreement, shall be and act as an independent contractor. Consultant understands and agrees that it and all of its employees shall not be considered officers, employees, agents, partner, or joint venture of the District, and are not entitled to benefits of any kind or nature normally provided employees of the District and/or to which District's employees are normally entitled, including, but not limited to, State Unemployment Compensation or Worker's Compensation. Consultant shall assume full responsibility for payment of all federal, state and local taxes or contributions, including unemployment insurance, social security and income taxes with respect to Consultant's employees. In the performance of the Services herein contemplated, Consultant is an independent contractor or business entity, with the sole authority for controlling and directing the performance of the details of the work, District being interested only in the results obtained.
- 7. **Materials**. Consultant shall furnish, at its own expense, all labor, materials, equipment, supplies and other items necessary to complete the services to be provided pursuant to this Agreement.

8. Performance of Services.

8.1. **Standard of Care**. Consultant represents that Consultant has the qualifications and ability to perform the Services in a professional manner, without the advice, control or supervision of District. Consultant's services will be performed, findings obtained, reports and recommendations prepared in accordance with generally and currently accepted principles and practices of its profession for services to California community college districts.

Consultant shall carefully study and compare all documents, findings, and other instructions and shall at once report to District, in writing, any error, inconsistency, or omission that Consultant or its employees may discover. Consultant shall have responsibility for discovery of errors, inconsistencies, or omissions.

- 8.2. **Meetings.** Consultant and District agree to participate in regular meetings on at least a quarterly basis to discuss strategies, timetables, implementations of services, and any other issues deemed relevant to the operation of Consultant's performance of Services. Meetings may be by teleconference, unless specifically requested by the District to be in person. District shall schedule the quarterly meetings with Consultant.
- 8.3. **District Approval.** The work completed herein must meet the approval of the District and shall be subject to the District's general right of inspection and supervision to secure the satisfactory completion thereof.

9. Proprietary Rights.

9.1. **Reservation of Rights.** Subject to the limited rights expressly granted hereunder, Consultant (or Third Party Software Suppliers, if applicable) reserves all rights, title and interest in and to the InSite System, Software, and InSite Underground Utilities Map Files, including all related intellectual property rights. No rights are granted to District hereunder other than a non-exclusive, unlimited license to use the InSite System, Software, and InSite Underground Utilities Map Files for the duration of this Agreement, and as further set forth herein.

9.2. Ownership.

- 9.2.1. It is acknowledged that all right, title and interest in the InSite System, Software, and InSite Underground Utilities Map Files, InSite System and Services will remain with Consultant (unless another owner is specified in or on those items, such party being referred to in this Section as the "Owner") (or System Suppliers, if applicable) and that the Services are provided on a subscription basis and not "sold" to District. Consultant shall own the entire right, title and interest in and to all Improvements. "Improvements" means all modifications, derivative works, enhancements and other improvements made to the InSite System, Software, InSite Underground Utilities Map Files, InSite System, or Services. Any Improvements are automatically transferred by operation of law to Consultant as the sole owner of any and all Improvements.
- 9.2.2. District is responsible for and expressly reserves all rights in the District Drawings and Data, except the limited right of Consultant to use the District's Drawings and Data in providing and delivering the Services solely for the District's benefit. District shall be entitled to an export of all District data upon the expiration or termination of this Agreement.
- 9.3. Restrictions. District shall not (i) modify, copy or create derivative works of the Software or InSite Underground Utilities Map File format; (ii) frame or mirror any content forming part of the Software, other than on District's own intranets or otherwise for its own internal business purposes; (iii) reverse engineer the Software or InSite Underground Utilities Map Files; or (iv) access the InSite System in order to (a) build a competitive product or service, or (b) copy any ideas, features, functions or graphics of the Software.
- 9.4. **Suggestions.** Consultant shall have a royalty-free, worldwide, transferable, sublicensable, irrevocable, perpetual license to use or incorporate into the Services any suggestions, enhancement requests, recommendations or other feedback provided by District or its Users relating to the operation of the Services. "Users" means individuals who are authorized by Client to use the Online Services and who have been supplied user identifications and passwords by UGIS at Client's request. Third parties (nonemployees) may access and use the Online Services only as agreed in advance in writing by Client and UGIS.
- 10. Audit. Consultant shall establish and maintain books, records, and systems of account, in accordance with generally accepted accounting principles, reflecting all business operations of Consultant transacted under this Agreement. Consultant shall retain these books, records, and systems of account during the Term of this Agreement and for five (5) years thereafter. Consultant shall permit the District, its agent, other representatives, or an independent auditor to audit, examine, and make excerpts, copies, and transcripts from all books and records, and to make audit(s) of all billing statements, invoices, records, and other data related to the Services covered by this Agreement. Audit(s) may be performed at any time, provided that the District shall give reasonable prior notice to Consultant and shall conduct audit(s) during Consultant's normal business hours, unless Consultant otherwise consents.

11. Termination.

- 11.1. **For Convenience by District**. District may, at any time, with or without reason, terminate this Agreement and compensate Consultant only for services satisfactorily rendered to the date of termination. Written notice by District shall be sufficient to stop further performance of services by Consultant. Notice shall be deemed given when received by the Consultant or no later than three days after the day of mailing, whichever is sooner.
- 11.2. **For Cause by District**. District may terminate this Agreement upon giving of written notice of intention to terminate for cause. Cause shall include:
 - 11.2.1. material violation of this Agreement by the Consultant; or
 - 11.2.2. any act by Consultant exposing the District to liability to others for personal injury or property damage; or
 - 11.2.3. Consultant is adjudged a bankrupt, Consultant makes a general assignment for the benefit of creditors or a receiver is appointed on account of Consultant's insolvency.

Written notice by District shall contain the reasons for such intention to terminate and unless within thirty (30) calendar days after that notice the condition or violation shall cease, or satisfactory arrangements for the correction thereof be made, this Agreement shall upon the expiration of the thirty (30) calendar days cease and terminate. In the event of this termination, the District may secure the required services from another Consultant. If the expense, fees, and/or costs to the District exceed the cost of providing the service pursuant to this Agreement, the Consultant shall immediately pay the excess expense, fees, and/or costs. The foregoing provisions are in addition to and not a limitation of any other rights or remedies available to District.

11.3 For thirty (30) days after a notice of termination, District and its agents shall have unlimited access to District underground utility InSite database. After thirty (30) days, the District's unlimited access shall cease. District drawings and/or data as uploaded or otherwise stored or contained within that database, however, shall continue to be the sole property of the District, and the District shall be entitled to an export of said drawings and/or data within seven (7) days of termination.

12. Mutual Indemnification.

- 12.1. **Indemnification by Consultant**. To the furthest extent permitted by California law, Consultant shall defend, indemnify, and hold harmless the District, its Governing Board, agents, representatives, officers, consultants, employees, trustees, and volunteers (the "indemnified parties") from any and all claims, damages, fees, costs, loss, or liabilities (including attorneys' fees) arising out of, pertaining to, or relating to the negligence, recklessness, or willful misconduct of the Consultant. The District shall have the right to accept or reject any legal representation that Consultant proposes to defend the indemnified parties.
- 12.2. Indemnification by District. Subject to this Agreement, District shall defend, indemnify and hold Consultant harmless against any loss, damage or costs (including reasonable attorneys' fees) incurred in connection with, directly or indirectly, claims made or brought against Consultant by a third party alleging that the use of District Drawings and Data has caused harm to a third party; provided, that Consultant (a) promptly gives written notice of the Claim to District; (b) gives District sole control of the defense and settlement of the Claim (provided that District may not settle any

Claim unless it unconditionally releases Consultant of all liability); and (c) provides to District all reasonable assistance.

13. Insurance.

13.1. The Consultant shall procure and maintain at all times it performs any portion of the Services the following insurance with minimum limits equal to the amount indicated below.

Type of Coverage	Minimum Requirement
Commercial General Liability Insurance, including Bodily	
Injury, Personal Injury, Property Damage, Advertising Injury,	
and Medical Payments	
Each Occurrence	\$ 1,000,000
General Aggregate	\$ 2,000,000
Automobile Liability Insurance - Any Auto	
Each Occurrence	\$ 1,000,000
General Aggregate	\$ 2,000,000
Workers Compensation	Statutory Limits
Employer's Liability	\$ 1,000,000

- 13.1.1. **Commercial General Liability and Automobile Liability Insurance**. Commercial General Liability Insurance and Any Auto Automobile Liability Insurance that shall protect the Consultant, the District, and the State from all claims of bodily injury, property damage, personal injury, death, advertising injury, and medical payments arising performing any portion of the Services. (Form CG 0001 and CA 0001, or forms substantially similar, if approved by the District.)
- 13.1.2. **Workers' Compensation and Employers' Liability Insurance**. Workers' Compensation Insurance and Employers' Liability Insurance for all of its employees performing any portion of the Services. In accordance with provisions of section 3700 of the California Labor Code, the Consultant shall be required to secure workers' compensation coverage for its employees. If any class of employee or employees engaged in performing any portion of the Services under this Agreement are not protected under the Workers' Compensation Statute, adequate insurance coverage for the protection of any employee(s) not otherwise protected must be obtained before any of those employee(s) commence performing any portion of the Services.
- 13.2. **Proof of Carriage of Insurance**. The Consultant shall not commence performing any portion of the Services until all required insurance has been obtained and certificates indicating the required coverage have been delivered in duplicate to the District and approved by the District. Certificates and insurance policies shall include the following:
 - 13.2.1. A clause stating: "This policy shall not be canceled or reduced in required limits of liability or amounts of insurance until notice has been mailed to the District, stating date of cancellation or reduction. Date of cancellation or reduction shall not be less than thirty (30) days after date of mailing notice."
 - 13.2.2. Language stating in particular those insured, extent of insurance, location and operation to which insurance applies, expiration date, to whom cancellation and reduction notice will be sent, and length of notice period.

- 13.2.3. An endorsement stating that the District and its Governing Board, agents, representatives, employees, trustees, officers, consultants, and volunteers are named additional insured under all policies except Workers' Compensation Insurance, Professional Liability, and Employers' Liability Insurance. An endorsement shall also state that Consultant's insurance policies shall be primary to any insurance or self-insurance maintained by District. An endorsement shall also state that there shall be a waiver of any subrogation.
- 13.2.4. All policies except the Professional Liability, Workers' Compensation Insurance, and Employers' Liability Insurance Policies shall be written on an occurrence form.
- 13.3. **Acceptability of Insurers**. Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A:VII, unless otherwise acceptable to the District.
- 14. **Assignment**. The obligations of the Consultant pursuant to this Agreement shall not be assigned by the Consultant.
- 15. **Compliance with Laws**. Consultant shall observe and comply with all rules and regulations of the governing board of the District and all federal, state, and local laws, ordinances and regulations. Consultant shall give all notices required by any law, ordinance, rule and regulation bearing on conduct of the Work as indicated or specified. If Consultant observes that any of the Work required by this Contract is at variance with any such laws, ordinance, rules or regulations, Consultant shall notify the District, in writing, and, at the sole option of the District, any necessary changes to the scope of the Work shall be terminated effective upon Consultant's receipt of a written termination notice from the District. If Consultant performs any work that is in violation of any laws, ordinances, rules or regulations, without first notifying the District of the violation, Consultant shall bear all costs arising therefrom.
- 16. **Certificates/Permits/Licenses**. Consultant and all Consultant's employees or agents shall secure and maintain in force such certificates, permits and licenses as are required by law in connection with the furnishing of Services pursuant to this Agreement.
- 17. **Employment with Public Agency**. Consultant, if an employee of another public agency, agrees that Consultant will not receive salary or remuneration, other than vacation pay, as an employee of another public agency for the actual time in which services are actually being performed pursuant to this Agreement.
- 18. Anti-Discrimination. It is the policy of the District that in connection with all work performed under Contracts there be no discrimination against any employee engaged in the work because of race, color, ancestry, national origin, religious creed, physical disability, medical condition, marital status, sexual orientation, gender, or age and therefore the Consultant agrees to comply with applicable Federal and California laws including, but not limited to the California Fair Employment and Housing Act beginning with Government Code Section 12900 and Labor Code Section 1735 and District policy. In addition, the Consultant agrees to require like compliance by all of its subcontractor(s).
- 19. **No Rights in Third Parties.** This Agreement does not create any rights in, or inure to the benefit of, any third party except as expressly provided herein.
- 20. **District's Evaluation of Consultant and Consultant's Employees and/or Subcontractors**. The District may evaluate the Consultant in any way the District is entitled pursuant to applicable law. The District's evaluation may include, without limitation:

- 20.1. Requesting that District employee(s) evaluate the Consultant and the Consultant's employees and subcontractors and each of their performance.
- 20.2. Announced and unannounced observance of Consultant, Consultant's employee(s), and/or subcontractor(s).
- 21. **Limitation of Liability**. Other than as provided in this Agreement, District's financial obligations under this Agreement shall be limited to the amount of payment of the compensation provided in this Agreement. Notwithstanding any other provision of this Agreement, in no event, shall Parties be liable, regardless of whether any claim is based on contract or tort, for any special, consequential, indirect or incidental damages, including, but not limited to, lost profits or revenue, arising out of or in connection with this Agreement for the services performed in connection with this Agreement.

22. Confidentiality.

- 22.1. Definition of Confidential Information. As used herein, "Confidential Information" means all confidential and proprietary information of a party ("Disclosing Party") disclosed to the other party ("Receiving Party"), which is not subject to disclosure under the Government Code, Education Code, Public Contracting Code, Code of Regulations, or other applicable local, state, or federal law, or due to its inclusion in a public record. Confidential Information may be provided orally or in writing, and may include business and marketing plans, technology and technical information, product designs, and business processes. However, the Disclosing Party must clearly identify any and all Confidential Information at the time of its disclosure. District acknowledges and agrees that the restrictions on Confidential Information contained in this Agreement shall not apply to the general knowledge, skills and experience gained by either Party or either Party's employees during the provision of Services under this Agreement. Confidential Information shall not include any information that: (i) is required by law to be disclosed; (ii) is or constitutes a public record; (iii) is or becomes generally known to the public without breach of any obligation owed to the Disclosing Party; (iv) was known to the Receiving Party prior to its disclosure by the Disclosing Party without breach of any obligation owed to the Disclosing Party; (v) was independently developed by the Receiving Party without breach of any obligation owed to the Disclosing Party; or (vi) is received from a third party without breach of any obligation owed to the Disclosing Party.
- 22.2. **Identifying Confidential Information**. At the time Confidential Information is disclosed, the Disclosing Part must clearly identify such information as Confidential.
 - 22.2.1. <u>Written Confidential Information</u>: For any and all documents containing Confidential Information, the Disclosing Party must clearly stamp or label each page in which Confidential Information appears with "**CONFIDENTIAL**".
 - 22.2.2. <u>Non-Written Confidential Information</u>: For any and all non-written materials containing Confidential Information, Disclosing Party must in writing describe the Confidential Information of a non-written communication, information, or material with reasonable precision and detail to enable the Receiving Party to identify the scope of such Confidential Information.
- 22.3. **Confidentiality.** The Receiving Party shall not disclose or use any Confidential Information of the Disclosing Party for any purpose outside the scope of this Agreement, except with the Disclosing Party's prior written permission.

- 22.4. **Compelled Disclosure.** If the Receiving Party is compelled by law to disclose Confidential Information of the Disclosing Party, it shall provide the Disclosing Party with prior notice of such compelled disclosure (to the extent legally permitted) and reasonable assistance, at Disclosing Party's cost, if the Disclosing Party wishes to contest the disclosure.
- 22.5. **Remedies.** If the Receiving Party discloses or uses (or threatens to disclose or use) any Confidential Information of the Disclosing Party in breach of confidentiality protections hereunder, the Disclosing Party shall have the right, in addition to any other remedies available to it, to seek injunctive relief to enjoin such acts, it being specifically acknowledged by the parties that any other available remedies are inadequate.
- 22.6. This requirement to maintain confidentiality shall extend beyond the termination of this Agreement
- 23. **Notice**. Any notice required or permitted to be given under this Agreement shall be deemed to have been given, served, and received if given in writing and either personally delivered or deposited in the United States mail, registered or certified mail, postage prepaid, return receipt required, or sent by overnight delivery service, or facsimile or electronic transmission, addressed as follows:

District:

Solano Community College District C/O Kitchell CEM 360 Campus Lane, Suite 203 Fairfield, California 94534 Email: pam.kinzie@solano.edu ATTN: Pam Kinzie

Consultant:

UndergroundGIS, Inc.

45 Leveroni Court Novato, California 94949 Email: crudkin@undergroundgis.com ATTN: Charlie Rudkin

Any notice personally given or sent by facsimile or electronic transmission shall be effective upon receipt. Any notice sent by overnight delivery service shall be effective the business day next following delivery thereof to the overnight delivery service. Any notice given by mail shall be effective three (3) days after deposit in the United States mail.

- 24. **Integration/Entire Agreement of Parties**. This Agreement constitutes the entire agreement between the Parties and supersedes all prior discussions, negotiations, and agreements, whether oral or written. This Agreement may be amended or modified only by a written instrument executed by both Parties.
- 25. **California Law**. This Agreement shall be governed by and the rights, duties and obligations of the Parties shall be determined and enforced in accordance with the laws of the State of California. The Parties further agree that any action or proceeding brought to enforce the terms and conditions of this Agreement shall be maintained in the county in which the District's administrative offices are located.
- 26. **Waiver**. The waiver by either party of any breach of any term, covenant, or condition herein contained shall not be deemed to be a waiver of such term, covenant, condition, or any subsequent breach of the same or any other term, covenant, or condition herein contained.
- 27. **Severability**. If any term, condition or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions will nevertheless continue in full force and effect, and shall not be affected, impaired or invalidated in any way.

- 28. **Provisions Required By Law Deemed Inserted.** Each and every provision of law and clause required by law to be inserted in this Contract shall be deemed to be inserted herein and this Contract shall be read and enforced as though it were included therein.
- 29. **Authority to Bind Parties.** Neither party in the performance of any and all duties under this Agreement, except as otherwise provided in this Agreement, has any authority to bind the other to any agreements or undertakings.
- 30. **Attorney Fees/Costs.** Should litigation be necessary to enforce any terms or provisions of this Agreement, then each party shall bear its own litigation and collection expenses, witness fees, court costs and attorney's fees.
- 31. **Captions and Interpretations.** Paragraph headings in this Agreement are used solely for convenience, and shall be wholly disregarded in the construction of this Agreement. No provision of this Agreement shall be interpreted for or against a party because that party or its legal representative drafted such provision, and this Agreement shall be construed as if jointly prepared by the Parties.
- 32. **Calculation of Time.** For the purposes of this Agreement, "days" refers to calendar days unless otherwise specified.
- 33. **Signature Authority.** Each party has the full power and authority to enter into and perform this Agreement, and the person signing this Agreement on behalf of each Party has been properly authority and empowered to enter into this Agreement.
- 34. **Counterparts.** This Agreement and all amendments and supplements to it may be executed in counterparts, and all counterparts together shall be construed as one document.
- 35. **Incorporation of Recitals and Exhibits**. The Recitals and each exhibit attached hereto are hereby incorporated herein by reference.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the date indicated below.

Dated:	, 2016	Dated:	, 2016
Solano Community College District		UndergroundGIS, Inc.	
By:		By:	
Print Name:	Yulian Ligioso	Print Name:	Charles G. Rudkin
Print Title:	V.P., Business & Administration	Print Title:	V.P., Sales & Marketing

Information regarding Consultant:

License No.: <u>N/A</u>

Address: <u>45 Leveroni Court</u> <u>Novato, CA 94949</u>

Telephone: <u>1-415-203-4600</u>

Facsimile:

E-Mail: crudkin@undergroundgis.com

Type of Business Entity: Individual Sole Proprietorship Partnership Limited Partnership X Corporation, State: Delaware Limited Liability Company

_____ Other: _____

Employer Identification Number: <u>47-</u> <u>2776107</u>

NOTE: Section 6041 of the Internal Revenue Code (26 U.S.C. 6041) and Section 1.6041-1 of Title 26 of the Code of Federal Regulations (26 C.F.R. 1.6041-1) requires the recipients of \$600.00 or more to furnish their taxpayer information to the payer. In order to comply with these requirements, the District requires the Consultant to furnish the information requested in this section.

WORKERS' COMPENSATION CERTIFICATION

Labor Code Section 3700 in relevant part provides:

Every employer except the State shall secure the payment of compensation in one or more of the following ways:

- By being insured against liability to pay compensation by one or more insurers duly authorized to write compensation insurance in this State.
- By securing from the Director of Industrial Relations a certificate of consent to self-insure, which may be given upon furnishing satisfactory proof to the Director of Industrial Relations of ability to self-insure and to pay any compensation that may become due to its employees.

I am aware of the provisions of Section 3700 of the Labor Code which require every employer to be insured against liability for workers' compensation or to undertake self-insurance in accordance with the provisions of that code, and I will comply with such provisions before commencing the performance of the Work of this Contract.

Date: December 30, 2015

Name of Consultant: UndergroundGIS, Inc.

Signature:

Print Name and Title: Charles G. Rudkin, V.P., Sales & Marketing

(In accordance with Article 5 – commencing at Section 1860, Chapter 1, part 7, Division 2 of the Labor Code, the above certificate must be signed and filed with the District prior to performing any Work under this Contract.)

EXHIBIT "A" DESCRIPTION OF SERVICES TO BE PERFORMED BY CONSULTANT

Consultant's entire Proposal is **<u>not</u>** made part of this Agreement.

- 1.1. Facilitate unlimited access by District and its agents to District underground utility InSite database in a secure cloud environment.
- 1.2. Implement updates and software upgrades to InSite as they may become available.
- 1.3. Provide technical support to the District and its agents during normal business hours (Pacific Coast time).
- 1.4. Modify InSite maps and asset information tables for District Campus and Centers (for example, changes due to Measure Q projects). Allowance of 30 hours; time required beyond allowance would be an Additional Service.