

10) **Agreement With Cotter Construction for Serenity Park Fitness Trail**

Approve and authorize the City Manager to Execute a Public Works Construction Agreement with Cotter Construction for Serenity Park Fitness Trail for \$160,000.00 and change orders not to exceed a 10% contingency amount of \$16,000.00 for unanticipated costs in such final form as approved by the City Attorney.



REPORT TO CITY COUNCIL

To: Honorable Mayor or Members of the City Council

From: Jason Simpson, City Manager

Prepared by: Rick DeSantiago, Public Works Manager

Date: January 24, 2023

Subject: **Agreement With Cotter Construction for Serenity Park Fitness Trail**

Recommendation

Approve and authorize the City Manager to Execute a Public Works Construction Agreement with Cotter Construction for Serenity Park Fitness Trail for \$160,000.00 and change orders not to exceed a 10% contingency amount of \$16,000.00 for unanticipated costs in such final form as approved by the City Attorney.

Background

Staff has determined the existing fitness trail needs significant maintenance and trail upgrades to improve the overall suitability and user enjoyment. On 9/24/22, staff began demolishing the existing fitness trail in preparation for the upcoming upgrades. A general requirements scope of work was developed and included in a request for proposal to construction contractors.

Essentially, the new fitness trail will include approximately 58,000 square feet of compacted decomposed granite (DG), providing upgrades to accommodate strollers, walkers, joggers, fitness groups, and all park users. Of significant improvement will be the upgraded trail surface to accommodate persons with physical impediments and provide ADA accessibility to the new fitness trail with connections to the fitness equipment and park restrooms.

Discussion

The general requirements in this project scope consist of the following elements:

- 2,500 lineal feet of concrete pathway mow curb
- Mow curb surrounding 10 workout stations (approx. 30 ft. per station)
- ADA ramp for complete access to the trail and all park amenities
- Construct new concrete stairs with handrails
- Install DG 58,000 square feet at 3 inches thick
- Install separate lighter color DG at 10 workout stations and walking path
- Install standard color throughout the park
- Includes DG pathway stabilizer

In response to the City's request for proposal, 3 proposals for the Serenity Park Fitness Trail were received. The amounts of each proposal are listed below:

Name of Company	Amount
RP Landscape & Irrigation	\$126,868.35
Cotter Construction	\$160,000.00
Excel Landscape	\$241,450.00

Although RP Landscape and Irrigation provided the lowest proposal, the proposal did not include the entire scope of work. Missing from their proposal is the required concrete work. Therefore, the RP Landscape and Irrigation proposal has been returned as non-responsive. The following lowest proposal is from Cotter Construction at \$160,000. The Cotter Construction proposal has been determined responsive and is recommended for award.

Fiscal Impact

Funds are available through Grant Funding and LLMD#1

Attachments

Attachment 1 - Agreement
Exhibit A - Proposal

AGREEMENT FOR PUBLIC WORKS CONSTRUCTION

Cotter Construction
For the
Serenity Park Fitness Trail
CIP PROJECT NO. Z40005

This Agreement for Public Works Construction ("Agreement") is made and entered into as of January 24, 2023 by and between the City of Lake Elsinore, a municipal corporation ("City") and Cotter Construction Inc., ("Contractor").

The City and Contractor, in consideration of the mutual promises and covenants set forth herein, agree as follows:

1. The Project and Project Documents. Contractor agrees to construct the following public improvements ("work") identified as:

Serenity Park Fitness Trail

The Project Documents include this Agreement and all of the following: (1) the Notice Inviting Bids, Instructions to Bidders, Bid Documents including Bidder's Proposal as submitted by the Contractor, Contract Documents, General Specifications, Special Provisions, and all attachments and appendices; (2) everything referenced in such documents, such as specifications, details, standard plans or drawings and appendices, including all applicable State and Federal requirements; (3) all required bonds, insurance certificates, permits, notices, and affidavits; and (4) any and all addenda or supplemental agreements clarifying, amending or extending the work contemplated as may be required to insure completion in an acceptable manner. All of the provisions of the above-listed documents are made a part of this Agreement as though fully set forth herein.

2. Compensation.

a. For and in consideration of the payments and agreements to be made and performed by City, Contractor agrees to construct the Project, including furnishing all materials and performing all work required for the Project, and to fulfill all other obligations as set forth in the Bidder's Proposal, such contract price being One Hundred Sixty Thousand and zero cents. \$160,000.00.

b. City hereby promises and agrees to employ, and does hereby employ, Contractor to provide the materials, do the work, and fulfill the obligations according to the terms and conditions herein contained and referred to, for the prices set forth, and hereby contracts to pay the same at the time, in the manner, and upon the conditions set forth in the Project Documents.

c. Contractor agrees to receive and accept the prices set forth in the Bidder's Proposal as full compensation for furnishing all materials, performing all work, and fulfilling all obligations hereunder. Such compensation shall cover all expenses, losses, damages, and consequences arising out of the nature of work during its progress or prior to its acceptance including those for well and faithfully completing the work and the whole thereof in the manner and time specified in the Project Documents; and also including those arising from actions of the elements, unforeseen difficulties or obstructions encountered in the prosecution of the work, suspension or discontinuance of the work, and all other unknowns or risks of any description connected with the work.

3. Completion of Work.

a. Contractor shall perform and complete all work within **50** working days from the date of commencement specified in the Notice to Proceed, and shall provide, furnish and pay for all the labor, materials, necessary tools, expendable equipment, and all taxes, utility and transportation services required for construction of the Project.

b. All work shall be performed and completed in a good workmanlike manner in strict accordance with the drawings, specifications and all provisions of this Agreement as hereinabove defined and in accordance with applicable laws, codes, regulations, ordinances and any other legal requirements governing the Project.

c. Contractor shall not be excused with respect to the failure to so comply by any act or omission of the City, the City Engineer, a City inspector, or a representative of any of them, unless such act or omission actually prevents the Contractor from fully complying with the requirements of the Project Documents, and unless the Contractor protests at the time of such alleged prevention that the act or omission is preventing the Contractor from fully complying with the Project Documents. Such protest shall not be effective unless reduced to writing and filed with the City within three (3) working days of the date of occurrence of the act or omission preventing the Contractor from fully complying with the Project Documents.

d. City and Contractor recognize that time is of the essence in the performance of this Agreement and further agree that if the work called for under the Agreement is not completed within the time hereinabove specified, damages will be sustained by the City and that, it is and will be impracticable or extremely difficult to ascertain and determine the actual amount of damages the City will sustain in the event of, and by reason of, such delay. It is, therefore, agreed that such damages shall be presumed to be in the amount of **\$1,000.00** per calendar day, and that the Contractor will pay to the City, or City may retain from amounts otherwise payable to Contractor, such amount for each calendar day by which the Contractor fails to complete the work, including corrective items of work, under this Agreement within the time hereinabove specified and as adjusted by any changes to the work.

4. Changes to Work. City and Contractor agree that the City may make changes to the work, or suspend the work, and no matter how many changes, such changes or suspensions are within the contemplation of the Contractor and City and will not be a basis for a compensable delay claim against the City nor be the basis for a liquidated damage claim against the Contractor.

Any change to the work shall be by way of a written instrument ("change order") signed by the City and the Contractor, stating their agreement to the following:

- a. The scope of the change in the work;
- b. The amount of the adjustment to the contract price; and
- c. The extent of the adjustment to the Schedule of Performance.

The City Engineer is authorized to sign any change order provided that sufficient contingency funds are available in the City's approved budget for the Project. All change in the work authorized by the change order shall be performed under the applicable conditions of the Project Documents. City and Contractor shall negotiate in good faith and as expeditiously as possible the appropriate adjustments for such changes.

5. Bonds. Contractor shall provide, before commencing work, a Faithful Performance Bond and a Labor and Material Bond, each for one-hundred percent (100%) of the contract price in the form that complies with the Project Documents and is satisfactory to the City Attorney.

6. Non-Assignability. Neither this Agreement nor any rights, title, interest, duties or obligations under this Agreement may be assigned, transferred, conveyed or otherwise disposed of by Contractor without the prior written consent of City.

7. Licenses. Contractor represents and warrants to City that it holds the contractor's license or licenses set forth in the Project Documents, is registered with the Department of Industrial Relations pursuant to Labor Code Section 1725.5, and holds such other licenses, permits, qualifications, insurance and approvals of whatsoever nature which are legally required of Contractor. Contractor represents and warrants to City that Contractor shall, at its sole cost and expense, keep in effect or obtain at all times during the term of this Agreement, any licenses, permits, insurance and approvals which are legally required of Contractor to practice its profession. Contractor shall maintain a City of Lake Elsinore business license.

8. Indemnity. Contractor shall indemnify, defend, and hold harmless the City and its officials, officers, employees, agents, the County and Board Supervisors, and volunteers from and against any and all losses, liability, claims, suits, actions, damages, and causes of action arising out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or municipal law or ordinance, to the extent caused, in whole or in part, by the willful misconduct or negligent acts or omissions of Contractor or its employees, subcontractors, or agents, by acts for which they could be held strictly liable, or by the quality or character of their work. The foregoing obligation of Contractor shall not apply when (1) the injury, loss of life, damage to property, or violation of law arises from the sole negligence or willful misconduct of the City or its officers, employees, agents, or volunteers and (2) the actions of Contractor or its employees, subcontractor, or agents have contributed in no part to the injury, loss of life, damage to

property, or violation of law. It is understood that the duty of Contractor to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code. Acceptance by City of insurance certificates and endorsements required under this Agreement does not relieve Contractor from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall apply to any damages or claims for damages whether or not such insurance policies shall have been determined to apply. By execution of this Agreement, Contractor acknowledges and agrees to the provisions of this Section and that it is a material element of consideration.

9. Insurance Requirements.

a. Insurance. Contractor, at Contractor's own cost and expense, shall procure and maintain, for the duration of the Agreement, unless modified by the City's Risk Manager, the following insurance policies.

i. Workers' Compensation Coverage. Contractor shall maintain Workers' Compensation Insurance and Employer's Liability Insurance for his/her employees in accordance with the laws of the State of California. In addition, Contractor shall require each subcontractor to similarly maintain Workers' Compensation Insurance and Employer's Liability Insurance in accordance with the laws of the State of California for all of the subcontractor's employees. Any notice of cancellation or non-renewal of all Workers' Compensation policies must be received by the City at least thirty (30) days prior to such change. The insurer shall agree to waive all rights of subrogation against City, its officers, agents, employees and volunteers for losses arising from work performed by Contractor for City. In the event that Contractor is exempt from Worker's Compensation Insurance and Employer's Liability Insurance for his/her employees in accordance with the laws of the State of California, Contractor shall submit to the City a Certificate of Exemption from Workers Compensation Insurance in a form approved by the City Attorney.

ii. Commercial General Liability Coverage. Contractor shall maintain commercial general liability insurance in an amount not less than one million dollars (\$1,000,000) per occurrence for bodily injury, personal injury and property damage. If a commercial general liability insurance form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least twice the required occurrence limit. Required commercial general liability coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) or Insurance Services Office form number GL 0002 (ed. 1/73) covering comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability. No endorsement may be attached limiting the coverage.

iii. Automobile Liability Coverage. Contractor shall maintain automobile liability insurance covering bodily injury and property damage for all activities of the Contractor arising out of or in connection with the work to be performed under this Agreement, including coverage for owned, hired and non-owned vehicles, in an amount of not less than one million dollars (\$1,000,000) combined single limit for each occurrence. Automobile liability coverage must be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 1 ("any auto"). No endorsement may be attached limiting the coverage.

iv. Builder's Risk Coverage. Prior to the commencement of any construction of the Project, Design-Builder shall obtain (or cause to be obtained) and keep in force during the term of any construction, builder's risk insurance insuring for all risks of physical loss of or damage (excluding the perils of earthquake and flood).

v. Professional Liability Coverage. Contractor shall maintain professional errors and omissions liability insurance appropriate for Contractor's profession for protection against claims alleging negligent acts, errors or omissions which may arise from Contractor's services under this Agreement, whether such services are provided by the Contractor or by its employees, subcontractors, or sub consultants. The amount of this insurance shall not be less than one million dollars (\$1,000,000) on a claims-made annual aggregate basis, or a combined single limit per occurrence basis.

b. Endorsements. Each general commercial liability and automobile liability insurance policy shall be with insurers possessing a Best's rating of no less than A:VII and shall be endorsed with the following specific language:

i. The City, its elected or appointed officers, officials, employees, agents and volunteers are to be covered as additional insured with respect to liability arising out of work performed by or on behalf of the Contractor, including materials, parts or equipment furnished in connection with such work or operations.

ii. This policy shall be considered primary insurance as respects the City, its elected or appointed officers, officials, employees, agents and volunteers. Any insurance maintained by the City, including any self-insured retention the City may have, shall be considered excess insurance only and shall not contribute with it.

iii. This insurance shall act for each insured and additional insured as though a separate policy had been written for each, except with respect to the limits of liability of the insuring company.

iv. The insurer waives all rights of subrogation against the City, its elected or appointed officers, officials, employees or agents.

v. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its elected or appointed officers, officials, employees, agents or volunteers.

vi. The insurance provided by this Policy shall not be suspended, voided, canceled, or reduced in coverage or in limits except after thirty (30) days written notice has been received by the City.

c. Deductibles and Self-Insured Retentions. Any deductibles or self-insured retentions must be declared to and approved by the City. At the City's option, Contractor shall demonstrate financial capability for payment of such deductibles or self-insured retentions.

d. Certificates of Insurance. Contractor shall provide certificates of insurance with original endorsements to City as evidence of the insurance coverage required herein. Certificates of such insurance shall be filed with the City on or before commencement of

performance of this Agreement. Current certification of insurance shall be kept on file with the City at all times during the term of this Agreement.

10. Notices. Any notice required to be given under this Agreement shall be in writing and either served personally or sent prepaid, first class mail. Any such notice shall be addressed to the other party at the address set forth below. Notice shall be deemed communicated within 48 hours from the time of mailing if mailed as provided in this section.

If to City: City of Lake Elsinore
 Attn: City Manager
 130 South Main Street
 Lake Elsinore, CA 92530

With a copy to: City of Lake Elsinore
 Attn: City Clerk
 130 South Main Street
 Lake Elsinore, CA 92530

If to Contractor: Cotter Construction Inc.
 Attn: Andrew Cotter
 29903 Gulf Stream Dr.
 Canyon Lake, CA 92587

11. Entire Agreement. This Agreement constitutes the complete and exclusive statement of agreement between the City and Contractor. All prior written and oral communications, including correspondence, drafts, memoranda, and representations, are superseded in total by this Agreement.

12. Amendments. This Agreement may be modified or amended only by a written document executed by both Contractor and City and approved as to form by the City Attorney.

13. Assignment and Subcontracting. Contractor shall be fully responsible to City for all acts or omissions of any subcontractors. Assignments of any or all rights, duties or obligations of the Contractor under this Agreement will be permitted only with the express consent of the City. Nothing in this Agreement shall create any contractual relationship between City and any subcontractor nor shall it create any obligation on the part of the City to pay or to see to the payment of any monies due to any such subcontractor other than as otherwise is required by law.

14. Waiver. Waiver of a breach or default under this Agreement shall not constitute a continuing waiver of a subsequent breach of the same or any other provision under this Agreement.

15. Severability. If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.

16. Controlling Law Venue. This Agreement and all matters relating to it shall be governed by the laws of the State of California and any action brought relating to this Agreement shall be held exclusively in a state court in the County of Riverside.

17. Litigation Expenses and Attorneys' Fees. If either party to this Agreement commences any legal action against the other party arising out of this Agreement, the prevailing party shall be entitled to recover its reasonable litigation expenses, including court costs, expert witness fees, discovery expenses, and attorneys' fees.

18. Mediation. The parties agree to make a good faith attempt to resolve any disputes arising out of this Agreement through mediation prior to commencing litigation. The parties shall mutually agree upon the mediator and share the costs of mediation equally. If the parties are unable to agree upon a mediator, the dispute shall be submitted to JAMS or its successor in interest. JAMS shall provide the parties with the names of five qualified mediators. Each party shall have the option to strike two of the five mediators selected by JAMS and thereafter the mediator remaining shall hear the dispute. If the dispute remains unresolved after mediation, either party may commence litigation.

19. Authority to Enter Agreement and Administration. Contractor has all requisite power and authority to conduct its business and to execute, deliver, and perform the Agreement. Each party warrants that the individuals who have signed this Agreement have the legal power, right, and authority to make this Agreement and to bind each respective party. The City Manager is authorized to enter into an amendment or otherwise take action on behalf of the City to make the following modifications to the Agreement: (a) a name change; (b) grant extensions of time; (c) non-monetary changes in the scope of services; and/or (d) suspend or terminate the Agreement. The City Engineer shall act as the Project administrator on behalf of the City.

20. Prohibited Interests. Contractor maintains and warrants that it has not employed nor retained any company or person, other than a bona fide employee working solely for Contractor, to solicit or secure this Agreement. Further, Contractor warrants that it has not paid nor has it agreed to pay any company or person, other than a bona fide employee working solely for Contractor, any fee, commission, percentage, brokerage fee, gift or other consideration contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, City shall have the right to rescind this Agreement without liability. For the term of this Agreement, no member, officer or employee of City, during the term of his or her service with City, shall have any direct interest in this Agreement, or obtain any present or anticipated material benefit arising therefrom.

21. Equal Opportunity Employment. Contractor represents that it is an equal opportunity employer and it shall not discriminate against any subcontractor, employee or applicant for employment because of race, religion, color, national origin, handicap, ancestry, sex or age. Such non-discrimination shall include, but not be limited to, all activities related to initial employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination.

22. Prevailing Wages.

a. Contractor and all subcontractors shall adhere to the general prevailing rate of per diem wages as determined and as published by the State Director of the Department of Industrial Relations pursuant to Labor Code Sections 1770, 1773, and 1773.2. Copies of these rates and the latest revisions thereto are on file in the office of the City Clerk of the City of Lake Elsinore and are available for review upon request.

b. Contractor's attention is directed to the provisions of Labor Code Sections 1774, 1775, 1776, 1777.5 and 1777.6. Contractor shall comply with the provisions of these Sections. The statutory provisions for penalties for failure to comply with the State's wage and the hours laws will be enforced.

c. Labor Code Sections 1774 and 1775 require the Contractor and all subcontractors to pay not less than the prevailing wage rates to all workmen employed in the execution of the contract and specify forfeitures and penalties for failure to do so. The minimum wages to be paid are those determined by the State Director of the Department of Industrial Relations. Labor Code Section 1776 requires the Contractor and all subcontractors to keep accurate payroll records, specifies the contents thereof, their inspection and duplication procedures and certain notices required of the Contractor pertaining to their location. The statutory penalties for failure to pay prevailing wages will be enforced. If the Project has been awarded to Contractor on or after April 1, 2015, Contractor and its subcontractors must furnish electronic certified payroll records to the Labor Commissioner. Beginning January 1, 2016, Contractor and its subcontractors must furnish electronic certified payroll records to the Labor Commissioner without regard to when the Project was awarded to Contractor.

d. Labor Code Section 1777.5 requires Contractor or subcontractor employing tradesmen in any apprenticeable occupation to apply to the Joint Apprenticeship Committee nearest the site of the public works project, which administers the apprenticeship program in that trade for a certificate of approval. The certificate will also fix the ratio of apprentices to journeymen to be used in the performance of the Agreement. The Contractor is required to make contributions to funds established for the administration of apprenticeship programs if the Contractor employs registered apprentices or journeymen in any apprenticeable trade and if other contractors on the public works site are making such contributions. Information relative to apprenticeship standards, contributions, wage schedules and other requirements may be obtained from the State Director of Industrial Relations or from the Division of Apprenticeship Standards. Labor Code Section 1777.6 provides that it shall be unlawful to refuse to accept otherwise qualified employees as registered apprentices solely on the grounds of race, religious creed, color, national origin, ancestry, sex, or age.

e. Eight hours labor constitutes a legal day's work, as set forth in Labor Code Section 1810.

23. Execution. This Agreement may be executed in several counterparts, each of which shall constitute one and the same instrument and shall become binding upon the parties when at least one copy hereof shall have been signed by both parties hereto. In approving this Agreement, it shall not be necessary to produce or account for more than one such counterpart.

[Signatures on next page]

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed on the date first written above.

“CITY”

CITY OF LAKE ELSINORE, a municipal corporation

“CONTRACTOR”

Cotter Construction Inc., a Licensed Contractor

City Manager

By: Andrew Cotter

Its: Owner

ATTEST:

City Clerk

By: [Click or tap here to enter text.](#)

APPROVED AS TO FORM:

Its: [Click or tap here to enter text.](#)

City Attorney

Assistant City Manager

EXHIBIT A
CONTRACTOR'S PROPOSAL
[ATTACHED]

EXHIBIT B

LIST OF SUBCONTRACTORS

[ATTACHED]

Cotter Construction

Andrew Cotter

Business Number 951-833-7842

General Engineering Contractor

Lic#1046653

Canyon Lake CA

DIR PW-LR-1000663711

cotter-construction.com

cotter-construction@outlook.com



TO

City of Lake Elsinore

Matt Reed

19685 Palomar Rd

Lake Elsinore CA 92530

☎ 9516745170x296

☐ 9518058632

mreed@lake-elsinore.org

DESCRIPTION	RATE	QTY	AMOUNT
2500 lineal feet mow curb path	\$6.50	2,500	\$16,250.00
Mow curb around 10 workout stations approx 30 ft per station	\$6.50	300	\$1,950.00
Ada ramp per lake elsinore standard from existing to walk path	\$13,600.00	1	\$13,600.00
Stairs Remove existing wood stairs and replace with concrete with handrail installation.	\$8,500.00	1	\$8,500.00
Install DG 58,000 square feet total Install separate lighter color DG at 10 workout stations and walkpath Install standard color throughout park Includes stabilizer 3 inch thickness	\$2.00	58,000	\$116,000.00
Equipment mobilization and demobilization and admin fee	\$3,700.00	1	\$3,700.00

TOTAL

USD \$160,000.00

Estimates valid for 30 days.