

Project title: 2021 Sorticulture Snohomish County TPA Contract**Council Bill #** *interoffice use***Agenda dates requested:**

May 26, 2021

Briefing

Proposed action

Consent 5/26/21

Action

Ordinance

Public hearing

Yes No **Budget amendment:**Yes No **PowerPoint presentation:**Yes No **Attachments:**2021 Sorticulture TPA
Contract**Department(s) involved:**

Economic Development

Contact person:

Tyler Chism

Phone number:

425-583-7422

Email:tchism@everettwa.gov**Initialed by:**

DE

Department head

Administration

Council President

Project: Sorticulture Garden and Arts Festival**Partner/Supplier:** Snohomish County Tourism Promotion Area (TPA)**Location:** Downtown Everett**Preceding action:** Legal review**Fund:** 112, Municipal Arts**Fiscal summary statement:**

The city will receive a \$15,000 grant from the Snohomish County Tourism Promotion Area (TPA) to support Sorticulture. This contract between the City of Everett and the Snohomish TPA binds the city to typical grant requirements necessary to appropriate those funds.

Project summary statement:

The \$15,000 TPA grant will fund the advertising expenses to market the City's 2021 Sorticulture Garden and Arts Festival.

Recommendation (exact action requested of Council):

Authorize the Mayor to execute the contract with Snohomish County TPA to receive a \$15,000 grant in support of the 2021 Sorticulture event.

CONSULTANT: City of Everett

CONTACT PERSON: Tyler Chism
Placemaking Coordinator

ADDRESS: 2930 Wetmore Ave. Suite 10A
Everett, WA 98201

FEDERAL TAX ID NUMBER/
U.B.I. NUMBER: 91-6001248

TELEPHONE: (425) 344-1727

COUNTY DEPT.: Parks, Recreation and Tourism

DEPT. CONTACT PERSON: Trudy Soriano
Public Involvement Associate

TELEPHONE/FAX NUMBER: (425) 388-6603

PROJECT: 2021 Sorticulture Garden and Arts Festival

AMOUNT: \$15,000

FUND SOURCE: 100.515094105204

CONTRACT DURATION: January 1, 2021 through
December 31, 2021

AGREEMENT FOR PROMOTIONAL SERVICES

THIS AGREEMENT (the "Agreement") is made by and between SNOHOMISH COUNTY, a political subdivision of the State of Washington (the "County") and the City of Everett (the "TPA Recipient").

RECITALS

WHEREAS, in 2003 the Washington Legislature enacted Chapter 35.101 RCW authorizing counties and cities to establish Tourism Promotion Areas ("TPAs") and to levy lodging charges within TPAs to fund tourism promotion; and

WHEREAS, pursuant to RCW 35.101.010(4), the tourism promotion purposes for which lodging charges collected within a TPA may be used are activities and expenditures designed to increase tourism and convention business; and

WHEREAS, the operators of lodging businesses located within the County presented an initial petition (the "Initiation Petition") to the County Council seeking establishment of a county-wide TPA pursuant to RCW 35.101.020; and

WHEREAS, by Motions No. 10-112 and 10-557, the County Council adopted resolutions

of intention which gave notice of the time and place of public hearings to consider establishment of a TPA and provided the other information required by RCW 35.101.030; and

WHEREAS, on March 31 and December 15, 2010, the County Council held public hearings to consider establishment of a TPA; and

WHEREAS, pursuant to RCW 35.101.040, the city councils of the cities of Arlington, Bothell, Edmonds, Everett, Lynnwood, Marysville, Monroe, Mountlake Terrace, and Mukilteo approved an interlocal agreement with the County to authorize establishment of a TPA within those cities; and

WHEREAS, pursuant to the Initiation Petition and the subsequent proceedings had in connection therewith, the County Council found that the best interests of the County, lodging industry, and public would be served by establishing a TPA and, by Ordinance No. 10-112, subsequently amended by Ordinance No. 11-016 (collectively codified as Chapter 4.118 SCC), established the TPA and provided for its administration; and

WHEREAS, SCC 4.118.070(2) provides that the resources of the Tourism Promotion Area Fund established by SCC 4.118.070 shall be subject to appropriation by the County Council after considering the recommendations of the Tourism Promotion Area Advisory Board established by SCC 4.118.080(1); and

WHEREAS, pursuant to SCC 4.118.070(2) and SCC 4.118.090, the Tourism Promotion Area Advisory Board recommended to the County Council certain applicants for funding from the Tourism Promotion Area Fund after undertaking an evaluation of applications; and

WHEREAS, by Motion No. 20-520, passed on January 13, 2021, the County Council authorized 2021 TPA funding of the projects as set forth therein and authorized the County Executive to execute the necessary contracts;

NOW, THEREFORE, in consideration of the mutual benefits and covenants contained herein, the parties agree as follows:

1. Purpose of Agreement. The purpose of this Agreement is to set forth the requirements governing the receipt of TPA funds to reimburse costs to TPA Recipient that increase lodging and promote general tourism in Snohomish County. TPA Recipient may be reimbursed in the amount up to \$15,000 for eligible expenses. The TPA Recipient shall not sub-contract for the performance of its obligations under this Agreement, unless otherwise stated in Schedule A attached hereto and by this reference incorporated herein (the "Project"). This Agreement is made in response to the TPA Recipient's application to the Tourism Promotion Area Advisory Board dated April 2021 (the "Application"), which is attached hereto as Schedule C.

The TPA Recipient will prepare and present status reports and other information regarding its performance under the Agreement as the County may request.

2. Term of Agreement; Time of Performance. This Agreement shall be effective upon January 1, 2021 (the “Effective Date”) and shall terminate on December 31, 2021. The TPA Recipient shall complete its obligations required by this Agreement no later than December 31, 2021. The County’s obligations after December 31, 2021 are contingent upon local legislative appropriation of necessary funds for this specific purpose in accordance with the County Charter and applicable law.

3. Funding of Project and Eligible Expenses. Subject to Section 8 of this Agreement and upon the completion of the Project to the satisfaction of the County, the County will reimburse the TPA Recipient for Project work as set forth in Schedule A, PROVIDED, HOWEVER, that no reimbursement shall be made for Project expenses for which the Schedule A has not demonstrated eligibility. The TPA Recipient shall submit a request for reimbursement for Project expenses supported by detailed statements, including invoices from third parties incident to those Project expenses, if any, indicating Project work performed as appropriate and consistent with the schedule of Project work outlined in Schedule A. Limits for categories of expenses in the Project Budget are set forth in Schedule B, Compensation and Expenses. Total requests for reimbursement for this Project shall not exceed \$15,000 (the “Contract Maximum”).

4. Independent Contractor. The TPA Recipient agrees that the TPA Recipient will perform its obligations under this Agreement as an independent contractor and not as an agent, employee, or servant of the County. This Agreement neither constitutes nor creates an employer-employee relationship. The parties agree that the TPA Recipient is not entitled to any benefits or rights enjoyed by employees of the County. The TPA Recipient specifically has the right to direct and control TPA Recipient’s own activities in providing the agreed services in accordance with the specifications set out in this Agreement.

The TPA Recipient shall furnish, employ and have exclusive control of all persons to be engaged in performing the TPA Recipient’s obligations under this Agreement (the “TPA Recipient personnel”), and shall prescribe and control the means and methods of performing such obligations by providing adequate and proper supervision. Such TPA Recipient personnel shall for all purposes be solely the employees or agents of the TPA Recipient and shall not be deemed to be employees or agents of the County for any purposes whatsoever. With respect to TPA Recipient personnel, the TPA Recipient shall be solely responsible for compliance with all rules, laws and regulations relating to employment of labor, hours of labor, working conditions, payment of wages and payment of taxes, including applicable contributions from TPA Recipient personnel when required by law.

Because it is an independent contractor, the TPA Recipient shall be responsible for all obligations relating to federal income tax, self-employment or FICA taxes and contributions, and all other so-called employer taxes and contributions including, but not limited to, industrial insurance (workers’ compensation). The TPA Recipient agrees to indemnify, defend and hold the County harmless from any and all claims, valid or otherwise, made to the County because of these obligations.

The TPA Recipient assumes full responsibility for the payment of all payroll taxes, use, sales, income, or other form of taxes, fees, licenses, excises or payments required by any city, county, federal or state legislation which are now or may during the term of the Agreement be enacted as to all persons employed by the TPA Recipient and as to all duties, activities and requirements by the TPA Recipient in performance of the work under this Agreement. The TPA Recipient shall assume exclusive liability therefor, and shall meet all requirements thereunder pursuant to any rules or regulations that are now or may be promulgated in connection therewith.

5. Ownership. Any and all data, reports, analyses, documents, photographs, pamphlets, plans, specifications, surveys, films or any other materials created, prepared, produced, constructed, assembled, made, performed or otherwise produced by the Contractor or the Contractor's subcontractors or consultants for delivery to the County under this Agreement shall be the sole and absolute property of the County. Such property shall constitute "work made for hire" as defined by the U.S. Copyright Act of 1976, 17 U.S.C. § 101, and the ownership of the copyright and any other intellectual property rights in such property shall vest in the County at the time of its creation. Ownership of the intellectual property includes the right to copyright, patent, and register, and the ability to transfer these rights. Material which the Contractor uses to perform this Agreement but is not created, prepared, constructed, assembled, made, performed or otherwise produced for or paid for by the County is owned by the Contractor and is not "work made for hire" within the terms of this Agreement.

6. Changes. No changes or additions shall be made in this Agreement except as agreed to by both parties, reduced to writing and executed with the same formalities as are required for the execution of this Agreement.

7. County Contact Person. The assigned contact person (or Project manager) for the County for this Agreement shall be:

Name: Trudy Soriano
Title: Public Involvement Associate
Department: Snohomish County Parks and Recreation
Telephone: (425) 388-6603
Email: Trudy.Soriano@snoco.org

8. County Review and Approval. If TPA Recipient's Project includes the production of promotional materials, TPA Recipient shall provide the County an advance copy of said promotional materials. If the content of the promotional material is objectionable to the County, the County, in its sole discretion, may determine whether to reimburse TPA Recipient for the associated expenses.

9. Subcontracting and Assignment. The TPA Recipient shall not subcontract, assign, or delegate any of the rights, duties or obligations covered by this Agreement without prior express written consent of the County. Any attempt by the Contractor to subcontract, assign, or delegate any portion of the Contractor's obligations under this Agreement to another party in violation of

the preceding sentence shall be null and void and shall constitute a material breach of this Agreement.

10. Insurance Requirements. During the term of this Agreement, the City shall maintain its self insurance program.

11. Indemnification and Hold Harmless. To the maximum extent permitted by law and except to the extent caused by the sole negligence of the County and, if any funds for this Agreement are provided by the State, the State, the TPA Recipient shall indemnify and hold harmless the County and the State, their officers, officials, agents and employees, from and against any and all suits, claims, actions, losses, costs, penalties and damages of whatsoever kind or nature arising out of, in connection with, or incidental to the goods and/or services provided by or on behalf of the TPA Recipient. In addition, the TPA Recipient shall assume the defense of the County and, if applicable, the State and their officers and employees in all legal or claim proceedings arising out of, in connection with, or incidental to such goods and/or services and shall pay all defense expenses, including reasonable attorney's fees, expert fees and costs incurred by the County and, if applicable, the State, on account of such litigation or claims.

The above indemnification obligations shall include, but are not limited to, all claims against the County and, if applicable, the State by an employee or former employee of the TPA Recipient or its subcontractors, and the TPA Recipient, by mutual negotiation, expressly waives all immunity and limitation on liability, as respects only the County and, if applicable, the State, under any industrial insurance act, including Title 51 RCW, other Worker's Compensation act, disability benefit act, or other employee benefit act of any jurisdiction which would otherwise be applicable in the case of such claim.

In the event that the County or, if applicable, the State incurs any judgment, award and/or cost including attorney's fees arising from the provisions of this section, or to enforce the provisions of this section, any such judgment, award, fees, expenses and costs shall be recoverable from the TPA Recipient.

In addition to injuries to persons and damage to property, the term "claims," for purposes of this provision, shall include, but not be limited to, assertions that the use or transfer of any software, book, document, report, film, tape, or sound reproduction or material of any kind, delivered hereunder, constitutes an infringement of any copyright, patent, trademark, trade name, and/or otherwise results in an unfair trade practice.

In the event the County or, if applicable, the State incurs attorney fees and/or costs in the defense of claims under these provisions, such attorney fees and costs shall be recoverable from the TPA Recipient. In addition, the County and, if applicable, the State shall be entitled to recover from the TPA Recipient their attorney fees and costs incurred to enforce the provisions of this section.

The indemnification, protection, defense and save harmless obligations contained herein shall survive the expiration, abandonment or termination of this Agreement.

Nothing contained within this provision shall affect and/or alter the application of any other provision contained within this Agreement.

12. County Non-discrimination. It is the policy of the County to reject discrimination, which denies equal treatment to any individual because of his or her race, creed, color, national origin, families with children, sex, marital status, sexual orientation, age, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability as provided in Washington's Law against Discrimination, Chapter 49.60 RCW, and the Snohomish County Human Rights Ordinance, Chapter 2.460 SCC. These laws protect against specific forms of discrimination in employment, credit transactions, public accommodation, housing, county facilities and services, and county contracts.

The TPA Recipient shall comply with the substantive requirements of Chapter 2.460 SCC, which are incorporated herein by this reference. Execution of this Agreement constitutes a certification by the TPA Recipient of the TPA Recipient's compliance with the requirements of Chapter 2.460 SCC. If the TPA Recipient is found to have violated this provision, or to have furnished false or misleading information in an investigation or proceeding conducted pursuant to this Agreement or Chapter 2.460 SCC, this Agreement may be subject to a declaration of default and termination at the County's discretion. This provision shall not affect the TPA Recipient's obligations under other federal, state, or local laws against discrimination.

13. Federal Non-discrimination. Snohomish County assures that no persons shall on the grounds of race, color, national origin, or sex as provided by Title VI of the Civil Rights Act of 1964 (Pub. L. No. 88-352), as amended, and the Civil Rights Restoration Act of 1987 (Pub. L. No. 100-259) be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any County sponsored program or activity. Snohomish County further assures that every effort will be made to ensure nondiscrimination in all of its programs and activities, whether those programs and activities are federally funded or not.

14. Employment of County Employees. SCC 2.50.075, "Restrictions on future employment of County employees," imposes certain restrictions on the subsequent employment and compensation of County employees. The TPA Recipient represents and warrants to the County that it does not at the time of execution of this Agreement, and that it shall not during the term of this Agreement, employ a former or current County employee in violation of SCC 2.50.075. For breach or violation of these representations and warranties, the County shall have the right to terminate this Agreement without liability.

15. Compliance with Other Laws. The TPA Recipient shall comply with all other applicable federal, state and local laws, rules, and regulations in performing this Agreement.

16. Compliance with Grant Terms and Conditions. The TPA Recipient shall comply with any and all conditions, terms and requirements of any federal, state or other grant, if any, that wholly or partially funds the TPA Recipient's work hereunder.

17. Prohibition of Contingency Fee Arrangements. The TPA Recipient warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for the TPA Recipient, to solicit or secure this Agreement and that it has not paid or agreed to pay any company or person, other than a bona fide employee working solely for the TPA Recipient, any fee, commission, percentage, brokerage fee, gifts or any other consideration, contingent upon or resulting from the award or making of this Agreement. For breach or violation of this warranty, the County shall have the right to terminate this Agreement without liability or, in its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of such fee, commission, percentage, brokerage fee, gift or contingent fee.

18. Force Majeure. If either party is unable to perform any of its obligations under this Agreement as a direct result of an unforeseeable event beyond that party's reasonable control, including but not limited to an act of war, act of nature (including but not limited to earthquake and flood), embargo, riot, sabotage, labor shortage or dispute (despite due diligence in obtaining the same), or governmental restriction imposed subsequent to execution of the Agreement (collectively, a "force majeure event"), the time for performance shall be extended by the number of days directly attributable to the force majeure event. Both parties agree to use their best efforts to minimize the effects of such failures or delays.

19. Suspension of Work. The County may, at any time, instruct the TPA Recipient in writing to stop work on the Project effective immediately, or as directed, pending either further instructions from the County to resume the work or a notice from the County of breach or termination under Section 20 of this Agreement.

20. Non-Waiver of Breach; Termination.

a. The failure of the County to insist upon strict performance of any of the covenants or agreements contained in this Agreement, or to exercise any option conferred by this Agreement, in one or more instances shall not be construed to be a waiver or relinquishment of those covenants, agreements or options, and the same shall be and remain in full force and effect.

b. If the TPA Recipient breaches any of its obligations hereunder, and fails to cure the same within five (5) business days of written notice to do so by the County, the County may terminate this Agreement, in which case the County shall pay the TPA Recipient only for the reimbursable expenses, if any, accepted by the County in accordance with Sections 3 and 8 hereof.

c. The County may terminate this Agreement upon thirty (30) business days' written notice to the TPA Recipient for any reason other than stated in subparagraph b above, in which case payment shall be made in accordance with Sections 3 and 8 hereof for the reimbursable expenses, if any, reasonably and directly incurred by the TPA Recipient in performing this Agreement prior to receipt of the termination notice.

d. Termination by the County hereunder shall not affect the rights of the County as against the TPA Recipient provided under any other section or paragraph herein. The

shall be to notify the TPA Recipient (a) of the request and (b) of the date that such information will be released to the requester unless the TPA Recipient obtains a court order to enjoin that disclosure pursuant to RCW 42.56.540. If the TPA Recipient fails to timely obtain a court order enjoining disclosure, the County will release the requested information on the date specified.

The County has, and by this section assumes, no obligation on behalf of the TPA Recipient to claim any exemption from disclosure under the Act. The County shall not be liable to the TPA Recipient for releasing records not clearly identified by the TPA Recipient as confidential or proprietary. The County shall not be liable to the TPA Recipient for any records that the County releases in compliance with this section or in compliance with an order of a court of competent jurisdiction.

24. Interpretation. This Agreement and each of the terms and provisions of it are deemed to have been explicitly negotiated by the parties. The language in all parts of this Agreement shall, in all cases, be construed according to its fair meaning and not strictly for or against either of the parties hereto. The captions and headings of this Agreement are used only for convenience and are not intended to affect the interpretation of the provisions of this Agreement. This Agreement shall be construed so that wherever applicable the use of the singular number shall include the plural number, and vice versa, and the use of any gender shall be applicable to all genders.

25. Complete Agreement. This Agreement has been entered into following an application and recommendation process in accordance with Chapter 4.118 SCC. The TPA Recipient's Application, attached hereto as Schedule C, is incorporated herein by this reference. To the extent of any inconsistency between this Agreement and the Application, this Agreement shall govern.

26. Conflicts between Attachments and Text. Should any conflicts exist between any attached exhibit or schedule and the text or main body of this Agreement, the text or main body of this Agreement shall prevail.

27. No Third Party Beneficiaries. The provisions of this Agreement are for the exclusive benefit of the County and the TPA Recipient. This Agreement shall not be deemed to have conferred any rights, express or implied, upon any third parties.

28. Governing Law; Venue. This Agreement shall be governed by the laws of the State of Washington. The venue of any action arising out of this Agreement shall be in the Superior Court of the State of Washington, in and for Snohomish County.

29. Severability. Should any clause, phrase, sentence or paragraph of this Agreement be declared invalid or void, the remaining provisions of this Agreement shall remain in full force and effect.

30. Authority. Each signatory to this Agreement represents that he or she has full and sufficient authority to execute this Agreement on behalf of the County or the TPA Recipient, as

the case may be, and that upon execution of this Agreement it shall constitute a binding obligation of the County or the TPA Recipient, as the case may be.

31. Survival. Those provisions of this Agreement that by their sense and purpose should survive expiration or termination of the Agreement shall so survive.

32. Execution in Counterparts. This Agreement may be executed in counterparts, each of which shall constitute an original and all of which shall constitute one and the same Agreement.

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Schedule A
Scope

TPA RECIPIENT: CITY OF EVERETT
PROJECT: 2021 SORTICULTURE GARDEN AND ARTS FESTIVAL

1. The TPA Recipient shall: prominently feature the following credit in any publication produced as a result of this Project: **MADE POSSIBLE IN PART THROUGH THE SUPPORT OF THE TPA FUND OF SNOHOMISH COUNTY, WASHINGTON.**
2. The TPA Recipient shall ensure that any publications produced as a result of this Project shall prominently feature the TPA logo.
3. The TPA Recipient shall create a final report and submit it to the County by December 31, 2021. The final report, along with the TPA Recipient's invoices required by Schedule B, will summarize the completed Project and will include the following information: substantiated overnight stays, estimated total overnight stays, economic benefit of Project to the County and general Project outcomes. The form of final report may be found on the TPA website, www.snocotpa.com.
4. The TPA Recipient shall submit invoices for allowable reimbursable items, the total of which is not to exceed the Contract Maximum. The following items in Section 5 of this Schedule A may be submitted by the TPA Recipient for reimbursement, the total of which is not to exceed the Contract Maximum.
5. The TPA Recipient shall: (a) implement a marketing program, to include but not be limited to city-owned social and digital/web channels, Everett Transit advertising, digital newsletter, and email listings; (b) purchase and secure entertainment costs, including but not limited to sound, staging, and performance; (c) secure event infrastructure necessary to host a successful outdoor festival; (d) submit a reimbursement request to the County, along with applicable proof of qualifying expenses at the completion of the event;

Schedule B
Compensation and Expenses

1. The TPA Recipient will be reimbursed by the County for services provided and/or eligible expenses incurred in executing the Project pursuant to the Agreement in an amount not to exceed the Contract Maximum.

2. Expenses eligible for reimbursement under the Agreement are defined as those listed in the "COUNTY" column of the Project budget below. The TPA Recipient shall submit up-to one (1) invoice once per-month to the County for all eligible expenditures for which the TPA Recipient seeks reimbursement. If requested by the County, the TPA Recipient will provide all third party invoices for which the TPA Recipient seeks reimbursement. In-kind matching volunteer services shall be valued at a rate of \$27.20 per hour or as invoiced to the TPA Recipient by independent third parties at a commercially reasonable rate that is customary for such work. In addition, if County funds are to be used to pay in whole or in part any printed materials, print advertising or broadcast medium advertising, the TPA Recipient will submit with the TPA Recipient's reimbursement request for associated costs incurred: three (3) copies of printed materials; one copy of each print advertisement as printed; and one copy of the text of each broadcast medium advertisement. In order to ensure timely closeout of the Project, the TPA Recipient shall submit its invoice to the County no later than thirty (30) calendar days after completion of the services authorized by this Agreement and, in any event, no later than December 31, 2021. The TPA Recipient's invoice shall be accompanied by a report summarizing the Project and how funds provided for the Project under this Agreement have promoted tourism in Snohomish County. In no event shall the TPA Recipient's invoice be paid by the County if it is submitted after December 31, 2021, or if it is not accompanied by the required report.

PROJECT BUDGET

ITEM	COUNTY	MATCH	
		CASH	IN-KIND
Marketing	\$15,000	\$5,000	
Entertainment		\$3,500	
Event Infrastructure		\$16,500	
Wages		\$45,000	
Off-duty police		\$5,000	
Total	\$15,000	\$75,000	

Upon request of the TPA Recipient and approval by the County, the TPA Recipient may be authorized to shift funds within the items defined in the budget shown above subject to the following conditions:

1. No funds may be shifted without **prior** written authorization from the County contact set forth in Section 7 of this Agreement. Authorization to shift funds must be sought and approved **prior** to anticipated need.

2. Funds shifted shall aggregate no more than twenty percent (20%) of the total allocation amount; provided, however, that no such authorization shall not be construed as permitting either an increase or reduction in the Wages and Benefits category.
3. Funds shifted shall be within the original allocation. Authorization to shift funds IS NOT authorization to exceed the original amount of the allocation. In no event shall payments by the County under the Agreement exceed the Contract Maximum.
4. Funds may only be shifted among expenditure categories listed in the original budget. No new budget items or expenditure categories may be funded without an amendment to this Agreement, and the shift shall not cause a reduction in the original marketing dollars percentage allocated by the TPA Advisory Board for the project.

Schedule C
TPA Recipient's Project Application