

STATE OF TEXAS

COUNTY OF COLLIN

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AGREEMENT FOR PUBLIC FACILITY PROJECT
(MINOR)

This Agreement for Public Facility Services (“Agreement”) is made by and between the City of Allen, Texas (“City”) and Whirlix Design, Inc., a Domestic For-Profit Corporation (“Contractor”) (each a “Party” and collectively the “Parties”), acting by and through their authorized representatives.

RECITALS:

WHEREAS, the City desires to engage the services of the Contractor as an independent contractor, and not as an employee, to provide the labor, goods, materials, equipment, installation, construction and services described in the Contract Documents (hereinafter defined) for the purchase and installation of custom shade structures for Bethany Lakes Park and Hillside Park (“Project”); and

WHEREAS, the Contractor desires to provide the labor, goods, materials, equipment, installation, construction and services described in the Contract Documents in accordance with the terms and conditions set forth in this Agreement (hereinafter defined as the “Work”);

NOW THEREFORE, in exchange for the mutual covenants set forth herein, and other valuable consideration, the sufficiency and receipt of which are hereby acknowledged, the Parties agree as follows:

Article I
Term; Termination

1.1 Term. The term of this Agreement shall commence on the last date of execution hereof (the “Effective Date”) and continue until the completion of the Services by the Contractor unless sooner terminated as provided herein.

1.2 Termination. This Agreement may be terminated upon any one of the following:

- (a) by written agreement of the Parties;
- (b) upon written notice by either Party in the event the other Party breaches any of the terms or conditions of this Agreement and such breach is not cured within thirty (30) days after written notice thereof; or
- (c) upon written notice by City, if the Contractor suffers an event of Bankruptcy or Insolvency (for purpose of this section “Bankruptcy or Insolvency” shall mean the dissolution or termination of Contractor’s existence as a going business, insolvency, appointment of receiver for any part of Contractor’s property and such appointment is not terminated within ninety (90) days after such appointment is initially made, any general assignment for the benefit of creditors, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Contractor and such proceeding is not dismissed within ninety (90) days after the filing thereof);

Article II

Scope of Work; Contract Documents

2.1 The Contract Documents shall include the documents identified below and are incorporated herein for all purposes. The Contract Documents are in descending order of precedence. Any conflict between or among any of the documents shall be resolved in favor of the document with higher precedence:

- A. This Agreement;
- B. The plans and specifications and general and/or special conditions attached hereto.

2.2 Contractor shall perform the Work (hereinafter defined) as set forth in the Contract Documents.

Article III

Project Scope of Work

3.1 General. Contractor shall perform the “Work” required, implied or reasonably inferable from the Contract Documents. The term “Work” shall mean whatever is done by the Contractor or required of the Contractor to perform and complete its duties under this Agreement including but not limited to the furnishing of any requested bonds and insurance, and the provision and furnishing of labor, supervision, goods, services materials, tools, fuel, power, light, heat, cooling, telephone, water, sanitary facilities, transportation, equipment, licenses and permits required by this Agreement necessary unless otherwise specified in the Contract Documents.

3.2 Notice to Proceed. Contractor shall not commence the Work necessary until receipt of a written notice to proceed from the City unless otherwise provided in the Contract Documents. Contractor shall commence the Work required under the Contract Documents within ten (10) calendar days after receipt of the City written notice to proceed. Any Work performed or expenses incurred by Contractor prior to Contractor receipt of the written notice to proceed shall be at the sole risk and cost of the Contractor and shall not be eligible for payment by City under the Contract Documents.

3.3 Change Orders.

(a) City, may from time to time, authorize change orders after the performance of the Work under the Contract has commenced necessary to decrease, increase the quantity of Work to be performed or materials, equipment or supplies to be furnished by the Contractor.

(b) The execution of a change order by the Contractor shall constitute the Contractor’s agreement to the ordered changes to the Work under the Contract Documents. Contractor by executing the change order waives and releases any claim against the City for additional time or compensation relating to the Work included in the change order.

(c) Any Work performed, or expenses incurred by Contractor prior to execution of the approved change order shall be at the sole risk and cost of the Contractor and shall not be eligible for payment by City under the Contract Documents.

3.4 Bonds. Contractor shall provide payment bonds and performance bonds for the Project to ensure completion of the Project pursuant to Chapter 2253, Texas Government Code. Contractor shall provide one (1) maintenance bond for the value of completed work for a period of two (2) years following completion of the Project in favor of City for the Project in accordance with City requirements and regulations pertaining to maintenance bonds for public improvements. During the term of this Agreement and any applicable Maintenance Bond period, Contractor agrees to respond to City requests deemed “warranty” within 5-business days for non-emergency issues, and within one (1) hour, for emergencies, which is defined as any instance that poses a hazard to building occupants, visitors, guests, and the public, and any instance if when left un-repaired, will cause damage to any portion of the City building or facility

3.5 Cleaning the Project Site. Contractor shall cause the Project site to be kept reasonably clean during performance of the Project Work. Upon completion of the Project Work, Contractor shall cause the Project site to be cleaned and cause the removal of all waste, rubbish, temporary structures, and other materials together with all of Contractor's property therefrom. Contractor shall cause the disposal of all refuse at a Texas Natural Resource Conservation Commission approved landfill. Contractor shall cause the restoration of all property damaged during the prosecution of the Project Work and shall leave the Project site in a clean and presentable condition. No additional payment shall be made by the City for this work, the compensation having been considered and included in the Project Price.

3.6 Access to Work and Inspections. City and the State of Texas, and their respective representatives, shall have access to the Project Work at all times. The Contractor shall take whatever steps reasonably necessary to provide such access when requested. When reasonably requested by the City, the Contractor shall perform or cause to be performed such testing as may be reasonably necessary or reasonably appropriate to ensure suitability of the jobsite or the compliance of the Project Work with the Contract Documents.

3.7 Suspension or Stoppage of Work.

(a) City shall have the right to immediately suspend the Work wholly or in part for such period or periods of time as it may deem appropriate due to unsuitable considerations considered unfavorable for the proper prosecution of the Work or for failure of the Contractor to carry out the instructions from the City or if City determines in its sole discretion that Contractor has, or will fail to perform, in accordance with this Agreement. In such event, any payments due Contractor shall be suspended until Contractor has taken satisfactory corrective action. During any period in which the Work is stopped or during which any of the Work is not actively in progress for any reason, Contractor shall properly protect the Project site and the Work from damage, loss or harm. Contractor shall not be compensated for periods of delay caused by suspension of Work by City. If Work is suspended

due to no fault of Contractor, an extension of time shall be granted by City by change order upon written application, which extension shall not be unreasonably denied.

(b) If Contractor persistently fails or refuses to perform the Work in accordance with this Agreement, or if City has sufficient reason to believe that Contractor is not and will not complete the Work by the scheduled date for completion or if the best interests of the public health, safety or welfare so require, City may order the Contractor to stop the Work, or any described portion thereof, until the cause for stoppage has been corrected, no longer exists, or the City orders that Work be resumed. In such event, the Contractor shall immediately obey such order.

(c) If the Contractor's Work is stopped by the City under Paragraph 3.7, or in the event the Contractor does not timely complete the Punch List items, and the Contractor fails within seven (7) days of such stoppage to provide adequate assurance to the City that the cause of such stoppage will be eliminated or corrected, or as applicable the Punch List Items will be timely completed then the City may, without prejudice to any other rights or remedies the City may have against the Contractor, proceed to carry out the subject Work and/or Punch List items, as applicable. In such a situation, an appropriate Change Order shall be issued deducting from the Contract Price the cost of completing the Punch List items, and the costs of correcting the subject deficiencies, plus compensation for the any engineer's additional services and expenses necessitated thereby, if any. If the unpaid portion of the Contract Price is insufficient to cover the amount due the City, the Contractor shall pay the difference to the City.

3.8 Contractor Representations. Contractor represents and covenants that its Work forces can perform the Work for the Project and agrees to work simultaneously with any representatives assigned by or contracted by the City, as a part of the Project to ensure continuity of Project Work.

3.9 Contractor Representative. Contractor agrees to provide a representative on the Project site at all times Work is being performed, for communication with the City, receiving materials and equipment, directing Contractors Work, and to provide daily Project clean-up.

3.10 Compliance with applicable law. Contractor shall and shall cause its employees and sub-contractors to comply with all personnel safety programs applicable for the Project Work and to keep the Project area clean and free from debris on a daily-basis, and to keep noise and obnoxious odors to a minimum. Personnel safety programs include but are not limited to protective eyewear; protective clothing; appropriate footwear; ear protection; hard hat, and reflective vest. Project protection includes warning devices such as barricades, lights, signs, and other such devices as may be appropriate or required by the City to protect persons or property in, near, or adjacent to the Project site. Such property includes landscape, irrigation, walkways, doors/frames, glass, elevators, furniture, and fixtures. The Contractor shall comply with all applicable federal, State, and local laws regarding occupational safety and health, as well as providing protection of the environment. This shall include but is not limited to compliance with the U.S. Department of Labor-Occupational Safety and Health Administration (OSHA), and the U.S. Environmental Protection Agency (EPA) guidelines and regulations.

3.11 Project Work Disturbance. In the event Project work by the Contractor and/or its subcontractors disrupts any City service, causes damage to City property, or causes harm to any person, Contractor agrees, at its sole cost and expense, to immediately contact the City Project Manager, while providing appropriate emergency response, including but not limited to, calling police, fire and/or the appropriate utility company regarding service.

3.12 Walk Through and Punch-List. When Contractor believes the Work is substantially complete, Contractor shall notify City in writing that the Work is substantially complete and request the City inspect the Work. The Contractor agrees to perform a walk-through of the Project with the City, upon completion of the Work, and to establish a punch-list of items required for final City acceptance of the Work. Contractor further agrees to complete all punch-list items within twenty-one (21) business days after issuance of the punch-list, unless otherwise provided in the Contract Documents. Failure to complete Project and/or the punch-list within this timeframe shall result in liquidated damages being assessed against Contractor, in accordance with section 4.4.

3.13 Criminal Backgrounds. From time to time, at its sole discretion, the City may require criminal background checks on Contractor and its employees (and its sub-contractors and its employees) who will be performing after-hours Work, and/or require access to Public Safety or City facilities, technology rooms, or secure areas. Criminal background checks are conducted in accordance with Department of Public safety regulations at no charge to the Contractor. All information obtained as part of the criminal background process is kept strictly confidential. Contractor agrees to submit and cause its employees (and to cause its sub-contractor and its employees) to the criminal background process, if required by the City. All decisions regarding Contractor and its employees (and its sub-contractor and its employees) access to City facilities are final.

3.14 Contractor Conduct. Contractor (and its sub-contractors) representatives, and employees shall conduct themselves in a professional and workmanlike manner at all times when performing the Work and on the Project site, including wearing appropriate clean work attire consistent with the type of work being performed, and hard hat, reflective vest, and protective eyewear when required by the Contract Documents. The use of any tobacco product, including smokeless tobaccos, vapor and E-cigarettes, inside City facilities is prohibited. Smoking is permitted outside of City facilities, in designated smoking areas, if at least 50-feet from any facility door. City shall cause the removal of, and, to require Contractor to remove Contractor's (and its sub-contractor's) employees from the Project site if in violation of the foregoing standards.

3.15 Prevailing Wage Rates. The Contractor shall comply in all respects with all requirements imposed by any laws, ordinances or resolutions applicable to the Project with regard to the minimum prevailing wage rates for all classes of employees, laborers, subcontractors, mechanics, workmen and persons furnishing labor and services to the Project. City has adopted a Prevailing Wage Rate Schedule, available to the Contractor by request, which specifies the classes and wage rates to be paid to all persons. The Contractor shall pay not less than the minimum wage rates established thereby for each class, craft or type of labor, workman, or mechanic employed in the execution of this Agreement. The failure of the Contractor to comply with this requirement shall result in the forfeiture to the Owner of a sum of not less than Sixty Dollars (\$60.00) for each person

per day, or portion thereof, that such person is paid less than the prevailing rate. Upon request by City, Contractor shall make available for inspection and copying its books and records, including but not limited to its payroll records, account information and other documents as may be required by the City to ensure compliance with this provision.

Article IV Compensation and Method of Payment

4.1 General.

(a) **Contract Price.** City shall pay, and Contractor shall accept, as full and complete payment for the Work required under the Contract Documents a total amount not to exceed one-hundred twenty-one thousand two-hundred forty-one dollars and zero cents (\$121,241.00) (the “Contract Price”) to be paid as set forth herein.

(b) **Payment of the Contract Price.** Unless otherwise provided in the Contract Documents the Contractor shall be paid on a monthly-basis within thirty (30) days after City receipt of the Contractor’s detailed monthly itemized invoice for Work and City verification of the work and Services set forth in the Contractor’s monthly invoice. Contractor shall submit a monthly invoice on or before the 5th calendar day of each month beginning with the first calendar month following the date of the City notice to proceed for the Work provided during the previous ending calendar monthly period, in a form prescribed by the City of Allen, if applicable. The Contractor’s detailed monthly itemized invoice shall, at a minimum include and show the Contract Price, the billing period, Project name, contract number issued by the City, schedule of values for the Work performed, amount of Work complete, percentage of the Work completed, the amount of Work being invoiced, amount of any City approved change orders, amount of Retainage (hereinafter defined) being withheld, and the amount of the Contract Price remaining to be paid.

4.2 **Retainage.** An amount equal to ten percent (10%) of the Contract Price shall be retained by City if the Contract Price is less than Four Hundred Thousand Dollars (\$400,000.00) and five percent (5%) if the Contract Price is Four Hundred Thousand Dollars (\$400,00.00) or more (“Retainage”), and shall be paid over by City to Contractor as the final installment of the Contract Price after the following has occurred to the reasonable satisfaction of City:

- (a) Contractor shall have completed all punch-list items, if any.
- (b) City shall have conducted a final inspection and has accepted the Work.
- (c) City shall have received a completion certificate executed by Contractor and the City’s inspector stating that the Work has been completed in accordance with the Contract Documents, together with such other evidence that no mechanics or materialmen’s liens or other encumbrances have been filed against the Work or the Project.
- (d) Contractor shall have delivered and assigned (or caused to be delivered and assigned) all warranties and maintenance bond(s) for the Work to the City.

(e) Submittal of executed Contractor's affidavit that all payrolls, invoices for materials and equipment, and other liabilities connected with the Work for which the City, or the City's property, might be responsible, have been fully paid or otherwise satisfied;

(f) Contractor shall deliver to City a set of record ("as-built") drawings, professionally prepared by a licensed engineer, in hardcopy, PDF digital and CAD digital formats in accordance with the current standards set forth by City Engineering Department, unless otherwise provided in the Contract Documents or otherwise approved by the Director of the City Engineering Department.

(g) Removed all materials, equipment, tools, and supplies, not required to remain on-site as indicated by the City, including storage containers, lifts, trash receptacles, and dumpsters;

(h) Re-established the Project site to its original condition, including but not limited to furniture, fixtures, equipment, finishes, landscaping, irrigation, and/or any concrete, disturbed by Contractor's work;

(i) Return of keys and/or security cards issued to Contractor for Project access.

4.3 Project Records and Audits. Contractor shall keep, and cause each sub-contractor to keep, a complete and accurate record to document the performance of the Work and to expedite any audit that might be conducted by City. Contractor shall maintain, and cause each contractor to maintain all books, documents, papers, accounting records and other documentation relating to costs incurred under this Agreement for the Work; and Contractor shall make, and cause each contractor to make such materials available to City for review and inspection during the term of this Agreement and for a period of two (2) years from the date of City acceptance of the Work, or until any pending litigation or claims are resolved, whichever is later.

4.4 Liquidated Damages. Contractor shall pay to City the sum of two-hundred forty dollars and zero cents (\$240.00) per day for each and every day of unexcused delay in achieving completion of the Work beyond the date set forth for completion of the Work including the completion of all Punch-List items identified by the City following substantial completion. Any sums shall be payable hereunder by Contractor, not as a penalty, but as liquidated damages representing an estimate of delay damages likely to be sustained by City, estimated at or before the time of execution of this Agreement. When City reasonably believes that the Work will be delayed, City shall be entitled, but not required, to withhold from any amounts otherwise due Contractor an amount then reasonably determined by City to be adequate to recover liquidated damages applicable to such delays. If and when Contractor overcomes the delay in achieving the completion of the Work, or part thereof, for which City has withheld payment, City shall promptly release to Contractor those funds withheld as liquidated damages. The City shall have the sole discretion to determine whether a delay is excused, or unexcused, and such determination shall be final.

4.5 No Damages for Delay. No claim shall be made by the Contractor to City, and no damages, costs or extra compensation shall be allowed or paid by City to Contractor for any delay or hindrance from any cause in the progress or completion of the Work or this Agreement. The Contractor's sole remedy in the event of any delay or hindrance shall be to request time extensions by written change order. Should the Contractor be delayed by an act of City, or should City order a

stoppage of the Work for insufficient cause, an extension of time shall be granted by the City by written authorization upon written application, which extension shall not be unreasonably denied, to compensate for the delay.

Article V

Devotion of Time; Personnel; and Equipment

5.1 Contractor shall devote such time as reasonably necessary for the satisfactory performance of the Work under this Agreement. Should the City require additional services not included under this Agreement, Contractor shall make reasonable efforts to provide such additional services within the time schedule without decreasing the effectiveness of the performance of the Work required under this Agreement, and shall be compensated for such additional services on a time and materials basis, in accordance with Contractor's standard hourly rate schedule, or as otherwise agreed in writing by the Parties.

5.2 To the extent reasonably necessary for the Contractor to perform the Work under this Agreement, Contractor shall be authorized to engage the services of any agents, assistants, persons, or corporations that the Contractor may deem proper to aid or assist in the performance of the Work under this Agreement. The cost of such personnel and assistance shall be included as part of the total compensation to be paid Contractor hereunder and shall not otherwise be reimbursed by the City unless provided differently herein.

5.3 Contractor shall furnish the facilities, equipment and personnel necessary to perform the Work required under this Agreement unless otherwise provided herein, without relying on City resources for water, sewage disposal, cleaning, or any other waste disposal.

Article VI

Miscellaneous

6.1 Entire Agreement. This Agreement constitutes the sole and only agreement between the Parties and supersedes any prior understandings written or oral agreements between the Parties with respect to this subject matter.

6.2 Assignment. The Contractor may not assign this Agreement, without the prior written consent of the City.

6.3 Successors and Assigns. Subject to the provisions regarding assignment, this Agreement shall be binding on and inure to the benefit of the Parties to it and their respective heirs, executors, administrators, legal representatives, successors and assigns.

6.4 Governing Law. The laws of the State of Texas shall govern this Agreement without regard to any conflict of law rules; and venue for any action concerning this Agreement shall be in the State District Court of Collin County, Texas. The Parties agree to submit to the personal and subject matter jurisdiction of said court.

6.5 Amendments. This Agreement may be amended by the mutual written agreement of the Parties.

6.6 Severability. In the event any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provisions, and the Agreement shall be construed as if such invalid, illegal, or unenforceable provision had never been contained in it.

6.7 Independent Contractor. It is understood and agreed by and between the Parties that Contractor, in satisfying the conditions of this Agreement, is acting independently, and that the City assumes no responsibility or liabilities to any third party in connection with these actions. All Work to be performed by Contractor pursuant to this Agreement shall be in the capacity of an independent contractor, and not as an agent or employee of the City. Contractor shall supervise the performance of its work and services and shall be entitled to control the manner and means by which its work and services are to be performed, subject to the terms of this Agreement.

6.8 Notice. Any notice required or permitted to be delivered hereunder may be sent by first class mail, overnight courier or by confirmed telefax or facsimile to the address specified below, or to such other Party or address as either Party may designate in writing, and shall be deemed received three (3) days after delivery set forth herein:

If intended for City, to:

Eric Ellwanger
City Manager
City of Allen, Texas
3rd Floor, Allen City Hall
305 Century Parkway
Allen, Texas 75013
214.509.4110 - telephone
214.509.4118 - fax

With a copy to:

Peter G. Smith
City Attorney
Nichols, Jackson, Dillard,
Hager & Smith, L.L.P.
1800 Ross Tower
500 North Akard Street
Dallas, Texas 75201
214.965.9900 – telephone
214.965.0010 – facsimile

If intended for Contractor:

Whirlix Design, Inc.
1761 International Parkway
Suite 125
Richardson, TX 75081

6.9 Insurance.

(a) Contractor shall during the term hereof maintain in full force and effect the following insurance: (i) a comprehensive general liability policy of insurance for bodily injury, death and

property damage insuring against all claims, demands or actions relating to the Contractor's performance of services pursuant to this Agreement with a minimum combined single limit of not less than \$1,000,000.00 per occurrence for injury to persons (including death), and for property damage, and minimum aggregate limit of not less than \$2,000,000.00 (this policy shall be primary to any policy or policies carried by or available to City and shall include products/completed operations coverage with a minimum aggregate of \$2,000,000.00 and personal and advertising injury coverage with a minimum occurrence limit of \$1,000,000.00); (ii) policy of automobile liability insurance covering any vehicles owned and/or operated by Contractor, its officers, agents, and employees, and used in the performance of this Agreement with policy limits of not less than \$1,000,000.00 combined single limit and aggregate for bodily injury, death and property damage; (iii) statutory Worker's Compensation Insurance and shall include bodily injury, occupational illness or disease coverage with Employers Liability limits of \$1,000,000/\$1,000,000/\$1,000,000 covering all of Contractor's employees involved in the provision of services under this Agreement and shall contain an Alternate Employer Endorsement to include the City being named an Alternate Employer under the Workers Compensation policy. A copy of the endorsement shall be provided to the City and attached to the Certificate of insurance signed by person authorized by the insurer to confirm coverage on its behalf; (iv) Policy of Property/Builders Risk Insurance Policy with "all-risk" coverage on the entire Project construction value with replacement cost basis of the Project work and materials in transit and stored off the Project site destined for incorporation; (v) Excess Liability Insurance with a limit of not less than \$2,000,000.00. Such policy shall be in excess of the commercial general liability insurance, automobile insurance and employer's liability insurance. This insurance shall be primary to any policy or policies carried by or available to City and shall be provided on a "following form basis"; and (vi) Professional Liability Insurance (if applicable) with limit of not less than \$2,000,000 for all negligent acts, errors, and omissions by the contractor, its sub-contractors, consultants and employees, that arise out of the performance of this Agreement.

(b) All policies of insurance shall be endorsed to provide the following provisions: (1) name the City, its officers, and employees as additional insureds as to all applicable coverage with the exception of Workers Compensation Insurance and Professional Liability Insurance; and (2) provide for at least thirty (30) days prior written notice to the City for cancellation of the insurance; (3) provide for a waiver of subrogation against the City for injuries, including death, property damage, or any other loss to the extent the same is covered by the proceeds of insurance. Contractor shall provide written notice to the City of any material change of or to the insurance required herein.

(c) All insurance companies providing the required insurance shall be authorized to transact business in Texas and rated at least "A" by AM Best or other equivalent rating service.

(d) A certificate of insurance and copies of the policy endorsements evidencing the required insurance shall be submitted prior to commencement of the Work and upon request by the City.

(e) Contractor shall cause its subcontractors performing the Work to obtain and maintain the insurance coverages as required in Section 6.9 (a) – (d) herein, which shall remain in full force and effect during the term of this Agreement.

6.10 Indemnification.

CITY SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE, OR INJURY OF ANY KIND OR CHARACTER TO ANY PERSON OR PROPERTY ARISING FROM THE WORK OF CONTRACTOR PURSUANT TO THIS AGREEMENT. CONTRACTOR HEREBY WAIVES ALL CLAIMS AGAINST CITY, ITS OFFICERS, AGENTS AND EMPLOYEES (COLLECTIVELY REFERRED TO IN THIS SECTION AS "CITY") FOR DAMAGE TO ANY PROPERTY OR INJURY TO, OR DEATH OF, ANY PERSON ARISING AT ANY TIME AND FROM ANY CAUSE OTHER THAN THE NEGLIGENCE OR WILLFUL MISCONDUCT OF CITY OR BREACH OF CITY'S OBLIGATIONS HEREUNDER. CONTRACTOR AGREES TO INDEMNIFY AND SAVE HARMLESS CITY FROM AND AGAINST ANY AND ALL LIABILITIES, DAMAGES, CLAIMS, SUITS, COSTS (INCLUDING COURT COSTS, ATTORNEYS' FEES AND COSTS OF INVESTIGATION) AND ACTIONS OF ANY KIND BY REASON OF INJURY TO OR DEATH OF ANY PERSON OR DAMAGE TO OR LOSS OF PROPERTY TO THE EXTENT CAUSED BY THE CONTRACTOR'S NEGLIGENT PERFORMANCE OF THE WORK UNDER THIS AGREEMENT OR BY REASON OF ANY NEGLIGENT ACT OR OMISSION ON THE PART OF CONTRACTOR, ITS OFFICERS, DIRECTORS, SERVANTS, EMPLOYEES, REPRESENTATIVES, CONSULTANTS, LICENSEES, SUCCESSORS, SUBCONTRACTORS OR PERMITTED ASSIGNS (EXCEPT WHEN SUCH LIABILITY, CLAIMS, SUITS, COSTS, INJURIES, DEATHS OR DAMAGES ARISE FROM OR ARE ATTRIBUTED TO NEGLIGENCE OF THE CITY, IN WHOLE OR IN PART, IN WHICH CASE CONTRACTOR SHALL INDEMNIFY CITY ONLY TO THE EXTENT OR PROPORTION OF NEGLIGENCE ATTRIBUTED TO CONTRACTOR AS DETERMINED BY A COURT OR OTHER FORUM OF COMPETENT JURISDICTION). THE CONTRACTOR'S OBLIGATIONS UNDER THIS SECTION SHALL NOT BE LIMITED TO THE LIMITS OF COVERAGE OF INSURANCE MAINTAINED OR REQUIRED TO BE MAINTAINED BY CONTRACTOR UNDER THIS AGREEMENT. THIS PROVISION SHALL SURVIVE THE TERMINATION OF THIS AGREEMENT.

WITHOUT LIMITING THE FOREGOING, AND TO THE FULLEST EXTENT PERMITTED BY LAW, CONTRACTOR HEREBY INDEMNIFIES AND HOLDS HARMLESS CITY FROM AND AGAINST ALL DAMAGES, LOSSES, COSTS, AND EXPENSES, INCLUDING BUT NOT LIMITED TO REASONABLE ATTORNEYS' FEES, INCURRED BY CITY IN CONNECTION WITH ANY ACTION AGAINST CITY FOR PERSONAL INJURY OF ANY EMPLOYEE OF THE CONTRACTOR OR ANY OF CONTRACTOR'S SUBCONTRACTORS AND CONSULTANTS OR ANYONE DIRECTLY OR INDIRECTLY EMPLOYED BY THEM, BROUGHT BY SUCH INJURED EMPLOYEE OR THE EMPLOYEE'S WORKERS COMPENSATION INSURANCE CARRIER (HEREINAFTER REFERRED TO AS AN "EMPLOYEE INJURY CLAIM), EXCEPT TO THE EXTENT CAUSED BY THE NEGLIGENCE OF CITY.

6.11 Debarment and Suspension.

(a) In accordance with 2 CFR section 180.300, the principal of this Agreement as described in 2 CFR section 180.995 being duly sworn or under penalty of perjury under the laws of

the United States, certifies that neither this company nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation in this transaction by any federal department or agency, the State of Texas or any of its departments or agencies.

(b) If during the Agreement period the principal becomes debarred, suspended, proposed for debarment, declared ineligible or voluntarily excluded from participation, the principal shall immediately inform the City.

(c) For contracts that are financed by Federal or State grants, the principal agrees that this section will be enforced on each of its subcontractors and will inform the City of any violations of this section by subcontractors to the contract.

(d) The certification in this section is a material representation of fact relied upon by the City in entering into this contract.

6.12 Counterparts. This Agreement may be executed by the Parties hereto in separate counterparts, each of which when so executed and delivered shall be an original, but all such counterparts shall together constitute one and the same instrument. Each counterpart may consist of any number of copies hereof each signed by less than all, but together signed by all of the Parties hereto.

6.13 Exhibits. The exhibits attached hereto are incorporated herein and made a part hereof for all purposes.

6.14 Prohibition of Boycott Israel. Contractor verifies that it does not Boycott Israel and agrees that during the term of this Agreement will not Boycott Israel as that term is defined in Texas Government Code Section 808.001, as amended. This section does not apply if the Consultant is a sole proprietor, a non-profit entity or a governmental entity; and only applies if: (i) the Consultant has ten (10) or more fulltime employees and (ii) this Agreement has a value of \$100,000.00 or more to be paid under the terms of this Agreement.

[Signature Page to Follow]

EXECUTED this _____ day of _____, 2020.

CITY OF ALLEN, TEXAS

By: _____
Eric Ellwanger, City Manager

ATTEST:

By: _____
Shelley George, City Secretary

APPROVED AS TO FORM:

By: _____
Peter G. Smith, City Attorney

EXECUTED this 16th day of July, 2020.

WHIRLIX DESIGN, INC.

By:  _____

Name: JASON EDMUNDSON

Title: PRESIDENT

Exhibit A

1. Whirlix Design Inc's proposal dated July 15, 2020 for the Hillside Park Shade, referencing Buyboard contract 592-19.
2. Whirlix Design Inc's proposal dated July 15, 2020 for the Bethany Lakes Park Shade, referencing Buyboard contract 592-19.
3. Warranty Statement.



Date: July 15th, 2020
Project: Hillside Park Shade Proposal
Location: Allen, Texas

To: Laura Cuellar, City of Allen

BUYBOARD CONTRACT # 592-19, VENDOR # 3120

Custom Sail Style Shades Over Existing Play Equipment

Series: *Two Single Post Cool Toppers & One Single Post Cantilever*
Surface: *Engineered Wood Fiber (Existing)*
Installation: *By Factory Trained and Certified Installers*
Quantity/Sizes: *See Attached Renders and Drawings*

Lead Time for Shades: Nine to Eleven Weeks

Installation Duration: One to Two Weeks

Base Bid: \$43,491.00

Buy Board Discount (5% on Equipment and Installation): (-1,678.00)

Total W/ Buy Board Discount: \$41,813.00

Base Bid Includes:

- Full Submittal Package
- Warranty As Specified – Best in the Business!
- Certified Installation
- Freight
- (2) Integrated Shades on Existing Play Equipment
- (2) New Steel Posts from Skyways to Support Shades (Painted to Match)
- (2) New Piers for the Integrated Shades
- (1) Single Post Cantilever Shade that is 14' x 14' for over the 2-5 Play Area
- Pier for Single Post Cantilever
- Temporary Fencing Around Area
- Payment and Performance Bonds
- Buy Board Discount

Base Bid Excludes:

- Sales Tax
- Use of Credit Cards as Payment
- Demolition of Existing Structure
- Excavation and Removal of Soil
- Tuff Timber or Concrete Border
- Drainage
- Engineered Wood Fiber or Surfacing
- Geotextile Fabric
- Play Equipment
- Swings
- Drilling Through Rocky Soil
- Hitting of New or Existing Sprinkler pipes

Whirlix Design Inc.
1761 International Parkway, Suite 125
Richardson, TX 75081



- Hitting of private electrical, water, sewer, internet, etc. that are not detectible during a commercial line location
- Logistical Issues that Prevent Truck or Equipment Access to Site
- Special Augers or Drilling Equipment
- Certified Payroll / Progress Billing
- Setting of Control Points or Benchmarks
- Remobilization Charges Due to Weather or Project Delays
- Offsite Storage of Equipment Due to Weather or Project Related Delays
- On Site Security
- Permitting and Inspections

Terms: Net 30 for Existing Customers. All new customers are subject to a credit check and Possible deposit.

Payment terms will be based, in part, on credit review that is pulled from The Experian Business Division.

All taxes now or hereafter levied by federal, state or local authority upon the sale of any of the forgoing products to be paid for by the purchaser. All quotations are subject to the conditions printed on the following pages if any and when accepted are subject to the approval of an officer of this company.

Prepared by Jason Edmundson · Whirlix Design Inc · jedmundson@whirlix.com · 972-658-7518

Acceptance of Approval: The above prices, specifications, and conditions are satisfactory and accepted. You are hereby authorized to provide all items described above. Any balances not paid within thirty (30) days of the date of the invoice shall accrue interest at the rate of 18% per annum. Any action to construe, declare or enforce this contract shall only be brought in a court of competent jurisdiction with venue lying solely and exclusively in Dallas County, Texas. The prevailing party in any action brought to construe, declare or enforce this contract shall be entitled to recover its actual attorney's fees, attorney's travel time charges and expenses, paralegal fees, computer access and utilization charges, expert witness fees and expenses, costs, expenses and expenses of investigation, discovery, and litigation. The parties to this contract expressly waive the right to trial by jury of any cause of action or defense pertaining to this contract. The above prices, specifications, and conditions are satisfactory and accepted. You are hereby authorized to provide all items described above.

Date: _____ **Signature:** _____



Hillside Park

1143301-01-01 • 02.12.2020



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Date: July 15th, 2020
Project: Bethany Lakes Shade Proposal
Location: Allen, Texas

To: Laura Cuellar, City of Allen

BUYBOARD CONTRACT # 592-19, VENDOR # 3120

Custom Sail Style Shades Over Existing Play Equipment

Series: *Two Sail Style Shades to Cover Existing Equipment*
Surface: *Engineered Wood Fiber (Existing)*
Installation: *By Factory Trained and Certified Installers*
Quantity/Sizes: *See Attached Renders and Drawings*

Lead Times on Shade: Nine to Eleven Weeks

Installation Duration: Two to Three Weeks

Base Bid: \$83,069.00

Buy Board Discount (5% on Equipment and Installation): (-3,641.00)

Total W/ Buy Board Discount: \$79,428.00

Base Bid Includes:

- Full Submittal Package
- Warranty As Specified – Best in the Business!
- Certified Installation
- Freight
- Shades Over Existing Play Area
- Temporary Fencing Around Area
- Payment and Performance Bonds
- Buy Board Discount

Base Bid Excludes:

- Sales Tax
- Use of Credit Cards as Payment
- Demolition of Existing Structure
- Excavation and Removal of Soil
- Tuff Timber or Concrete Border
- Drainage
- Engineered Wood Fiber or Surfacing
- Geotextile Fabric
- Play Equipment
- Swings
- Drilling Through Rocky Soil
- Hitting of New or Existing Sprinkler pipes
- Hitting of private electrical, water, sewer, internet, etc. that are not detectible during a commercial line location
- Logistical Issues that Prevent Truck or Equipment Access to Site



- Special Augers or Drilling Equipment
- Certified Payroll / Progress Billing
- Setting of Control Points or Benchmarks
- Remobilization Charges Due to Weather or Project Delays
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Date: _____ **Signature:** _____

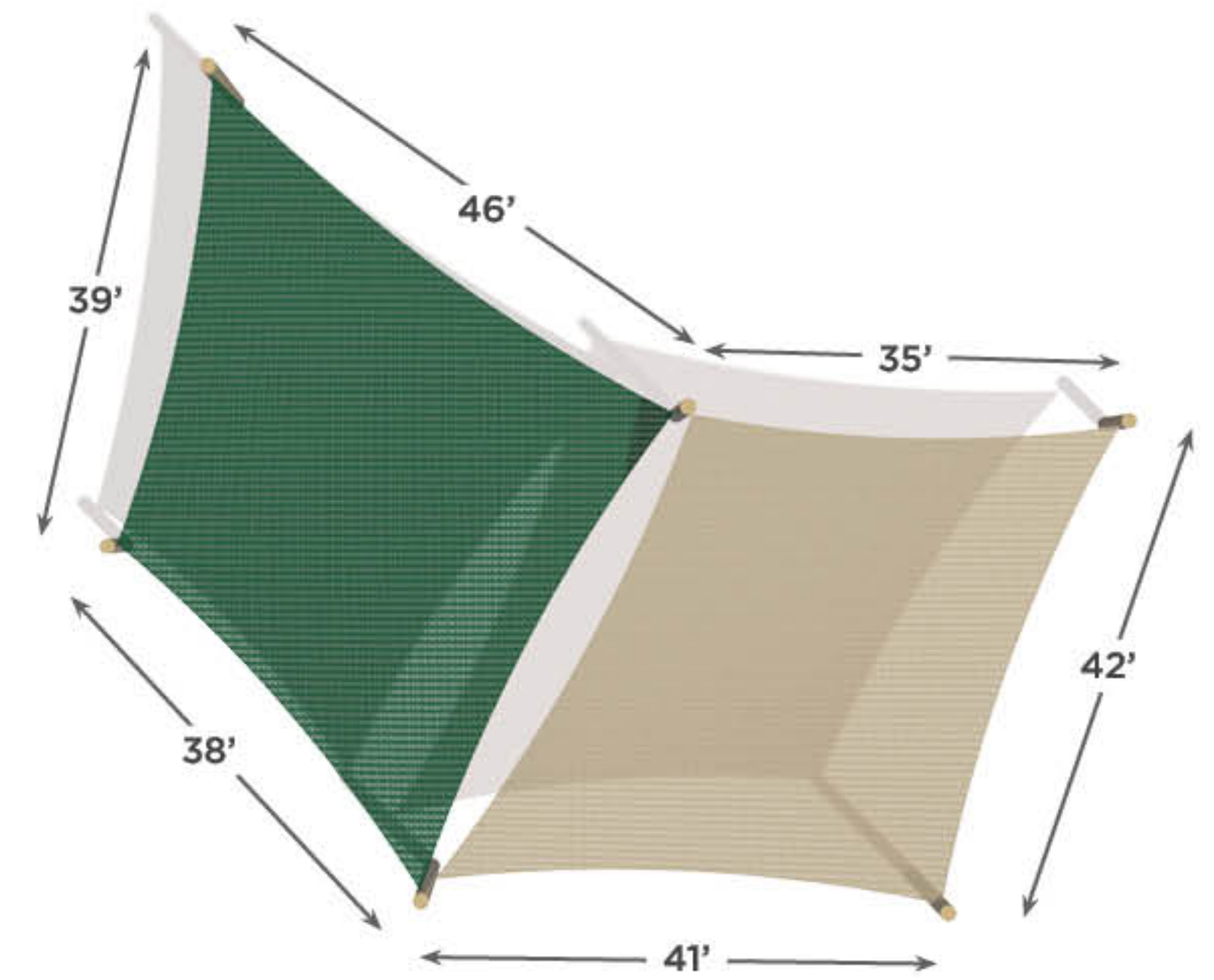
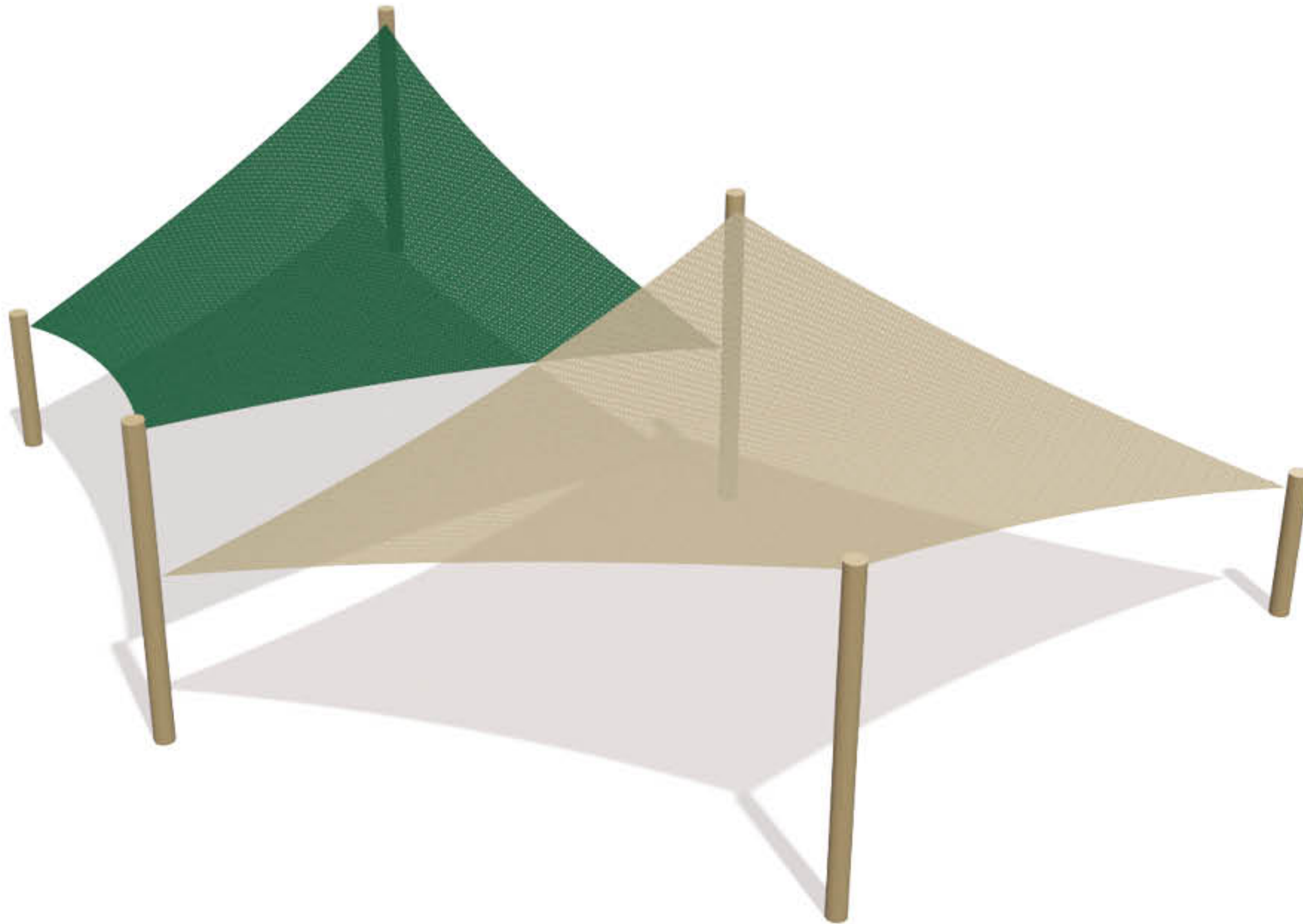


Image for illustrative purposes only. Does not represent the finished product. Not to scale.



Bethany Lakes Park Shade

1143340-01-01 • 02.24.2020



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Statement of Limited Warranty for USA SHADE Brands
Shade Structures – Sun Ports - VPS

1. The structural integrity of all supplied steel is warranted for ten years.
2. If assembly is provided by the Company, workmanship covering the labor for the removal, assembly and cost of shipping will be covered for one year.
3. All steel surface finishes are warranted for one year.
4. Shadesure™, Colourshade® FR, Extreme 32™, Commercial 95™, SaFRshade™ and Monotec 370™ fabrics all carry a ten year limited manufacturer's warranty against failure from significant fading, deterioration, breakdown, outdoor heat, cold or discoloration. Should the fabric need to be replaced under the warranty, the Company will manufacture and ship a new replacement fabric at no charge for the first six years, thereafter pro-rated at 20% per year over the last four years. The following are exceptions to the preceding warranty terms:
 - a. Shadesure™ fabrics in Red, Yellow, Atomic Orange, Electric Purple, Zesty Lime, Cinnamon, Olive and Mulberry carry a five year pro-rated warranty;
 - b. Fabric canopies attached to Coolbrella™ structures carry a three year warranty;
 - c. Individual canopy tops measuring greater than 40' in length are covered by a non-prorated five year warranty;
 - d. Preconstraint 502™ waterproof material is subject to an eight year pro-rated warranty
5. Thread is warranted for ten years.

General Limited Warranty Terms and Conditions

- These limited warranties are effective from the date of sale, or, if assembly is provided by the Company, upon receipt by Company from Purchaser of a completed and signed "Customer Checklist and Sign-off" form.
- In its sole discretion, the Company will repair and or/replace defective structures, products or workmanship, or refund that portion of the price related to the defective product, labor or service rendered.
- The Company reserves the right, in cases where certain fabric colors have been discontinued, to offer the Purchaser or Owner a choice of available alternative colors to replace the warranted fabric. The Company does not warranty that any particular color will be available for any period of time, and reserves the right to discontinue any color for any reason, without recourse by the Purchaser or Owner of the continued fabric color.
- Should the Purchaser or Owner sell the structures to another party, the warranty cannot be transferred to the new owner without a complete and thorough on-site inspection performed by a Company representative. Please contact the company at warranty@usa-shade.com for more details.
- All warranty claims covering Company supplied structures, products and services must be submitted by Purchaser or Owner in writing to the Company within thirty days from the date of discovery of the alleged defect and must include a detailed description and photographs of the alleged defect or problem. Warranty claims should be submitted by email to: warranty@usa-shade.com.
- Purchaser or Owner agrees that venue for any court action to enforce these limited warranties shall be in the City or County of Dallas in the state of Texas, USA.
- These limited warranties are void if:





- the supplied structures, products, services and/or labor are not paid for in full;
- the structures are not assembled in strict compliance with USA SHADE specifications;
- any changes, modifications, additions or attachments are made to the structures in any way, without prior written approval from the Company. Specifically, no signs, objects, fans, light fixtures, etc. may be hung from the structures, unless specifically engineered by the Company.
- These limited warranties do not cover defects and/or damages caused by:
 - normal wear and tear;
 - misuse, willful or intentional damage, vandalism, contact with chemicals, cuts and Acts of God (i.e. tornado, hurricane, micro/macros burst, earthquake, wildfires, etc.);
 - ice, snow or wind loads in excess of the designed load parameters engineered for the supplied structures;
 - use, maintenance, neglect, repair and/or service inconsistent with the Company's written care and maintenance instructions, provided with the order.
- The limited warranties explicitly exclude:
 - workmanship related to assembly not provided by the Company or its agents;
 - fabric curtains, valances and flat vertical panels;
 - fabric canopies installed on structures that were not engineered and originally supplied by the Company.
- **THE COMPANY SHALL NOT BE LIABLE FOR ANY INCIDENTAL, CONSEQUENTIAL, SPECIAL, LIQUIDATED, EXEMPLARY, OR PUNITIVE DAMAGES, OR ANY LOSS OF REVENUE, PROFIT, USE OR GOODWILL, WHETHER BASED UPON CONTRACT, TORT (INCLUDING NEGLIGENCE), OR ANY OTHER LEGAL THEORY, ARISING OUT OF A BREACH OF THIS WARRANTY OR IN CONNECTION WITH THE SALE, INSTALLATION, MAINTENANCE, USE, OPERATION OR REPAIR OF ANY PRODUCT OR SERVICE. IN NO EVENT WILL THE COMPANY BE LIABLE FOR ANY AMOUNT GREATER THAN THE PURCHASE PRICE FOR ANY PRODUCT OR SERVICE PROVIDED BY THE COMPANY.**
- **THE FOREGOING LIMITED WARRANTY IS THE SOLE AND EXCLUSIVE WARRANTY FOR THE COMPANY'S PRODUCTS AND SERVICES, AND IS IN LIEU OF ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, IN LAW OR IN FACT. SELLER SPECIFICALLY DISCLAIMS ALL OTHER WARRANTIES, EXPRESS OR IMPLIED, INCLUDING, WITHOUT LIMITATION, ALL IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR USE OR PURPOSE, AND ANY IMPLIED WARRANTIES ARISING OUT OF COURSE OF DEALING OR PERFORMANCE OR TRADE USAGE. PURCHASER, BY ACCEPTANCE AND USE OF THIS LIMITED WARRANTY, WAIVES ANY RIGHTS IT WOULD OTHERWISE HAVE TO CLAIM OR ASSERT THAT THIS LIMITED WARRANTY FAILS OF ITS ESSENTIAL PURPOSE.**

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