

1978

John Price Associates, Inc, A Corporation v. Richard J. Davis, And Connie M. Davis : Brief of Defendants-Appellants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN PRICE ASSOCIATES,
INC., a Corporation,

Plaintiff and
Respondent,

Case No. 15474

v.

RICHARD J. DAVIS, and
CONNIE M. DAVIS,

Defendants and
Appellants.

BRIEF OF DEFENDANTS-APPELLANTS

Appeal from the Third Judicial District Court
of Salt Lake County, State of Utah
The Honorable Macellus K. Snow, Judge

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN PRICE ASSOCIATES,
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vs.

RICHARD J. DAVIS, and
CONNIE M. DAVIS,

Defendants and
Appellants.

BRIEF OF DEFENDANTS - APPELLANTS

STATEMENT OF CASE

On June 16, 1975 the Plaintiff contractor commenced an action in Third Judicial District Court, No. 228,634, against the Defendant owners seeking to reduce to judgment a promissory note dated September 9, 1974 in the principal sum of \$10,708.39 together with interest thereon at the rate of 15% per annum until paid. The Defendants answered said complaint, and filed a separate counterclaim against the Plaintiff alleging that the Plaintiff contractor had failed to timely complete its construction contract with the Defendant owners, thus causing the owners to lose their long term financing upon the nursing home being constructed. The Defendant owners sought delay damages for such unjustified delays, together with compensatory damages.

DISPOSITION IN THE LOWER COURT

Plaintiff-Respondent contractor brought a motion for summary judgment on its promissory note before the Law and Motion Division of the Third Judicial District Court, Judge David B. Dee, presiding, on September 7, 1977, some days preceeding jury trial of the matter. The court granted judgment against the Defendant-Appellants and in favor of the Plaintiff-Respondent upon the promissory note in the sum of \$10,708.39 together with interest from September 9, 1974 to the date of summary judgment in the sum of \$3,900.77. Further hearing on the matter of attorney fees was held on September 20, 1977, one day before trial, and the law and motion division of the Third Judicial District Court awarded the Plaintiff-Respondent \$4,600.00 attorney fees, together with an additional \$300.00 attorney fees awarded November 23, 1976, for a total of \$4,900.00 attorney fees.

At trial on September 21, 1977, while only partially into the trial, and upon motion of the Plaintiff-Respondent, the lower trial court granted Plaintiff-Respondent's motion for a directed verdict in favor of Plaintiff-Respondent and against the Defendants-Appellants on their counterclaim for damages arising from the alleged delay in completion of the construction contract which was the subject matter of the lawsuit.

It is from the lower court's order granting a directed verdict to the Plaintiff-Respondent upon Defendants-Appellants' counterclaim that Appellants appeal.

RELIEF SOUGHT ON APPEAL

The Defendants-Appellants ask this court to reverse the order of the lower court granting a directed verdict on Defendants-Appellants' counterclaim against the Plaintiff-Respondent, and to direct the lower court to try the issues related to the claims contained in Defendants-Appellants' counterclaim.

STATEMENT OF FACTS

The Defendants-Appellants (hereafter called the "owners"), entered into a construction contract with the Plaintiff-Respondent (hereafter called the "contractor"), on or about August 28, 1972 for the construction of a nursing home to be located at 4600 South Highland Drive, in Salt Lake City, Utah 84117 for a sum certain in the amount of \$720,000.00. The contract called for commencement of the work within fifteen days after completion of the working drawings, or upon mutual consent, but in no case later than October 15, 1972. Completion was scheduled, under the terms of the contract for June 15, 1972.

The owners obtained construction financing from Commercial Security Bank in the amount of \$800,000.00, of which \$710,000.00 was earmarked for the contractor. The owners agreed to execute a promissory note for the \$10,000.00 balance, and to pay in accordance with the terms of the contract.

There was some delay in obtaining the completed plans for the nursing home from the architect, and they were not received until some time in the latter part of December, 1972. There is yet an unresolved question of fact as to whether or not the delay was the fault of the contractor or the owner.

In any event change order number one to the original contract was executed between the parties on or about January 3, 1973 extending the completion date of the contract from June 15, 1973 to August 1, 1973, an extension of some 47 days.

Actual construction on the project did not productively begin until the early spring of 1973, and then there were several delays in construction, so that by August 1, 1973 the project was only about 50% complete.

The contractor sought a further extension for completion of the contract from the owners on August 21, 1973, and at a meeting held between the parties on August 27, 1973 the owners agreed to extend the time for completion to and through November 30, 1973, with the contractor's agreement to pay Commercial Security Bank an extension fee, for extending the interim financing the additional time.

At the same time, the parties agreed that the granting of the extension in no way would waive any claim which the owners had against the contractor by reason of the contractor's failure to complete the project by August 1, 1973. This was embodied in change order number two.

When November 30, 1973 came and passed it was apparent to the contractor that they would not be able to complete the project by that date; hence the contractor sought a third extension of time in which to complete the contract, designated as change order number 3. The contractor wished to extend the contract completion date to December 30, 1977. The owners refused to grant any further extensions of time in which to complete the contract and thus this change order was never signed by the owners.

A Certificate of Occupancy was issued upon the premises on December 26, 1973 by Salt Lake County, at the request of the contractor, and a certificate of substantial completion was executed by the architect and the contractor on January 14, 1974, and was countersigned by the owner on March 18, 1974. Certain items still remained to be completed, but were attached to the certificate as items yet to be completed.

On March 1, 1974 a document prepared by the contractor and sent to the owners, designated as "change order number 4" was executed by the owner after having been previously executed by the contractor. It should be noted that it is this so-called "change order" which gives rise to the legal confrontation between the parties on the Defendant-Appellants' counterclaim.

The State Fire Marshall had directed the owners to change certain of the panic hardware on the doors so as to meet state fire safety requirements. These changes had not been contemplated by the architect, and as such, were not in the original plans. The additional cost to the owners was \$2,282.00. Negotiations were made with the contractor to install the new panic hardware for that price.

The contractor prepared the contract to install the additional hardware on the doors, and sent it to the owners shortly after February 19, 1974. The contractor placed the contract on a change order form which purported to add this to the contract of August 28, 1972, and which purported to increase the contract time as necessary to complete this work.

On or about September 12, 1974 the contractor was paid off with a \$10,461.00 payment from Commercial Security Bank on the construction loan, and on or about September 10, 1974 a

promissory note was executed by the owners in favor of the contract for the remainder of \$10,708.39.

ARGUMENT

POINT I

THE COURT'S ORDER FOR A DIRECTED VERDICT IN FAVOR OF THE PLAINTIFF-RESPONDENT AND AGAINST THE DEFENDANTS-APPELLANTS IS IN ERROR AND IS CONTRARY TO LAW.

After extensive argument, (T.26-55 D) and discussion in judge's chambers, the Plaintiff-Respondent was permitted to move the court for an order directing a verdict in favor of the Plaintiff (T. 54:10). Upon Plaintiff's motion, the court directed a verdict in favor of the Plaintiff-Respondent and against the Defendants-Appellants (T. 54:19). While the reasoning of the court in awarding the directed verdict is not entirely clear from the transcript, it can be pieced together from the argument of counsel.

Plaintiff's counsel argued that the contract was fully paid by a payment from the Defendants to the Plaintiff on or about September 14, 1974. Plaintiff further argued that paragraph 17.4 of the AIA construction contract provided as follows:

"The making of final payment shall constitute a waiver of all claims by the owner except those arising from" and the four exceptions, none of which are applicable to this lawsuit." (T. 29: 4, 12-14)

The trial court agreed with the argument of Plaintiff's counsel and concluded that the Defendant, by making final payment to the Plaintiff, waived any claim they may have had for damages due to delay.

The trial court judge further reasoned that the order directing verdict in favor of the Plaintiff should further be granted because change order number four supersedes all of the provisions of previous change orders, including change order number two.

It is in both of these assumptions as to the state of the law that the trial court erred.

All parties concur that the contract, and change orders numbers 1, 2 and 4 were executed by the parties. The question for this court to determine is their legal effect.

Pursuant to the terms of the contract, as expanded by change orders one and two, the contractor had until November 30, 1973 in which to complete the work. Paragraph 16.1 of the contract made time of the essence.

Change Order Number Two also provided as follows:

"It is expressly understood and agreed that by execution of this Change Order No. 2, owners in no way waive any claim which they may have against contractor by reason of contractor's failure to complete the project on or before August 1, 1973."

By this paragraph, which is clear on its face, the parties agreed that even though the completion date of the contract was extended beyond August 1, 1977, that the owners were reserving their right to make a claim against the contractor for his failure to complete the contract by August 1, 1977.

The problem which faced the trial court and one which this court is asked to resolve upon appeal, is what effect the subsequent change order number four had upon this provision, and further, what effect final payment in September, 1974 had upon this provision.

Case law is absolutely clear that parties to a written contract may modify, waive, or make new terms to it regardless of the provisions in such contract to the contrary. Massey v. Ferguson, Inc., (Utah, 1962), 13 U 2nd 142, 369 P 2nd 296. Davis v. Payne & Day, Inc., 10 U 2nd 53, 348 P 2nd 337.

In the case at bar both the owner and the contractor were free to alter the provisions of the original contract dated August 28, 1972, or to waive some of the terms of that contract, or to add new provisions to that contract, as they saw fit, regardless of the terms of the original contract to the contrary. Cheney v. Rucker, 14 U 2nd 205, 381 P 2nd 86.

There can be little question that change orders numbers one, two and four, if all are deemed to be additions to the original contract of August 28, 1972, thus modified that contract to some extent. They were alterations to the contract. An alteration is a modification or change in one or more respects which introduces new elements into the details of the contract, or cancels some of them, but leaves the general purposes and effect of the original contract undisturbed. Grant v. Aero-draulics Co., 91 C.A. 2nd 68, 204 P 2nd 683.

Paragraph 8.1 of the original contract clearly contemplate that written changes to the original contract may occur, and incorporates written change orders into the original contract. Case law and the contract itself thus clearly establish the right of the owner and the contractor to alter, modify, or waive terms and conditions of the original contract of August 28, 1972.

One is then led to the question of what the legal effect is when a subsequent modification, alteration or waiver is made to a primary contract.

The courts have held that where a building and construction contract is modified by change orders, such modifications or variations from the original contract do not abrogate the original contract, or the rights and obligations of the parties under the original contract, but that the original contract remains in force and effect, to the extent that it is not modified or altered by the subsequent modifications, alterations, or waivers. See 17A, CJS, Contracts, §379, at page 444.

Thus, a written agreement is not superseded or invalidated by a subsequent integration or alteration relating to the same subject matter, if the subsequent agreement is not inconsistent with the original contract, and is made for a separate consideration. See 17A, CJS, Contracts, §382, at page 452. To the extent the the subsequent modification or alteration is inconsistent with the first contract into which it is integrated, the second contract or alteration will supersede or modify the first. Ragan v. Schreffler, 306 SW 2nd 494. And a subsequent modification or alteration, or waiver, will supersede inconsistent portions of the original contract even though there is no express provision in the original contract, or the alteration, that such will be the legal effect. Decca Records, Inc. v. Republic Recording Co., 235 F 2nd 360.

In summary, then, where an alteration, modification, or waiver does not expressly provide whether and to what extent it is intended to operate in discharge or substitution of the first

contract, the two contracts must be interpreted together and insofar as they are inconsistent, the alteration, modification or waiver will prevail; and the original contract, insofar as it is consistent with the purposes and intent of the parties, and with the alterations, modifications or waivers, will be enforced. Dill v. Poindexter Tile Co. (Mo. App., 1970), 451 SW 2nd 365.

To the extent that change orders one, two and four altered, modified, or waived the conditions set forth in the contract of August 28, 1972, the original contract was superseded to that extent. In all other respects; however, the original contract remained the same, and is enforceable.

As to change order number one, the completion date was amended, or altered, and extended from June 15, 1973 to August 1, 1973, an extension of some 47 days.

By change order number two, the completion date was again altered, and extended from August 1, 1973 to November 30, 1973. But crucial to this argument, is that by change order number two the parties expressly understood and agreed that the contractor agreed to waive a defense he might otherwise have had against the owner. The owner and the contractor agreed on August 27, 1973, some 27 days after the August 1, 1973 deadline, that the owner could retain its claim, or could reserve its claim, against the contractor for the contractor's failure to complete the contract by August 1, 1973, and this despite the fact that the contractor would be allowed to finish the work.

Ordinarily, the owner, by permitting the contractor to continue with completion of the work after the contractor's delay in performance, would have constituted a legal waiver on the part of the owner to make a claim against the contractor for delay damages. 13 Am. Jur. 2nd, Building and Construction Contracts, §53, at page 57. In this case, the owners specifically reserved to themselves the right to make a claim against the contractor for delay damages, even though the contractor was permitted to complete the work.

It is clear that the parties intended by change order number two to separate the issues of completion date by the contractor, and the reservation of a claim by the owner to make a claim for delay damages. If the two issues are separate and distinct, so far as the parties were concerned, then it is immaterial how long the contractor was given to complete the project. Counsel for the contractor seems to recognize this assertion when he stated in his argument for a directed verdict that the provisions of change order number two would still be alive, except for the payoff by the owners of the contract on September 12, 1974. (T. Dern, 46: 25-27)

That the parties intended the issues of owners' claim for delay damages to be distinctly separate from date of completion, is further shown by the fact that the parties entered into this agreement on August 27, 1973, some 27 days after the default of the contractor in the completion date. The contractor, knowing it was in default, still agreed to be liable to the owner for delay damages, while at the same time seeking an extension in which to complete the contract.

The crux of the appeal is then, not whether change order number four, which granted an extension of time as was reasonably necessary to complete the installation of the panic hardware, superseded the owner's reservation of a claim against the contractor for delay damages, since such clearly was not the intention of the parties, but rather, it is whether the reservation of owners' claim against the contractor for delay damages was extinguished by the final payment on the contract on September 12, 1974.

Section 17.4 of the contract provides that final payment by the owner does constitute a waiver of all claims by the owner against the contractor, with four exceptions, none of which probably apply here. By the execution of change order number two, however, the contractor agreed to a fifth exception, that could not be extinguished by final payment by the owners. With the execution of change order number two the parties understood and agreed that the owner could maintain an action against the contractor for delay damages for the contractor's failure to complete the project by August 1, 1973, without regard to when the contractor actually completed the job. In fact the parties anticipated that the contractor would complete the work, and that he would be entitled to his pay under the terms of the contract when he did complete the project. In view of this anticipation, or perhaps, in spite of it, the parties still agreed that the owner could maintain an action for delay damages against the contractor for delay damages.

If this be the case, then paragraph 17.4 of the original

contract was in fact modified or altered. A new exception must necessarily be inferred, to wit: The parties agreed that the owner could maintain an action against the contractor for delay damages even though the contractor completed the work, and made a claim for final payment under the contract, and was paid.

This has to be the logical conclusion of the intention of the parties when they executed change order number two. To rule otherwise would be to misconstrue the natural intention of the parties. If the parties had intended final payment to cut off the owners' rights to make claim against the owner for delay damages, they would have said so in change order number two, or they would have said that the final payment would be adjusted by an appropriate reduction for owners' claims for delay damages against the contractor. This was not done because the parties clearly kept the issue of completion, and thus demand for payment under the contract, and the issue of a claim for delay damages separate and distinct.

Whether the owners payment of the contract in full on or about September 12, 1974 constituted a waiver to any claim they may have had against the contractor for delay damages will depend upon this court's interpretation of the legal effect of change order number two upon section 17.4 of the original contract.

In many, many cases, the courts have held that the mere acceptance of work by the contractee, and payment therefor did not constitute a waiver on the contractee's part to claim delay damages against the contractor. This was the ruling, for example, in El Paso & S.W. R. Co. v. Harris, (Tex. Civ. App.), 110 SW 145, 115 A.R. 92, 93, where the court held that a railroad

construction contractor's acceptance of a voucher for work performed did not preclude recovery of damages for delay, such damages not being included in the terms of the voucher.

In Selden Breech Construction Company v. University of Michigan, (D.C., 1921) 274 F. 982, the court held that the acceptance by a contractor of an extension of time in which to complete work from his subcontractor was not a waiver of the contractor's right to recover damages from the subcontractor for the subcontractor's delay in performance. See also, Edge Moor Iron Co. v. U.S. (1925), 61 Ct. Cl. (F) 392.

In Pneumatic Gun-Carriage and Powder Co. v. U.S. (1901) 36 Ct. Cl (F) 71, a contractee was held not to have waived his right to recover damages against the contractor for delay damages by paying the amount due under the contract and by executing a release in full, since the amount due under the contract was not in dispute.

In building construction projects generally, the contractee has generally been held not to have waived his right to recover delay damages against the contractor resulting from the default of the contractor, where the contractor proceeds with the work after default where the contractee protests the delay. 115 ALR 90

It is evident that by change order number two, the owners preserved unto themselves an absolute, and not a conditional right, to make a claim against the contractor for delay damages. That right could not be abrogated, either by change order number four, or by section 17.4 of the contract, which it superseded, to the extent that section 17.4 and the clause reserving unto the owners a claim against the contractor for delay damages in change order number two were inconsistent with each other.

The only way in which owner's reservation of a right to claim delay damages against the contractor could have been abrogated would have been by a subsequent waiver. Such a waiver would have required the owners to have knowingly waived this valuable right. To do that, the owners, it must be shown, must have had knowledge of the existence of their right, and must have intentionally waived that right, and such waiver must have been supported by a valuable consideration. There was never a subsequent writing after change order number two wherein the owners waived their right to claim delay damages against the owners. See Phoenix Ins. Co. v. Heath, 90 Utah 187, 61 P 2nd 308.

There is not one shread of evidence in the record, or otherwise, to substantiate the proposition that the owners knowingly and intentionally abrogated the right they preserved unto themselves to make claim upon the contractor for delay damages when they paid off the contract amount on September 12, 1974. The evidence is to the contrary. If the owners had intended to permit a waiver of their rights for delay damages to occur upon final payment, it seems illogical that they did not make provision for a set-off for delay damages at the time of final payment. If the contractor was further permitted to continue to complete the contract, certainly the contractor could make claim upon the owners for the remainder due on the contract independent of the owners' claims against the contractor for delay damages.

CONCLUSION

The trial court erred in failing to apply the proper construction to the facts of the case, and in further failing to apply the proper law. Clearly, the owners reserved unto themselves by change order number two, the right to claim damages for delay in the completion of the construction of the nursing home in question against the contractor. This right was not abrogated either by the execution of change order number four giving the contractor additional time as necessary to install the panic hardware, nor by the final payment on September 12, 1974 to the contractor of monies due under the contract. The reservation of the right to make claim against the contractor for delay damages was separate and distinct from the issue of the completion of the contract by the contractor, and his right to make claim against the owner for funds due under the contract upon completion.

Section 17.4 of the original contract was altered to the extent that the reservation of a claim for delay damages was reserved to the owners in change order number two. The owners could bring their suit to collect for delay damages at any time after completion, even after final payment was made on the contract.

Respectfully Submitted,
Daniel K. Smith

APPENDIX

CHANGE ORDER

AIA DOCUMENT G701

A-1

OWNER
ARCHITECT
CONTRACTOR
FIELD
OTHER

☐
☐
☐
☐
☐

16
Davis
10/11/76

143AL
394

PROJECT: NURSING HOME
(name, address) 4600 SOUTH HIGHLAND DRIVE
SALT LAKE CITY, UTAH

CHANGE ORDER NUMBER: 2

TO (Contractor)

JOHN PRICE ASSOCIATES
35 CENTURY PARK WAY
SALT LAKE CITY, UTAH 84115

ARCHITECT'S PROJECT NO:

CONTRACT FOR: NURSING HOME
JPA PROJECT #394

CONTRACT DATE:

You are directed to make the following changes in this Contract:

Extend completion date of construction through November 30, 1973 in consideration of payment of a two thousand dollar (\$2,000.00) fee to the Owner and Commercial Security Bank.

The Bank, Commercial Security Bank, agrees and accepts the terms and conditions of this Change Order and will disburse funds for construction purposes per the term and conditions of the Contract.

COMMERCIAL SECURITY BANK

By

Date



It is expressly understood and agreed that by execution of this Change Order No. 2, owners in no way waive any claim which they may have against contractor by reason of contractor's failure to complete the project on or before August 1, 1973. *RJR CM's CM*

The original Contract Sum was	\$720,000.00
Net change by previous Change Orders	5-----0----
The Contract Sum prior to this Change Order was	\$720,000.00
The Contract Sum will be increased/decreased (unchanged) by this Change Order.	5-----0----
The new Contract Sum including this Change Order will be	\$720,000.00
The Contract Time will be (increased) decreased/unchanged by	XXXXXXXXXX
The Date of Completion as of the date of this Change Order therefore is November 30, 1973	

W.E. HARRIS
ARCHITECT
315 FIRST SECOND SOUTH
Address
SALT LAKE CITY, UTAH

JOHN PRICE ASSOCIATES
CONTRACTOR
35 CENTURY PARK WAY
Address
SALT LAKE CITY, UTAH

MR. & MRS. R.J. DAVIS
OWNER
2125 WALKER LANE
Address
SALT LAKE CITY, UTAH

BY

DATE

BY

DATE

BY

DATE

THE AMERICAN INSTITUTE OF ARCHITECTS

Exhibit 7
 Volume DEPOS
 Date 10/14/76
Jan. Trimmer,



AIA Document A107

Standard Form of Agreement Between Owner and Contractor

Short Form Agreement for Small Construction Contracts

Where the Basis of Payment is a

STIPULATED SUM

THIS DOCUMENT HAS IMPORTANT LEGAL CONSEQUENCES; CONSULTATION WITH
 AN ATTORNEY IS ENCOURAGED WITH RESPECT TO ITS COMPLETION OR MODIFICATION

For other contracts the AIA issues Standard Forms of Owner-Contractor Agreements and Standard General Conditions
 of the Contract for Construction for use in connection therewith.

AGREEMENT

made this Twenty-Eighth day of August in the year Nineteen
 Hundred and Seventy-Two.

BETWEEN

RICHARD J. AND CONNIE M. DAVIS ----- the Owner, and

JOHN PRICE ASSOCIATES, INC. ----- the Contractor.

The Owner and Contractor agree as set forth below.

contractors or for labor, materials, or equipment, (4) damage to another contractor, or (5) unsatisfactory prosecution of the Work by the Contractor.

17.3 Final payment shall not be due until the Contractor has delivered to the Owner a complete release of all liens arising out of this Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the Owner indemnifying him against any lien.

17.4 The making of final payment shall constitute a waiver of all claims by the Owner except those arising from (1) unsettled liens, (2) faulty or defective Work appearing after Substantial Completion, (3) failure of the Work to comply with the requirements of the Contract Documents, or (4) terms of any special guarantees required by the Contract Documents. The acceptance of final payment shall constitute a waiver of all claims by the Contractor except those previously made in writing and still unsettled.

ARTICLE 18

PROTECTION OF PERSONS AND PROPERTY

The Contractor shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work. He shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to (1) all employees on the Work and other persons who may be affected thereby, (2) all the Work and all materials and equipment to be incorporated therein, and (3) other property at the site or adjacent thereto. He shall comply with all applicable laws, ordinances, rules, regulations and orders of any public authority having jurisdiction for the safety of persons or property or to protect them from damage, injury or loss. All damage or loss to any property caused in whole or in part by the Contractor, any Subcontractor, any Sub-subcontractor or anyone directly or indirectly employed by any of them, or by anyone for whose acts any of them may be liable, shall be remedied by the Contractor, except damage or loss attributable to faulty Drawings or Specifications or to the acts or omissions of the Owner or Architect or anyone employed by either of them or for whose acts either of them may be liable but which are not attributable to the fault or negligence of the Contractor.

ARTICLE 19

CONTRACTOR'S LIABILITY INSURANCE

The Contractor shall purchase and maintain such insurance as will protect him from claims under workmen's compensation acts and other employee benefit acts, from claims for damages because of bodily injury, including death, and from claims for damages to property which may arise out of or result from the Contractor's operations under this Contract, whether such operations be by himself or by any Subcontractor or anyone directly or indirectly employed by any of them. This insurance shall be written for not less than any limits of liability specified as part of this Contract, or required by law, whichever is the greater, and shall include contractual liability insurance as applicable to the Contractor's obligations

under Paragraph 11.10. Certificates of such insurance shall be filed with the Owner.

ARTICLE 20

OWNER'S LIABILITY INSURANCE

The Owner shall be responsible for purchasing and maintaining his own liability insurance and, at his option, may maintain such insurance as will protect him against claims which may arise from operations under the Contract.

ARTICLE 21

PROPERTY INSURANCE

21.1 Unless otherwise provided, the Owner shall purchase and maintain property insurance upon the entire Work at the site to the full insurable value thereof. This insurance shall include the interests of the Owner, the Contractor, Subcontractors and Sub-subcontractors in the Work and shall insure against the perils of Fire, Extended Coverage, Vandalism and Malicious Mischief.

21.2 Any insured loss is to be adjusted with the Owner and made payable to the Owner as trustee for the insureds, as their interests may appear, subject to the requirements of any mortgagee clause.

21.3 The Owner shall file a copy of all policies with the Contractor prior to the commencement of the Work.

21.4 The Owner and Contractor waive all rights against each other for damages caused by fire or other perils to the extent covered by insurance provided under this paragraph. The Contractor shall require similar waivers by Subcontractors and Sub-subcontractors.

ARTICLE 22

CHANGES IN THE WORK

22.1 The Owner without invalidating the Contract may order Changes in the Work consisting of additions, deletions, or modifications, the Contract Sum and the Contract Time being adjusted accordingly. All such Changes in the Work shall be authorized by written Change Order signed by the Owner or the Architect as his duly authorized agent.

22.2 The Contract Sum and the Contract Time may be changed only by Change Order.

22.3 The cost or credit to the Owner from a Change in the Work shall be determined by mutual agreement.

ARTICLE 23

CORRECTION OF WORK

The Contractor shall correct any Work that fails to conform to the requirements of the Contract Documents where such failure to conform appears during the progress of the Work, and shall remedy any defects due to faulty materials, equipment or workmanship which appear within a period of one year from the Date of Substantial Completion of the Contract or within such longer period of time as may be prescribed by law or by the terms of any applicable special guarantee required by the Contract Documents. The provisions of this Article 23 apply to Work done by Subcontractors as well as to Work done by direct employees of the Contractor.

ARTICLE 1
THE WORK

The Contractor shall perform all the Work required by the Contract Documents for
(Here insert the caption descriptive of the Work as used on other Contract Documents.)

The construction of a Nursing Home, located at 4600 Highland Drive, Salt Lake County, Utah, which real property is more particularly described as follows: Beginning at a point in the center of a County Road 90 rods West and North 15° West 83.15 rods from the Southeast corner of Section 4, Township 2 South, Range 1 East, Salt Lake Base and Meridian, running thence North 15° West 5 rods; thence South 87° 30' West 453 feet, more or less, to the center of Big Cottonwood Ditch; thence Southeasterly along the center of said ditch 5 rods, more or less, to a point which is South 87° 30' West from the point of beginning; thence North 87° 30' East 25 rods, more or less, to the point of beginning.

In accordance with the attached Preliminary Design Drawings A-1 and A-2, revised February 22nd, 1972

ARTICLE 2
ARCHITECT

The Architect for this Project is M. E. Harris, Jr., 315 East Second South, Salt Lake City, Utah

ARTICLE 3
TIME OF COMMENCEMENT AND COMPLETION

The Work to be performed under this Contract shall be commenced within fifteen (15) days after completion of working drawings, or upon mutual agreement. In no case shall construction commence after October 15th, .

and completed within two hundred forty five days after start or prior to June 15th, 1973.

ARTICLE 4
CONTRACT SUM

The Owner shall pay the Contractor for the performance of the Work, subject to additions and deductions by Change Order as provided in the General Conditions, in current funds, the Contract Sum of
(State here the lump sum amount, unit prices, or both, as desired.)

Seven Hundred Twenty Thousand Dollars and no/100 ----- (\$720,000.00)

ARTICLE 5
PROGRESS PAYMENTS

Based upon Applications for Payment submitted to the Architect by the Contractor and Certificates for Payment issued by the Architect, the Owner shall make progress payments on account of the Contract Sum to the Contractor as follows:

Owner warrants that he has a firm written commitment from Commercial Security Bank in the amount of \$800,000.00 for the construction of a Nursing Home Facility. The Owner and Commercial Security Bank will issue to the Contractor, a letter stating that \$710,000.00 will be available to the Contractor to use in the construction of the facility. This letter shall further state that the Contractor can, at his option, withdraw funds monthly, subject to interest on the withdrawn dollars at the rate of nine percent (9%). Contractor shall reimburse bank, interest only, for such draws. Balance of \$10,000.00, due under the contract shall be paid by Owner to Contractor in equal monthly installments beginning with the fourth month after completion of the project, through the seventh month, or a total of four (4) consecutive payments. Contractor's obligation to Commercial Security Bank is only for the payment of interest on construction funds used by the Contractor during the interim construction period. (Continued on Page 3-A.)

ARTICLE 6
FINAL PAYMENT

The Owner shall make final payment thirty (30) days after completion of the Work, provided the Contract be then fully performed, subject to the provisions of Article 17 of the General Conditions.

ARTICLE 7
ENUMERATION OF CONTRACT DOCUMENTS

The Contract Documents are as noted in Paragraph 8.1 of the General Conditions and are enumerated as follows:
(List below the Agreement, Conditions of the Contract (General, Supplementary, and other Conditions), Drawings, Specifications, Addenda and accepted Alternates, showing page or sheet numbers in all cases and dates where applicable.)

The Drawings, Specifications, General and Special Conditions, shall be provided herein upon completion and approval by signature of the referenced items by the Owner, Architect, and Contractor. It is further agreed that the Contractor shall have the authority of responsibility to work directly with the Architect to keep the Project cost within the Contract amount.

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Article 5 - Progress Payments, (Continued):

Draw requests, if elected, shall be as follows:

On or about the 10th of each month, ninety percent (90%) of the proportion of the Contract Sum properly allocable to labor, materials, and equipment incorporated in the Work and ninety percent (90%) of the portion of the Contract Sum properly allocable to materials and equipment suitably stored at the site or at some other location agreed upon in writing by the parties, up to the 1st day of that month, less the aggregate of previous payments in each case; and upon Substantial Completion of the entire Work, a sum sufficient to increase the total payments to one hundred percent (100%) of the Contract Sum, less such retainages as the Architect shall determine for all incomplete Work and unsettled claims.

After 50% of the work has been completed, the retained amount shall be decreased to 5%.

GENERAL CONDITIONS

ARTICLE 8 CONTRACT DOCUMENTS

8.1 The Contract Documents consist of this Agreement (which includes the General Conditions), Supplementary and other Conditions, the Drawings, the Specifications, all Addenda issued prior to the execution of this Agreement, all amendments, Change Orders, and written interpretations of the Contract Documents issued by the Architect. These form the Contract and what is required by any one shall be as binding as if required by all. The intention of the Contract Documents is to include all labor, materials, equipment and other items as provided in Paragraph 11.2 necessary for the proper execution and completion of the Work and the terms and conditions of payment therefor, and also to include all Work which may be reasonably inferable from the Contract Documents as being necessary to produce the intended results.

8.2 The Contract Documents shall be signed in not less than triplicate by the Owner and the Contractor. If either the Owner or the Contractor do not sign the Drawings, Specifications, or any of the other Contract Documents, the Architect shall identify them. By executing the Contract, the Contractor represents that he has visited the site and familiarized himself with the local conditions under which the Work is to be performed.

8.3 The term Work as used in the Contract Documents includes all labor necessary to produce the construction required by the Contract Documents, and all materials and equipment incorporated or to be incorporated in such construction.

ARTICLE 9 ARCHITECT

9.1 The Architect will provide general administration of the Contract and will be the Owner's representative during the construction period.

9.2 The Architect shall at all times have access to the Work wherever it is in preparation and progress.

9.3 The Architect will make periodic visits to the site to familiarize himself generally with the progress and quality of the Work and to determine in general if the Work is proceeding in accordance with the Contract Documents. On the basis of his on-site observations as an architect, he will keep the Owner informed of the progress of the Work, and will endeavor to guard the Owner against defects and deficiencies in the Work of the Contractor. The Architect will not be required to make exhaustive or continuous on-site inspections to check the quality or quantity of the Work. The Architect will not be responsible for construction means, methods, techniques, sequences or procedures, or for safety precautions and programs in connection with the Work, and he will not be responsible for the Contractor's failure to carry out the Work in accordance with the Contract Documents.

9.4 Based on such observations and the Contractor's Applications for Payment, the Architect will determine the amounts owing to the Contractor and will issue Certificates for Payment in accordance with Article 17.

9.5 The Architect will be, in the first instance, the interpreter of the requirements of the Contract Documents. He will make decisions on all claims and disputes between the Owner and the Contractor. All his decisions are subject to arbitration.

9.6 The Architect will have authority to reject Work which does not conform to the Contract Documents.

ARTICLE 10 OWNER

10.1 The Owner shall furnish all surveys.

10.2 The Owner shall secure and pay for easements for permanent structures or permanent changes in existing facilities.

10.3 The Owner shall issue all instructions to the Contractor through the Architect.

ARTICLE 11 CONTRACTOR

11.1 The Contractor shall supervise and direct the Work, using his best skill and attention. The Contractor shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract.

11.2 Unless otherwise specifically noted, the Contractor shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work.

11.3 The Contractor shall at all times enforce strict discipline and good order among his employees, and shall not employ on the Work any unfit person or anyone not skilled in the task assigned to him.

11.4 The Contractor warrants to the Owner and the Architect that all materials and equipment incorporated in the Work will be new unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not so conforming to these standards may be considered defective.

11.5 The Contractor shall pay all sales, consumer, use and other similar taxes required by law and shall secure all permits, fees and licenses necessary for the execution of the Work.

11.6 The Contractor shall give all notices and comply with all laws, ordinances, rules, regulations, and orders of any public authority bearing on the performance of

the Work, and shall notify the Architect if the Drawings and Specifications are at variance therewith.

11.7 The Contractor shall be responsible for the acts and omissions of all his employees and all Subcontractors, their agents and employees and all other persons performing any of the Work under a contract with the Contractor.

11.8 The Contractor shall review, stamp with his approval and submit all samples and shop drawings as directed for approval of the Architect for conformance with the design concept and with the information given in the Contract Documents. The Work shall be in accordance with approved samples and shop drawings.

11.9 The Contractor at all times shall keep the premises free from accumulation of waste materials or rubbish caused by his operations. At the completion of the Work he shall remove all his waste materials and rubbish from and about the Project as well as his tools, construction equipment, machinery and surplus materials, and shall clean all glass surfaces and shall leave the Work "broom clean" or its equivalent, except as otherwise specified.

11.10 The Contractor shall indemnify and hold harmless the Owner and the Architect and their agents and employees from and against all claims, damages, losses and expenses including attorneys' fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder. In any and all claims against the Owner or the Architect or any of their agents or employees by any employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph 11.10 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any Subcontractor under workmen's compensation acts, disability benefit acts or other employee benefit acts. The obligations of the Contractor under this Paragraph 11.10 shall not extend to the liability of the Architect, his agents or employees arising out of (1) the preparation or approval of maps, drawings, opinions, reports, surveys, Change Orders, designs or specifications, or (2) the giving of or the failure to give directions or instructions by the Architect, his agents or employees provided such giving or failure to give is the primary cause of the injury or damage.

ARTICLE 12

SUBCONTRACTS

12.1 A Subcontractor is a person who has a direct contract with the Contractor to perform any of the Work at the site.

12.2 Unless otherwise specified in the Contract Docu-

ments or in the Instructions to Bidders, the Contractor, as soon as practicable after the award of the Contract, shall furnish to the Architect in writing a list of the names of Subcontractors proposed for the principal portions of the Work. The Contractor shall not employ any Subcontractor to whom the Architect or the Owner may have a reasonable objection. The Contractor shall not be required to employ any Subcontractor to whom he has a reasonable objection. Contracts between the Contractor and the Subcontractor shall be in accordance with the terms of this Agreement and shall include the General Conditions of this Agreement insofar as applicable.

ARTICLE 13

SEPARATE CONTRACTS

The Owner has the right to let other contracts in connection with the Work and the Contractor shall properly cooperate with any such other contractors.

ARTICLE 14

ROYALTIES AND PATENTS

The Contractor shall pay all royalties and license fees. The Contractor shall defend all suits or claims for infringement of any patent rights and shall save the Owner harmless from loss on account thereof.

ARTICLE 15

ARBITRATION

All claims or disputes arising out of this Contract or the breach thereof shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. Notice of the demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association and shall be made within a reasonable time after the dispute has arisen.

ARTICLE 16

TIME

16.1 All time limits stated in the Contract Documents are of the essence of the Contract.

16.2 If the Contractor is delayed at any time in the progress of the Work by changes ordered in the Work, by labor disputes, fire, unusual delay in transportation, unavoidable casualties, causes beyond the Contractor's control, or by any cause which the Architect may determine justifies the delay, then the Contract Time shall be extended by Change Order for such reasonable time as the Architect may determine.

ARTICLE 17

PAYMENTS

17.1 Payments shall be made as provided in Article 5 of this Agreement.

17.2 Payments may be withheld on account of (1) defective Work not remedied, (2) claims filed, (3) failure of the Contractor to make payments properly to Sub-

ARTICLE 24.

TERMINATION BY THE CONTRACTOR

If the Architect fails to issue a Certificate of Payment for a period of thirty days through no fault of the Contractor, or if the Owner fails to make payment thereon for a period of thirty days, the Contractor may, upon seven days' written notice to the Owner and the Architect, terminate the Contract and recover from the Owner payment for all Work executed and for any proven loss sustained upon any materials, equipment, tools, and construction equipment and machinery, including reasonable profit and damages.

ARTICLE 25

TERMINATION BY THE OWNER

If the Contractor defaults or neglects to carry out the Work in accordance with the Contract Documents or fails to perform any provision of the Contract, the Owner may, after seven days' written notice to the Contractor and without prejudice to any other remedy he may have, make good such deficiencies and may deduct the cost thereof from the payment then or thereafter due the Contractor or, at his option, may terminate the Contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever method he may deem expedient, and if the unpaid balance of the Contract Sum exceeds the expense of finishing the Work, such excess shall be paid to the Contractor, but if such expense exceeds such unpaid balance, the Contractor shall pay the difference to the Owner.

This Agreement executed the day and year first written above.

OWNER RICHARD J. AND CONNIE M. DAVIS CONTRACTOR JOHN PRICE ASSOCIATES, INC.

Richard J. Davis
Connie M. Davis

John Price

AGREED: RE: ARTICLE #1

AGREED:

M.E. Harris Jr.
Architect

Commercial Security Bank