

96007520

96 FEB -2 PM 1:41

CONSTRUCTION CONTRACT

MANIC
RECORDER

9
THIS AGREEMENT made and entered into this 31st day of January, 1996, by and between GOUGH, INC., an Indiana corporation (hereinafter called "Contractor"), and HOBART RIDGE CORPORATION, an Indiana corporation (hereinafter called "Owner").

W I T N E S S E T H:

The Contractor and Owner, for consideration hereinafter named, mutually covenant and agree as follows:

I

This Contract is for the expansion and remodeling of an existing supermarket building located on the real estate described on Exhibit "A" attached hereto and made a part hereof. The Contractor shall furnish all the materials and labor to perform all of the General Construction Work, as defined in the "Contract Documents" described below, all of which is hereinafter called the "Work". Not included in the scope of Work and for which separate prime contracts will be let by Owner are for the Casework Fabrication and Installation Work, Decor Work, Refrigeration Equipment & Installation Work, and Electrical Work.

The following Contract Documents shall govern the nature, scope and extent of Contractor's Work and the contractual relationship between the Owner and the Contractor:

- (1) This Construction Contract;
- (2) Plans for the Addition and Remodeling of the Wiseway Super Center located at 999 West Ridge Road, Hobart, Indiana, prepared by Fred Collins Architect (hereinafter called "Architect") and identified as Job No. 9420, (included in which are the plans for interior design prepared by Off The Wall Co., Inc.), copies of which Plans have been initialed by the Owner and Contractor and which are on file with Owner's attorneys, Lucas, Holcomb & Medrea;
- (3) Specifications (Project Manual) for the Addition and Remodeling of Wiseway Super Center prepared by the Architect, including the Notice to Bidders, Instructions to Bidders, Bid Proposal Form, General Conditions, Supplementary Conditions, and Technical Specifications;
- (4) Addendum No. 1 dated November 1, 1995, issued by the Architect; and
- (5) The General Conditions of the Contract for Construction published by the American Institute of Architects, Form A-201, Fourteenth Edition, 1987, except to the extent modified herein at Article XXI of this Contract.

In the event of any conflict or inconsistency between the provisions of this Contract and any of the other aforementioned Contract Documents, this Contract shall govern.

II

Owner shall pay to the Contractor for the performance of this Contract, subject to the additions and deductions as hereinafter provided, the sum of One Hundred Ninety-Two Thousand Eighty-Four and 00/00 Dollars (\$192,084.00), which amount includes all taxes (including Indiana Retail Sales Tax) and permit fees. Said amount was arrived at by combining Contractor's Base Bid with Contractor's Bid for Alternative #1 (A).

25-00
10
#77566

In addition to the above, reference is hereby made to Contractor's letter to Owner dated December 26, 1995 pertaining to certain additional work to be performed involving floor tiling. At Owner's election, Item # 1 and or Item # 3 described in said letter may be added to the scope of the Work at the amounts set forth in said letter; and Item # 2 may be deleted from the scope of the Work for the credit set forth in said letter.

III

In accordance with the various Contract Documents, the Owner will let the following separate prime contract: Casework Fabrication and Installation Contract, Decor Contract, Refrigeration Equipment & Installation Contract, and Electrical Contract. Contractor shall cooperate with the other prime contractor and shall coordinate all of the Work. In addition, Contractor agrees to coordinate and oversee the work of the other prime contractor employed by the Owner and keep the Owner and Owner's Architect informed as to the progress of the other prime contractor and any problems experienced therewith.

The Architect (as designated by the Owner from time to time), shall supervise the Contractor's Work to the extent provided for in Article 4 of the AIA's General Conditions and the Contractor shall furnish Owner and Owner's Architect with notice whenever the work of the other prime contractor employed by Owner occasions delays in the Work of Contractor.

IV

As long as the Work is proceeding on schedule and based upon application for payment submitted to the Architect by the Contractor and certificate for payment issued by the Architect, the Owner shall, subject to the further conditions and limitations set forth below, make monthly progress payments (hereinafter called "Draws"). Each Draw shall be based on the proportion of the Contract Sum properly allowable for the labor, materials and equipment actually incorporated in the Work up to the time of the application for such Draw, less the aggregate of all previous Draws. No payment shall be made for any materials and equipment which is stored on site but is not actually incorporated into the Work. The Owner shall withhold as retainage the sum of ten percent (10%) of each Draw.

Applications for Draws shall be submitted on a Contractor's Sworn Affidavit for Payment on a form customarily required by Chicago Title Insurance Company, or such similar form approved by Owner. Notwithstanding the "no lien contract" provisions hereinafter set forth, all payments shall be made pursuant to sufficient partial and/or final waivers of mechanic's lien of Contractor, all subcontractors and material suppliers.

Each application for a Draw shall be subject to approval by the Architect and Donald J. Weiss, acting for and on behalf of the Owner. Owner will use its best efforts to have all Draws paid within fifteen (15) working days after the submission of the application.

Final payment, including all retainage, shall be paid to Contractor within thirty (30) days after completion of all of Contractor's Work, the issuance of the Architect's final completion certificate, and the procuring by Contractor of an occupancy permit. Request for final payment shall be submitted on the same form as utilized for Draws and final payment shall be made only upon submission of final waivers of mechanic's lien by Contractor, all subcontractors and material suppliers.

Notwithstanding the foregoing, all requests for payment shall be subject to the further reasonable and customary procedures and conditions of the construction financing agreements between Owner and Owner's Lender, if any.

V

Time is of the essence of this Contract and the Contractor shall use its best efforts to complete its Work within ninety (90) days of the date of this Contract. "Substantial completion", as that term is used in the Contract Documents shall mean that stage of construction when the Owner is able to open the entire premises involved in the Work for business, and in a form appearing finished to said Tenant's customers, subject only to minor odds and ends, normal adjustments and final finishing that would not unreasonably interfere with the conduct of normal business operations on the premises.

VI

Within five (5) days of the execution of this Contract by Contractor, the Contractor shall submit to the Owner a list of subcontractors which Contractor proposes to use on the job. Such list shall be subject to the Owner's reasonable approval and any subsequent changes in subcontractors shall be subject to Owner's further reasonable approval. The Contractor and all of his subcontractors shall, during the progress of the work, employ only Union labor. Noncompliance with this provision shall be considered by the Owner as a material breach of this Contract. Contractor hereby also acknowledges that any union picketing of the project will have an adverse effect on the other Wiseway Food Centers. Contractor therefore agrees to use its best good faith efforts to avoid being picketed. If any subcontractor of Contractor is the cause of the picketing, and the picketing continues for more than five (5) days, Contractor shall promptly remove and replace said subcontractor at Contractor's expense. If the Contractor is the cause of the picketing, and the picketing continues for more than five (5) days, Owner shall have the right to remove and replace the Contractor, at Contractor's expense, with another contractor in order to complete the Work.

VII

No claim for payment for extras shall be due and payable unless the same is performed or furnished pursuant to a written Change Order Agreement executed by the Owner and the Contractor. All Change Orders shall include a detailed itemized breakdown of all materials, labor and overhead costs, including appropriate invoices and time cards for it and its subcontractors, prepared by Contractor.

Donald J. Weiss is hereby designated as the Owner's representative for purposes of executing Change Orders on behalf of the Owner.

The cost of any and all extras shall be computed according to the following formula: Actual out-of-pocket costs, plus 8% for overhead and profit, plus taxes, if any. This formula shall apply to Contractor as well as any and all of Contractor's subcontractors. Any claims for extras hereunder shall be substantiated by Contractor providing Owner with a detailed breakdown of all material and labor cost, including appropriate invoices and time cards for Contractor and its subcontractors.

In addition, in performing the Work, Contractor shall make no changes or deviations in the materials or work called for in the Plans and Specifications without the express written consent of the Owner. All samples of materials to be used by Contractor in performing the Work shall be submitted to the Owner's representative, Donald J. Weiss, for Owner's approval on a timely basis prior to such materials being incorporated into the Work.

VIII

The Contractor shall maintain such insurance as will protect it and the Owner from claims under workmen's compensation actions. Contractor shall also maintain liability insurance, protecting Contractor and Owner from claims for

damages because of bodily injury, including death and property damage, which may arise from and during operation under this Contract, until final payment of the Contract Price, with limits of liability in the amount of at least \$2,000,000.00 per person and \$4,000,000.00 per accident, and \$1,000,000.00 for property damage, whether such operations be by itself or by any subcontractor or anyone directly or indirectly employed by either of them, and deliver a copy of endorsement of said insurance policy to the Owner before commencing work, pursuant to this Contract, with Owner to be added to the liability policy as an additional insured and said policy shall provide for non cancellation without 30 days prior written notice to Owner. Contractor shall save Owner free and harmless and indemnify against any loss, cost or expense, whether from personal injury, death or property damage, tort or contract claims arising from and during operations under this Contract.

The Owner shall procure and pay for all necessary comprehensive builder's risk insurance sufficient to insure the Contractor's Work, as well as the work of the other prime contractors. The Contractor shall reimburse the Owner for its prorata share of such builder's risk insurance, based on the base amount of each prime contract. The Contractor shall be named as an additional insured and the policy shall provide for non-cancellation without 20 days prior written notice to Owner and Contractor. The form of the builder's risk policy shall be subject to Contractor's reasonable approval.

IX

Notwithstanding anything herein to the contrary, Contractor shall commence construction only after this Contract is recorded in the Office of the Recorder of Lake County, Indiana.

X

Should either party hereto bring suit in court, or by way of arbitration, to enforce the terms or breach hereof, it is agreed that the prevailing party shall recover from the other party its costs and reasonable attorney fees.

XI

No periodic or final certificate issued, nor any periodic or final payment made to the Contractor, nor partial or entire use or occupancy of the Work by the Owner, shall be an acceptance of any Work or materials which is not in accordance with this Contract. The making and acceptance of the final payment (including retainage) shall not constitute a waiver of any claims by the Owner, including those arising from unsettled liens, from faulty work or material appearing after latent defects are reasonably discoverable, and from deviations from the Plans and Specifications.

XII

The Owner shall be permitted to store and thereafter install its equipment, trade fixtures and merchandise, and do other work in the premises prior to final completion at such times as the Architect shall determine such action shall not unreasonably interfere with the Work of Contractor. Contractor shall keep the building secure and properly closed in for such purposes.

XIII

Neither the final certificate of the Architect nor the final payment by Owner to Contractor, shall relieve Contractor of the responsibility for faulty materials, workmanship or the failure of any portion of the Work to perform and/or operate as intended by the Plans and Specifications; and the Contractor does now hereby expressly guarantee to Owner all materials and workmanship incor-

porated in its execution of this Contract, which guarantee shall remain in full force and effect for a period of one (1) year from the date of substantial completion of the Work. During this period of one (1) year, Contractor shall furnish to Owner prompt free maintenance, inspection and adjusting service to Owner for all mechanical equipment included in the Work. In the event that the Plans and Specifications, or other portions of this Contract, call for a guarantee, warranty or servicing for a period of more than one (1) year, or in the event parts of the Work or material are guaranteed for a period of more than one (1) year to Contractor by a subcontractor, manufacturer or supplier, such as is sometimes the case for roofing, air conditioner compressors and other installations, supplies, material or equipment, then the guarantee of Contractor to Owner shall be for the length of period of time set forth in the Plans or Specifications, or as set forth in other portions of this Contract, or as set forth in the guarantee of such installer or manufacturer to Contractor. During such period of guarantee, warranty or servicing, the Contractor hereby expressly undertakes and agrees to speedily repair and/or replace, without charge to Owner for either labor or material, any and all faulty or defective materials and to pay for any damage to other work resulting therefrom. Upon failure of Contractor to correct, repair or replace within a reasonable time after notice, Owner may have the work done by others and Contractor shall be liable for the amounts expended by Owner, together with reasonable attorney fees. In addition, any guarantees which are extended by subcontractors, manufacturers and suppliers shall be assigned to Owner no later than the time of final payment of the retainage under this Contract. Notwithstanding the foregoing time limitations, if in the event of latent defects which are not reasonably discoverable by owner within the one (1) year following final payments, then upon notice of such defects, the Contractor shall promptly repair, replace or correct any and all such faulty or defective work or materials and pay for any damage to other work resulting therefrom.

XIV

Within a reasonable time after the completion of the Work, Contractor shall furnish Owner with a set of drawings showing "As Built" conditions noted thereon.

XV

Contractor agrees that no lien shall attach to the real estate, buildings, structures or any other improvement of the Owner by the Contractor for the performance of his work or by any subcontractor, mechanic, journeyman, laborer or person performing labor upon or furnishing materials or machinery for the within property and/or improvements; and further agrees that this Contract shall be acknowledged as provided in case of deeds and filed and recorded in the Office of the Recorder of Lake County, Indiana. Contractor further represents and warrants that as of the date of this Contract, no labor, material or machinery has been supplied for the within property and/or improvements. This Contract shall hereafter be known as a "No Lien Contract." The Contractor agrees to furnish the Owner with partial and final waiver of liens for all work paid for as it progresses together with a verified Contractor's affidavit of all costs in spite of the "no lien" provision of this Contract; and further agrees to execute and deliver to the Owner sufficient evidence of payment and release of claims and/or choses in action, full or partial in form, to be provided by the Architect. The real estate covered by this No Lien Contract is legally described on Exhibit "A" attached hereto and made a part hereof.

XVI

Notwithstanding anything to the contrary contained in any of the other Contract Documents, if Contractor fails to prosecute the work required hereunder diligently, or abandons or ceases work for a period of five (5) or more days, or fails to pay laborers, mechanics, materialmen and suppliers when due (and if such failure to pay is not caused by Owner's failure to make payments to Contractor in accordance with this Contract), or shall become insolvent, or shall make an

assignment for the benefit of creditors, or shall commence any proceeding in bankruptcy, or if any such proceedings are commenced against it (and are not discharged within ten (10) days), Owner shall have the right, if it so elects and without prejudice to any other rights it may have, by giving forty-eight (48) hours' written notice of its election to Contractor to take over all Work, or any part thereof, and all tools, equipment and supplies and finish the work, by whatever method it deems expedient. In such event, Contractor shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the contract price exceeds Owner's expense of completion of the work, such excess shall be paid to Contractor. If such expense exceeds the unpaid balance, Contractor shall promptly pay the difference to the Owner on demand. Owner's expense of completion shall be established as the actual cost of construction plus ten percent (10%) additional for overhead and supervision.

XVII

Contractor shall not assign this Contract or any amount payable hereunder without the prior written consent of Owner. Contractor shall, upon request of Owner, disclose to Owner the names of all subcontractors or other persons with whom it contracts or intends to contract with or hereafter contracts with in connection with the performance of this Contract.

XVIII

In view of the need to maintain adequate customer parking during the course of construction, Contractor shall require its workers to park only in those areas designated by the Owner which may be on or near the parking lot. During the course of construction, Contractor shall provide reasonable entrances and exists for deliveries to existing businesses and Contractor shall perform all of its work in such a way so as to cause a minimum amount of disruption to Owner's business and the business of any other tenants. In addition, Contractor shall store all trucks, equipment and materials only in those locations designated by the Owner.

XIX

Contractor's Work hereunder shall also include obtaining and paying for all permits, approvals, and licenses (including building permits and certificates of occupancy) which are, or may be, required by any governmental entities in connection with the Work.

XX

With respect to Contractor's obligations under Section 3.2 of the AIA's General Conditions, Contractor represents and warrants that it has inspected the site and reviewed the Plans and Specifications and that there does not appear to be, to the best of Contractor's knowledge, any significant errors or omissions which would prevent the Work to be performed in accordance with the scope and concept of the Plans and Specifications. Contractor shall use care and caution, during the course of the Work, so as not to damage any existing utility lines. In addition, in performing the Work, Contractor shall take care so as to schedule demolition of existing structures, or portions thereof, as required by the Contract Documents, in such manner so that any new Work which is required to be performed in the sales areas of Owner's store can be done promptly after such demolition. In addition thereto, no demolition shall be scheduled unless and until the materials and labor to perform the Work which is to follow the demolition can be completed promptly thereafter. In addition, Contractor shall schedule all Work in such stages and such times of day so as to result in the most minimal disruption possible to the Owner's tenant's on-going business operations.

At all times during the course of the Work under this Contract, Contractor shall provide an experienced, competent supervisor to direct, coordinate, expedite and supervise the Work.

XXI

Notwithstanding anything to the contrary contained in the General Conditions (the hereinabove referred to AIA form A-201) the following modifications are hereby made to said General Conditions:

- (1) Section 2.1.2 is hereby deleted.
- (2) Section 2.4.1 is hereby superseded by Article XVI hereof to the extent of any inconsistencies.
- (3) Section 4.3.5 is hereby amended to provide that there shall be no waiver of claims based on fraud.
- (4) Section 5.4.2 is hereby deleted.
- (5) Section 9.2.1 is hereby modified to provide that the schedule of values described therein shall be provided by Contractor within fifteen (15) days of the execution of this Contract.
- (6) Section 10.1.4 is hereby deleted.
- (7) Section 14.1.1 is hereby modified to provide that the thirty (30) day period described therein shall be ninety (90) days in case of work stoppage for the reasons stated in Section 14.1.1.1 and/or Section 14.1.1.2.
- (8) Section 14.1.2 is hereby modified to provide that, in the event of termination by Contractor under Section 14.1.1.1 and/or Section 14.1.1.2, Contractor's recovery shall be limited to payment for work completed as of the date of termination, plus reasonable overhead and profit earned and applicable to the work completed through the date of termination.

XXII

The terms, covenants and conditions herein contained shall be binding alike upon the parties hereto, their respective successors and assigns. This Contract shall be construed under the laws of the State of Indiana.

IN WITNESS WHEREOF, the parties hereto have hereunto set their respective hands and seals the day and year first above written.

CONTRACTOR:

GOUGH, INC., an Indiana corporation

By: 

Joseph Gent, President

OWNER:

HOBART RIDGE CORPORATION, an Indiana corporation

By: Donald J. Weiss
Donald J. Weiss, Vice President

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

Before me, the undersigned Notary Public, personally appeared Joseph Gent, as President and duly authorized agent of Gough, Inc., and acknowledged the execution of the above and foregoing to be his voluntary act and deed this 30th day of January, 1996.

Pamela R. Miller
PAMELA R. MILLER, Notary Public
Resident of Lake County, Indiana

My Commission Expires:

4-22-99

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

Before me, the undersigned Notary Public, personally appeared Donald J. Weiss, Vice President and duly authorized agent of Hobart Ridge Corporation and acknowledged the execution of the above and foregoing to his voluntary act and deed this 31 day of January, 1996.

Nick Katich
Nick Katich, Notary Public
Resident of Lake County, Indiana.

My Commission Expires:

10-20-96

↓
This instrument prepared by: Nick Katich, Attorney at Law, 300 East 90th Drive, Merrillville, Indiana 46410.

EXHIBIT "A"

Legal Description

PARCEL 1: That part of the Southwest $\frac{1}{4}$ of Section 30, Township 36 North, Range 7 West of the 2nd P.M., described as follows: Beginning at the intersection of the South line of Ridge Road and the West line of California Street; thence North 80 degrees 32 minutes 00 seconds West along the South line of Ridge Road, 349.45 feet to a point 15.38 feet Southeasterly of the Northeast corner of Lot 1, Homewood Subdivision; thence South 09 degrees 28 minutes 00 seconds West parallel to the Easterly line of said Lot 1, a distance of 125 feet; thence North 80 degrees 32 minutes 00 seconds West 15.38 feet; thence South 09 degrees 28 minutes 00 seconds West 16 feet; thence North 80 degrees 32 minutes 00 seconds West 68.62 feet; thence South 0 degrees 00 minutes 00 seconds West and parallel to the East line of Delaware Street, 276.77 feet; thence South 88 degrees 12 minutes 00 seconds East and parallel to the North line of Home Avenue, 325.96 feet; thence South 00 degrees 00 minutes 00 seconds West and parallel with the West line of California Street, 6 feet; thence South 88 degrees 12 minutes 00 seconds East, 125 feet to the West line of California Street; thence North 00 degrees 00 minutes 00 seconds East along the West line of California Street, 364.72 feet more or less to the point of beginning, all in the City of Hobart, Lake County, Indiana.

PARCEL 2: Lots 1 and 2 in Homewood Subdivision, in the City of Hobart, as per plat thereof, recorded in Plat Book 21, page 12, in the Office of the Recorder of Lake County, Indiana, and part of the Southwest $\frac{1}{4}$ of Section 30, Township 36 North, Range 7 West of the 2nd Principal Meridian described as follows: Beginning at a point on the center line of Ridge Road and 40.05 feet Northwesterly from the point of intersection of the center lines of Ridge Road and Virginia Street; thence Northwesterly along the center line of Ridge Road 15.38 feet to the Easterly line of Lot 1, Homewood Subdivision, produced; thence Southwesterly and at right angles, along the Easterly line of said Lot 1 produced and the Easterly line of said Lot 1, a distance of 155 feet to the Southeast corner of said Lot 1; thence Southeasterly parallel to the center line of Ridge Road, a distance of 15.38 feet; thence Northeasterly, parallel to the Easterly line of said Lot 1, a distance of 155 feet to the point of beginning; in the City of Hobart, Lake County, Indiana.