

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY

The meeting was called to order by Senator Robert Frey at  
Chairperson

10:00 a.m./~~p.m.~~ on March 7, 1985 in room 514-S of the Capitol.

~~All~~ members ~~were~~ present ~~except~~: Senators Frey, Hoferer, Burke, Feleciano, Gaines, Langworthy, Parrish, Talkington, Winter and Yost.

Committee staff present:

Mary Torrence, Office of Revisor of Statutes  
Mike Heim, Legislative Research Department  
Jerry Donaldson, Legislative Research Department

Conferees appearing before the committee:

Senator Eugene Anderson  
Charles Carey, Mechanical Contractors Association of Kansas  
Dan Morgan, Associated General Contractors of Kansas  
Don Strole, State Board of Healing Arts  
Wayne Stratton, Kansas Medical Society  
Bill Sneed, Kansas Association of Defense Counsel

Senate Bill 211 - Standard form mandated for agreements between contractors and subcontractors on certain projects.

Senator Anderson, the sponsor of the bill, explained he had requested the bill be introduced because of problems that were called to his attention by several people. This bill would restrict the application of the bill to state contracts entered into by governmental bodies. Copies of his handout are attached (See Attachments I).

Charles Carey, Mechanical Contractors Association of Kansas, testified in support of the bill. He stated the association has long wanted the State of Kansas to require the use of a neutral, equitable subcontract agreement on public work. A copy of his testimony is attached (See Attachment II).

Dan Morgan, Associated General Contractors of Kansas, appeared in opposition to the bill. He stated it is the position of the association that the state should not be in the position of dictating what form of subcontract agreement a contractor must use. A copy of his statement is attached (See Attachment III).

A copy of committee testimony from Billy Q. McCray is attached (See Attachment IV).

Senate Bill 267 - Submission to board of healing arts of information relating to medical malpractice actions.

Don Strole, State Board of Healing Arts, handed out a proposed amendment, (See Attachment V), and stated this should satisfy some of the concerns of some people. He said his department requested this because they receive 15 to 20 malpractice petitions a month. They have requested substantive information from the insurance department and have not received it. They need some kind of information to make an initial screening to determine which cases they need to look at in more detail.

Following committee discussion, Senator Gaines moved to amend the bill as proposed by Mr. Strole. Senator Winter seconded the motion. The motion carried.

Wayne Stratton, Kansas Medical Society, stated he supports the purpose of the bill. He defends medical malpractice cases and has reservations with this bill. He thinks the Board of Healing Arts needs the information. He stated occasionally there are conflicts between insurance

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,  
room 514-S, Statehouse, at 10:00 a.m./~~p.m.~~ on March 7, 1985

Senate Bill 267 continued

company and insurance department, and the language in his proposed amendment should resolve the problem (See Attachment VI). Instead of imposing the burden on the state, he proposed attorneys representing the action shall provide depositions and pleadings filed with the court. Mr. Stratton stated he feels if Mr. Strole's amendment is provided, it is going to work to the detriment of the attorney's client; you are asking the attorney representing the doctor to give out information he is going to use.

Bill Sneed, Kansas Association of Defense Counsel, testified the KADC supports efforts to assist the Board of Healing Arts in such a crack-down; however, we have several reservations about the bill. Mr. Stratton has recommended certain amendments to the bill, and the KADC strongly urges the committee to review these proposed amendments and they would support them. A copy of his handout is attached (See Attachment VII).

A copy of a letter from Fletcher Bill to Donald G. Strole is attached (See Attachment VIII).

The meeting adjourned.

Copy of the guest list is attached (See Attachment IX).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE

DATE: 3-7-85

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Billy O'McCray	503 Ks Ave.	KDED
Tommy August	503 Ks. Ave	KDED
Ron Albert	Newton	U.J.U.
Terenda P. Mitchell	420 SW Ninth	Health Care Stabiliz. Fund
Bill Speed	Topeka	Ks. Assn of Deaf & Hearing Impaired
Page Smith	Topeka	KMS
Ron Smith	"	Ks Bar Assoc
DAN MORGAN	Topeka	AGC of KS
Bob West	"	Natl Elec Contractors Assn
Charles Carey	Topeka	Mech Contr. Assoc.
Eugene Anderson	Senator	Wichita
JANET STUBBS	Topeka	HBAAK
Ron Todd	"	Ins Dept
Mike Slotzky	Lawrence	Intern-Sen Paralel
Don Stroble	Topeka	Bd of Healing Arts
Larry Bruning	Topeka	Bd of Healing Arts
William S. S. S.	Topeka	KTLA
LARRY MAGILL	"	INDEP. INS. AGENTS
HAROLD RIEMM	"	KS ASSN OSTEOPATHIC

3/7/85  
Attach IX

# THE KANSAS SOCIETY OF ARCHITECTS, AIA

612-614 Kansas Avenue Topeka, Kansas 66603 913-357-5308 A Chapter of the American Institute of Architects

February 27, 1985

3/1/85  
SB 211

Senator Gene Anderson  
Room 404-N  
State Capitol Building  
Topeka, Kansas 66612

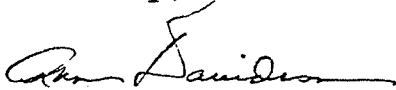
Dear Senator Anderson:

My name is Ann Davidson and I am the Executive Director of the Kansas Society of Architect, a chapter of the American Institute of Architects. We are the distributor of AIA Contract Documents for the State of Kansas and it's construction industry. We have noted your bill SB-211 concerning the use of AIA Document A401, Standard Form of Agreement Between Contractor and Subcontractor. I would like to make one suggestion as to the wording of the bill. On line 0026 where you have referred to the "1978 edition", I think it would be more appropriate to strike those two words and use "current edition" instead. Since the A401's existence, it has been revised 10 times: 1925, 1937, 1951, 1958, 1961, 1963, 1966, 1967, 1972, and the current edition, 1978. The reason this document has to be revised from time to time is to keep harmony with the A201 Document or contract which is the General Conditions of the Contract for Construction. At this time, the AIA is in the midst of revising the A201 which means other documents such as the A401 will follow suit.

We are pleased to see that you recognize the fairness and usefulness of this document and support your efforts. Much work has gone into the preparation of these documents to help make the construction industry's job a little easier. A vast amount of legal work also goes into the preparation and revision of all the AIA documents.

I thought this bit of information might be of help to you and save you the problem of having to revise the statute from time to time to update the document's edition. If I can be of help to you with any further information concerning the A401, please give me a call.

Sincerely,



Ann Davidson  
Executive Director



3/7/85 AM  
Attch. I

# THE AMERICAN INSTITUTE OF ARCHITECTS



AIA Document A401

## SUBCONTRACT

### Standard Form of Agreement Between Contractor and Subcontractor

1978 EDITION

Use with the latest edition of the appropriate AIA Documents as follows:

- A101, Owner-Contractor Agreement — Stipulated Sum
- A107, Abbreviated Owner-Contractor Agreement with General Conditions
- A111, Owner-Contractor Agreement — Cost plus Fee
- A201, General Conditions of the Contract for Construction.

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

This document has been approved and endorsed by the American Subcontractors Association  
and the Associated Specialty Contractors, Inc.

#### AGREEMENT

made as of the \_\_\_\_\_ day of \_\_\_\_\_ in the year Nineteen  
Hundred and \_\_\_\_\_

**BETWEEN** the Contractor:

and the Subcontractor:

The Project:

The Owner:

The Architect:

The Contractor and Subcontractor agree as set forth below.

Copyright 1915, 1925, 1937, 1951, 1958, 1961, 1963, 1966, 1967, 1972, © 1978 by the American Institute of Architects, 1735 New York Avenue, N.W., Washington, D.C. 20006. Reproduction of the material herein or substantial quotation of its provisions without permission of the AIA violates the copyright laws of the United States and will be subject to legal prosecution.

3/7/85  
Attach I

**ARTICLE 1**  
**THE CONTRACT DOCUMENTS**

- 1.1 The Contract Documents for this Subcontract consist of this Agreement and any Exhibits attached hereto, the Agreement between the Owner and Contractor dated as of \_\_\_\_\_, the Conditions of the Contract between the Owner and Contractor (General, Supplementary and other Conditions), the Drawings, the Specifications, all Addenda issued prior to and all Modifications issued after execution of the Agreement between the Owner and Contractor and agreed upon by the parties to this Subcontract. These form the Subcontract, and are as fully a part of the Subcontract as if attached to this Agreement or repeated herein.
- 1.2 Copies of the above documents which are applicable to the Work under this Subcontract shall be furnished to the Subcontractor upon his request. An enumeration of the applicable Contract Documents appears in Article 15.

**ARTICLE 2**  
**THE WORK**

- 2.1 The Subcontractor shall perform all the Work required by the Contract Documents for  
*(Here insert a precise description of the Work covered by this Subcontract and refer to numbers of Drawings and pages of Specifications including Addenda, Modifications and accepted Alternates.)*

**ARTICLE 3**  
**TIME OF COMMENCEMENT AND SUBSTANTIAL COMPLETION**

- 3.1 The Work to be performed under this Subcontract shall be commenced \_\_\_\_\_ and, subject to authorized adjustments, shall be substantially completed not later than \_\_\_\_\_  
*(Here insert the specific provisions that are applicable to this Subcontract including any information pertaining to notice to proceed or other method of modification for commencement of Work, starting and completion dates, or duration, and any provisions for liquidated damages relating to failure to complete on time.)*
- 3.2 Time is of the essence of this Subcontract.
- 3.3 No extension of time will be valid without the Contractor's written consent after claim made by the Subcontractor in accordance with Paragraph 11.10.

**ARTICLE 4**  
**THE CONTRACT SUM**

- 4.1 The Contractor shall pay the Subcontractor in current funds for the performance of the Work, subject to additions and deductions authorized pursuant to Paragraph 11.9, the Contract Sum of \_\_\_\_\_ dollars (\$ \_\_\_\_\_).

The Contract Sum is determined as follows:

*(State here the base bid or other lump sum amount, accepted alternates, and unit prices, as applicable.)*

**ARTICLE 5**  
**PROGRESS PAYMENTS**

- 5.1 The Contractor shall pay the Subcontractor monthly progress payments in accordance with Paragraph 12.4 of this Subcontract.
- 5.2 Applications for monthly progress payments shall be in writing and in accordance with Paragraph 11.8, shall state the estimated percentage of the Work in this Subcontract that has been satisfactorily completed and shall be submitted to the Contractor on or before the day of each month.

*(Here insert details on (1) payment procedures and date of monthly applications, or other procedure if on other than a monthly basis, (2) the basis on which payment will be made on account of materials and equipment suitably stored at the site or other location agreed upon in writing, and (3) any provisions consistent with the Contract Documents for limiting or reducing the amount retained after the Work reaches a certain stage of completion.)*

- 5.3 When the Subcontractor's Work or a designated portion thereof is substantially complete and in accordance with the Contract Documents, the Contractor shall, upon application by the Subcontractor, make prompt application for payment of such Work. Within thirty days following issuance by the Architect of the Certificate for Payment covering such substantially completed Work, the Contractor shall, to the full extent provided in the Contract Documents, make payment to the Subcontractor of the entire unpaid balance of the Contract Sum or of that portion of the Contract Sum attributable to the substantially completed Work, less any portion of the funds for the Subcontractor's Work withheld in accordance with the Certificate to cover costs of items to be completed or corrected by the Subcontractor.

*(Delete the above Paragraph if the Contract Documents do not provide for, and the Subcontractor agrees to forego, release of retainage for the Subcontractor's Work prior to completion of the entire Project.)*

- 5.4 Progress payments or final payment due and unpaid under this Subcontract shall bear interest from the date payment is due at the rate entered below or, in the absence thereof, at the legal rate prevailing at the place of the Project.

*(Here insert any rate of interest agreed upon.)*

*(Usury laws and requirements under the Federal Truth in Lending Act, similar state and local consumer credit laws and other regulations at the Owner's, Contractor's and Subcontractor's principal places of business, the location of the Project and elsewhere may affect the validity of this provision. Specific legal advice should be obtained with respect to deletion, modification, or other requirements such as written disclosures or waivers.)*

**ARTICLE 6**  
**FINAL PAYMENT**

- 6.1 Final payment, constituting the entire unpaid balance of the Contract Sum, shall be due when the Work described in this Subcontract is fully completed and performed in accordance with the Contract Documents and is satisfactory to the Architect, and shall be payable as follows, in accordance with Article 5 and with Paragraph 12.4 of this Subcontract:

*(Here insert the relevant conditions under which, or time in which, final payment will become payable.)*

- 6.2 Before issuance of the final payment, the Subcontractor, if required, shall submit evidence satisfactory to the Contractor that all payrolls, bills for materials and equipment, and all known indebtedness connected with the Subcontractor's Work have been satisfied.

**ARTICLE 7**  
**PERFORMANCE BOND AND LABOR AND MATERIAL PAYMENT BOND**

*(Here insert any requirement for the furnishing of bonds by the Subcontractor.)*

ARTICLE 8  
TEMPORARY FACILITIES AND SERVICES

- 8.1 Unless otherwise provided in this Subcontract, the Contractor shall furnish and make available at no cost to the Subcontractor the following temporary facilities and services:

ARTICLE 9  
INSURANCE

- 9.1 Prior to starting work, the Subcontractor shall obtain the required insurance from a responsible insurer, and shall furnish satisfactory evidence to the Contractor that the Subcontractor has complied with the requirements of this Article 9. Similarly, the Contractor shall furnish to the Subcontractor satisfactory evidence of insurance required of the Contractor by the Contract Documents.
- 9.2 The Contractor and Subcontractor waive all rights against each other and against the Owner, the Architect, separate contractors and all other subcontractors for damages caused by fire or other perils to the extent covered by property insurance provided under the General Conditions, except such rights as they may have to the proceeds of such insurance.

*(Here insert any insurance requirements and Subcontractor's responsibility for obtaining, maintaining and paying for necessary insurance with limits equaling or exceeding those specified in the Contract Documents and inserted below, or required by law. If applicable, this shall include fire insurance and extended coverage, public liability, property damage, employer's liability, and workers' or workmen's compensation insurance for the Subcontractor and his employees. The insertion should cover provisions for notice of cancellation, allocation of insurance proceeds, and other aspects of insurance.)*

ARTICLE 10  
WORKING CONDITIONS

*(Here insert any applicable arrangements concerning working conditions and labor matters for the Project.)*

*Attach. I*



# GENERAL CONDITIONS

## ARTICLE 11 SUBCONTRACTOR

### 11.1 RIGHTS AND RESPONSIBILITIES

**11.1.1** The Subcontractor shall be bound to the Contractor by the terms of this Agreement and, to the extent that provisions of the Contract Documents between the Owner and Contractor apply to the Work of the Subcontractor as defined in this Agreement, the Subcontractor shall assume toward the Contractor all the obligations and responsibilities which the Contractor, by those Documents, assumes toward the Owner and the Architect, and shall have the benefit of all rights, remedies and redress against the Contractor which the Contractor, by those Documents, has against the Owner, insofar as applicable to this Subcontract, provided that where any provision of the Contract Documents between the Owner and Contractor is inconsistent with any provision of this Agreement, this Agreement shall govern.

**11.1.2** The Subcontractor shall not assign this subcontract without the written consent of the Contractor, nor subcontract the whole of this Subcontract without the written consent of the Contractor, nor further subcontract portions of this Subcontract without written notification to the Contractor when such notification is requested by the Contractor. The Subcontractor shall not assign any amounts due or to become due under this Subcontract without written notice to the Contractor.

### 11.2 EXECUTION AND PROGRESS OF THE WORK

**11.2.1** The Subcontractor agrees that the Contractor's equipment will be available to the Subcontractor only at the Contractor's discretion and on mutually satisfactory terms.

**11.2.2** The Subcontractor shall cooperate with the Contractor in scheduling and performing his Work to avoid conflict or interference with the work of others.

**11.2.3** The Subcontractor shall promptly submit shop drawings and samples required in order to perform his Work efficiently, expeditiously and in a manner that will not cause delay in the progress of the Work of the Contractor or other subcontractors.

**11.2.4** The Subcontractor shall furnish periodic progress reports on the Work as mutually agreed, including information on the status of materials and equipment under this Subcontract which may be in the course of preparation or manufacture.

**11.2.5** The Subcontractor agrees that all Work shall be done subject to the final approval of the Architect. The Architect's decisions in matters relating to artistic effect shall be final if consistent with the intent of the Contract Documents.

**11.2.6** The Subcontractor shall pay for all materials, equipment and labor used in, or in connection with, the performance of this Subcontract through the period covered by previous payments received from the Contractor, and shall furnish satisfactory evidence, when requested

by the Contractor, to verify compliance with the above requirements.

### 11.3 LAWS, PERMITS, FEES AND NOTICES

**11.3.1** The Subcontractor 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 under this Subcontract. The Subcontractor shall secure and pay for all permits and governmental fees, licenses and inspections necessary for the proper execution and completion of the Subcontractor's Work, the furnishing of which is required of the Contractor by the Contract Documents.

**11.3.2** The Subcontractor shall comply with Federal, State and local tax laws, social security acts, unemployment compensation acts and workers' or workmen's compensation acts insofar as applicable to the performance of this Subcontract.

### 11.4 WORK OF OTHERS

**11.4.1** In carrying out his Work, the Subcontractor shall take necessary precautions to protect properly the finished work of other trades from damage caused by his operations.

**11.4.2** The Subcontractor shall cooperate with the Contractor and other subcontractors whose work might interfere with the Subcontractor's Work, and shall participate in the preparation of coordinated drawings in areas of congestion as required by the Contract Documents, specifically noting and advising the Contractor of any such interference.

### 11.5 SAFETY PRECAUTIONS AND PROCEDURES

**11.5.1** The Subcontractor shall take all reasonable safety precautions with respect to his Work, shall comply with all safety measures initiated by the Contractor and with all applicable laws, ordinances, rules, regulations and orders of any public authority for the safety of persons or property in accordance with the requirements of the Contract Documents. The Subcontractor shall report within three days to the Contractor any injury to any of the Subcontractor's employees at the site.

### 11.6 CLEANING UP

**11.6.1** The Subcontractor shall at all times keep the premises free from accumulation of waste materials or rubbish arising out of the operations of this Subcontract. Unless otherwise provided, the Subcontractor shall not be held responsible for unclean conditions caused by other contractors or subcontractors.

### 11.7 WARRANTY

**11.7.1** The Subcontractor warrants to the Owner, the Architect and the Contractor that all materials and equipment furnished shall be new unless otherwise specified, and that all Work under this Subcontract shall be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defec-

Contract Documents between the Owner and the Contractor is inconsistent with any provisions of this Agreement, this Agreement shall govern.

## 12.2 SERVICES PROVIDED BY THE CONTRACTOR

**12.2.1** The Contractor shall cooperate with the Subcontractor in scheduling and performing his Work to avoid conflicts or interference in the Subcontractor's Work, and shall expedite written responses to submittals made by the Subcontractor in accordance with Paragraphs 11.2, 11.9 and 11.10. As soon as practicable after execution of this Agreement, the Contractor shall provide the Subcontractor a copy of the estimated progress schedule of the Contractor's entire Work which the Contractor has prepared and submitted for the Owner's and the Architect's information, together with such additional scheduling details as will enable the Subcontractor to plan and perform his Work properly. The Subcontractor shall be notified promptly of any subsequent changes in the progress schedule and the additional scheduling details.

**12.2.2** The Contractor shall provide suitable areas for storage of the Subcontractor's materials and equipment during the course of the Work. Any additional costs to the Subcontractor resulting from the relocation of such facilities at the direction of the Contractor shall be reimbursed by the Contractor.

## 12.3 COMMUNICATIONS

**12.3.1** The Contractor shall promptly notify the Subcontractor of all modifications to the Contract between the Owner and the Contractor which affect this Subcontract and which were issued or entered into subsequent to the execution of this Subcontract.

**12.3.2** The Contractor shall not give instructions or orders directly to employees or workmen of the Subcontractor except to persons designated as authorized representatives of the Subcontractor.

## 12.4 PAYMENTS TO THE SUBCONTRACTOR

**12.4.1** Unless otherwise provided in the Contract Documents, the Contractor shall pay the Subcontractor each progress payment and the final payment under this Subcontract within three working days after he receives payment from the Owner, except as provided in Subparagraph 12.4.3. The amount of each progress payment to the Subcontractor shall be the amount to which the Subcontractor is entitled, reflecting the percentage of completion allowed to the Contractor for the Work of this Subcontractor applied to the Contract Sum of this Subcontract, and the percentage actually retained, if any, from payments to the Contractor on account of such Subcontractor's Work, plus, to the extent permitted by the Contract Documents, the amount allowed for materials and equipment suitably stored by the Subcontractor, less the aggregate of previous payments to the Subcontractor.

**12.4.2** The Contractor shall permit the Subcontractor to request directly from the Architect information regarding the percentages of completion or the amount certified on account of Work done by the Subcontractor.

**12.4.3** If the Architect does not issue a Certificate for Payment or the Contractor does not receive payment for any cause which is not the fault of the Subcontractor, the Contractor shall pay the Subcontractor, on demand, a

progress payment computed as provided in Subparagraph 12.4.1 or the final payment as provided in Article 6.

## 12.5 CLAIMS BY THE CONTRACTOR

**12.5.1** The Contractor shall make no demand for liquidated damages for delay in any sum in excess of such amount as may be specifically named in this Subcontract, and liquidated damages shall be assessed against this Subcontractor only for his negligent acts and his failure to act in accordance with the terms of this Agreement, and in no case for delays or causes arising outside the scope of this Subcontract, or for which other subcontractors are responsible.

**12.5.2** Except as may be indicated in this Agreement, the Contractor agrees that no claim for payment for services rendered or materials and equipment furnished by the Contractor to the Subcontractor shall be valid without prior notice to the Subcontractor and unless written notice thereof is given by the Contractor to the Subcontractor not later than the tenth day of the calendar month following that in which the claim originated.

## 12.6 CONTRACTOR'S REMEDIES

**12.6.1** If the Subcontractor defaults or neglects to carry out the Work in accordance with this Agreement and fails within three working days after receipt of written notice from the Contractor to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, after three days following receipt by the Subcontractor of an additional written notice, and without prejudice to any other remedy he may have, make good such deficiencies and may deduct the cost thereof from the payments then or thereafter due the Subcontractor, provided, however, that if such action is based upon faulty workmanship or materials and equipment, the Architect shall first have determined that the workmanship or materials and equipment are not in accordance with the Contract Documents.

## ARTICLE 13 ARBITRATION

**13.1** All claims, disputes and other matters in question arising out of, or relating to, this Subcontract, or the breach thereof, shall be decided by arbitration, which shall be conducted in the same manner and under the same procedure as provided in the Contract Documents with respect to disputes between the Owner and the Contractor, except that a decision by the Architect shall not be a condition precedent to arbitration. If the Contract Documents do not provide for arbitration or fail to specify the manner and procedure for arbitration, it shall be conducted in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise.

**13.2** Except by written consent of the person or entity sought to be joined, no arbitration arising out of or relating to the Contract Documents shall include, by consolidation, joinder or in any other manner, any person or entity not a party to the Agreement under which such arbitration arises, unless it is shown at the time the demand for arbitration is filed that (1) such person or entity is substantially involved in a common question of fact or law,

(2) the presence of such person or entity is required if complete relief is to be accorded in the arbitration, (3) the interest or responsibility of such person or entity in the matter is not insubstantial, and (4) such person or entity is not the Architect, his employee or his consultant. This agreement to arbitrate and any other written agreement to arbitrate with an additional person or persons referred to herein shall be specifically enforceable under the prevailing arbitration law.

13.3 The Contractor shall permit the Subcontractor to be present and to submit evidence in any arbitration proceeding involving his rights.

13.4 The Contractor shall permit the Subcontractor to exercise whatever rights the Contractor may have under the Contract Documents in the choice of arbitrators in any dispute, if the sole cause of the dispute is the Work, materials, equipment, rights or responsibilities of the Subcontractor; or if the dispute involves the Subcontractor and any other subcontractor or subcontractors jointly, the Contractor shall permit them to exercise such rights jointly.

13.5 The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

13.6 This Article shall not be deemed a limitation of any rights or remedies which the Subcontractor may have under any Federal or State mechanics' lien laws or under any applicable labor and material payment bonds unless such rights or remedies are expressly waived by him.

**ARTICLE 14  
TERMINATION**

**14.1 TERMINATION BY THE SUBCONTRACTOR**

14.1.1 If the Work is stopped for a period of thirty days through no fault of the Subcontractor because the Contractor has not made payments thereon as provided in this Agreement, then the Subcontractor may without prejudice to any other remedy he may have, upon seven additional days' written notice to the Contractor, terminate this Subcontract and recover from the Contractor payment for all Work executed and for any proven loss resulting from the stoppage of the Work, including reasonable overhead, profit and damages.

**14.2 TERMINATION BY THE CONTRACTOR**

14.2.1 If the Subcontractor persistently or repeatedly fails or neglects to carry out the Work in accordance with the Contract Documents or otherwise to perform in accordance with this Agreement and fails within seven days after receipt of written notice to commence and continue correction of such default or neglect with diligence and promptness, the Contractor may, after seven days following receipt by the Subcontractor of an additional written notice and without prejudice to any other remedy he may have, terminate the Subcontract and finish the Work by whatever method he may deem expedient. If the unpaid balance of the Contract Sum exceeds the expense of finishing the Work, such excess shall be paid to the Subcontractor, but if such expense exceeds such unpaid balance, the Subcontractor shall pay the difference to the Contractor.

**ARTICLE 15  
MISCELLANEOUS PROVISIONS**

15.1 Terms used in this Agreement which are defined in the Conditions of the Contract shall have the meanings designated in those Conditions.

15.2 The Contract Documents, which constitute the entire Agreement between the Owner and the Contractor, are listed in Article 1, and the documents which are applicable to this Subcontract, except for Addenda and Modifications issued after execution of this Subcontract, are enumerated as follows:

*(List below the Agreement, the Conditions of the Contract [General, Supplementary, and other Conditions], the Drawings, the Specifications, and any Addenda and accepted Alternates, showing page or sheet numbers in all cases and dates where applicable. Continue on succeeding pages as required.)*

This Agreement entered into as of the day and year first written above.

CONTRACTOR

SUBCONTRACTOR

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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tive. The warranty provided in this Paragraph 11.7 shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Contract Documents.

#### **11.8 APPLICATIONS FOR PAYMENT**

**11.8.1** The Subcontractor shall submit to the Contractor applications for payment at such times as stipulated in Article 5 to enable the Contractor to apply for payment.

**11.8.2** If payments are made on the valuation of Work done, the Subcontractor shall, before the first application, submit to the Contractor a schedule of values of the various parts of the Work aggregating the total sum of this Subcontract, made out in such detail as the Subcontractor and Contractor may agree upon or as required by the Owner, and supported by such evidence as to its correctness as the Contractor may direct. This schedule, when approved by the Contractor, shall be used only as a basis for Applications for Payment, unless it be found to be in error. In applying for payment, the Subcontractor shall submit a statement based upon this schedule.

**11.8.3** If payments are made on account of materials or equipment not incorporated in the Work but delivered and suitably stored at the site or at some other location agreed upon in writing, such payments shall be in accordance with the Terms and Conditions of the Contract Documents.

#### **11.9 CHANGES IN THE WORK**

**11.9.1** The Subcontractor may be ordered in writing by the Contractor, without invalidating this Subcontract, to make changes in the Work within the general scope of this Subcontract consisting of additions, deletions or other revisions, the Contract Sum and the Contract Time being adjusted accordingly. The Subcontractor, prior to the commencement of such changed or revised Work, shall submit promptly to the Contractor written copies of any claim for adjustment to the Contract Sum and Contract Time for such revised Work in a manner consistent with the Contract Documents.

#### **11.10 CLAIMS OF THE SUBCONTRACTOR**

**11.10.1** The Subcontractor shall make all claims promptly to the Contractor for additional cost, extensions of time, and damages for delays or other causes in accordance with the Contract Documents. Any such claim which will affect or become part of a claim which the Contractor is required to make under the Contract Documents within a specified time period or in a specified manner shall be made in sufficient time to permit the Contractor to satisfy the requirements of the Contract Documents. Such claims shall be received by the Contractor not less than two working days preceding the time by which the Contractor's claim must be made. Failure of the Subcontractor to make such a timely claim shall bind the Subcontractor to the same consequences as those to which the Contractor is bound.

#### **11.11 INDEMNIFICATION**

**11.11.1** To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, the Architect and the Contractor and all of their agents and employees from and against all claims, damages, losses and expenses, including but not limited to attor-

ney's fees, arising out of or resulting from the performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss, or expense 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, to the extent caused in whole or in part by any negligent act or omission of the Subcontractor or anyone directly or indirectly employed by him or anyone for whose acts he may be liable, regardless of whether it is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, or abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this Paragraph 11.11.

**11.11.2** In any and all claims against the Owner, the Architect, or the Contractor or any of their agents or employees by any employee of the Subcontractor, anyone directly or indirectly employed by him or anyone for whose acts he may be liable, the indemnification obligation under this Paragraph 11.11 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 Subcontractor under workers' or workmen's compensation acts, disability benefit acts or other employee benefit acts.

**11.11.3** The obligations of the Subcontractor under this Paragraph 11.11 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.

#### **11.12 SUBCONTRACTOR'S REMEDIES**

**11.12.1** If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in Paragraph 12.4, the Subcontractor may, without prejudice to any other remedy he may have, upon seven additional days' written notice to the Contractor, stop his Work until payment of the amount owing has been received. The Contract Sum shall, by appropriate adjustment, be increased by the amount of the Subcontractor's reasonable costs of shutdown, delay and start-up.

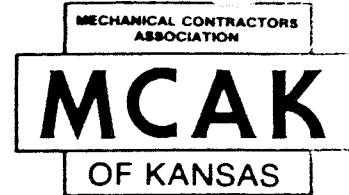
## **ARTICLE 12** **CONTRACTOR**

### **12.1 RIGHTS AND RESPONSIBILITIES**

**12.1.1** The Contractor shall be bound to the Subcontractor by the terms of this Agreement, and to the extent that provisions of the Contract Documents between the Owner and the Contractor apply to the Work of the Subcontractor as defined in this Agreement, the Contractor shall assume toward the Subcontractor all the obligations and responsibilities that the Owner, by those Documents, assumes toward the Contractor, and shall have the benefit of all rights, remedies and redress against the Subcontractor which the Owner, by those Documents, has against the Contractor. Where any provision of the

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**MECHANICAL CONTRACTORS** Association of Kansas, Inc.



Phone 913-354/1130

500 Kansas Avenue, Topeka, Kansas 66603

March 7, 1985

To: Senate Judiciary Committee, Chairperson Frey; Vice-Chairperson, Hoferer;  
Members: Burke, Feleciano, Gaines, Langworthy, Parrish, Steineger, Talkington,  
Winter, Yost.

From: Charles D. Carey, Jr., Executive Director

SB 211 -- FOR

Re: Required use of AIA document A401, 1978 edition of their standard form of agreement or the equivalent thereof for agreements between building contractors and subcontractors.

We have long wanted the State of Kansas to require the use of a neutral, equitable subcontract agreement on public work.

The American Institute of Architects have developed such a form. They obviously recognize the importance of a neutral subcontract agreement from the viewpoint of the Owner's best interest. The majority of Architects prefer one contract. Apparently, however, they do recognize some of the "unfairness" that can be required by loaded subcontract agreements such as delays in periodic and final payments even when it is not the subcontractor's fault and for a number of other reasons. This "unfairness", although concealed under the one contract method, too often adversely affects the Owner's best interest because it reduces the productivity and performance level of the subcontractor.

One might ask why subcontractors sign "unfair" subcontract agreements. Under the one bid and one prime contract method these prime contractors who choose to demand signing of an unfair agreement "can do this because of the unbalanced bargaining power existing when the (prime) contractor already has a contract and the subcontractor is still competing to get a subcontract." The prime enjoys confidential competitive bidding, whereas the sub is subjected to a subsequent auction.

ASC, the Associated Specialty Contractors, Inc., which includes eight national associations with a combined membership of nearly 20,000 construction firms with 1,300,000 employees, recommends that "the statute should require the use of a uniform State subcontract form, to be printed in regulations". "This

3/7/85 AM  
Attch. II

should be a neutral form similar to the American Institute of Architects Document A 401".

I submit that the requirement of a neutral standard form of agreement will encourage a desirable uniformity of subcontractor bidding. This will be beneficial for the State, Cities and Counties and will be desirable for those prime contractors who may only demand "unfair" or "biased" subcontracts because their competitors require them.

Many persons may not realize that at the time a subcontractor phones a bid to the prime contractor that the terms and details of the subcontract agreement are not established or fully known. After the letting a negotiation too often results over the terms of the subcontract. These repeated negotiations with the resulting delays and dissensions could be eliminated if primes and subs both knew before the letting the terms and conditions of the subcontract form.

While the same principles of fairness should be extended to all subs, i.e. 1st, 2nd and 3rd tier subs, I would submit the following judgment to the Committee's wisdom. Perhaps the standard form of subcontract agreement should only be required for 1st tier subs because 2nd and 3rd tier subs may become very small dollar amounts and the prime could be swamped with direct requests from such a large number of sub-subs with whom he has no contract. This is a suggestion for practicality.

ASC reports that in 1977 "89% of companies performing non-residential work were specialty contractors and only 11% were general contractors". Specialty contractors are typically considered to be subcontractors. "Some general contractors are virtually brokers and financial middlemen". Since subcontractors play such a major role, i.e. do the major part of the project, the manner in which they "are treated will significantly determine the cost, quality and timeliness of construction".

The preceding makes it obvious that the success of a project may be equally if not more dependent on subcontractors' performance than on the prime contractor's performance. The theory that the "one contract total responsibility" solves all the problems created by loaded subcontracts is a myth.

It is time that we quit spending so much of our time looking for ways to punish bad building contractors and instead spend more time looking for ways that will prevent bad things from happening in the first place.

Since subcontractors are legitimate businesses that render a needed service that benefits the Owners of public buildings, it makes sense for the State of Kansas to require a standard subcontract form of agreement.

It is urged that this Committee act without delay to pass this requirement.

Thank you.

*Attch. II*

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TESTIMONY RE SB 211 BEFORE THE SENATE JUDICIARY COMMITTEE  
BY DAN MORGAN, ASSOCIATED GENERAL CONTRACTORS OF KANSAS  
MARCH 7, 1985

THANK YOU MR. CHAIRMAN, MEMBERS OF THE COMMITTEE. I AM DAN MORGAN AND I AM APPEARING TODAY IN OPPOSITION TO SENATE BILL 211 ON BEHALF OF THE ASSOCIATED GENERAL CONTRACTORS OF KANSAS. AGC OF KANSAS REPRESENTS OVER 200 GENERAL CONTRACTOR AND ASSOCIATE SUBCONTRACTOR AND SUPPLIER MEMBERS THROUGHOUT THE STATE WHO ARE DIRECTLY ENGAGED IN OR ARE SUPPORTING THE COMMERCIAL AND INDUSTRIAL BUILDING CONSTRUCTION INDUSTRY IN THE STATE.

MR. CHAIRMAN WE HAVE NO PARTICULAR OBJECTION TO A.I.A. DOCUMENT A401, THE SUBCONTRACTOR AGREEMENT MENTIONED IN SB 211. WE THINK THAT IT IS A GOOD AGREEMENT FOR THOSE CONTRACTORS THAT CHOOSE TO USE IT. THE TRUTH IS THAT THERE ARE A NUMBER OF SUCH DOCUMENTS AVAILABLE TODAY - OUR NATIONAL ASSOCIATION HAS A NEW SUBCONTRACT AGREEMENT FOR EXAMPLE AND OUR OWN STATE CHAPTER HAS DEVELOPED A SUBCONTRACT WHICH OUR MEMBERS PREFER OVER THE NATIONAL AGREEMENT AND THE AIA FORM. OUR SUBCONTRACT AGREEMENT WAS DEVELOPED BY OUR SUBCONTRACTOR/SUPPLIER RELATIONS COMMITTEE WITH INPUT FROM SUPPLIERS, SUBCONTRACTORS AND GENERAL CONTRACTORS. WE WOULD SUBMIT THAT THIS AGREEMENT FITS OUR PARTICULAR NEEDS VERY WELL BUT WE WOULD NOT SUGGEST THAT THE STATE MANDATE THAT OUR AGREEMENT BE USED. BEYOND THAT, MANY CONTRACTORS HAVE DEVELOPED THEIR OWN AGREEMENTS WHICH SUIT THEIR PARTICULAR NEEDS AND THEY CERTAINLY DON'T WANT TO BE FORCED TO USE ANY AGREEMENT THAT IS NOT DESIGNED TO MEET THEIR INDIVIDUAL NEEDS. WE HAVE GOTTEN MANY CALLS ON THIS BILL AND ITS COMPANION IN THE HOUSE (HB 2394). I CAN ASSURE YOU THAT THIS ISSUE HAS GOTTEN THEIR ATTENTION. SO IT IS OUR POSITION

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Attch. III

THAT THE STATE SHOULD NOT BE IN THE POSITION OF DICTATING WHAT FORM OF SUBCONTRACT AGREEMENT A CONTRACTOR MUST USE. WHILE THE AIA FORM IS PREFERRED BY SOME IT IS NOT SUITABLE FOR MANY OTHER COMPANIES.

IT IS IMPORTANT TO POINT OUT THAT THIS BILL WOULD AFFECT BOTH PRIVATE AND PUBLIC WORKS. WE WOULD SUGGEST THAT IN NO EVENT SHOULD USE OF THIS FORM BE MANDATED ON PRIVATE WORK. ONCE AGAIN, WE DON'T BELIEVE THE STATE SHOULD IMPOSE THE USE OF ANY SINGLE AGREEMENT ON ANY WORK - PUBLIC OR PRIVATE.

IF THE ISSUE IS TIMELY PAYMENT WE HAVE NO PROBLEM WITH THAT. WE BELIEVE THAT THE SUBCONTRACTOR AND SUPPLIER SHOULD BE PAID IN REASONABLE AND TIMELY FASHION AFTER THE GENERAL CONTRACTOR IS PAID. THE AIA FORM CALLS FOR PAYMENT TO THE SUBCONTRACTOR WITHIN 3 WORKING DAYS AFTER HE RECEIVES PAYMENT FROM THE OWNER. WE FEEL THAT THAT IS NOT ENOUGH TIME. OUR OWN SUBCONTRACT AGREEMENT CALLS FOR PAYMENT WITHIN 5 DAYS. BEYOND THAT, PROGRESS PAYMENTS DUE AND UNPAID AFTER 30 DAYS, UNDER OUR CONTRACT, BEAR INTEREST FROM THE DUE DATE AT THE MAXIMUM LEGAL RATE. WE FEEL OUR CONDITIONS REGARDING PAYMENT ARE MORE REASONABLE BUT AGAIN, WE DO NOT SUGGEST THAT OUR FORM BE IMPOSED UPON ANYONE BY THE STATE.

SO, IN BRIEF, WE ARE OPPOSED TO SENATE BILL 211 BECAUSE IT AFFECTS BOTH PRIVATE AND PUBLIC WORKS, BECAUSE DIFFERENT OPERATIONS CALL FOR DIFFERENT SUBCONTRACT AGREEMENTS AND CONTRACTORS OUGHT TO BE FREE TO USE THE FORM THAT SUITS THEIR OWN INDIVIDUAL NEEDS, AND, FINALLY, WE FEEL THAT TIMELY PAYMENT IS REASONABLY ADDRESSED IN OUR OWN SUBCONTRACT AGREEMENT AND OTHER AGREEMENTS.

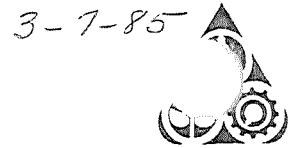
THANK YOU VERY MUCH. QUESTIONS?

*Atch. III*



KANSAS DEPARTMENT OF ECONOMIC DEVELOPMENT

Minority Business Division  
503 Kansas Avenue, Sixth Floor, Topeka, Kansas 66603  
Phone (913) 296-3805



JOHN CARLIN  
Governor

CHARLES J. "Jamie" SCHWARTZ  
Secretary

COMMITTEE TESTIMONY

My name is Billy Q. McCray and I am director of Minority Business Division of KDED.

As I see it, SB211 could be known as a Sub-Contractors Conformity Bill.

Most small contractors earn their livelihood by contracting with larger contractors who often have an attorney or competent staff to design and print the contract document. Often the document is drawn up to favor the person whom it is made by. Sometimes this is done inadvertently and again it is done in a modified spirit of free enterprise.

SB211 would create a model contract which could be used by all prime contractors and sub-contractors alike, and would eliminate abuse by unscrupulous primes who may take advantage of anxious unwary subs.

Mr. Chairman, we believe that many prime contractors prepare agreements or contracts that are fair and equitable, yet enough bonafide complaints have been voiced at our Procurement Conferences that our division supports some kind of a uniform contract promulgated by state law.

BQM:bjjo

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Attch. V

SENATE BILL No. 267

By Committee on Judiciary

2-18

0017 AN ACT concerning certain medical malpractice actions; re-  
0018 quiring submission to the state board of healing arts of certain  
0019 information relating thereto; amending K.S.A. 1984 Supp.  
0020 40-3409 and repealing the existing section.

0021 *Be it enacted by the Legislature of the State of Kansas:*

0022 Section 1. K.S.A. 1984 Supp. 40-3409 is hereby amended to  
0023 read as follows: 40-3409. (a) (1) In any action filed in this state for  
0024 personal injury or death arising out of the rendering of or the  
0025 failure to render professional services by any health care pro-  
0026 vider covered by the fund or any inactive health care provider  
0027 covered by the fund, the plaintiff shall serve a copy of the  
0028 petition upon the commissioner by registered mail within 10  
0029 days from filing the same, and if such service is not made the  
0030 fund shall not be liable for any amount due from a judgment or a  
0031 settlement nor, in such case, shall the health care provider or the  
0032 provider's insurer or the inactive health care provider or the  
0033 provider's insurer be liable for such amount that, if such service  
0034 had been made, would have been paid by the fund; (2) in any  
0035 action filed outside of this state for personal injury or death  
0036 arising out of the rendering of or the failure to render profes-  
0037 sional services by any health care provider or any inactive health  
0038 care provider covered by the fund, the inactive health care  
0039 provider, the self-insurer or the insurer of a health care provider  
0040 or an inactive health care provider shall notify the commissioner,  
0041 as soon as it is reasonably practicable, that such summons or  
0042 petition has been filed. If the petition names *as a defendant in*  
0043 *the action* a health care provider as a ~~defendant in the action~~ who  
0044 is licensed, registered or certified by the state board of healing  
0045 arts, the commissioner shall forward a copy of the petition to the

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Attach. I

0046 state board of healing arts and, upon the board's request, shall  
 0047 submit to the board any depositions, reports, summaries of  
 0048 cases or other relevant information concerning the case. ~~In~~  
 0049 ~~addition, the commissioner and the board of governors shall~~  
 0050 ~~submit to the state board of healing arts any relevant informa-~~  
 0051 ~~tion to assist the board in determining whether a licensee of the~~  
 0052 ~~board has violated K.S.A. 65-2836 and amendments thereto.~~

0053 (b) Such action shall be defended by the insurer or the  
 0054 self-insurer, but if the commissioner believes it to be in the best  
 0055 interests of the fund, the commissioner may employ indepen-  
 0056 dent counsel to represent the interests of the fund. The cost of  
 0057 employing such counsel shall be paid from the fund. The com-  
 0058 missioner is authorized to employ independent counsel in any  
 0059 such action against an inactive health care provider covered by  
 0060 the fund.

0061 Sec. 2. K.S.A. 1984 Supp. 40-3409 is hereby repealed.

0062 Sec. 3. This act shall take effect and be in force from and  
 0063 after its publication in the statute book.

Any information provided to the board under this section shall be confidential and shall be only used by the board for screening purposes. The information shall not be subject to subpoena and shall not be admissible in any formal board hearing or other administrative or judicial proceedings, unless the information has been provided to the other parties in the malpractice case by the defendant(s).

[attorneys representing parties to the action]

SB 267

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U

0046 state board of healing arts ~~and, upon the board's request/shall~~  
0047 submit to the board any depositions; reports, summaries of  
0048 cases or other relevant information concerning the case. In  
0049 addition, the commissioner and the board of governors shall  
0050 submit to the state board of healing arts any relevant informa-  
0051 tion to assist the board in determining whether a licensee of the  
0052 board has violated K.S.A. 65-2836 and amendments thereto.

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0054 self-insurer, but if the commissioner believes it to be in the best  
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0056 dent counsel to represent the interests of the fund. The cost of  
0057 employing such counsel shall be paid from the fund. The com-  
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0059 such action against an inactive health care provider covered by  
0060 the fund.

0061 Sec. 2. K.S.A. 1984 Supp. 40-3409 is hereby repealed.

0062 Sec. 3. This act shall take effect and be in force from and  
0063 after its publication in the statute book.

[ or pleadings filed with the clerk of the court or served upon opposing counsel. ]

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Attach. VI

PROPOSED REPORTS OF STANDING COMMITTEES

On page 1, after line 21, by inserting:

"Section 1. K.S.A. 1984 Supp. 40-3403 is hereby amended to read as follows: 40-3403. (a) For the purpose of paying damages for personal injury or death arising out of the rendering of or the failure to render professional services by a health care provider, self-insurer or inactive health care provider subsequent to the time that such health care provider or self-insurer has qualified for coverage under the provisions of this act, there is hereby established the health care stabilization fund. The fund shall be held in trust in a segregated fund in the state treasury. The commissioner shall administer the fund or contract for the administration of the fund with an insurance company authorized to do business in this state.

(b) (1) There is hereby created a board of governors. The board of governors shall provide:

(A) Technical assistance with respect to administration of the fund;

(B) such expertise as the commissioner may reasonably request with respect to evaluation of claims or potential claims;

(C) advice, information and testimony to the appropriate licensing or disciplinary authority regarding the qualifications of a health care provider.

(2) The board shall consist of 13 persons appointed by the commissioner of insurance, as follows: (A) The commissioner of insurance, or the designee of the commissioner, who shall act as chairperson; (B) one member appointed from the public at large who is not affiliated with any health care provider; (C) three members licensed to practice medicine and surgery in Kansas who are doctors of medicine; (D) three members who are representatives of Kansas hospitals; (E) two members licensed to practice medicine and surgery in Kansas who are doctors of

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osteopathic medicine; (F) one member licensed to practice chiropractic in Kansas; and (G) two members of other categories of health care providers. Meetings shall be called by the chairperson or by a written notice signed by three members of the board. The board, in addition to other duties imposed by this act, shall study and evaluate the operation of the fund and make such recommendations to the legislature as may be appropriate to ensure the viability of the fund.

(3) The board shall be attached to the insurance department and shall be within the insurance department as a part thereof. All budgeting, purchasing and related management functions of the board shall be administered under the direction and supervision of the commissioner of insurance. All vouchers for expenditures of the board shall be approved by the commissioner of insurance or a person designated by the commissioner.

(c) Subject to subsections (d), (e) and ~~(g)~~, (f) and (h), the fund shall be liable to pay: (1) Any amount due from a judgment or settlement which is in excess of the basic coverage liability of all liable resident health care providers or resident self-insurers for any such injury or death arising out of the rendering of or the failure to render professional services within or without this state; (2) any amount due from a judgment or settlement which is in excess of the basic coverage liability of all liable nonresident health care providers or nonresident self-insurers for any such injury or death arising out of the rendering or the failure to render professional services within this state. In no event shall the fund be obligated for claims against nonresident health care providers or nonresident self-insurers who have not complied with this act or for claims against nonresident health care providers or nonresident self-insurers that arose outside of this state; (3) any amount due from a judgment or settlement against a resident inactive health care provider for any such injury or death; (4) any amount due from a judgment or settlement against a nonresident inactive health care provider for any injury or death

arising out of the rendering or failure to render professional services within this state. In no event shall the fund be obligated for claims against: (A) Nonresident inactive health care providers who have not complied with this act; or (B) nonresident inactive health care providers for claims that arose outside of this state, unless such health care provider was a resident health care provider or resident self-insurer at the time such act occurred; (5) reasonable and necessary expenses for attorney fees incurred in defending the fund against claims; (6) any amounts expended for reinsurance obtained to protect the best interests of the fund purchased by the commissioner, which purchase shall be subject to the provisions of K.S.A. 75-3738 ~~to~~ through 75-3744, ~~inclusive,~~ and amendments thereto but shall not be subject to the provisions of K.S.A. 75-4101 and amendments thereto; (7) reasonable and necessary actuarial expenses incurred in administering the act, which expenditures shall not be subject to the provisions of K.S.A. 75-3738 ~~to~~ through 75-3744, ~~inclusive,~~ and amendments thereto; (8) annually to the plan or plans, any amount due pursuant to subsection (a)(3) of K.S.A. 40-3413, and amendments thereto; and (9) reasonable and necessary expenses incurred by the insurance department and the board of governors in the administration of the fund.

(d) All amounts for which the fund is liable pursuant to paragraphs (1), (2), (3) or (4) of subsection (c) of this section shall be paid promptly and in full if less than \$300,000, or if \$300,000 or more, by installment payments of \$300,000 or 10% of the amount of the judgment including interest thereon, whichever is greater, per fiscal year, the first installment to be paid within 60 days after the fund becomes liable and each subsequent installment to be paid annually on the same date of the year the first installment was paid, until the claim has been paid in full. Any ~~attorney's~~ attorney fees payable from such installment shall be similarly prorated.

(e) Subject to approval by the board of governors, the commissioner may purchase an annuity to pay any amounts for which

the fund is liable pursuant to subsections (c)(1), (2), (3) or (4). Any annuity so purchased shall be exempt from the provisions of subsection (d).

(f) In no event shall the fund be liable to pay in excess of \$3,000,000 pursuant to any one judgment or settlement against any one health care provider relating to any injury or death arising out of the rendering of or the failure to render professional services from and after July 1, 1984, subject to an aggregate limitation for all judgments or settlements arising from all claims made in any one fiscal year in the amount of \$6,000,000 for each provider.

~~(f)~~ (g) A health care provider shall be deemed to have qualified for coverage under the fund: (1) On and after the effective date of this act if basic coverage is then in effect; (2) subsequent to the effective date of this act, at such time as basic coverage becomes effective; or (3) upon qualifying as a self-insurer pursuant to K.S.A. 40-3414 and amendments thereto.

~~(g)~~ (h) Notwithstanding the provisions of K.S.A. 40-3402 and amendments thereto, if the board of governors determines that an individual health care provider presents a material risk of significant future liability to the fund, the board of governors is authorized by a vote of a majority of the members thereof, after notice and an opportunity for hearing, to terminate the liability of the fund for all claims against the health care provider for damages for death or personal injury arising out of the rendering of or the failure to render professional services after the date of termination. The date of termination shall be 30 days after the date of the determination by the board of governors. The board of governors, upon termination of the liability of the fund under this subsection ~~(g)~~, shall notify the licensing or other disciplinary board having jurisdiction over the health care provider involved of the name of the health care provider and the reasons for the termination.";

Also on page 1, in line 22, by striking "Section 1" and inserting "Sec. 2";

*Attach VI*



On page 2, by renumbering sections 2 and 3 as sections 3 and 4; in line 61, by striking "40-3409 is" and inserting "40-3403 and 40-3409 are";

In the title, in line 19, after the semicolon, by inserting "concerning the health stabilization fund;"; in line 20, before "40-3409", by inserting "40-3403 and"; also in line 20, by striking "section" and inserting "sections";

3-7-85

**GEHRT & ROBERTS, CHARTERED**

ATTORNEYS AT LAW

3400 VAN BUREN STREET — P.O. BOX 5188

TOPEKA, KANSAS 66605

(913) ~~266-3650~~ 266-3650

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WILLIAM A. LARSON  
WILLIAM W. SNEED  
SHELDEN P. LE BRON

March 4, 1985

Honorable Robert G. Fry  
Senator - 38th District  
State Capitol  
Topeka, Kansas 66612

Re: Senate Bill No. 267

Dear Senator Fry:

On behalf of the Kansas Association of Defense Counsel, please accept this letter in reference to the above mentioned Bill. It is my understanding that this Bill has been proposed by the Board of Healing Arts in an effort to assist them in their investigation on Health Care Providers. The KADC supports efforts to assist the Board of Healing Arts in such a crackdown; however, we have several reservations about Senate Bill No. 267.

As you are aware, the relationship of an attorney appointed to represent a defendant in a medical malpractice case and the Health Care Provider he represents is a confidential one. It is very probable that the insurance company retaining the services of this attorney will frequently receive information which is confidential and which in many instances will not be discovered by the opposing counsel pursuant to K.S.A. 226 et seq. This information is, at the present time, provided to the Health Care Stabilization Fund in an effort to coordinate their efforts to legitimately value the case and to coordinate the defense of the case.

Senate Bill No. 267 would mandate that such information be made available to the Board of Healing Arts. Obviously if this occurs, the relationship between the attorney and the physician will be seriously undermined and the effectiveness of the defense would be compromised. Further, no defense counsel would divulge any such information to the Fund once the attorney becomes aware that it will be divulged to the Board of Healing Arts. As you are aware the Fund depends very heavily on the expertise and recommendations of these specialized attorneys. Thus, there can be disastrous consequences in the future claim handling by the Fund.

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Attch. VII

**GEHRT & ROBERTS, CHARTERED**

Honorable Robert G. Fry  
March 4, 1985  
Page Two

I have conferred with Wayne Stratton who represents the Medical Society and the Hospital Association and I am aware that he has contacted Don Strole, Attorney for the Kansas Board of Healing Arts. In his letter to Mr. Strole, Mr. Stratton has recommended certain amendments to the Bill which would provide that information which is filed with the Court or exchanged between parties and as such can be made available to the Board of Healing Arts. The Kansas Association of Defense Counsel strongly urges your committee to review these proposed amendments and would support these amendments.

Thank you very much for your assistance in this matter and I am available for further comment at your convenience.

Very truly yours,

**GEHRT & ROBERTS, CHARTERED**

William W. Sneed  
Legislative Counsel

Attch. VII

3-7-85



FLETCHER BELL  
COMMISSIONER OF INSURANCE

March 6, 1985

Mr. Donald G. Strole  
Board of Healing Arts  
503 Kansas Avenue, Suite 508  
Topeka, Kansas 66603-3449

Dear Mr. Strole:

This letter is written in response to the comments attributed to your office in the Kansas City Star Sunday, February 24, 1985. Frankly, I am somewhat baffled at the accusation attributed to you that you believe the Kansas Insurance Department does not cooperate with the Board of Healing Arts.

My attorney for the Health Care Stabilization Fund (The Fund), Derenda Mitchell, advises me that shortly after her appointment to the Fund attorney position, she visited your offices on November 14, 1984, specifically to pledge our cooperation in matters of mutual concern. Her visit was followed by a letter, dated November 29, 1984, again pledging cooperation and requesting information from your office concerning the Board of Healing Arts' actions regarding Dr. Earl Sifers. I might note, to date, our records indicate that we have not received a response to this letter from your office.

Shortly after the McGuire v. Sifers decision was handed down by the District Court in Johnson County, Kansas, we contacted your office and requested what, if any, action was being undertaken to address the situation by the Board of Healing Arts. On February 24, 1983 Dr. Helen Gilles and Ms. Elizabeth Carlson came to my office as a result of our inquiry. Dr. Gilles and Ms. Carlson requested assistance from our office. I, at that time, suggested that the Board structure itself similar to the disciplinary mechanism for lawyers. I also called the Governor's office requesting his assistance. Ms. Charneil Hadl from the Governor's office joined us that same morning.

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Attch. VIII

Mr. Donald G. Strole  
March 6, 1985

Page 2

As a result of our February 24, 1983 meeting, Senate Bill No. 41, 1983 Legislative Session, was spawned. On April 20, 1983, Mr. Michael Dutton, the Fund attorney at that time, testified in support of the legislation enlarging the powers of your office and requiring the Fund to forward copies of the malpractice petitions received by our office to your attention. Prior to the effective date of the legislation requiring us to send petitions to your office, Mr. Dutton, by cover letter of June 3, 1983, sent petitions in seven (7) actions against Dr. Earl Sifers to the Board of Healing Arts (copy of June 3, 1983 letter enclosed).

The following year, Senate Bill No. 507 was proposed to the Legislature. Senate Bill No. 507 created the disciplinary counsel position which Mr. Larry Buening of your office presently holds. As I am sure you are aware, I adamantly supported passage of Senate Bill No. 507 and its component provisions purporting to strengthen the effectiveness of the Board of Healing Arts.

Now that the 1985 Legislative Session is well upon us, I again pledge my cooperation to the Board of Healing Arts. The members of my staff who work with the Fund have contributed considerable time, energy, and resources to provide you with the information you have requested which you claim you need to do your job. Senate Bill No. 267 proposed by your office this current legislative session, however, is unworkable in the face of the responsibilities of the Fund. First, we seldom receive copies of depositions in medical malpractice actions. Our office cannot supply you with information we do not have. Second, I am sure you understand the sensitive nature of our position and our relationship to the defense of medical malpractice cases. My counsel has advised me that we cannot supply your office with information closed by the court, the subject of attorney client privilege, or of attorney work product. Third, we would need additional staff, time, and financing to accommodate your request in its present form.

Attach. VIII

Mr. Donald G. Strole  
March 6, 1985

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Had you come to us prior to the introduction of Senate Bill No. 267, I would have been happy to work with you to develop a proposal which would address the problems of the Board of Healing Arts and facilitate information without imposing an impossible burden on the administration of the Fund. My staff and I remain available to discuss this matter further with you at your request.

Very truly yours,

Fletcher Bell  
Commissioner of Insurance

FB:ks  
LE/2294

bcc: The Honorable Robert Frey

Attch. VIII