

**PRESENTATION OF THE  
CONTRACTORS LICENSE BOARD**

**TO THE HOUSE COMMITTEE ON  
CONSUMER PROTECTION & COMMERCE**

**TWENTY-FIFTH LEGISLATURE  
Regular Session of 2009**

**Thursday, April 16, 2009  
2:00 p.m.**

**TESTIMONY ON HCR 124, H.D.1, REQUESTING A STUDY TO DETERMINE THE  
PROPER INTERPRETATION AND APPLICATION OF THE PHRASE "INCIDENTAL  
AND SUPPLEMENTAL" WITH REGARD TO THE CONTRACTING BUSINESS.**

**TO THE HONORABLE ROBERT N. HERKES, CHAIR,  
AND MEMBERS OF THE COMMITTEE:**

The Contractors License Board ("Board") appreciates the opportunity to comment on House Concurrent Resolution No. 124, H.D. 1 ("HCR No. 124, H.D. 1"), which requests that the Legislative Reference Bureau conduct a study on how the phrase "incidental and supplemental" should be interpreted and applied in the bidding process, and to determine the extent of "incidental and supplemental" work that can be performed by a specialty contractor.

The Board believes that the decision on whether work is "incidental and supplemental" is best determined on a case-by-case basis, rather than a specific percentage of work or dollar amount. There are so many different scenarios that may occur, that specifying a rigid application of the term may be too constricting, and may not take all aspects of the project into consideration.

Furthermore, the Board, as well as its advising deputy attorney general, disagrees with the assertion, on page 2, lines 34 through 36, that the Board's

application of the term "incidental and supplemental" contradicts the Hawaii Supreme Court's holdings in *Okada Trucking Co., Ltd. v. Board of Water Supply, City and County of Honolulu and Inter Island Environmental Services, Inc.*, 97 Hawai'i 450 (2002).

The issue raised in HCR No. 124, H.D. 1, apparently arose because the Board determined that a general contractor may perform work that is incidental and supplemental to work it performs as a specialty contractor. This does not contradict the Hawaii Supreme Court's holding that a specialty contractor, as opposed to a general contractor, is permitted to undertake incidental and supplemental work. Whether or not a contractor also holds a general contractor classification is not relevant in determining whether or not it may perform work incidental and supplemental to its specialty classification. Therefore, the issue is not whether a contractor submitted bid proposals that did not identify the appropriate specialty contractors, but whether as a specialty contractor, it may perform the work as "incidental and supplemental" to its license.

In summary, because there are so many different specialty classifications, and so many different situations that may occur on a particular project, the Board questions whether the Legislative Reference Bureau will be able to determine the extent of work that may be performed incidental and supplemental to a specialty classification without addressing in great detail the specific type of project or trade involved.

Thank you for the opportunity to comment on HCR No. 124, H.D. 1.

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LEGISLATIVE REFERENCE BUREAU  
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State Capitol  
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Honolulu, Hawaii 96813

## HCR124, HD1

### REQUESTING A STUDY TO DETERMINE THE PROPER INTERPRETATION AND APPLICATION OF THE PHRASE "INCIDENTAL AND SUPPLEMENTAL" WITH REGARD TO THE CONTRACTING BUSINESS

Testimony by the Legislative Reference Bureau  
Ken H. Takayama, Director

Presented to the House Committee on Consumer Protection & Commerce

Thursday, April 16, 2009, 2:00 p.m.  
Conference Room 325

Chair Herkes and Members of the Committee:

I am Ken H. Takayama, Director of the Legislative Reference Bureau. Thank you very much for this opportunity to testify on House Concurrent Resolution No. 124, H.D. 1. The Bureau takes **no position** on this measure but offers the following **comments**:

1. The resolution directs the Legislative Reference Bureau to study the issue of the so called "proper" interpretation and application of the phrase "incidental and supplemental" with regard to work that may be performed by general and specialty contractors in areas in which they are not licensed.

2. The issue apparently stems from the ruling of the Hawaii Supreme Court in *Okada Trucking Co., Ltd., vs. Board of Water Supply*, and subsequent interpretations of the court's ruling by the Contractor's Licensing Board.

3. It appears that this issue is also as controverted as it complex. We therefore suspect that there may be no single "correct" answer by which one size will fit all. We expect that the study requested will be difficult.

4. Nevertheless, the study requested appears to be reasonably straightforward, and manageable in scope. If the Legislature wants us to do this study, we will do our best to carry it out.

Thank you very much for this opportunity to testify.

# ***SAH - Subcontractors Association of Hawaii***

***820 Mililani Street, Suite 810, Honolulu, Hawaii 96813-2938***

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April 16, 2009

Testimony To: House Committee on Consumer Protection & Commerce  
Representative Robert N. Herkes, Chair

Presented By: Tim Lyons, President

Subject: HCR 124, HD 1 - REQUESTING A STUDY TO DETERMINE THE PROPER  
INTERPRETATION AND APPLICATION OF THE PHRASE "INCIDENTAL AND  
SUPPLEMENTAL" WITH REGARD TO THE CONTRACTING BUSINESS.

Chair Herkes and Members of the Committee:

I am Tim Lyons, President of the Subcontractors Association of Hawaii, also known as "specialty contractors" in this resolution. We support the resolution.

The Subcontractors Association represents the following separate and distinct associations who have combined their testimony in the interest of saving time and resources.

HAWAII FLOORING ASSOCIATION

ROOFING CONTRACTORS ASSOCIATION OF HAWAII

HAWAII WALL AND CEILING INDUSTRIES ASSOCIATION

TILE CONTRACTORS PROMOTIONAL PROGRAM

PLUMBING AND MECHANICAL CONTRACTORS ASSOCIATION OF HAWAII

SHEETMETAL CONTRACTORS ASSOCIATION OF HAWAII

PAINTING AND DECORATING CONTRACTORS ASSOCIATION

PACIFIC INSULATION CONTRACTORS ASSOCIATION

We agree that this is an issue that needs to be resolved. As a matter of fact, in the mid 1980's there was an attempt to resolve this definition. Unfortunately, the Task Force met with no success. That is no reason however, why we can't look at this issue again and see if there are any commonalities.

Thank you.

# **BIA-HAWAII**

**BUILDING INDUSTRY ASSOCIATION**

April 16, 2009

Representative Robert Herkes, Chair  
Committee on Consumer Protection and Commerce  
State Capitol, Room 325  
Honolulu, Hawaii 96813

RE: HCR 124, HD1 "Requesting a Study to Determine the Proper Interpretation and Application of the Phrase "Incidental and Supplemental" with Regard to the Contracting Business"

Chair Herkes and Members of the Committee on Consumer Protection and Commerce:

I am Karen Nakamura, Chief Executive Officer of the Building Industry Association of Hawaii (BIA-Hawaii). Chartered in 1955, the Building Industry Association of Hawaii is a professional trade organization affiliated with the National Association of Home Builders, representing the building industry and its associates. BIA-Hawaii takes a leadership role in unifying and promoting the interests of the industry to enhance the quality of life for the people of Hawaii.

BIA-Hawaii opposes and does not support the purpose of HCR 124, HD1 that calls for a study to determine the proper interpretation and application of the phrase "incidental and supplemental". We believe the proper entity to make this determination is the Contractors License Board.

On April 2, 2009, the Contractors License Board testified before the House Committee on Economic Revitalization, Business and Military Affairs that they questioned the need for a task force to determine the interpretation and application of the "incidental and supplemental" phrase when that function was in the purview of the Contractors License Board. Although the title of HCR124 has been changed to call for a study, BIA-Hawaii believes it is unnecessary and would be unproductive in addressing the myriad issues that come before the Contractors License Board. We believe this issue is a recurring one and is not taken lightly by the Contractors License Board.

We respectfully request that this concurrent resolution and the corresponding HR171 be held.

Thank you for the opportunity to share our views with you.



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BIA-Hawaii

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# GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

APRIL 16, 2009

TO: THE HONORABLE REPRESENTATIVE ROBERT N. HERKES, CHAIR AND MEMBERS OF COMMITTEE ON CONSUMER PROTECTION & COMMERCE

SUBJECT: HCR 124, HD1 - REQUESTING A STUDY TO DETERMINE THE PROPER INTERPRETATION AND APPLICATION OF THE PHRASE "INCIDENTAL AND SUPPLEMENTAL" WITH REGARD TO THE CONTRACTING BUSINESS.

### NOTICE OF HEARING

DATE: Thursday, April 16, 2009  
TIME: 2:00 P.M.  
PLACE: Conference Room 325

Dear Chair Herkes and Committee Members:

The General Contractors Association of Hawaii (GCA), an organization comprised of over five hundred and sixty (560) general contractors, subcontractors, and construction related firms.

The GCA **strongly opposes** HCR 124, HD1 which calls for a study by the Legislative Reference Bureau determining how the term "incidental and supplemental" should be interpreted and applied in the bidding process and to determine the extent of the work that can be performed by a specialty contractor not licensed for that type of work.

The GCA's believes that incidental and supplemental is a licensing issue that should continue to be determined on a case by case basis by the Contractors License.

The GCA **strongly opposed** to the passage of HCR 124, HD1 as unnecessary and unproductive.

Thank you for giving us this opportunity to testify.

# IRON WORKERS STABILIZATION FUND

Fax No: 586-6221

April 15, 2009

Hon. Glenn Wakai, Chair  
House Committee on Consumer Protection & Commerce  
Room 316 - State Capitol  
Honolulu, Hawaii 96813

Iron Workers Stabilization Fund

Hearing Date - April 16, 2009, 2:00 p.m., CR 325

Support of HCR 124

Ironworkers Stabilization Fund

Hearing Date - April 2, 2009, 9:00 a.m., CR 312

Support of HCR 124

As HCR 124 sets forth, the term *incidental and supplemental* has caused much confusion in the construction industry as it relates to county and state jobs.

As way of background, HRS sections 444-7, 8 and 9, authorize the Contractors License Board ("CLB") to define *incidental and supplemental*. Pursuant to these 3 sections, the board has established the definition of *incidental and supplemental* that is found in Hawaii Administrative Rules (HAR") section 16-77-34 which states:

***"Incidental and supplemental" is defined as work in other trades directly related to and necessary for the completion of the project undertaken by a licensee pursuant to the scope of the licensee's license.***

HRS section 444-8, entitled Powers to classify and limit operations states in subsection (c) as follows:

**(c) This section shall not prohibit a specialty contractor from taking and executing a contract involving two or more crafts or trades, if the performance of the work in the other crafts or trades, other than in which the specialty contractor is licensed, is *incidental and supplemental* to the performance of work in the craft for which the specialty contractor is licensed.**

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HAR section 16-77-33, entitled *Limitation of classifications* in section (a) states:

**(a) A licensee classified as an "A" general engineering Contractor or as a "B" general building contractor shall not act . . . as a specialty contractor except in the specialty classifications which the licensee holds.**

Two cases that we will discuss highlight the different interpretations given by the CLB to this troublesome phrase.

In the Lanakila Elementary School case decided by the CLB in January, 2007, the board ruled that even if the glazing and tinting work (which requires a C-22 license) amounted to 25% of the monetary value of the job, this 25% was *incidental and supplemental* to the work being performed by the *general* contractor. This CLB ruling appears to be in contravention of HRS section 444-8 (as quoted above) which states that the *incidental and supplemental* exception is only available to *specialty* contractors. And, besides, it would appear that 25% of a job surely should not fall into the *incidental and supplemental* category.

In another recent case (which we label as "Ukee Street"), the CLB ruled that a licensed C-31 (masonry contractor) is permitted to install reinforced steel/rebar that normally requires a licensed C-41 (reinforcing steel contractor) to perform, ostensibly because this reinforced steel/rebar work was *incidental and supplemental* to the work of the masonry contractor. This ruling was made despite the clear and uncontroverted fact that installation of the reinforced steel/rebar was for the *entire foundation of the building*. We point to HAR section 16-77-34 (as quoted above) which makes it clear that the *incidental and supplemental* work must be "directly related to and necessary for the completion of the project". It is also uncontroverted that reinforced steel/rebar are installed *before* the concrete is poured by the C-31 mason contractor. Here, it is pure folly for the CLB to argue that the work performed by the C-31 masonry contractor in installing the reinforced steel/rebar is "directly related to and necessary for the completion of the project". This installation is the 1st step in the construction of the building even before the concrete is poured.

Based on the above, we respectfully urge the legislature to assign the Legislative Reference Bureau the task of studying the various decisions of the Contractors License Board and our courts, and advise the legislature as to whether or not the phrase *incidental and supplemental* should be clarified so that the confusion that now exists will be minimized.