IRON WORKERS STABILIZATION FUND

Fax No. – 586-8479

April 1, 2009

Honorable Angus L.K. McKelvey, Chair
House Committee on Economic Revitalization,
Business & Military Affairs
Room 427 – State Capitol
Honolulu, Hawai'i 96813

Ironworkers Stabilization Fund

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

Support of HCR 124, with amendment, replacing 7 member task force with the Legislative Reference Bureau

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.**

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.

SAH - Subcontractors Association of Hawaii

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April 2, 2009

Testimony To: House Committee on Economic Revitalization, Business, & Military Affairs
Representative Angus L.K. McKelvey, Chair

Presented By: Tim Lyons, President

Subject: HCR 124 – REQUESTING THE CONVENING OF A TASK FORCE TO DETERMINE THE PROPER INTERPRETATION AND APPLICATION OF THE TERM "INCIDENTAL AND SUPPLEMENTAL" WITH REGARD TO THE CONTRACTING BUSINESS.

Chair McKelvey 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.

We only have one suggestion for amendment and that is in the first, "BE IT FURTHER RESOLVED" clause where it designates members to be appointed by the Governor, the President of the Senate and the Speaker of the House of Representatives that provides that in the final analysis, there be an equal balance between specialty contractors and general contractors. We believe that the Resolution is faulty in its second paragraph indicating that there are three (3) types of licenses and while that is technically correct, the first two listed are both general contractors while only the last is a subcontractor or specialty contractor. There are almost four (4) times as many subcontractors as general contractors however, because of the nature of the construction industry it is the general contractor who is the boss and in situations where they employ a specialty contractor, the specialty contractor is subservient to the general. Based on that, we would request specifically that the subcontractor representatives be representatives of subcontracting associations. Members often tell us that they don't like to serve on Task Forces where there are other general contractors because it could impact their future employment possibilities. On the other hand, representatives of associations do not depend on the general contractor for jobs.

Therefore, we would suggest the following wording, "BE IT FURTHER RESOLVED that the Governor, President of the Senate and Speaker of the House of Representatives shall coordinate amongst themselves in order to be sure that contractor representatives, who shall be representatives of

subcontractor trade associations, be equally distributed between general contractors and specialty contractors".

With the addition of that clause, we can support this resolution wholeheartedly and request your favorable adoption.

Thank you.