

HB 1875

**RELATING TO
SPECIALTY
CONTRACTORS**

A BILL FOR AN ACT

RELATING TO SPECIALTY CONTRACTORS.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. Section 444-8, Hawaii Revised Statutes, is
2 amended to read as follows:

3 "§444-8 Powers to classify and limit operations. (a) The
4 contractors license board may adopt rules and regulations
5 necessary to effect the classification of contractors in a
6 manner consistent with established usage and procedure as found
7 in the construction business, and may limit the field and scope
8 of the operations of a licensed contractor to those in which the
9 contractor is classified and qualified to engage, as defined in
10 section 444-7.

11 (b) A licensee may make application for classification and
12 be classified in more than one classification if the licensee
13 meets the qualifications prescribed by the board for such
14 additional classification or classifications. For qualifying or
15 classifying in additional classifications, the licensee shall
16 pay the appropriate application fee but shall not be required to
17 pay any additional license fee.



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

8 (d) The board shall adopt rules pursuant to chapter 91 to
 9 define the phrase "incidental and supplemental to the
 10 performance of work", as used in subsection (c); provided that
 11 the definition shall refer to no more than per cent of all
 12 work in any craft or trade, other than any craft or trade for
 13 which the specialty contractor is licensed, to be performed
 14 under a single contract."

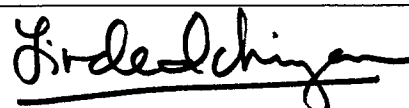
15 SECTION 2. This Act does not affect rights and duties that
 16 matured, penalties that were incurred, and proceedings that were
 17 begun before its effective date.

18 SECTION 3. New statutory material is underscored.

19 SECTION 4. This Act shall take effect upon its approval.

20

INTRODUCED BY:



JAN 18 2018



H.B. NO. 1875

Report Title:

Specialty Contractors; Incidental and Supplemental Work

Description:

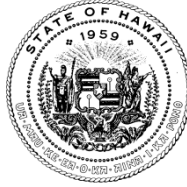
Requires the Contractors License Board to adopt rules to define "incidental and supplemental to the performance of work" and to set the percentage of a craft or trade in which a specialty contractor may engage without a license while performing work in a craft or trade for which the contractor is licensed.

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.



HB 1875

TESTIMONY



Testimony by:
JADE T. BUTAY
INTERIM DIRECTOR

Deputy Directors
ROY CATALANI
ROSS M. HIGASHI
EDWIN H. SNIFFEN
DARRELL T. YOUNG

IN REPLY REFER TO:

STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

February 1, 2018
9:00 a.m.
State Capitol, Room 309

H.B. 1875
RELATING TO SPECIALTY CONTRACTORS

House Committee on Labor and Public Employment

The Department of Transportation (DOT) **supports** the intent of this bill which proposes to require the Contractors License Board to adopt rules to define “incidental and supplemental to the performance of work” and to set the percentage of a craft or trade in which a specialty contractor may engage without a license while performing work in a craft or trade for which the contractor is licensed.

The Hawaii Revised Statutes (HRS) Contractor Licensing Law § 444-8(c) created, “an exception for the completion of limited amounts of unlicensed work.”¹

Specifically, HRS § 444-8(c), “shall not prohibit a specialty contractor from taking and executing a contract involving the use of two or more crafts or trades, if the performance of the work in the 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.”

Furthermore, Hawaii Administrative Rules, §16-77-34, (HAR) defines incidental and supplemental 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.”

In *District Council 50*², the appeals court upheld the Hawaii Contractor Licensing Board’s (“CLB”) new test in determining whether work qualifies as incidental and supplemental. The test is, “to qualify as “incidental and supplemental” work, that work must represent less than 50% of the project (as measured in relation to the projects total cost or extent), and the work must be subordinate to, directly related to, and necessary for the completion of the work of greater importance that is within the scope

¹ *District Council 50 of the International Union of Painters and Allied Trades and Aloha Glass Sales & Service, Inc., v. Catherine P. Awakuni Colon, 136 Hawaii 543 (2015), (quoting District Council 50, 129 Hawaii 281, 298 P. 3d 1045 (2013).*

² *Id.*

of the licensee's license (i.e., the primary work the specialty contractor is licensed to perform).”

While the DOT understands the policy and importance of contractors performing work for which it holds a valid license, as the case law and administrative rules show, a clear definition, including a percentage to determine what is incidental and supplemental to the performance of work could help the DOT during bid evaluation and bid challenges.

Thank you for the opportunity to provide testimony.

**PRESENTATION OF THE
CONTRACTORS LICENSE BOARD**

TO THE HOUSE COMMITTEE ON
LABOR AND PUBLIC EMPLOYMENT

TWENTY-NINTH LEGISLATURE
Regular Session of 2018

Thursday, February 1, 2018
9:00 a.m.

**TESTIMONY ON HOUSE BILL NO. 1875, RELATING TO SPECIALTY
CONTRACTORS.**

TO THE HONORABLE AARON LING JOHANSON, CHAIR, AND MEMBERS OF THE
COMMITTEE:

My name is Peter H.M. Lee, I am the Chairperson of the Contractors License Board (“Board”) Legislative Committee. Thank you for the opportunity to testify on H.B. 1875. The Board takes no position at this time but offers the following comments.

This measure proposes to require the Board to adopt rules to define the phrase “incidental and supplemental to the performance of work” and to set the percentage of work in a craft or trade in which a specialty contractor may engage without a license while performing work in a craft or trade for which the contractor is licensed.

The Board has not had an opportunity to discuss this bill but will be discussing this measure at its next meeting on February 16, 2018. However, the Board has previously testified in strong opposition to similar measures that propose to define “incidental and supplemental” work for the following reasons.

The Board respectfully submits this bill is unnecessary because the limit of “incidental and supplemental” work that can be performed by specialty contractors has already been established by the Hawaii Supreme Court in District Council 50 v. Lopez, 129 Hawai'i 281, 298 P.3d 1045 (2013) (“DC 50”). Among other things, the Court in DC

50 interpreted the term “incidental and supplemental” in Hawaii Revised Statutes (“HRS”) chapter 444 to be less than a majority. The Board complied with this directive and interpreted less than a majority to mean less than fifty percent.¹ The Board also determined that to qualify as “incidental and supplemental” work, that work must be subordinate to, directly related to, and necessary for the completion of the work of greater importance that is within the scope of the licensee’s license (i.e., the primary work the specialty contractor is licensed to perform), and that work must represent less than fifty percent of the project (as measured in relation to the project’s total cost or extent).

The Board’s interpretation of “incidental and supplemental” work in its BFO has subsequently been upheld by the circuit court and the Hawaii Intermediate Court of Appeals. In addition, in May 2016, the Hawaii Supreme Court rejected a petition for writ of certiorari that challenged the BFO. Thus, the BFO is the current standard in the construction industry. Since October 2013, the Board has consistently applied this standard to numerous scope of work inquiries.

Thank you for the opportunity to testify on H.B. 1875.

¹ See In the Matter of the Petition for Declaratory Relief of District Council 50 of the International Union of Painters and Allied Trades and Aloha Glass Sales & Service, Inc., CLB-DR-2006-2, for the Board’s Final Order Upon Remand issued October 18, 2013 (“BFO”).

Testimony of
Christopher Delaunay, Government Relations Manager
Pacific Resource Partnership

HOUSE OF REPRESENTATIVES
Committee on Labor & Public Employment
Representative Aaron Ling Johanson, Chair
Representative Daniel Holt, Vice Chair

Thursday, February 1, 2018
9:00 A.M.
State Capitol – Room 309

Aloha Chair Johanson, Vice Chair Holt and members of the Committee:

We respectfully **oppose** HB 1648 and HB 1875 as both measures attempt to redefine the term “incidental and supplemental” which has already been clarified by the Contractor’s Licensing Board (CLB) through a Final Order and, more recently, the rulemaking process.

On October 18, 2013, a CLB Final Order was issued pursuant to the Hawaii Supreme Court’s ruling in District Council 50 v. Lopez,¹ which clarified the term “incidental and supplemental” work. The CLB concluded that to qualify as “incidental and supplemental” work, the work must:²

- (1) Represent less than 50% of the project (as measured in relation to the project’s total cost or extent); and
- (2) Be subordinate to, directly related to, and necessary for the completion of the work of greater importance that is within the scope of the licensee’s license (i.e., the primary work the specialty contractor is licensed to perform).

This Final Order was subsequently upheld by the Circuit Court on November 6, 2014, and by the Intermediate Court of Appeal’s on December 21, 2015.³ On May 10, 2016, the Hawaii Supreme Court

¹ District Council 50 v. Lopez, 129 Haw. 281 (2013).

² In the Matter of the Petition for Declaratory Relief of District Council 50 of the International Union of Painters and Allied Trades and Aloha Glass Sales & Service, Inc., Board’s Final Order Upon Remand, CLB-DR-2006-2 (2013).

³ District Council 50 v. Colon, CAAP-14-0001336 (Haw. App., 2015).



(Continued From Page 1)

denied further challenges to this Final Order when it rejected a March 28, 2016 “Application For Writ of Certiorari” in the District Council 50 v. Colon case.⁴

Furthermore, on November 17, 2017, the CLB held a public rulemaking hearing where it approved an amendment to § 16-77-34, Hawaii Administrative Rules (HAR) which clarified “incidental and supplemental” work. The amendment conforms to the Hawaii Supreme Court’s decision in the District Council 50 v. Lopez case and the CLB’s corresponding Final Order dated October 18, 2013. The approved amendment is now before the Governor for his consideration.

Since the CLB and the courts have clarified what qualifies as “incidental and supplemental” work, amendments in HB1648 and HB 1875 are unnecessary.

Thank you for allowing us to voice our opinion and we respectfully request that these bills be held by the Committee.

About PRP

Pacific Resource Partnership (PRP) is a not-for-profit organization that represents the Hawaii Regional Council of Carpenters, the largest construction union in the state, and more than 240 of Hawaii’s top contractors. Through this unique partnership, PRP has become an influential voice for responsible construction and an advocate for creating a stronger, more sustainable Hawaii in a way that promotes a vibrant economy, creates jobs and enhances the quality of life for all residents.

⁴ Order Rejecting Application For Writ Of Certiorari, SCWC-14-0001336, May 10, 2016.

HB 1875

**LATE
TESTIMONY**

SAH - Subcontractors Association of Hawaii

1188 Bishop St., Ste. 1003**Honolulu, Hawaii 96813-2938

Phone: (808) 537-5619 ✦ Fax: (808) 533-2739

February 1, 2018

Testimony To: House Committee on Labor & Public Employment
Representative Aaron Ling Johanson, Chair

Presented By: Tim Lyons, President

Subject: H.B. 1875 – RELATNG TO THE SPECIALTY CONTRACTORS.

Chair Johanson and Members of the Committee:

I am Tim Lyons, President of the Subcontractors Association of Hawaii. The SAH represents the following nine separate and distinct subcontracting associations.

HAWAII FLOORING ASSOCIATION

ROOFING CONTRACTORS ASSOCIATION OF HAWAII

HAWAII WALL AND CEILING INDUSTRIES ASSOCIATION

ELECTRICAL CONTRACTORS ASSOCIATION OF HAWAII

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 are not sure of the purpose of this bill. The Board has already concurred with the opinion of the Court that incidental and supplemental is 49% or less by issuing administrative rule changes to that extent. It would seem to us that if the Board were to follow the stipulations in this bill they would mimic that stipulation and we would be right back where we started.

When it comes down to it, contractors would prefer the maximum flexibility and therefore tend to prefer the higher percentage (such as 49%) as the number to declare for less than a majority of the work. Apparently some would prefer to see that number be some other arbitrary number and a restrictive one at that.

Because we are unsure as to the intent of this bill we cannot be in support of it.

Thank you.



HAWAII LABORERS-EMPLOYERS COOPERATION AND EDUCATION TRUST
650 Iwilei Road, Suite 285 · Honolulu, HI 96817 · Phone: 808-845-3238 · Fax: 808-845-8300 · URL: hilecet.org

February 1, 2018

**HOUSE OF REPRESENTATIVES
COMMITTEE ON LABOR & PUBLIC EMPLOYMENT**

DATE: Thursday, February 1, 2018
TIME: 9:00 AM
PLACE: Conference Room 429
State Capitol
415 South Beretania Street

RE: STRONG OPPOSITION TO HB1875 - RELATING TO SPECIALTY CONTRACTORS

Aloha Chair Aaron Johanson, Vice Chair Daniel Holt, and members of the Committee on Labor & Public Employment,

The Hawaii Laborers-Employers Cooperation and Education Trust (LECET) is a labor-management partnership between the 5000+ members of the Hawaii Laborers Union and its 250+ unionized contractors.

Hawaii LECET STRONGLY OPPOSES HB1875 which requires the Contractors License Board (board) to adopt rules to define "incidental and supplemental to the performance of work" and to set the percentage of a craft or trade in which a specialty contractor may engage without a license while performing work in a craft or trade for which the contractor is licensed.

The board already held a public hearing on Friday, November 17, 2017. The purpose of the public hearing was to amend Administrative Rules section 16-77-34, Work Incidental and Supplemental, to clarify that to qualify as "incidental and supplemental" work, that work must represent less than a majority (less than 50%) of the project (as measured in relation to the project's total cost or extent), and the work must be subordinate to, directly related to, and necessary for the completion of the work of greater importance that is within the scope of the licensee's license (i.e., the primary work of the specialty contractor's license to perform). The amendment was intended to conform with the Hawaii Supreme Court's decision in the District Council 50 v. Lopez case, and the Board's corresponding Board's Final Order ("BFO") dated October 18, 2013, in the matter of the Petition for Declaratory Relief of District Council 50 of the International Union of Painters and Allied Trades and Aloha Glass Sales & Service, Inc.

As it currently stands, the rule amendments sits on the Governor's desk for his signature.

This bill attempts to provide a new percentage for the meaning of "less than a majority" even when the Court in DC 50 interpreted the term "incidental and supplemental" in HRS chapter 444 to be less than a majority. The board complied with the Court's directive, and interpreted less than a majority to mean less than fifty per cent (50%).

For these reasons, we ask for your consideration to **defer HB1875 indefinitely.**

With respect,

Joy Kimura
Hawaii Laborers-Employers Cooperation
and Education Trust



LATE

LiUNA!

**TESTIMONY OF RYAN K. KOBAYASHI
GOVERNMENT AND COMMUNITY RELATIONS DIRECTOR
HAWAII LABORERS UNION LOCAL 368**

PETER A. GANABAN
*Business Manager/
Secretary-Treasurer*

ALFONSO OLIVER
President

JOBY NORTH II
Vice President

TONI FIGUEROA
Recording Secretary

JAMES DRUMGOLD JR.
Executive Board

ORLANDO PAESTE
Executive Board

JOSEPH YAW
Executive Board

MARTIN ARANAYDO
Auditor

RUSSELL NAPIHA'A
Auditor

MARK TRAVALINO
Auditor

ALFRED HUFANA JR.
Sergeant-At-Arms

COMMITTEE ON LABOR & PUBLIC EMPLOYMENT

NOTICE OF HEARING

DATE: Thursday, February 1, 2018
TIME: 9:00 a.m.
PLACE: Room 309

TESTIMONY IN OPPOSITION TO HB 1875 RELATING TO SPECIALTY CONTRACTORS

ALOHA COMMITTEE CHAIR JOHANSON, VICE-CHAIR HOLT, AND COMMITTEE MEMBERS,

My name is Ryan K. Kobayashi, Government and Community Relations Director for the Hawaii Laborers Union Local 368. The Hawaii Laborers Union is made up of over 5000 working and retired members across the State of Hawaii, and we are **OPPOSED to HB 1875 AS WRITTEN.**

On November 17, 2017 the State of Hawaii's Contractors License Board (Board) conducted a public hearing to amend Hawaii Administrative Rules Section 16-77-34 (Work Incidental and Supplemental) to conform to a Hawaii State Supreme Court ruling in the case of District Council 50 v. Lopez. At this hearing, the Board adopted the number of **less than 50%** as the qualifying number to qualify as "Incidental and Supplemental" work.¹

Pursuant to the adoption of the "less than 50%" standard adopted on November 17, 2017 a proposed change to the HAR 16-77-34 is currently being worked on by the Board. In addition, the "less than 50%" standard for Incidental and Supplemental work has been the Board's unofficial standard since 2013 when the initial Hawaii State Supreme Court decision was made.

Therefore, we would only support a change in the HRS only as far as it would specifically state the "less than 50%" standard (which the Board is presently drafting as a change to

¹ Incidental and Supplemental work must represent less than a majority (50% or less) of the project (as measured in relation to the project's total cost or extent) and the work must be subordinate to, directly related to, and necessary for the completion of the work of greater importance that is within the scope of the licensee's license.

LiUNA Local 368
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Honolulu, HI 96817
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Feel the Power

HAR, and which has been putting into practice since 2013) to reflect consistency between the HRS and proposed change in the HAR.

Therefore, aside from the "less than 50%" language mentioned above we **OPPOSE HB 1875 AS WRITTEN.**

Sincerely,

A handwritten signature in black ink, appearing to read "Ryan K. Kobayashi". The signature is stylized with large, overlapping loops and a horizontal line across the middle.

Ryan K. Kobayashi
Government and Community Relations Director
Hawaii Laborers' Union, Local 368

1065 Ahua Street
Honolulu, HI 96819
Phone: 808-833-1681 FAX: 839-4167
Email: info@gcahawaii.org
Website: www.gcahawaii.org



GCA of Hawaii

GENERAL CONTRACTORS ASSOCIATION OF HAWAII

Quality People. Quality Projects.

Uploaded via Capitol Website

February 1, 2018

TO: HONORABLE AARON JOHANSON, CHAIR, HONORABLE DANIEL HOLT, VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON LABOR

SUBJECT: **STRONG OPPOSITION TO H.B. 1875, RELATING TO SPECIALTY CONTRACTORS.** Requires the Contractors License Board to adopt rules to define "incidental and supplemental to the performance of work" and to set the percentage of a craft or trade in which a specialty contractor may engage without a license while performing work in a craft or trade for which the contractor is licensed.

HEARING

DATE: February 1, 2018
TIME: 9:00 a.m.
PLACE: Conference Room 309

LATE

Dear Chair Johanson, Vice Chair Holt and Committee Members,

The General Contractors Association (GCA) is an organization comprised of over 500 general contractors, subcontractors, and construction related firms. The GCA was established in 1932 and is the largest construction association in the State of Hawaii. GCA's mission is to represent its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest.

GCA is in strong opposition to H.B. 1875, Relating to Specialty Contractors which proposes to mandate the Contractors License Board to define "incidental and supplemental" by setting a percentage of a craft or trade in which a specialty contractor may engage. The current bill includes a blank percentage. The GCA respectfully **requests that the bill be held** because it is unnecessary; the Contractors License Board recently underwent the adoption of administrative rules amending the existing definition of incidental and supplemental in alignment with the 2013 Hawaii State Supreme Court Decision in *District Council 50 vs. Lopez, State of Hawaii*.

H.B. 1875 is flawed and would create more confusion.

This measure directs the Board to adopt rules and suggests a flawed definition of incidental and supplemental that is not necessary because Section 444-8(c) references the term and its applicability to the performance of such work. The proposed definition haphazardly attempts to define the term by quantifying "incidental and supplemental" with a percentage that goes directly against the sustained interpretation by the Board in its Final Order.

Background regarding Incidental and Supplemental

Due to the Okada Trucking ruling in 2002, the term incidental and supplemental has been a topic of much debate in disputes regarding jurisdiction and the performance of work by a general contractor or a specialty contractor. Most recently this issue has been highlighted in the *District Council 50 vs. Lopez, State of Hawaii* and the Supreme Court's decision in 2013 ("DC 50"). This case underwent two requests for certiorari by the Hawaii Supreme Court and was sent back to the Board for clarification and implementation. Since then, there have been legislative proposals at the Hawaii State Legislature attempting to "quantify" what incidental and supplemental is in reference to; many times these proposals present a flawed analysis for an already complicated field of construction. In 2013 the Hawaii Supreme Court ruled in DC 50 case that a C-5 cabinet millwork, and carpentry remodeling and repairs specialty contractor, cannot perform work that is not covered by the C-5 license unless it is incidental and supplemental to the C-5 work. According to the Court, "incidental and supplemental" meant that work could not be the majority of the work, but had to be minor in nature.

Incidental and supplemental is *currently* defined in Hawaii Administrative Rules 16-77-34 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." The Board recently passed its revised administrative rules in November 2017 and is awaiting the Governor's final approval. **Due to the pending approval of the administrative rules it would be prudent to allow the process to take its course which intimately involved input from the construction industry and was recommended after unanimous approval by the Contractors License Board.**

The proposed changes in this measure is a haphazard attempt to amend what incidental and supplemental means by quantifying it with a certain percentage. The Board acknowledged in its October 2013 Final Order Upon Remand, and subsequent scope determinations that it will review inquiries **on a case by case basis** and apply a test that will consider whether such work is less than a majority of the project and is subordinate and in addition to licensed work of greater importance. If a bill were to set a certain percentage for incidental and supplemental work it would result in more bid protests due to a host of additional subcontractors needing to be listed for a job and also increase costs, and greater inefficiency.

GCA Supports the Board's Administrative Rule on Incidental and Supplemental

As the Contractors License Board articulated in October 2013 –its' Final Order Upon Remand "the Court's decision did not expressly invalidate the Board's rule." See *Contractors License Board-DR 2006-2, District Council 50 Board's Final Order Upon Remand*, p. 9. It is important to note that while the existing administrative rule in Section 16-77-34 has not been invalidated, it is laudable that the Board is attempting to further articulate the intent and meaning of incidental and supplemental. It would be hazardous for this legislative proposal to try to abdicate the work of the Contractors License Board and arbitrarily assign a percentage of what it thinks should be considered incidental and supplemental.

The GCA urges the committee to hold H.B. 1875 and allow the current rulemaking process to take its course. Thank you for this opportunity to present our strong opposition to H.B. 1875.

HB-1875

Submitted on: 1/31/2018 8:32:26 AM

Testimony for LAB on 2/1/2018 9:00:00 AM

Submitted By	Organization	Testifier Position	Present at Hearing
Arnold	Ironworkers Stabilization	Support	Yes

Comments:

Dear Honorable Chair Johanson and Members of the Committee on Labor and Public Employment:

Re: Strong Support for HB 1875 – Relating to Specialty Contractors

We are in strong support of HB 1875, Relating to Specialty Contractors; that establishes an amount for incidental and supplemental work on a construction project.

The purpose of this bill is to ensure that all parties dealing with construction will know that incidental and supplemental work should be done by the subcontractors and that there is a limit to the work that can be done as incidental/supplemental.

Additionally we wish to make an amendment to this bill to ensure the language will be clear to all parties.

The board shall adopt rules pursuant to chapter 91 to define the phrase "incidental and supplemental to the performance of work", as used in subsection (c); provided that the definition shall refer to no more than 10 percent of all work in that subcontractor's contract."

We believe this bill will ensure that the jobs will be done correctly and by trained individuals. We strongly support this measure for the working men and women of Hawaii. Thank you for your time and consideration.