

HR-67

REQUESTING THE
AUDITOR TO CONDUCT
A REVIEW REGARDING
THE PERFORMANCE OF
"INCIDENTAL AND
SUPPLEMENTAL"
CONTRACTING WORK

HOUSE RESOLUTION

REQUESTING THE AUDITOR TO CONDUCT A REVIEW REGARDING THE
PERFORMANCE OF "INCIDENTAL AND SUPPLEMENTAL" CONTRACTING
WORK.

1 WHEREAS, it is of paramount importance to protect public
2 safety and welfare in any sort of construction work; and
3

4 WHEREAS, in construction work, a structural engineer
5 reviews all plans (known as S plans) that deal with the
6 structural integrity of the building, and the structural
7 engineer must approve the plans by stamping and validating these
8 plans; and
9

10 WHEREAS, the C-6, C-31, C-32, C-35, C-38, C-41, C-48, and
11 C-56 specialty subcontractor's license and other similar
12 licenses fall under the purview of a structural engineer and
13 must meet all requirements set forth in national and
14 international standards; and
15

16 WHEREAS, the structural engineer must ensure that
17 subcontractors and workers have sufficient knowledge and
18 experience to work on a construction project; and
19

20 WHEREAS, the case *District Council 50, of the International*
21 *Union of Painters and Allied Trades, et al., v. Lopez*, 298 P.3d
22 1045 (2013), dealt with the issue of whether Allied Pacific, a
23 general contractor performing renovation work at Lanakila
24 Elementary school, could undertake glass work as "incidental and
25 supplemental" to its automatically held C-5 specialty
26 subcontractor license and without a C-22 specialty contractor
27 license; and
28

29 WHEREAS, the Hawaii Supreme Court held that the Contractors
30 License Board of the Department of Commerce and Consumer Affairs
31 erred in its interpretation of what is deemed "incidental and
32 supplemental" in this case; and



1 WHEREAS, the Contractors License Board had erroneously
2 decided that any work that constitutes less than a majority of
3 the work can be deemed "incidental and supplemental" work; and
4

5 WHEREAS, the Contractors License Board has attempted to
6 pass an administrative rule to this effect; and
7

8 WHEREAS, although under chapter 444, Hawaii Revised
9 Statutes, the Contractors License Board has the authority to
10 administer, review, and grant contractors and subcontractors
11 licenses, it may be more useful to have an independent agency,
12 like the Auditor's Office, evaluate the need for new
13 construction licensing requirements; now, therefore,
14

15 BE IT RESOLVED by the House of Representatives of the
16 Twenty-ninth Legislature of the State of Hawaii, Regular Session
17 of 2018, that the Auditor is requested to conduct a review about
18 allowing no "incidental and supplemental" work under the S plans
19 of a structural engineer's purview, including specialty licenses
20 and C-6, C-31, C-32, C-35, C-38, C-41, C-48, and C-56 licenses;
21 and
22

23 BE IT FURTHER RESOLVED that the Auditor is requested to
24 include in the review:
25

- 26 (1) An estimate of the number of licenses granted by the
27 Contractors License Board;
- 28 (2) The possible implications if less than a majority of
29 the work performed is deemed "incidental and
30 supplemental";
31
- 32 (3) An examination of whether there are any public-safety
33 issues involved in the performance of "incidental and
34 supplemental" work;
35
- 36 (4) A review of best practices in construction projects;
37
- 38 (5) An examination of whether regulating individuals
39 rather than companies would better protect public
40 safety and welfare;
41



H.R. NO. 67

1 (6) A review of all construction-project disasters in
2 Hawaii related to this issue; and
3

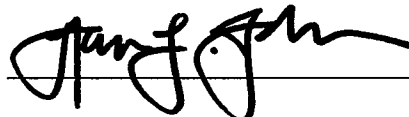
4 (7) Any proposed legislation; and
5

6 BE IT FURTHER RESOLVED that as the Auditor conducts the
7 review, the Auditor is requested to meet with stakeholders
8 regarding this issue, including construction unions,
9 construction companies, structural engineers, steel fabricators
10 and erectors, and trades councils; and
11

12 BE IT FURTHER RESOLVED that no later than 20 days prior to
13 the convening of the Regular Session of 2019, the Auditor is
14 requested to submit to the Legislature a report of the Auditor's
15 findings and recommendations, including any proposed
16 legislation; and
17

18 BE IT FURTHER RESOLVED that certified copies of this
19 Resolution be transmitted to the Auditor, Governor, and Director
20 of Commerce and Consumer Affairs.
21
22
23

OFFERED BY:



MAR - 7 2018



HR-67

TESTIMONY



INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS

Affiliated with A.F.L.-C.I.O.

LOCAL UNION NUMBER 625

94-497 UKEE STREET • WAIPAHU, HAWAII 96797

T.G. Paris
President Emeritus

March 21, 2018

Aaron Ling Johanson, Chair
Committee on Labor & Public Employment

Bertrand Kobayashi, Chair
Committee on Legislative Management
House of Representatives
State Capitol
Honolulu, Hawai`i 96813

RE: HCR82/HR67 REQUESTING THE AUDITOR TO CONDUCT A REVIEW REGARDING
THE PERFORMANCE OF "INCIDENTAL AND SUPPLEMENTAL" CONTRACTING
WORK.

Dear Chair Johanson, Chair Kobayashi, and honorable members:

The Iron Workers, Local 625, AFL-CIO is in **STRONG SUPPORT** of these resolutions.

HCR82/HR67 requests that the auditor conduct a review regarding the performance of "incidental and supplemental" contracting work, especially as it relates to improving **public safety** of projects under the purview of a structural engineer.

We strongly support this bill because we believe in public safety and the safety of our Hawai`i workers. All the work that Ironworkers do in Hawai`i is covered under the "S stamp" of a structural engineer, including steel erection. Steel erection is undisputedly one of the most dangerous work to do in the United States. Steel erection is a trade that commonly experiences a high rate of fatalities. Last year, we lost seven Ironworker brothers to job related industry while performing steel erection across the country. These men perished on the job that was covered under the purview of a structural engineer, or similar, in their various states.

Ironworkers are rigorously trained and go through apprenticeship and journeyman programs that allows them high levels of safety training for steel erection. Even with all that training the job is still extremely dangerous and fatalities happen. Unqualified workers doing structural steel erection is an extreme danger to the workers. Further, unqualified workers doing structural steel erection can lead to shoddy work resulting in property damage, injury, or even fatalities.

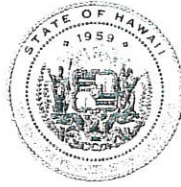
Unqualified workers are doing steel erection right now in our state. As an example, in I filed a complaint with the Regulated Industries Complaints Office (RICO) regarding the unlicensed steel erection on a construction project behind Kaiser Waipio Medical Office (Case No. CLB2015-181-L). In April 29, 2016, RICO informed me that there was "...no licensing violations. The structural steel portion was *incidental and supplemental* to the projects." (emphasis added; *See attached record*). We believe that the Contractors License Board erroneous interpretation of incidental and supplemental will lead towards unwarranted risk, injury, property damage, and even death.

We do not wish to lose anyone at home. Please help us make Hawai`i safer for our people.

Sincerely,

A handwritten signature in black ink, reading "Joseph O'Donnell". The signature is written in a cursive style with a large, sweeping initial "J".

Joseph O'Donnell,
Business Manager, Financial Secretary-Treasurer
Iron Workers Union, Local 625



DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LIEUTENANT GOVERNOR

CATHERINE P. AWAKUNI COLÓN
DIRECTOR
DEPARTMENT OF COMMERCE AND
CONSUMER AFFAIRS

DARIA A. LOY-GOTO
COMPLAINTS AND
ENFORCEMENT OFFICER

STATE OF HAWAII
REGULATED INDUSTRIES COMPLAINTS OFFICE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
LEIOPAPA A KAMEHAMEHA BUILDING
235 SOUTH BERETANIA STREET, NINTH FLOOR
HONOLULU, HAWAII 96813
TELEPHONE: (808) 586-2676
FAX: (808) 587-4382

HILO OFFICE
120 PAUAAHI STREET, SUITE 212
HILO HAWAII 96720

KONA OFFICE
HUALALAI CENTER
75-170 HUALALAI ROAD, ROOM C-309
KAILUA-KONA, HAWAII 96740

MAUI OFFICE
1063 LOWER MAIN STREET, SUITE C-216
WAILUKU, HAWAII 96793

KAUAI OFFICE
3060 EIVA STREET, SUITE 204
LIHUE, HAWAII 96766

April 29, 2016

Mr. Joseph V. O'Donnell
Iron Workers Union Local 625
94-497 Uke'e Street
Waipahu, HI 96797

Dear: Mr. O'Donnell:

RE: Your Complaint Against
RESOLUTE PERFORMANCE
CONTRACTING LLC
Case No. CLB 2015-181-L

B
L-48, 10/2/15
EFF.

The Regulated Industries Complaints Office has completed its investigation of the above complaint. Upon careful review of all available evidence, there appears to be no licensing violations. The structural steel portion was incidental and supplemental to the projects. This case will be closed the case with no further action.

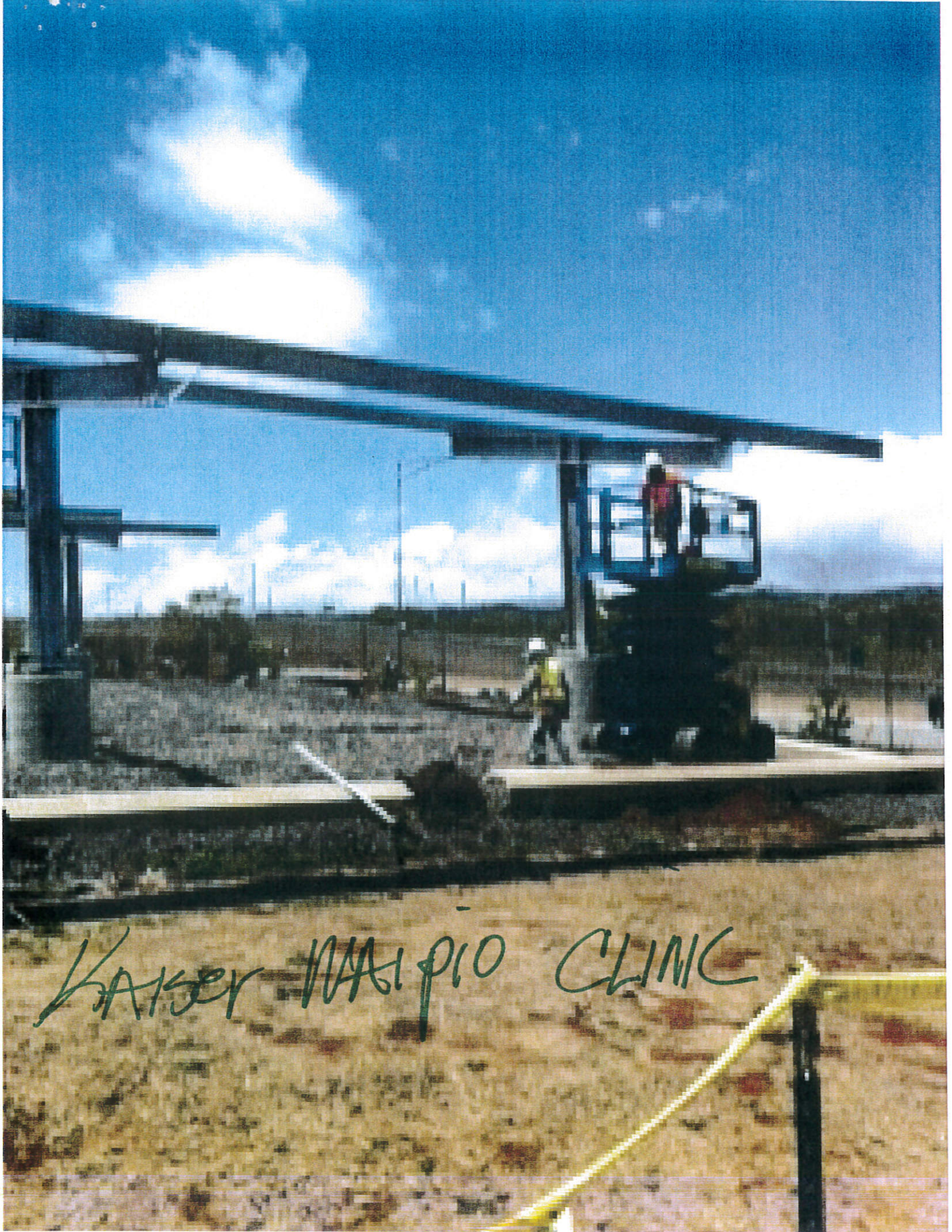
Thank you for sharing your concern with us. If you have any questions, please call me at 586-2678.

Very truly yours,


Bertram Apo
Investigator



HAUSER WAIPIO-CLINIC



KAISER MULTIPRO CLINIC

11/15/51 Wagon Hill



NANA KULI KAUSER CLINIC





WANA KULI Kaiser Clinic



Kaiser's Koolhaas
Clinic



Kaiser Kooka Clinic



KAREN KODAN CLINK



DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LIEUTENANT GOVERNOR

CATHERINE P. AWAKUNI COLÓN
DIRECTOR
DEPARTMENT OF COMMERCE AND
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KAUAI OFFICE
3060 EWA STREET, SUITE 204
LIHUE, HAWAII 96765

May 11, 2017

Joseph V. O'Donnell
94-497 Uke'e Street
Waipahu, Hawaii 96797

Re: RICO Case No. CLB 2015-181-L
Resolute Performance Contracting, LLC; Robert D. Olson

Dear Mr. O'Donnell:

This letter is to update you on the status of your complaint filed with our office. This office entered into a Settlement Agreement Prior to Filing of Petition for Disciplinary Action and Board's Final Order (the "Settlement Agreement"), with Resolute Performance Contracting, LLC, and Robert D. Olson (collectively, "Respondents"). Pursuant to the Settlement Agreement, which was approved by the Contractors License Board on April 13, 2017, Respondents agreed to pay a fine of \$500.00, which has been paid in full. A copy of the Settlement Agreement is enclosed for your files.

We will be placing our file on inactive status at this time. I would like to thank you for referring this matter to our office for handling.

Very truly yours,

WENDY J. UTSUMI
Staff Attorney

WJU:ps

Enclosure (1)

7. Respondents agree that this Settlement Agreement is intended to resolve the issues raised in RICO's investigation in RICO Case No. CLB 2015-181-L.

8. Respondents understand this Settlement Agreement is public record pursuant to Hawaii Revised Statutes chapter 92F.

C. TERMS OF SETTLEMENT:

1. Administrative fine. Respondents collectively agree to pay a fine in the amount of FIVE HUNDRED AND NO/100 U.S. DOLLARS (\$500.00). Payment shall be made by **cashier's check or money order made payable to "DCCA - Compliance Resolution Fund"** and mailed to the Regulated Industries Complaints Office, Attn.: Wendy J. Utsumi, Esq., 235 S. Beretania Street, 9th Floor, Honolulu, Hawaii 96813. Payment of the fine shall be due at the time this Settlement Agreement is returned to RICO.

2. Failure to Comply with Settlement Agreement. If Respondents fail to fully and timely comply with the terms of this Settlement Agreement as set forth in paragraph C.1 above, Respondents' licenses shall be automatically revoked upon RICO's filing of an affidavit with the Board attesting to such failure. In case of such revocation, Respondents shall turn in all indicia of the license to the Executive Officer of the Board within ten (10) days after receipt of notice of the revocation. In case of such revocation, Respondents understand Respondents cannot apply for a new license until the expiration of at least five (5) years after the effective date of the revocation. Respondents understand that if Respondents desire to become licensed again, Respondents must apply to the Board for a new license pursuant to and subject to HRS §§ 92-17, 436B-21, and all other applicable laws and rules in effect at the time.

3. Possible further sanction. The Board, at its discretion, may pursue additional disciplinary action as provided by law to include further fines and other sanctions as the Board may deem appropriate if Respondents violate any provision of the statutes or rules governing the conduct of contractors in the State of Hawaii, or if Respondents fail to abide by the terms of this Settlement Agreement.

4. Approval of the Board. Respondents agree that, except for the representations, agreements and covenants contained in Paragraphs C.5, C.6, C.7 and C.8 below, this Settlement Agreement shall not be binding on any of the parties unless and until it is approved by the Board.

5. No Objection if Board Fails to Approve. If the Board does not approve this Settlement Agreement, does not issue an order pursuant thereto, or does not approve a lesser remedy, but instead an administrative hearing is conducted against Respondents in the Board's usual and customary fashion pursuant to the Administrative Procedure Act, Respondents agree that neither Respondents nor any attorney that Respondents may retain, will raise as an objection in any administrative proceeding or in any judicial action, to the Board's proceeding against Respondents on the basis that the Board has become disqualified to consider the case because of its review and consideration of this Settlement Agreement.


Ambiguities Shall be Construed to Protect the Consuming Public. It is agreed in this Settlement Agreement is to be read in the manner that most completely protects of the consuming public.

No Reliance on Representations by RICO. Other than the matters specifically in this Settlement Agreement, neither RICO nor anyone acting on its behalf has made any representation of fact, opinion or promise to Respondents to induce entry into this Settlement Agreement, and Respondents are not relying upon any statement, representation or opinion or promise made by RICO or any of its agents, employees, representatives or attorneys concerning the nature, extent or duration of exposure to legal liability arising from the subject matter of this Settlement Agreement or concerning any other matter.

8. Complete Agreement. This Settlement Agreement is a complete settlement of the rights, responsibilities and liabilities of the parties hereto with respect to the subject matter hereof; contains the entire agreement of the parties; and may only be modified, changed or amended by written instrument duly executed by all parties hereto.

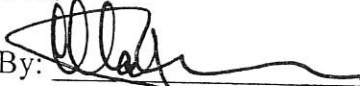
IN WITNESS WHEREOF, the parties have signed this Settlement Agreement on the date(s) set forth below.

DATED: Honolulu, HI, 3-28-17.
(CITY) (STATE) (DATE)



ROBERT D. OLSON
Respondent

DATED: Tempe, Arizona, 3/23/17.
(CITY) (STATE) (DATE)

RESOLUTE PERFORMANCE CONTRACTING,
INC.

By: 
Its MALCOLM PERSEN, PRESIDENT
Respondent

DATED: Honolulu, Hawaii, MAR 29 2017.


WENDY J. UTSUMI
Attorney for Department of Commerce and
Consumer Affairs

HR-67

Submitted on: 3/19/2018 10:14:07 PM

Testimony for LAB on 3/21/2018 3:15:00 PM

| Submitted By | Organization | Testifier Position | Present at Hearing |
|---------------------|---------------------|---------------------------|---------------------------|
| Karin Nomura | Individual | Support | No |

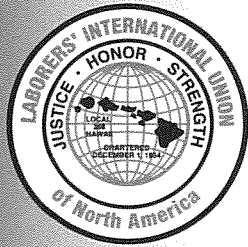
Comments:

As someone who recently went through an incident that involved construction being conducted on a neighboring property, albeit not an “incidental and supplemental” project, feel that engineers “must ensure that subcontractors and workers have sufficient knowledge and experience to work on a construction project” – and for **all** construction projects requiring a permit. That the safety of the workers, and any within the surrounding area of the construction site are paramount.

That said, fully support and hope that “A review of all construction-project disasters in Hawaii” not just those related to “incidental and supplemental” will be reviewed, along with the review of the “best practices in construction projects”. I know one item that I’d like to see all construction sites that have the potential of damaging, impacting or harming those outside of their projects done – ensure that they have to provide the name of the company or person of contact and a telephone number to.

HR-67

**LATE
TESTIMONY**



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

LATE

COMMITTEE ON LABOR

NOTICE OF HEARING

DATE: Wednesday, March 21, 2018

TIME: 3:15 p.m.

PLACE: Room 423

**TESTIMONY IN OPPOSITION TO HCR 82/HR67 REQUESTING THE
AUDITOR TO CONDUCT A REVIEW REGARDING THE
PERFORMANCE OF "INCIDENTAL AND SUPPLEMENTAL "
CONTRACTING WORK.**

**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 **OPPOSE HCR82/HR67.**

First, we disagree with the fact that the Contractors License Board (CLB) erroneously decided that any work that constitutes less than a majority of the work can be deemed "incidental and supplemental" work. When in fact, it was the Hawaii State Supreme Court who in DC50 v. Lopez, interpreted the term "incidental and supplemental" in Chapter 444 as "less than a majority". This was a decision made by the Hawaii State Supreme Court and not the CLB. The CLB merely complied with the court's orders.

Secondly, we disagree that the State Auditor's Office is the appropriate governmental agency to perform any perceived study with regard which trades or license classifications should require a "stamp" from the structural engineer. Construction and/or license classifications are highly

LIUNA Local 368
1617 Palama Street
Honolulu, HI 96817
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Feel the Power

technical and specialized areas of knowledge, to ask an agency or office who does not regularly deal in those areas of specific knowledge to deliver an opinion or study not in their specific area of expertise is risky at best not only for the industry as a whole, but to the proponents of such a study as well.

Therefore for the above reasons, we **OPPOSE HCR82/HR67**.

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

March 21, 2018

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

HONORABLE BERT KOBAYASHI, CHAIR, HONORABLE MARK NAKASHIMA, VICE CHAIR AND MEMBERS OF THE HOUSE COMMITTEE ON LEGISLATIVE MANAGEMENT

SUBJECT: **OPPOSITION TO HCR 82/HR 67.** REQUESTING THE AUDITOR TO CONDUCT A REVIEW REGARDING THE PERFORMANCE OF INCIDENTAL AND SUPPLEMENTAL CONTRACTING WORK

HEARING

DATE: March 21, 2018
TIME: 3:15 PM
PLACE: Conference Room 423



Dear Chair Johanson, Chair Kobayashi, Vice Chair Holt, Vice Chair Nakashima and Members of the Committees,

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 opposition to HCR 82 and HR 67 because it is proposing that the Auditor, who may have little to no construction background to do a study on the performance of incidental and supplemental work as it relates to the construction industry. The GCA was strongly against H.B. 1875 which proposed 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. This Resolution is directly related to the proposed legislation. The GCA respectfully **requests these Resolutions 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*.

The Resolutions are flawed and an Auditor's assessment could create confusion.

This measure alleges false statements as to the Contractors License Board's Action and the decision of the Supreme Court. Further, the Resolution calls out eight C speciality licenses without any justification as to why those six should be precluded from doing incidental and supplemental work.

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 for the legislature to allow the process to take its course which intimately involves input from the construction industry and was recommended after unanimous approval by the Contractors License Board.**

Any proposed changes to the term incidental and supplemental may haphazardly amend what incidental and supplemental means by quantifying "incidental and supplemental" with a certain percentage or carving it out for specific C specialty licenses. The Board has acknowledged in its Final Order Upon Remand, in subsequent court filings, and scope determinations that the Board 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 Current Proposed Rule

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." Contractors License Board-DR 2006-2, District Council 50 Board's Final Order Upon Remand, p. 9.

The GCA urges the committee to defer these Resolutions as the application of the incidental and supplemental test has been ongoing since the 2013 Supreme Court ruling and has not resulted in any catastrophic event mandating legislative action.

LATE

LATE (or updated) TESTIMONY

for Measure: HCR 82/HR 67

| | |
|-------------------------------|--|
| Committee | LAB / LMG |
| Committee Referrals | LAB / LMG, FIN |
| Date of Hearing | 03-21-18 |
| Organization | Alpha Steel Corp |
| Name of Testifier | ED Hoo |
| Job Title of Testifier | President |
| Position – Circle One | <input checked="" type="checkbox"/> Support / Oppose / Comments |
| Category – Circle One | Fed Govt. / State Govt. / County Govt. <input checked="" type="checkbox"/> Industry / Private Citizen |
| Notes: | |