



DAVID Y. IGE  
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JOSH GREEN  
LT. GOVERNOR

**STATE OF HAWAII  
OFFICE OF THE DIRECTOR  
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**

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**Testimony of the Department of Commerce and Consumer Affairs**

**Before the  
Senate Committee on Commerce and Consumer Protection  
Wednesday, February 23, 2022  
9:30 a.m.  
Via Videoconference**

**On the following measure:  
S.B. 2709, S.D.1, RELATING TO CONTRACTORS**

Chair Baker and Members of the Committee:

My name is Esther Brown, and I am the Complaints and Enforcement Officer of the Department of Commerce and Consumer Affairs' (Department), Regulated Industries Complaints Office (RICO). The Contractor Licensing Board is the regulatory authority over licensed contracting in the State, and RICO defers to and supports the Contractor Licensing Board's long-standing role in interpreting and promulgating guidelines on what constitutes "incidental and supplemental" work by licensed subcontractors. As the enforcement arm for the Contractor Licensing Board, RICO offers limited comments on the enforceability of certain language contained in this bill.

The purpose of this bill is to clarify the extent of incidental and supplemental work a specialty contractor may perform in other crafts or trades it is not licensed in, by requiring that the work be substantially less than and only incidental and supplemental to the cost and extent of work performed in the craft or trade that the specialty contractor is licensed.

RICO submits that the S.D.1's "substantially less than" language (line 9) inserts another factor into the mix despite the Contractor Licensing Board's firmly-established policy and guideline regarding how much out-of-scope "incidental and supplemental" work is permissible for the specialty contractor. The additional factor is vague and confusing, and potentially problematic to enforcement.

Enforcement action against licensees must comport with due process, and due process requires the State provide adequate notice of a prohibition or condition. In contrast to the certain, numerical benchmark that is currently used and relied upon by the Contractor's Licensing Board to determine permissible incidental and supplemental work, RICO submits that the new "substantially less than" language falls at the opposite extreme. The phrase could potentially mean anything in its inherent vagueness, and may therefore not meet the minimal level of due process that industry tradespersons are entitled to rely upon so that they understand and can conform their behavior to the law. A well-meaning and intentioned specialty contractor, for example, could easily run afoul of this provision inadvertently depending on the specific facts and circumstances underlying the incidental and supplement work they performed. For this reason, were RICO to take enforcement action against such a licensee based on the amorphous "substantially less than" standard, the enforcement action may be vulnerable to attack for lack of adequate notification.

The "substantially less than" language is concerning for two additional reasons. First, it could lead to arbitrary or even contradictory results because no one will know what it means. Second, it may end up costing everyone in the long run as it could take years of litigation and a new body of case law and Contractor Licensing Board decisions, to figure it out.

Thank you for the opportunity to testify on this bill.

## Testimony of the Contractors License Board

Before the  
Senate Committee on Commerce and Consumer Protection  
Wednesday February 23, 2022  
9:30 a.m.  
Via Videoconference

On the following measure:  
**S.B. 2709, S.D. 1, RELATING TO CONTRACTORS**

Chair Baker and Members of the Committee:

My name is Neal Arita, and I am the Legislative Committee Chairperson of the Contractors License Board (Board).

The purpose of this bill is to clarify that a licensed specialty contractor may perform incidental and supplement work in crafts or trades other than in which the specialty contractor is licensed, provided that when measured by the cost and extent of work involved in executing the specialty contract's work, the performance of the unlicensed work is substantially less than and only incidental and supplemental to the performance of work in the craft for which the specialty contractor is licensed.

The Board will review this bill at its next publicly noticed meeting on February 25, 2022. The Board has testified in strong opposition to similar measures that propose to define "incidental and supplemental" work.

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.<sup>1</sup> The Board 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.,

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<sup>1</sup> 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").

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).

S.D. 1 fails to take into account key factors that the Board considers when determining "incidental and supplemental" work. "Incidental and supplemental" work is work that 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 and that work must also represent less than a majority of the project. The S.D. 1 includes an ambiguous phrase "substantially less than", on line 9. There is no standard for the phrase "substantially less than". This alone will cause significant uncertainty among the licensed contractors and their ability to determine whether work is "incidental and supplemental" work.

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 this bill.

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

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

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February 23, 2022

Testimony To: Senate Committee on Commerce and Consumer Protection  
Senator Rosalyn H. Baker, Chair

Presented By: Tim Lyons, President

Subject: S.B. 2709, SD 1 – RELATNG TO CONTRACTORS.

Chair Baker 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 have comments (one) on this bill.

What is "substantially less than"?

We think this will just add confusion.

Thank you.

# IRON WORKERS STABILIZATION FUND

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February 23, 2022  
9:30 am

Senate Committee on Commerce and Consumer Protection  
Via Videoconference  
State Capitol  
415 S. Beretania Street

Re: Support for SB 2709 SD 1 – Relating to Contractors

Aloha Chair Baker, Vice Chair Chang and Members of the Senate Committee:


We are in **support** of SB 2709 SD 1, Relating to Contractors. First, it should be recognized that this is not a union issue, but a public safety issue. The proposed draft will only codify the language in Hawaii Administrative Rule and the Supreme Court Decision District Council 50 v. Lopez, 129 Hawaii 281, 298 P.3d 1045 (2013).

Second, it should be recognized that the term “incidental and supplemental” is to apply only when there are two specialty contractors involved. Under the well-established 2002 OkadaTrucking vs Board of Water Supply #22956, 40 P.3d 73 (2002), 97 Hawai`i 450, ruling which was established by the Hawaii Supreme Court, general contractors are prohibited from using this “incidental and supplemental” to take on work in a specialty for which they are not licensed. This bill will deal with the cost and extent and only allow incidental work that is related to the subcontractor’s work.

While examining this proposal, it should be kept in mind that the specialty contractor who would be able to avail himself or herself of the term “incidental and supplemental”, would be performing work that he or she is not licensed for. Again, we desire that this bill add a section to limit the incidental and supplemental work to 5% of the subcontractor’s work. This will ensure that it is by the subcontractor’s work and not the entire project. This will ensure the overriding public policy of HRS Chapter 444 of “protecting” the safety of the public.

Thank you for your time and consideration

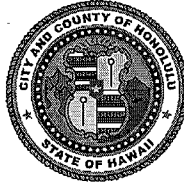
Sincerely,

  
T. George Paris  
Managing Director

DEPARTMENT OF PLANNING AND PERMITTING  
**CITY AND COUNTY OF HONOLULU**

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RICK BLANGIARDI  
MAYOR



DEAN UCHIDA  
DIRECTOR

DAWN TAKEUCHI APUNA  
DEPUTY DIRECTOR

EUGENE H. TAKAHASHI  
DEPUTY DIRECTOR

February 23, 2022

**LATE**

The Honorable Rosalyn H. Baker, Chair  
and Members of the Committee on Commerce  
and Consumer Protection  
Hawaii State Senate  
Hawaii State Capitol  
415 South Beretania Street  
Honolulu, Hawaii 96813

Dear Chair Baker and Committee Members:

**Subject: Senate Bill No. 2709, SD 1  
Relating to Contractors**

The Department of Planning and Permitting (DPP) **opposes** Senate Bill No. 2709, SD 1, which seeks to clarify that a licensed specialty contractor may take and execute a contract involving the use of two or more crafts and trades.

The Bill allows work by other crafts or trades only if that work is “substantially less” compared to “the cost and extent of work involved.” The term “substantially less” is vague and open to interpretation. The costs for incidental and supplemental work will often far exceed the main specialty contractor’s work.

For example, the installation of a split air conditioning (AC) system might require upgrades to the home’s electrical meter, the electrical feeder line, and the main junction box. These electrical upgrades may equal or even exceed the costs of the main specialty contractor’s work. A similar condition might also apply to a photovoltaic contractor’s work in requiring an upgrade to the home’s main electrical service.

For the reasons stated above, we ask that Senate Bill No. 2709, SD 1, be held in Committee. Thank you for the opportunity to testify.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dean Uchida".

Dean Uchida  
Director