

MAR 18 2009

S.C.R. NO. 162

SENATE CONCURRENT RESOLUTION

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.

1 WHEREAS, the Contractors License Board is vested with broad
2 authority to issue licenses to contractors and to ensure that
3 contractors are qualified to undertake the work for which they
4 are licensed; and

5
6 WHEREAS, the Contractors License Board classifies the types
7 of licenses it issues as:

- 8
9 (1) General engineering contractor;
10
11 (2) General building contractor; and
12
13 (3) Specialty contractor; and
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15 WHEREAS, the Hawaii Supreme Court in *Okada Trucking Co.,*
16 *Ltd. v. Board of Water Supply, City and County of Honolulu and*
17 *Inter Island Environmental Services, Inc.*, 97 Hawai'i 450 (2002),
18 made several significant holdings that clarified the treatment
19 of bid proposals submitted by contractors on state and county
20 projects; and

21
22 WHEREAS, in *Okada*, the Hawaii Supreme Court held that a
23 general contractor's bid for a board of water supply booster
24 station project was nonresponsive because it required work by a
25 licensed plumbing (specialty) contractor, which was work that
26 the general contractor was not authorized to perform under the
27 general contracting licenses that it held; and

28
29 WHEREAS, in *Okada*, the Hawaii Supreme Court also held that
30 a general engineering or building contractor is prohibited from
31 undertaking any work, solely or as part of a larger project,



1 that would require it to act as a specialty contractor in an
2 area in which the general contractor was not licensed to
3 operate; and
4

5 WHEREAS, in *Okada*, the Hawaii Supreme Court noted that a
6 specialty contractor, as opposed to a general contractor, is
7 permitted to undertake work involving the use of crafts or
8 trades for which the specialty contractor is not licensed, so
9 long as the performance of the work in those crafts or trades is
10 "incidental and supplemental" to the performance of work in the
11 craft for which the specialty contractor is licensed; and
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13 WHEREAS, the term "incidental and supplemental" is defined
14 as work in other trades directly related to and necessary for
15 the completion of the project undertaken by a licensee pursuant
16 to the scope of the licensee's license; and
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18 WHEREAS, in the years since the *Okada* opinion, the
19 Contractors License Board has permitted contractors, on several
20 occasions, to submit bid proposals that failed to identify
21 specialty subcontractors that would be engaged, even in
22 situations where the invitation for bids clearly indicated that
23 the construction projects involved would require substantial
24 amounts of specialty contracting work; and
25

26 WHEREAS, in these cases, the Contractors License Board has
27 ruled that the specialty contracting work required in these
28 projects was merely "incidental and supplemental" to the
29 licenses held by the bidding contractors; and
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31 WHEREAS, the Contractors License Board's application of the
32 term "incidental and supplemental" appears to contradict the
33 Hawaii Supreme Court's holdings in *Okada*; now, therefore,
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35 BE IT RESOLVED by the Senate of the Twenty-fifth
36 Legislature of the State of Hawaii, Regular Session of 2009, the
37 House of Representatives concurring, that the Department of
38 Commerce and Consumer Affairs is requested to convene a task
39 force for the purpose of determining how the term "incidental
40 and supplemental" should be interpreted and applied in the
41 bidding process; and
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43 BE IT FURTHER RESOLVED that the Legislature requests that
44 the task force consist of seven members designated as follows:



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- 1
- 2 (1) Three members appointed by the Governor;
- 3
- 4 (2) Two members appointed by the President of the Senate;
- 5 and
- 6
- 7 (3) Two members appointed by the Speaker of the House of
- 8 Representatives; and
- 9

10 BE IT FURTHER RESOLVED that the members of the task force
 11 are requested to select a chairperson from among themselves; and
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13 BE IT FURTHER RESOLVED that the Department of Commerce and
 14 Consumer Affairs is requested to report the findings and
 15 recommendations of the task force, including any proposed
 16 legislation, to the Legislature not later than twenty days prior
 17 to the convening of the Regular Session of 2010; and
 18

19 BE IT FURTHER RESOLVED that certified copies of this
 20 Concurrent Resolution be transmitted to the Governor, the
 21 Director of Commerce and Consumer Affairs, the President of the
 22 Senate, the Speaker of the House of Representatives, and the
 23 Chairperson of the Contractors License Board.
 24

25 OFFERED BY: _____

26 *[Handwritten signature]*

[Two large handwritten signatures below the line]



LINDA LINGLE
GOVERNOR
JAMES R. AIONA, JR.
LT. GOVERNOR

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**PRESENTATION OF THE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS**

TO THE SENATE COMMITTEE ON COMMERCE AND CONSUMER PROTECTION

TWENTY-FIFTH STATE LEGISLATURE
REGULAR SESSION of 2009

Friday, April 3, 2009
9:30 a.m.

WRITTEN TESTIMONY ONLY

**TESTIMONY ON SENATE CONCURRENT RESOLUTION NO. 162, 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.**

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Lawrence Reifurth, and I am the Director of the Department of Commerce and Consumer Affairs ("Department"). Thank you for the opportunity to testify **in opposition to** Senate Concurrent Resolution No. 162 ("S.C.R. No. 162"), which requests that the Department convene a task force to determine how the term "incidental and supplemental" should be interpreted and applied in the bidding process.

The task force would consist of seven members; three members appointed by the Governor, two members appointed by the President of the Senate, and two

members appointed by the Speaker of the House of Representatives. The Department must then report the findings of the task force to the Legislature.

The purpose of the task force appears to duplicate the function of the Contractors License Board ("Board"), and the resolution implies that a task force is needed because the Board's interpretations have run counter to the Hawaii Supreme Court's opinion in the *Okada Trucking Co., Ltd. v. Board of Water Supply* (2002) case. The Department believes these concerns are unfounded, as the Board's deputy attorney general has confirmed that the Board's interpretations do not contradict the Hawaii Supreme Court's opinion in the *Okada* case, and that the creation of a task force to look into this matter is not necessary. Furthermore, the focus of the resolution has to do with how these interpretations affect the bidding process, which is not within the jurisdiction of this Department.

Thank you for the opportunity to testify on S.C.R. No. 162.

**PRESENTATION OF THE
CONTRACTORS LICENSE BOARD**

TO THE SENATE COMMITTEE ON
COMMERCE AND CONSUMER PROTECTION

TWENTY-FIFTH LEGISLATURE
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**TESTIMONY ON SENATE CONCURRENT RESOLUTION NO. 162, REQUESTING
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INTERPRETATION AND APPLICATION OF THE TERM “INCIDENTAL AND
SUPPLEMENTAL” WITH REGARD TO THE CONTRACTING BUSINESS.**

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND MEMBERS OF THE COMMITTEE:

The Contractors License Board (“Board”) appreciates the opportunity to testify **in opposition to** Senate Concurrent Resolution No. 162 (“SCR No. 162”), which requests that a task force be convened to determine the appropriate application of the term “incidental and supplemental” with regard to contractors.

The Board questions the need for a task force, as it 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 31 through 33, 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 SCR No. 162 apparently arose because the Board did not determine that it was a violation of its statute for a contractor holding the C-5 (Cabinet, millwork, and carpentry remodeling and repairs) classification to perform work incidental and supplemental to its remodeling work. This does not contradict the Hawaii Supreme Court's holding that a specialty contractor, as opposed to a general contractor, is permitted to undertake work involving the use of crafts or trades for which the specialty contractor is not licensed, provided that such work is "incidental and supplemental" to the work for which the specialty contractor is licensed. 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.

The purpose of this resolution appears to be to force the C-5 contractor to subcontract portions of its work to contractors holding other specialty classifications, although it is the only specialty classification that specifically mentions its authority to perform incidental and supplemental work in its description. Where does one draw the line on a remodeling project? Since electrical and plumbing work requires a permit and trade licenses, such work must be subcontracted out. However, must the flooring be subcontracted out because the C-5 contractor does not hold the C-21 (Flooring) classification? Must the painting work be subcontracted out because the C-5 contractor does not hold the C-33 (Painting) classification? Must drywall repair be subcontracted

to the C-12 (Drywall) contractor? Furthermore, to obtain these additional classifications, four years of experience in each classification is required; therefore, it will be onerous to require the C-5 contractor to do so.

The Board believes that it is within its jurisdiction to render these decisions, that it is able to do so objectively, and that it has done so without contradicting the Hawaii Supreme Court's holdings in *Okada*. The purpose of the Board and its statutes and rules is for the protection of the public. We do not want to see a task force put together merely for the sake of resolving bidding disputes and turf battles, without consumer protection as its priority and purpose.

Thank you for the opportunity to testify on SCR No. 162.

SAH - Subcontractors Association of Hawaii

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April 3, 2009

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

Presented By: Tim Lyons, President

Subject: SCR 162 – 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 Baker 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.