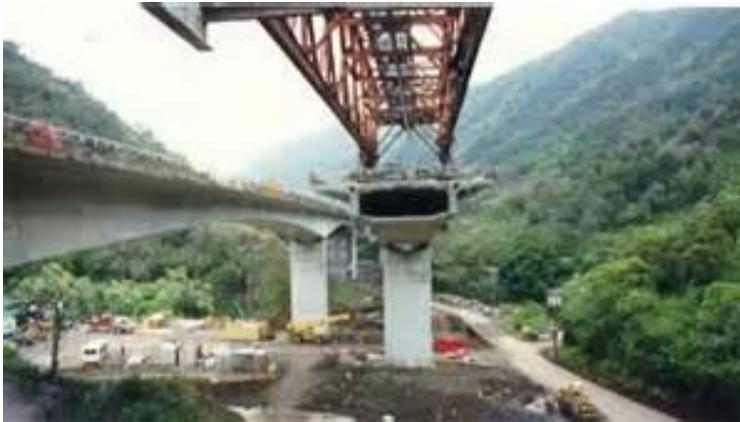


OKADA TRUCKING: HOW THE SUPREME COURT REDEFINED WHAT IT MEANS TO BE A GENERAL CONTRACTOR IN HAWAII



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JUDICIAL LIMITS ON THE SCOPE OF THE HAWAII GENERAL CONTRACTOR LICENSE: LONG LASTING EFFECTS OF THE OKADA TRUCKING DECISION

I. INTRODUCTION

The scope of work a general contractor licensed in Hawaii may legally self-perform underwent a dramatic reduction when the *Okada Trucking* decision was first decided by the Hawaii Supreme Court in 2002.¹ Today, over a decade after the decision was entered, the *Okada Trucking* case continues to reverberate through the construction industry, affecting nearly every project requiring a contractor's license, and greatly impacting public construction procurement. While the language of Hawaii's licensing laws appears to endow general contractors with the legal right to perform a broad scope of construction work, judicial interpretation of the contractor licensing statutes and accompanying administrative rules – starting with the *Okada Trucking* decision, and continuing with the District Council 50 case that is still working its way through the appellate courts – have increasingly restricted the scope of work that can be legally self-performed by general building contractors in Hawaii. This paper examines the law existing when *Okada Trucking* was first decided, considers the case's impact on the construction industry and on developing contractor license law, and compares and contrasts the *Okada Trucking* decision with the interpretation of similar laws in other states.

II. LICENSING LAW IN HAWAII: BACKGROUND

In 1957, Hawaii's contractor licensing statutes were promulgated as Act 305. The statute is now contained in Chapter 444 of the Hawaii Revised Statutes. The stated purpose of the legislation when enacted was to protect the public from dishonest, fraudulent, unskilled, or otherwise unqualified contractors.²

¹ *Okada Trucking Co., Ltd. v. Board of Water Supply*, 97 Haw. 450, 40 P.3d 73 (2002).

² Hse. Stand. Comm. Rpt. 618 on H.B. 423, Regular Session of 1957.

Haw. Rev. Stat. Ch. 444 governs contractor licensing in Hawaii.³ Haw. Rev. Stat. Ch. 436B governs all professional and vocational licenses required by law to be regulated by a licensing authority.⁴ Because of the broad comprehensive licensing scheme enacted by the state's contractor licensing statutes, the state has been deemed the sole regulator of the professional qualifications of contractors.⁵ Many aspects of Hawaii's licensing laws are identical to and appear to have been patterned after California contractor licensing statutes.⁶ For this reason, it has been argued that California courts' interpretation of identical law should be persuasive in the absence of Hawaii precedent.⁷

Hawaii's contractor license law imposes heavy penalties on unlicensed contractors. Licensees who contract outside the appropriate scope of their classifications will be fined \$500 for the first offense, \$1000 for the second offense, and not less than \$1500 or more than \$2000 for any subsequent offense. Licensees who aid and abet an unlicensed contractor, or enter into a contract with an unlicensed contractor, will be fined up to \$25,000 or up to the full

³ HAW. REV. STAT. CH. 444 (1993).

⁴ HAW. REV. STAT. § 436B-3(a) (1993). The provisions of Chapter 436B apply whenever the provisions of the licensing laws for the respective profession or vocation are silent. *Id.* § 436B-3(b).

⁵ *In re Application of Anamizu*, 52 Haw. 550, 554, 481 P.2d 116, 119 (1971) ("It is apparent from the pervasiveness of the above statutory scheme that the State has taken great care to supervise the qualifications of persons engaged as contractors within the State of Hawaii . . . [and] [t]his permission may not be circumscribed by local authorities through the enactment of additional qualifying regulations.").

⁶ *See, e.g.*, Cal. Bus. & Prof. Code §§ 7057 & 7058 (West 1992).

⁷ *See, e.g.*, *S. Utsunomiya Enters., Inc. v. Moomuku Country Club*, 75 Haw. 480, 505 n.10, 866 P.2d 951, 964 n.10 (1994) ("California courts' interpretation of California's *lis pendens* statutes [are] particularly relevant" in interpreting Hawaii's statute, in light of the similarity between the statutes); *see generally* *Cowan v. First Ins. Co. of Haw., Ltd.*, 61 Haw. 644, 608 P.2d 394 (1980) (adoption of another state's statute encompasses that state's judicial construction of statute unless contrary intent appears); *In re Sawyer*, 41 Haw. 270 (Terr. 1956) (adoption by territorial legislature of a statute of another jurisdiction carries with it the judicial interpretation of the statute by that jurisdiction).

amount of the contract price for each offense, whichever is greater.⁸ Any person who violates or fails to comply with any of the provisions of the licensing chapters will be fined not less than \$100 and not more than \$5000 for each violation; provided that persons who act or advertise as contractors without having a proper license shall be fined \$2500 or 40 percent of the total contract price, whichever is greater, for the first offense; \$3500 or 40 percent of the total contract price, whichever is greater, for the second offense; and \$5000 or 40 percent of the total contract price, whichever is greater, for any subsequent offense.⁹

In addition, the legislature imposes a forfeiture penalty for unlicensed contractors, codified at Haw. Rev. Stat. § 444-23.5, and entitled “[f]orfeiture of property for unlicensed activity.” Pursuant to this statute, if an investigator finds that a person has engaged in unlicensed contracting, a notice of forfeiture of property used by that person to engage in unlicensed activity can be issued. This means that an unlicensed contractor’s tools, equipment, and other materials can be forfeited. The statute sets forth the procedural requirements for forfeiture, including service of the notice, entitlement to an administrative hearing on the issue of forfeiture (followed by the right to appeal to the appropriate court for review of the administrative findings), and disposition of the forfeited property. Proceeds of the sale of the forfeited property will be used to fund the cost of the forfeiture process.¹⁰

In 2012, the legislature enacted criminal legislation codifying the misdemeanor offense of contracting without a license, or representing that one was a licensed contractor without possessing a valid contractor’s license. Each day after receipt of notice of unlicensed

⁸ HAW. REV. STAT. § 444-23 (Supp. 2012).

⁹ *Id.*

¹⁰ HAW. REV. STAT. § 444-23.5(l)-(m) (Supp. 2012).

activity constitutes a separate offense. The same statute elevated the crime to a felony for repeat offenders.¹¹

In addition to the above, failure to be licensed properly prior to contracting will prevent recovery in a civil action for work done, or materials or supplies furnished, or both, under a contract or quantum meruit theory of recovery.¹² This includes situations in which the owner knows that the contractor is not licensed but enters into the contract anyway.¹³

III. HAWAII'S CONTRACTORS LICENSE STATUTE: DEFINITION OF A GENERAL BUILDING CONTRACTOR

The fundamental starting point for interpreting a statute is the language of the statute itself.” *State of Hawaii v. Briones*, 71 Haw. 86, 92, 784 P.2d 860, 863 (1989).

The court’s primary duty in interpreting statutes is to ascertain and give effect to the legislature’s intention and to implement that intention to the fullest degree. Moreover, in the absence of clear legislative intent to the contrary, the legislature’s intention is primarily obtained from the language of the statute itself, although legislative history may still be considered. And where there exists no ambiguity in the language of the statute, the statute must be given effect according to its plain and obvious meaning.

Id. at 92, 784 P.2d at 863 (emphasis added). The definition of “general contractor” under Hawaii’s contractor licensing statute has remained the same since its first enactment. Haw. Rev. Stat. § 444-7(c) provides as follows:

(c) A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of more than two

¹¹ 2012 HAW. SESS. LAWS ACT 244 (codified at HAW. REV. STAT. §§ 708-8300 – 708-8305 (Supp. 2012)).

¹² See HAW. REV. STAT. §§ 444-22 (1993) & 507-49(b) (2006); *Wagner v. World Botanical Gardens, Inc.*, 126 Haw. 190, 268 P.3d 443 (App. 2011).

¹³ See *Butler v. Obayashi*, 71 Haw. 175, 785 P.2d 1324 (1990).

unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

Haw. Rev. Stat. § 444-7(c) (emphasis added). The plain language of the statute states that when the project requires the use of more than two unrelated building trades or crafts, a general building contractor may “do or superintend the whole or any part thereof.” *Id.* (emphases added). The dictionary definition of “do” is, *inter alia*, to “perform; execute.” WEBSTER’S NEW COLLEGIATE DICTIONARY 332 (150th Anniversary ed. 1981).

IV. CONTRACTORS LICENSE BOARD

Chapter 444 requires the creation of a Contractors License Board. The Board consists of thirteen members, and by statute, ten of whom shall be contractors (five general engineering or building contractors and five specialty contractors), and three shall be non-contractors.¹⁴ Haw. Rev. Stat. § 444-8(a) afforded the Contractor License Board the authority to create rules to limit the field and scope of the operations of a contractor to its licensed activity, but only as defined in section 444-7.¹⁵

The first meeting of the Contractors License Board was held on August 22, 1958. At that first meeting of the Board, an inquiry was raised regarding the statutory definition of a General Building Contractor. The minutes of that first meeting state as follows:

¹⁴ HAW. REV. STAT. § 444-3 (1993).

¹⁵ HAW. REV. STAT. §444-8(a) states:

“(a) The contractors license board may adopt rules and regulations necessary to effect the classification of contractors in a manner consistent with established usage and procedure as found in the construction business **and may limit the field and scope of the operations of a licensed contractor to those which the contractor is classified and qualified to engage, as defined in section 444-7.**”

(emphasis added).

That has reference to the three types of contractors as explained in Act 305, Section 6. This merely brings forth the intent of the Legislators in describing the three types of contractors. **The ruling of the Board in constructing what they thought was the intent of the Act in describing a General Building Contractor was that a General Building Contractor shall not take a prime contract unless the same requires more than two unrelated trades or crafts, or unless he has qualified for the particular specialty classification he is bidding.** Act 305 specifically states that a contractor can be licensed in more than one classification and will not be charged an additional fee. **In the main, it could be explained better this way. A General Building Contractor will be restricted from bidding just a painting job unless he is also licensed as a painter.** It is felt by the Board that that is the interpretation intended by the Legislators.

Contractors License Board Meeting Minutes, August 22, 1958 (emphases added). In other words, in its first meeting, the Contractors License Board clarified its interpretation of the scope of a general contractor license: if the work involved requires more than two specialty trades or crafts, the general building contractor can contract for or do the entire job. If the work involves less than three specialty trades or crafts, the general building contractor can only bid the job if it possesses the specialty license(s) required for the job.

V. 1983 HAWAII'S LICENSING LAW AUDIT

In 1977, Hawaii's legislature enacted Sunset Laws, or the Hawaii Regulatory Licensing Reform Act of 1977 (now Haw. Rev. Stat. § 26H-6), which when first enacted, scheduled 38 occupational licensing programs for termination over a six-year period. In 1978, the Legislature assigned to the Office of the Legislative Auditor responsibility for evaluating each program prior to its repeal.¹⁶ For regulation and licensing of professions and vocations, the audit committee was charged to ensure that licensing be undertaken only where reasonably necessary to protect the health, safety, or welfare of consumers, *not* for protection of the

¹⁶ See 1983 Sunset Evaluation Report ("Sunset Report"), Legislative Auditor of the State of Hawaii, p.1.

regulated profession or vocation.¹⁷ The audit committee was charged that professional and vocational regulation which artificially increases the costs of goods and services to the consumer should be avoided, and regulation shall not unreasonably restrict entry into professions and vocations by all qualified persons.¹⁸

The first contractor licensing report arising from this audit was issued in 1983.¹⁹ The 1983 report is instructive on two points relative to the scope of the general contractor license. First, the report illustrates the accepted pre-*Okada Trucking* definition of the scope of a general engineering or contractor's license as being able to perform all work on a structure built, being built, or to be built, as long as the work involved more than two specialty trades or crafts. Second, the report calls out the need to carefully examine and prevent attempts to stifle competition through overuse of specialty contractor classifications and the conflicts created through such use.

In particular, in 1983, the Legislative Auditor found that “there are two aspects to the licensing classification system that have the effect of restricting competition and are open to abuse: (1) the limiting of general contractors to those projects that require two or more trades; and (2) the licensing of 82 specialty contracting categories and another 212 unofficial subspecialty licensing classifications.” Reading through the statute and accompanying rules as they existed in 1983 (and still exist), the audit committee noted that “the law says that a general building contractor is one whose principal business is building structures that require ‘in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.’ The board’s rules say further that the general building contractor

¹⁷ See 1983 Sunset Report at p.2.

¹⁸ *Id.*

¹⁹ See 1983 Sunset Report.

is not entitled to take any contract unless it requires two or more unrelated trades.” Report, citing Haw. Rev. Stat. § 444-7(c) and Haw. Admin. R. § 16-77-33. The audit committee found as follows: **“This provision exists more to prevent the general contractor from competing with specialty contractors than with public protection. For example, under this rule, a general building contractor is not permitted to bid on or to do fencing work if that is the sole work to be done. However, if the fence is to be built as part of a larger project, then the general building contractor would be eligible to do the work. Certainly, the general building contractor is no less competent to do the smaller job by itself than the smaller job when it is part of a larger project.”**²⁰

The audit committee noted that similar contractor licensing provisions were reviewed pursuant to a similar audit performed in Arizona, with the Arizona audit concluding: “[T]here appears to be no health or welfare justification for the statutory limitation of more than two trades. If the general contractor is permitted to do the work when it is part of a larger project, it is unclear what health or safety considerations justify restricting him from doing smaller projects. As mentioned, the only purpose of the statute seems to be to protect specialty contractors on certain kinds of jobs.” “Occupational Licensing and Related Entry Controls in Miscellaneous Public Welfare Areas” by Dr. Jonathan Rose in *A Performance Audit of the Arizona Registrar of Contractors*, State of Arizona, Office of the Auditor General, October 1979, p. IX-9. Both of these citations by the audit committee are aligned with the general understanding at the time (and indeed up to the *Okada Trucking* decision), that a general contractor is allowed to “do the whole or any part thereof” of an entire project, subject to the limitation that the project must involve more than two specialty trades or crafts.

²⁰ 1983 Sunset Report at p. 28 (emphasis added).

VI. CONTRACTORS LICENSE BOARD CONFIRMS INTERPRETATION

In or about 1980, and in the face of the ongoing audit and potential repeal of the contractor licensing laws in their entirety, the Contractors License Board adopted rules that awarded automatic specialty licenses to general engineering and general building contractors. Pursuant to this rule, Haw. Admin. R. § 16-77-32(c)(1988) was created, automatically awarding a number of specialty licenses upon licensure. This section provides, *inter alia*:

(c) Licensees who hold the “B” general building contractor classification shall automatically hold the following specialty classifications without further examination or paying additional fees:

- (1) C-5 cabinet, millwork, and carpentry remodeling and repairs;
- (2) C-6 carpentry framing;
- (3) C-10 scaffolding;
- (4) C-12 drywall;
- (5) C-24 building moving and wrecking;
- (6) C-25 institutional and commercial equipment;
- (7) C-31a cement concrete;
- (8) C-32a wood and vinyl fencing;
- (9) C-42a aluminum and other metal shingles;
- (10) C-42b wood shingles and wood shakes.

Haw. Admin. R. § 16-77-32(c) (1988). The rules contain no indication that this automatic grant of specialty licenses was intended to restrict or affect a general contractor’s authority to “do or superintend the whole or any part” of a project involving more than two unrelated trades. Rather, it merely states that it is part of an automatic award of licenses to the general contractor upon licensure. In fact, section 16-77-33(b) of the Hawaii Administrative Rules provides:

(b) A general building contractor license does not entitle the holder to undertake a contract unless it requires more than two unrelated building trades or crafts or unless the general building contractor holds the specialty license to undertake the contract. Work performed which is incidental and supplemental to one contractor classification shall not be considered as unrelated trades or crafts.

Haw. Admin. R. § 16-77-33(b) (emphasis added). This provision prohibits a general contractor from undertaking a project contract *unless* the project requires more than two unrelated building trades or crafts **OR** unless the general contractor holds the specialty license to undertake the contract.

On May 21, 1993, at a monthly meeting of the Contractors License Board, the Board analyzed and opined upon the scope of the “B” general building contractor license, and clarified what it intended when in 1980 it adopted administrative rules providing for automatic specialty license awards. At that meeting, the Board eliminated any doubts regarding its interpretation of the license statute, stating as follows:

The Board had a discussion concerning the scope of work that a “B” general building contractor can perform in the State. Due to the increased confusion and uncertainty on this particular issue in the construction industry, the Board decided to provide a position on the matter, which previously had been subject to varying interpretations.

In the past, some of the interpretations that the Board had discussed were: (a) a “B” licensee could perform all of the work on a structure so long as three or more trades or crafts were involved; (b) a “B” licensee could only perform work if he/she held the appropriate “C” license regardless of whether a structure was involved or not, and (c) a “B” licensee could perform all of the work on a new structure but not on a repair or renovation project unless he/she held the appropriate “C” license.

Present at the meeting were Mr. Charles Cook, former Executive Secretary, and Mr. Wilbert Toma, former Chairman of the Board. Mr. Cook was the Executive Secretary when the predecessor rules to HAR § 16-77-32(c) was promulgated and he stated that the intent behind the rule was to expand, not limit, the scope of activity that a “B” licensee could engage in. Mr. Cook said that when a structure was involved, a “B” licensee could do all of the work involved. When a structure was not involved, the previous board provided a “B” licensee with some “C” licenses to enable the “B” licensee to engage in “C” work. Thus, the scope of activity that a “B” licensee could actually perform was enlarged.

* * *

After extensive discussion, it was moved by Mr. Yamada, seconded by Mr. Koga and carried by a majority vote . . . to clarify the position of the Board as to the interpretation of the current statutes and rules to allow a “B” general building contractor to perform all of the work involved on a structure that is built, being built, or to be built for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind and requires three or more trades or crafts in its construction. In addition, on these types of projects, a “B” licensee can superintend (i.e., supervise and subcontract out) the entire project or any part of it. Moreover, the electrical, plumbing and elevator work must be performed by the appropriately licensed specialty contractor because of the special permits required by the Counties.

This explanation of the regulations allows for full internal consistency among the administrative rules and between the rules and the enabling contractor licensing statute. To hold otherwise would have created an internal contradiction between Haw. Admin. R. § 16-77-32(c) and Haw. Admin. R. §§ 16-77-28(b) (which states that contractor licensing classification definitions shall be as set forth in Haw. Rev. Stat. § 444-7), and 33(b) (which defines a general contractor as being able to undertake a project if the job involves more than two specialty trades or crafts).

Section 444-7(c) defines a general building contractor as a contractor who may “do or superintend the whole or any part” of a construction project where more than two trades or crafts are involved. Haw. Rev. Stat. § 444-7(c). The Contractors License Board’s interpretation of its automatic award of specialty licenses to general “A” and “B” licensees accords with Hawaii’s rules of statutory interpretation, by not attempting to change the scope of licensure afforded by statute. “Administrative rules and regulations which exceed the scope of the statutory enactment they were devised to implement are invalid[.]” *Stop H-3 Ass’n v. Dep’t of Transp.*, 68 Haw. 154, 161, 706 P.2d 446, 451 (1985); *see also Leaseway Distribution Centers, Inc. v. Dep’t of Admin. Serv.*, 550 N.E.2d 955, 959 (Ohio 1988) (discretion of an agency

is not unlimited, but it is limited by statute). Although the Contractors License Board is vested by law with authority to create rules to effectuate the purpose of the licensing statute, its authority is limited by the language of the statute the board is charged with enforcing. Even if the Contractors License Board had attempted to alter the scope of work to be performed by a general contractor, “an agency’s statutory interpretation . . . cannot contradict the clear statutory language that is consistent with legislative purpose.” *Gibb v. Spiker*, 68 Haw. 432, 437, 718 P.2d 1076, 1079 (1986) (citations omitted); *see also Agsalud v. Blalack*, 67 Haw. 588, 591, 699 P.2d 17, 19 (1985). Although judicial deference to agency expertise is generally accorded where the interpretation and application of broad or ambiguous statutory language by an administrative tribunal are subject to review, such deference is not required when the administrative construction is palpably erroneous. *Armbruster v. Nip*, 5 Haw. App. 37, 43, 677 P.2d 477, 482 (1984).

Moreover, statutes must be construed so as to give meaning and effect to all of their terms; interpretations which render any part meaningless, of no effect, or as mere surplusage are to be avoided. *State v. Engcabo*, 71 Haw. 96, 98, 784 P.2d 865, 866 (1989); *State v. Wallace*, 71 Haw. 591, 594, 801 P.2d 27, 29 (1990); *Camara v. Agsalud*, 67 Haw. 212, 215-16, 685 P.2d 794, 797 (1984). Thus, any investigation into what scope of work a general contractor is allowed to do under the law, should take into account the statute’s enabling provisions, which provide that in projects with more than two trades or crafts, a general contractor is the entity which may “do *or* superintend the whole or any part thereof.” In order for the words “do . . . the whole or any part thereof” to retain their meaning and not be rendered mere surplusage, the contractor must be entitled to self-perform work on a project. Any attempt to lessen the scope of the general contractor license through administrative rules or

interpretations by the Contractors License Board would run afoul of the mandate that these rules and the Board's actions are first and foremost dictated by statute. *Hyatt Corp. v. Honolulu Liquor Comm'n*, 69 Haw. 238, 245 n.9, 738 P.2d 1205, 1209 n.9 (1987); *id.* at 241, 738 P.2d at 1206 ("It is axiomatic that an administrative rule cannot contradict or conflict with the statute it attempts to implement"). Any such action would have rendered a class "B" license a mere license to act as a construction manager, supplanting the general contractor with specialty licensees the general is only entitled to oversee, but whose work the contractor must not perform.

Thus, the Contractors License Board's regulations are in accord with Hawaii's licensing statute. Section 16-77-28(b) adopts the statutory definition of a general building contractor set forth in Haw. Rev. Stat. § 444-7(c) for purposes of defining a class "B" licensee. Haw. Admin. R. § 16-77-28(b) (1988). Section 16-77-33(b) echoes this authorization in discussing limitation of classifications:

A general building contractor license does not entitle the holder to undertake a contract unless it requires more than two unrelated building trades or crafts **or** unless the general building contractor holds the specialty license to undertake the contract.

Haw. Admin. R. § 16-77-33(b) (emphasis added). While Haw. Admin. R. § 16-77-33(a) prohibits a general contractor from acting as a specialty contractor unless it holds the appropriate specialty license, this merely prevents the general contractor from performing the work when there are two or fewer trades involved, because such would be outside of the statutory definition of a general contractor.

General contractors are free to hire qualified technicians to perform the work required by statute, *see Otani v. Contractors Lic. Bd.*, 51 Haw. 673, 466 P.2d 1009 (1970), and it is up to the Contractors License Board to ensure that general contractors are fully tested in order to perform the work which the statute qualifies them to do. Haw. Rev. Stat. § 444-4. It is not,

however, within the power of the Contractor License Board to change the scope of a general contractor's license under Haw. Rev. Stat. § 444-7(c). The Contractor License Board acknowledged this in its 1993 interpretation of the statute, and this interpretation held sway until the *Okada Trucking* decision in 2002.

VII. OKADA TRUCKING DECISION

In May 1999, the Board of Water Supply (BWS) issued an invitation for bids (IFB) for a project ("the project") involving the construction of the Kaluanui Booster Station, Phase II. The project involved some work that required a plumber with a C-37 specialty contracting license. The IFB stated that any general contractor who bid for the project was required to disclose the names of, as well as the nature and scope of work to be undertaken by, any joint contractor or subcontractor, but that, "where the value of the work to be performed by the joint contractor or subcontractor is equal to or less than one percent of the total bid amount, the listing of the joint contractor or subcontractor may be waived if it is in the best interest of [the] BWS." *Okada Trucking*, 97 Haw. at 453, 40 P.3d at 76.

The BWS opened bids for the project on June 10, 1999, and determined that Inter Island had submitted the lowest bid, but that it had not disclosed, among other things, the name of and the nature and scope of any work to be performed by a C-37 licensed plumbing subcontractor. The BWS contacted Inter Island regarding its omission and Inter Island explained that it "did not list subcontractors for the plumbing and installation of the pumps as their quotes were considerably below 1%[,] or \$13,500.[00,]" of its bid. *Id.* In support of its contention, Inter Island produced an estimate that it had received from a subcontractor to perform the work that required the use of a C-37 licensed plumber, which was, in fact, less than one percent of Inter Island's bid. The subcontractor's estimate bore the date of June 22, 1999,

which was twelve days after the “bid-opening” date of June 10, 1999. The BWS notified Inter Island on July 28, 1999, that it had been awarded the contract for the project. *Id.*

On August 4, 1999, Okada Trucking, which had submitted the second lowest bid for the project, filed a protest of BWS’ award of the contract with BWS’ chief procurement officer (CPO), pursuant to Haw. Rev. Stat. § 103D-701. Okada argued that the contract for the project should not have been awarded to Inter Island because, among other things, Inter Island had not disclosed the name of or the nature and scope of work to be performed by the C-37 (plumbing) licensed subcontractor it intended to use, and it was not in BWS’ best interest to waive the statutory requirement. *Id.* at 454, 40 P.3d at 77. The CPO denied Okada Trucking’s protest, reasoning that it was within BWS’ discretion to waive the disclosure requirement in the event that, as Inter Island had verified, the work to be performed by the unnamed subcontractor was less than one percent of Inter Island’s bid. *Id.*

On September 10, 1999, Okada requested administrative review of BWS’ denial of its protest. Inter Island was allowed to intervene in the administrative proceedings. After hearing, the hearings officer determined that, while Inter Island was obligated to identify all the subcontractors that it would engage in order to complete the project, BWS could waive “the non-responsive aspect of [Inter Island’s] bid,” pursuant to Haw. Rev. Stat. § 103D-302(b) and Haw. Admin. R. § 3-122-21(a)(8), if it determined that “acceptance [of the bid] would be in [its] best interest[.]” *Id.* at 455, 40 P.3d at 78. Nevertheless, the hearings officer concluded that the IFB’s requirement that each prospective bidder “must be capable of performing the work for which the bids [were] being” invited “subsume[d] a requirement that] the bidder, at the time of bid submission and no later than bid opening date, was ready and able to perform the work required on the construction project if awarded the contract.” *Id.* Thus, because Inter Island failed to

have a duly licensed plumbing subcontractor “lined up” and “contractually bound to perform” its delegated responsibilities at the time of bid-opening, the hearings officer found that Inter Island “was not a responsible bidder.” *Id.* While the hearings officer acknowledged that BWS could waive the requirement that a bidder list each of its subcontractors and the nature and scope of their work, if the value of the unlisted subcontractor’s work was less than one percent of the total project contract amount, he ruled that BWS could not waive the requirement that a bidder have all of its subcontractors “lined-up” and “contractually bound to perform” its delegated responsibilities prior to bid-opening. Therefore, the hearings officer believed that the BWS had violated “provisions of the Procurement Code” by allowing Inter Island “to rectify its failure by obtaining a plumbing subcontractor after bid opening.” *Id.* (emphasis in original). Consequently, the hearings officer concluded that it was not in the BWS’ or the public’s best interests to have waived the disclosure requirement. Accordingly, the hearings officer terminated the contract between the BWS and Inter Island and awarded Inter Island compensation for any actual expenses it had reasonably incurred under the contract. *Id.* Subsequently, the BWS awarded the contract for the project to Okada.

Inter Island appealed to the Supreme Court for judicial review of the hearings officer’s decision.²¹ Inter Island challenged the hearings officer’s determinations that it had submitted a non-responsive bid, that it was not a responsible bidder, and that it was not in the BWS’ best interest to waive the disclosure requirement with regard to Inter Island’s failure to identify a duly licensed plumbing subcontractor. Inter Island contended the BWS was entitled to determine that it was in its best interest to waive the subcontractor listing requirement and allow Inter Island to obtain a written commitment from a plumbing subcontractor after bid

²¹ At the time *Okada Trucking* was decided, the procurement code had identified the Hawaii Supreme Court as the appellate court of first review for appeals of administrative procurement decisions. Haw. Rev. Stat. § 103D-710.

opening. The matter was assigned to the Hawaii Intermediate Court of Appeals (ICA). *See id.* at 455-56, 40 P.3d at 78-79.

On appeal, the ICA departed from the inquiry at hand and held, *sua sponte*, that the hearings officer erred in determining that the project required Inter Island to subcontract *any* plumbing specialty work involved in the project. *Okada Trucking Co., Ltd. v. Board of Water Supply*, 97 Haw. 544, 562, 40 P.3d 946, 964 (App. 2001). The ICA held that Inter Island “was authorized to undertake the [p]roject with its own staff,[] provided, of course that where certain work required performance by individuals with particular licenses, Inter Island utilized employees who were appropriately licensed to perform such work.” *Id.* at 564, 40 P.3d at 966. Accordingly, the ICA vacated the hearings officer’s decision. *Id.* at 568, 40 P.3d at 970. The ICA did not terminate Okada’s contract with the BWS, however, based on the parties’ representations that Okada had been performing on the contract for several months. *Id.* at 567-68, 40 P.3d at 969-70. The ICA held that it would not be in either the BWS’ or the public’s best interest to terminate the contract at this stage. *Id.*

On May 18, 2001, Okada filed a writ of certiorari with the Hawaii Supreme Court to review the ICA’s opinion. In its application, Okada argued that the ICA erred in its conclusions (1) that the project did not involve some specialty work requiring the use of a duly licensed plumbing subcontractor and (2) that Inter Island was not required to list a duly licensed plumbing subcontractor in its bid for the project contract. *Okada Trucking*, 97 Haw. at 457, 40 P.3d at 80.

With the certiorari application pending, the Contractors License Board attempted to assist the Supreme Court in its decision making process, by filing an amicus brief including a sworn declaration from the then-serving Executive Officer for the Contractors License Board,

who informed the court that the Board interpreted the scope of work an “A” general engineering contractor as including ALL work “requiring specialized engineering knowledge and skill under HRS § 444-7(b); or a structure that requires more than two unrelated building trades or crafts under HRS § 444-7(c), and “A” or “B” licensee respectively can bid on the entire project, provided that the electrical, boiler, plumbing or elevator work must be subcontracted unless the “A” or “B” licensee has its own electrical, boiler, plumbing, or elevator specialty contractor’s license. The Board informed the Court that under HAR §16-77-32(a), the “A” licensee automatically gets sixteen (16) “C” specialty contractor licenses; and under HAR § 16-77-32(c), the “B” licensee automatically gets seven (7) “C” specialty contractor licenses. The Board stated that these subsections were promulgated to allow an “A” or “B” licensee to act as a specialty contractor on a project that is not considered either an “A” project or a “B” project. For example, if a project only involves aluminum shingles it is not a project involving more than two unrelated building trades or crafts. But, a “B” licensee who automatically holds a C-42a license, can still bid on and perform work on this project. In other words, the purpose of the automatic award of licenses was to expand, no contract, the work a “B” licensee could bid on and perform.

The Hawaii Supreme Court accepted certiorari of the ICA’s decision. The Court reviewed the ICA’s findings regarding whether a plumbing license was required for the work in question, but like the ICA, went further than the question posed, and decided the case based upon the Court’s interpretation of the administrative rules promulgated by the Contractors License Board. The Court’s decision thereby effected a dramatic restriction of the then existing scope of a general contractor license in Hawaii.

The Supreme Court reviewed the licensing laws and the Board’s administrative rules, noting that through its rules, the Board automatically awarded a number of specialty

licenses to general engineering and building contractors upon licensure. *Id.* at 459-60, 40 P.3d at 82-83. The Supreme Court held that the ICA erred in holding that the hearings officer was wrong in determining that the nature of the project required Inter Island to subcontract with a duly licensed plumbing subcontractor. *Id.* at 459, 40 P.3d at 82. The Supreme Court stated “[t]he question then becomes whether the ICA further erred in holding that, pursuant to the applicable statutes and administrative rules, Inter Island, which did not possess the requisite specialty contracting license in plumbing, could, by virtue of the general contracting licenses it did hold, lawfully perform the specialty work that the project required without engaging a duly licensed specialty plumbing contractor.” *Id.* (emphasis in original).

In deciding this question, the Court looked to the licensing statute, which created a contractors license board vested with broad authority over contractor licensing. The Court noted that, by statute, “the board is directed to adopt such rules as it deems proper fully to implement its authority and to enforce the provisions of HRS ch. 444 and the rules adopted pursuant thereto.” *Id.* (citing Haw. Rev. Stat. §§ 444-4(2), (3), & (4)). The Court further noted that “[t]he board also grants, suspends, and revokes contractors’ licenses and oversees the examination of applicants to ensure that contractors are qualified to undertake the work for which they are licensed.” *Id.* (citing Haw. Rev. Stat. § 444-4(1), (5), (7), & (8)).

The following language from the *Okada Trucking* decision appears to have been pivotal to the Court’s decision:

HRS § 444-7(a) (1993) provides that, “[f]or the purposes of classification, the contracting business includes any or all of the following branches: (1) general engineering contracting; (2) general building contracting; [and] (3) specialty contracting.” **As such, pursuant to its rules, the board has classified the types of licenses it issues as (1) general engineering contractor (classification “A”), (2) general building contractor (classification “B”), and (3) specialty contractor (classification “C”).** See HAR §§ 16-77-28(a) (1988) and 16-77-32 through 16-77-35 (1988). Classification “C” includes numerous specific

licenses, each of which pertains to the particular trade or craft in which the applicant has the requisite expertise. See HAR, title 16, chapter 77, exhibit A (1988). For example, a “C-6” license pertains to “carpentry framing,” a “C-13” license pertains to “electrical” work, and so on. *Id.*

HRS § 444-7 generally describes the principal business activity of each of the three contracting “branches.” “A general engineering contractor is a contractor whose principal contracting business is in connection with fixed works requiring specialized engineering knowledge and skill[.]” HRS § 444-7(b).

The legislature has determined that a general engineering contractor’s knowledge and skill includes

the following divisions or subjects: irrigation, drainage, water power, water supply, flood control, inland waterways, harbors, docks and wharves, shipyards and ports, dams and hydroelectric projects, levees, river control and reclamation works, railroads, highways, streets and roads, tunnels, airports and airways, sewers and sewage disposal plants and systems, waste reduction plants, bridges, overpasses, underpasses and other similar works, pipelines and other systems for the transmission of petroleum and other liquid or gaseous substances, parks, playgrounds and other recreational works, refineries, chemical plants and similar industrial plants requiring specialized engineering knowledge and skill, powerhouses, power plants and other utility plants and installations, mines and metallurgical plants, land leveling and earth-moving projects, excavating, grading, trenching, paving and surfacing work and cement and concrete works in connection with the above mentioned fixed works.

***Id.* Elaborating upon the foregoing determination, the board has determined, by virtue of the “A” classification, that a duly licensed general engineering contractor “automatically hold[s]” sixteen classification “C” specialty licenses. HAR § 16-77-32(a). However, a global C-37 specialty license is not among those that a general engineering contractor automatically holds.**

A general building contractor

is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

HRS § 444-7(c). **Like a general engineering contractor, a general building contractor, duly holding a classification “B” license, “automatically holds” a number of classification “C” specialty licenses, but a C-37 specialty plumbing license is not among them.** HAR § 16-77-32(c).

Finally, a specialty contractor “is a contractor whose operations as such are the performance of construction work requiring special skill such as, but not limited to, electrical, . . . plumbing, or roofing work, and others whose principal contracting business involves the use of specialized building trades or crafts.” HRS § 444-7(d). Insofar as the board has, with regard to classification “C” specialty licensing, subclassified particular trades or crafts (such as C-37 plumbing, which includes five subdivisions), it has further determined that “licensees who hold a specialty contractors license shall automatically hold the subclassifications of the licensee’s particular specialty without examination or paying additional fees.” HAR § 16-77-32(d).

However, pursuant to HRS § 444-9 (1993), “no person within the purview of [HRS ch. 444] shall act, or assume to act, or advertise, as [a] general engineering contractor, [a] general building contractor, or [a] specialty contractor without a license previously obtained under and in compliance with [HRS ch. 444] and the rules and regulations of the contractors license board.” *See also* HAR § 16-77-4(a) (1988) (same). Thus, absent, for example, a global C-37 specialty plumbing license, neither a general engineering contractor (despite the fact that it automatically holds specialty licenses in two subclassifications of plumbing, *see supra* note 13) nor a general building contractor can act as a C-37 specialty plumbing contractor. **In other words, a general engineering contractor cannot perform specialized work for which it is not, automatically or otherwise, duly licensed and which it lacks the requisite specialized skill to undertake. Accordingly, although a general engineering contractor possesses a broad range of knowledge and experience that renders it competent to undertake particular specialty work that is subsumed within its classification “A” general engineering contractor’s license, that range does not extend, in the view of the board, to the “special skill” requisite to undertake global C-37 specialty plumbing work. Indeed, a contrary result would eviscerate the board’s express enumeration of the particular specialty licenses that a general engineering contractor “automatically holds,” due to its experience, knowledge, and skill.**

Okada Trucking, 97 Haw. at 459-61, 40 P.3d at 82-84 (emphases added). Based upon the foregoing, the *Okada Trucking* Court found that “if a particular project for which a general engineering contractor has obtained a contract requires work in a specialty classification in which it is not licensed to operate (“automatically” or otherwise), the general engineering

contractor cannot, pursuant to HRS § 444-9, undertake to perform that specialty work itself.” *Id.* at 461, 40 P.3d at 84. The Court thus held that only a duly licensed specialty contractor can undertake to complete the requisite specialty work. *Id.*

Based upon the history set forth above regarding the “automatic award” of licenses upon which the *Okada Trucking* decision was based, the decision is problematic.

First, the Contractors License Board’s 1993 meeting minutes, which were placed before the Court via the declaration of the Contractors License Board’s then-serving Executive Secretary, state plainly that limitation of the scope of the general contractor and general engineering license was never the intent behind the Board’s promulgation of rules granting an automatic award of specialty licenses to “A” and “B” licensees. Instead, the Board’s intent was to “allow a “B” general building contractor to perform all of the work involved on a structure that is built, being built, or to be built, for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind and requires three or more trades or crafts in its construction.” The intent behind the automatic award was “to expand, not limit, the scope of activity that a “B” licensee could engage in.” *See Minutes of Meeting of the Contractors License Board, May 21, 1993.* The *Okada Trucking* decision appears to directly contradict the Board’s own interpretation and explanation of the rules it was directed to create.

Second, the Board’s enumeration of specialty licenses automatically awarded to general engineering and building contractors, did not happen until after the Board was formed and until after it had crafted and adopted rules applying to the statute. Under the *Okada* Court’s logic, if a contractor were limited to the “express enumeration” of those specialty licenses automatically awarded upon licensure, when the licensing law first passed in 1956, general contractors were legally prohibited from performing any work, unless at some point in time at a

later date, the Board elected to automatically award specialty licenses through the Board's rule making authority. In other words, by the Court's logic, the Legislature created an entity (general contractor) that could do nothing on a job except contract for and supervise it (despite the statutory language authorizing a general contractor to "do" the whole or any part thereof), and this was the intended purport of the law from 1956 (when Chapter 444 was first enacted) until the contractor licensing administrative rules, including enumeration of specialty licenses, happened to be enacted.²²

Third, by relying upon its interpretation of the effect and intent behind the automatic specialty licenses awarded to general contractors through the board's administrative rules, the Supreme Court rendered specific statutory language a nullity, namely the statute classifying the work to be performed by the general contractor as including the right "**to do** or superintend the whole or any part thereof." Haw. Rev. Stat. § 444-7.5 (emphasis added).

Fourth, by elevating its own interpretation of the Board's administrative rule allowing for automatic award of specialty licenses to general engineer and building contractors (in direct contradiction of the Board's stated intent in doing so) over the language of the statute, the *Okada* decision conflicts with the limited authority granted to the Board – allowing it to adopt rules and regulations and to limit the field and scope of the operations of a licensed contractor but **only** "to those in which the contractor is classified and qualified to engage, **as defined in section 444-7.**" Haw. Rev. Stat. § 444-8 (emphasis added).

²² At the time the Board enacted the rules and allowed for the automatic award of certain specialty licenses to general engineering and building contractors, the entire licensing statute was under review for sunset, because of a general dissatisfaction with perceived overregulation of professions. As the Board later explained in the board's meeting minutes of May 1993, discussed *infra*, the reasoning behind the Board's automatic award of specialty licenses, was a desire to increase the scope of work a general contractor could perform, by allowing the general to self-perform work where a job required two or fewer different trades or crafts.

The Supreme Court in *Okada Trucking* held it was apparent that the ICA erred in holding that the applicable statutes and administrative rules merely prohibit a general engineering or building contractor from “undertaking work solely in a specialty contracting area, unless the contractor holds a specialty license in that area.” Instead, the Supreme Court ruled that pursuant to HRS § 444-9, a general engineering or building contractor is prohibited from undertaking any work, solely or as part of a larger project, that would require it to act as a specialty contractor in an area in which the general contractor was not licensed to operate. Thus, to the extent the project required plumbing work classified as C-37 specialty work, the Court held that Inter Island, which did not hold a C-37 specialty license, could not undertake to act in that area. The court reasoned that, therefore, Inter Island would need to obtain a subcontractor duly licensed in the C-37 plumbing classification to undertake such work in order to complete the project. Consequently, the court held that the ICA erred, in both law and fact, in reversing the hearing officer's decision.

Through the *Okada Trucking* decision, the Supreme Court judicially limited the scope of a general contractor license from the full panoply of self-performed work previously afforded by statutory classification, to the handful of specialty licenses automatically awarded to engineering and general contractors upon licensure pursuant to Haw. Admin. R. § 16-77-32(c)(1988) – which rule, ironically, was enacted by the board in order to increase, not decrease, general contractors’ ability to contract for work.

What is especially ironic about the decision is that the C-37 work in dispute in *Okada Trucking*, involved plumbing work. Under the May 1993 interpretation of the licensing statute in existence at the time of the *Okada Trucking* decision, a general contractor would need to either hire a subcontractor or possess a plumbing license, regardless of how the General

Building license was interpreted. *See* Verna Oda declaration (“counties only allow licensed electrical or plumbing specialty contractor to pull the respective electrical or plumbing permits”); *see also* May 1993 Meeting Minutes of the Contractor’s Licensing Board. “Moreover, the electrical, plumbing and elevator work must be performed by the appropriately licensed specialty contractor because of the special permits required by the Counties.” Therefore, the Supreme Court would have had proper grounds for reversing the ICA’s treatment of the issue without fundamentally altering the scope of a general contractor license.

VIII. OTHER STATES’ CONTRACTOR LICENSE STATUTES

The *Okada Trucking* decision is an outlier among states that regulate contractor licenses in a manner similar to Hawaii. Review of other states’ contractor licensing provisions yields several findings. First, not all states have contractor licensing laws. Approximately 20% of the states do not define or even issue licenses to general contractors or others, but instead either have no regulatory scheme for contractor licensing, or else leave such discretion to independent counties.

Second, of the states that attempt to regulate contractor licensing, many do not license a “general contractor” but instead only issue licenses for specific work, such as plumbing, electrical work, or residential construction.

For those states that, like Hawaii, issue “general contractor” licenses that cover a broad range of construction, Hawaii is the *only* state that, by virtue of the *Okada Trucking* decision, simultaneously defines a general contractor as having the ability to “**do or superintend**” the **whole** of a project, but nevertheless limits the work a general contractor can “do” to a handful of specialty licenses awarded upon licensure. In fact, the definition of “general building contractor” contained in Hawaii’s licensing statute, is virtually identical to the same

definition in several other states. In these states, the scope of work the general building contractor is entitled to “do” as the statute states, includes the entirety of the building at issue, except to the extent the work includes trades requiring a special permit.

A. California

The definition of a general building contractor under Haw. Rev. Stat. § 444-7 is virtually identical to the definition provided in California's licensing statute, which has been interpreted to allow a general building contractor to complete any work otherwise covered by a specialty license. The California statute provides as follows:

§ 7057. General building contractor defined:

A general building contractor is a contractor whose principal contracting business is in connection with any structure built, being built, or to be built, for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind, requiring in its construction the use of more than two unrelated building trades or crafts, or to do or superintend the whole or any part thereof.

* * *

§ 7058. Specialty contractor defined.

(a) a specialty contractor is a contractor whose operations as such are the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts.

Cal. Bus. & Prof. Code §§ 7057 & 7058 (West 1992).

In interpreting this identical language of the California statutes, the Court in *Martin v. Mitchell Cement Contracting Co., Inc.*, 140 Cal. Rptr. 424 (1977), adopted the opinion of the California Attorney General on the following two questions:

(1) May the holder of a general contractor's license accept a contract covering only one particular field of endeavor, without first securing an additional supplemental classification in that particular field, such as painting, decoration, electrical work, etc.?

(2) Is the holder of a general contractor's license required to sublet his specialty work, such as electrical, plumbing, sheetmetal, and painting for which the board now issues specialty contractor licenses, or is he permitted to do the work himself?

Id. at 426 (emphasis added). The answer adopted by the Court was:

[T]here is nothing in the contractors' license law which states the manner in which a contractor must accomplish the work, i.e., **there is nothing to prevent him from doing all of the work himself, or of hiring, or contracting with, specialty contractors to do a certain part of the work.** Therefore. . . **the holder of a general contractor's license** may accept a contract covering only one particular field of endeavor, and he **need not secure an additional supplemental specialty classification covering a particular field, and he may do the entire work himself if he desires.**

Id. at 426 (emphasis added). Under California's statutes, protection of the public "shall be the highest priority for the contractors' State License Board in exercising its licensing, regulatory, and disciplinary functions."²³ California's courts have interpreted identical statutory language in a manner directly opposite to the interpretation adopted by Hawaii's Supreme Court.

B. Arizona

Arizona similarly defines general building contracting as the following:

1. . . . [E]ngaging in the contracting business other than residential contracting in connection with any structure built, being built or to be built for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind requiring in its construction the use of more than two unrelated construction trades or crafts, **or to do or superintend the whole or any part thereof** which includes the management or direct or indirect supervision of any work performed by a contractor, but does not include a person who merely furnishes materials or supplies as provided in § 32-1121 without fabricating them into or consuming them in performing the work of the general contractor.

²³ Cal. Bus. & Prof. Code § 7000.6: "Protection of the public shall be the highest priority for the Contractors' State License Board in exercising its licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."

Ariz. Rev. Stat. § 32-1102 (emphasis added).

The Arizona Court of Appeals construed the scope of the general building contractor license in *Security Insurance Co. of New Haven v. Day*, 6 Ariz. App. 403, 433 P.2d 54 (1967). Therein, the owner entered into an agreement with the contractor for the construction of improvements. The surety executed a payment bond. The contractor then contracted with its subcontractor, a general contractor B-2 licensee, to perform certain site work, carpentry, concrete work, as well as some job supervision. The subcontractor recovered monies from the surety on the payment bond. The surety argued that because the subcontractor (who had a general contractor's license), lacked specialty licenses for the work it performed on the job, and because there could be only one general contractor on a job, the subcontractor could not sue to recover payment for the same because it was in effect unlicensed for the work it performed. The court found that because the subcontractor had a general contractor license, and because the work performed involved more than two unrelated building crafts, he was acting as a general contractor and could self-perform the work in question. 6 Ariz. App. 403, 443 P.2d 54, 59 (1967). In short, virtually identical licensing statutory language to the language in Hawaii, led the Arizona court to determine that, indeed, a general contractor could do “the whole or any part thereof” of a project involving multiple specialty licenses.

C. Oregon

In Oregon, the statutory language is not identical to Hawaii's but is similar. There, a general contractor is defined as a “contractor whose business operations require the use of more than two unrelated building trades or crafts that the contractor supervises or performs, whenever the sum of all contracts on a single property is in excess of \$2,500, including materials and labor.” ORS § 701.013. In Oregon, a general contractor may be registered as either a

general contractor, “all-structures” or as a “general contractor, residential only.” OAR 812-03-000)10). A general all-structures contractor may perform the work of a specialty contractor on all-structures. *Id.* A general contractor residential-only may also perform the work of a specialty contractor residential-only. *Id.*

D. Nevada

In Nevada, general contractors are defined similarly to general building contractors in Hawaii. The Nevada statute states general contractors shall not be allowed to perform specialty work unless they are the prime contractor on the job, and there is certain specialty work that cannot be performed by the prime contractor:

A general building contractor is a contractor whose principal contracting business is in connection with the construction or remodeling of buildings or structures for the support, shelter and enclosure of persons, animals, chattels or movable property of any kind, requiring in their construction the use of more than two unrelated building trades or crafts, upon which he or she is a prime contractor and where the construction or remodeling of a building is the primary purpose. **Unless he or she holds the appropriate specialty license, a general building contractor may only contract to perform specialty contracting if he or she is a prime contractor on a project. A general building contractor shall not perform specialty contracting in plumbing, electrical, refrigeration and air-conditioning or fire protection without a license for the specialty.**

NRS § 624.215. This language codifies the pre-Okada interpretation of Hawaii’s statute as allowing a general contractor to perform all work on a project, as general contractor, except for specific specialty items such as plumbing, electrical, refrigeration, air conditioning, and fire protection.

E. Florida

Florida’s contractor statutes contain many similarities to Hawaii. In Florida, the legislature has declared that the construction and home improvement industries pose a danger of

significant harm to the public when incompetent or dishonest contractors provide unsafe, unstable, or short-lived products or services. Fla. Stat. ch. 489.101. The legislature, like Hawaii, regulates the industry for the public health, safety, and welfare. *Id.* Like Hawaii, Florida has had to deal with the aftermath of natural disasters such as Hurricane Andrew in August 1992, when many unlicensed and unscrupulous contractors preyed upon homeowners.

The Florida statutes establish general contractor classifications of the general contractor, building contractor, and residential contractor. Unlike Hawaii after *Okada Trucking*, Florida general, building, and residential contractors appear to be restricted only from self-performing specific specialty items of work, including electrical, mechanical, plumbing, roofing, sheet metal, swimming pool, and air-conditioning work. *Id.* ch. 489.105(3)(c). Specialty contractors may obtain certification under the state licensing scheme, including solar water heating specialty contractors, specialty structure contractors, gypsum drywall specialty contractors, gas line specialty contractors, and others. These categories are *voluntary* licensing categories without mandatory license requirements.

F. North Carolina

North Carolina establishes through contractor license board rule classifications, that a general building contractor can perform work on a building, including accompanying specialty work. Sec. .0200.0202, North Carolina Admin. Code, Title 21, Chapter 12.

G. Washington

The term “general contractor” under Washington statutes, is defined as:

"General contractor" means a contractor whose business operations require the use of more than one building trade or craft upon a single job or project or under a single building permit. A general contractor also includes one who superintends, or consults on, in whole or in part, work falling within the definition of a contractor.

RCW § 18.27.010.

H. West Virginia

Like Hawaii, West Virginia defines a general contractor as a “contractor whose principal business involves building structures for the support, shelter and enclosure of persons, animals, or movable property requiring the use of two or more contractor classifications.” W. Va. Code § 21-11-3(c)(4). Like pre-Okada Hawaii, the licensing board for West Virginia established rules holding that the general contractor license does not permit the holder to perform electrical, plumbing, heating, ventilating and cooling, and/or general engineering work, without a separate license in said classification. W. Va. Code. Stat. R. Tit. 28 § 28-2-3.16.

I. Other States

Out of the remaining states, many have *no licensing laws* at all, have no licensing law requirements for general contractors, or else classify contractors in a manner entirely different from Hawaii.²⁴ A person or entity in these states can act as a general contractor under a variety of circumstances and comparison with these states would be inapposite. *See also* Appendix “A” hereto, Table of Statutes with Dissimilar Licensing of General Contractors.

A comprehensive review of the treatment of a “general” engineering or building contractor in every other state, reveals that the *Okada Trucking* decision is on its own in its interpretation of Hawaii’s licensing laws, and not only is it at odds with decisions from states with identical licensing laws, but it is also one of if not the most restrictive state in the country in terms of the scope of work allowed to be performed by general engineering or building contractors. There has never been a claim, much less any showing, that construction work in Hawaii is so unique as to require a contractor possess a specialty license for, e.g., painting,

²⁴ *See* Table, Appendix “A” hereto.

carpeting, or removing a glass window, when it can be installed by a general building or home contractor in virtually every other state in the country.

IX. DISTRICT COUNCIL 50

The *Okada Trucking* decision continues to shape contractor licensing decisions in the state. In 2012, the Supreme Court accepted a writ of certiorari and in December 2012 ruled on the scope of a renovation license, in *District Council 50 v. Lopez*, 129 Haw. 281, 298 P.3d. 1045 (2013).

The case arose from a State of Hawaii school renovation project (the Project). The public Notice to Bidders (Notice) describing the work involved in the Project as including, *inter alia*, window replacement, floor covering, tackboards, whiteboards, electrical light fixtures, switches, receptacles and cover plates, doors and door frames, finish hardware, termite damaged wood, gypsum wallboard partition, sinks and cabinets, re-keying of locks, interior and exterior painting, cast-in-place concrete, concrete repairs, concrete masonry, and some minor repair work. The notice stated that to be eligible to submit a Bid, the Bidder must possess a valid State of Hawaii Contractor's license classification B.

The Project required installation of 476 aluminum jalousie windows. The Project specifications required that "[f]abrication and installation of jalousie windows shall be done by skilled and experienced mechanics to the best standard of the trade and in accordance with the approved shop drawings." Under one estimate, the window work, which fell within the scope of the C-22 specialty license for glaziers, cost \$372,875, representing approximately 20% to 25% of the total project cost.

On December 20, 2005, Allied Pacific's low bid was accepted for the Project. Allied Pacific is licensed as a "B" general building contractor and, therefore, holds an automatic

C-5 (renovation) specialty license.²⁵ Allied Pacific's bid listed a number of subcontractors holding specialty contractor licenses, but did not list any subcontractor holding a C-22 glazing and tinting license. Allied did not hold a C-22 license.

District Council 50 of the International Union of Painters and Allied Trades, and Aloha Glass Sales & Service, Inc. (together, "Petitioners"), filed a Petition for Declaratory Ruling (Petition) with the Contractors License Board. The Board referred the Petition to the Office of Administrative Hearings. Petitioners sought a ruling that "[a] general building contractor with a B-license cannot engage in work requiring a C-22 subcontractor license under the general contractor's license." Petitioners' argument was based on their interpretation of HRS §§ 444-9 (1993) and 444-8(c) (1993), and upon *Okada Trucking*, 97 Hawai'i 450, 40 P.3d 73 (2002).

HRS § 444-8(c) creates a general exception for specialty contractors to complete work for which they are unlicensed if the work is "incidental and supplemental" to licensed work:

This section 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.

Based on the "incidental and supplemental" exception, the hearings officer concluded: "The jalousie window replacement work can be undertaken by a C-22 specialty contractor, and a C-5 specialty contractor, provided that the work is incidental and supplemental to the renovation

²⁵ HAR § 16-77-32(c) (2004). The C-5 licensee is technically entitled the "cabinet, millwork, and carpentry remodeling and repairs contractor," although the work description for this trade includes, *inter alia*, "to remodel or to make repairs to existing buildings or structures, or both, and to do any other work which would be incidental and supplemental to the remodeling or repairing." *Id.*

work for which the C-5 contractor is licensed to perform."²⁶ Work that falls under the "incidental and supplemental" provision is licensed and the performance of this work by a general contractor would not violate *Okada Trucking*.

In interpreting the terms "incidental and supplemental," the hearings officer relied upon the definition found in HAR § 16-77-34. This rule 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."²⁷ The hearings officer noted that this definition of "incidental and supplemental" does not take into consideration the cost or extent of work.²⁸ Accordingly, the hearings officer recommended that the Board deny the Petition. On January 22, 2007, the Board adopted the hearings officer's recommended decision as the Board's final order.

Petitioners appealed to the circuit court, and the circuit court affirmed the Board's final order. The circuit court reasoned that it was the Board's duty as the finder of fact to determine the scope of licensing and "there is nothing to prohibit the Board from determining and interpreting HRS chapter 444 such that jalousie window work representing 20% to 25% of the total project meets the definition of incidental and supplemental under HAR § 16-77-34."²⁹

Petitioners appealed the circuit court's decision to the Intermediate Court of Appeals. The ICA held that, because Petitioners did not demonstrate that the Board's interpretation of "incidental and supplemental" was clearly erroneous or inconsistent with the underlying legislative purpose, the circuit court did not err in affirming the Board's final order.

²⁶ 129 Haw. at 285, 298 P.2d at 1049.

²⁷ HAR § 16-77-34.

²⁸ *Id.*, 129 Haw. at 286, 298 P.3d at 1050.

²⁹ *Id.*

Petitioners filed an application for writ of certiorari, and the Supreme Court accepted the application.

The Supreme Court reversed the ICA, circuit court, and administrative hearings officer's decisions. It held the Board's interpretation of its rules was plainly erroneous and contrary to the clear meaning of the statute, thus not entitled to deference. In doing so, the Court took issue not only with the Board's interpretation of the word "incidental," but also with the Board's rule making authority. The Court emphasized the public safety underpinnings of the licensing statute, noting that the purpose behind contractor licensing laws in Hawai'i is to

"protect the general public against dishonest, fraudulent, unskillful or unqualified contractors." *Jones v. Phillipson*, 92 Hawai'i 117, 125, 987 P.2d 1015, 1023 (App. 1999) (quoting 1957 Haw. Sess. L. Act 305, at 358-67). In accordance with this principal, the stated purpose of HRS chapter 444 is "the protection of the general public." *Okada Trucking*, 97 Hawai'i at 459, 40 P.3d at 82 (quoting HRS § 444-4(2) (Supp. 2000)). The legislature has stated that HRS chapter 444 was "enacted, in part, to ensure the health and safety of the public by requiring that contractors possess a minimum level of expertise, experience and training." *Jones*, 92 Hawai'i at 125, 987 P.2d at 1023 (emphasis omitted) (quoting Hse. Stand. Comm. Rep. No. 727-96, in 1996 House Journal, at 1309).'

Id., 129 Haw. at 291, 298 P.3d at 1055.

The Court found that a C-5 contractor "may not possess the minimum level of expertise, experience, and training to complete this unlicensed work. If such work is poorly completed, it could present a grave risk to public health and safety." The Court disagreed that "incidental and supplemental" could be defined merely as "necessary to the completion thereof," and instead imposed another, according to the court, more "ordinary," definition. The Court noted that "[i]ncidental" is defined as: "[s]ubordinate to something of greater importance; having a minor role." *Black's Law Dictionary* 830 (9th ed. 2009). "Supplemental" is defined as: "supplying something additional; adding what is lacking." *Id.* at 1577. Therefore, the Court reasoned, "the ordinary meaning of 'incidental and supplemental' is "subordinate to something

of greater importance and supplying something additional.”” Applying this meaning to HRS § 444-8(c), the Court held it was apparent that the legislature meant to provide specialty contractors with a limited ability to perform work outside of their licensed specialty area. The Court went on that because the Board's interpretation of "incidental and supplemental" contravenes the manifest legislative purpose of the statute, it is entitled to no deference.” The Court objected to the Board's interpretation of the rules as providing no limitation on the amount of specialty work that may be completed as incidental and supplemental to C-5 licensed work. Thus, the Court held that the Board's refusal to consider cost and extent of work when determining whether that work qualifies as "incidental and supplemental" is plainly erroneous in light of the clear meaning of HRS § 444-8(c).

The Court held that the “incidental and supplemental” exception must be interpreted narrowly to preserve the statute's overarching purpose of protecting public safety by insuring that work is completed by fully competent contractors. In order to comply with this statutory provision, and the overall purpose of HRS chapter 444, the "incidental and supplemental" exception to the C-5 license must be similarly limited. By allowing C-5 specialty contractors to complete all work related to and necessary for the completion of a renovation project, regardless of cost and extent, the Board is contravening the express purpose of HRS chapter 444.³⁰

In making its findings, the Supreme Court observed that the "incidental and supplemental" exception to license scope limitation applies only to specialty contractors and not

³⁰ Interestingly, although in oral argument specific questions were raised regarding the exact percentage of work that could be considered “incidental and supplemental,” the Court refused to impose an arbitrary number to its decision, stating instead only that the work in exception must be applied “narrowly” and must not make up the majority of the work. “However, the ‘incidental and supplemental’ work must not make up the majority of the project, and must instead be ‘subordinate’ and in addition to licensed work ‘of greater importance.’” 129 Haw. 281 at 290, 298 P.3d 1045 at 1054.

to general "A" or "B" contractors.³¹ The Court cited *Okada Trucking* for the proposition that a general contractor may not engage in work requiring a specialty license that the general contractor does not hold.

Of course, if the *Okada Trucking* case did not exist, there would have been no District Council 50 controversy. Before *Okada Trucking*, Allied Builders would have been able to complete jalousie replacement as part of the scope of self-perform work afforded by its general contractor "B" license, in accordance with the classification language set forth in Haw. Rev. Stat. § 444-7, as well as the May 1993 interpretation of the Contractors License Board confirming that scope. Because of *Okada Trucking*, however, each tribunal from the Contractors' License Board through the Supreme Court, was forced to examine whether the jalousie window work qualified as "incidental and supplemental" to Allied Pacific's C-5 specialty license.

Subsequent to the issuance of the DC 50 decision, the Contractors License Board issued a decision upon remand finding that, in fact, the jalousie windows installed by Allied were incidental and supplemental to the renovation project it undertook. In making this determination the Board considered the amount of the work, the percentage it made up on the job, and found that since both were well under one half of the value and scope of the job, it met the limitations imposed by the Supreme Court.³²

³¹ The court did not make the further inquiry of *why* the Legislature would have created an "incidental and supplemental" exception to license scope limitations, and applied that exception *only* to specialty contractors, and not to general engineering or building contractors. An obvious answer might have been because under statute, general engineering and building contractors were never intended to be limited in the scope of work they could self-perform, thus an "incidental and supplemental" exception to scope limits was not needed.

³² See Board Meeting Minutes dated July 29, 2013.

The DC 50 Petitioners refiled their complaint in the Circuit Court and simultaneously sought writ of mandamus from the Supreme Court to force the Contractors License Board to change its considered opinion. The Court denied the request for mandamus relief,³³ and the Circuit Court denied Petitioners' request for relief, but the case is currently expected to yield a second appeal.

In March 2014, the Hawaii Legislature passed (with less than 50% of the House's support), a House Resolution encouraging the Contractors License Board to reconsider its finding regarding the definition of "incidental and supplemental," because "the Board's definition also would allow general contractors with automatic "C" licenses to perform unlicensed work, thereby depriving licensed specialty contractors from performing work in the fields for which they are trained and licensed." The Legislature requested that the Contractors License Board report to the Legislature no later than twenty days prior to the convening of the Regular Session of 2014, whether it amended its October 18, 2013 final order to comply with legislative intent and the Hawaii Supreme Court's ruling.³⁴ The board is not expected to take further action on the case.

What is entirely lost in this discussion, is that prior to the *Okada Trucking* decision, or from the time the contractors licensing statute was first enacted until the *Okada Trucking* decision was issued in 2002, general contractors were deemed fully licensed and capable of self-performing the exact type of work at issue in the District Council 50 case, i.e., jalousie removal and replacement, as well as painting, carpet laying, flooring, tiling, masonry, and any number of other scopes of work the *Okada Trucking* decision deemed beyond the scope

³³ *District Council 50 v. Lopez*, 2014 Haw. LEXIS 9 (January 8, 2014).

³⁴ House Resolution No. 63 (March 6, 2014).

of their license. As noted above, prior to *Okada Trucking*, the only work general building contractors could not self-perform was specialty license work governed by separate licensing statutes and/or permitting requirements, including boiler,³⁵ elevator,³⁶ electrical,³⁷ plumbing, and asbestos removal.³⁸ It is ironic that cries of public safety and endangerment could be raised against general contractors doing the same work they had been self-performing for nearly half a century, because a court decision had declared them unlicensed to perform this work. The *DC 50* decision was predicated upon the *Okada Trucking* Court's imposed license scope restriction, and extended that restriction to renovation work as well as new construction.

X. OKADA TRUCKING EFFECTS

A. Bid Protests

Probably the most drastic impact of the *Okada Trucking* decision has been in the area of public procurement. Hawaii's procurement code requires that prospective bidders include in their bids a list of all subcontractors to be utilized on construction projects.³⁹ Failure to list subcontractors could render a bid nonresponsive and subject to rejection. When a bidder fails to identify a subcontractor for work the bidder is not able to self-perform under its license, the bid is deemed non-responsive and subject to rejection, as protection against bid shopping.⁴⁰

³⁵ Haw. Rev. Stat. § 397-2

³⁶ Haw. Rev. Stat. Chapter 448H

³⁷ Haw. Rev. Stat. Chapter 448E

³⁸ Haw. Rev. Stat. § 444-7.5

³⁹ Haw. Rev. Stat. § 103D-302(b); HAR § 3-122-21(a)(8).

⁴⁰ By forcing the contractor to commit, when it submits its bid, to utilize a specified subcontractor, the Code seeks to guard against bid shopping and bid peddling. *Hawaiian Dredging Constr. Co. v. City and County of Honolulu*, PCH 99-6(August 9, 1999); *CC Eng'g & Constr., Inc. v Dept. of Budget and Fiscal Services, City and County of Honolulu*, PCH-2005-6 (November 1, 2005); *Parsons RCI, Inc. v. DOT, et al.* PCH-2007-3 (July 13, 2007).

This is why the *Okada Trucking* decision had such a drastic, and immediate, effect on the industry; whereas formerly general building contractors could self-perform all work on projects involving more than two building trades or crafts, except for specific exceptions for plumbing, electrical, elevator and asbestos work, after *Okada Trucking*, general contractors' allowable self-performed work was limited to the handful of enumerated specialty licenses set forth in the contractor licensing administrative rules, potentially subjecting the general contractor to criminal penalties, and taking away their right to sue, for collection on work they had been self-performing for decades. Whereas, prior to *Okada Trucking*, a contractor could paint, install carpets, tiling, change windows, clear and grub an area, etc., it was now required to list a subcontractor to do so, upon penalty of bid rejection, criminal prosecution, and no right to sue -- thereby instantly raising the cost of the work by the cost of the subcontractor markup.

A brief review of the available written procurement decisions issued by the office of administrative hearings on procurement, reveals that from the time *Okada Trucking* was first enacted, subcontractor listing and contractor licensing became one of if not the most litigated procurement issue.⁴¹ Notably, the list of cases only records those cases that went to

⁴¹ The contrast between pre and post-*Okada Trucking* procurement decisions arising out of contractor licensing issues is stark. A sampling only of administrative hearing decisions on procurement cases addressing the nature and scope of work to be performed by subcontractors due to a general contractor's inability to self-perform work, and other subcontractor listing issues, include *CC Eng'g & Constr. Inc. v. Dept. of Budget and Fiscal Services, City and County of Honolulu*; PCH 2005-6 (November 1, 2005); *Parsons RCI, Inc. v. DOT, et al.* PCH-2007-3 (July 13, 2007); *Frank Coluccio Constr. Co. v. City and County of Honolulu, et al.*, PCH-2002-7 (August 2, 2002); *CR Dispatch Services, Inc. dba Security Armored Car & Courier Services v. DOE, et al.*, PCH-2007-7 (December 12, 2007); *Stoneridge Recoveries, LLC v. City and County of Honolulu*, PCH-2003-5 (June 26, 2003); *Oceanic Companies, Inc. v. DOT*, PCH-2003-14 (July 3, 2004); *Maui Master Builders v. DOT*, PCH-2007-8 (February 25, 2008); *Robison Constr., Inc. v. Board of Water Supply*, PCH-2003-11 (August 14, 2003); *Kiewit Pacific Co. v. Dept. of Land and Natural Resources, et al.*, PCH-2008-20 (February 20, 2009); *Ludwig Contr., Inc. v. County of Hawaii*, PCX-2009-6 (December 21, 2009), *Nan, Inc. v. DOT*, PCH-2009-9 (October 3, 2009); *LTM Corp. dba Civil Mechanical Contractor v. City and County of Honolulu*; PCH-2009-17 (Order Denying Motion for Summary Determination; 8/10/09).

administrative hearing. The vast majority of licensing disputes do not end up in hearing; rather, most cases are resolved by the agencies through internal review and subsequent bid or protest rejections that are never made public. The cost to the public of such delays is almost impossible to quantify, but by any reckoning must be enormous: aside from the straightforward additional markup accompanying the subcontracting of all specialty work on a project, every time a bid is issued that is delayed either due to protest or rejection of the low bid, it is potentially subject to additional costs due to delay, material and labor price escalation, subcontractor changeover, etc. Moreover, the resources required to respond to bid protests, conduct licensing reviews, and reject and sometimes rebid jobs due to licensing issues, slows the process of procurement and allows fewer jobs to get through the bidding process. This slows down construction of needed improvements, makes them more expensive when they are constructed, and hurts the livelihood of all of the contractors *and* trades clamoring for the chance to perform public works.

Directly as a result of the *Okada Trucking* decision, many have begun to question the subcontractor listing requirements of the procurement code. The subcontractor listing requirement was enacted in order to prevent general contractors from obtaining pricing from numerous subcontractors for bid purposes, then “shopping” the subcontractor bid to other subcontractors after the bid opening to find a subcontractor willing to do the work for a cheaper price. Such actions might lead to risk shifting job costs onto the backs of subcontractors ill-equipped or unable to handle the same, at the expense of the quality of work and materials provided to the job. However, because of *Okada Trucking* and the number of subcontractors listings required thereby, Hawaii’s subcontractor listing requirement has come under question as

In contrast to this, from the adoption of the procurement code in 1994, through the *Okada Trucking* decision in 2002, there were a total of two (2) written hearing decisions addressing contractor licensing issues. See *Standard Electric, Inc. v. City & County of Honolulu*, pch-97-7 (January 2, 1997); and *KD Construction, Inc. v. Takahashi*, PCH-2001-9 (December 26, 2001)(decision predicated upon ICA *Okada Trucking* decision). See decisions at http://cca.hawaii.gov/oah/oah_decisions/procurement/

a cumbersome requirement that is not a benefit to the system, hampers competition, and raises prices.⁴² It is true that if subcontractor listing were not required on public projects, the bid protest problems associated with *Okada Trucking* might be ameliorated, but it would do nothing to actually lower the cost of construction, since subcontractors would still be required for every trade the general contractor is, due to *Okada Trucking*, deemed unlicensed to self-perform.

Indeed, with the advent of the District Council 50 case, it can be anticipated that school and other public renovation projects will be equally hampered by protests seeking to test the impact of the case. The decision will come at a cost of delay and money the State can ill afford to bear. See Haw. Inst. for Pub. Affairs, *Report on the State of Physical Infrastructure in Hawaii—Final Report to the Econ. Dev. Admin. U.S. Dep’t of Commerce* 8 (2010), available at <http://www.hipaonline.com/images/uploads/InfrastructureReport-7-7-10.pdf> (“Hawaii currently faces one of its most challenging economic times since statehood in 1959.”). See also *id.* at 25 (“About 26 percent or \$3.7 billion of projected infrastructure costs are for public facilities, which include school improvements and upgrades at the University of Hawaii System, Department of Education and state libraries.”); *id.* at 4 (“Hawaii’s public schools and the University of Hawaii System are facing a significant backlog in repair and maintenance.”); Am. Soc. of Civil Engineers, *Report Card for America’s Infrastructure—Hawaii* (2009), available at <http://www.infrastructurereportcard.org/state-page/hawaii> (listing schools as among Hawaii’s “Top Three Infrastructure Concerns”).

B. Public Safety: RICO Complaints

The *Okada Trucking* decision’s underpinning is that its interpretation of the scope of a general contractor license supports the legislature’s desire to protect the public from

⁴² There is no subcontractor listing requirement for federal contracting. Although at times bills have been introduced to require subcontractor listing in order to prevent bid shopping, they have not gained traction. See, e.g., H.R. 1942, the text of which is available at <http://thomas.loc.gov/cgi-bin/query/z?c113:H.R.1942>:

unskilled or unqualified contractors. However, there is no evidence that the decision has had such a prophylactic effect. Certainly the continued proliferation of RICO complaints issued by dissatisfied project owners does not reflect a marked improvement in contractor satisfaction since the *Okada Trucking* decision was entered.⁴³ The cycle of complaint numbers appears to follow the ebb and flow of the construction industry, rather than the impact of the licensing decision.

C. Labor Shortages

The industry is considered to be hampered by a worker shortage when construction unemployment rates dip below 6.5%. <http://labor.hawaii.gov/rs/files/2012/12/DLIR-Worker-Shortage-Determination-2013.pdf>.

During the last construction boom in Hawaii, average unemployment rates went down to as low as 2.2%. As one article notes: "the big general contractors have already begun adding staff for the upswing in construction. Hawaiian Dredging, for example, which cut salaried staff nearly 40 percent during the recession, is already back up to 2006-2007 levels. But, as the cycle continues to heat up, the shortage of subcontract labor is likely to be the main constraint on growth. The most successful general contractors will be the ones that figure out how to deal with that shortage." <http://www.hawaiibusiness.com/Hawaii-Business/September-2013/Riding-the-Up-and-Down-Construction-Cycle/>. With specialty subcontractors focusing efforts, time and money on vertical private construction, competition among specialty subcontractors will drop for public work, which will mean less work gets done, at a higher price.

XI. CONCLUSION

⁴³ The total number of Contractor-related complaints filed with the Regulated Industries Complaints Offices from the time the *Okada Trucking* decision was first issued, until 2012, is as follows: 2002: 345, 2003: 320; 2004: 344; 2005: 489; 2006: 457; 2007: 387; 2008: 366; 2009: 297; 2010: 363; 2011: 363; 2012: 346. See DCCA Annual Compliance Resolution Fund Report, years 2002 – 2012.

The language of the applicable contractor licensing statute, accompanying administrative rules and pre-*Okada* statutory interpretation of the Contractors License Board, are not in accord with the *Okada Trucking* decision. Nor is the decision in accord with state licensing statutes from across the country. The decision has negatively impacted the public procurement process, has made public procurement more expensive, and now threatens to impact economic growth, to the detriment of the State. At the same time, there is no evidence of any measurable benefit in terms of increased public satisfaction of safety as a result of the decision. Now, the progeny of *Okada Trucking*, District Council 50, is poised to impose additional costs, limit available labor pools, and hamper procurement relative to renovation work traditionally and customarily performed by general building contractors, whose scope of services have been limited once again by judicial interpretation of the law.

APPENDIX “A”
STATES WITH DISSIMILAR LICENSING REQUIREMENTS FOR
GENERAL CONTRACTORS

STATE	CITATION	CONTRAST WITH HAWAII
Alabama	Alabama Administrative Code § 230-X-1-.26 Code of Ala. 1975, §34-8-2	Contractors holding licenses with Building Construction (BC) appearing thereon may undertake to construct or superintend the construction of any project even if 51% or more of the work as measured by the cost (labor, materials, tools, construction equipment cost and installed equipment) falls outside the major classification of Building Construction (BC) so long as such work is required to make the building usable for its intended purpose
Alaska	Alaska Statutes § 08.18.025	Only requires a license for private residential construction
Arkansas	Ark. Code. § 17-25-302;§ Rules and Regulations of the Residential Contractors Committee § 225-25-5-9	Statute allows the Contractors License Board to limit by classification the license to the character of work for which the applicant is qualified. Administrative rules allow contractors to obtain general commercial, residential, or renovation license, which would entitle the general contractor to perform any of the “specialties” associated with the classification in question. A contractor licensed as a Residential Specialty Contractor is authorized to only perform the functions of the specific specialty for which a license is held.
Colorado		No comprehensive statutory scheme governing licensing of general contractors, with the exception of certain “specialty contractors.”
Delaware	30 Del. C. § 2501(1) (2014)	Statute does not separately define general contractor, but instead separately defines and licenses specialty licenses.
Georgia	O.C.G.A. § 43-41-2	"General contractor" means a contractor whose services are unlimited as to the type of work which he or she may do, subject to the financial limitations as may be imposed by a subclassification, and who may contract for, undertake to perform, submit a bid or a proposal or otherwise offer to perform, and

		perform any activity or work as a contractor requiring licensure under this chapter including within its scope any work requiring licensure under Chapter 14 of this title; provided, however, that any work contractually undertaken by a general contractor in the nature of electrical contracting, plumbing, conditioned air contracting, low voltage contracting, or utility contracting which falls within the licensing requirements of Chapter 14 of this title may not be performed by the general contractor but shall only be performed by a person who is duly licensed to perform such work under Chapter 14 of this title.
Idaho		Idaho does not require that general contractors become licensed before taking on work on commercial or residential projects; just registered as contractors.
Illinois		Illinois does not license general contractors. They are licensed separately by city and county governments.
Indiana		General contractors are not tested or licensed by the state; they are licensed by city and county governments.
Iowa	Iowa Code § 91C.2 (2013)	Iowa requires registration and proof of workers compensation in order to perform construction, but does not otherwise classify contractors.
Kansas		Kansas does not license contractors at the state level, with the exception of asbestos abatement and water well drilling.
Kentucky		Kentucky does not provide for state level licensing of general contractors, but only certain construction specialties such as electrical, HVAC, fire sprinkler, plumbing, and asbestos abatement.
Louisiana	La. Rev. Stat. Ann. § 38.2156.2 (2014)	Contractors licenses are issued in 10 broad categories which include numerous sub or specialty categories.
Maine	Me. Rev. Stat. Ann. Tlt. 32 § 1372 (West 1996) Me. Rev. Stat. Ann. Tlt. 38 §	No licensing statutory requirement other than for fire sprinkler contractors, and asbestos abatement contractors.

	§ 1273, 1274-A (West 1996)	
Maryland	<i>Scholss v. Davis</i> , 215 Md. 119, 125-26, 131 A.2d 287, 291 (1959); <i>Maguire v. State</i> , 192 Md. 615, 618, 65 A.2d 299, 300 (1949)	General contractors are not separately licensed in Maryland. A license is required to perform home improvement projects. Also, plumbing and HVAC contractors are separately licensed.
Massachusetts		Massachusetts does not separately license general contractors. It does require licensure of home improvement contractors, as well as certain specialty constructors such as electricians, plumbers and pipefitters.
Michigan		Michigan does not provide for comprehensive licensing regulation, thus does not separately license general contractors, although residential builders, plumbers and electricians are separately licensed.
Minnesota		Minnesota does not separately license general contractors, except for smaller scale residential projects, although certain specialty contractors such as electricians, plumbers, and pipefitters are separately licensed.
Missouri		General contractors are not separately licensed at the state level. They may be licensed and regulated at the county level.
Mississippi	Miss. Code. Ann. § 31-3-13(g) (1972)	Contractors are required to obtain a “certificate of responsibility” to perform construction and the classification for the kind or kinds of work a contractor can perform under its “certificate of responsibility” is expressly granted to the Board of Contractors.
Montana	Mont. Code Ann. § 37-68-301; Mont. Code Ann. § 37-43-302(1) (2013)	No state licensing of general contractors; separate licensing for specialties such as electrical and water well contractors.
Nebraska	Neb. Rev. Stat. § 48-2104 (2013)	State laws only require a license to do business, except for electrical work, which requires a separate electrician’s license. Separate counties may impose contractor license requirements.
New Mexico	NMAC § 60-13-12 (1978); New Mexico Housing and Construction Industries	Prohibits any contractor from acting without a license to cover the type of work to be undertaken. Statute expressly limited

	Licensing Classifications and Scopes (14.6.6.9)	general contractors to perform only work in their classification, and the classification was entirely left to the Construction Industries Commission. Commission’s scope of work afforded to the General building “GB -98” contractor includes virtually all specialty classifications
New Hampshire		There is no statewide licensure requirement for general contractors in New Hampshire, with the exception of licensing requirements for certain specialty contractors including asbestos abatement, plumbing, and electrical contractors.
New Jersey		New Jersey licenses electrical contractors, plumbing contractors, and home repair contractors, but does not specifically license “general contractors.”
New York		There are no statewide license requirements for contractors in New York. Contractors are separately licensed by counties.
Rhode Island	R.I. Gen. Laws § 5-65-1 through 19 (2013)	There is no license law covering general contractors, except for the “Contractors’ Registration Act, which covers “residential buildings.” There is no licensing scheme covering general contractors or construction managers for private, nonresidential construction services, or for state or municipal public works or road buildings.
South Carolina	S.C. Code Ann. §§ 40-11-410, 40-11-320 (2013)	South Carolina’s statute specifically defines and limits the scope of general building contractors’ work to specific work items (which are broadly defined), and allows the contractor to perform said work if a certain percentage of the job falls under the scope of

		its classification.
South Dakota		No registration or licensing scheme for construction contractors at the State level.
Tennessee	Tenn. Code Ann. § 62-6-112 (2013)	Legislature identifies nine major classifications of contractors, and by statute states that all specialty licenses identified as subclassifications of the major classification can be performed by the licensed contractor.
Utah	Utah Code Ann. § 58-55-102(12) (2014)	Utah’s licensing laws define a general contractor as “a person licensed under this chapter as a general building contractor qualified by education, training, experience, and knowledge to perform or superintend construction of structures for the support, shelter, and enclosure of persons, animals, chattels, or movable property of any kind or any of the components of that construction except plumbing, electrical work, mechanical work, work related to the operating integrity of an elevator, and manufactured housing installation , for which the general building contractor shall employ the services of a contractor licensed in the particular specialty, except that a general building contractor engaged in the construction of single-family and multifamily residences up to four units may perform the mechanical work and hire a licensed plumber or electrician as an employee.
Virginia	Va. Code Ann. § 54-1-1102, 18 VAC, § 15-22-20.	Legislature created tiers of contractor classification -- by class (i.e. the cost of the construction), and by classification (i.e. what scope of work the contractor can perform). Virginia’s Board for Contractors identifies classifications for contractors and assigns classifications to various identified contractors.