NO. SCWC-28762

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

DISTRICT COUNCIL 50 OF THE INTERNATIONAL UNION OF PAINTERS & ALLIED TRADES and ALOHA GLASS SALES & SERVICE, INC., Petitioner/Plaintiffs-Appellants, vs. KEALI'I S. LOPEZ, in her capacity as Director, Department of Commerce & Consumer Affairs, Respondents/Defendant-Appellee	CIVIL NO. 07-1-0310-02 (Agency Appeal) APPEAL FROM THE JUDGMENT, Filed on September 12, 2007 FIRST CIRCUIT COURT HON. EDEN ELIZABETH HIFO Judge

GENERAL CONTRACTORS ASSOCIATION OF HAWAII'S AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT/DEFENDANT-APPELLEE

APPENDICES "1" — "7"

CERTIFICATE OF SERVICE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND RULES

Hawaii Revised Statutes

TABLE OF AUTHORITIES — CONTINUED

Page

OTHER AUTHORITIES

GENERAL CONTRACTORS ASSOCIATION OF HAWAII'S AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENT/DEFENDANT-APPELLEE

Pursuant to this Court's Order (Dec. 26, 2012) (Dkt. 28) and Haw. R. App. P. 28(g), the General Contractors Association of Hawaii (GCA) submits this brief amicus curiae in support of respondent/defendant-appellee and the Contractors' License Board (Board), respectfully urging the Court to affirm the judgment of the Intermediate Court of Appeals (Aug. 22, 2012).

INTEREST OF AMICUS CURIAE

This case implicates much more than the scope of contractors' licenses, and whether a contractor with a C-5 specialty renovation license entitling it in a renovation project to perform "any other work" that will not change the structure, must employ a C-22 subcontractor to replace windows. Rather, this case asks whether the Board's definition of "incidental and supplemental" work deserves deference because it is consistent with the plain meaning of those words, and whether the Board—comprised of five general contractors, five specialty contractors, and three members of the public who have been charged with the responsibility of carrying out the mandate of the contractor licensing statutes—"possesses expertise and experience in [its] particular field." *Okada Trucking Co. v. Bd. of Water Supply*, 97 Haw. 450, 458, 40 P.3d 73, 81 (2002) ("insofar as an administrative hearings officer possesses expertise and experience in his or her particular field, the appellate court 'should not substitute its own judgment for that of the agency' either with respect to questions of fact or mixed questions of fact and law."). Petitioners invite this Court to go much further than merely overturning the Hearings Officer's conclusion that window replacement was "incidental and supplemental" to a C-5 license. It urges the Court to "substitute its own judgment for that of the agency" by rewriting the Board's rules to define "incidental and supplemental" to mean *only* "minor" work.

Established in 1932, GCA is the largest construction trade association in Hawaii, and represents its members in all matters related to the construction industry, while improving the quality of construction and protecting the public interest. GCA is participating in this case to provide the Court with background regarding the impacts that will be felt if petitioners' deeply flawed argument is accepted, including the cost to the industry, consumers, and the public, if holders of specialty licenses are forced to employ separate subcontractors to perform every item of specialty work in building renovations. GCA also seeks to inform the Court of the numerous Board interpretations regarding the scope of the specialty licenses at issue, all of which are in accord with the ICA's judgment and which demonstrate that the result reached by the Hearings

Officer, the Board, the circuit court, and the ICA in this case is neither absurd nor standardless.

This case has real-world consequences. The cost of construction is one of the prime factors in the cost of housing and commercial space, and it is no accident that Hawaii has the most expensive housing in the nation, making the dream of homeownership a distant fantasy for many of the state's residents.[1] *See* Sumner J. LaCroix, *Cost of Housing–Can government make housing affordable?* in *The Price of Paradise–Lucky We Live Hawaii?* at 137 (Randall W. Roth, ed. 1992) (noting that state licensing requirements are among the factors resulting in construction costs being higher in Hawaii than on the mainland). This Court's decision in *Okada*, the case which petitioners assert affords them a monopoly, had a major effect upon both public and private construction costs. On private jobs, contractors who had been doing work for decades were suddenly considered unlicensed for completed, ongoing, and future work deemed to be specialty work and forced, upon penalty of criminal and civil sanctions, to hire subcontractors at an additional expense to themselves, and ultimately to the consumer. For past and completed work, contractors lost their right to lien or otherwise sue for unpaid completed work for which, under *Okada*, they were suddenly deemed unlicensed. Similar impacts were felt in public construction projects, many of which were delayed due to bid protests and uncertainty over contractors' ability to perform work. Bids needed to be issued with a warning that general contractors could no longer perform work covered by specialty licenses they do not possess. All of this resulted in an increase in the costs ultimately borne by the public.[2] These effects will be magnified should the petitioners' argument be accepted. The work on the project in the case at bar included replacement of windows, floor covering, tackboards, electrical light fixtures, doors and door frames, finish hardware, termite-damaged wood, gypsum wall board partition, sinks and cabinets, re-keying of locks, interior and exterior painting, cast-in-place concrete, concrete

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[1] *See* Erika Engle, *Average home price in state tops U.S.*, Hon. Star-Advertiser (Nov. 29, 2012), http://www.staradvertiser.com/businesspremium/20121129_Average_home_price_in_state_tops_in_US.html?c=n ("The average listing price of a four-bedroom, two-bathroom home in the isles was $742,551, the study said, far exceeding the average of $489,063 in second-ranked Massachusetts and the $431,625 average for No. 3 California.").

[2] *See* State of Hawaii State Procurement Office, *Procurement Circular No. 2002-06* (Sep. 17, 2002), *available at* http://spo3.hawaii.gov/circulars/circulars/2002-06/getfile?filename=2002-06.pdf ("The following revised guidance is provided to assist State agencies to consistently apply the contractor's licensing laws recently interpreted by the Hawaii Supreme Court in the Okada Trucking Co., Ltd. v. Board of Water Supply case (*See*, *97 Haw. 450 (2002)*).").

repairs, and concrete masonry. This type of work—which the tribunals below concluded is covered by a specialty C-5 renovation license—is the same the type of work found in nearly every similar project across the state. The renovation project at issue in this case involved repairs to Lanakila Elementary, a Liliha-Palama public school. The cost of repairing public facilities—especially schools—cannot afford to be increased. In a strained economy, *higher* renovation costs for schools mean *less* renovation for schools.[3] Honolulu is already the most or second-most expensive major market in the nation for costs of construction in nearly every category, including office, retail shopping, hotel, industrial, residential, and education facilities, and adoption of petitioners' crabbed reading of the licensing statute will further add to the costs of construction and increase existing administrative burdens.[4] Hawaii's construction industry is in the beginning and tentative stages of a nascent recovery and can hardly afford additional costs, which could halt this recovery in its tracks by not only impacting contractors' ability to perform future work under C-5 renovation licenses, but also by jeopardizing their rights regarding already-completed renovation work, including payment for existing and completed work on ongoing construction project for private owners and government.[5] Consumers and the industry both deserve a consistent reading of the licensing statutes that results in lower costs, not unnecessary uncertainty and expense.

This brief makes two points. *First*, the decision in this case should reaffirm the proper

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[3] *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").

[4] *See* RLP Rider Levett Bucknall, *Quarterly Construction Cost Report – Fourth Quarter 2012* at 6, *available at* http://rlb.com/rlb.com/pdf/research/RLB_USA_Report_Fourth_Quarter_2012.pdf.

[5] *See* U. of Haw. Econ. Rsh Org., *Tourism Shines, Construction Clouds Lifting* at 4 (Nov. 2, 2012) ("We think prospects are very positive going forward, with pending improvements in private building activity poised to offset the adverse impact of delayed rail construction."), *available at* http://www.uhero.hawaii.edu/assets/12Q4StateUpdatePublicSummary.pdf.

balance between administrative agencies such as the Board, and the courts. The Board's definition of work covered by a C-5 license, and its definition of "incidental and supplemental" work should be accorded deference. Contrary to petitioners' claim, the plain meaning of these terms is not limited to "minor" work, but the dictionary definition also includes "connected" or "related." This means the Board's definition ("directly related and necessary") should be accorded deference because it is consistent with the statute's plain language, and is not "palpably wrong and contrary to the plain meaning of the words used by the legislature." In such situations, courts should be very reluctant to intrude. *Cf.* App for Cert. at 5. *Second*, the administrative definition upheld by the ICA has been an accepted part of industry practice for years, as shown by the prior determinations of the agency charged with enforcing the licensing laws, all of which are in accord with the decision of the Hearing Officer, the Board, the circuit court, and the ICA..

ARGUMENT

I. "INCIDENTAL" IS SUBJECT TO MORE THAN ONE DEFINITION, MEANING THE BOARD'S CONSTRUCTION IS NOT "PALPABLY ERRONEOUS" AND MUST BE ACCORDED DEFERENCE

Petitioners stake everything on their claim that the term "incidental and supplemental" in Haw. Rev. Stat. § 444-8(c) (1993), which allows a specialty contractor to do work outside of its specialization, is defined only as "minor" work. Petitioners argue the administrative rule adopted by the Board, which defines the term not as a matter of size or percentages, but as "work in other trades directly related to and necessary for the completion of the project undertaken," exceeds the Board's statutory authority because it is "palpably wrong" and contravenes the intent of licensing laws. *See* App. for Cert. at 5-6. Petitioners ask this Court to set aside the deference generally accorded to administrative agencies acting within their areas of expertise, inviting the Court to rewrite the administrative rules so that "incidental and supplemental" is deemed to be only "minor" work, a standard they do not define, but which apparently means some amount less than 25% of the project's cost.

Contrary to petitioners' assertion, the dictionary definitions of "incidental" and "supplemental" are not defined solely as "minor" work. "Incidental" is defined as "happening in connection with or resulting from something more important; casual or fortuitous," "found in connection (with); related (to)," "caused (by))," and "occasional or minor." *Collins English Dictionary—Complete & Unabridged 10th ed., available at* http://dictionary.reference.com /browse/incidental. It is also defined as "occurring merely by chance or without intention or

calculation," in addition to "being likely to ensue as a chance or minor consequence." *Webster's New Collegiate Dictionary* 575 (1981). "Supplemental" means "something that completes or makes an addition, and supplemental is serving to supplement." *Id.* at 1162. *Cf.* App. for Cert. at 5 ("Here, the 'incidental and supplemental' exception is limited to 'minor' work supplementing a project."). Other courts have considered the same statutory language, and concluded the agency's definition of "incidental and supplemental" as "necessary to the main purpose," is entitled to judicial deference:

> Plaintiff argues that the plumbing work (for which he did not have a specialty license) was only incidental and supplemental to the work performed under his c–20, C–4, and C–43... An experienced examiner testified that *the State Contractor's License Board has always construed 'incidental' and 'supplemental' to mean necessary to the main purpose.* A similar conclusion was reached by the Attorney General. 3 Ops. Atty. Gen. 312. It is a well settled rule of statutory construction that when the language of a statute is open to any doubt as to its proper interpretation, contemporaneous administrative construction is to be given great weight.

Currie v. Stolowitz, 338 P.2d 208, 211 (Cal. App. 1959) (emphasis added) (reviewing Cal. Bus. & Prof. Code § 7059, which is nearly identical to Haw. Rev. Stat. § 444-8).[6] These cases also refute Petitioners' argument that the Board's rule is "entitled to little or no deference" because Hawaii's administrative rules were first adopted years after the statute. *See* App. for Cert. 7-8. The statutory definitions of "incidental and supplemental" had been a part of the contracting landscape for decades before Hawaii's legislature first adopted section 444-8.

Thus, because "incidental and supplemental" have a broad and indefinite meaning, the Board acted within its delegated discretion when it defined the words to mean that C-5 specialty licensees may do work in areas that are "directly related to and necessary for the completion of the project," a definition that is consistent with at least one plain meaning of the word:

"Incidental and supplemental" is defined as work in other trades directly related to

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[6] *See also Roy Brothers Drilling Co. v. Jones*, 176 Cal. Rptr. 449, 454-55 (Cal. App. 1981) ("incidental and supplemental" means "connected" or "related"); *State Bd. of Architects v. North*, 484 A.2d 1297, 1300 (N.J. Super. 1984) (statute allowing engineers to engage in planning and design work "incidental" to engineering project means that "it is at least clear that engineers may engage in conduct that would otherwise qualify as architecture so long as it is done *in connection with* an engineering project.") (emphasis added); *Kelly v. Hill*, 230 P.2d 864, 867 (Cal. App. 1951) (as used in a statute allowing nonlicensed work "incidental" to farming, court held that construction of irrigation ditch qualified because it was "depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another with is termed the principal").

> and necessary for the completion of the project undertaken by a licensee pursuant to the scope of the licensee's license.

Haw. Admin. R. § 16-77-34 (2004). Nothing in this definition prohibits "minor" work; the size of the project and the percentage of work are not the dispositive factors. As this Court held, "[w]here an administrative agency is charged with the responsibility of carrying out the mandate of a statute which contains words of broad and indefinite meaning, courts accord persuasive weight to administrative construction and follow the same, unless the construction is palpably erroneous." *Morgan v. Planning Dep't, County of Kauai*, 104 Haw. 173, 180, 86 P.3d 982, 989 (2004) (quoting *Ka Paakai O Ka Aina v. Land Use Comm'n*, 94 Haw. 31, 41, 7 P.3d 1069, 1078 (2000)). When there is no legislatively-supplied definition in the licensing statute, and there is nothing inherent in the plain meaning of the words themselves that limit "incidental and supplemental" to "minor" work, and at least one of the plain meanings is entirely consistent with the Board's rule and court interpretations, the Board's definition is entitled to judicial deference. This Court should not heed petitioners' call to ignore the judgment of the Board experts who are intimately familiar with the industry being regulated. *Poe v. Hawai'i Labor Rels. Bd.*, 87 Haw. 191, 195, 953 P.2d 569, 573 (1998) ("the court should not substitute its own judgment for that of the agency").

Contrary to petitioners' claim, *Okada* supports affirmance of the ICA's rationale. *Okada* teaches that courts should defer to the administrative rules adopted by the Board and not disregard them. In that case, the Court held a general contractor with only a *general* license could not do work encompassed by certain *specialty* licenses. *Okada*, 97 Haw. at 462, 40 P.3d at 85. The Court reached this result by deferring to the Board's expertise. The administrative rules promulgated by the Board automatically award to general contractors certain specialty licenses upon licensure. The Court read these rules as prohibiting general contractors from doing any work in areas outside those expressly awarded specialties. *Id*. at 461, 40 P.3d at 84. This Court held that "insofar as an administrative hearings officer possesses expertise and experience in his or her particular field, the appellate court 'should not substitute its own judgment for that of the agency' either with respect to questions of fact or mixed questions of fact and law." *Okada*, 97 Haw. at 458, 40 P.3d at 81 (quoting *Southern Foods Group, L.P. v. State of Hawai'i Dept. of Educ.*, 89 Haw. 443, 452, 974 P.2d 1033, 1042 (1999)). To hold otherwise would "eviscerate" the Board's authority to determine when "experience, knowledge, and skill" required specialty

licenses. *Id.*[7] This Court has never deviated from the principle that "judicial deference to agency expertise is a guiding precept where the interpretation and application of broad or ambiguous statutory language by an administrative tribunal are the subject of review." *Gov't Employees Ins. Co. v. Hyman*, 90 Haw. 1, 5, 975 P.2d 211, 215 (1999) (quoting *Richard v. Metcalf*, 82 Haw. 249, 252, 921 P.2d 169, 172 (1996)). Statutory language is "ambiguous" when, as here, it is subject to more than one meaning. *Haw. State Teachers Ass'n v. Abercrombie*, 126 Haw. 318, 320, 271 P.3d 613, 615 (2012) ("when there is doubt, doubleness of meaning, or indistinctiveness or uncertainty of an expression used in a statute, an ambiguity exists").

Moreover, petitioners focus on the wrong part of the licensing law. They present the question as whether the "incidental and supplemental" exception allows a C-5 licenseholder to do window renovations. This appeal, however, can be resolved without such an inquiry. Possessing a C-5 specialty renovation license automatically grants a contractor the right to "install cabinets, cases, sashes, doors, trims, or nonbearing partitions that become a permanent part of a structure, *and 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." Haw. Admin. R. § 16-77-28(c) (2004) (emphasis added). The license expressly includes the right to accomplish:

> the installation of window shutters, garage doors, bifold, and shutter doors; and the installation of manufactured sidings *and any other work that would not involve changes or additions to the building's or structure's basic components* such as, but not limited to, foundations, beams, rafters, joists, or any load bearing members or sections..

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[7] One of the reasons *Okada* had such an impact is because it was a sudden departure from then-existing practices. Prior to that decision, a general contractor with a "B" license was for the most part entitled to do the entire job. Haw. Rev. Stat. § 444-7 (1993) ("B" licensee may "*do* or superintend the whole [of a building project] or any part thereof") (emphasis added). This language is nearly identical to other states' statutes. Those states uniformly held a general contractor could *perform* work covered by specialty licenses the general contractor did not possess and was not required to subcontract such work. *See Martin v. Mitchell Cement Contracting Co.*, 140 Cal. Rptr. 424, 426 (Cal. App. (1977) ("the holder of a general contractor's license ... need not secure an additional supplemental specialty classification covering a particular field, and he may do the entire work himself if he desires") (quoting 3 Ops. Cal. Atty. Gen 311, 312-13 (1944)). *See also Arnold Constr. Co., Inc. v. Arizona Board of Regents*, 512 P.2d 1229, 1231 (Ariz. 1973) ("There is no question but that Redden Construction, Inc. has the proper license to construct the total project ... if the project in its totality had been submitted for construction under a single contract."). *See also* CLB Meeting Minutes (May 1993) (copy attached as App. "1").

Haw. Admin. R. Ch. 77, *Contractors*, Ex. "A" (emphasis added) (copy attached as App. "2"). Thus, a C-5 licenseholder has the right to: (1) remodel or repair existing structures, including installing cabinets, windows shutters, doors, and other enumerated items, *as well as* the right to (2) do work incidental and supplemental to the remodeling work; *and* (3) to perform "any other work" that would "not involve changes or additions to the building's or structures basic components," regardless of whether this work is "incidental and supplemental." Thus, petitioners' argument is somewhat of a red herring, because a C-5 licenseholder may perform "any other work" that would not involve changes or additions to the building's or structure's basic components," *as well as* any other work that is incidental or supplemental to the remodel. In other words, a C-5 specialty renovation licenseholder is fully qualified, by definition, to undertake specialty window work, and a ruling on whether the Board exceeded its statutory authority is not necessary in order to affirm the ICA's judgment. *Canalez v. Bob's Appliance Service Center, Inc.*, 89 Haw. 292, 301, 972 P.2d 295, 304 (1999) (appellate court may affirm correct result on any basis supported by the record). Here, the window work is both part of "any other work" required for the renovation, and was "directly related to and necessary" to the renovation project. Petitioners have shown no reason why *Okada*'s rule of deference should not govern the result in the case at bar, but instead assert that the ICA "effectively erased the word 'incidental' (i.e., 'minor') from the statute." App. for Cert. at 6. Ironically, the term "minor" is found neither in the statute, nor is the sole plain meaning of the word "incidental."

II. THE BOARD'S DEFINITION HAS BEEN AN ESTABLISHED PART OF INDUSTRY PRACTICE FOR YEARS

Petitioners argue that *Okada* means that all specialty licensees have their own protected *kuleana* and were endowed the exclusive right to undertake specialty work. However, there is nothing in either *Okada* or in Hawaii's licensing statutes that so states; rather, the *Okada* decision is grounded first and foremost in the Board's authority to create and define specialty licenses, and the court's general obligation to defer to such authority.

Contrary to petitioners' claim, this discretion does not leave "the construction industry guessing when the exception applies." App. for Cert. at 9. Instead, Hawaii's licensing statute contemplates inquiry to the Board, and empowers it to interpret and issue informal decisions regarding licensing scope questions. *See* Haw. Rev. Stat. § 444-7 (1993). Pursuant to this authority, the Board has interpreted the scope of the C-5 specialty license many times in the years since it created the license, and its opinions have been remarkably consistent. In at least

five instances the Board concluded, as it ultimately did in this case, that contractors' renovation license includes the ability to perform the removal and replacement of windows even though such work would also be covered by a specialty license. Those decisions are excerpted here, and are attached as appendices:

> DAGS requests a determination on the license required to install plexiglass in classroom windows. Recommendation: The C-5 Cabinet, millwork, and carpentry remodeling and repairs or the C-22 Glazing and tinting contractor license is required to install plexiglass in classroom windows[.]

CLB Meeting Minutes (Feb. 21, 2003) (copy attached as App. "3").

> Inquiry was received on whether the "B" General Building or C-5 Cabinet, millwork, and carpentry remodeling and repairs contractor could install vinyl sliding windows and doors if the frames had flanges and was nailed to wood framing as part of a new structure or renovation project;" Recommendation: The "B" General Building, C-5 Cabinet, millwork, and carpentry remodeling and repairs, or C-22 Glazing and tinting contractor can install vinyl sliding windows and doors if the frames have flangers and nailed to wood framing as part of a new structure or renovation project[.]

CLB Meeting Minutes (Jan. 21, 2005) (copy attached as App. "4").

> Allied Pacific Builders, Inc. requests determination on whether a "B" General Building contractor may complete the replacement of aluminum jalousie windows for the Lanikila Elementary School Renovation and Painting project. Recommendation: if the renovation work performed by the "B" General Building contractor falls within the scope of the C-5 Cabinet, millwork, and carpentry remodeling and repairs classification, and the replacement of aluminum jalousie windows is a part of the renovation work, the then jalousie work may be performed by the "B" General Building contractor[.]

CLB Meeting Minutes (Mar. 18, 2005) (copy attached as App. "5").

> The Board of Water Supply requests determination on whether the "B"/C-5 contractor doing renovation work on a pump building is allowed to replace a portion of the existing windows with glass blocks. Recommendation: The "B" General Building contractor may replace a portion of the existing windows with glass blocks, provided that the pump building renovation work falls within the scope of the C-5 Cabinet, millwork, and carpentry remodeling and repairs classification[.]

CLB Meeting Minutes (Sep. 22, 2006) (copy attached as App. "6").

> Francisco B. Sapigao, Jr. requests clarification on the types of incidental work he can perform as follows. . . What types of windows can he install (i.e. nail-on,

> block) and is there a limit to what he can without the C-22 Glazing and tinting classification? Recommendation: Installation of windows is incidental to the "B" General Building or C-5 Cabinet millwork, and carpentry remodeling the repairs licenses[.]

CLB Meeting Minutes (Nov. 16, 2007) (copy attached as App. "7"). *See also* Meeting Minutes, adopting the Findings of Fact, Conclusions of Law, and Recommended Order of the hearings officer in this action (Jan. 19, 2007). These scope determinations have resulted in general and specialty C-5 contractors routinely bidding for and performing renovations which include the removal and replacement of windows, as was the case here.

CONCLUSION

Both lower courts concluded the Board's and the Administrative Hearings Officer properly determined that the window work was "incidental and supplemental" to the C-5 specialty licenseholder's permissible work. The ICA did not gravely err when it held that it must defer to the Board's interpretation of the scope of permissible work, which is in conformity with the statutory text. The judgment of the ICA should be affirmed.

DATED: Honolulu, Hawaii, January 2, 2013.

Respectfully submitted,

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