

# BUILDING IN HAWAII

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## ROOFING EXPLAINED

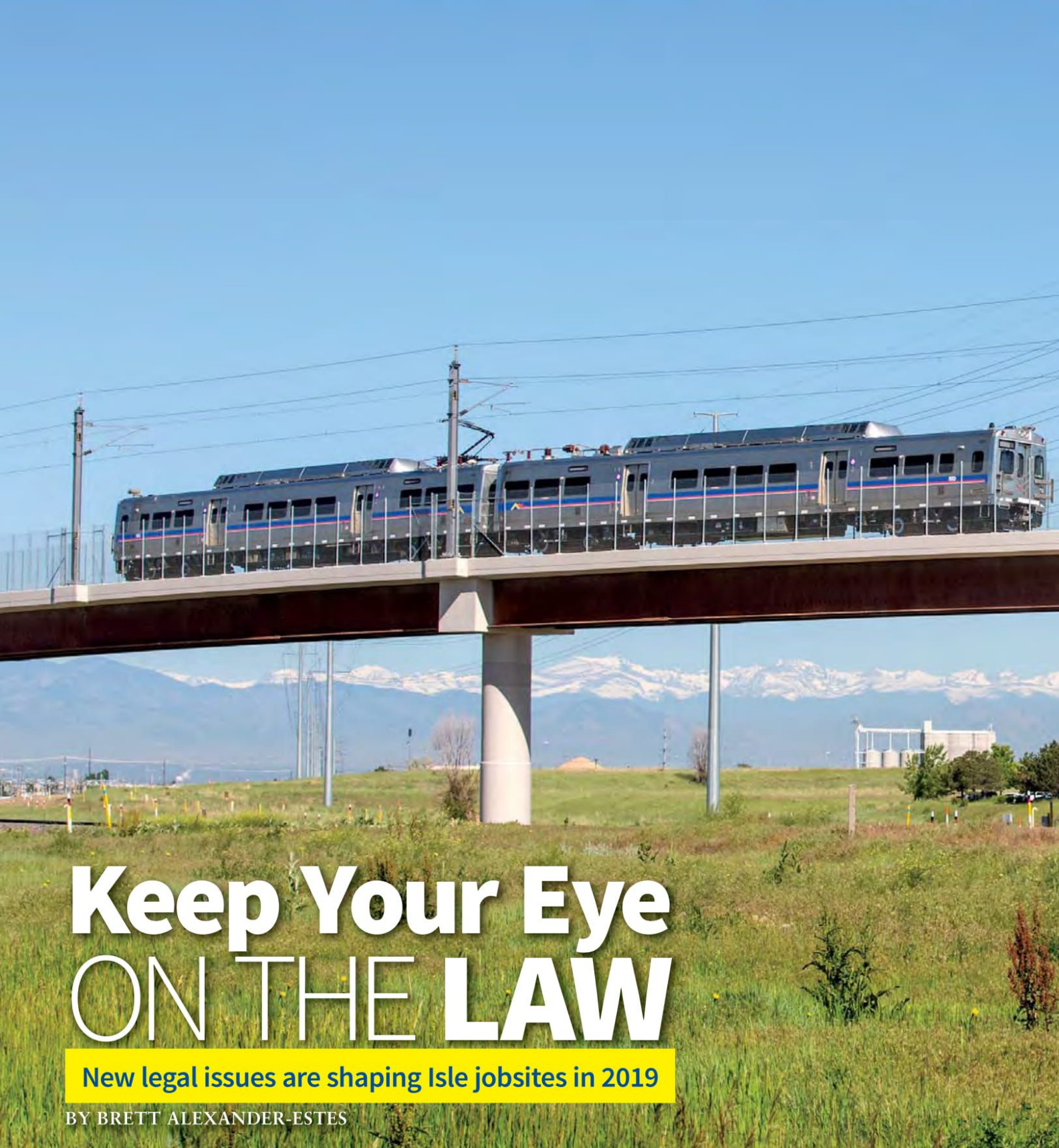
How Scot Jimenez and Beachside Roofing climbed to the top of the industry



TOP ROOFING  
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# Keep Your Eye ON THE LAW

New legal issues are shaping Isle jobsites in 2019

BY BRETT ALEXANDER-ESTES

**H**awaii builders are keeping abreast of OSHA's evolving silica rules, but should also keep an eye on other legal developments in Hawaii's construction industry.

These include new laws needed for

public-private partnerships, Bill 64, decisions in two recent construction cases—and, of course, the clauses in their own contracts.

## No Legal Framework

“We have been hearing a lot about

‘P3s’—Public Private Partnerships—where the government cannot afford to carry out construction, so it looks to get private industry to kick in,” says Scott I. Batterman, an attorney and partner at Clay Chapman Iwamura Pulice & Nervell, a Hawaii



Built through a P3, the Eagle Public-Private Partnership Commuter Rail Design-Build project is Denver's first commuter rail network, encompassing three new electric lines, expediting travel between key commuter hubs and connecting communities that were not served by existing rail lines. Phase one opened in 2016 with the launch of the 22.8-mile University of Colorado A Line in April and the 6.2-mile B Line in July.

PHOTO COURTESY HDR INC.

law firm. “We have not seen what these contracts are going to look like, nor how they will be accommodated in public procurement laws.”

Portions of the Honolulu Authority for Rapid Transportation (HART) rail line and transit-oriented development

(TOD) are among recently proposed P3 projects.

“These projects are coming,” Batterman says, “and people need to be thinking about the legislation to accommodate them, the contract forms to structure them, and how to

allocate risk.”

### **New Permit Approvals**

Bill 64, passed in November to help spur residential development, may do so at other sectors' expense.

“While the General Contractors

Association of Hawaii applauds both the mayor and the City Council for looking at ways to expedite and streamline the permitting process, we did express concern that the new law could give priority for approvals of building permits to one- and two-family residential dwellings over other building permits, including commercial, industrial and other multi-unit



Michael R. Yadao

## Mechanic's and Materialman's Liens Cases Filed, 2016-2018\*

CIRCUIT	2016	2017	2018	TOTAL
First (Oahu)	58	66	29	153
Second (Maui)	13	3	10	26
Third (Hawaii Island)	7	17	11	35
Fifth (Kauai)	3	4	6	13
Statewide	81	90	56	227

*\*Based on a preliminary review of Hawaii court records*

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**—Jeffrey M. Osterkamp**

residential building permit requests,” says Michael R. Yadao, the GCA’s director of government relations.

“Rather than giving priority to one segment over another, GCA continues to advocate for a revisiting of the entire system in an effort to allow for the proper processing of all building permits in an efficient manner.

“We will monitor the implementation of Bill 64 and its effects on the industry, and look forward to working with the Department (of Planning & Permitting) on streamlining the construction delivery process.”

### Indirect Liability

Citing a recent federal decision for the Fifth Circuit (Mississippi, Louisiana, Texas), the National Safety Council reports “OSHA can issue citations to general contractors who fail to control hazardous conditions at multi-employer worksites, even if those conditions do not directly affect their own employees.”

As a result, states The American Equity Underwriters Inc., “OSHA can now issue Multi-Employer Worksite citations to both general contractors and its subcontractors” in many Southern states. Should a similar dispute arise in Hawaii, OSHA and local courts may look to the Fifth Circuit’s ruling.

### Double Jeopardy

U.S. Pipelining LLC v. Johnson Controls Inc., a recent federal decision, allows an unlicensed subcontractor to bring a civil action for nonpayment against a licensed general contractor.

U.S. Pipelining “is not binding on Hawaii state courts, but general contractors need to be aware of it”—and especially, the licensing status of their subs, says Jeffrey M. Osterkamp, an attorney and partner at Cades Schutte LLP, a Hawaii law firm.



Jeffrey M. Osterkamp



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**“The designer  
... should  
consider a  
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manuscript  
policy that  
covers the GC.”**  
—Kenneth Kasdan

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“It’s conceivable that a general contractor could, on the one hand, be liable to an owner for damages relating to an unlicensed subcontractor’s work, but on the other hand, would not be able to recover against the subcontractor for the same issues,” Osterkamp says.

“U.S. Pipelining is a confusing decision, and it’s hard to tell what the ultimate implications might be. But at a minimum, it should serve as a caution to general contractors to make sure that their subcontractors are licensed.”

### **Accident or Design?**

The thin line between design/

## **Material Facts**

Ocean air destroys most construction materials, says Kenneth Kasdan, senior partner at Kasdan



Kenneth Kasdan

LippSmith LLLC, a Hawaii law firm, so designers and builders “must appreciate that Hawaii’s environment is corrosive, and design and build accordingly.”

**When assigning fault for the failure of metal materials in a Hawaii project, he says, the following considerations are critical:**

- Was a more durable stainless steel available, but a cheaper galvanized material chosen to lower costs?
- Was a more durable stainless steel even considered?
- Even if galvanized steel was to be used, did the designer select a high grade of galvanic protection, or was price the controlling aspect?

“Ultimately, when determining if there is a claim in addition to warranty claims,” he says, “it may come down to questions over whether the construction professionals specified, used, installed, or caused the installation of proper materials.”

build and design/assist projects, says Batterman, can also create legal problems.

When the contractor “is providing significant input, but not the sole input, who then is actually responsible for a failure to perform?” In these cases, Batterman says, how a contract structures responsibility and insurance is critical.

“Many General Liability policies do not cover claims for designer-type errors, while general contractors do not always have the type of Errors & Omissions policies which do cover design errors,” he says.

Kenneth Kasdan, senior partner at Kasdan LippSmith LLLC, a Hawaii law firm, says the designer in a design/build arrangement “should not rely solely upon the standard commercial general liability (CGL) policy, but rather, should consider a custom or a manuscript policy that covers the GC for design services as well as construction operations and completed operation coverage, typically triggered by completion dates.”

### **Set Project Scope**

To provide adequate protection, a construction contract should, at a minimum, contain “basic provisions on the contractor’s specific scope of work and the process for determining how to resolve disputes over whether the contractor complied with its scope,” says Osterkamp.

“It’s also very helpful for a contract to provide a specific process—such as mandatory face-to-face discussions and review of the issue by a neutral party—in order to try to head off disputes before they reach a court or arbitrator.” 🏠

## **Don’t Void Your Contract**

“A very large percentage of contractors doing residential work do not contain certain clauses and information required



Scott I. Batterman

by Hawaii Law and Contractors License Board regulations, which render those contracts void,” says Scott I. Batterman, an attorney and

partner at Clay Chapman Iwamura Pulice & Nervell.

If a contract is voided, a contractor

loses “rights to place a mechanic’s lien on the project,” he says.

Fifty-six mechanic’s and materialman’s liens were filed statewide in 2018.

Other losses can include:

- Specific formula provisions for overhead and profit
- Fee provisions if a project is cancelled
- A waiver of consequential damages (indirect losses from a breached contract)
- A specific limit on a contractor’s liability