BEFORE THE
REGISTRAR OF CONTRACTORS
CONTRACTORS' STATE LICENSE BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: DECKTECH INC., Ronald James McKenna, RMO/CEO/PRES Contractor's License No. 796956, Respondent.	Case No. N2014-235 OAH Case No. 2016010752
HUNTER JAMES INC., Ronald James McKenna, RMO/CEO/PRES Heather Lynn McKenna, Officer Contractor's License No. 862903, Affiliated Party.	

DECISION AFTER NONADOPTION OF PROPOSED DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, in San Luis Obispo, California, on June 15, 16, and 17, and November 14, 15, and 16, 2016.

Shawn P. Cook, Deputy Attorney General, represented Wood Robinson (Complainant), Enforcement Supervisor, Contractors' State License Board (Board), Department of Consumer Affairs.

John F. Hodges, Attorney at Law, represented Decktech, Inc. (Respondent) and Hunter James, Inc., whose Responsible Managing Officer (RMO), Chief Executive Officer, and President is Ronald James McKenna (McKenna).

The Accusation was amended at the hearing as follows. In Paragraph 22.a of the Accusation, on page 7, line 12, the number "40-" was struck. Paragraph 22.b was struck and replaced with the following: "Respondent failed to install concrete tiles at a proper slope for drainage and failed to maintain consistent grout joints." A Seventh Cause for Discipline was added, which states: "Respondent is subject to disciplinary action under [Business and

Professions Code[1]] Section 7159.6 for failure to execute written change orders. The circumstances are that Respondent substituted Carboline for the NCS 6000 UVS coating without executing a written change order."

Complainant seeks to discipline Respondent's license, an order of restitution, and reimbursement of costs of investigation and prosecution, because Respondent allegedly departed from trade standards, failed to complete the project for the contract price, violated home improvement contract requirements, obtained an excessive down payment, obtained a payment in excess of the value of the work performed, failed to provide a full and unconditional lien release when requested, and failed to execute a written change order in connection with a home improvement project at the home of Frank P. Smith (Smith) and Judi Smith, collectively referred to as Homeowners. Respondent disputed most of the facts and presented evidence and argument against discipline and against the order of restitution.

Oral and documentary evidence was received at the hearing. The record was left open for the submission of additional evidence and for the filing of closing argument. No additional evidence was received from Complainant by the December 2, 2016 deadline. Closing argument was received from both parties on December 19, 2016. The parties thereafter submitted a stipulation waiving the filing of scheduled reply argument. The stipulation was approved on January 3, 2017, and the matter was submitted for decision on January 3, 2017.

The proposed decision of the Administrative Law Judge was submitted to the Registrar of Contractors ("Registrar) of the Contractors' State License Board ("Board") on February 3, 2017. After due consideration thereof, the Registrar declined to adopt said proposed decision and thereafter on February 23, 2017 issued an Order of Non-adoption and subsequently on March 1, 2017 issued an Order Fixing Date for Submission of Argument. Written argument having been received from Respondents and the time for filing written argument in this matter having expired, and the entire record, including the transcript of said hearing having been read and considered, the Registrar, pursuant to Section 11517 of the Government Code, hereby makes the following decision:

FACTUAL FINDINGS

Parties and Jurisdiction

1. Complainant filed the Accusation solely in his official capacity.

2. On July 2, 2001, the Board issued License number 796956, classification B (General Building Contractor), to Respondent, with McKenna as its Responsible Managing Officer (RMO)[2], President and Chief Executive Officer (CEO). The license, with McKenna serving as RMO, was in effect at all times material to this matter and is renewed to July 31, 2017.

---

[1] All further statutory references are to the Business and Professions Code ("Code").

[2] The RMO "qualifies" the license for the corporation pursuant to Section 7065 of the Code.

3. On August 15, 2005, the Board issued License number 862903, classification B (General Building Contractor), to Hunter James, Inc., with McKenna as its RMO, CEO and President. The license, with McKenna serving as RMO, was in effect at all times material to this matter and is renewed to August 31, 2017.

Project Inception

4. On August 27, 2013, McKenna and Smith met at the Homeowners' home, located at 1125 West Avenue, Morro Bay, California (Property), to discuss the project. Smith wanted to repair and waterproof his deck, which was located over living space with views of the ocean. The perimeter contained tempered glass panes supported by 15 metal posts dug into the concrete below. Approximately 2.5 inches of concrete sat on the home's wood framing. The deck floor was covered with a smooth craft tile that was no longer manufactured in 2013.

5. McKenna and Smith had somewhat different recollections of the discussion about the floor. Smith testified that he wanted to retain the same tile look and feel. McKenna recalled that Smith initially wanted a non-tile deck material because the existing tile was no longer being manufactured. To educate Smith about his options, McKenna left a sample of Nevada Coating Systems (NCS) Crushed Granite, which was one of the waterproof membranes used by Respondent.

6. The membrane in the sample McKenna left was yellow in color, had the "Decktech, Inc." logo, and was set on a small rectangular piece of plywood.

7. a. On August 29, 2013, McKenna provided Smith with a packet of materials he called an "assessment" for the Homeowners to evaluate. The assessment contained photographs documenting the project's existing condition, photographs of other projects to describe work planned or suggested, a proposed scope of work, and a cost breakdown. Included with the assessment were "testimonials" from satisfied customers and a product data sheet[3] for the NCS 6000-UVS (Ultra Violet Stable) Waterproof Membrane (NCS 6000-UVS).

b. McKenna's transmittal email states, in part: "[I] have provided [a] Power Point attachment with photos walking you through the renovation details and what is involved with the proposed Scope of Work. The intent is to educate you with process so it makes sense. I have also included a membrane spec sheet submittal and local client testimonials or letters of endorsement for review as well. ¶ . . . ¶ Upon your review, feel free to contact me if there are any additional questions or concerns. If you elect to move forward then Irene in Contracts will expedite contract reflecting the scope and cost provided along with warranty package for your final review and approval. . . ." (Exh. 5.)

[3] A product data sheet, which contains general and descriptive information about the product, is to be distinguished from a product specification sheet, which contains more technical details about the product and its application requirements.

8. The NCS 6000-UVS product data sheet included in the assessment packet contained the following information:

"NCS 6000-UVS waterproof membrane is a uniquely blended polymer system designed to install quickly with rapid drying, thus allowing soil replacement (backfill) or concrete applications within 30 minutes. NCS 6000-UVS is formulated in 100% solid solution and comprised of specially blended UV-stabilized Polyurea Resins which result in substantial physical properties achieved in as little as 30 minutes from initial application.

"Once NCS 6000-UVS is dry to the touch, soil, concrete, tile and stone can be placed directly over the surface without negatively affecting the integrity of the membrane. NCS 6000-UVS is installed by spray, roller or brushing.

"NCS-6000-UVS is installed in thicknesses of 45 mils [thousandths of an inch] to as much as 125 mils (please contact NCS for design specifications). NCS-6000-UVS can incorporate traditional drainage systems as deemed necessary. ¶ . . . ¶." (Exh. 4, at p. 57.)

9. McKenna testified he sent the NCS 6000-UVS product information because Smith expressed a desire for a non-tile walking surface, and the NCS 6000-UVS is the product he typically uses for exposed membranes because of its ultraviolet protection properties. If the membrane was to be installed under tile, Respondent typically uses the NCS Extra Tough, which does not have the ultraviolet protection properties needed if direct sun exposure is contemplated.

10. Smith agreed to the proposal contained in the assessment, and told McKenna that he wanted to start the project quickly, as he was leaving town. To accommodate Smith's wishes, McKenna started ordering materials based on the scope of work and cost figures contained in the assessment.

The Contract

11. On August 29, 2013, Respondent presented the Homeowners with a formal contract, a 14-page document entitled "Work Contract" (hereinafter referred to as the "Work Contract" or "the contract"). The document described the work to be performed as follows:

"1. Remove existing railing and dispose.

"2. Chip stucco off surrounding resident wall to deck transitions up approx. 10-16 inches.

"3. Inspect all exposed underlying framing for additional dry-rot fungus and excessive moisture damage. If found provide supplemental estimate to rectify. All supplemental work is estimated at $48 sqft for removal and replacement.

"4. Install additional blocking at outside perimeter of deck for appropriate backing during new rail installation.

"5. Install new 1 1/8 exterior grade plywood utilizing screw sank nailing and glue. Deck is assumed to have 2% slope to outside for industry standard drainage. If once exposed and slope is inadequate then an additional quote will be provided to retrofit joist for proper slope prior to sheathing installation. The $48 sqft is not used for slope retrofit, instead a sensible assessment will be made and cost effective quote determined based off additional time and materials needed.

"6. Chip stucco off outside perimeter of deck and retrofit framing here to bring stucco elevation up and terminate properly with new outside deck flashing. Existing detail is substantiated and no flashing is evident.

"7. Install 16oz copper flashing throughout deck to accommodate new waterproof deck coating assembly.

"8. Install new stucco weep screed detail with 2 inch finished reveal above finished deck surface. Install new stucco to all impacted areas through finish.

"9. Install NCS waterproof deck coating membrane ready for tile.

"10. Install tile to same layout, design and size of existing.

"11. Install new glass rail system with 1/2 tempered glass at 6ft spans."
(Exh. 4, at pp. 108-109.)

12. The contract specifically excluded the following items from the scope of work: permit and drawing of permit, cost for additional repairs exposed from inaccessible areas, painting of stucco, and gutters.

13. The total contract price was $59,970, and the cost breakdowns were made for demolition ($6,160), framing ($8,400), stucco ($6,156), membrane ($13,860), copper flashing ($3,360), tile purchase and installation ($12,320), and railing ($9,714).

14. Payments were scheduled as follows: (1) a "deposit and first draw" of $15,500 was due at signing of the contract "to confirm start date and provide scoped items 1-5 of Work Contract." (Exh 4, at p. 110.); (2) a second payment of $15,500 was due upon completion of contract work items 6, 7 and 8 through scratch coat and dry-in coat of membrane; (3) a third payment of $15,500 was due upon completion of membrane, brown coat to stucco and tile delivery to the project; and (4) the balance of $13,470 was due upon completion of the project.

15. Smith initialed each page of the contract and signed its last page.

16. The contract did not contain the statement regarding an unconditional claim or lien release to be given the homeowner for any portion of the work for which payment has been made, as required by section 7159, subdivision (c)(4) of the Code.

17. Also on August 29, 2013, the parties executed a five-page "Warranty for Waterproof Deck Coatings," which also contained Smith's initials on every page. The warranty contained different terms depending on the type of waterproof membrane used. The warranty code referenced on the signature page is "2A," which provided a 10-year warranty, the longest term provided under the warranty, for "Overlay of Existing Coating with NCS-6000 & Amerilyte." (Exh. 4, at pp. 31 and 34.)

18. a. Both Homeowners testified that the NCS 6000-UVS product sheet was given to them with the contract. Smith testified that it was given to him with an unsigned copy of the contract, but he appeared to refer interchangeably to the assessment, where Respondent agreed the product data sheet was included, and to the actual contract. Judi Smith testified that the product data sheet, accompanied with a signed copy of the contract, was sent to them on August 30, 2013. The Homeowners did not testify about any discussion of the product data sheet at the time the contract was signed, and unlike all pages of the contract or of the warranty, the NCS 6000-UVS product data sheet did not contain the Homeowners' initials or signature, or Respondent's signature. McKenna denied that he attached or otherwise made the NCS 6000-UVS product sheet a part of the home improvement contract. In these circumstances, it was not established that the NCS 6000-UVS product sheet was actually part of the home improvement contract between Respondent and the Homeowners.

b. Nevertheless, even if specific waterproof membrane specifications were not incorporated into the contract, Respondent planned to install an NCS waterproof membrane and Smith reasonably expected the installation of an NCS membrane. Thus, Respondent left an NCS Crushed Granite membrane sample on August 27, 2013, provided a product data sheet for the NCS 6000-UVS on August 29, 2013, and referred to installation of an NCS waterproof membrane in item 9 of the scope of work section of the contract.

19. On September 13, 2013, McKenna submitted a written proposal for removal of additional dry rot fungus and excessive moisture damage uncovered after commencement of the project, as contemplated by item 3 of the scope of work in the contract. On the same date, Smith accepted the proposal, agreeing to pay an additional $5,472.

20. a. The Homeowners paid Respondent $15,500 on September 9, 2013 (first draw), $15,500 on September 27, 2013 (second draw), $5,472 on September 27, 2013 (supplemental contract), and $15,500 on October 17, 2013 (third draw), for a total of $51,972.

b. In late November or early December 2013, Respondent and Smith disagreed about whether installation of the glass panels required a permit, and Smith called another contractor, Central Coast Glass, to perform the work called for under the contract between Respondent and the Homeowners. On December 3, 2013, the Homeowners paid Central Cost Glass $3,749.61 for the work.

Choice/Substitution of Waterproofing Membrane

21. NCS is Respondent's primary source for waterproofing membranes. On August 29, 2013, McKenna called NCS to order the waterproof membrane. His contact at NCS was out of town, and McKenna ordered the waterproof membrane from Carboline, his secondary source. The Carboline Reactamine ET Waterproof Membrane (Carboline) was the one actually used on the project.

22. Respondent deemed the Carboline product comparable to the NCS Extra Tough membrane he planned to use once the Homeowners opted for a tile floor on their deck. The manufacturer specifications called for an installation thickness between 30 to 250 mils.

23. Respondent did not obtain a written change order from the Homeowners in order to use Carboline instead of NCS 6000-UVS or another NCS product. In fact no authorization, written or otherwise, was sought from the Homeowners prior to the substitution.

24. a. As set forth below, the Board contracted with Gary Lasater (Lasater), the principal of Gary Lasater Construction, Inc., to conduct an inspection of the project. Lasater holds contractor licenses in classification A (General Engineering Contractor), classification B (General Building Contractor), subclassification CS (Concrete Contractor), and subclassification C12 (Earthworks and Paving Contractor). Lasater has been involved in many projects involving waterproofing, but has only actually applied a waterproof membrane on three occasions.

b. Lasater opined that all change orders are required to be in writing under the Contractors State License Law. Changing the waterproofing membrane from the NCS 6000-UVS product to the Carboline product would, therefore, require a written change order.

25. a. Respondent called David L. Mazor (Mazor), the founder and owner of NCS, as a witness. Mazor, who holds General Building Contractor licenses in California and Nevada, has spent over 35 years in the construction industry, developing or applying waterproofing coatings, among other things. The NCS 6000-UVS Waterproof Membrane is in a class of polyurea membrane products, which are durable, flexible, water resistant compounds designed to be applied over multiple surfaces. Mazor referred to the Carboline membrane as "identical" to the NCS 6000-UVS, with the same properties and the same manner of application.

b. In Mazor's opinion, if someone could not obtain the NCS 6000-UVS membrane, Carboline would be an acceptable substitute.

26. Given Mazor's extensive knowledge and experience in waterproofing applications and his greater knowledge of the products involved, his testimony regarding waterproofing applications is credited when in conflict with Lasater's. However, expert testimony is not necessary to resolve the question of whether Respondent failed to comply with the law regarding getting authorization from the consumer prior to a change to the Work Contract or compliance with Section 7159.6 of the Code.

27. While Respondent attempted to establish that the substitution of the Carboline membrane for the NCS 6000-UVS is not a "material" change in the contract that would have triggered the need for Respondent to obtain a change order, this is not the standard Respondent must meet. The Contractors' State License Law requires all changes to be in writing[4] and plainly does not permit exemption or deviation from the requirement that a contractor obtain written authorization from the consumer prior to making any change to the contract. There is no exemption for product substitutions or deviations where the change is deemed "not material" in the sole discretion of the contractor. The Work Contract also states, in part, that, "[a]ny deviation" will not be performed "unless a written extra work order is executed by the customer..." (Exh. 4 at p. 110.) McKenna admitted that he neither had discussions with Smith nor provided the Homeowners with a written change order before unilaterally substituting another product. (AR Vol. VI, 208:20-25, 209:1-6.) However, this is contrary to the terms of the Work Contract and the warranty identifying the product as an NCS product (see Factual Findings 11, 17 and 18b); and therefore required written authorization from the Homeowners to be enforceable under Section 7159.6 of the Code.

Commencement of Work on the Project

28. a. McKenna testified that he performed significant administrative work before the start of construction. In addition to ordering the waterproof membrane on August 30, 2013, he met with project manager Scott Wilson (Wilson) to plan and schedule tasks associated with the project.

b. At the time of the Smith project, McKenna believed .that he could charge for administrative work before the start of construction work. He now realizes his understanding was in error, and has made necessary changes in his standard contract language.

29. Work on the site of the project started on September 11, 2013. Glass panels were removed and protective construction paper was placed over areas that could be impacted by debris during demolition, and demolition was commenced.

30. As of September 27, 2013, when the second payment was made by the Homeowners, Respondent had completed demolition (item 1 of the contract), removed stucco (item 2), inspected underlying framing for damage (item 3), and had commenced installation of blocks at the outside perimeter (item 4) and had commenced the installation of new plywood (item 5.) The work required by the supplemental contract was completed.

Tile Installation (Grout Joints)

31. The Homeowners ultimately selected a 12-inch by 12-inch concrete composite Mexican Saltillo tile manufactured by Coronado Stone Products (Coronado). Mexican Saltillo

---

[4] Section 7159(c)(5) of the Code provides that contractors must comply with the following: "A change-order form for changes or extra work shall be incorporated into the contract and shall become part of the contract only if it is in writing and signed by the parties prior to the commencement of any work covered by a change order."

tile is named after the town in Mexico where the tile originated. The Saltillo tile tends to have irregular perimeter and height, although manufactured tiles like the Coronado product selected by the Homeowners are more regular.

32. The tile was installed during the week of October 14, 2013, a job that consumed five days. The installation was performed by Quality Tile, whose principal is Rodney Alexander Gibson (Gibson). Mark Lopez (Lopez) was the main tile setter during the installation and supervised other workers. Gibson and Lopez testified that the tile had been properly installed.

33. In its "Installation Specifications" sheet, Coronado suggests a one-half-inch grout joint. (Exh. 17, at p. 6.) According to the manufacturer specifications for the grout used, Polyblend Sanded Grout, the product is recommended to fill joint widths of one-eighth inch to one-half inch.

34. Lasater has worked in over 1,000 jobs involving installation of Saltillo tiles. In testimony not disputed, Lasater opined that accepted industry standards for good and workmanlike construction require a contractor to follow a manufacturer's tile installation recommendations. In Lasater's opinion, Respondent failed to install the tile on the Smith project in accordance with industry standards because the grout joints did not follow the manufacturer's one-half-inch specification and were not uniform, ranging in size from one-half- inch to one-and-one-half inches. Some of the joints measured about three-quarter of an inch and others about one inch. The one-and-one-half inch joints were found along the south edge of the deck. The variability in the size of the grout joints was greater than allowed by industry standards or necessitated because of the nature of the tile. Complainant presented photographs which supported Lasater's observations and testimony about the size and regularity of the grout joints.

35. Respondent called Mark Marsch (Marsch), owner of a consulting firm that bears his name, as an expert in tile installation. Marsch is not licensed as a contractor, but over the past 35 years has installed tile on about 25 projects and overseen tile installation on about 100 others.

36. Marsch opined that the tile installation complied with industry standards. With the exception of the one-and-one-half-inch area along the south edge of the deck, he measured the grout joints to average between one-half and five-eighth inches. In his opinion, such range was acceptable and consistent with the nature and rustic appearance of the Saltillo tile.

37. Lasater's testimony is credited, as it is more persuasive and supplemented by the record evidence. Grout joints greater than one-half inches, including measuring three-fourths of an inch, one inch, and one-and-one-half inches, were observed and documented by Lasater. The lack of uniformity and variation in grout joint size were more significant than would be expected given the nature of the tile used and the scope of work for this contract. The Work Contract specifically stated "Install tile to same layout, design and size of existing." (Exh. 4, p. 109.) Lasater further confirmed that "that's what the owner wanted, three-quarter-inch grout; same layout as before, 12-inch variance by half inch. Half inch was not acceptable." (AR Vol. III, 73:5-8.)

38. a. Installers left a one-and-one-half-inch grout joint along the south edge of the deck.

b. Lopez testified that he spoke to Smith when he realized that there would be one-and-one-half-inch grout joints on the south end of the deck. Lopez testified that he gave Smith the option of using pieces of tile to avoid the large joints, and that Smith just told him "to just go ahead and grout it."

c. Smith testified that when informed by the installers about the potential one-and-one-half-inch joints, he said he did not want such large joints. He suggested that the installers could increase the size of the grout joints in the south end by one-eighth, to a total of five-eighths. According to Smith, the installer simply walked away. Smith denied giving direction for where the tile layout would begin. In light of Smith's credible, detailed contrary testimony, it was not established that he authorized the one-and-one-half-inch grout joint. Also, Smith's testimony is consistent with the scope of work contained in the Work Contract. Smith testified that he "wanted it [tile] replaced in the same layout as what my original tile was," (AR: Vol. I 62:11-12), and the "same layout we could possibly get in three-quarter inch joints" (AR Vol. I,163:14-15).

39. In Lasater's opinion, leaving a one-and-one-half-inch grout line along the south edge of the deck constitutes a departure from industry standards. The grout line is unsightly and could break off. The contractor should have started laying the tile on the southerly edge and make necessary adjustments in tile size to avoid the one-and-one-half-inch grout line. Lasater's opinion is persuasive and sufficient to establish a deviation from industry standards.

40. Marsch opined that homeowner input must be considered and that a contractor's obligation is to present options for the homeowner to decide. Because he was informed that Smith was given the choice and opted for the course the installers followed, Marsch found no deviation from industry standards. Marsch's opinion is based on the false premise that Smith authorized the one-and-one-half-inch grout joints and is not credited.

The Deck Slope and the Tile Installation

41. During his inspection of the project, Lasater measured the slope of the deck using a digital level. The deck was not uniformly level. Some areas of the deck had no slope, and one area sloped toward the house. Some of the tiles were lower than adjacent tiles.

42. As established by the credible testimony of Lasater, industry standards require that structures built over living spaces, such as the Smith deck, drain away from living spaces at a two percent slope. This testimony was partially supported by McKenna's testimony that he assumed in preparing the contract that the slope was two percent as required by codes, and by McKenna's inclusion of the language in the contract, i.e., item 5 of the scope of work indicating that "the deck is assumed to have a 2% slope to outside edge for industry standard drainage." Marsch's contrary testimony that all that was required was "positive drainage" is unsupported and unpersuasive.

43. The evidence established that the deck did not have a two percent slope before commencement of work by Respondent, a fact that was not known to Respondent. Lasater testified without contradiction that the industry standard required Respondent to bring up the matter of the substandard slope to Smith for the homeowner to decide if he wanted to fix the problem. Lasater opined that the fact that Respondents uncovered a less than 2% slope to install the concrete tiles meant that Respondents should have placed written notice of the slope issue in writing to the homeowner, either in a change order or a letter. (AR Vol. V 29:18-25). In addition, the contract at Item No. 5 specifically required Respondent to provide an additional quote if the "slope is inadequate" prior to sheathing installation (Ex. 4, p. 16). Lasater opined that this statement meant it was assumed that "the deck was going to have two-percent fall. If there was not two-percent fall, once it was exposed, then there would be additional quote to retrofit" (AR Vol. V 45-:18-21).

44. a. There is conflicting testimony regarding whether Respondent brought the matter up to Smith regarding fixing the deficient slope. McKenna and Wilson testified, with corroborating photographic evidence that once the tile had been removed and the substrate had been exposed, McKenna, Wilson and another employee of Respondent, confirmed that the slope of the deck was below two percent. McKenna recalled that it was one percent or 1.2 percent in the four to six locations where the slope was measured with the digital level.

b. Wilson testified that McKenna had reported his findings to Smith, but did not provide any further detail about the Homeowner's response. On cross-examination, Wilson admitted that he was not present for the alleged conversation with Smith regarding the deficiency in the slope (AR Vol IV 163:14-19). His testimony that the issue was "brought up to Smith" was based only on the fact that McKenna told him that the conversation with the Homeowner had happened (AR Vol. IV 163:20-22).

c. McKenna testified that Smith was at the top of the stairs when they were taking the measurements. McKenna spoke to Smith and informed him the slope was one percent. Smith then asked what it would take to fix it. McKenna told him that he would have to retrofit the framing and that it would probably cost about $19,000. McKenna said he had to consult with an engineer before making a formal bid. According to McKenna, Smith said "no way, this deck is costing me too much, will it drain?" When McKenna said that there was positive drainage in the deck, Smith told him to just prepare an estimate to fix the dry rot. As set forth above at Factual Finding number 19, the supplemental proposal was submitted on September 13, 2013.

d. Smith testified Respondent never reported the slope was less than two percent or provided the opportunity to enter into a supplemental contract to correct any deviations.

e. McKenna's testimony is not corroborated by Wilson's testimony, since Wilson was not present when the alleged conversation with Smith supposedly occurred. There is also no corroborating documentary evidence that Smith was notified. In fact, other than McKenna's bald assertion that the conversation happened, there is no evidence that Respondent provided any sort of written notice or quote for a change order to the Homeowners about the inadequate slope as required by the Work Contract and consistent with the standards described by Lasater. Any conclusion that the Homeowners were notified is considered speculative.

f. Accordingly, it is not established that McKenna met industry standards by bringing up the matter of the substandard slope to Smith for the homeowner to decide whether he wanted to fix the problem. Regardless, the Accusation charges Respondent with deviating from accepted trade standards by failing to install concrete tiles at a proper slope for drainage.

45. In Lasater's opinion, in addition to the absence of the two percent slope, Respondent's work deviated from industry standards in that the tile installation failed to direct the water away from the residence, and some areas of the deck sloped toward the house ("reverse slope"). Drainage, as well as aesthetics, was further diminished by the fact that some tiles were set lower than adjacent ones. This testimony, which is also supported by photographic evidence, is credited and establishes a deviation from the standard of care.

46. Because of the poor workmanship in the tile installation, Lasater concluded that the only way to correct the problem was to "redo the deck" (AR Vol. V 35:14-25, 36:6-22). This would include: replacing the tile deck and the glass panels, adding necessary sleepers on the sheeting to obtain a 2% minimum slope, installing new plywood sheeting, installing a new waterproof membrane, re-installing the tile per manufacturer's instructions and re-installing the glass panels (Exh. 19).

Installation of Deck Perimeter Wall

47. The homeowners wanted to use the existing glass for the deck walls. Smith testified that City of Morro Bay (Morro Bay) staff had advised him that a new permit would not be required if no changes were made to the perimeter layout or the size of the glass panes. Respondent agreed to comply with the Homeowners' wishes, but concluded, based on his own subsequent discussions with Morro Bay representatives that a permit would be required because oversize glass was being used.

48. Respondent declined to perform the work unless Smith agreed to Morro Bay inspection and Smith did not accede. As a result of the disagreement over the permit issue, the Homeowners contracted with Central Coast Glass to install the glass panes.

49. SE Technologies, whose principal is John Ebrahimi (Ebrahimi), a subcontractor hired by Respondent, fabricated the required 15 metal posts and delivered them to the project. On November 26, 2013, Ebrahimi met League, an employee of Central Coast Glass, to show him where the posts should be placed. Ebrahimi and League verified there was sufficient material to which the posts could be attached. A dispute thereafter ensued about who was responsible for paying for Ebrahimi's work. Respondent eventually paid Ebrahimi.

50. On December 2, 2013, Central Coast Glass installed the glass posts and glass panes.

Homeowners' Complaints and Investigation

51. a. On November 29, 2013, Smith sent Respondent an email detailing his perceived problems with the project, including the application of the waterproof membrane, the

tile installation, and the deck perimeter wall installation. Smith calculated he had overpaid Respondent $22,424 in light of the poor workmanship and work not performed. Smith asked Respondent not to visit the Property unless invited and supervised. Smith requested all lien releases and an accounting of money paid by respondent to subcontractors and for materials used on the project. At the hearing, Smith explained that he sought the information because he did not want any subcontractor to file a lien on his property.

b. Respondent did not provide the requested lien releases because no liens had been filed by any of the subcontractors.

52. On December 9, 2013, Smith filed a complaint with the Board. The matter was assigned to Enforcement Representative Maria Gonzalez (Gonzalez). As part of her investigation, Gonzalez requested industry expert Lasater to inspect the property.

53. On April 10, 2014, Lasater inspected the property. Gonzalez and Smith were present. Another contractor hired by Smith, Bill Leys (Leys) joined them after Lasater and Gonzalez started a discussion about the complaint with Smith.

54. a. Smith requested Lasater to perform destructive testing to examine the thickness of the membrane. Smith asked Lasater to inspect an area in the northeast section of the deck where there was a broken tile. Using a saw, Leys removed the grout and tile, and cut out a one-half-deep four-inch by four-inch piece of the underlying plywood. The waterproof membrane was visible on top of the sample. Lasater examined the sample, and using a caliper provided by Leys, measured the membrane to be approximately 35 mils thick.

b. Lasater then selected a different location, on the southeast section of the deck, to obtain another sample. Leys followed the same procedure to remove another four-by-four piece of the plywood sheeting. Using the same caliper, Lasater determined the membrane measured 40 mils in thickness.

55. Lasater submitted his report to Gonzalez on June 16, 2014.

Expert Opinion and Findings Regarding the Waterproofing Membrane

56. Lasater opined that accepted industry standards for good and workmanlike construction require a contractor to use the membrane thickness recommended by the manufacturer. In this case, the required thickness was the 45 to 125 mils specification contained in the NCS 6000-UVS product data sheet Respondent attached to the contract with Smith. Lasater concluded that the product data sheet had been attached to the contract based on his review of contract materials and his discussions with Smith. Because the two samples obtained on April 10, 2014 were below the 45 to 125 mils range, Lasater concluded the membrane had not been installed in accordance with the manufacturer's requirements and, therefore, Respondent's installation was below industry standards.

57. Lasater testified that his opinion would not change even if a Carboline waterproof membrane had been installed because the homeowners were promised a membrane thickness of 45 to 125 mils.

58. a. Mazor questioned the reliability and validity of Lasater's testing of the membrane thickness. In testimony that was not directly challenged, Mazor testified that the testing the thickness of polyurea membranes is governed by standards developed by the American Society for Testing and Materials (ASTM). ASTM has protocols for noninvasive as well as for invasive testing. If invasive testing is to be undertaken, as was done in the Smith project, then ASTM requires examination of multiple samples obtained on a specified grid to ensure a valid measure. In the Smith deck, ASTM standards require 45 separate measurements clustered in three separate circles of six inches in diameter each.

b. Inasmuch as the testing of the Smith deck was not conducted in accordance with ASTM testing standards, the results obtained from the two samples measured by Lasater are insufficient to establish the thickness of the membrane.

59. Mazor further testified that even if the results obtained by Lasater were accepted, the thickness of the Carboline waterproof membrane was within acceptable limits. In Mazor's opinion, post-installation measurements must take into account absorption into the substrate. For instance, steel would absorb more of the membrane than wood. In the Smith deck, a 30 mils thickness on a one-and-one-eighth plywood surface would be more than adequate to waterproof the deck.

60. Mazor explained that the 45 to 125 Mils reference in the NCS 6000-UVS refers to the average thickness of the application, but that the product is designed to be effective at thicknesses of 20 to 215 Mils, as set forth in its product specification.

61. In light of Mazor's credible testimony, it was not established that Respondent deviated from industry standards in his installation of the Carboline waterproof membrane in the Smith project.

Cost to Complete Project

62. Lasater calculated the cost to complete the project in accordance with industry standards. His calculations included replacement of the membrane and the tile. The total cost to repair all complaint items was $36,220. Of this amount, $13,120 was for the installation of tile, grout and sealer. Installation of a new waterproof membrane was $13,860. Other items, such as removal and reinstallation of the glass panels ($2,200), demolition of the floor tile and thin set ($5,640), and removal of debris ($1,400.), pertained to both jobs. Respondent did not present any contrary calculations, and Lasater's estimates establish the cost to complete the project. At hearing, Lasater added $6,000 to his estimate for materials and labor to create a slope in the deck that was at least equal to what the deck had before Respondent's work.

Completion of the Project in Accordance with Trade Standards

63. Respondent willfully departed from accepted trade standards for good and workmanlike construction in the tile installation on the Smith project, as set forth in factual finding numbers 31 through 46.

64. In failing to complete the Smith project in accordance with accepted trade standards, Respondent failed in a material respect to complete the project for the price stated in the contract, by reason of factual finding numbers 31 through 46.

65. a. Respondent's failure to complete the Smith project in accordance with accepted trade standards caused substantial injury to the Homeowners.

b. The cost to repair the tile installation deficiencies and to complete the project in accordance with trade standards is $28,360, which is the total of the cost to remove the existing tile ($5,640), the cost to replace the tile ($13,120), the cost to return the slope lost during tile installation ($6,000), the cost to remove and reinstall the glass panels ($2,200), and the cost to remove debris ($1,400).

c. The damage suffered by the Homeowners is $28, 360. At hearing, Respondent's counsel argued that Smith had received a settlement check from Respondent's insurance company to resolve the financial injury claim. Therefore, to the extent that the Homeowners' claims have been the subject of a civil action that has been settled for monetary damages providing for full and final satisfaction of the civil case, the Board may not require Respondent to pay any additional sums to the benefit of the Homeowners.[5]

Costs of Investigation and Enforcement

66. The Board has incurred $960.34 in investigative costs, $875 in industry expert costs, and $5,395 in charges from the Attorney General's office, for a total of $7,230.34. In light of the violations established, the Administrative Law Judge found that the reasonable costs are 50 percent of the total costs, or $3,615.18. Pursuant to Section 125.3(d), this finding is not reviewable by the Board to increase the cost award.

LEGAL CONCLUSIONS

The Purpose of the Contractors' State License Law

1. The purpose of the Contractors' State License Law is to protect the public from incompetence and dishonesty by those who provide building and construction services. The licensing requirements provide minimal assurance that all persons offering these services in California have the requisite skill and character, understand applicable local laws and codes, and know the rudiments of administering a contracting business. (*Hydrotech Systems, Ltd. v. Oasis*

[5] See Section 143.5(b) of the Code.

Waterpark (1991) 52 Cal.3d 988, 995; Smith v. Workers' Comp. Appeals Bd. (2002) 96 Cal.App.4th 117, 126.)

2. The public policy behind Section 7159 of the Code is to encourage written contracts for home improvements in order to protect unsophisticated consumers. (*Asdourian v. Araj* (1985) 38 Cal.3d 276, 292).

Expert Testimony

3. Expert testimony is required to establish the standard of care with respect to a profession. (See, *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 1001; *Williams v. Prida* (1999) 75 Cal.App.4th 1417, 1424.)

4. The California Court of Appeal in *Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 277, quoting from a list of authorities, stated as follows: "Ordinarily, where a professional person is accused of negligence in failing to adhere to accepted standards within his profession the accepted standards must be established only by qualified expert testimony [citations] unless the standard is a matter of common knowledge. [Citation.] However, when the matter in issue is within the knowledge of experts only and not within common knowledge, expert evidence is conclusive and cannot be disregarded."

Applicable Statutory Provisions

5. Business and Professions Code section 7090 provides, in pertinent part, that the Registrar may "temporarily suspend, or permanently revoke any license or registration if the applicant, licensee, or registrant, is guilty of or commits any one or more of the acts or omissions constituting causes for disciplinary action."

6. The standard of proof in an administrative disciplinary proceeding seeking the suspension or revocation of a contractor's license is clear and convincing evidence. (Bus. & Prof. Code, § 7090.)

7. A willful departure "in any material respect from accepted trade standards for good and workmanlike construction" is grounds for disciplinary action, unless the departure was in accordance with an architect's plans and specifications. (Bus. & Prof. Code, § 7109, subd. (a).) [6]

8. Failing, in a material respect, to complete a construction project for the price stated in the contract is cause for disciplinary action. (Bus. & Prof. Code, § 7113.)

9. Business and Professions Code section 7159 is an extensive provision in the Contractors' State License Law that identifies information and specific language that must be

[6] A "willful" violation does not require proof of Respondent's intention to violate the trade standard, which it is assumed to know. Rather, "willful" means that respondent intended to perform work in the manner that it did and, if trade standards were not met, the failure to build according to the trade standards is deemed "willful" within the meaning of section 7109. (*Mickelson Concrete Construction v. Contractors' State License Board* (1979) 95 Cal.App.3d 631, 634-5.)

included in every home improvement contract where the labor, services, or material to be furnished exceeds $500. The broad requirements in section 7159 range from headings and topics that must be included in every home improvement contract, to specific language regarding a consumer's three day right to cancel, a limitation on the amount of any down payment, insurance, workers compensation, liens, and other categories of information that must be included.

10. Business and Professions Code section 7159(c) provides, in pertinent part:

> In addition to the specific requirements listed under this section, every home improvement contract and any person subject to licensure under this chapter or his or her agent or salesperson shall comply with all of the following:
>
> . . .
>
> (4) The contract shall include a statement that, upon satisfactory payment being made for any portion of the work performed, the contractor, prior to any further payment being made, shall furnish to the person contracting for the home improvement or swimming pool work a full and unconditional release from any potential lien claimant claim or mechanics lien authorized pursuant to Sections 8400 and 8404 of the Civil Code for that portion of the work for which payment has been made.

11. Business and Professions Code section 7159.5, subdivision (a)(3), codifies the required language in section 7159 about down payments. Under section 7159.5, subdivision (a)(3), if the contractor charges a down payment, it may not exceed $1,000 or 10 percent of the contract amount, whichever is less. Except for that down payment, "the contractor may neither request nor accept payment that exceeds the value of the work performed or material delivered." (Bus. & Prof. Code, § 7159.5, subd. (a)(5).)

12. Business and Professions Code Section 7159.5, subdivision (a)(6), in pertinent part provides: "upon any payment by the person contracting for home improvement, and prior to any further payment being made, the contractor shall, if requested, obtain and furnish to the person a full and unconditional release from any potential lien claimant claim or mechanics lien authorized pursuant to Sections 8400 and 8404 of the Civil Code for any portion of the work for which payment has been made."

13. Business and Professions Code section 7159.6 provides, in pertinent part:

> (a) An extra work or change order is not enforceable against a buyer unless the change order sets forth all of the following:
> (1) The scope of work encompassed by the order.
> (2) The amount to be added or subtracted from the contract.
> (3) The effect the order will make in the progress payments or the

completion date. ...

14. Business and Professions Code section 7122 provides, in part, that:

> The performance by an individual, . . . [or] corporation, . . . of an act or omission constituting a cause for disciplinary action, likewise constitutes a cause for disciplinary action against a licensee other than the individual qualifying on behalf of the individual or entity, if the licensee was a partner, officer, director, manager, or associate of that individual, . . . [or] corporation, . . . at the time the act or omission occurred, and had knowledge of or participated in the prohibited act or omission.

15. Business and Professions Code section 7122.5 provides, in part, that:

> The performance by an individual, . . . [or] corporation, . . . of an act or omission constituting a cause for disciplinary action, likewise constitutes a cause for disciplinary action against a licensee who at the time that the act or omission occurred was the qualifying individual of that individual, . . . [or] corporation,. . . whether or not he or she had knowledge of or participated in the prohibited act or omission.

First Cause for Discipline

16. Cause exists to discipline Respondent's license pursuant to section 7109, subdivision (a), in that Respondent willfully departed from accepted trade standards for good and workmanlike construction in material respects in the Smith project, by reason of factual finding numbers 31 through 46 and 63 and legal conclusions 1, and 3-7.

17. Except as set forth in legal conclusion number 1 with respect to the tile installation and the failure to maintain consistent grout joints, cause does not exist to discipline Respondent's license pursuant to section 7109, subdivision (a), for willful departure from accepted trade standards for good and workmanlike construction, by reason of factual finding numbers 56 through 61 and Legal conclusions 3-6.

Second Cause for Discipline

18. Cause exists to discipline Respondent's license pursuant to section 7113 in that Respondent failed to complete the Smith project for the price stated in the contract, which resulted in substantial injury to the Homeowners, by reason of factual finding numbers 31 through 46, 63, and 64 and legal conclusions 1, 3-6, 8 and 16.

Third Cause for Discipline

19. Cause exists to discipline Respondent's license pursuant to sections 7159 and 7159, subdivision (c)(4), in that he failed to include required terms in the home improvement contract tendered to the Homeowners, by reason of factual finding numbers 11 through 16 and legal conclusions 1, 2, 5, 6, 9 and 10.

Fourth Cause for Discipline

20. Cause exists to discipline Respondent's license pursuant to section 7159.5, subdivision (a)(3), in that Respondent requested and received a down payment in excess of $1,000 or one percent of the contract price, by reason of factual finding numbers 1 through 16, 20, and 29, and 30, and legal conclusions 1, 5, 6 and 11.

Fifth Cause for Discipline

21. Cause exists to discipline Respondent's license pursuant to section 7159.5, subdivision (a)(5), in that Respondent requested and received a payment in excess of the work performed as of September 27, 2013, by reason of factual finding numbers 11 through 16, 20, and 30 and legal conclusions 1, 5, 6, and 11.

Sixth Cause for Discipline

22. Cause exists to discipline Respondent's license pursuant to section 7159.5, subdivision (a)(6), in that Respondent failed to provide Smith with lien releases after Smith's request for the releases, by reason of factual finding number 51 and legal conclusions 1, 5, 6 and 12.

Seventh Cause for Discipline

23. Cause exists to discipline Respondent's license pursuant to section 7159.6, in that it was established that Respondent failed to execute written change orders in the Smith project, by reason of factual finding numbers 21 through 27 and legal conclusions 1-6, 9 and 13.

Cost Recovery

24. Cause exists pursuant to section 125.3 to order Respondent to pay the Board's costs of investigation and prosecution, in the sum of $3,615.18, by reason of legal conclusions 16 and 18-23, and factual finding number 66.

Penalty Determination

25. The Board has issued Disciplinary Guidelines that set forth factors to be considered in determining whether revocation, suspension or probation is to be imposed in a given case (Title 16, California Code of Regulations section 871). Those factors include: the nature and severity of the acts under consideration, actual or potential harm to the public, whether the contractor performed work that was potentially hazardous to the health, safety or general welfare of the public, prior disciplinary record, number and/or variety of current violations, mitigation evidence and rehabilitation evidence.

26. The Board's recommended penalty for discipline involving Sections 7109(a) (departure from accepted trade standards for workmanship) and 7113 (failure to complete project for contract price) of the Code is a minimum revocation stayed with two years' probation and the

maximum penalty is revocation. The Board's recommended minimum penalty for violation of Section 7159 (home improvement contract requirements) is a 60-day suspension, stayed, and a one-year probation, and the maximum penalty is revocation.

27. Turning to the factors the Registrar considers in assessing a penalty, the first is the nature and severity of the acts under consideration. The laws that Respondent violated in this case are in place to help ensure that contractors meet minimum trade standards for good and workmanlike construction, perform the work contracted for and abide by their agreements with the consumer. In addition, the laws help ensure that contractors document the scope of work authorized by the consumer, provide adequate disclosures to the consumer, and refrain from charging the consumer excessively and for work or materials that have not been provided to the consumer. Seven different causes for discipline have been sustained involving violations of multiple laws. The violations committed by Respondent were serious in that such conduct shows a pattern of disregard for the Board's laws, with substantial financial harm to the consumers. In mitigation, Respondent has no prior record of discipline and McKenna testified that Respondent has since adjusted its home improvement contracts to address the legal prohibitions against receipt of payments in advance of work performed or materials delivered. No rehabilitation evidence was submitted.

28. 16.19. Under the Contractors' State License Law, protection of the public is the highest priority. Bus. & Prof. Code § 7000.6. The purpose of licensing statutes and administrative proceedings enforcing licensing requirements is not penal but public protection. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 784-786; *Bryce v. Board of Medical Quality Assurance* (1986) 184 Cal.App.3d 1471, 1476).

29. Based upon these considerations, outright revocation or suspension is not warranted in this case. Public protection would be served by a three-year period of probation on standard terms and conditions to allow the Board to monitor Respondent and Mr. McKenna to help ensure that Respondent and the affiliated licensee pay close attention to compliance with the Board's laws and regulations. Additional terms will also include the requirement that Respondent post a Disciplinary Bond or post a cash deposit in the amount of $15,000.00 to help ensure fiscal responsibility. Restitution will be ordered but Respondent will be deemed compliant with that term if it submits proof satisfactory to the Registrar that the Homeowners' claims have been settled for monetary damages and they obtained a release providing for full and final satisfaction of any civil case (see factual finding number 65). It is believed that the inclusion of these conditions of probation will assist in addressing issues that led to the present proceeding and provide for the protection of the public. This finding is supported by all Factual Findings and Legal Conclusions.

30. Cause to discipline McKenna's affiliated license, Hunter James, Inc., was established pursuant to Business and Professions Code sections 7122 and 7122.5. Mr. McKenna was the RMO, CEO and President for both licensees at the time the underlying acts or omissions by Respondent DeckTeck, Inc. occurred. (See Factual Findings 2 and 3.) In addition, Mr. McKenna was directly involved in all aspects of this case at the time the alleged acts or omissions occurred (see factual findings). Regardless, according to Section 7122.5, cause for discipline exists whether or not Mr. McKenna had knowledge of or participated in the prohibited act.

ORDER

Based upon the foregoing, the following order shall issue:

DeckTech, Inc.

General Building Contractor License number 796956 issued to Decktech, Inc., Ronald James McKenna, RMO, shall be immediately REVOKED, the revocation shall be STAYED, and Respondent's license shall be placed on PROBATION for a period of three (3) years under the following terms and conditions:

1. Respondent shall comply with all federal, state and local laws, including all building laws and uniform codes, governing the activities of a licensed contractor in California.

2. Respondent and any of respondent's personnel of record shall appear in person for interviews with the Registrar or his designee upon request and reasonable notice.

3. If respondent violates probation or any condition of probation in any respect, the Registrar, after giving notice and opportunity to be heard, may revoke probation and impose the disciplinary order that was stayed.

4. IT IS FURTHER ORDERED that respondent, as a condition of licensure, on the effective date of this Decision shall have on file a Disciplinary Bond or post a cash deposit in the amount of $15,000.00, for a period of not less than two years pursuant to Section 7071.8 of the Business and Professions Code. Any suspension for failing to post a Disciplinary Bond or a cash deposit, or any suspension for any other reason, shall not relieve the Respondent from complying with the terms and conditions of probation. Furthermore, suspension of the license during the period of probation, for any reason under this chapter, will cause the probationary period to be automatically extended in time equal to the length of time that the license is not in a clear and active status.

5. Respondent shall reimburse the Board for its costs of investigation in the amount of $3,615.18 within 30 days of the effective date of this decision.

6. Respondent shall submit copies of documents directly related to the person's construction operations to the Registrar or his designee upon demand during the probation period.

7. It is also ordered that Respondent make restitution to the Homeowners in this matter in the amount of $28,360. Respondent may satisfy this requirement by providing proof satisfactory to the Registrar of either: (a) payment to the Homeowners; or, (b) proof that the Homeowners' claims have been settled in a civil case for monetary damages and Respondent or its agents obtained a release providing for the full and final satisfaction of the Homeowners' claims. Failure to make the payment or provide satisfactory proof of payment or, in the alternative, proof of civil settlement within 90 days of the effective date of the Registrar's decision in this matter shall constitute a violation of probation.

8. Upon successful completion of probation, the contractor's license will be fully restored.

Hunter James, Inc.

General Building Contractor License number 862903, issued to Hunter James, Inc., Ronald James McKenna, RMO, shall be immediately REVOKED, the revocation shall be STAYED, and Respondent's license shall be placed on PROBATION for a period of three (3) years under the following terms and conditions:

1. Respondent shall comply with all federal, state and local laws, including all building laws and uniform codes, governing the activities of a licensed contractor in California.

2. Respondent and any of respondent's personnel of record shall appear in person for interviews with the Registrar or his designee upon request and reasonable notice.

3. If respondent violates probation or any condition of probation in any respect, the Registrar, after giving notice and opportunity to be heard, may revoke probation and impose the disciplinary order that was stayed.

4. IT IS FURTHER ORDERED that respondent, as a condition of licensure, on the effective date of this Decision shall have on file a Disciplinary Bond or post a cash deposit in the amount of $15,000.00, for a period of not less than two years pursuant to Section 7071.8 of the Business and Professions Code. Any suspension for failing to post a Disciplinary Bond or a cash deposit, or any suspension for any other reason, shall not relieve the Respondent from complying with the terms and conditions of probation. Furthermore, suspension of the license during the period of probation, for any reason under this chapter, will cause the probationary period to be automatically extended in time equal to the length of time that the license is not in a clear and active status.

5. Respondent shall submit copies of documents directly related to the person's construction operations to the Registrar or his designee upon demand during the probation period.

6. Upon successful completion of probation, the contractor's license will be fully restored.

The Decision shall become effective on July 10, 2017.

IT IS SO ORDERED: June 9, 2017.

David Fogt
Registrar of Contractors