A Subcontractor’s Guidebook
For
SB800
The “Fix It” Right to Repair Law
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SB 800—A Subcontractor’s Guide

Introduction

Governor Gray Davis signed SB 800 into law on September 20, 2002. The product of intense negotiation by the California Consumer Attorneys and the California Building Industry Association, the bill replaces, in its entirety, existing law regarding construction defects for new homes that are first sold after January 1, 2003.

The law applies to all new residential construction, including detached and attached homes. It does not apply to remodeling contracts or condominium conversions.

The bill contains two primary sections. The first consists of 45 definitions of actionable conditions or defects. These standards are designed to allow a consumer to recover for construction problems that actually affect the usability or functionality of the home. If a problem is not addressed in the 45 standards, or in a newly required one-year fit-and-finish warranty for traditional “punch list” items, there is no liability.

The functionality standard section also codifies several affirmative defenses, including relief for defendants if the homeowner did not properly maintain his or her home. Also, each functionality standard has a different time limit for homeowner claims.

The second main section of SB 800 contains a very specific and time-sensitive process for dealing with complaints prior to litigation. This section mandates that each alleged violation of the functionality standards be presented in writing to the builder, and that the builder has the right to inspect the problem and offer to repair it. If a builder offers to repair the problem, the homeowner must allow the builder to do so prior to instituting any litigation stemming from a violation of any of the 45 standards.

The details of SB 800 are too numerous to list in this guide. For specific information, we encourage you to read “SB 800, The Homebuilder ‘FIX IT’ Construction Dispute Resolution Law,” available through the California Building Industry Association (CBIA).
Section 1: An Opportunity for Increased Partnership

The proponents of SB 800 look upon this bill as an opportunity, not a panacea. Unless full advantage of the bill is taken, SB 800 may do little to reduce the number of lawsuits filed, and may not improve the relationships between subcontractors and builders.

SB 800 provides an opportunity for builders and trade contractors, along with their insurers, to create a better partnership. This opportunity begins at the contracting stage, with a clearer mutual understanding of which entity is taking responsibility for compliance with the standards, how the parties will work together in the event of a claim, and how the parties will resolve their own internal disputes. Each of these opportunities will be discussed fully in this guide.
Section 2: Subcontractors’ Liability Under SB 800

As discussed in more detail in the accompanying guide, “SB 800, The Homebuilder ‘FIX IT’ Construction Dispute Resolution Law,” this legislation replaces existing tort law with new definitions or standards of liability. In order for a builder to be held liable under SB 800, a claimant must demonstrate that there is a violation of one of the standards and that the violation arises out of the original construction. In addition, builders may be held liable for any breach of express contracts or warranties.

If a builder intends to hold a subcontractor liable for a violation of the functionality standard, it must give the trade contractor the right to attend inspections pursuant to Chapter 4 of the law. If a builder does not give notice to the trade contractor, the builder may not pursue the trade contractor in subsequent litigation.

However, a claimant, after having gone through the Chapter 4 process (either through completion of the process or by ending the process based upon a builder’s non-compliance), may sue the trade contractor directly. Most likely, a builder that did not give notice to the trade contractor during Chapter 4 may not enforce contractual indemnity provisions.

The standard for holding a trade contractor responsible for a construction defect states that the homeowner must first show a violation of the particular standard and then must show that a trade contractor’s act or omission contributed in whole or in part to the violation. Under this process and existing law, a trade contractor can be held liable jointly and severally for violations of a particular standard with other culpable trade contractors.

A trade contractor has all of the SB 800 affirmative defenses available to it, plus any other common law and contract defenses, i.e. outside the scope of work of the trade contractor, contractual exclusions, etc.
Section 3: SB 800 Requirements of Trade Contractors

If the builder intends to hold the trade contractor responsible for a violation of a functionality standard, it must give the trade contractor the opportunity to participate in the inspections under Chapter 4. Beyond this procedural protection in Chapter 4, there is no other required role for the trade contractor. Under a strict interpretation, the builder does not have to consult with the trade contractor before taking any action, including opting out of the pre-litigation process.

The only other requirement under SB 800 is that the trade contractor must provide the builder with a location for sending a notice of the impending inspection for 10 years after the homes are first sold (not after completion of the trade contractor’s work).

Under the statute, the builder may offer a repair to the claimant. While one would expect that the builder would give the original trade contractor the opportunity to perform the repair, it has no obligation to do so. Even if the builder elects to use the original trade contractor, the claimant has the right to object to the original trade contractor performing the work, and request that the builder provide three other subcontractors paid for by the builder.

Trade contractors should expect to be held responsible under the contractual indemnity provisions for the costs of the repair, regardless of whether the original trade contractor agrees to perform the work or whether one of the three alternative subcontractors does so. This is no different from today’s system where there is usually no chance for the original trade contractor to do the work, and the settlements are used to pay another contractor, or the work never gets done.

Repair work does not extend the statute of limitations for the builder or trade contractor unless the statute of limitations would otherwise have run during the SB 800 process. In that case, the time to file an action is 100 days after the SB 800 process is completed.

As noted in the negotiating points section that follows, subcontractors should consider seeking the contractual right to be involved in the decisions regarding handling claims under SB 800. This includes participating in the decision-making process, the repair, or the selection of the three alternative contractors.
Section 4: Making the Most of SB 800

Under the statute, the builder has the obligation to ensure full compliance. There are no subcontractor obligations under Chapter 4, the dispute resolution process. However, trade contractors have a large stake in the success of the builder’s SB 800 compliance. The following summarizes the efforts required of builders under SB 800.

In order for a builder to take advantage of SB 800, it first needs to comply with the statutory requirements for document changes, the official recording of documents and internal claims procedures. These efforts are required prior to the sale of any new residences, and involve considerable detail in the documentation process.

SB 800 allows the builders to make certain business decisions in the set up of SB 800. These decisions are fully described in the CBIA booklet, and pertain to whether the builder wants to substitute its own definitions of the standards (referred to in the statute as an Enhanced Protection Agreement (EPA), whether it wants to substitute its own pre-litigation claims procedure (referred to as an “Alternative Non-Adversarial Procedure”) and what type of one-year fit-and-finish warranty it wants to supply. Additionally, a builder may choose the maintenance program to supply to its customers.

Aside from these basic decisions, the builder also is in control of each claim, and has the ability to directly influence the way the pre-litigation claim is handled. For example, it can choose to ignore a notice of an SB 800 claim and allow it to go directly to suit or binding arbitration, it can inspect the residence and elect not to offer a resolution, or it can, by choice or omission, not comply with the myriad deadlines contained in Chapter 4. All of these decisions are, by statute, within the province of SB 800 and not within the direct control of trade contractors.

A builder should consciously make decisions on setting up a good SB 800 compliance program, looking at each claim presented and making every attempt to resolve the claim short of litigation. A builder should also involve the trade contractors in a meaningful way, and allow the partnership to jointly make decisions geared towards avoiding litigation and saving money. The only way for a subcontractor to influence the builder’s actions is to do so via contract. This booklet provides guidance for identifying these issues and attempting to negotiate favorable provisions that give subcontractors the ability to similarly benefit from SB 800. The intent of this information is not for the subcontractor to gain an economic advantage over the builder, but rather to inject itself into the benefits of SB 800 for the common goal of early claims resolution and claims savings.
Section 5: Area of Negotiation Between Builders and Trade Contractors—Transferring the Risk for the Functionality Standards

There are two areas in a construction contract that are affected by SB 800. The first, covered in this section, is determining which party is responsible for the home’s performance under the functionality standards. The second, covered in Section 6, deals with ensuring that the trade contractor is involved in the Chapter 4 process.

As discussed more completely in the main guide, available through the CBIA, the 45 functionality standards were developed to ensure that each home operates properly. Certain standards, such as water intrusion items, by necessity, involve the construction activities of multiple trade contractors. For example, window leaks (Section 896 (a) (2)) may involve the framing contractor, the stucco contractor, the window installer, etc. Certain standards, such as Section 896 (b) (3), which ensures that slabs meet design criteria for chemical deterioration, may involve only the concrete contractor and the design professional.

Builders may attempt to transfer responsibility for meeting the standard entirely to one or more trade contractors. Thus, by contract, the trade contractor is taking full responsibility for items beyond its control. For example, if a trade contractor accepts full contractual responsibility for window leaks, but is only one of four contractors who have control over the installation process, the trade contractor may be accepting too much liability.

On the other hand, since trade contractors are often responsible for all other trade contractors involved in a component of a home under the doctrine of joint and several liability, the trade contractor may wish to accept full responsibility for one or more functionality standards. This is a business decision that must be evaluated and priced. In addition, if a trade contractor accepts responsibility for a functionality standard, it must also contract for sufficient control over that part of the construction process.
The following are examples of various scope-of-work provisions that a trade contractor may find in a new SB 800 contract. These alternatives change, to varying degrees, the allocation of risk under the construction contract. The decision about which type of provision to use is a business and pricing one for each party to the contract, as a result of the relative bargaining power of the parties.

**Alternative 1, Scope of Work:**

Trade contractor acknowledges being fully aware of the provisions of SB 800. Trade contractor hereby warrants and agrees to be fully responsible for all violations of functionality standards connected to or arising out of trade contractor’s work.

This section is very broad. It requires, by contract, that the trade contractor be responsible for all functionality standards, regardless of whether the trade contractor has control over the ultimate performance of the home. Also, the term, “connected to or arising out of” is very broad and may further extend the responsibility of the trade contractor.

**Alternative 2, Scope of Work:**

Trade contractor hereby agrees to be fully responsible for any act or omission that may cause a breach of any SB 800 standard that applies to its work. Trade contractor must bring to builder’s attention any site condition or design decision that may lead to a breach of any SB 800 functionality standard related to trade contractor’s scope of work.

This section starts out with a recitation of the liability standard for SB 800. However, it then imposes an obligation for the trade contractor to notify the builder of any condition that may lead to any breach of standard related to its work. Under some circumstances, this type of provision may be very appropriate and lead to better quality construction, since the trade contractor has the experience to know what works and what does not. In some cases, the trade contractor may have so little control over the circumstances so as to make this an unreasonable clause.
**Alternative 3, Scope of Work:**

Trade contractor and builder have reviewed the scope of work and the SB 800 standards. Both parties agree that trade contractor is fully responsible for the home performing to Section 896 (a) and that trade contractor accepts the obligation to notify builder if any act by a third party may prevent the home from fulfilling this standard(s). As to any other SB 800 standard, trade contractor agrees to be fully responsible for its acts or omissions that lead to, in whole or in part, a violation of a standard.

This type of provision, while being more time consuming to negotiate, is more precise and may lead to a more accurate acceptance of risk under this contract. It allows for the trade contractor to take more control over those areas it accepts liability for and to abide by the general SB 800 liability standards for all else.

**Alternative 4, Scope of Work:**

Trade contractor and builder have reviewed the scope of work and the SB 800 standards. Both parties agree that trade contractor is fully responsible for the home performing to Standards XX and that trade contractor agrees to be proportionately liable with other trade contractors for any failure of the functionality standards connected in any way with their work.

As with the third alternative, this is more precise, but holds the trade contractor responsible along with others who would be jointly responsible if the matter proceeded to court.

**Alternative 5, Scope of Work:**

Trade contractor and builder are aware of the standards contained in SB 800. Both parties acknowledge that these standards will be used in determining liability for any potential problems with the work of improvement. However, because trade contractor does not have full control over any particular standard, both parties agree that the scope of work for trade contractor does not include any obligation to ensure that any standard under SB 800 is achieved. Trade contractor shall perform its scope of work according to the standard of care in the industry and the specifications contained in this contract.

This type of provision does not shift any responsibility to the trade contractor, nor does it include compliance within the scope of work. Trade contractor should ensure that it is not obligating itself to follow each applicable building code or technical specification in the remainder of the contract.
Section 6: Areas of Negotiation – Participation in the Chapter 4 Procedures

In this area of the contract, there are two related items to discuss. The first is for the contractor to understand the builder’s intent in implementing SB 800. The second is to encourage the builder to include the trade contractor in the SB 800 process and to provide incentives to both sides for the trade contractor’s involvement.

As noted in Section 4, the builder has to make many choices in implementing SB 800. The variations of how to implement SB 800 are too numerous to list here, and the practices will be evolving over time. The key is for the trade contractor to fully understand the builder’s position and how the builder’s choices may affect the trade contractor’s liability, ability to take advantage of the early claims resolution process and ultimately secure insurance.

What follows are some of the key points a builder may consider and how the choices may affect the trade contractor.

1) Whether to make any decisions regarding SB 800.

SB 800 is mandatory, but requires builder action to implement it. If the builder fails to implement SB 800, the definitions of the 45 standards will apply to the trade contractor’s liability, but without any of the protections and early claims resolution opportunities.

2) Whether to create an Enhanced Protection Agreement (EPA), establishing new liability standards in lieu of the SB 800 definitions.

This decision impacts the liability standards for the trade contractors. Trades must understand the specifics of the EPA and realize that these standards are over and above the functionality standards. Also, as discussed in the main booklet, these standards are subject to attack and increased litigation by the homeowner and may also impact coverage.

3) Whether to impose a separate non-adversarial procedure.

This decision impacts the ability of a trade contractor to be involved in an early resolution claims procedure. The trade contractor must be fully apprised of the details of the alternative procedures, including whether there is a notice requirement for the trade contractors. As discussed in the main book, if an
alternative procedure fails, the particular housing tract will never have the protection of Chapter 4. There may also be insurance ramifications.

4) How much to prepare for Chapter 4.

While the builder may intend to take full advantage of Chapter 4, what is the level of preparation? How successful will the builder be? As described throughout this booklet, the trade contractor is in the hands of the builder. The trade contractor should be fully aware of the builder’s attitude towards Chapter 4 and make its decision accordingly.

5) How much influence the trade contractor will have.

As with #4, this issue is of great importance to the trade contractor since, by law, it has no power to direct or even influence the process. As will be discussed below, it is important for the trade contractor to be fully aware of the builder’s intention.

Planning for Incentives

The second contractual issue relating to Chapter 4 is providing incentives for trade contractor participation. There are many incentives available to both parties for doing something good in a partnership. This booklet focuses on two of the more dynamic areas of the trade contractor/builder relationship: the indemnity provision and additional insured endorsements.

Indemnity agreements and additional insured endorsements often transfer risk from the builder to the trade contractor beyond the actual fault of the trade contractor. This topic has evolved into one that creates great controversy. From the trade contractor’s perspective, the object is to use these two provisions as incentives for the builder to effectively utilize SB 800, to allow the trade contractor to assist in the claims resolution process, and to make it easier for a builder to carry out a reasonable risk-transfer strategy.

As noted above in items one through five, a builder is making representations regarding its commitment to SB 800 and involving the trade contractors. Assuming that a builder has agreed to make full use of the system, what are the consequences of its failure to do so, especially if the trade contractor and its carrier have relied upon these representations in taking the job? Obviously, if a builder states its intention to not utilize SB 800 or use a different form of it, and the trade contractor agrees to this, no incentive is needed.
The following contractual language may illustrate this concept.

**SB 800 Compliance:**

The builder represents that it is aware of all of the provisions of SB 800 and that it intends to fully utilize the Chapter 4 provisions allowing the builder to receive notice, conduct inspections and make repair offers, if appropriate. Trade contractor considers this representation material and relies upon it in accepting this contract.

In the event of a claim under SB 800, builder agrees to provide notice to trade contractor, and trade contractor agrees to provide builder with a method of providing timely notice. Failure of trade contractor to provide an accurate method of providing notice relieves builder not only of the obligation to provide notice under SB 800, but also invalidates the incentive discussed herein.

Builder agrees to accept claims under SB 800 and to process claims through the inspection process set forth therein. Builder agrees to involve the trade contractor in any decision to end the SB 800 process or in any decision on whether to offer a repair. Builder agrees to allow trade contractor the opportunity, assuming no objection from the homeowner, to perform any repairs as part of its contribution to resolving the claim.

In the event that builder and any involved trade contractor fail to agree on a decision or repair offer, including allocation of fault or monetary obligation, the parties agree to proceed with the disputed decision and be subject to binding arbitration to resolve any disputes. Trade contractor agrees that if for any reason, including the actions of its insurance carrier, trade contractor fails to participate or agree to fund a disputed repair or settlement offer, the following incentive becomes invalid.

**Incentive:**

The incentive is triggered for one of three reasons: 1) If the builder fails to abide by the SB 800 Chapter 4 proceedings according to the representations made herein; 2) If the builder fails to put the trade contractor on notice and the claimant ultimately sues the trade contractor directly; 3) If the trade contractor and its carrier agree to fully cooperate with a repair decision or settlement offer, along with the proposed allocation of responsibility and financial allocation, and actually pay the agreed-upon monies or make the agreed-upon repairs.
If the incentive is triggered, the indemnity obligations contained in Paragraph __ of the subcontract is hereby modified as follows:

“Trade contractor agrees to protect and indemnify builder for any and all claims arising out of the negligent acts or omissions of the trade contractor, including, but not limited to, damages, attorney’s fees and costs. Trade contractor is not responsible for any acts or omissions of the builder or any other trade contractor not under the direct contractual control of the trade contractor.”

If the incentive is triggered, regardless of what type of additional insured endorsement is issued by any carrier for the trade contractor, the builder and its carriers agree to only seek defense and indemnity obligations in line with the indemnity provisions as modified by this incentive.”

The idea of this incentive is to not only ensure that the builder will live up to the material representations set forth in this agreement, but also encourage trade contractors to participate, even under protest, in the expedited claims procedure. If this program works, both parties have a reasonable allocation of risk and a timely participation in the claims process. Obviously, these provisions are for illustration only. There are many variables that affect the actual language of this type of provision or the willingness of the parties to enter into this type of agreement. Any such agreement should be reviewed by counsel and by all parties’ insurance carriers.
Section 7: Maintenance Obligations

As noted, one of the main benefits of SB 800 is the ability of builders to provide their homeowners with maintenance requirements. Part of the partnership opportunity is to have the trade contractors work with the builder to develop trade-specific recommendations based upon the trade’s expertise. The trade contractor should review the materials utilized by the builder, and make suggestions to enhance the ability of the home to meet the standards. A trade contractor may feel strongly enough to insist upon the use of these materials as part of the subcontract agreement.
## Statute of Limitations for Functionality Standards

<table>
<thead>
<tr>
<th>Function</th>
<th>Time Limit</th>
<th>Code Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>Operation of plumbing and sewer systems, electrical</td>
<td>4 years from COE</td>
<td>869(e)</td>
</tr>
<tr>
<td>Cracks in exterior pathways, driveways, hardscape, sidewalks, and patios</td>
<td>4 years from COE</td>
<td>896(g)(1)</td>
</tr>
<tr>
<td>Manufacture products, including windows, doors, roofs, plumbing products and fixtures, fireplaces, electrical fixtures, HVAC units, countertops, cabinets, paint, appliances, and any other product that is completely manufactured offsite</td>
<td>1 year unless manufacturer specifies a greater period</td>
<td>896(g)(3)</td>
</tr>
<tr>
<td>Noise for attached units</td>
<td>1 year from original occupancy of adjacent unit</td>
<td>896(g)(6)</td>
</tr>
<tr>
<td>Operation of irrigation and drainage system</td>
<td>1 year from COE</td>
<td>896(g)(7)</td>
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<tr>
<td>Decay of untreated wood posts</td>
<td>2 years from COE</td>
<td>896(g)(8)</td>
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<tr>
<td>Unreasonable corrosion of untreated steel fences and adjacent components</td>
<td>4 years from COE</td>
<td>896(g)(9)</td>
</tr>
<tr>
<td>Deterioration of building surfaces due to paint or stain</td>
<td>5 years from COE for filing action, however, deterioration may be limited to a shorter period if manufacturer specifies</td>
<td>896(g)(10)</td>
</tr>
<tr>
<td>Landscaping</td>
<td>2 years from COE for filing an action, however, survival period is 1 year</td>
<td>896(g)(12)</td>
</tr>
<tr>
<td>Dryer ducts</td>
<td>2 years from COE</td>
<td>896(G)(14)</td>
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| Fit and finish warranty | 1 year | 900 |

Conclusion

SB 800 requires a new education and awareness of the risk-transfer issues between trade contractors and builders. If handled with full information, this effort will greatly increase the quality of construction, the ease of claims handling and the opportunity to resolve claims more efficiently.

This booklet is designed to raise awareness and identify issues. Please consult with your legal, risk-management and insurance advisors before implementing any changes to your contracting practices.