

Executive Department
State of California

FILED
In the office of the Secretary of State
of the State of California

DEC 8 - 1978

MARCH FONG EU, Secretary of State

By *[Signature]*
Deputy

EXECUTIVE ORDER B 50-78

WHEREAS, protracted litigation involving complex issues arising from major commercial and construction contracts is a significant cause of court congestion in the metropolitan courts of this state; and

WHEREAS, it is in the interest of the State of California, its citizens and parties to State construction contracts to reduce the rising cost of State construction projects by resolving claims which remain in dispute after exhaustion of administrative settlement procedures in a uniform and economical manner as expeditiously and informally as possible; and

WHEREAS, principles of simple equity and fairness require that disputes which the parties to State construction contracts are unable to settle themselves be submitted to mutually agreeable third parties for resolution; and

WHEREAS, Civil Code §1670 (Stats. 1978 c. 1374) authorizes independent arbitration of disputes involving public construction contracts;

NOW, THEREFORE, I, Edmund G. Brown Jr., Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby issue this order to become effective immediately:

1. All contracts by the Departments of General Services, Transportation and Water Resources under the State Contract Act, for which bids are opened between January 1, 1979 and December 31, 1983, shall include the following provision requiring disputes to be submitted to arbitration pursuant to Code of Civil Procedure §1280 et seq., except as otherwise provided herein:

ARBITRATION

- "a. **AGREEMENT OF PARTIES** - By entering into the contract both parties are obligated, and hereby agree, to submit all disputes arising under or relating to the contract which remain unresolved after exhaustion of all remedies available under the contract to independent arbitration prior to litigation.

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Except as otherwise provided herein, the arbitration shall be conducted under Code of Civil Procedure §1280 et seq., and applicable departmental regulations.

Either party may elect to proceed under Government Code §14378 for disputes subject to that section. Such an election shall constitute a waiver of arbitration hereunder. Arbitration by both parties shall constitute a waiver of the right to proceed under Government Code §14378. The arbitration provided for in this contract shall be de novo, and any prior internal contractual dispute decision of the contracting agency shall not be final or conclusive.

- "b. INITIATION OF ARBITRATION - Except on cost audit, latent defect, warranty or guarantee claims by the contracting state agency, arbitration of any dispute must be demanded in writing not later than one hundred eighty (180) days after receipt of a final written decision by the contracting state agency. If a final decision has not been issued within two hundred forty (240) days after acceptance of the work, a party shall have the immediate right thereafter to demand arbitration.
- "c. SELECTION OF ARBITRATORS - Unless the parties agree otherwise, arbitration shall be by a single neutral arbitrator who shall be an attorney or retired judge. If the parties cannot agree to the appointment of a neutral arbitrator, either party may petition the superior court to appoint a neutral arbitrator from the panel of arbitrators certified by the Arbitration Committee.

The arbitrator may employ an expert technical advisor in disputes of extraordinary technical complexity on motion

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of either party or with the consent of the parties. On motion of either party, a non-attorney arbitrator shall employ an attorney advisor to assist in preparing the arbitration award. The parties shall share the expense of such advisors pro rata.

- "d. DISCOVERY - The parties consent to discovery rights and procedures as provided in Code of Civil Procedure §1283.05. The provisions of subparagraph (e) of §1283.05 shall not be applicable to discovery under this contract.
- "e. ARBITRATION AWARD - The arbitrator shall decide the dispute in accordance with the applicable substantive law of California. An award, including an award of costs and fees pursuant to subparagraph (f), is beyond the power of the arbitrator if the findings of fact are not supported by substantial evidence or the award is based on an error of law. The award shall include written findings of fact, a summary of the evidence and reasons underlying the decision, and conclusions of law.

Either party may petition the court to correct or vacate the award; provided, however, that the contracting state department may not petition to vacate an award without prior written authorization by the relevant Agency Secretary.

- "f. AWARD OF COSTS - The arbitrator may also award reasonable and necessary costs actually incurred by the prevailing party, including that party's share of the arbitrator's fees, costs and expenses, as well as any administration fees. The arbitrator may also include reasonable attorney fees in an award of costs if:
- (i) the arbitrator finds that the party against whom the fees are assessed acted frivolously or in bad faith in its demand for, or participation in, the arbitration; or

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- (ii) not less than ten (10) days prior to the arbitration hearing the party made an offer in writing to settle the dispute which was not accepted prior to such hearing, and the arbitration award is less favorable to the opposing party than the offer of settlement; provided, however, the offering party may only be awarded attorney fees from the time of the offer.

If awarded, attorney fees shall not exceed the lowest rate incurred by either party, proof of which must include contemporaneous time records.

- "g. **SUBCONTRACTORS AND SUPPLIERS** - All contracts valued at more than \$15,000 between the general contractor and its subcontractors and suppliers shall include a provision that the subcontractors and suppliers shall be bound to the contractor to the same extent that the contractor is bound to the State by all terms and provisions of this contract, including the arbitration provision.
- "h. **WAIVER** - Nothing in this contract shall preclude the parties from waiving their right to arbitrate disputes under this contract and instead seeking relief in a court of competent jurisdiction. However, such a waiver must be by mutual written agreement executed after the dispute has arisen and approved on behalf of the state department by the relevant Agency Secretary.
- "i. **DEFINITIONS** - The term 'dispute' as used herein means any claim or demand for compensation or damages asserted by one party to this contract against the other party, arising under or relating to this contract which remains unresolved after exhausting all contractual remedies except arbitration.

The phrase 'Arbitration Committee' means

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the committee of seven (7) members created by Executive Order B 50-78 issued December 8, 1978".

The Departments of General Services, Transportation and Water Resources are directed to adopt whatever uniform administrative regulations are required to implement this Order. The departments shall consult with the Arbitration Committee for advice and recommendations prior to promulgating such regulations.

2. Effective January 1, 1979, the contracting state agencies shall offer the construction contractor the opportunity to arbitrate any dispute involving an existing contract awarded under the State Contract Act in which trial has not commenced pursuant to the procedures set forth herein. Such arbitration shall be in lieu of any de novo judicial determination of the dispute, but shall not preclude judicial review of the arbitration award as provided herein.

With respect to the Department of Transportation, this provision shall apply only if the dispute is based on an exception to the Chief Engineer's proposed final estimate filed after January 1, 1979, or to litigation pending on or filed after January 1, 1979. However, if requested by a contractor, the Chief Engineer, in his discretion, may agree to submit any dispute under an existing contract not otherwise subject to this Order, which arises prior to January 1, 1979, to arbitration as provided herein.

3. The Office of Administrative Hearings shall provide whatever administrative services and facilities are required to implement this Order pursuant to arbitration rules adopted by, and interagency contracts executed with, the departments subject to this Order. Such services shall include collection of data necessary to evaluate the operation and effect of this Order. The Office shall recover the costs of such services through a filing fee imposed for each demand for arbitration.

The parties may also contract with the Office to provide an administrative law judge selected by mutual agreement to serve as their arbitrator.

4. The Arbitration Committee is hereby created consisting of seven members. Three members from the construction industry shall be appointed by the Associated General Contractors of California, of which at least one must be a nonmember of said association, and one member shall be appointed by each

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of the three departments subject to this Order. The Director of the Office of Administrative Hearings, or his designee, shall be a nonvoting, ex officio member of the Committee and will provide the necessary fiscal and staff support for the Committee. Committee members shall serve voluntarily and without compensation, but will be reimbursed for their necessary expenses.

The Committee shall develop criteria for the selection of arbitrators, certify a panel of arbitrators meeting the Committee's criteria, and advise the Governor and departments subject to this Order on its implementation, including the development of arbitration rules as needed.

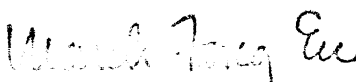
5. State agencies not expressly subject to this Order, the State University and Colleges, the University of California, and local governmental agencies, are urged to consider utilizing arbitration as provided by this Order to resolve disputes under their public construction contracts.

6. Unless modified by a subsequent Executive Order, this Order shall be effective until December 31, 1983. The departments subject to this Order shall evaluate the arbitration process and report to the Governor by July 1, 1983 with an analysis of its effectiveness, including any recommendations for modification or alternative procedures. In preparing their report, the departments shall consult with and include the recommendations of the Arbitration Committee.

IN WITNESS WHEREOF, I have hereunto
set my hand and caused the
Great Seal of the State of
California to be affixed this
8th day of December, 1978.


Governor of California

ATTEST:


Secretary of State

