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OPINION	:	No. 80-811
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of	:	<u>JANUARY 21, 1981</u>
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The Honorable Ronald B. Robie, Director, Department of Water Resources,  
has requested an opinion on the following question:

May the Department of Water Resources include within a contract in  
connection with the construction and operation of the State Water Project a provision for  
binding arbitration of disputes arising under such contracts?

CONCLUSION

The Department of Water Resources may include within an otherwise valid  
contract in connection with the construction and operation of the State Water Project a  
provision for binding arbitration of disputes arising under such contract, except as may be  
otherwise provided by statute pertaining to the subject matter of the agreement.

## ANALYSIS

The inquiry presented is whether the Department of Water Resources (hereinafter “department”) may include within a contract in connection with the State Water Resources Development System (referred to commonly and hereinafter as the “State Water Project”) a provision for binding arbitration of disputes arising under such contract. Generally, the State Water Project is comprised of the State Water Facilities as defined in section 12934(d)<sup>1</sup> and “such additional facilities as may now or hereafter be authorized by the Legislature as a part of (1) the Central Valley Project or (2) the California Water Plan, and including such other additional facilities as the department deems necessary and desirable to meet local needs. . . .” (§ 12931; *cf.* 36 Ops. Cal. Atty. Gen. 160 (1960).) Section 12931 provides in part:

“Any facilities heretofore or hereafter authorized as a part of the Central Valley Project or facilities which are acquired or constructed as a part of the State Water Resources Development System with funds made available hereunder shall be acquired, constructed, operated, and maintained pursuant to the provisions of the code governing the Central Valley Project, as said provisions may now or hereafter be amended.”

We turn to the provisions of the Central Valley Project Act (§ 11100 *et seq.*) conferring broad contract powers upon the department. (*CF. Metropolitan Water District v. Marquardt* (1963) 59 Cal. 2d 159, 176 fn. 5, 185.) Section 11454, pertaining inter alia to the construction, operation, and maintenance by the department of project facilities (§ 11451) provides:

“Under such regulations and upon such terms, limitations, and conditions as it prescribes, the department may do any of the following:

“ . . . . .

“(b) Enter into contracts and agreements and do any and all things which in its judgment are necessary, convenient, or expedient for the accomplishment of the purposes and objects of this part.”

Section 11160 provides:

“The department, the officials thereof, and all state officials may do such acts and make such agreements not inconsistent with law as may be

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<sup>1</sup> Hereinafter, all section references are to the Water Code unless otherwise indicated.

necessary or desirable in connection with the duties and powers conferred upon them respectively by law regarding the construction, maintenance, and operation of the project and the safeguarding of the funds and revenues required for such construction and the payment of the indebtedness incurred therefor.”

Section 11126 provides:

“The construction, operation, and maintenance of the project as provided for in this part is in all respects for the welfare and benefit of the people of the State, for the improvement of their prosperity and their living conditions, and the provisions of this part shall therefore be liberally construed to effectuate the purposes and objects thereof.”

With respect to construction contracts specifically, the department is subject generally to the provisions of the State Contract Act. (§ 11554; Gov. Code, §§ 14250, 14254.5.) Government Code sections 14378 and 14379 prescribe a certain procedure, at the option of either party, for the resolution of monetary claims totaling in the aggregate fifty thousand dollars or less on any contract. In accordance with our discussion with department staff, we need not consider for purposes of the present inquiry, nor do we express any views herein regarding the interpretation, force, or effect of such provisions respecting such claims. In effect, then, the inquiry is limited to disputes as to sums in excess of fifty thousand dollars.

Civil Code section 1670 provides:

“Any dispute arising from a construction contract with a public agency, which contract contains a provision that one party to the contract or one party’s agent or employee shall decide any disputes arising under the contract, shall be resolved by submitting the dispute to independent arbitration, if mutually agreeable, otherwise by litigation in a court of competent jurisdiction.”

Prior to the enactment of Civil Code section 1670 in 1978, public agencies often incorporated in their construction contracts a provision authorizing an agent of the public agency to decide disputes arising under the contract and making such decision final and conclusive. (62 Ops. Cal. Atty. Gen. 289, 291 (1979).) The validity of such unilateral determination clauses was confirmed in *Zurn Engineers v. State of California ex rel. Dept. Water Res.* (1977) 69 Cal. App. 3d 798, 823–824, 828. By providing for independent arbitration or litigation to resolve contract disputes, Civil Code section 1670 nullified these unilateral contract clauses. (62 Ops. Cal. Atty. Gen. 289, *supra*.) Civil Code section 1670

provides, under designated circumstances, for arbitration of present disputes. If arbitration is not mutually agreeable with respect to a given dispute, the matter must be resolved by litigation.

It is established that in the absence of a statutory prohibition, a public entity has the power to submit to arbitration any claim asserted by or against it arising from a contract. (Cf. *Cary v. Long* (1919) 181 Cal. 443, 448; *Alameda County Water District v. Spring Valley Water Co.* (1924) 67 Cal. App. 533, 540; *Viola, Inc. v. Santa Barbara High School Dist.* (1969) 276 Cal. App. 2d 425, 427–428; *Tri-Cor, Inc. v. City of Hawthorne* (1970) 8 Cal. App. 3d 134.)<sup>2</sup> The present inquiry, however, concerns an agreement to submit *future* claims to binding arbitration, a matter concerning which the court in *Viola* expressly withheld judgment. (*Id.*, at p. 427, fn. 4.)

As an extension of the power to arbitrate existing disputes, a public entity may, in the absence of a statutory prohibition, agree to arbitrate future disputes or claims which may arise under a contract. Thus, as previously noted, public agencies, prior to 1978, often incorporated in their contracts a provision authorizing an agent of the public agency to decide disputes arising under the contract and making such decision final and conclusive. (*Zurn Engineers v. State of California ex rel. Dept. Water Res.*, *supra*, 69 Cal. App. 3d 798; *McGillivray Const. Co. v. Hoskins* (1921) 54 Cal. App. 636, 641; *City Street Imp. Co. v. Marysville* (1909) 155 Cal. 419, 427.) The issue remaining, then, is whether the power to submit future disputes to arbitration extends to independent, binding arbitration.<sup>3</sup> Our analysis of this issue, regarding contracts generally, does not purport to examine the universe of subject matter which such contracts, such as construction, service, procurement, and consultant contracts, might cover; it is simply assumed with respect to the subject of any particular contract that an agreement to submit future claims to independent, final arbitration is not statutorily proscribed, and that alternative exclusive procedural remedies for the resolution of disputes is not otherwise expressly prescribed. It is further assumed for purposes of this analysis that any such contract was made in the mode or manner prescribed by law for the making of public contracts, that it falls within

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<sup>2</sup> Government Code section 14404 provides that the department “shall have full authority to compromise or otherwise settle any claims arising from the contract at any time.” Code of Civil Procedure section 1141.10 *et seq.* provides for judicial arbitration of at-issue civil actions, including those to which a public agency is a party (Code Civ. Proc., § 1141.27), involving fifteen thousand dollars or less (Code Civ. Proc., § 1141.11), or any amount upon stipulation of the parties (Code Civ. Proc., § 1141.12(a)). These provisions relate to the resolution of existing controversies.

<sup>3</sup> By Executive Order B 50-78 the Governor has ordered, ostensibly under the authority of Civil Code section 1670, that all of the department’s construction contracts contain a provision for independent arbitration of future disputes prior to litigation. In view of the analysis and conclusions herein, we express no views as to the interpretation, force or effect of the order.

the jurisdiction and authority of the department to enter into such agreement, that such contract neither violates any public policy nor offends any legal or constitutional constraint including any limitation on incurring indebtedness. (*Cf. Viola, Inc. v. Santa Barbara High School Dist.*, *supra*, 276 Cal. App. 2d at p. 427.)

Section 1281 of the Code of Civil Procedure provides:

“A written agreement to submit to arbitration an existing controversy or a controversy thereafter arising is valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract.”

Section 1281 of the Code of Civil Procedure applies to public entities. (*East San Bernardino County Water Dist. v. City of San Bernardino* (1973) 33 Cal. App. 3d 942, 950; and *cf. Cary v. Long*, *supra*, 181 Cal. at p. 448.) While we do not base our conclusion upon the department’s broad contract power alone (*cf.* 47 Ops. Cal. Atty. Gen. 11, 13 (1966)), there can be, in our view, little doubt that such powers, including those conferred under section 123, in conjunction with the provisions of section 1281 of the Code of Civil Procedure, constitute adequate authority to submit to independent arbitration disputes both existing and prospective. (*Cf. Viola, Inc. v. Santa Barbara High School Dist.*, *supra*, 276 Cal. App. 2d at p. 428.) As stated in *East San Bernardino County Water Dist. v. City of San Bernardino*, *supra*, involving an agreement between two public agencies for arbitration of future disputes arising from contract:

“Code of Civil Procedure section 1280 defines an arbitrable controversy as covering *any question* arising between the parties to an agreement whether such question is one of law or of fact or both. Code of Civil Procedure section 1281 honors written agreements to submit an existing controversy to arbitration, and provides such agreements . . . are valid, enforceable, and irrevocable, save upon such grounds as exist for the revocation of any contract.”

It is, of course, well established as a general rule that powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of public trusts and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. (*American Federation of Teachers v. Board of Education* (1980) 107 Cal. App. 3d 829, 834; *California Sch. Employees Assn. v. Personnel Commission* (1970) 3 Cal. 3d 139, 144.)<sup>4</sup> Arbitration, however, involves only the procedure

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<sup>4</sup> This opinion concerns the resolution of “rights” disputes, i.e., justiciable controversies arising from executed agreements, as distinguished from “interest” disputes in connection with executory contracts. Thus, we are not presented with any problem respecting delegation of legislative power.

by which a dispute may be resolved. The resolution of any such dispute is necessarily confined by the parameters of the contract itself, and neither requires nor permits the exercise of judgment or discretion with respect to the policy or purposes which underlie the agreement.

In view of the public policy favoring arbitration, any doubts we might entertain as to the right of a public agency to arbitrate must be resolved affirmatively. (*Cf. Conejo Valley Unified Sch. Dist. v. William Bluvrock & Partners, Inc.* (1980) 111 Cal. App. 3d 983, 989; *Charles J. Rounds Co. v. Joint Council of Teamsters No. 42* (1971) 4 Cal. 3d 888, 892.) It is concluded that the department may include within an otherwise valid contract in connection with the State Water Project a provision for binding arbitration of disputes arising under such contract, provided, with regard to the subject matter of such contract, that the pertinent statutes neither proscribe the resolution of disputes by such means nor prescribe another exclusive remedial procedure. (Accord, *Pytko v. State of Connecticut* (1969) 255 A.2d 640, 28 Conn. Sup. 173; and *cf. Landis Construction Co., Inc. v. Health Education Auth.* (La., 1979) 367 So. 2d 330.)

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(*Cf. Bagley v. City of Manhattan Beach*, (1976) 18 Cal. 3d 22; *Kuglar v. Yocum* (1968) 69 Cal. 2d 371.)