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CHALLENGE PUBLIC OWNER DECISIONS WITH DECLARATORY JUDGMENT ACTIONS

By Massachusetts Construction Law Attorney Jonathan Sauer

I. INTRODUCTION.

An architect on a public buildings construction project (renovation of a police station) told the telecommunications subcontractor that it 'owned' various audio visual work in addition to the telecommunications work. The subcontractor disagreed. This was an item worth at least 70k. How does this get resolved? Will the subcontractor have to 'eat' this?

A public owner allowed an electrical filed subbidder to file a communications bid to install a system that was different from that which was specified in the bid documents as a proprietary specification. This procurement was challenged by one of the subbidders, who filed a bid protest. The AG held that this bidder could submit a bid bidding on an alternative system. (That bidder did not have the requisite manufacturer's license for the proprietary product.) Is the protesting subbidder out of luck?

Using these real world examples, we will discuss declaratory judgment actions and how they might be used to protect contractor rights.

II. AN ACTION FOR DECLARATORY JUDGMENT: WHAT IT IS.

The first thing to understand is that this is a 'statutory remedy', meaning just that. Declaratory judgments exist and are possible only because of the provisions of various statutes, this not being a right or remedy under the 'common law' (judge-made decisions).[2] I include the bare minimum of the statute to enable our readers to understand what this is all about.[3]

M.G.L.A. 231A § 1

§ 1. Power to make declaratory determination; jury questions

> "The supreme judicial court, the superior court, the land court and the probate courts, within their respective jurisdictions, may on appropriate proceedings make binding declarations of right, duty, status and other legal relations sought thereby, either before or after a breach or violation thereof has occurred in any case in which an actual controversy has arisen and is specifically set forth in the pleadings and whether any consequential judgment or relief is or could be claimed at law or in equity or not. . ." (Emphasis added)

M.G.L.A. 231A § 2

§ 2. Controversies to which declaratory judgment procedure is applicable

"The procedure under section one may be used to secure determinations of right, duty, status or other legal relations under deeds, wills or written contracts or other writings constituting a contract or contracts or under the common law, or a charter, statute, municipal ordinance or by-law, or administrative regulation, including determination of any question of construction or validity thereof which may be involved in such determination." (Emphasis added)

M.G.L.A. 231A § 8

§ 8. Necessary parties; class actions

"When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." (Emphasis added)

M.G.L.A. 231A § 9

§ 9. Purpose and construction of declaratory judgment provisions

"This chapter is declared to be remedial. Its purpose is to remove, and to afford relief from, uncertainty and insecurity with respect to rights, duties, status and other legal relations, and it is to be liberally construed and administered."

A declaratory judgment, then, is a procedure that where there is an 'actual controversy', a court can determine a party's rights and obligations arising under a contract or a statute.

Civil actions are generally situations where one party sues another party seeking money damages. For example, with most breach-of-contract cases, one party is suing another party looking for damages. That is not a requirement in a declaratory judgment action.

A general contractor in Massachusetts can't usually sue an architect over a claimed omitted item in the bid documents. Massachusetts follows the "economic loss doctrine", which says that where a party seeks damages for personal injury or property damage in a negligence action, there has to be actual damage and Massachusetts courts have held that the loss of money is not considered to be property damage.[4]

Similarly, a subcontractor can't generally sue the owner in such a situation – no privity of contract – and can't sue the architect for the same reasons that a general contractor can't sue an architect. But, since a party seeking a declaratory judgment does not actually have to be seeking damages, this allows a party to bring into court parties which it ordinarily could not sue. And, whether damages are sought or not, parties do not like to be sued and do not like the notoriety and expense of litigation, particularly in municipal situations where many of the actors both in and out of government have been fighting each other since kindergarten, situations which the local newspaper gleefully and frequently comments on when presented with the opportunity to do so.

Boiling this down, this can mean that the playing field is potentially somewhat levelled as between the general contractor and the owner/architect and as between the subcontractor and the owner/architect. And, while an owner and/or an architect usually make private out-of-the-limelight decisions as to who 'owns' claimed omitted work, being able to bring the matter in front of a judge makes such a dispute quite public. After all, no one likes to be second guessed or made a fool of. Particularly with municipalities, by my experience, town governments often try to keep out of the local paper in situations where their decisions will be criticized. So, the declaratory judgment procedure might tend to make people more reasonable in looking to resolve situations than they might otherwise be. Declaratory judgment actions can stimulate settlement discussions, sometimes earlier rather than later.

Some other factors:

First, only a very small percentage of civil cases in the superior court – it could be as low as one percent – actually goes through a complete trial. To do so takes forever – usually five years or more – is unpleasant and expensive. This means, then, that sometimes the filing of a lawsuit is to gain an advantage in a dispute, to gain some leverage, recognizing that, ultimately, this is a situation which will probably not result in a complete a trial. Non-attorneys often think that 'going legal' necessarily commits them to going through the entire court process. That is not generally the case. The filing of intelligent litigation is something that one might do to cause someone else to 'do the right thing'. Thus, although I have filed well in excess of one

hundred payment bond cases representing material suppliers/subcontractors, I think I have had a total of only one trial arising out of all of them and I have collected millions of dollars for my clients in such cases through settlements.

In bid matters, for example, the disappointed bidder will sometimes seek to get an injunction against a job going forward due to a claimed bid error by filing a court case. My experience has been that if the party seeking the injunction doesn't get it, that party will usually rather quickly dismiss its suit. And, with mechanics' lien cases, if they are going to work, they will usually work quickly or not at all, which leads to only an infrequent trial of mechanics' lien cases.

With a declaratory judgment case, again, in many instances, if it is going to work in terms of leading to a settlement of a dispute, it will work earlier in the case. Since these cases are on the 'Average Track' – a court scheduling system - they will generally take five years or more to come to trial. That gives the litigants plenty of time to think about the issues and whether or not they feel sufficiently strongly about them to go to trial.

Secondly, I don't think many readers would disagree with the statement that when architects make errors in their design documents, they will often try to get the general contractor or subcontractor(s) to 'eat' them, meaning that there will be no change order providing compensation. And, where the architect has been working with the owner for a period of time, often a matter of years, before the job is advertised, owners become used to listening to the architect first over issues such as whether or not a certain piece of work is included in the contract documents or not. Perhaps, this is natural and to be expected. But that doesn't make it fair that owners frequently uphold architects' determinations making a bidder perform work at its own cost, which item of work was not included in its bid.

Thirdly, and as stated above, it is very hard for a general contractor or subcontractor in Massachusetts to sue an architect for damages for a whole host of reasons, including, but not limited to the 'economic loss doctrine.'[5]

Fourthly, and from a very practical standpoint, architects' errors and omissions policies often have substantial deductibles, meaning that the architect is going to have to spend its own money to fund the cost of defense and, possibly, to participate in the paying of smaller judgments. To the extent of the deductible, an architect litigates on his/her own nickel. And, in Massachusetts, as a general rule, parties are not able to collect their attorneys' fees from the other side, even when they win.

So, architects can not simply turn disputes over to their insurance companies and try to forget such unpleasant situations. Indeed, much as is the case for bond principals in payment bond and performance bond claims, the design professional might want to see contractor claims go away sooner rather than later due, in part, to the effect that pending cases might have on future insurance premiums.

One has to keep in mind that a party seeking a declaratory judgment does not have to include claims for actual damages, although a plaintiff might also be seeking damages against one or more defendants. And, as stated in the statute above, parties who have an interest in the issue involved with the declaratory judgment can be named as parties to such suits. This allows the general contractor to sue the architect and allows the subcontractor to sue the owner and the architect for a declaratory judgment.

One of the best things about this process can not be over-stated. That is that in 'normal' civil litigation, a plaintiff corporation can only name as defendants individuals/companies against which it thinks it has monetary claims. For a declaratory judgment, the only showings that a plaintiff has to make is that there is an 'actual controversy' and that the defendants are 'interested parties', meaning they have some interest in the declaration of rights by the court. Put another way, it's a much lower standard one has to meet to bring in parties to a dispute and to keep them in that dispute (e.g. survive motions to dismiss). And, as the statute says above, these cases will be construed 'liberally', meaning that there is some judicial predisposition to having such disputes wend their way through the judicial process without successful procedural challenge.

So, I offer two examples out of my own experience as to how the declaratory judgment process can be utilized/might be utilized within the construction context.

III. PROBLEM ONE: WHO GETS TO 'EAT' A DESIGN ERROR.

A certain town had a contract with a general contractor to renovate a police station (Project).

The subcontractor in its complaint made the following contentions.

Post-bid and during the construction process, the architect made the determination that various audio visual work (AV System) was included within the contract documents as part of the telecommunications work for the Project, even though there were absolutely no specifications or specific drawings in the bid documents/contract documents for this work. There were some indications on the drawings that there would be an AV System but this was drawn in quite lightly, not as dark as the work that clearly had to be done. It looked like potential future work - when the town had the money – which, I think, was a reasonable interpretation.

The telecommunications subcontractor challenged this decision by filing a declaratory judgment action. In its complaint, the subcontractor alleged that while the architect may have done some preliminary design work for an AV System for the Project, it did not actually complete its design work for it, evidenced by the fact that the architect had not prepared any specifications or drawings for the AV System as part of the bid documents/contract documents. Therefore, there was no AV System work included within the telecommunications specification.

IV. PROBLEM TWO: AFTER AN ADVERSE BID PROTEST DECISION.

Filed subbidders submitted bids for the electrical work for a certain project. The owner issued an addendum stating that as to the communications system, which would be Paragraph E work (meaning the filed subbidder would be allowed to subcontract out this work), there would be a proprietary specification and that there would be only one system acceptable to the owner, a large, sophisticated state agency. This was stated in the last addendum issued before the bids were received, which said: "Proprietary (manufacturer) and no other manufacturer will be considered or substitutions allowed." In addition, one bidder posed a question to the owner concerning the proprietary system prior to bid and the owner answered it by affirming the language above-cited. Namely, that only one proprietary-specified product and system would be acceptable for the communications system.

That manufacturer required contractors to be licensed by it to buy materials and to install its system. Further, that manufacturer had a stated written policy that it would not license contractors for projects which were already specified. One of the low bidders, not so licensed, bid on a completely different system, saying that it would perform this work itself.

One of the bidders filed a bid protest claiming, among other things, that that bidder's bid was non-responsive. The AG held that under these circumstances that bidder could submit a bid for an 'as equal' system, despite the language of the addendum.

V. HOW THE SUBCONTRACTOR DEALT WITH PROBLEM ONE.

In this matter, a court complaint was prepared and filed, including claims for declaratory judgment. The owner and the architect, among others, were defendants, against whom no damages were sought. Shortly after suit was filed, there was a meeting of all concerned, at which time the architect indicated that he would not force the subcontractor to furnish and install the AV System at its own cost.

Did the filing of the declaratory judgment action help achieve this result? How can one say? My own opinion is that it did help to achieve this result.[6]

VI. WHAT COULD HAVE BEEN DONE WITH PROBLEM TWO.

I think that there were problems with this AG decision. Bid protests are, from a judicial standpoint, only advisory opinions and are not binding on courts.

I think that a court's interpretation of the proprietary specification issues for this project might have been different from the AG's decision. But, the subcontractor chose not to take this to court.

Had I filed a declaratory judgment, the owner and design professionals would have been parties.

This type of situation is one where the filing of a declaratory judgment action might have proved to be useful.

VII. CONCLUSION.

Knowing something about the possibility of filing a declaratory judgment action in appropriate circumstances is just another potential arrow in a general contractor's/subcontractor's quiver. It is a mechanism for including the owner and the architect as parties to a dispute, something that would not likely be possible for subcontractors at all and, in most situations, would not be likely for general contractors in claims against architects.

Additionally, since declaratory judgment actions can be filed not seeking damages, this might tend to tone down some of the aggression often found in other litigation. Because, after all, with angry owner and architect defendants, a subcontractor or general contractor plaintiff can quite truthfully say: "I'm not suing you for damages. I'm including you in this case merely because you are an interested party in this dispute and your being in this case will help protect everyone's rights, including your own."

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[1] A s*quib* is defined as 'a short humorous or satiric writing or speech'. If that definition doesn't float your boat, Wiktionary defines *squib* as "a short article, often published in journals, that introduces empirical data problematic to linguistic theory or discusses an overlooked theoretical problem. In contrast to a typical linguistic article, a squib need not answer the questions that it poses."

[2] There may be statutes, such as this one, which are written in simple, understandable English. Fortunately, there is a movement afoot to do away with such an outrage!

[3] This is a 'Uniform Law'. Uniform Laws are model laws prepared by individuals/committees on a certain subject which various states subsequently either adopt or don't adopt. In this case, Massachusetts adopted the 'Uniform Declaratory Judgment Act.' One perceived advantage in having a 'Uniform Law' is that this makes case decisions interpreting it from other states potential authority for a Massachusetts court in a determination of the same issue.

[4] That makes one heck of a lot of sense, doesn't it?

[5] For those who want to understand the reasons 'why', there is a Construction Article on my website titled "Architectural Liability to Contractors".

[6] On the way to the general contractor's office, where this meeting took place, we passed a Harley dealership that had an exceptionally cool orange 'V-ROD' out front. A mild disagreement arose between us as to whether we would stop and look at it on the way back to his office. As attorney-client privilege is a near sacred right/obligation, I will not divulge which position I took and which position the subcontractor took. In the spirit of full disclosure, however, it is true that at one point previously in the last ten years or so, I had seven motorcycles at one time. Having matured greatly since that time, I saw the folly of this situation, coming to the realization that, after all, motorcycle riding is a younger person's sport. That is why I currently have only two motorcycles. These were picked because they are light weight and easier for an older person to ride and handle. One is nearly nine hundred pounds and the other is nearly eight hundred pounds and, being British, is somewhat temperamental, particularly as to starting and shifting. One recalls that when there used to be a lot more MG and Triumph cars on the road with English electrical systems, Lucas Electrics was nicknamed by the cognoscenti as the 'the Prince of Darkness.' As a point of comparison, my first motorcycle – a

Honda CB350 – tipped the scales at a gargantuan 393.8 pounds. Of course, I was a younger man then and could better handle such a great weight.

[7] There is, after all, no accounting for taste!

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