

Declaratory Judgment Actions—An Effective Tool for Serious Situations

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The declaratory judgment action can be a powerful litigation tool to resolve contract disputes with the government, but contractors often do not know how to use declaratory judgment actions effectively, or even that the option is available. Overlooking the declaratory judgment option is understandable. The predecessors to the Court of Federal Claims—the Court of Claims and the Claims Court—for years would not even hear declaratory actions, holding that their jurisdiction extended only to claims for money. However, because of congressional action, contractors now can bring suits for declaratory relief to either the Court of Federal Claims (CFC) or the appropriate board of contract appeals. Moreover, a slowly building body of law on declaratory actions provides some useful insight into when declaratory actions may be most effective, as well as some common pitfalls to be avoided.

Early Approaches to Declaratory Actions

Historically, the boards and the courts have addressed actions for declaratory relief differently. The boards have long held that their jurisdiction includes the power to hear declaratory actions. In contrast, the courts held for years that they did not have comparable authority. This inconsistency between the courts and boards arose because they were separately created, with different sources of jurisdiction.

The boards were created by charters issued under executive authority. The boards interpreted the broad grants of power under those charters as allowing them to determine contract rights and duties even in the absence of any claim for monetary relief.¹

In contrast to the boards, the CFC and its predecessors

(the Court of Claims and the Claims Court) were created by statute. Their jurisdiction has long been defined by the Tucker Act,² a portion of which provides that the court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . .³

Although that language might appear broad, the courts traditionally did not interpret the Tucker Act's grant of jurisdiction to include actions solely for declaratory relief. To the contrary, the United States Supreme Court observed that "[t]hroughout its entire history . . . [Court of Claims] jurisdiction has been limited to money claims against the United States Government."⁴

Legislative Changes and Continued Jurisdictional Disparity

In 1978, Congress passed the Contract Disputes Act (CDA). The CDA provided a new basis for the court and the boards to hear contract disputes, establishing their authority to hear appeals from final decisions of contracting officers.⁵ With the CDA, Congress also amended the Tucker Act, specifically providing the court with jurisdiction "to render judgment upon any claim by or against, or in dispute with, a contractor arising under the [CDA]."⁶ However, the CDA did not explicitly give the court jurisdiction to address declaratory actions, and, therefore, it did not effectively resolve the jurisdictional disparity between the court and the boards.⁷ The Claims Court continued to hold that, despite enactment of the CDA, it did not have jurisdiction to hear actions solely for declaratory relief.⁸

In 1982, Congress passed the Federal Courts Improvement Act, which eliminated the Court of Claims, creating the Court of Appeals for the Federal Circuit and the Claims Court.⁹ The Act also amended the jurisdictional provisions of the Tucker Act, specifically providing the court with authority to issue declaratory relief in bid protest actions, but it did not address declaratory relief in post-award contract disputes, and the court continued to hold that it did not have jurisdiction to hear such suits.¹⁰ In contrast, the Federal Circuit reaffirmed the boards' jurisdiction to hear such cases.¹¹

This disparity was highlighted in *Overall Roofing and Construction, Inc. v. United States*.¹² In that case, the Federal Circuit affirmed the Claims Court's dismissal of a case in which the contractor had challenged its termination for default.¹³ Both the appellate and trial courts held that, be-

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cause the contractor's challenge to the propriety of the termination did not also include a claim for money damages, the Claims Court had no jurisdiction to hear the case.¹⁴ In doing so, the courts relied upon historical views of Claims Court (and Court of Claims) jurisdiction, with the Federal Circuit holding that the Tucker Act's reference to "claims" against the government was limited solely to claims that "assert a right to presently due money."¹⁵

Rough Parity: The Federal Courts Administration Act of 1992

Following the 1991 *Overall Roofing* decision, Congress passed the Federal Courts Administration Act of 1992. In addition to changing the name of the Claims Court to "Court of Federal Claims," that Act clarified that Congress

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intended to allow both the court and the boards to have jurisdiction over actions for declaratory relief by specifically amending the jurisdiction of the court to include disputes concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under [the CDA].¹⁶

The legislative record indicates that Congress intended this language to "restore the option of appealing any final decisions to either the Court of Federal Claims or agency board of contract appeals [as] was intended in the Contract Disputes Act."¹⁷

With the passage of this Act, Congress expressly gave the Court of Federal Claims jurisdiction to consider actions for declaratory relief.¹⁸ Although subtle (but sometimes important) differences between the jurisdictional bases for declaratory judgment actions in the CFC and boards still remain,¹⁹ this legislative change finally brought the court and the boards close to jurisdictional parity for declaratory actions.

Prudential Considerations for Relief

Although both the CFC and the boards now agree that they have jurisdiction to hear declaratory actions, either may still decline to hear such an action for prudential reasons. As the Federal Circuit said in *Alliant Techsystems, Inc. v. United States*,

[t]his is not to say that the Court of Federal Claims (or an agency board of contract appeals) is required to issue a declaration of rights whenever a contractor raises a question of contract interpretation during the course of contract performance.

In responding to such a request, the court or board is free to consider the appropriateness of declaratory relief, including whether the claim involves a live dispute between the parties, whether a declaration will resolve that dispute, and whether the legal remedies available to the parties would be adequate to protect the parties' interests.²⁰

These considerations for the "appropriateness" of declaratory relief appear to stem from a concern for judicial economy—judges are reluctant to allow actions to go forward if those actions are unnecessary or will not finally resolve the dispute.²¹ Judges also do not want parties rushing into the boards or court to argue every minor contract dispute.

Consider, for example, a dispute over a directed change to a contract. If the change is not alleged to be cardinal (outside the general scope of the contract), then there generally is no question of whether the contractor must comply—the contract's changes clause will require compliance.²² Instead, the only likely dispute is over entitlement to an equitable adjustment for making the change. In that circumstance, a judicial declaration on entitlement alone may resolve little, as further litigation would still be necessary to determine the value of the resultant price adjustment, if any. Moreover, a later monetary remedy is likely to address fully any damages to the contractor. For these reasons, the court or board may be reluctant to exercise its declaratory powers in such a circumstance. In fact, the court in *Alliant* used this as an example of when it would "normally be appropriate" to deny declaratory relief.²³

Thus, although the basic question of jurisdiction may be resolved, the court or board will still consider whether such "prudential" considerations favor a declaratory action. If prudential considerations counsel against declaratory relief, then the court or board may decline to consider the claim.

Using Declaratory Judgment Actions Effectively

Although actions for declaratory relief still are not common, the body of law has slowly grown since jurisdiction was finally established in the CFC, and contractors are beginning to understand that declaratory actions can be powerful tools in the right circumstances. But what are the right circumstances? Although situations will vary, contractors should seriously consider seeking declaratory relief at least in those circumstances where (1) there is a dispute relating to a fundamental issue of contract interpretation or the contractor's obligation to perform, (2) there is need for a relatively speedy determination of the contractor's rights, and (3) future monetary damages may be inadequate to make the contractor whole. At the same time, contractors should also know that the path to declaratory relief will not always be easy. The government often has fought contractors' efforts to bring declaratory actions, on both jurisdictional and prudential grounds, and there are some common pitfalls to be avoided.

Fundamental Contract Dispute

Probably the most obvious circumstances in which declaratory judgment actions may be useful are those in which there is a fundamental dispute over contract interpretation or the contractor's obligation to perform. In such situations, a declaratory judgment action may resolve the dispute while, at the same time, minimizing certain risks to the contractor.

For example, in *CW Government Travel, Inc. v. United States*,²⁴ a contractor brought suit before the Court of Federal Claims asking for a declaration that its contract with the U.S. Army gave it an exclusive right to provide certain travel services and that the Army could not transfer a portion of that work to another contractor. The Court held that this was an appropriate circumstance for a declaratory action, finding that there was a "live dispute" between the parties because the government appeared to have taken several steps toward transferring work to another contractor and that it was possible that the government had anticipatorily breached the contract.²⁵

A declaratory judgment action may be even more valuable, however, when there is a fundamental dispute about whether the contractor must continue to work under the contract or accept changes ordered by the contracting officer. In such cases, the contractor risks termination for default and liability to the government if it acts unilaterally to stop or refuse work and later learns it was wrong about its obligations. Often, that risk will be too great for a contractor to accept. In contrast, filing a declaratory action may help minimize these risks, allowing the contractor to delay unilateral action until it has a clear determination of its rights.

For example, in *SUFI Network Services, Inc.*,²⁶ a contractor providing telephone networks at U.S. Air Force lodgings in Germany had been ordered by the government to remove certain restrictions on access to other long-distance carriers via its telephone network. The contractor complied with this order, but did so under protest, arguing that it had a right to maintain those restrictions under the contract.²⁷ In its appeal to the ASBCA, the contractor asked for a declaration that its interpretation of the contract was correct and, moreover, that the government's order in violation of the contract constituted a material breach entitling it to stop work.²⁸ The board first issued its decision denying a government motion to dismiss, holding that the contractor's complaint raised a "fundamental question of contract interpretation—whether SUFI must perform" and, therefore, was appropriate for declaratory relief.²⁹ In its ultimate decision on the merits, the board agreed with the contractor that the government's order was a breach.³⁰ The board also determined that the government's breach was material, entitling the contractor to stop work, because the government's conduct had caused a substantial loss of revenue and the government had given no assurance that it would cure its breach.³¹

*International Data Products Corp. v. United States*³² provides another useful example. In that case, a small, minority-owned business had obtained a contract under the Small Business Administration's 8(a) program to provide computer systems, warranty services, and software products and upgrades to the government.³³ During performance, a non-8(a) business purchased the contractor and the government terminated the contract for convenience,³⁴ but asserted that the contractor's warranty and upgrade obligations continued post-termination.³⁵ The contractor kept performing those services as directed by the contracting officer, but it sought a declaratory judgment from the CFC that it was not required to do so.³⁶ The court agreed, holding that the contractor was not obligated to provide the warranty and upgrade services post-termination.³⁷

Need for Speedy Resolution

An action for declaratory relief can also be valuable to a contractor when it is important to resolve the contract dispute relatively quickly. A contractor may often obtain declaratory relief much more quickly than monetary relief—possibly within only a few months of filing suit. In *Emery Worldwide Airlines, Inc. v. United States*,³⁸ for example, the CFC granted the contractor favorable declaratory relief only five months after the contractor's complaint.³⁹ In that case, the contractor alleged that the government was refusing to follow contractually required procedures for a price redetermination and that the government's actions constituted a

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material breach of the contract entitling the contractor to stop working.⁴⁰ Although the court declined at that time to determine whether the government's conduct constituted a material breach of the contract, the court did declare, inter alia, that the government's interpretation of the contract was incorrect and that the government was obligated to follow the contract's price redetermination process.⁴¹

The relative speed of declaratory actions is probably attributable to two things. First, the CFC and boards recognize that, in most cases, the issues brought in a declaratory action need to be resolved quickly. For example, in a case where a party's basic obligation to perform is in question, a declaration of its right to stop or refuse work might be of little value if the contract were completed by the time a decision issued. The need for quick resolution also is specifically recognized in CFC Rule 57, which states that "[t]he

court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.”⁴² Second, declaratory suits often can move more quickly because the issues they address may be relatively narrow. The litigants (and the court or board) can focus on the core issues in dispute and avoid the complications attendant to actions for monetary relief and proving damages. This focus may not only simplify the briefings and hearings before a judge, but, just as importantly, narrow the scope and time for discovery in the litigation.

Monetary Damages Will Be Inadequate

Contractors also should consider a declaratory action where they believe that future monetary damages will be inadequate to make the company whole again. Such a circumstance might arise where the government is breaching its obligations under the contract and the consequences of those breaches are so significant that they threaten the permanent impairment of business relationships or the very viability of the contractor. This might also arise when the parties’ dispute is in part over the proper timing, and not just the amount, of payments due to the contractor. For example, in *Emery Worldwide Airlines, Inc. v. United States*, the CFC held that the mere fact that the contractor might eventually be paid the rate to which it was entitled did not give it a fully adequate legal remedy where one of the issues before the court was whether the contract required the payment of a “provisional” rate increase in advance of the parties’ negotiated agreement of a new fixed price.⁴³

In contrast, contractors might have difficulty obtaining declaratory relief if money damages would be adequate. The Federal Circuit in *Alliant* held that the adequacy of monetary remedies is an important consideration to determine the “appropriateness” of declaratory relief.⁴⁴ Thus, in certain circumstances in which contractors can be made whole through the recovery of monetary damages, declaratory relief may be unnecessary and the boards and the CFC may decline to hear the action for prudential reasons. Some decision makers might also look to whether the claim is fundamentally about monetary relief, rather than contract interpretation, and refuse to consider declaratory relief if it is.⁴⁵

Continue-to-Work Provisions

When seeking declaratory relief, contractors should not ignore the “continue-to-work” provisions of their disputes and changes clauses. The continue-to-work provisions typically require a contractor to continue performing as directed by the government while a dispute between the parties is resolved.⁴⁶ This may be true even in cases in which the contractor is seeking a determination that it has no obligation to accept the work or to continue performance under the contract. Failure to comply with those provisions might create a new basis for default termination and liability to the government, negating the value of declara-

tory relief in the underlying dispute.

This is clearly illustrated by *Alliant*. In that case, the contractor brought suit seeking a declaration that the government’s purported exercise of a contract option was invalid and, therefore, that the contractor was not obligated to perform.⁴⁷ In the midst of litigation, the contractor also stopped performing and, as a result, the government terminated the contractor for default.⁴⁸ On appeal, the Federal Circuit held that the government’s exercise of the option was, in fact, invalid.⁴⁹ However, that declaratory relief may have provided little comfort to the contractor, because the Federal Circuit also held that the contractor had an obligation under the contract’s disputes clause to continue performing the option pending the resolution of litigation.⁵⁰ Because the contractor did not continue to work while litigating its dispute, the court held that the contractor had breached the contract.⁵¹

Claim and Final Decision Requirements

Among the most common jurisdictional arguments put forth by the government in opposition to an action for declaratory relief are: (1) a valid claim was not presented to the contracting officer for a final decision or (2) a final decision on the question was not issued by the contracting officer.⁵² Because it is such a likely point of attack, contractors must be especially careful to follow the disputes procedures required by their contracts. In some cases, a government determination or directive may constitute a claim or final decision and be appealable by the contractor without further delay.⁵³ In most cases, however, the contractor will need to file a formal claim with the contracting officer and obtain the contracting officer’s final decision before bringing a suit for declaratory relief.

When filing a claim with the contracting officer, the contractor should take pains to include all of the relevant contract interpretation issues, as well as any consequential issues that will need to be addressed in a declaratory action. This is because, if a particular issue is not clearly presented for the contracting officer’s final decision, then the court or board might determine that it does not have jurisdiction to hear the action under the CDA.⁵⁴ For example, if a contractor believes that the government has materially breached its contract obligations and that those breaches give the contractor a right to stop work, then the contractor’s claim to the contracting officer should request a determination not only of the government’s obligations under the contract, but also of whether the government is in material breach so that the contractor can stop work, assuming it prevails on the disputed contract interpretation. Although it will undoubtedly be the infrequent circumstance in which a contracting officer issues a decision agreeing with the contractor on the materiality question, the failure to submit it as a specific claim, and the consequent absence of the issue in the final decision, could lead to dismissal of that part of a subsequent declaratory action.

Conclusion

Although contractors bringing actions for declaratory relief are likely to face both jurisdictional and prudential challenges from the government, a slowly growing body of law supports the use of these actions to resolve fundamental issues of contract interpretation. Claims for declaratory relief appear particularly useful when the disputes need relatively quick resolution or cannot be adequately addressed with later monetary relief. Contractors do not use the declaratory judgment action frequently, but in some serious situations they may find it is the most effective tool to reach a resolution. 

Endnotes

1. See, e.g., *Metalstand Co.*, GSBCA No. 4682, 77-1 BCA ¶ 12,418; *A. Brown & Co.*, GSBCA Nos. 3575, 3700, 73-2 BCA ¶ 10,219; *G.A. Karnavas Painting Co.*, ASBCA No. 19569, 76-1 BCA ¶ 11,837.

2. 28 U.S.C. § 1491 (2000).

3. *Id.* § 1491(a)(1).

4. *United States v. King*, 395 U.S. 1, 2-3 (1969).

5. Pub. L. No. 95-563, §§ 8, 10; 12 Stat. 2383 (1978), *codified at* 41 U.S.C. §§ 607(d), 609(a)(1) (2000).

6. Pub. L. No. 95-563 § 14(i), *codified at* 28 U.S.C. § 1491(a)(2) (2000).

7. Notably, the CDA did include language stating that agency boards, in exercising their jurisdiction, were “authorized to grant any relief that would be available to a litigant asserting a contract claim in the Court of Claims.” *Id.* § 8(d) (emphasis added).

8. See, e.g., *Alan J. Haynes Constr. Sys. v. United States*, 10 Cl. Ct. 526 (1986) (holding that the CDA changes to 28 U.S.C. § 1491 did not expand jurisdiction to include declaratory actions); *Industrial Coatings, Inc. v. United States*, 11 Cl. Ct. 161 (1986) (concluding the court still did “not have authority to render purely declaratory relief”).

9. See Pub. L. No. 97-164, 96 Stat. 25 (1982).

10. See, e.g., *Alan J. Haynes Construction Sys.*, 10 Cl. Ct. 526 (1986); *Industrial Coatings*, 11 Cl. Ct. 161 (1986).

11. See *Malone v. United States*, 849 F.2d 1441 (Fed. Cir. 1988).

12. 929 F.2d 687 (Fed. Cir. 1991).

13. *Id.*

14. *Id.* at 690; 20 Cl. Ct. 181, 184 (1990).

15. 929 F.2d at 689; 20 Cl. Ct. at 184.

16. Pub. L. No. 102-572, § 907, 106 Stat. 4506 (1992) (emphasis added); 28 U.S.C. § 1491(a)(2) (2000).

17. *Alliant Techsys., Inc. v. United States*, 178 F.3d 1260, 1268 (Fed. Cir. 1999) (quoting statement of Senator Heflin, 138 CONG. REC. 34,204 (1992)).

18. See, e.g., *Alliant*, 178 F.3d at 1269-70; *Tiger Natural Gas, Inc. v. United States*, 61 Fed. Cl. 287, 292 (2004); *Garrett v. Gen. Elec. Co.*, 987 F.2d 747, 750 (Fed. Cir. 1993).

19. For example, because nonappropriated fund instrumentalities (NAFIs) generally are not subject to the CDA, contractors with claims against NAFIs may be unable to bring their actions to the CFC. They may, however, rely upon the disputes clauses in their contracts and charter jurisdiction at the boards to obtain relief. See, e.g., *SUFI Network Servs., Inc.*, ASBCA No. 54503, 04-1 BCA ¶ 32,606 at 161,366.

20. *Alliant*, 178 F.3d at 1271.

21. See, e.g., *Sabbia Corp.*, VABCA Nos. 5557, 5857, 99-2 BCA ¶ 30,394 (noting that, with the exception of appeals from default terminations, its exercise of declaratory jurisdiction “must be discretionary for reasons of judicial economy”).

22. See, e.g., FAR 52.243-4 (“Changes”).

23. *Alliant*, 178 F.3d at 1271.

24. 63 Fed. Cl. 369 (2004).

25. *Id.* at 389.

26. 04-1 BCA ¶ 32,606 (ASBCA 2004); 04-2 BCA ¶ 32,714 (ASBCA 2004).

27. 04-2 BCA ¶ 32,714 at 161,866.

28. *Id.*

29. 04-1 BCA ¶ 32,606 at 161,367.

30. 04-2 BCA ¶ 32,714 at 161,869.

31. *Id.*

32. 64 Fed. Cl. 642 (2005).

33. *Id.* at 643.

34. *Id.* at 644.

35. *Id.*

36. *Id.*

37. *Id.* at 649-51.

38. 47 Fed. Cl. 461 (2000).

39. *Id.* at 464.

40. *Id.* at 467.

41. *Id.* at 478-80.

42. The language of this rule tracks that of the Federal Rule of Civil Procedure 57.

43. 47 Fed. Cl. at 478.

44. 178 F.3d at 1271; see also *Valley View Enters., Inc. v. United States*, 35 Fed. Cl. 378, 383-86 (1996) (holding that question of whether contracting officer’s direction constituted a compensable change to the contract was not appropriate for declaratory relief and that the proper course was for the contractor to perform the work and bring a claim for an equitable adjustment).

45. See, e.g., *Aeronca, Inc.*, ASBCA No. 51927, 01-1 BCA ¶ 31,230 at 154,145 (stating that “[a]ppeals relating to claims seeking monetary relief only, such as the present one, are not eligible for declaratory relief”); see also, e.g., *Weststar Eng’g, Inc.*, ASBCA No. 52484, 02-1 BCA ¶ 31,759 at 156,852-53 (refusing to hear plaintiff’s request for declaratory relief where it presented a quantum issue by “cloaking it as a request for contract interpretation.”).

46. See FAR 52.233-1 (“Disputes” clause at (i)) (“The contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer.”).

47. 178 F.3d at 1263.

48. *Id.*

49. *Id.* at 1275.

50. *Id.* at 1277.

51. *Id.* The *Alliant* court’s decision that the contractor had a contractual obligation to continue performing even though there was no valid contract between the parties is subject to serious question; however, at a minimum, the lesson of this case is clear—a contractor ignores the continue-to-work provision at significant peril.

52. See, e.g., *Alliant*, 178 F.3d at 1265-68; *CW Gov’t Travel, Inc.*, 63 Fed. Cl. 369; *Garrett*, 987 F.2d 747.

53. See, e.g., *Garrett*, 987 F.2d at 749 (holding that a government directive to correct or replace engines was an appealable “claim” by the government); *Ind. Mfg. & Serv. Cos. of Am., Inc.*, ASBCA No. 47636, 94-3 BCA ¶ 27,223 (government issuance of a termination for default is an appealable claim); *Educators Assocs., Inc. v. United States*, 41 Fed. Cl. 811 (1998) (same).

54. See, e.g., *Aeronca Inc.*, 01-1 BCA ¶ 31,230 (entitlement issue was not within the board’s jurisdiction under the CDA).