



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR LEAVE TO AMEND GRANTED:
March 2, 2017

CBCA 5008

QUALITY CONTROL INTERNATIONAL,

Appellant,

v.

GENERAL SERVICES ADMINISTRATION,

Respondent.

Joseph A. Camardo, Jr., and Justin T. Huffman of Camardo Law Firm, P.C., Auburn, NY, counsel for Appellant.

Elyssa Tanenbaum, Office of General Counsel, General Services Administration, Washington, DC, counsel for Respondent.

Before Board Judges **SOMERS**, **HYATT**, and **LESTER**.

LESTER, Board Judge.

Appellant, Quality Control International (QCI), has filed a motion seeking leave to amend its complaint. In its original complaint, QCI sought a price adjustment from respondent, the General Services Administration (GSA), pursuant to its contract's Price Adjustment clause, 48 CFR 52.222-43 (2013), to account for wages that it was required to pay its employees pursuant to a Collective Bargaining Agreement (CBA) and a subsequently

issued Department of Labor (DOL) wage determination. QCI now believes that the issues in its appeal also could be characterized as a constructive change under the contract's Changes clause, 48 CFR 52.243-1, and it seeks to amend its complaint to add a request for an equitable adjustment under the Changes clause.

GSA opposes QCI's motion, arguing that the constructive change claim constitutes a different claim than the Price Adjustment clause claim. Because there is no contracting officer's decision on a claim under the Changes clause, GSA argues, the Board lacks jurisdiction to entertain the constructive change claim, rendering the amendment futile.

Having reviewed QCI's written certified claim and considered the parties' arguments, we grant QCI's motion for leave to amend its complaint.

Background

On July 22, 2013, GSA awarded a task order, no. GS-P-08-13-JA-0030, to QCI under QCI's previously awarded Federal Supply Schedule (FSS) contract. Appeal File, Exhibit 6.¹ The task order required QCI to provide custodial services for a year at various federal buildings in Colorado beginning on August 1, 2013, and provided GSA options for two one-year task order extensions.

Eleven months later, on June 23, 2014, QCI entered into a CBA with the International Union of Operating Engineers, Local 1 (the union), covering all work that union employees would be performing on the contract beginning August 1, 2014, if GSA exercised the first option. Exhibit 80 at 360-76. The next day, QCI forwarded a copy of the CBA to the GSA contracting officer. Answer ¶ 6.

On or about July 24, 2014, the contracting officer issued a contract modification, no. P011, exercising the first one-year option and extending the contract performance period from August 1, 2014, to July 31, 2015. Exhibit 7 at 41-46. The pricing included in Modification P011 reflected the option prices provided in the original contract and did not mention or address the CBA. Nevertheless, attached to Modification P011 was an email message stating as follows: "There is no intent to stay at this pricing and in the next week to ten days I will send you another mod restoring the recent changes for H&W etc," Answer

¹ All exhibits referenced in this decision are found in the appeal file, unless otherwise noted. Any citations to the complaint and answer refer to QCI's original complaint, filed November 15, 2015, and GSA's answer to that complaint, filed December 21, 2015.

¶ 7, which QCI believes referred to the CBA wage rates. Apparently, however, no such subsequent modification was ever issued.

On July 31, 2014, the contracting officer requested a wage determination from DOL, based upon the CBA, through submission to DOL of Standard Form (SF) 98, as prescribed by Federal Acquisition Regulation (FAR) 22.1007 (48 CFR 22.1007) and 29 CFR 4.4(a)(1)(iv). Complaint ¶ 8; Exhibit 19. GSA did not notify QCI that it had made such a request to DOL. Answer ¶ 8.

On or about August 1, 2014, in response to GSA's wage determination request, a DOL representative notified GSA that the wage determination had to be based upon the CBA:

Based upon the information that you have provided, the employees working on the current contract are paid in accordance with a collective bargaining agreement (CBA). Pursuant to sections 2(a) and 4(c) of the Service Contract Act, the wage determination for the following contract must be based upon the rates and benefits in the CBA.

Please respond [sic] to this email with a signed copy of the CBA. Upon receipt of the requested documentation, your [SF98] request will be answered.

Exhibit 20 at 2. Subsequently, on or about August 18, 2014, DOL issued Wage Determination 2014-0737, Revision 1, with wage rates mirroring QCI's CBA. Exhibit 80 at 380-82; Complaint ¶ 9. QCI alleges that, although GSA received this wage determination revision, neither DOL nor GSA provided the revision to QCI. Complaint ¶ 9.

On October 7, 2014, allegedly unaware of the wage determination revision, QCI submitted a request for an equitable adjustment (REA) to GSA "in accordance with FAR 52.222-43 Fair Labor Standards Act and Service Contract Act – Price Adjustment (Multiple Year and Option Contracts)." Exhibit 80 at 416. In the REA, QCI asked GSA to incorporate the CBA into its contract, an action that QCI alleges, based upon prior conversations with the GSA contracting officer, it expected to be approved, with an annual task order price increase of \$676,931.16. *Id.*; Complaint ¶ 10.

The GSA contracting officer responded on October 14, 2014, challenging the manner in which QCI calculated its requested price increase and asking for a spreadsheet showing the methodology underlying QCI's request:

I am [in] receipt of your request for equitable adjustment. Our numbers are considerably off. The methodology we expected was one of adding the

difference between your current wage structure by employee and the new union scale to the contract price. . . . This process must produce a straight pass through of most (but not all), of the increased cost of union scale. It is not an opportunity to look at increasing the overhead and profit. From a legal perspective for your negotiation with the union to be deemed as being “arms length”, QCI should feel some pain. To that end I believe you should cover the full cost of the employers [sic] half of FICA and other payroll taxes. . . .

I request a spreadsheet showing your methodology to arrive at your numbers.

Exhibit 80 at 424. After QCI requested a copy of the current FAR Price Adjustment clause from GSA as a reference for its calculations, the contracting officer responded that he was relying not upon “a FAR clause,” but upon “the concept of an ‘Arms Length Negotiation.’” *Id.* at 426.

On October 20, 2014, the DOL wage determination revision dated August 18, 2014, was retransmitted to GSA, with a copy provided to QCI. Complaint ¶ 12. The next day, QCI submitted a revised spreadsheet in support of its REA to the GSA contracting officer, and it submitted another round of corrections on October 27, 2014, at the contracting officer’s request. *Id.* ¶ 13; Answer ¶ 13. In the succeeding months, the parties exchanged numerous communications in an attempt to resolve GSA’s concerns. Answer ¶ 15.

In April 2015, QCI was advised that GSA had asked DOL for a variance hearing, but, on July 20, 2015, QCI was notified by GSA’s contracting officer that DOL had denied GSA’s request as untimely. Complaint ¶ 16; Answer ¶ 16. On July 31, 2015, GSA extended QCI’s contract for an additional six months rather than exercising the full one-year option, but never incorporated the CBA into either the first option year or the six-month extension. Answer ¶¶ 17, 18. Further, the GSA contracting officer never responded to QCI’s REA. *Id.* ¶ 19.

On August 27, 2015, QCI submitted a claim to the contracting officer “to seek monetary relief as a result of a [CBA] entered into between QCI and [the union].” Exhibit 80 at 1; Complaint ¶ 20. In that claim, QCI described the history of its dealings with GSA regarding the CBA and wage determination matters, and it complained generally about the contracting officer’s alleged failure to comply with regulatory requirements for obtaining and/or incorporating wage determinations into its contract. QCI requested payment of a sum certain of \$541,347.31 as “[m]onetary [r]elief for CBA [w]ages,” comprised of “wages and fringe benefits, applicable taxes, and administrative costs endured.” Exhibit 80 at 9. QCI does not expressly indicate in the claim that it is seeking compensation under the Price Adjustment clause – in fact, the claim does not mention the Price Adjustment clause at all

– but, consistent with the limitations of that clause, QCI does not request payment of profit or overhead in its claim, it references the previously submitted REA (which referenced that clause), and QCI has acknowledged in its pleadings before the Board that it was relying upon the Price Adjustment clause in submitting its claim.

On September 29, 2015, a new GSA contracting officer issued a decision granting QCI’s claim in part. She stated that “[t]he wage determination obtained from [DOL] is not a directive for GSA to incorporate unfair and unreasonable CBA rates into the contract” and that, “[u]ltimately, the Contracting Officer must determine if the CBA is fair and reasonable.” Exhibit 86 at 3-4. She found, based upon her review of QCI’s documentation, that the “fair and reasonable” wage increase to which QCI was entitled was \$330,527.13, and she issued a unilateral modification authorizing payment to QCI of that amount. *Id.* at 4, 6-8. She requested that QCI submit an invoice for payment in that amount, the submission of which would “not affect QCI’s ability to appeal the partial denial of its claim.” *Id.* at 4. QCI has represented that it, in fact, has been paid the amount that the contracting officer authorized, but that it is entitled to the remainder of what it had requested. Complaint ¶ 22.

QCI appealed the contracting officer’s decision to the Board and, on November 15, 2015, filed its complaint seeking the unpaid portion of its claim (\$210,820.18). After GSA filed an answer to QCI’s complaint, the parties jointly requested that the Board suspend proceedings so that they could discuss the possibility of an amicable resolution. By order dated January 22, 2016, the Board stayed proceedings in the appeal. After reporting to the Board about their progress during settlement negotiations over the course of several months, QCI informed the Board during a telephonic status conference on December 22, 2016, that the parties’ efforts at settlement had concluded without a resolution of the dispute and that QCI wanted to resume proceedings. QCI also indicated that it intended to file a motion seeking leave to amend its complaint to update the monetary relief that it was seeking.²

² During the same conference, GSA indicated that, because this appeal involves a dispute about labor standards involving DOL, it intended to file a motion to dismiss the appeal for lack of jurisdiction under the rationale of the Board’s decision in *SecTek, Inc. v. National Archives & Records Administration*, CBCA 5084-R, 16-1 BCA ¶ 36,466. After the Board set a deadline for the motion’s submission, GSA informed the Board that it would not be filing such a motion. Cognizant of our “independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party,” *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,969 (quoting *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006)), we have considered the jurisdictional argument that GSA indicated it had intended to raise, but can see no basis for dismissing this appeal for lack of jurisdiction. Unlike the situation in *Sectek*,

QCI filed its motion for leave to amend its complaint on January 18, 2017. In the accompanying proposed amended complaint, QCI adds a few explanatory factual allegations to its complaint, clarifies (and corrects) some other factual allegations to conform to the documentary record, and adds an allegation that GSA's conduct in refusing to incorporate the CBA wage rates, approved by DOL, into its contract constitutes a change under FAR 52.243-1(b).

GSA filed an opposition to that motion on February 17, 2017, arguing that the factual elements necessary for establishing entitlement to a price adjustment differ from those necessary for establishing a constructive change, meaning that the two theories constitute different claims. GSA also informed us that, on January 18, 2017, QCI submitted a new claim to the GSA contracting officer (albeit with an unsigned certification) seeking relief under the Changes clause in the amount of \$252,881.94 – an increase of \$42,061.76 from its August 2015 certified claim, inclusive of QCI's new request for profit and overhead markups – resulting from GSA's actions in failing to incorporate the CBA into its contract. GSA asserts that the submission of this new claim indicates that even QCI is aware that its constructive change theory is not encompassed within its August 27, 2015, claim.

Discussion

I. Standard for Evaluating Leave to Amend

Under Board Rule 6(e), once the Government has filed its answer to the complaint in an appeal, the appellant may file an amended complaint only by leave of the Board. *Crane & Co. v. Department of the Treasury*, CBCA 4965, 16-1 BCA ¶ 36,539, at 178,000 (citing 48 CFR 6101.6(e) (2015)). In considering a motion for leave to amend, we apply the guidance contained in Rule 15 of the Federal Rules of Civil Procedure (FRCP), *id.*, which provides that leave to amend shall be freely given “when justice so requires.” Fed. R. Civ. P. 15(a)(2). Generally, “[i]n the absence of any apparent or declared reason – such as undue

QCI is not challenging DOL's wage determination, a challenge that would have to be pursued before DOL. Instead, QCI accepts DOL's wage determination, but challenges GSA's position on the effect of that wage determination on QCI's contract under the Price Adjustment and Changes clauses. The Board possesses jurisdiction “to determine the effect that the DOL's classification has on [the appellant's] contract rights” under those clauses. *Burnside-Ott Aviation Training Center, Inc. v. United States*, 985 F.2d 1574, 1580 (Fed. Cir. 1993); see *United International Investigative Services v. United States*, 109 F.3d 734, 738 (Fed. Cir. 1997) (assuming jurisdiction over contractor claim challenging agency's failure to increase contract price after DOL issued new wage determination).

delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be ‘freely given.’” *Foman v. Davis*, 371 U.S. 178, 182 (1962).

GSA’s sole argument in opposition to QCI’s request for leave to amend is futility. Under FRCP 15, “futility is a well-established ground for denying leave to amend.” *Crane*, 16-1 BCA at 178,002; *see Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995) (“futility of amendment can, by itself, justify the denial of a motion for leave to amend”). If the proposed amended complaint (or, as in this instance, the new theory of recovery that the appellant proposes to add to its existing complaint) would be subject to dismissal for lack of jurisdiction, amendment is futile. *Johnson v. United States*, No. 2016-2618, 2017 WL 164332, at *1 (Fed. Cir. Jan. 17, 2017); *Mortimer Off Shore Services, Ltd. v. Federal Republic of Germany*, 615 F.3d 97, 99 (2d Cir. 2010); *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006). It is the appellant’s burden to establish that the new aspects of its amended complaint could survive a motion to dismiss. *Kemin Foods, L.C. v. Pigmentos Vegetales del Centro S.A. de C.V.*, 464 F.3d 1339, 1354-55 (Fed. Cir. 2006).

II. Whether The Proposed Amendments Would Be Futile

“The comprehensive procedures of the Contract Disputes Act” (CDA), 41 U.S.C. §§ 7101-7109 (2012), “govern the resolution of contract disputes that arise between the government and contractors.” *Applied Cos. v. United States*, 144 F.3d 1470, 1477 (Fed. Cir. 1998). The CDA expressly requires that “[e]ach claim by a contractor against the Federal Government relating to a contract shall be in writing” and “shall be submitted to the contracting officer for a decision.” 41 U.S.C. § 7103(a)(1), (2). If the amount of a claim exceeds \$100,000, the claim must be certified by the contractor. *Id.* § 7103(b)(1). The CDA further requires that “[t]he contracting officer shall issue a decision in writing and shall . . . furnish a copy of the decision to the contractor” *Id.* § 7103(d). These requirements are “jurisdictional prerequisites to any appeal.” *England v. Swanson Group, Inc.*, 353 F.3d 1375, 1379 (Fed. Cir. 2004) (quoting *Sharman Co. v. United States*, 2 F.3d 1564, 1569 n.6 (Fed. Cir. 1993), *overruled on other grounds by Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc)). Accordingly, “jurisdiction over an appeal of a contracting officer’s decision is lacking unless the contractor’s claim is first presented to the contracting officer and that officer renders a final decision on the claim.” *Id.*

“An action brought . . . under the CDA must be ‘based on the same claim previously presented to and denied by the contracting officer.’” *Scott Timber Co. v. United States*, 333 F.3d 1358, 1365 (Fed. Cir. 2003) (quoting *Cerberonics, Inc. v. United States*, 13 Cl. Ct. 415, 417 (1987)). Here, QCI originally presented a claim to the contracting officer asserting

entitlement to a price adjustment under the Price Adjustment clause, based upon GSA's failure properly to apply its CBA wage rates and DOL's wage determination revision to its contract. Based upon the express language of the Price Adjustment clause, such an adjustment does not entitle the contractor to a markup for profit or for overhead. *See* 48 CFR 52.222-43(e) ("Any adjustment will be limited to increases or decreases in wages and fringe benefits . . . but shall not include any amount for general and administrative costs, overhead, or profit."). Consistent with that clause, QCI did not include profit or overhead in the requested monetary relief in its claim to the contracting officer or in its original complaint to the Board.

In its proposed amended complaint, QCI wants to pursue a new legal theory: that it is entitled to an equitable adjustment under the Changes clause based upon the contracting officer's actions in dealing with its CBA and the DOL wage determination revision. As a monetary recovery under the Changes clause, profit and overhead "are routinely added to the actual costs incurred to 'make the contractor whole.'" *W.G. Yates & Sons Construction Co. v. General Services Administration*, CBCA 1495, 11-1 BCA ¶ 34,638, at 170,708 (2010) (citation omitted in original). Consistent with that rule, QCI, in adding its new theory of liability to its amended complaint, also adds a request for a profit and overhead markup on any monetary award. GSA argues that QCI's request constitutes a new claim that has not yet been presented to the contracting officer.

The standard for determining whether a request for relief from the Board is encompassed within a previously submitted claim "does not require [rigid] adherence to the exact language or structure of the original administrative CDA claim." *Scott Timber*, 333 F.3d at 1365. Instead, the Board must assess whether the claim as originally submitted and the request before the Board "are based on a common or related set of operative facts. If the [tribunal] will have to review the same or related evidence to make its decision, then only one claim exists." *Placeway Construction Corp. v. United States*, 920 F.2d 903, 907 (Fed. Cir. 1990). "New theories or new damages arising from the same operative facts are not new claims." *Contel Advanced Systems, Inc.*, ASBCA 50648, et al., 03-2 BCA ¶ 32,277 at 159,696; *see JRS Management v. Department of Justice*, CBCA 3053, 13 BCA ¶ 35,235, at 172,996-97 ("The fact that appellant asserts differing legal theories and seeks greater relief does not convert claim 2 into a new claim, as it arose from the same operative facts as those in claim 1.").

GSA first argues that QCI's constructive change claim is not encompassed within the price adjustment claim that QCI submitted because, to prove a constructive change, QCI must show that the contracting officer "directed a specific change to the contract's terms that caused an increase or decrease in the cost of, or time required for, contract performance." Response Brief at 4 (citing *W.G. Yates*, 11-1 BCA at 170,705-06). This element of proof,

GSA asserts, is not necessary in establishing entitlement to a Price Adjustment clause recovery. *Id.* at 4-5. If we accepted GSA's position, it would be incredibly rare that we could *ever* find that two legal theories constituted the same claim, as every legal theory has at least *some* element that differs in some way from the elements of other legal theories. In evaluating whether two legal theories share substantially the same operative facts, we have to take a common-sense look at the degree to which the facts underlying both theories are intertwined and interrelated, considering whether "the same or related evidence" is relevant to both theories. *Placeway Construction*, 920 F.2d at 907. Although the necessary elements of a new legal theory can certainly take the theory outside of the operative facts of the previously submitted claim, *Ketchikan Indian Community v. Department of Health & Human Services*, CBCA 1053-ISDA, et al, 13 BCA ¶ 35,436, at 173,810, "[t]he law does not require a strictly literal identity between what is presented to the contracting officer for decision and what is presented to the Board. All that is required is that the claimant . . . limit itself in litigation to the same claim or claims presented to the contracting officer." *Tera Advanced Services Corp.*, GSBCA 6713-NRC-R, 85-3 BCA ¶ 18,218, at 91,440. Here, QCI's August 2015 claim broadly describes its communications with the GSA contracting officer in attempting to have the agency include the CBA wage rates in its first one-year option, as well as GSA's actions, or failures to act, in relation to QCI's effort. Whether labeled a price adjustment or a constructive change, it is clear from the written claim that, however the legal theory is labeled, QCI is seeking compensation for GSA's failure to apply the wage rates from its CBA and the DOL wage determination revision to its option pricing. The evidence in support of both theories should be essentially the same. Plainly, QCI's constructive change theory falls within the operative facts alleged in the August 2015 claim document.

GSA next argues that the August 2015 claim contains no request for profit or overhead and that, to recover that type of cost element, QCI must submit a claim asking for it. It is somewhat unclear whether, in light of the Supreme Court's decision in *United States v. Tohono O'Odham Nation*, 563 U.S. 307 (2011), it is even necessary to consider whether two claims arising out of the same operative facts have any overlap in the relief sought. Some past precedential decisions have indicated that, in considering whether two requests for monetary relief are essentially one and the same claim, a tribunal should consider not only whether the requests arise from the same operative facts, but also whether they seek "essentially the same relief." *Scott Timber*, 333 F.3d at 1365. That test mirrors the test that courts have traditionally applied to the "same claim" doctrine in other settings, particularly in applying 28 U.S.C. § 1500 (section 1500) to suits filed in both the Court of Federal Claims and a United States district court. Under section 1500, a plaintiff that files a suit in a district court cannot, while the district court action remains pending, file a suit based upon the "same claim" in the Court of Federal Claims. *Harbuck v. United States*, 378 F.3d 1324, 1328 (Fed. Cir. 2004). For years, the test for determining whether suits pending in both the Court of Federal Claims and in the district court involved the "same claim" was whether the two suits

were “based on substantially the same operative facts . . . , at least if there was some overlap in the relief requested.” *Keene Corp. v. United States*, 508 U.S. 200, 212 (1993). “That the two actions were based on different legal theories did not matter.” *Id.* In 2011, however, the Supreme Court in *Tohono O’Odham Nation* eliminated the overlapping relief requirement, holding that “[t]wo suits are for or in respect to the same claim . . . if they are based on substantially the same operative facts, regardless of the relief sought in each suit.” *Tohono O’Odham Nation*, 563 U.S. at 317.

Given that, historically, the test for determining whether a newly asserted legal theory or argument is the “same claim” as one previously submitted to the contracting officer has mirrored the “same claim” test under section 1500, it is questionable whether we still need consider whether QCI’s new constructive change claim seeks the same relief as its original price adjustment claim. Nevertheless, even comparing QCI’s requests for relief, it is clear that the addition of a profit and overhead markup under the constructive change theory does not create a new and separate claim from QCI’s August 2015 submission. Because the money that QCI seeks as compensation for the alleged constructive change is simply “an alternative measure of damages” for the same actions underlying its price adjustment request, any slight differences in the manner of calculating or supporting damages do not affect the overlap in the factual underpinnings between the two legal theories. *Advanced Communications Systems*, ASBCA 52592, 06-2 BCA ¶ 33,429, at 165,736; *see Ketchikan Indian Community*, 13 BCA at 173,810 (“Modified amounts of damages that do not rely on changes to the essential nature of the original claim or its basic underlying facts are not required to be submitted again to the contracting officer.”). Typically, “[n]ew elements of damages have been held not to constitute additional claims or revised new claims,” and “contractor markups,” including profit and overhead markups, “are clearly elements of quantum rather than new entitlement elements.” *Transco Contracting Co.*, ASBCA 28620, 85-2 BCA ¶ 17,977, at 90,171; *see Policy Research, Inc.*, ASBCA 27168, 83-2 BCA ¶ 16,911, at 84,163 (“The fact that the specific item of damage that appears in the latter claim was not contained in the former [claim] is simply an insufficient basis to warrant treatment of the latter as a different claim.”). Only significant differences in “the underlying factual entitlement elements defining the dispute” create separate and unique claims. *Transco Contracting*, 85-2 BCA at 90,171. As a result, the mere fact that QCI’s new changes theory encompasses profit and overhead does not create a claim separate and distinct from the August 2015 claim, even though it did not mention profit or overhead.

Finally, GSA asserts that, because QCI submitted a new written claim to the GSA contracting officer in January 2017 (with an unsigned certification) that expressly requests payment of profit and overhead under a constructive change theory, QCI has acknowledged that its August 2015 claim does not encompass those elements. It seems unlikely that QCI’s January 2017 claim submission was anything other than a proactive response to GSA’s

anticipated challenge to QCI's request to raise a constructive changes theory in this appeal. Certainly, GSA has presented no evidence that QCI, by submitting the January 2017 claim letter, intended to admit that the claim is not encompassed within the August 2015 claim. In any event, any "admission" by QCI would be ineffective because subject-matter jurisdiction is a question of law, and parties cannot agree, stipulate, concede, or somehow admit to the existence, or absence, of jurisdiction. *Southern California Federal Savings & Loan Association v. United States*, 422 F.3d 1319, 1328 n.3 (Fed. Cir. 2005); *State Automobile Mutual Insurance Co. v. Department of Veterans Affairs*, CBCA 1185, 08-2 BCA ¶ 33,875, at 167,672 n.1; *Public Service Satellite Consortium*, GSBCA 9622-P, 89-1 BCA ¶ 21,288, at 107,370 (1988). Our independent review of QCI's August 2015 claim establishes that it is based upon the same operative facts as QCI's new constructive change theory. Accordingly, QCI is entitled to raise it here, and amendment of QCI's original complaint would not be futile.

Decision

For the foregoing reasons, QCI's motion for leave to amend its complaint is granted, and the first amended complaint that accompanied QCI's motion is deemed filed. GSA shall file its answer to the first amended complaint within thirty days of the date of this decision.

HAROLD D. LESTER, JR.
Board Judge

We concur:

JERI KAYLENE SOMERS
Board Judge

CATHERINE B. HYATT
Board Judge