

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jan 13, 2020

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

MISSION SUPPORT ALLIANCE,  
LLC; LOCKHEED MARTIN  
SERVICES, INC; LOCKHEED  
MARTIN CORPORATION; and  
JORGE FRANCISCO ARMIJO,  
Frank,

Defendants.

NO: 4:19-CV-5021-RMP

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTIONS TO DISMISS

BEFORE THE COURT are Motions to Dismiss from Defendants Lockheed  
Martin Corporation (“LMC”) and Lockheed Martin Services, Inc. (“LMSI”), ECF  
No. 37, Jorge Francisco “Frank” Armijo, ECF No. 39, and Mission Support  
Alliance, LLC (“MSA”), ECF No. 42.

The Court heard oral argument from all Defendants and Plaintiff United  
States of America (“the Government”) and has reviewed all of the parties’ filings

1 and the relevant law.<sup>1</sup> Fully informed, the Court grants in part and denies in part  
2 the motions.

### 3 **I. BACKGROUND**

4 The United States Department of Energy (“DOE”) operates the Hanford Site  
5 in southeastern Washington, a former plutonium production facility where DOE’s  
6 contemporary focus is on environmental cleanup. *See* ECF No. 1 (Complaint) at  
7 10. In 2007, DOE issued a request for proposals to provide mission support  
8 services, including information technology (“IT”) services as well as site security,  
9 occupational health, training, and logistical support services, at the Hanford Site  
10 (the “Mission Support prime contract”). *Id.* The Request for Proposals provided  
11 that the Mission Support prime contract “was to be a cost-reimbursement plus fee  
12 award contract in which the contractor would receive full reimbursement for its  
13 allowable, reasonable, and allocable incurred costs (incorporating the [Federal  
14 Acquisition Regulations (“FAR”)] . . . regarding allowability and reasonableness of  
15 costs), and as its profit on the contract, would receive an award fee based on its  
16 performance, including how successful the contract was in limiting the cost to  
17 DOE.” *Id.* at 10–11.

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19  
20 <sup>1</sup> The Court notes that Defendants join in each other’s arguments, to the extent that  
21 they apply equally to all Defendants. *See* ECF Nos. 37 at 37; 39 at 20; and 42 at 9,  
n.1.

1 In clause B.11 of the Request for Proposals, the DOE set forth when the  
2 prime contractor would be allowed to receive additional profit through a  
3 subcontract with an affiliate company of the prime contractor:

4 **B.11 ALLOWABILITY OF SUBCONTRACTOR FEE**

5 (a) If the Contractor is part of a teaming arrangement as described in  
6 FAR Subpart 9.6, Contractor Team Arrangements, the team shall share  
7 in the Total Available Fee as shown in Table B.4-1. Separate additional  
8 subcontractor fee is not an allowable cost under this Contract for  
9 individual team members, or for a subcontractor, supplier, or lower-tier  
10 subcontractor that is a wholly-owned, majority owned, or affiliate of  
11 any team member.

12 (b) The subcontractor fee restriction in paragraph (a) does not apply  
13 to members of the Contractor's team that are: (1) small business(es);  
14 (2) Protégé firms as part of an approved Mentor-Protégé relationship  
15 under the Section H Clause entitled, Mentor-Protégé Program; (3)  
16 subcontractors under a competitively awarded firm-fixed price or firm-  
17 fixed unit price subcontract; or (4) commercial items as defined in FAR  
18 Subpart 2.1, Definitions of Words and Terms.

19 ECF No. 1 at 11.

20 **A. *Mission Support Prime Contract Formation***

21 On approximately May 5, 2007, LMC submitted a notice to DOE that it  
intended to submit an offer to fulfill the Mission Support prime contract through  
the formation of a joint venture, MSA, with two other entities not parties in this  
suit. ECF No. 1 at 12. DOE "engaged offerors in a series of questions and  
answers and requested offerors submit Final Proposal Revisions." *Id.* at 13. In the  
Final Proposal Revision submitted on May 12, 2008, MSA designated LMSI as the

1 subcontractor for the Information Resources and Content Management (“IR/CM”)  
2 scope of work on the Mission Support prime contract. *Id.* at 13.

3 The subcontract with LMSI contained in the Final Proposal Revision was a  
4 firm-fixed-price subcontract for labor only and amounted to \$275,672,433 for  
5 Fiscal Years 2009 through 2018. *Id.* The Final Proposal Revision “represented  
6 that the rates used to price the subcontract were from LMSI Contract Number GS-  
7 35-F-4863G (Contract 4863G), an existing LMSI government contract with the  
8 United States General Services Administration (GSA).” *Id.* Prior to being  
9 included in MSA’s Final Proposal Revision as the IR/CM subcontractor, LMSI had  
10 performed the same services at Hanford “for years” for an unaffiliated predecessor  
11 contractor. *See id.* at 38.

12 The IR/CM subcontract with LMSI is central to the current litigation. In the  
13 course of reviewing proposals for the Mission Support prime contract, DOE  
14 requested that the Defense Contract Audit Agency (“DCAA”) review the MSA  
15 proposal, including the proposed LMSI subcontract. ECF No. 1 at 13. In June  
16 2008, DCAA questioned \$59,545,246 of LMSI’s proposed cost as unallowable  
17 profit. *Id.* The Complaint alleges that LMC executive, Defendant Armijo, and  
18 LMC’s GSA contract manager, Jeffrey Chesko, submitted a “technical analysis,”  
19 “price analysis,” and “sole source justification” for the DCAA to review and  
20 “falsely told DCAA that these analyses had been performed by MSA prior to . . .  
21 the Final Proposal Revision, when in fact LMC had merely created them for the

1 DCAA audit in order to suggest that MSA and LMC had meaningfully analyzed  
2 LMSI's subcontract proposal." *Id.* at 14.

3 DOE awarded the Mission Support prime contract to MSA in September  
4 2008, but a different offeror on the bid submitted a bid protest to the United States  
5 Government Accountability Office ("GAO"). ECF No. 1 at 14. The protesting  
6 offeror "challenged DOE's determination to award the contract to MSA because it  
7 contended that MSA would include additional profit to LMSI that would  
8 significantly increase the cost of performance by MSA relative to that of the other  
9 offeror." *Id.* The GAO dismissed the protest on December 29, 2008, allegedly  
10 based on DOE's notification to GAO of its intent to take corrective action. *Id.*

11 DOE re-awarded the Mission Support prime contract to MSA on April 28,  
12 2009. ECF No. 1 at 14. DOE's Contract Officer, Alan Hopko, notified MSA and  
13 LMC that he would permit MSA to subcontract the IR/CM work to LMSI, but he  
14 would not consent to the subcontract until "it did not include [sic] fee." *Id.*

### 15 **B. Contract Provisions**

16 The Complaint characterizes the Mission Support prime contract as a "cost-  
17 reimbursement contract" under which MSA would receive full reimbursement for  
18 its costs so long as all costs charged by MSA, including subcontractor costs, were  
19 "allowable, allocable, and reasonable." ECF No. 1 at 9, 11. The prime contract  
20 provided MSA an ability to earn profit through an award fee based on MSA's  
21 performance, "including how successful the contractor was in limiting the cost to

1 DOE.” *Id.* at 11. The Mission Support prime contract also included a provision  
2 requiring MSA to comply with the Anti-Kickback Act and to avoid conflicts of  
3 interest. *Id.* Another provision required that MSA obtain agency consent for large  
4 subcontracts. *Id.*

5 In the Complaint, with respect to the reasonableness of costs and conflicts of  
6 interest, the Government alleges that LMC executives who were seconded to MSA,  
7 including Defendant Armijo, were pivotal in establishing LMSI’s pricing while  
8 also accepting that pricing in their roles as MSA executives. *Id.* at 16–17. The  
9 Government alleges that Defendant Armijo “negotiate[ed] with himself, through  
10 his own MSA and LMSI subordinates, to establish and agree to pricing, and then  
11 falsely representing to DOE that the pricing had been appropriately and  
12 independently evaluated and determined to be fair and reasonable.” *Id.*

13 The Complaint recites that Clause B.11 of the Mission Support prime  
14 contract prohibited MSA from receiving a “separate additional subcontractor fee”  
15 through a subcontract with an affiliate company with limited exceptions. ECF No.  
16 1 at 11. One exception to the prohibition against a subcontractor fee is for  
17 “commercial items” as defined in the FAR, Subpart 2.1. *Id.*

### 18 **C. *Subcontract Formation***

19 On July 31, 2009, LMSI submitted a revised proposal to MSA, for MSA to  
20 propose to DOE, for a subcontract based on fixed-unit-rate services, fixed-price  
21 services, and time-and-materials services. ECF No. 1 at 17. In the Complaint, the

1 Government alleges that the July 2009 proposal: (1) “falsely represented that ‘all  
2 pricing is based on discounts from LMSI published rates under’” Contract 4863G;  
3 (2) “that ‘the labor rates [were] based on a three percent discount from [LMSI’s]  
4 GSA Schedule 70 contract,’”; and (3) that “the proposal represented ‘[d]iscounted  
5 GSA time and material labor rates for CY 2009 through CY 2014.’” *Id.* at 17–18.

6 In August 2009, LMSI sent DOE a letter responding to the DCAA audit of  
7 the original LMSI proposal, asserting that the services LMSI was offering to  
8 provide through the subcontract were commercial and could include profit  
9 pursuant to the exception in clause B.11(b)(4). *Id.* at 19. In the Complaint, the  
10 Government alleges that LMSI falsely stated in its August 2009 communication  
11 that it had updated its proposal to include a three percent discount of the labor rates  
12 below the current GSA Schedule rates. *Id.* at 19. The Government further alleges  
13 in the Complaint that LMSI represented that it was offering “‘to sell its services to  
14 MSA LLC as a commercial item’” at “‘discounted prices based on GSA  
15 Commercial Rate Schedule GS-35-4863G,’” despite LMSI and LMC knowing that  
16 the “proposed prices were not discounted GSA prices at all, but were grossly  
17 inflated rates, and therefore neither ‘commercially’ derived nor fair and  
18 reasonable.” *Id.* (further alleging that “the pricing for some of the LMSI labor  
19 categories, and all of the materials that made up the LMSI proposal, were not even  
20 part of the LMSI GSA Schedule.’”).

1           The IR/CM subcontract with LMSI continued to take shape over the course  
2 of approximately eighteen months. *See* ECF No. 1 at 15–38.

3           In October 2010, LMSI prepared a Best and Final Offer (“BAFO”) for MSA  
4 to submit to DOE. ECF No. 1 at 29. In the Complaint, the Government portrays  
5 the BAFO as “a critical document in this case.” ECF No. 53 at 45. Specifically,  
6 the Government alleges in the Complaint that the BAFO contained three false  
7 statements: (1) that the pricing was based on discounts from LMSI published rates  
8 under its GSA Contract 4863G, while the pricing for both fixed-unit rates and  
9 fixed-price services allegedly consisted of inflated amounts from the published  
10 GSA prices instead; (2) that the labor rates were based on a 7.13 percent discount  
11 from LMSI’s GSA Schedule 70 prices when instead they allegedly represented an  
12 increase from the schedule prices; and (3) that the rates were based on the  
13 commercial rates in LMSI’s GSA Schedule 70 contract and had been determined  
14 by GSA to be fair and reasonable when instead GSA had “negotiated far better  
15 prices than those which LMSI was proposing to MSA.” *Id.* at 30–32.

16           The Government alleges in the Complaint that Defendant Armijo “had  
17 established the pricing on his own—deciding on behalf of LMC and LMSI what  
18 rates to offer, and deciding on behalf of MSA what MSA would accept, and charge  
19 to DOE.” ECF No. 1 at 31. The Government also alleges in the Complaint that  
20 Defendant Armijo, LMC executive Richard Olsen, and MSA subcontracts manager  
21 Rich Meyer “were among those who took the lead” in preparing a letter sent by

1 MSA to DOE on November 2, 2010, to which the BAFO was appended, requesting  
2 consent to the subcontract. *Id.* at 5, 16, and 34.

3 In the Complaint, the Government alleges that the November 2010 consent  
4 letter conveyed the falsehoods contained in the BAFO to DOE and misrepresented  
5 that MSA had “‘sought a price reduction of additional discounts [from LMSI’s  
6 GSA schedule prices] that reflects best value.’” *Id.* at 34–35. The Government  
7 additionally alleges:

8 MSA’s consent letter further falsely represented the extent of the  
9 additional profit anticipated by LMSI. MSA, LMSI, LMC, and Armijo  
10 knew that DOE had expressly stated that it would not permit any  
11 additional profit for LMSI on the subcontract, and had taken the  
12 position that LMSI’s proposed subcontract should not bear any  
13 additional profit beyond that already earned by LMC on LMSI’s IR/CM  
14 work through MSA’s performance of the prime contract and LMC’s  
15 part ownership of MSA. MSA, LMSI, LMC, and Armijo also knew  
16 that LMC was projecting, at a minimum, tens of millions of dollars and  
17 well above 10 percent in additional profit on the subcontract, and had  
18 already earned millions of dollars (in fact, exceeding these projections)  
19 on the work already performed and billed in 2010.

20 MSA’s consent letter nonetheless falsely stated that “relative to the fee  
21 amount . . . MSA did not solicit cost details. Therefore MSA does not  
have a specific LMSI proposed fee figure.” In fact, MSA, through  
Armijo, Olsen, and others, knew precisely the amount of additional  
fee/profit LMC was estimating on the proposed LMSI subcontract.

To compound these lies, MSA’s consent letter went on to falsely state  
to DOE that although it did “not have a specific LMSI proposed fee  
figure,” it had calculated an “estimated net profit potential” for LMSI’s  
additional profit to be 1 percent, and that it would impose a 1 percent  
penalty on LMSI if it did not adequately perform, such as “all of  
[LMSI’s] remaining fee was at risk” based on LMSI’s performance. As  
Armijo, LMC, LMSI, and MSA knew, this was completely false. MSA  
did not need to “estimate” LMSI’s net profit potential at all—it had

1 specific and contemporary information regarding precisely what  
2 additional LMSI profit LMC was estimating and could earn.  
3 Additionally, MSA, LMC, LMSI, and Armijo knew that they were  
4 anticipating, at a minimum, 11.5 percent—not 1 percent—in additional  
5 profit for LMSI on the subcontract. Finally, MSA, LMC, LMSI, and  
6 Armijo knew that the overwhelming majority of this anticipated profit  
7 was not dependent in any way on LMSI’s good performance, but was  
8 built into the false and inflated labor rates and [sic] fixed unit rates and  
9 fixed prices proposed to MSA.

6 ECF No. 1 at 35–36 (paragraph numbers omitted).

7 In February 2011, DOE conditionally consented to the subcontract with  
8 LMSI for IR/CM services, subject to removal of what DOE allegedly understood  
9 to be a one percent affiliate fee, based on Defendants’ alleged misrepresentations.

10 ECF No. 1 at 38. The Government alleges in the Complaint that

11 rather than carry out DOE’s wishes by removing the proposed profit,  
12 which would have required LMSI to eliminate its gross inflation of its  
13 labor rates, fixed unit rates, and fixed prices, MSA, LMSI, LMC, and  
14 Armijo agreed to reduce LMSI’s proposed labor rates by 1 percent—  
15 falsely and knowingly failing to disclose that its many prior false  
16 statements had led DOE to believe that the additional profit for LMSI  
17 had been 1 percent, and not the, at a minimum, 11.5 percent actually  
18 estimated by LMSI, LMC, MSA, and Armijo, and falsely and  
19 knowingly failing to disclose that this very high level of expected profit  
20 was due to the significant inflation of LMSI’s labor rates, fixed unit  
21 rates, and fixed prices as set forth in LMSI’s proposal.

17 *Id.* at 39.

18 **D. *False Claims Act Allegations***

19 In opposing Defendants’ Motions to Dismiss, the Government alleges that  
20 the following are “lies, deceptive half-truths, misleading omissions, and false  
21 representations” by Defendants:

1 (1) LMSI and LMC’s anticipated profit on the subcontract; (2) LMSI’s  
2 anticipated level of effort needed to perform the work on the  
3 subcontract; (3) labor costs and rates charged by LMSI; (4) MSA’s  
visibility into LMSI’s internal cost and revenue estimates; and (5)  
Defendants’ compliance with the Anti-Kickback Act.

4 ECF No. 53 at 4.

5 The Government alleges in its Complaint that Defendants’ false  
6 statements induced DOE to consent to the subcontract and to pay the “false  
7 and inflated” rates “for the entirety of LMSI’s subcontract in each and every  
8 claim that LMSI submitted to MSA under the subcontract and in each and  
9 every claim that MSA made to DOE for LMSI’s grossly inflated labor rates,  
10 fixed unit rates, and firm fixed prices.” ECF No. 1 at 39.

11 **E. *Anti-Kickback Act Allegations***

12 In the Complaint, the Government alleges that LMC “used its Management  
13 Incentive Compensation Program (MICP) to provide things of value to high-  
14 ranking MSA employees, including Armijo and Olsen, for their use of their MSA  
15 positions to provide favorable treatment to LMC and LMSI.” ECF No. 1 at 40.  
16 LMC allegedly made the payments to LMC employees who were seconded to  
17 MSA. *See id.* at 41.

18 **II. PLEADING AND DISMISSAL STANDARDS**

19 Complaints filed in federal court must contain “a short and plain statement of  
20 the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2).  
21 When a defendant challenges a complaint’s sufficiency under Fed. R. Civ. P.

1 12(b)(6), the court must determine whether the complaint bears “sufficient factual  
2 matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”  
3 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim is plausible when the plaintiff  
4 pleads “factual content that allows the court to draw the reasonable inference that the  
5 defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “In sum, for  
6 a complaint to survive a motion to dismiss, the non-conclusory ‘factual content,’ and  
7 reasonable inferences from that content, must be plausibly suggestive of a claim  
8 entitling the plaintiff to relief.” *Moss v. United States Secret Serv.*, 572 F.3d 962,  
9 969 (9th Cir. 2009). The Ninth Circuit has described plausibility as follows:

10       When faced with two possible explanations, only one of which can be  
11 true and only one of which results in liability, plaintiffs cannot offer  
12 allegations that are “merely consistent with” their favored explanation  
13 but are also consistent with the alternative explanation. Something  
more is needed, such as facts tending to exclude the possibility that the  
alternative explanation is true . . . in order to render plaintiffs’  
allegations plausible within the meaning of *Iqbal* and *Twombly*.

14 *Petzschke v. Century Aluminum Co. (In re Century Aluminum Co. Sec. Litig.)*, 729  
15 F.3d 1104, 1108 (9th Cir. 2013) (internal quotations omitted) (finding that the  
16 plaintiffs’ allegations “remain[ed] stuck in ‘neutral territory’” because they did not  
17 tend to exclude the possibility that the defendants’ alternative explanation that  
18 excluded liability was true) (quoting *Twombly*, 550 U.S. at 557).

19       In deciding a Rule 12(b)(6) motion to dismiss, a court “accept[s] factual  
20 allegations in the complaint as true and construe[s] the pleadings in the light most  
21 favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marin Ins. Co.*,

1 519 F.3d 1025, 1031 (9th Cir. 2008). However, a court need not “assume the truth  
2 of legal conclusions merely because they are cast in the form of factual allegations.”  
3 *Fayer v. Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011) (per curiam) (internal  
4 quotation omitted).

5 A party must further plead claims under the False Claims Act, and any other  
6 cause of action based on alleged fraud or mistake, in satisfaction of the elevated  
7 pleading standard set forth in Fed. R. Civ. P. 9(b). *See Godecke ex rel. United States*  
8 *v. Kinetic Concepts, Inc.*, 937 F.3d 1201, 1208 (9th Cir. 2019). A plaintiff must  
9 allege the circumstances constituting fraud with enough specificity “to give the  
10 defendant notice of the particular misconduct so that it can defend against the  
11 charge.” *Id.* (citing *Kearns v. Ford Motor Co.*, 567 F.3d 1120, 1124 (9th Cir.  
12 2009)). The plaintiff “must allege the ‘who, what, when, where, and how’ of the  
13 misconduct.” *Id.*

14 In addition, a district court is required to dismiss a claim over which it lacks  
15 subject-matter jurisdiction. Fed. R. Civ. P. 12(b)(1). The party asserting jurisdiction  
16 bears the burden of establishing its existence. *Kokkonen v. Guardian Life Ins. Co. of*  
17 *Am.*, 511 U.S. 375, 377 (1994). When considering a motion to dismiss under Rule  
18 12(b)(1), the Court is “not restricted to the face of the pleadings, but may review any  
19 evidence, such as affidavits and testimony, to resolve factual disputes concerning the  
20 existence of jurisdiction.” *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir.  
21 1988).

1 **III. ANALYSIS**

2 **A. *False Claims Act (“FCA”)***

3 The FCA creates liability for any person who, *inter alia*: “(A) knowingly  
4 presents, or causes to be presented, a false or fraudulent claim for payment or  
5 approval”; or “(B) knowingly makes, uses, or causes to be made or used, a false  
6 record or statement material to a false or fraudulent claim.” 31 U.S.C. §  
7 3729(a)(1). The Government alleges that all four Defendants violated section  
8 3729(a)(1)(A) in Count I of the Complaint and section (a)(1)(B) in Count II of the  
9 Complaint. ECF No. 1 at 46–47.

10 The Ninth Circuit has identified four essential elements that must be shown  
11 to prevail under the FCA pursuant to either section 3729(a)(1)(A) or (a)(1)(B):  
12 ““(1) a false statement or fraudulent course of conduct, (2) made with scienter, (3)  
13 that was material, causing (4) the government to pay out money or forfeit moneys  
14 due.”” *United States ex rel. Rose v. Stephens Inst.*, 909 F.3d 1012, 1017, 1020 (9th  
15 Cir. 2018) (quoting from *United States ex rel. Hendow v. University of Phoenix*,  
16 461 F.3d 1166, 1174 (9th Cir. 2006)).

17 The falsity requirement may be satisfied through a showing of express false  
18 certification, meaning that defendant falsely “certifies compliance with a law, rule  
19 or regulation as part of the process through which the claim for payment is  
20 submitted.” *Ebeid ex rel. United States v. Lungwitz*, 616 F.3d 993, 998 (9th Cir.

1 2010). Alternatively, a plaintiff may make an implied certification claim to satisfy  
2 the first element, in which case the plaintiff must satisfy two conditions:

3 First, the claim does not merely request payment, but also makes  
4 specific representations about the goods or services provided; and  
5 second, the defendant’s failure to disclose noncompliance with material  
statutory, regulatory, or contractual requirements makes those  
representations misleading half-truths.

6 *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989,  
7 2001 (2016); *see also Rose*, 909 F.3d at 1017, 1020 (9th Cir. 2018) (determining  
8 that the four basic elements set out in *Hendow*, 461 F.3d at 1174, remain valid after  
9 the Supreme Court’s decision in *Escobar*, 136 S. Ct. 1989).

10 “Generally speaking, Rule 9(b) requires a plaintiff alleging fraud to: ‘1)  
11 specify the statements that the plaintiff contends were fraudulent; 2) identify the  
12 speaker; 3) state where and when the statements were made; and 4) explain why  
13 the statements were fraudulent.’” *U.S. ex rel. Polansky v. Pfizer, Inc.*, No. 04-CV-  
14 0704 (ERK), 2009 U.S. Dist. LEXIS 43438, at \*10–11, 2009 WL 1456582, at \* 4  
15 (E.D.N.Y. May 22, 2009) (quoting *Rombach v. Chang*, 355 F.3d 164, 170 (2d Cir.  
16 2004)).

17 Defendants seek dismissal of the FCA allegations based on a failure to plead  
18 scienter and materiality. *See* ECF No. 58 at 7–16.

19 **1. Scienter**

20 To act “knowingly” for purposes of the FCA, a defendant must act with  
21 actual knowledge, deliberate ignorance, or reckless disregard of the truth or falsity

1 of information. 31 U.S.C. § 3729(b)(1)(A). No proof of specific intent to defraud  
2 is required. 31 U.S.C. § 3729(b)(1)(B).

3 Defendants assert that since LMSI and MSA fully disclosed the rates that  
4 LMSI would be charging, and the GSA rates were available on the GSA website,  
5 the Government cannot establish scienter. ECF No. 69 at 14. The FCA takes issue  
6 with falsity, not negligent misrepresentation. *Id.* Defendants further emphasize  
7 that although DOE was required by the FAR to request certified cost or pricing  
8 data if it was actually prohibiting profit, DOE never requested such data and never  
9 communicated a final determination that LMSI's services were not "commercial  
10 items" as defined by the FAR. ECF No. 58 at 6. Defendants posit that the "only  
11 plausible and non-speculative inference from the allegations in the Complaint is  
12 that DOE consented to the subcontract *knowing* that LMSI could earn profit given  
13 the contract types and the commerciality of the services." *Id.* at 7 (emphasis in  
14 original). Moreover, Defendants assert that discrepancies between LMSI's internal  
15 estimates related to fixed-unit rates and fixed-price services do not establish a  
16 factual basis for the false claim allegations because internal estimates are  
17 "inherently subjective." ECF No. 59 at 19.

18 In the Complaint, the Government has alleged that the entity Defendants as  
19 well as an individual Defendant, Armijo, knew that the relevant rates provided by  
20 LMSI to MSA, which in turn MSA provided to DOE, were falsely inflated and  
21 included a profit despite DOE's disallowance of an affiliate fee. *See, e.g.*, ECF

1 No. 1 at 23, 28–29, 34–39. Defendants argue that the full context of the  
2 subcontract formation supports the conclusion that DOE agreed to a subcontract  
3 that allowed for profit after a lengthy price negotiation with MSA and LMSI,  
4 which undermines the Government’s allegations regarding scienter. However, the  
5 Government’s many allegations in the Complaint that Defendants knowingly  
6 misled DOE tend to exclude the possibility that Defendants’ benign explanation for  
7 the ultimate subcontract is true and complete. *See In re Century Aluminum Co.*  
8 *Sec. Litig.*, 729 F.3d at 1108.

9 In reviewing the Complaint to determine whether to grant a motion to  
10 dismiss, the Court must accept the nonmoving party’s allegations as true. *Iqbal*,  
11 556 U.S. at 678. In light of the Government’s allegations that the entities  
12 knowingly reported prices that the Defendants knew were inaccurate, the Court  
13 finds that the Government has alleged sufficient information to infer that, at the  
14 least, Defendants recklessly disregarded the truth or the falsity of information.

15 Therefore, the Court finds that the Government has adequately pleaded  
16 scienter with respect to Defendants’ statements prior to DOE’s consent to the  
17 IR/CM subcontract.

## 18 2. Materiality

19 “A false statement is material if it ‘has a natural tendency to influence  
20 agency action or is capable of influencing agency action.’” *United States ex rel.*  
21 *Fago v. M&T Mortg. Corp.*, 518 F. Supp. 2d 108, 118 (D.D.C. 2007) (quoting

1 *United States ex rel. Berge v. Bd. of Trustees of Univ. of Alabama*, 104 F.3d 1453,  
2 1460 (4th Cir. 1997)). “Materiality . . . cannot be found where noncompliance is  
3 minor or insubstantial.” *Escobar*, 136 S. Ct. at 2003. “Moreover, if the  
4 Government pays a particular claim in full despite its actual knowledge that certain  
5 requirements were violated, that is very strong evidence that those requirements  
6 are not material.” *Id.* at 2003–04. Courts examine the disputed transaction  
7 through the lenses of whether: (1) a reasonable person would attach importance to  
8 the allegedly false statement in determining his or her “choice of action in the  
9 transaction”; or (2) the defendant “knew or had reason to know that the recipient of  
10 the representation attaches importance to the specific matter in determining his  
11 choice of action, even though a reasonable person would not.” *Id.* at 2002–03.

12 In the Complaint and in defending against the Motions to Dismiss, the  
13 Government argues that the Mission Support prime contract did not allow LMC to  
14 receive any additional profit beyond what it received as a prime contractor. ECF  
15 No. 53 at 7 (citing ECF No. 1 at 11). The Government emphasizes the particular  
16 provision that a “[s]eparate additional subcontractor fee is not an allowable cost  
17 under this Contract for individual team members, or for a subcontractor, supplier,  
18 or lower-tier subcontractor that is a wholly-owned majority-owned, or affiliate of  
19 any team member.” ECF No. 1 at 11; *see also* ECF No. 53 at 7. The Government  
20 further alleges in the Complaint that MSA misled DOE into believing that LMSI  
21 would not earn any profit under its subcontract with MSA, and LMSI charged

1 fraudulently inflated rates to MSA under the subcontract. *See, e.g.*, ECF No. 1 at  
2 20, 33–34. The Government maintains that Defendants’ statements and omissions  
3 had a tendency and capacity to influence, and did influence, DOE’s consent and  
4 payment decisions and the amounts paid to Defendants. *See* ECF No. 53 at 27.

5 Defendants, in rebuttal, cast the Government’s theory about LMSI’s  
6 anticipated profit as a red herring because government contractors need not  
7 disclose internal profit projections in a commercial subcontract. *See* ECF No. 58 at  
8 11 (citing 41 U.S.C. §§ 3503(a)(2), 3504(b); 48 C.F.R. §§ 15.403-1(b)(3), 15.404-  
9 1(b)(1) (directing contracting officers to assess a contract for commercial items,  
10 “without evaluating its separate cost elements and proposed profit”), and 2.101  
11 (defining “[d]ata other than certified cost or pricing data”). The Request for  
12 Proposals and Clause B.11 of the Mission Support prime contract both exempt  
13 commercial items and services from a prohibition against a prime contractor  
14 receiving a “subcontractor fee,” or additional profit from a subcontractor affiliate.  
15 *See* ECF No. 1 at 12. Defendants maintain that the LMSI subcontract was for  
16 “commercial” services and that DOE did not undertake the necessary legal steps to  
17 establish that the services were not commercial. ECF No. 58 at 9–10, 14.

18 Defendants further contend that since DOE could have insisted on a cost-  
19 reimbursement subcontract or could have disallowed profit by determining that  
20 LMSI’s services were not commercial, and did not, it is implausible that

1 Defendants' representations of which DOE complains were material to DOE's  
2 decision to consent to the subcontract. *See* ECF Nos. 58 at 7, 13; 57 at 17–18.

3 The challenges that Defendants raise regarding the materiality element of the  
4 Government's FCA allegations are substantial and may be successful at a later  
5 stage in the litigation. However, in deciding the Motions to Dismiss, the Court  
6 finds that the allegations in the Complaint are sufficiently specific to put  
7 Defendants on notice and to state a claim on which relief could be granted. The  
8 Government also has set forth adequate allegations in the Complaint, particularly  
9 about representations made in writing during the course of negotiating DOE's  
10 consent to the subcontract, that tend to exclude the plausibility of Defendants'  
11 alternative explanation that the Government was fully aware of and acquiesced to  
12 Defendants' conduct. *See In re Century Aluminum Co. Sec. Litig.*, 729 F.3d at  
13 1108 (defining plausibility, as discussed above).

14 The Complaint adequately alleges a scenario in which the Government was  
15 induced to accept the subcontract with LMSI by Defendants' allegedly false  
16 representations in the July 2009 LMSI revised proposal, the August 2009 letter  
17 from LMSI to DOE responding to the DCAA audit, the October 2010 BAFO from  
18 LMSI, and the November 2010 consent letter from MSA, allegedly prepared by  
19 Armijo. *See* ECF No. 1 at 17–19, 29–32. Furthermore, the Government's  
20 allegations are “specific enough to give defendants notice of the particular  
21 misconduct which is alleged . . . so they can defend against the charge and not just

1 deny that they have done anything wrong.” *Neubronner v. Milken*, 6 F.3d 666, 671  
2 (9th Cir. 1993) (internal quotation omitted).

3 Drawing all reasonable inferences in the Government’s favor, the Court  
4 reasonably may infer that the alleged misrepresentations were capable of  
5 influencing DOE’s contracting and payment decisions. *See Moss*, 572 F.3d at 969.  
6 The FCA claims will not be dismissed.

7 **B. *Anti-Kickback Act Claim***

8 The Anti-Kickback Act (“AKA”) prohibits (1) providing, attempting to  
9 provide, or offering a kickback; and (2) soliciting, accepting, or attempting to  
10 accept a kickback. 41 U.S.C. § 8702. The AKA defines a “kickback” as:

11 any money, fee, commission, credit, gift, gratuity, thing of value, or  
12 compensation of any kind that is provided to a prime contractor, prime  
13 contractor employee, subcontractor, or subcontractor employee to  
improperly obtain or reward favorable treatment in connection with a  
prime contract or a subcontract relating to a prime contract.

14 41 U.S.C. § 8701(2).

15 “Congress intended the language ‘favorable treatment’ be construed broadly  
16 to reach all conduct analogous to commercial bribery.” *Morse Diesel Int’l, Inc. v.*  
17 *United States* (“*Morse Diesel*”), 66 Fed. Cl. 788, 800 (Fed. Cl. 2005).

18 Congress defined “person” for purposes of the AKA as “a corporation,  
19 partnership, business association of any kind, trust, joint-stock company, or  
20 individual.” 41 U.S.C. § 8701(3). A “prime contractor” is a “person that has  
21 entered into a prime contract with the Federal Government.” 41 U.S.C. § 8701(6).

1 In addition to criminal sanctions, the AKA provides for civil penalties:

2 (a) **Amount.** The Federal Government in a civil action may recover from a  
3 person—

4 (1) that knowingly engaged in conduct prohibited by section 8702 of  
5 this title a civil penalty equal to—

6 (A) twice the amount of each kickback involved in the  
7 violation; and

8 (B) not more than \$10,000 for each occurrence of prohibited  
9 conduct; and

10 (2) whose employee, subcontractor, or subcontractor employee violates  
11 section 8702 of this title by providing, accepting, or charging a  
12 kickback a civil penalty equal to the amount of that kickback.

13 41 U.S.C. § 8706(a).

14 The Government alleges that LMC, one of the parent companies of joint  
15 venture MSA and parent company of LMSI, used its MICP to provide “things of  
16 value” to MSA employees including Defendant Armijo and non-defendant Olsen  
17 in exchange “for their use of their MSA positions to provide favorable treatment to  
18 LMC and LMSI.” ECF No. 1 at 40. According to the Complaint, Defendant  
19 Armijo was Vice President of LMC prior to MSA’s formation. ECF No. 1 at 4.  
20 The Complaint alleges that Armijo served as MSA’s Vice President for IT at the  
21 outset of the Mission Support prime contract in 2009, then left MSA in December  
2009 to participate in an LMC executive program, and subsequently rejoined MSA  
as its President and General Manager in May 2010. *Id.* The Complaint alleges that  
Armijo continuously served as LMC’s Vice President throughout this period. *Id.*

Defendants argue that the AKA claim fails as a matter of law because  
caselaw has rejected that a parent of a prime contractor is a different “person” for

1 purposes of AKA liability. *See* ECF No. 37 at 27. Defendants further argue that  
2 under *Skilling v. United States*, 561 U.S. 358 (2010), and other decisions, a person  
3 cannot bribe itself or its own employees. *See id.* at 20. Defendants contend that  
4 LMC, MSA, and LMSI are all the same “person” under the holding of *Morse*  
5 *Diesel*, 66 Fed. Cl. 788. ECF No. 59 at 8. The Court addresses each assertion in  
6 turn.

### 7 1. Kickback

8 In *Skilling*, the government charged defendant with committing criminal  
9 “honest services” fraud under 18 U.S.C. § 1346 based on his participation in  
10 fraudulent schemes to manipulate and misrepresent his employer’s financial results  
11 to increase the value of his bonuses and stock options. 561 U.S. at 369, 413. The  
12 Court held that to receive a bribe or kickback, a person must solicit or accept “side  
13 payments from a third party in exchange” for favorable treatment. *Id.* at 413. The  
14 favorable treatment alleged in *Skilling*’s case was making misrepresentations. *Id.*  
15 In reaching that holding, the Court distinguished between “bribes and kickbacks”  
16 and the receipt of “salary, bonuses, grants of stock and stock options.” *Id.* at 369,  
17 410, 414. The Court relied on the AKA’s definition of “kickback.” *Id.* at 414. By  
18 limiting the prohibition of the honest-services statute to acceptance of “bribes and  
19 kickbacks,” the Court avoided striking the statute in its entirety as  
20 unconstitutionally vague. *Id.* at 405–06.

1           The Government’s attempt in this case to characterize LMC’s MICP as a  
2 vehicle for a kickback risks stretching the AKA statute “out of shape” for the same  
3 reasons examined by the Supreme Court in *Skilling*. 561 U.S. at 412 (“As to  
4 arbitrary prosecutions, we perceive no significant risk that the honest-services  
5 statute, as we interpret it today, will be stretched out of shape.”). As noted above,  
6 the AKA defines a “kickback” as “money, fee, commission, credit, gift, gratuity,  
7 thing of value, or compensation of any kind” that is provided to “improperly obtain  
8 or reward favorable treatment.” 41 U.S.C. § 8701(2). The Court took judicial  
9 notice of the existence of the MICP Plans for years 2010, 2011, 2013, 2014, and  
10 2015 and the fact that all of those plan documents asserted that “[o]ne objective of  
11 the [MICP] is to ‘[e]stablish performance goals within the meaning of Section  
12 162(m) of the Internal Revenue Code.’” ECF No. 52 at 6 (quoting ECF Nos. 38-1  
13 at 2; 38-2 at 2; 38-3 at 2; 38-4 at 2; 38-5 at 2; 38-6 at 2; 38-7 at 2; 38-8 at 2). As  
14 Defendants argue, and the Government does not address, an unpublished decision  
15 from the Ninth Circuit found that a payment is not for the purpose of “improperly”  
16 obtaining favorable treatment and could not be characterized as a “kickback” if the  
17 payment was made under a “regulatory regime . . . whether [the payments] violate  
18 the regulatory regime or not.” *United States ex rel. Bly-Magee v. Premo*, 333 F.  
19 App’x 169, 170 (9th Cir. 2009). Similarly, the Government does not allege in the  
20 Complaint that the MICP plans are side payments. Rather, the MICP plans are  
21 standardized incentive programs for LMC executives to establish performance

1 goals within the meaning of Internal Revenue Code § 162(m), which addresses  
2 performance-based based compensation.

3 The Court finds that the MICP incentive compensation does not qualify as a  
4 kickback under *Skilling*, 561 U.S. at 413. Accordingly, the Court proceeds to  
5 determine whether the Complaint alleges any payments from a third party in  
6 exchange for favorable treatment.

## 7 2. Affiliate Entities

8 In *Morse Diesel*, the government pursued Anti-Kickback Act civil liability  
9 against a corporation known as AMEC, a fifty percent owner of a joint venture, for  
10 engaging in a fee splitting arrangement with the joint venture's unaffiliated  
11 subcontractor. 66 Fed. Cl. at 792–93. AMEC argued that it could not be liable  
12 because the joint venture, and not AMEC, was the prime contractor with the  
13 government and had received the payments at issue. *Id.* at 799. Construing the  
14 AKA's definitions of "prime contractor" and "person," the court found that  
15 AMEC, as "a 50% owner of . . . a prime contractor," was a prime contractor under  
16 the AKA as a matter of law. *Id.* Once *Morse Diesel* determined that AMEC, as  
17 joint parent of the prime contractor also qualified as the "prime contractor" under  
18 the AKA, the Court of Federal Claims determined that the commission splitting  
19 arrangement in which AMEC engaged was a kickback. 66 Fed. Cl. at 799–800.

20 The Court agrees with Defendants that the holding of *Morse Diesel* may  
21 appropriately be considered within the analogous context of how affiliate entities

1 have been treated for purposes of antitrust conspiracies, as both the AKA and  
2 antitrust conspiracy law target anti-competitive, conspiratorial conduct. *See*  
3 *Skilling*, 561 U.S. at 410 (describing a “classic kickback scheme” in which a public  
4 official “conspired with a third party” to share commissions with entities in which  
5 the official held an interest); *Morse Diesel*, 66 Fed. Cl. at 800 (“Congress intended  
6 the language ‘favorable treatment’ be construed broadly to reach all conduct  
7 analogous to commercial bribery.”). In the antitrust context, “a parent company  
8 and its wholly owned subsidiary ‘are incapable of conspiring with each other[.]’”  
9 *Arandell Corp. v. CenterPoint Energy Servs.*, 900 F.3d 623, 630 (9th Cir. 2018)  
10 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777  
11 (1984)); *Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1148 (9th Cir.  
12 2003) (“Where there is substantial common ownership, a fiduciary obligation to  
13 act for another entity’s economic benefit or an agreement to divide profits and  
14 losses, individual firms function as an economic unit and are generally treated as a  
15 single entity.”).

16 The Government argues that Congress has enacted a variety of statutes  
17 evidencing its intention “that the anti-kickback laws be interpreted to cover  
18 payment between affiliated persons absent an express exemption.” ECF No. 53 at  
19 64. The Government cites a Ninth Circuit case addressing kickback liability under  
20 the Real Estate Settlement Procedures Act (“RESPA”), 12 U.S.C. §§ 2601–2617,  
21 for the proposition that this Circuit allows affiliated companies to be held liable for

1 illegal kickbacks to each other. ECF No. 53 at 65. The case, *Edwards v. First*  
2 *American Corp.*, 798 F.3d 1172 (9th Cir. 2015), interpreted a section of RESPA  
3 that exempts “affiliated business arrangements” from violating RESPA as kickback  
4 transactions if they meet certain criteria set forth in 12 U.S.C. § 2607(c)(4). The  
5 Ninth Circuit rejected an argument from the title insurer defendant that payments  
6 made to title agencies of which the insurer was a majority owner could not amount  
7 to kickbacks because the insurer could not “refer business to itself.” 798 F.3d at  
8 1185.

9       The Court is not persuaded that an interpretation of RESPA and its different  
10 criteria for liability for kickback transactions is determinative of whether LMC’s  
11 MICP could constitute a kickback under the AKA to MSA employees, including  
12 Armijo. Rather, the Court relies on the broad “business association of any kind”  
13 language of the AKA’s definition of “person.” 41 U.S.C. § 8701(3). While the  
14 Court accepts the Government’s representation that subsidiaries are “legally  
15 distinct” from their parent companies as a “hornbook principle of corporate law,”  
16 that principle does not supersede the AKA’s own formulation of who and how an  
17 entity is liable under the AKA. *See* ECF No. 53 at 51, n. 9; *Amalgamated Sugar*  
18 *Co. LLC v. Vilsack*, 563 F.3d 822, 831 (9th Cir. 2009) (holding that, as a matter of  
19 statutory construction, a court must follow the definition of a term expressly  
20 defined by Congress, even if the definition “varies from that term’s ordinary  
21 meaning.”).

1 The Government has not supplied persuasive authority that the AKA's  
2 definition of "person" should be read more restrictively than the language of the  
3 AKA indicates or than the court in *Morse Diesel* interpreted it to mean.  
4 Consequently, the Court finds that the Government has failed to assert the  
5 necessary elements of an AKA claim, namely a qualifying kickback and a payment  
6 between distinct persons. Therefore, the Court dismisses Count III of the  
7 Complaint in its entirety. Because the Government's allegation that MICP  
8 payments qualified as kickbacks is defective as a matter of law, and there is no  
9 allegation of third party involvement by whom a payment could be alleged, the  
10 Court finds that no additional facts could cure the deficiency, and the dismissal is  
11 with prejudice. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725–26 (9th Cir.  
12 2000) (recognizing that a district court acts within its discretion to deny leave to  
13 amend when amendment would be futile).

#### 14 **C. Breach of Contract**

15 Defendant MSA also moves to dismiss the breach of contract claim under  
16 Fed. R. Civ. P. 12(b)(1) based on an argument that the Contract Disputes Act  
17 ("CDA"), 41 U.S.C. § 7101 *et seq.*, "divests the federal district courts of  
18 jurisdiction over breach of contract claims in these circumstances." ECF No. 42 at  
19 22. MSA argues that there is a parallel action before the Civilian Board of  
20 Contract Appeals ("CBCA") in which the Government is alleging that the affiliate  
21

1 fee was unallowable, which is also at issue in the breach of contract claim alleged  
2 by the Government's Complaint in this case. *Id.* at 28–29.

3 The Government responds that the breach of contract claim alleged in the  
4 Complaint qualifies for an exception to the CDA's exclusive jurisdiction for “any  
5 claim involving fraud.” ECF No. 53 at 76 (quoting *United States v. Kellogg*  
6 *Brown & Root Servs., Inc.*, 800 F. Supp. 2d 143, 160 (D.D.C. 2011) (quoting 41  
7 U.S.C. § 605(a)). The Government argues that this Court has jurisdiction over the  
8 breach of contract claim because Defendants' alleged “fraud is inextricably  
9 intertwined with the breach of contract claim” with both the breach of contract and  
10 the FCA claims depending on “the same facts and circumstances[.]” ECF No. 53  
11 at 80–81. The Government acknowledges that the breach of contract claim is  
12 inclusive of the matter stayed before the CBCA but contends that the breach of  
13 contract claim is broader. *Id.* at 80–81.

14 The appeal before the CBCA concerns “whether MSA breached the terms  
15 of the Mission Support prime contract by charging [an] unallowable affiliate fee.”  
16 ECF No. 53 at 81 (citing MSA's Motion to Dismiss, ECF No. 42 at 26). By  
17 contrast, the breach of contract claim in the Complaint alleges that:

18 Without excuse, Defendant MSA materially breached its Mission  
19 Support Contract with the United States Department of Energy by: (1)  
20 charging inflated, unallowable, and unreasonable costs associated with  
21 LMSI's subcontract to MSA; (2) soliciting and accepting kickbacks  
from LMSI and LMC in return for improperly providing LMSI and  
LMC with favorable treatment with respect to LMSI's subcontract to  
MSA; (3) charging the Department of Energy for unreasonable and

1 unallowable subcontractor fee in violation of contractual and regulatory  
2 provisions; and (4) billing the Department of Energy for purported  
3 MSA employees “seconded” from LMC and LMSI who, in fact, were  
working on behalf of LMC and LMSI and to the detriment of MSA and  
the Department of Energy.

4 ECF No. 1 at 49.

5 MSA disputes the Government’s characterization of the breach of contract  
6 and FCA claims as “inextricably intertwined,” arguing that they are “separate  
7 causes of action with distinct elements.” ECF No. 58 at 18. MSA rebuts that the  
8 fraud exception does not apply because the breach of contract claim before the  
9 CBCA may be decided without a determination of fraud. *See* ECF No. 58 at 18  
10 (citing *United States v. Marovic*, 69 F. Supp. 2d 1190, 1194 (N.D. Cal. 1999)).

11 The CDA provides “a comprehensive administrative scheme for resolving  
12 government contract disputes, and that federal district courts lack jurisdiction over  
13 breach of contract claims subject to the CDA.” *United States v. First Choice*  
14 *Armor & Equip.*, 808 F. Supp. 2d 68, 79 (D.D.C. 2011). Disputes regarding a  
15 contract with the federal government may only be appealed to the CBCA or the  
16 United States Court of Federal Claims. 41 U.S.C. §§ 7104(b)(1), 7105 (e)(1)(B).  
17 However, “a claim by the Federal Government against a contractor that is based on  
18 a claim by the contractor involving fraud” is exempt from the CDA’s mandatory  
19 jurisdiction. 41 U.S.C. § 7103(a)(4)(B).

20 As in the context of the AKA, the Court acknowledges the broad language  
21 Congress utilized in defining the CDA exception. “The CDA exception applies to

1 claims ‘involving fraud’ and not merely to claims ‘of fraud’ or ‘for fraud.’” *First*  
2 *Choice Armor & Equip.*, 808 F. Supp. 2d at 80. Defendant MSA and the DOE  
3 already agreed in the CBCA proceedings that the evidence subject to discovery in  
4 the appeal concerning the contract overlaps with the discovery relating to the FCA  
5 claims before this Court. *See* ECF No. 43-2 at 2–3. Having already determined  
6 that the FCA claims survive the Motions to Dismiss, the Court finds that the  
7 exception to the exclusive jurisdiction of the CBCA or the Court of Federal Claims  
8 should apply, and the CDA does not strip this Court of jurisdiction over the breach  
9 of contract claim in this case. Accordingly, Defendants’ Motion to Dismiss the  
10 breach of contract claim under Fed. R. Civ. P. 12(b)(1) is denied.

11 **D. *Unjust Enrichment***

12 Defendant Armijo moves to dismiss the unjust enrichment claim as it  
13 pertains to him. ECF Nos. 39 at 36; 57 at 19. In state common law, unjust  
14 enrichment is an available method of recovery “for the value of the benefit retained  
15 absent any contractual relationship because notions of fairness and justice require  
16 it.” *Young v. Young*, 164 Wn.2d 477, 484 (Wash. 2008). A claim of unjust  
17 enrichment requires a plaintiff to show that “(1) the defendant receives a benefit,  
18 (2) the received benefit is at the plaintiff’s expense, and (3) the circumstances  
19 make it unjust for the defendant to retain the benefit without payment.” *Id.* at  
20 484–85.

1 Armijo asserts that the only benefit that the Complaint alleges that he  
2 unfairly retained is the alleged kickback in the form of the MICP payments. ECF  
3 No. 57 at 19. Therefore, Armijo argues, the unjust enrichment claim fails, as a  
4 matter of law, alongside the AKA claim. *Id.* Armijo asserts that there is no factual  
5 allegation to support that the incentive compensation he received from his  
6 employer was at DOE's expense and that the Complaint does not allege that  
7 Armijo's salary, rather than the incentive payments, was a kickback. *See id.* at 5,  
8 19. The Government responds that Armijo's salary from MSA is at the United  
9 States' expense because MSA was engaged in a cost-reimbursement contract with  
10 DOE. ECF No. 53 at 82. The Government further argues that even if the incentive  
11 payments from LMC were not "expensed to the United States," the costs "would  
12 have necessarily been borne out of LMC and LMSI's profit on the subcontract, the  
13 very inflated profit that was brought about through Armijo's corruption and at  
14 DOE's expense." *Id.* at 83.

15 The Court finds the Complaint, read in conjunction with the briefing on the  
16 Motions to Dismiss, fails to state what benefit received by Armijo that the  
17 Government is alleging was unjustly retained: was it his entire salary from MSA,  
18 his MICP incentive compensation from LMC, or some configuration of the two  
19 and possibly some other source? The Court finds that the Government's pleading  
20 fails to give Defendant Armijo notice as to how to defend himself and fails to set  
21

1 forth adequate factual content to state a plausible claim for relief. *See Iqbal*, 556  
2 U.S. at 678.

3 In addition, the unjust enrichment claim is appropriate for dismissal because  
4 the claim arises out of an express contract. *See, e.g.*, ECF No. 53 at 82 (arguing  
5 that allowing Armijo to retain his MSA salary would be unjust because MSA was  
6 contractually obligated to minimize costs while Armijo allegedly was using his  
7 MSA position to benefit LMC and LMSI). At the motion-to-dismiss stage, district  
8 courts “have permitted the government to proceed with claims alleging FCA  
9 violations as well as claims for unjust enrichment” as alternative forms of relief.  
10 *United States ex. rel. Purcell v. MWI Corp.*, 254 F.Supp.2d 69, 79 (D.D.C. 2003)  
11 (collecting cases). However, where the government has raised unjust enrichment  
12 or payment by mistake claims that arise out of an express contract, courts have  
13 found dismissal appropriate. *Id.* (collecting other cases that dismissed unjust  
14 enrichment claims in light of existence of an express contract); *see also United*  
15 *States ex. rel. Doughty v. Or. Health & Scis. Univ.*, No. 3:13-CV-3106-BR, 2017  
16 U.S. Dist. LEXIS 55083, at \*18, 2017 WL 1364208 (D. Or. Apr. 11, 2017)  
17 (dismissing unjust enrichment claims for failure to state a claim where the claims  
18 arose from the express contracts the government alleged in the complaint).

19 The Court finds that dismissal of the unjust enrichment claims is appropriate  
20 because the arises from an express contract. However, the defects in the unjust  
21 enrichment claim possibly may be cured by amendment. For instance, there may

1 be additional factual allegations from which the Court could infer unjust  
2 enrichment that did not arise out of an express contract. Therefore, the claim, as it  
3 relates to Defendant Armijo, shall be dismissed without prejudice.

4 Accordingly, **IT IS HEREBY ORDERED:**

5 1. Defendants Lockheed Martin Corporation's and Lockheed Martin  
6 Services, Inc.'s Motion to Dismiss, **ECF No. 37**, Defendant Frank Armijo's  
7 Motion to Dismiss, **ECF No. 39**, and Defendant Mission Support Alliance, LLC's  
8 Motion to Dismiss, **ECF No. 42**, are **GRANTED IN PART** and **DENIED IN**  
9 **PART**.

10 2. Count III for civil penalties under the Anti-Kickback Act ("AKA"),  
11 41 U.S.C. §§ 8702 and 8706 is **dismissed with prejudice**. A judgment of  
12 dismissal regarding that count shall be entered in favor of all Defendants.

13 3. Count V for equitable remedies under a theory of unjust enrichment is  
14 **dismissed without prejudice** as to Defendant Armijo. To the extent that the  
15 Government can allege a claim for unjust enrichment that does not arise from an  
16 express contract or the dismissed AKA claim, it may file an Amended Complaint  
17 by **February 14, 2020**.

18 4. Dismissal is denied regarding the remaining counts. After the  
19 amendment deadline has passed, a scheduling conference notice shall be issued  
20 separately to establish a trial schedule in this matter.

1 The District Court Clerk is directed to enter this Order, enter judgment of  
2 dismissal as ordered, and provide copies to counsel and the Courtroom Deputy.

3 **DATED** January 13, 2020.

4  
5 *s/ Rosanna Malouf Peterson*  
6 ROSANNA MALOUF PETERSON  
7 United States District Judge  
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