Circuit Court for Montgomery County
Case No. 369478

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 288

September Term, 2017

URS CORPORATION

v.

MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION

Meredith,
Nazarian,
Fader,

JJ.

Opinion by Nazarian, J.

Filed: July 6, 2018

The greatest challenge in this case lies in discerning which, among a series of documents, comprises the contract. URS Corporation ("URS") is an engineering firm that entered into a contract in 2004 with the Maryland-National Capital Park and Planning Commission (the "Commission"), a Maryland state agency,[1] to provide engineering and design services for a pedestrian bridge in Montgomery County. Four years later, in November 2008, the Commission entered into a separate agreement with Fort Myer Construction Corporation ("Fort Myer") to construct the bridge. Four years after that, in October 2012, Fort Myer sued the Commission over disputes relating to the construction of the bridge. The Commission filed third-party claims in that case against URS for indemnification, contribution, and breach of contract. The breach of contract claim alleged that URS had a duty to defend the Commission against Fort Myer's lawsuit, and that URS had breached that duty by refusing to do so.

The Circuit Court for Montgomery County found that URS owed the Commission a duty to defend and awarded the Commission $352,355.68 in attorneys' fees. URS appeals and we affirm.

I. BACKGROUND

A. The Documents

There are six agreements and documents at play here, and their relationship to one another and the parties requires a bit of unpacking. We begin with the Basic Ordering

[1] *See* MD. CODE ANN., LAND USE §§ 15-101 *et seq.*

Agreement ("BOA"), the agreement that contains the duty to defend language at issue, and two relevant attachments.[2]

The Basic Ordering Agreement (or "BOA")

First is the BOA (*i.e.*, Basic Ordering Agreement No. 3504001012HM), entered on or about February 26, 2004 and the starting point for understanding the relationship between URS and Montgomery County. Under the BOA, URS agreed to provide "transportation engineering services" to facilitate "the planning and design" of various projects described in the BOA as "Roadway Projects," "Bridge Projects," and "Bikeway and Pedestrian Facilities," among others. URS's services for individual projects were to be provided based on "written Task Order[s]."

Second, the BOA (a County document) was extended to reach the Commission by a document titled "RFP #3504001012," a request for proposal ("RFP") issued by Montgomery County at some point in time before the parties entered into the BOA. The BOA expressly incorporates the RFP by reference, and also refers to it as "Attachment B-

[2] Md. Rule 8-504(a)(4) requires that parties include references to pages of the record extract to support the factual assertions made in their briefs. URS's brief does not comply with that rule. In the course of quoting directly from and discussing various sections of the numerous documents at issue, though, URS provides references *only* to (1) the first page of its summary judgment motion and (2) a signature page of a proposed order attached to summary judgment briefing. URS's failure to comply with Rule 8-504(a)(4) in a case involving at least five interrelated documents, some with attachments and others with multiple versions, buried in a ten-volume extract that totals over 4,000 pages not only violates the Rules, but also reveals a lack of consideration for the court's and the opposing party's time and resources. Although we will not exercise our discretion to do so in this instance—we generally prefer to reach the merits of a case when we can—we could have dismissed the appeal on this basis, Md. Rule 804(c), and we urge counsel not to repeat these tactics.

1." Section A of the RFP/Attachment B-1 lists the Commission in a clause titled "Joint Procurement" that identifies the Commission as an "entit[y] within Montgomery County" that "must be able to purchase directly from any contracts resulting from this solicitation":

> JOINT PROCUREMENT
>
> The following entities within Montgomery County must be able to purchase directly from any contracts resulting from this solicitation:
>
> > Maryland-National Capital Park & Planning Commission (M-NCPPC)
> >
> > . . .
>
> ***While this solicitation is prepared on behalf of the Montgomery County (MC), it is intended to apply for the benefit of the above-named entities as though they were expressly named throughout the document.*** Each of these entities may purchase from the successful offeror under the same prices and services of the contract, with MC, in accordance with each entity's respective laws and regulations, or an entity may choose not to procure from the successful offeror at the entity's sole discretion. If one of the above-named entities elects to purchase under the contract, the prices shall be determined by using unit costs and other pertinent costs that are provided in the offer. MC shall not be held liable for any costs, payments, or damages incurred by the above jurisdictions.

(Emphasis added.)

Third, the BOA also incorporates by reference "Attachment E." That attachment contains a clause titled "Indemnification," which in turn includes language requiring the contractor both to indemnify and defend the County:

> 17. INDEMNIFICATION
>
> The contractor is responsible for any loss, personal injury, death and any other damage (including incidental and

> consequential) that may be done or suffered by reason of the contractor's negligence or failure to perform any contractual obligations. The contractor must indemnify and save the County harmless from any loss, cost, damage and other expenses, including attorney's fees and litigation expenses, suffered or incurred due to the contractor's negligence or failure to perform any of its contractual obligations. ***If requested by the County, the contractor must defend the County in any action or suit brought against the County arising out of the contractor's negligence, errors, acts or omissions under this contract.*** The negligence of any agent, subcontractor or employee of the contractor is deemed to be the negligence of the contractor. For the purposes of this paragraph, County includes its boards, agencies, agents, officials, and employees.

(Emphasis added.)

The Bridge Project: The Commission's Task Order and URS's Proposal

Fourth, in accordance with the BOA's procedures regarding task orders and proposals, the Commission issued Task Order #P&P03 ("Task Order") for construction of the pedestrian bridge in August or September 2004. The Task Order stated in its introductory clause that it was requesting a proposal "in accordance with" the BOA:

> A. Introduction
>
> [The Commission] is soliciting a proposal (in accordance with Montgomery County contract #[3]504001012HM) from your firm for engineering services for the construction of the Rock Creek Hiker-Biker Trail Bridge over Veirs Mill Road.

Fifth, on or about September 14, 2004, in response to the Task Order, URS submitted a proposal, and then on or about October 1, 2004, a revised proposal (the "Proposal"), for the pedestrian bridge project.

The parties do not dispute that URS was able to forego the public competitive bidding process to seek and win the pedestrian bridge job as the result of the BOA and the special relationships that both URS and the Commission shared with the Montgomery County Government.

The Bridge Project: The Contract between URS and the Commission

Sixth, in about December 2004, after the Task Order was issued and URS submitted the Proposal in response, URS and the Commission entered into Contract No. 250334 (the "Contract"). The Contract refers numerous times to the BOA and states in so many words that "the Commission is riding [the BOA] in accordance with the Commission's Procurement Rules, Regulations and Laws." And importantly, in its first full paragraph, the Contract expressly incorporates by reference the BOA and the following documents: the Task Order, the Commission's "Procurement Rules," and the Proposal.[3] The Contract

[3] The relevant sections of the Contract state in full:

> **THIS CONTRACT** is between [the Commission], a public body corporate of the State of Maryland . . . and [URS] . . . .
>
> **WHEREAS,** the Commission needs engineering services for the construction of [the pedestrian bridge].
>
> **WHEREAS,** on February 26, 2004, the Contractor entered into a Contract with the Montgomery County, Maryland, Contract No. 3504001012HM, which is a Basic Ordering Agreement for transportation engineering services.
>
> **WHEREAS,** Article IV, Term, Contract No. 3504001012HM, provides that the term is a period of two years, which the County may extend for two additional years.
>
> **WHEREAS,** Section A, Joint Procurement provides that the Commission may purchase engineering services from the Contractor under the Contract No. 3504001012HM at the same

also anticipates the distinct likelihood that the various documents contain conflicting terms and, to resolve them, defines which documents take precedence and in which order:

> In case of any conflict, the documents shall have precedence in the following order: (1) this Contract, (2) the Task Order, as amended, (3) the Commission's Procurement Rules, Regulations and Laws, (4) the Proposal and all forms and documents submitted by the Contractor, and (5) Contract No. 354001012HM [*i.e.*, the BOA]."

Finally, the Contract also contains a provision titled "Indemnification" that, unlike the BOA's clause, does *not* include a duty to defend:

> **7. Indemnification.** The Contractor shall indemnify and save harmless the Commission, its officers, employees, agents and representatives, and shall require that each sub-contractor

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> prices provided to Montgomery County.
>
> **WHEREAS,** the Commission is riding Contract No. 3504001012HM in accordance with the Commission's Procurement Rules, Regulations and Laws.
>
> 1. **Scope of Services.** The Contractor [*i.e.*, URS] shall provide engineering services for the construction of the Rock Creek Hiker-Biker Trail Bridge over Veirs Mill Road at the same prices charged to the County under Contract No. 3504001012HM, and in accordance with Task Order No. P&P03, Amendment to the Task Order and the Proposal submitted by the Contractor dated October 1, 2004. The documents Incorporated into the Contract are: (1) the Task Order, as amended, (2) the Commission's Procurement Rules, Regulations and Laws, (3) the Proposal and all forms and documents submitted by the Contractor, and (4) Contract No. 3504001012HM [*i.e.*, the BOA]. In case of any conflict, the documents shall have precedence in the following order: (1) this Contract, (2) the Task Order, as amended, (3) the Commission's Procurement Rules, Regulations and Laws, (4) the Proposal and all forms and documents submitted by the Contractor, and (5) Contract No. 354001012HM [*i.e.*, the BOA].

> indemnify and save harmless, the Commission, its officers, employees, agents and representatives from and against all actions, liability, claims, suits, damages, cost or expenses of any kind which are made against or incurred by the Commission arising from the Contractor's or any subcontractor's negligence, negligent performance of or failure to perform any of their obligations under the terms of this Contract.

B. Procedural History

The procedural history of this case is long and messy and includes decisions of this Court and the Court of Appeals, albeit on procedural and substantive issues different from those before us now. The portions relevant to this appeal began with a lawsuit Fort Myer filed against the Commission in October 2012. The suit was prompted by disagreements among URS, the Commission, and the subcontractor Fort Myer during construction of the bridge. In September 2011 and January 2012, Fort Myer sent letters to the Commission claiming it had suffered damages and delays due to defects in URS's design and demanded payment from the Commission as compensation.

In January, March, and May of 2012, the Commission sent letters to URS informing it of its dispute with Fort Myer. The March and May letters cited URS's duty to defend. On May 17, 2012, URS sent what appears to be its first response to the Commission's letters and, among other things, "den[ied] your demand for defense and indemnification."

In October 2012, Fort Myer sued the Commission for breach of contract and declaratory judgment in connection with the Commission's alleged failure to pay Fort Myer for work on the bridge. In February 2013, the Commission again wrote to URS and demanded a defense and indemnification.

In March 2013, the Commission filed a third-party complaint against URS seeking indemnification and contribution and alleging that URS breached the Contract when it refused to defend the Commission against Fort Myer's claims. Fort Myer's complaint was dismissed without prejudice on March 31, 2014, apparently due to Fort Myer's acknowledgement that it had failed to file a certificate necessary to pursue its claims against the Commission.

URS also had filed a counterclaim against the Commission, alleging that the Commission breached the Contract when it failed to pay URS for work that URS performed, at the Commission's request, as part of the bridge project. The circuit court held a bench trial on the Commission's third-party complaint and URS's counterclaim on April 7 and 8, 2014. On May 5, 2014, the court entered a written order memorializing its findings.[4] The parties dispute precisely what issues concerning the Commission's third-party claims were before and decided by the court. The circuit court's written opinion did not explicitly address the Commission's three individual third-party claims against URS (*i.e.*, indemnification, contribution, and breach of contract). It stated simply that "URS . . . owes the Commission a duty to defend under the BOA." URS contends that the circuit court erred in awarding damages to the Commission (which, as we discuss below, it did after a subsequent hearing later in 2014) because the court never made an explicit finding that the duty to defend had been "triggered" or that URS had breached that duty. Put

[4] On URS's counterclaim, the court found that the Commission owed URS $103,420.00 in damages and entered judgment in that amount. That decision is not before us.

another way, URS argues that owing the Commission a duty to defend is not the same as a finding of liability, and that the circuit court never found URS liable for breach of contract.

The Commission responds that URS failed to preserve that argument for appeal, and that even if the argument were preserved, the circuit court indeed found that URS was liable for breach of contract. We'll add facts and context on this point below, but it will suffice to say here that before the bench trial, URS filed a motion to bifurcate the issues of liability and damages with respect to the Commission's third-party claims, and the Commission and the court agreed to do so.

Shortly after the court issued the May 5 order finding a duty to defend, the Commission moved to have the matter set for a hearing on damages. URS opposed that motion, arguing that the May 5 order had "fully adjudicated" the dispute between URS and the Commission, the Commission had already been awarded its full attorneys' fees in the form of sanctions against Fort Myer, and the Commission should not be permitted to recover twice. On August 27, 2014, the circuit court granted the Commission's motion and stated its intent to set an evidentiary hearing to determine the quantum of damages after consulting with the parties about their schedules.

URS then filed its own motion asking the court to decide the remaining liability issues before considering damages. URS argued that the court had not found "that the Commission had triggered that duty or that URS had breached that duty." URS requested, among other things, that the court set a pre-hearing briefing schedule that would "allow the Court and the parties to efficiently address the remaining liability and damages issues in

this case . . . .” The Commission opposed the motion, arguing that URS had already presented its “entitlement” argument to the court numerous times—on summary judgment, in a motion for reconsideration, and at the April 2014 bench trial—and that the court had decided liability when it found that URS owed the Commission a duty to defend. The Commission asked the court to move on to consider damages, and that’s what the court did in October 2014: “This court having previously determined and ruled that the only issue remaining is the appropriate measure of damages, if any, as a result of URS Corporation’s breach of its duty to defend [the Commission] in response to the claims brought by [Fort Myer].”

The hearing on damages was held on November 13, 2014. Both parties presented evidence of the amount of damages, which consisted mainly of attorneys’ fees. The court took the matter under advisement.

In an oral ruling on December 18, 2014, the court ordered URS to pay $352,355.68 to the Commission as damages for failing to fulfill its duty to defend. On the same day, the docket reflects that the court “enter[ed] judgment” in the Commission’s favor in that amount. This case then proceeded to this Court, and eventually to the Court of Appeals, on the issues of whether an appealable final judgment existed and whether the circuit court had erred in awarding Maryland Rule 1-341sanctions against Fort Myer. *Fort Myer Constr. Corp. v. Md.-Nat’l Capital Park and Planning Comm’n*, slip op., Case Nos. 16 and 71, Sept. Term, 2015 (April 28, 2016) (available at 2016 WL 4415260); *URS Corp. v. Fort Myer Constr. Corp.*, 452 Md. 48, 53 (2017). The Court of Appeals ultimately held that the

separate document requirement for final appealable orders was waived, and that this Court had jurisdiction to decide URS's (and Fort Myer's) appeals. *URS Corp.*, 452 Md. at 70.

We supply additional facts as necessary below.

II. DISCUSSION

URS identified two issues on appeal that the Commission re-framed as three[5] and we condense into one: Did the circuit court err in entering judgment against URS? URS argues that it had no duty to defend under the BOA and, in the alternative, that if it did, the

[5] URS stated its Questions Presented as follows:

> 1. Did the trial court err in finding that URS owed the Commission a duty to defend?
>
> 2. Did the trial court err in awarding damages to the Commission for URS' alleged breach of its duty to defend without actually finding/holding that the duty had been triggered by Fort Myer's legally-deficient claims or breached by URS or that the conditions under that clause were met?

The Commission rephrased the Questions Presented as follows:

> 1. Did the trial court correctly determine that URS owed the Commission a duty to defend?
>
> 2. Did URS preserve the issue of the trial court's alleged failure to find that the duty to defend was triggered and breached where URS did not raise the issue at the trial court's hearing on damages and did not object to the court's determination of damages?
>
> 3. If preserved, did the trial court properly award damages to the Commission based on URS's breach of its duty to defend where the claims filed against the Commission by Fort Myer were based upon alleged acts and omissions of URS, and where it was undisputed that, despite the Commission's demand, URS declined to defend the Commission against Fort Myer's claims[?]

circuit court erred by entering judgment against it without finding that such duty had been triggered or breached. Neither argument succeeds.

A. URS Owed The Commission A Duty To Defend.

The Commission's breach of contract claim alleged that URS breached its duty to defend the Commission against Fort Myer's claims. URS argues that the circuit court erred in finding that the duty to defend contained in the BOA attaches to URS because (1) the Contract's indemnification clause—without a duty to defend—controls and (2) the only provisions of the BOA that apply to URS are the provisions relating to pricing. Unless contract language is ambiguous (which in this case it isn't), we review the circuit court's construction of a contract *de novo*.[6] *Calomiris v. Woods*, 353 Md. 425, 434 (1999) (collecting and citing cases); *see also Gebhardt & Smith LLP v. Maryland Port Admin.*, 188 Md. App. 532, 565 (2009).

Courts in Maryland apply the law of objective contract interpretation, under which we give effect to unambiguous contract language as written "without concern for the subjective intent of the parties at the time of formation . . . ." *Ocean Petroleum Co., Inc. v. Yanek*, 416 Md. 74, 86 (2010) (citing *Cochran v. Norkunas*, 398 Md. 1, 16 (2007)); *Dumbarton Improvement Assoc. v. Druid Ridge Cemetery Co.*, 434 Md. 37, 51–52 (2013).

[6] Because there are no disputed issues of material fact regarding the agreements, the "clearly erroneous" standard for appellate review of a judgment in a case tried without a jury that, *see* Md. Rule 8-131(c), does not apply. *Metropolitan Life Ins. Co. v. Promenade Towers Mut. Hous. Corp.*, 84 Md. App. 702, 716 (1990); *accord Yaffe v. Scarlett Place Residential Condominium, Inc.*, 205 Md. App. 429, 440 (2012) (citing *Cattail Assocs., Inc. v. Sass*, 170 Md. App. 474, 486 (2006)).

"When the language of the contract is clear, the court will presume that the parties intended what they expressed, even if the expression differs from the parties' intentions at the time they created the contract." *Baltimore Gas & Elec. Co. v. Commercial Union Ins. Co.*, 113 Md. App. 540, 554 (1998) (collecting and citing cases). The court "ascribe[s] to the contract's language its 'customary, ordinary, and accepted meaning.'" *Id*. (quoting *Fister v. Allstate Life Ins. Co.*, 366 Md. 201, 210 (2001)). And we construe the contract in its entirety, meaning that, if reasonably possible, we give effect to "every clause and phrase, so as not to omit an important part of the agreement." *Baltimore Gas & Elec.*, 113 Md. App. at 554 (citations omitted); *see also Cochran*, 398 Md. at 17; *Sagner v. Glenangus Farms*, 234 Md. 156, 167 (1964).

In this case, though, the challenge lies less in interpreting contract language than in determining which provisions from which documents embody the parties' agreement. Where, as here, "the contract comprises two or more documents, the documents are to be construed together, harmoniously, so that, to the extent possible, all of the provisions can be given effect." *Schneider Elec. Bldgs. Critical Sys., Inc. v. Western Sur. Co.*, 454 Md. 698, 707 (2017) (quoting *Rourke v. Amchem Prods., Inc.*, 384 Md. 329, 354 (2004)); *see also Rocks v. Brosius*, 241 Md. 612, 637 (1966) ("Where several instruments are made a part of a single transaction they will all be read and construed together as evidencing the intention of the parties in regard to the single transaction."). And not surprisingly, the parties disagree on which terms emerge and bind.

URS argues *first* that the "indemnification" clauses in the BOA and the Contract

conflict because the BOA's clause contains duty to defend language while the Contract's does not. And because the Contract's order of precedence language gives priority to the Contract, UBS argues, the Contract's indemnification provision—with no duty to defend—controls.

We see no conflict between the BOA and the Contract with respect to the duty to defend. If two contract provisions "are seemingly in conflict, they must, if possible, be construed to effectuate the intention of the parties as collected from the whole instrument, the subject matter of the agreement, the circumstances surrounding its execution, and its purpose and design." *Heist v. Eastern Sav. Bank, FSB*, 165 Md. App. 144, 151 (2005) (quoting *Chew v. DeVries*, 240 Md. 216, 220–21 (1965)). Put another way, we give effect to each clause "so that [we] will not find an interpretation which casts out or disregards a meaningful part of the language of the writing unless no other course can be sensibly and reasonably followed." *Sagner*, 234 Md. at 167; *see also* 17A Am. Jur. 2d *Contracts* § 374 (2018 update) ("[A]s a corollary of the rule that the entire contract and each and all of its parts and provisions must be given effect if that can consistently and reasonably be done, all clauses and provisions of a contract should, if possible, be so construed as to harmonize with one another . . . ."); 17A C.J.S. *Contracts* § 412 (2018 update) ("[A]n interpretation will not be given to one part of a contract that will annul another part of it, unless there is no other reasonable interpretation."). And as the Commission points out, the duty to defend is distinct from, and broader than, the duty to indemnify. *Walk v. Hartford Cas. Ins. Co.*, 382 Md. 1, 15 (2004) (noting that "an insurer's duty to defend is distinct conceptually from

its duty to indemnify"); *see also Litz v. State Farm*, 346 Md. 217, 225 (1997) (in insurance context, noting that "[t]he duty to defend is broader than the duty to indemnify"); *Back Creek Partners, LLC v. First Am. Title Ins. Co.*, 213 Md. App. 703 (2013). A duty to defend obligates a party to pay the litigation expenses of another party regardless of the outcome of the case, *Litz*, 346 Md. at 225, whereas, by contrast, the duty to indemnify is a narrower "obligation to pay a judgment." *Walk*, 382 Md. at 15 (citations omitted).

It's true that both the Contract and the BOA contain clauses titled "Indemnification," and that both clauses define URS's indemnification obligations. And if this dispute were about indemnification, we would have to identify and resolve any conflicts. But there is no conflict here. The duty to defend language at issue supplements the BOA's indemnification language. The fact that there is no duty to defend in the Contract's version doesn't negate the duty in the BOA's: silence in one provision as to a particular right or obligation does not create a conflict with a provision that affirmatively contains such an obligation. *See CooperVision, Inc. v. Intek Integration Techn., Inc.*, 7 Misc. 3d 592 (N.Y. Sup. Ct. 2005) (citing federal government procurement contracts and stating that "silence in one or the other agreement or writing in question will not, alone, create a conflict triggering the operation of the [order of precedence] clause"); *see also Apollo Sheet Metal, Inc. v. U.S.*, 44 Fed. Cl. 210, 214 (1999). As an analytical matter, the Contract incorporates the BOA by reference, and we construe the Contract and the BOA together and interpret their respective provisions to avoid casting out or disregarding

meaningful language from either agreement. *See Scheider*, 454 Md. at 707; *Heist*, 165, Md. App. at 151; *Sagner*, 234 Md. at 167.

Second, URS argues that the BOA applies only with respect to the pricing of goods and services and to the exclusion of all of the BOA's other provisions, including the duty to defend. And it's true that the RFP/Attachment B-1, the Task Order, and the Proposal reference the BOA in the context of pricing.[7] But the RFP/Attachment B-1 also states that "[w]hile this solicitation is prepared on behalf of the Montgomery County (MC), it is intended to apply for the benefit of the above-named entities as though they were expressly named throughout the document." And the Contract states unambiguously that the BOA is "incorporated into the Contract" without any qualification or limitation as to the BOA provisions it incorporates.[8] Again, when the language of a contract is clear, "the court will

[7] The RFP/Attachment B-1 states: "Each of these entities may purchase from the successful offeror under the same prices and services of the contract, with MC, ..." The Task Order references the BOA on a blank "Price Proposal Form" stating that a "*detailed breakdown* of the costs must be attached in accordance with" the BOA (emphasis in original). The Proposal references the BOA in a paragraph that lists its total proposed fees in connection with the project.

[8] Citing *Hartford Accident and Indemn. Co. v. Scarlett Harbor Assoc. Ltd. P'ship*, 109 Md. App. 217 (1996), URS argues that even if it owes a duty to defend, that duty is limited to Montgomery County and does not apply to the Commission because the BOA's duty to defend language names only the County. URS's reliance on that case is misplaced. *Hartford* involved the question of whether certain parties were required to submit to arbitration in a dispute among a condo association, a developer, a subcontractor, and a surety. The court did state that "[a]bsent an indication of a contrary intention, the incorporation of one contract into another contract involving different parties does not automatically transform the incorporated document into an agreement between the parties to the second contract," but the court made that statement, and interpreted the agreements at issue, in the context of law relating to arbitration agreements and suretyship. *Hartford*, 109 Md. App. at 289–92. The case was not anything like the situation here, which involves government contracts and a web of relationships among a county government, a state

presume the parties intended what they expressed, even if the expression differs from the parties' intentions at the time they created the contract." *Baltimore Gas & Elec. Co.*, 113 Md. App. at 554. And the express language of the applicable agreements supports the circuit court's finding that URS owed the Commission a duty to defend.[9]

B. URS Breached Its Duty To Defend The Commission.

In the alternative, URS argues that if it owed a duty to defend, the circuit court erred by entering judgment without making an express finding that the duty to defend had been "triggered" by the subcontractor's claims or that URS had breached the duty. But URS's arguments gloss the procedural history of this case and the circuit court's decisions. Read

agency, a contractor, and a subcontractor—a relationship URS wouldn't have been able to enter if the Commission weren't riding on the BOA in the first place.

[9] Both parties cite versions of the Commission's "Purchasing Manual" (Section 7 of the two 1998 version and Section 13 of the 2005 version) in their briefs. The Commission contends that its Purchasing Manuals are the documents the Contract means when it refers to "the Commission's Procurement Rules, Regulations and Laws" and incorporates them by reference. URS disagrees. But both parties cite the Manuals in support of their respective positions on the applicable scope of the BOA. URS claims that the Purchasing Manuals reinforce the conclusion that the only provisions of the BOA that apply to it are those relating to pricing of goods and services. The Commission argues the opposite: that the language of the Purchasing Manuals reinforces *its* position that the entirety of the BOA, including the duty to defend, applies to URS. The Commission also argues that by the terms of Section 7 of the 1998 Purchasing Manual, URS and the Commission agreed that any contract between them have "terms at least as favorable as the governmental entity that conducted the original bid process," and that the duty to defend language must apply to URS because a contract with a duty to defend is more favorable than one without it. We don't need to dig that deeply, though, since we can resolve this dispute using the language of the Contract and BOA themselves.

in context, the circuit court did not err in entering judgment against URS on the Commission's breach of contract/duty to defend claim.[10]

The circuit court's decision that URS breached its duty to defend is a mixed question of law and fact. Ordinarily, we review findings of fact in a bench trial under the "clearly erroneous" standard set forth in Md. Rule 8-131(c). In cases such as this where there are no disputed issues of material fact, we review the circuit court's decision *de novo* and determine whether the circuit court's decision was legally correct. *See Yaffe*, 205 Md. App. at 439; *Hillsmere Shores Improvement Assn. v. Singleton*, 182 Md. App. 667, 690 (2008). But it is not necessary for the circuit court to identify every single factor or piece of evidence it considered in reaching a decision. *Davidson v. Seneca Crossing Section II Homeowner's Ass'n Inc.*, 187 Md. App. 601, 628 n.4 (2009); *see also Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426–27 (2007) (collecting and citing cases). Where the circuit court does not explain the grounds of its decision, the appellate court "assume[s] that the

[10] We disagree with the Commission that URS failed to preserve its argument concerning the "trigger" and breach issue. Putting aside URS's own initiative to bifurcate the issue of liability and damages, the portions of the hearing transcripts reveal that URS did preserve this issue. In an excerpt cited by the Commission, counsel for URS stated: "We disagree respectfully with [the court's] decision. We don't believe he's reached some of the critical issues or entitlement trigger was primarily . . . . [sic]." In addition, URS raised this issue in briefing filed after the circuit court's May 5, 2014 order finding a duty to defend and before the November 2014 hearing on damages. The Commission acknowledges that URS raised this issue in its briefs, but argues that URS's failure to raise it *orally* at the November 2014 hearing waived it. But URS's counsel did state at that hearing that URS did not believe the "trigger" and breach issue had been decided. And as URS points out in its reply brief, the circuit court stated expressly in its October 3 order that the court already had decided that damages, and not liability, was the only remaining issue—a statement consistent with the court and the parties' agreement to bifurcate.

circuit court . . . carefully considered all of the asserted grounds and . . . determined that all or at least enough of them merited the decisions ultimately implemented." *Smith-Myers Corp. v. Sherill*, 209 Md. App. 494, 504 (2013) (citing *Piscatelli v. Smith*, 197 Md. App. 23, 37 (2012)). And "in reviewing a judgment of a trial court, the appellate court will search the record for evidence to support the judgment and will sustain the judgment for a reason plainly appearing on the record whether or not the reason was expressly relied upon by the trial court." *Davidson*, 187 Md. App. at 628 n.4; *see also Robeson v. State*, 285 Md. 498, 502 (1979) ("[W]here the record in a case adequately demonstrates that the decision of the trial court was correct, although on a ground not relied upon by the trial court and perhaps not even raised by the parties, an appellate court will affirm. In other words, a trial court's decision may be correct although for a different reason than relied on by that court.")

URS argues that the circuit court failed to make an explicit finding of liability, but the procedural history and the record prove otherwise. As an initial matter, the parties and the court *expressly* acknowledged on the record at the April 7–8 bench trial that the parties had agreed to bifurcate liability and damages with respect to the Commission's third-party claims against URS. That agreement, moreover, appears to have arisen at least in part from URS's own motion to bifurcate liability and damages. In that motion, URS did *not* request bifurcation of the applicability of the duty to defend as a standalone issue, separate and apart from the question of URS's *liability* for breach of that duty. Instead, UBS asked the court to bifurcate liability altogether from damages:

> As discussed during the March 31, 2014 hearing before the Court, to conserve precious judicial resources and foster

> efficient streamlined dispute resolution, the Court should first determine whether URS was obligated to defend the Commission; and then, ***if the Court concludes URS did breach an obligation to defend the Commission***, hold a separate trial/hearing to take evidence on any damages sustained by the Commission, after first allowing limited discovery on the issue of damages.

(Emphasis added.)

In short, the parties and the court proceeded under the assumption that liability and damages for breach of contract were bifurcated. URS had the opportunity to litigate liability at the two-day bench trial held in April 2014. URS identifies nothing in the transcript from that trial that even suggests the parties or the court thought differently. After the trial, the court issued a memorandum opinion stating that "URS . . . owes the Commission a duty to defend under the BOA."

That ruling seems straightforward enough, if less detailed than perhaps it could have been. In post-trial briefing before the circuit court judge (a different judge than the judge who presided over the bench trial, who had retired), and now on appeal, URS tries to exploit the lack of detail to cast doubt about what the court had decided. But we see no error in the second judge's decision to award damages on the breach of contract/duty to defend claim. *See Davidson*, 187 Md. App. at 628 n.4 (in cases in which the court does not articulate the reasons for its decision, the appellate court assumes that the circuit court considered all of the asserted grounds and legal principles); *see also Smith-Myers*, 209 Md. App. at 504.

First, the duty to defend was triggered by Fort Myer's lawsuit. Under the BOA, the duty to defend attaches "in any action or suit brought against the [Commission] arising out

of the contractor's [*i.e.*, URS's] negligence, errors, acts or omissions under this contract." There is no dispute that Fort Myer's claims arose from the claim of negligence on the part of URS, nor any dispute that the claims fell within the scope of the contractual duty.

Second, URS never defended the Commission against Fort Myer's lawsuit, and it doesn't argue otherwise. Instead, URS argues that the duty to defend was never "triggered" because Fort Myer's claims eventually were found to be legally deficient. But that argument misapprehends the point of a duty to defend. Duties to defend are triggered by claims, not viable claims. *Litz*, 346 Md. at 225 ("[T]he duty to defend exists even though the claim asserted against the insured cannot possibly succeed because either in law or in fact there is no basis for a plaintiff's judgment."). URS's duty to defend required it to fight any frivolous (or non-frivolous) claims that fell within the duty, and didn't require the Commission or anyone else to demonstrate first that the claims had legs.

This latter point ends the inquiry. Even if we were to agree with URS that the circuit court had found only that URS had a duty to defend (and we don't), its unavoidable concession that it had refused to defend the case had the effect of conceding liability too. From there, the court proceeded correctly to determine damages and, we hold, to enter judgment against URS.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. APPELLANT TO PAY COSTS.