

Circuit Court for Baltimore City
Case No.: 24-C-23-005370

UNREPORTED
IN THE APPELLATE COURT
OF MARYLAND*

No. 951

September Term, 2024

MARYLAND DEPARTMENT OF
TRANSPORTATION, STATE HIGHWAY
ADMINISTRATION

v.

MILANI CONSTRUCTION, LLC

Leahy,
Kehoe,
Sharer, J. Frederick
(Senior Judge, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: August 19, 2026

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Md. Rule 1-104(a)(2)(B).

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In this appeal, we review the denial of a claim for construction performed under a procurement contract between Milani Construction, LLC (“Milani”), appellee, and the Maryland Department of Transportation’s State Highway Administration (“SHA”), appellant. When Milani appealed the SHA procurement officer’s denial of its claim, the Maryland State Board of Contract Appeals (“MSBCA” or “Board”) held a non-evidentiary hearing, then issued a split decision granting SHA’s motion for summary decision on grounds not cited by the procurement officer, which was that Milani failed to timely file its notice of claim within the thirty-day window established by former Md. Code (1985, 2021 Repl. Vol.), § 15-219(a) of the State Finance and Procurement Article (“SFP”) and its implementing regulation in COMAR 21.10.04.02B.¹

On judicial review, the Circuit Court for Baltimore City agreed with the Dissent that the Board majority (the “Majority”) erred in drawing “impermissible inferences from” correspondence between SHA and Milani to make “factual findings at the summary decision stage regarding Milani’s knowledge of the basis of its claim” before “hear[ing] all the evidence” relevant to that determination. The circuit court reversed the MSBCA’s

¹ While this appeal was pending, the 2026 General Assembly amended this notice provision to clarify that the thirty-day filing period that begins running when a contractor knows the basis for its claim is triggered by either the denial of its request for an equitable adjustment, or when parties communicate that negotiations regarding such a request have reached an impasse, whichever is later. *See* 2026 Md. Laws, ch. 395, codified at SFP § 15-219(a)(1)(i)-(ii). Although this revised standard does not govern this appeal because it took effect on July 1, 2026, we recognize and discuss below that it contemplates the scenario presented here, by adopting the same standard suggested by the dissenting Board member in this case for determining when a contractor has knowledge of the basis for its claim (the “Dissent”). We shall revisit this legislation later in this opinion.

decision and remanded for further administrative proceedings at which “[t]he Board must hear all the evidence before making” a factual determination “regarding Milani’s knowledge of the basis of its claim.”

We affirm that judgment because we agree with the Dissent and the circuit court that the Majority erred in failing to view the full evidentiary record in the light most favorable to Milani on the disputed factual question of when Milani knew the basis for its claim, and in resolving disputed facts material to determining whether Milani filed its notice of claim within the thirty-day period established by former SFP § 15-219(a).²

LEGAL BACKGROUND

Because this appeal involves a request for additional compensation under a procurement contract between SHA and a private contractor, otherwise known as a “request for equitable adjustment” or “REA,” we begin by reviewing the relevant rules and policies governing such claims, as background for our summary of the factual record.

The State has waived its sovereign immunity “in a contract action, in a court of the State, based on a written contract that an official or employee executed for the State or 1

² In its opening brief, the State Highway Administration poses the following questions:

1. Did the Board correctly grant summary decision based on Milani’s failure to file a timely notice of claim, where Milani filed its notice more than three years, or, in the alternative, more than one year, after it knew the basis of its claim?
2. If estoppel or waiver may be asserted against the State of Maryland, did the Board correctly find no genuine dispute of material fact that the Administration did not waive, and is not estopped from raising, the 30-day notice of claim filing requirement?

of its units while the official or employee was acting within the scope of the authority of the official or employee.” *Md. State Highway Admin. v. Brawner Builders, Inc.*, 248 Md. App. 646, 658-59 (2020), *aff’d*, 476 Md. 15 (2021). See Md. Code (1974, 2020 Repl. Vol.), § 5-522 of the Courts and Judicial Proceedings Article. Because “the Legislature may impose conditions and limitations, both substantive and procedural, on such a waiver,” the General Assembly “has enacted a comprehensive set of laws governing . . . the processing of contract claims” in the State Finance and Procurement Article. *Brawner Builders*, 248 Md. App. at 659. “The purposes and policies of this” statutory framework include:

- (1) providing for increased confidence in State procurement;
- (2) ensuring fair and equitable treatment of all persons who deal with the State procurement system;
- (3) providing safeguards for maintaining a State procurement system of quality and integrity;
- (4) fostering effective broad-based competition in the State through support of the free enterprise system;

* * *

- (8) simplifying, clarifying, and modernizing the law that governs State procurement;
- (9) allowing the continued development of procurement regulations, policies, and practices in the State; and
- (10) promoting development of uniform State procurement procedures to the extent possible.

SFP § 11-201(a). “Unless otherwise indicated,” the statutory requirements “shall be construed liberally and applied to promote the[se] purposes and policies[.]” SFP § 11-201(b).

A “contract claim” means “a claim about the performance, breach, modification, or termination of the procurement contract.” SFP § 15-215(a)-(b). Under regulations governing procurement disputes regarding “all construction contracts[,]” the term

claim means a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or other relief, arising under or relating to this contract. **A voucher, invoice, or request for payment that is not in dispute when submitted is not a claim under this clause.** However, if the submission subsequently is not acted upon in a reasonable time, or is disputed as to liability or amount, it may be converted to a claim for the purpose of this clause.

COMAR 21.07.02.05-1C (emphasis added).

Under the statutory and regulatory framework applicable to a construction contract claim like Milani’s,

[t]he structure and procedure begin with the procurement officer, who is the individual authorized by the agency (unit) to enter into, administer, and make determinations and findings with respect to a “procurement contract.” SFP § 11-101(o).

With respect to construction projects, this is a two-step process. **First, the contractor must file a written notice of a claim with the procurement officer within 30 days after the basis for the claim is known or should have been known. SFP § 15-219(a).** Within 90 days after submitting that notice, the contractor must submit “a written explanation that states the amount of the contract claim, the facts on which the contract claim is based, and all relevant data and correspondence that may substantiate the contract claim.” SFP § 15-219(b). *See also* COMAR 21.10.04.02.

Brawner Builders, 248 Md. App. at 660 (emphasis added). *See generally* SFP § 15-217(b) (providing that a “contract claim shall be submitted within the time required under regulations adopted by the primary procurement unit responsible for the procurement”).

This appeal focuses on the thirty-day period for filing “a written notice of claim with the procurement officer[,]” and more specifically, on the meaning and application of the

triggering provision that the clock on that thirty-day filing period begins when the “contractor knows or should have known of the basis for a claim relating to this contract[.]” COMAR 21.07.02.05-1D. Under former SFP § 15-219(a), with exceptions not applicable here, “a contractor shall file a written notice of a claim relating to a procurement contract for construction within 30 days after the basis for the claim is known or should have been known.”

As we have noted, during the pendency of this appeal, the 2026 General Assembly amended this provision, changing this knowledge standard to the following:

- (a) Except to the extent a shorter period is prescribed by regulation governing differing site conditions, a contractor shall file a written notice of a claim relating to a procurement contract ~~for construction~~ within 30 days after ~~the basis for the claim is known or should have been known:~~
 - (1) **for requests for equitable adjustments, the later of:**
 - (i) a unit denying a request for equitable adjustment; or**
 - (ii) one of the parties notifying the other party in writing that the notifying party determined the discussions reached an impasse in attempting to resolve their disagreement regarding the request; and**
 - (2) for other claims, the basis for the claim is known or should have been known.^[3]

³ The legislature also amended and renumbered the existing restriction in SFP § 15-219(e), as follows:

- (h) Recovery under a contract claim is not allowed for any expense incurred:
 - (1) more than ~~30~~ 60 days before the required submission of a notice of a claim under subsection (a) of this section[.]

(continued...)

2026 Md. Laws, ch. 395.

Although this revised notice of claim provision governs requests for equitable adjustment like the one at issue here, it does not govern this appeal because it took effect on July 1, 2026. *See id.* Nevertheless, we recognize this new standard addresses the scenario presented by this case, clarifying that the trigger for the thirty-day period to file a notice of claim is the denial of the contractor’s REA or an announced impasse in negotiations over it. Indeed, the Fiscal and Policy Note for the Senate bill states that the deadline for contractors to submit a written notice of a claim **begins upon the later of either a procurement unit denying a request for equitable adjustment or the parties reaching an impasse in negotiations.** Dep’t of Legis. Servs., S.B. 213, 2026 Sess., Fiscal and Policy Note, p. 4 (2026).

Notably, REA denial and negotiations impasse were the key events debated by Milani and SHA before the Board and circuit court. Specifically, if Milani had knowledge of its claim (1) when SHA denied its REA in May 2022, resulting in a timely notice of claim within thirty days; or alternatively, (2) when Milani knew that negotiations over the time overruns had reached an impasse, which SHA contends occurred either (a) in September 2018, when Milani acknowledged to SHA that “global settlement negotiations” to resolve compensation for the costs of both additional work and additional time “did not

See 2026 Md. Laws, ch. 395.

work out”; or (b) in September 2020, when SHA notified Milani that it intended to invoke per diem liquidated damages for all the time overruns.

In MSBCA proceedings, “[t]he legal standard for granting summary disposition is the same as that for granting summary judgment under Maryland Rule 2-501(a). That is, summary disposition is appropriate if ‘there is no genuine issue of material fact[,] and [a] party is entitled to prevail as a matter of law.’” *Brawner Builders, Inc. v. Md. State Highway Admin.*, 476 Md. 15, 31 (2021) (quoting COMAR 21.10.05.06D(2)(a), (b)). “[O]nce a movant has met its burden of demonstrating sufficient grounds for summary judgment,” the opponent “must produce admissible evidence demonstrating a dispute.” *Id.* “Even where there are alleged factual disputes, if the factual disputes are irrelevant, they will not prevent the entry of summary judgment.” *Id.*

In this Court, “we review the MSBCA’s ‘decision directly, not the decision of the circuit court.’” *Matter of Md. Bio Energy LLC*, 263 Md. App. 215, 233, *cert. denied*, 489 Md. 287 (2024) (citation omitted). Our review is limited to the decision and grounds relied upon by the MSBCA. *Id.* at 234. Pertinent here, this Court may reverse, modify, or remand the MSBCA’s decision if it “results from an unlawful procedure[,]” “is affected by any other error of law[,]” or “is arbitrary or capricious.” Md. Code (1984, 2021 Repl. Vol.), § 10-222(h) of the State Government Article.

In addressing MSBCA disputes raising timeliness, waiver, and estoppel issues, our Supreme Court has recognized “that it is often inappropriate to grant summary disposition where there are factual issues related to knowledge, motive, or intent because such issues

may require ‘greater than usual factual development[.]’” *Browner Builders*, 476 Md. at 42 (citation omitted). Yet that general “rule is not absolute” because “summary judgment may be appropriate notwithstanding the presence of factual issues concerning knowledge, motive, or intent so long as there are no genuine issues of material fact, and the facts are not susceptible to inferences supporting the position of the party opposing summary judgment.” *Id.* at 42-43 (cleaned up).

With this public contracting framework in mind, we examine the course of Milani’s claim in order to determine whether the MSBCA correctly ruled as a matter of law that Milani failed to comply with the thirty-day deadline for its notice of claim, as mandated by SFP § 15-219(a).

FACTUAL BACKGROUND

Because we “look through” the circuit court’s decision to directly review the MSBCA’s decision that Milani undisputedly failed to file its written notice of claim “within 30 days after the basis for the claim is known or should have been known[,]” SFP § 15-219(a), we summarize the relevant record in the following timelines.

Overview of Milani’s Contract Claim

March 31, 2015: After negotiating over the installation of noise barriers and landscaping in Baltimore County along MD 295 (the “Contract”), SHA and Milani agreed to a contract price of \$8.9 million and a performance period of seventeen months.

September 25-26, 2018: In a series of email exchanges, Milani and SHA District 4 officials discussed their negotiations on the previous day regarding “a change order for

various extra work and quantity increases” and well as related “time” adjustments. At issue was how much of the time overrun, i.e., the extra days of work past the originally contracted period, would SHA treat as (a) excusable and compensable, resulting in additional compensation due to Milani; (b) excusable but non-compensable, resulting in no additional compensation due to Milani, but also no liquidated damages assessed against Milani; and/or (c) non-excusable, and therefore grounds for imposing per diem liquidated damages at the Contract rate of \$1,230, and for reducing the retainage held by SHA.

- At 1:23 p.m. on September 25, Milani Vice President Ira Kaplan emailed SHA District 4 Assistant Area Engineer Jesse Free, copying Milani President Saeed Milani-nia and SHA District 4 Engineer Bruce Cain, “confirming your discussion with Saeed this morning[,]” in which “SHA agreed to issue a change order for various extra work and quantity increases” as delineated on an itemized list.⁴ “With regard to time,” Kaplan stated:

we agreed in our meeting yesterday to 230 excusable, compensable days and 99 excusable, non-compensable days. Bruce will get back with us regarding time in the next few weeks.

- The next morning, September 26, at 6:37 a.m. and resending at 6:42 a.m., Free responded to Kaplan, stating:

We are in agreement with most of the listing below **except for the time** and [another matter]. **After looking at the schedule we are still at the 60 days compensable as originally discussed and the remaining time we can offer a non-compensable time extension.**

* * *

⁴ We use the titles for SHA officials as they are stated in the cited correspondence, but note that over the years-long course of this Contract, SHA personnel changed numerous times.

We will follow up with a final decision letter within the next two weeks outlining the information noted.

(Emphasis added.)

- At 10:11 a.m., Kaplan replied, thanking Free “for **starting the CO [i.e., change order] process for the items we agree.**” Addressing “the time portion,” Kaplan stated:

it’s premature for a final decision as we were recently trying to reach a global settlement on the time issue, which did not work out. As we mentioned in our meeting, we need to now package our time-related costs into a request for equitable adjustment and then submit it to SHA for its review. As you are aware, even though the end date was in August 2016, we continued to perform SHA-directed force account work beyond that time frame, which will be included in our REA. **SHA should not issue a final decision prior to the review of our REA.**

(Emphasis added.)

- At 12:29 p.m., Free replied: “**In response to your e-mail we will be reviewing the additional time and await for you [sic] REA cost breakdown.**” (Emphasis added.)

October 1, 2018: Kaplan emailed SHA’s Bruce Cain (who was copied on the September 26 email string), “to confirm SHA has initiated the change order for the direct cost of the various additional work in the amount of \$421,144.17” and stating that “[w]e will submit the REA for additional time separately.”

September 24, 2019: Milani and SHA prepared Change Order Request No. 11, adding \$421,144.17 to the Contract price. Under “CONTRACTOR’S ACCEPTANCE,” Change Order No. 11 states:

THE TERMS AND CONDITIONS OF THIS CHANGE ORDER,
INCLUDING THE AMOUNT AND THE TIME CONTAINED HEREIN,
CONSTITUTE A FULL ACCORD AND SATISFACTION BY THE

CONTRACTOR FOR ALL COSTS AND TIME OF PERFORMANCE RELATED TO THE ACTIONS DESCRIBED OR REFERENCED HEREIN, INCLUDING BUT NOT LIMITED TO, DELAY AND IMPACT COSTS RESULTING FROM THIS CHANGE ORDER[.] EXCEPT AS AMENDED HEREIN, ALL PROVISIONS OF SAID CONTRACT REMAIN IN FULL FORCE AND EFFECT.

However, in the section titled “This work is necessary for the following reasons[.]”

Change Order No. 11 states:

ITEM 3043.A – **GLOBAL SETTLEMENT** – CONTRACTOR DIRECTED TO PERFORM ADDITIONAL WORK. THIS SETTLEMENT IS COVERING ALL REMAINING CHANGE ORDERS FOR THIS CONTRACT. **THERE WILL BE AN ADDITIONAL TIME CHANGE ORDER BEING SUBMITTED BY THE CONTRACTOR UPON COMPLETION OF THIS WORK.** THE CONTRACTOR WAS DIRECTED TO [DESCRIPTION OF ADDITIONAL WORK] **TIME IS BEING NEGOTIATED AND SHALL BE PROCESSED UPON COMPLETION OF THE REMAINING WORK.**

(Bold emphasis added.)

January 29, 2020: Milani’s Kaplan emailed SHA’s Wendy Wolcott, Metropolitan District 4 Engineer, copying Abraham Kidane, Assistant District 4 Engineer, and attaching its letter requesting payment of interest on SHA’s late payment. Kidane forwarded that email to District 4 Assistant Area Engineer Thomas Briggs.

February 3, 2020: In response to Milani’s request for payment of interest, District 4 Assistant Area Engineer Michael Akers Jr. emailed Kaplan that “[w]e need to close out the time first. Please submit your request so we can move forward with both the time and the interest.”

February 11, 2020: Akers forwarded the same email string to Kaplan, again prompting, “Please do not forget to submit your time request as indicated below.”

September 23, 2020: Wolcott wrote to Milani-nia “regarding construction completion delay for the” Contract, with copies to Briggs and Kidane, stating:

Our records indicate that the contract time charges are over by 337 Calendar Days. Per Liquidated Damages provision of the Maryland Standard Specifications, this contract will be assessed a Liquidated Damages [sic] at [the] rate of \$1,230.00 per Calendar Day for a total Liquidated Damages amount for \$414,510.00.

MDOT SHA District 4 construction is currently in the process of closing out this contract and we are hereby kindly request [sic] Milani construction [sic] to respond within 30 days should you disagree with our assessment.

We appreciate your continuing cooperation in this matter, and should you have any questions or require additional information on this matter, please contact Mr. Thomas Briggs, Area Engineer – Construction[.]

October 17, 2020: Replying to Wolcott’s letter, Kaplan emphasized that throughout the prior course of dealing, SHA indicated that it would not treat delays caused by the additional work in Change Order No. 11 as grounds for liquidated damages:

We were quite surprised to see that SHA intends to assess liquidated damages for the entire contract time overrun. As you know, **SHA has previously acknowledged that Milani Construction is entitled to an excusable time extension for all the contract overrun, and it has further acknowledged a portion of that time extension is compensable. Furthermore, SHA and Milani Construction agreed that Milani would submit a request for equitable adjustment and time impact analysis to identify the compensable portion of the delay and costs associated with it. Additionally, in Change Order No. 11 (which noted the significant amount of extra work that was added to this project which caused the delays), SHA acknowledged that Milani was entitled to additional time, and that Milani would be submitting its request for additional time when the time impact analysis was complete.** So, the answer to your question as to whether Milani disagrees with your assessment of liquidated damages is certainly yes, and SHA itself has acknowledged that this is incorrect.

In addition, there remains an additional dispute on the project which has not been resolved. By letter dated 1/29/20 Milani submitted a request pursuant

to TC-7.07 for interest for late payment for the work described in Change Order No. 11. That request has never been resolved or responded to.

In short, this project is not now in a position to begin the procedures for final acceptance and final payment under TC-7.06. Milani hired a 3rd party consultant to prepare the REA, and Milani expects to submit it for review in approximately 90 days. Meantime, please take action on Milani's outstanding request for the payment of interest.

(Emphasis added.)

November 6, 2020: Wolcott “acknowledge[d] receipt of” Milani’s October 17 letter and asked Milani’s president, Saeed Milani-nia, for documentation of any agreement to compensate Milani for time delays:

MDOT SHA has never received a letter from Milani Construction, LLC seeking compensation for time delay. Please provide proof that MDOT SHA agreed to give compensation for time delay and a time impact analysis of the delay along with associated cost if any. MDOT SHA will responding [sic] to your request regarding additional payment of interest for change order #11 (Global Settlement) with a separate letter.

We appreciate your continuing cooperation in this matter, and should you have any questions or require additional information on this matter, please contact Mr. Thomas Briggs, Area Engineer[.]

Wolcott’s letter was copied to Briggs, Kidane, and Kaplan.

January 5, 2021: By “Follow-Up” letter to Wolcott, referencing two December letters regarding Milani’s request for retainage reduction,⁵ Milani-nia requested “a status update for this request.”

January 20, 2021: In a letter to Milani-nia, copied to Briggs, Kidane, and Kaplan, Wolcott acknowledged receipt of Milani’s letters “dated December 21 and January 5, 2021

⁵ Melani-nia’s letter refers to his previous correspondence dated December 8, 2020 and December 21, 2020, but the parties do not cite to either letter in their appeal volumes.

regarding retainage reduction” and confirmed that “SHA is currently holding a 5% retainage amount of \$493,661.50[.]” Stating that “we concur that this contract is due for retainage reduction as the construction work for this project is complete[.]” Wolcott invoked her prior letters of “Sep 23, 2020 and Nov 6, 2020[.]” stating again that “MDOT SHA is intending to assess Liquidated Damages (LD) at a rate of \$1,230.00 per Calendar Day for a total Liquidated Damages amount for \$414,510.00.” After agreeing to release the difference of \$79,151.50, Wolcott stated:

Per Milani’s letters . . . dated October 17, 2020 and December 3, 2020 respectively, we are waiting for the REA submittal that is being prepared by Milani hired a 3rd party consultant [sic].

We appreciate your continuing cooperation in this matter, and should you have any questions or require additional information on this matter, please contact Mr. Thomas Briggs[.]

February 23, 2021: Milani filed a claim for \$39,441.97 in unpaid interest on the \$400,086.97 that Milani reported receiving under the Change Order.

May 21, 2021: Stephen A. Bucy, as SHA’s Procurement Officer authorized to review construction contract claims, issued a letter denying Milani’s separate claim for interest on SHA’s late payment. In recounting the Contract history, Bucy stated:

In September 2018, MDOT SHA and Milani were in negotiations concerning Milani’s proposed compensation for certain additional work on the Contract. In an October 1, 2018, email, Milani confirmed its understanding that MDOT SHA would be initiating a change order for \$421,144.17 in payment for that additional work. **Negotiations continued, but an agreement had not yet been reached regarding a time extension.** In an August 27, 2019 email, MDOT SHA wrote Milani to confirm that Milani had agreed to a negotiated settlement of \$421,144.17 “to cover all outstanding invoices” and Change Order #11 was drafted to memorialize the negotiated settlement and begin the process of payment to Milani. **Pursuant to that change order, which**

Milani signed on November 11, 2019, all remaining change order and outstanding issues were settled, except for an additional time change order that Milani indicated it would submit upon completion of the Contract. On December 17, 2019, MDOT SHA generated Progress Estimate No. 29 that reflected the settlement amount and, on that same day, Milani signed Estimate No. 29. Payment to Milani of the settlement amount, minus retainage, was made on January 10, 2020.

(Emphasis added.)

November 5, 2021: Milani received the report and supporting documentation from the third-party contractor hired “to calculate delay damages associated with the” Contract work, which concluded that such damages “total \$1,638,622.29 based on 328-days of compensable delay.”

November 9, 2021: Milani submitted to Wolcott its REA for time-related costs required to complete the additional work in Change Order No. 11, with its supporting Time Impact Analysis (“TIA”).

January 7, 2022: Kidane wrote to Milani-nia that “SHA has reviewed your request and regrets to inform you that due to project completion time delay and possible Liquidated Damages (LDs) on this project, we cannot reduce the retainage.”

May 4, 2022: By letter to Milani-nia, Kidane, as District 4 Assistant District Engineer, denied Milani’s REA for additional time-related costs. Among other reasons, Kidane invoked the thirty-day period for filing a notice of claim:

A review of the information submitted reveals that Milani did not meet the requirements outlined in the MDOT SHA Specifications Specifically, Milani:

- Failed to make timely notice of its intent to file a claim as per GP-5.14 (a).

- Failed to make timely submission of the claim as per GP-5.14 (b).
- Failed to submit the claim with all pertinent data and correspondence that Milani relied upon to substantiate the claim as per GP-5.14 (b)(4).

In accordance with GP-5.14 (d), MDOT SHA is dismissing this claim for failure to file the claim within the prescribed time.

In any event, Kidane continued, “Milani also failed to meet the requirements” governing “any revisions to the Activity Chart of Record (ACR)” and to support its request with sufficient data. Nevertheless, SHA offered a lesser number of compensable days:

Understanding that Milani encountered additional time due to the additional excavation and obstructions, in good faith, MDOT SHA agrees to extend the previous offer of a 60-day compensable time extension as offered back in September 2017. Adding 60 days to the contract results in a revised Contract Completion date of November 29, 2016.

Substantial [c]ompletion of the Project was reached on September 1, 2017, or 276 days beyond the revised contract completion date. Milani is hereby advised that MDOT SHA will assess Liquidated Damages as described on page 337 on the Contract Special Provisions.

(Emphasis added.)

Kidane then advised that SHA “will move forward with the process of closing out this contract and hereby requests that Milani Construction respond within 30 days should you disagree with our assessment.” Stating that “[w]e appreciate your continuing cooperation in this matter,” Kidane directed Milani-nia to contact “Mr. Thomas Briggs, Area Engineer – Construction” with “any questions” or request for “additional information[.]”

May 5, 2022: By letter to Kidane, Kaplan acknowledged receipt of his May 4 letter and stated, “We do not accept SHA’s offer as stipulated in your letter.” Referencing

Kidane’s “phone conversation with Mr. Milani-nia this morning,” Kaplan stated: “this response is not the District Engineer’s final decision. However, you agreed to provide the District Engineer’s final decision next week.”

May 10, 2022: By letter to Milani-nia, with copies to Bucy and Briggs, Wolcott cited the May 4 letter from Kidane and “once again” denied Milani’s claim.

May 27, 2022: Milani filed its notice of claim with SHA’s procurement officer, Stephen Bucy.

May 31, 2022: By letter to Milani-nia, Bucy acknowledged receipt of Milani’s notice of intent to file a claim and a revised copy dated May 31, 2022. Bucy stated that “Milani’s claim will be reviewed as soon as all the documents are submitted to support the claim.”

July 21, 2022: Milani filed its explanation of claim with supporting information and documentation.

July 25, 2022: By letter to Milani-nia, Bucy acknowledged receipt of Milani’s claim, stating that “SHA will begin the analysis immediately and will contact Milani if needed to discuss this matter.”

September 27, 2022: By letter to Milani-nia, Bucy requested additional information and documentation.

October 7, 2022: By letter to Bucy, Kaplan provided additional documentation.

January 17, 2023: Bucy, as SHA’s procurement officer, denied Milani’s claim, stating that his “letter serves as the final decision of” SHA. Considering each component

of Milani’s claim, Bucy explained why none was compensable, notably without addressing the timeliness of Milani’s notice of claim under SFP § 15-219(a). With respect to Change Order No. 11, Bucy determined that, although Milani “cannot now claim additional financial compensation for the alleged delays for which it already negotiated for [sic] and accepted payment[,]”

SHA was and still is willing to further consider Milani’s request for additional Contract time. However, this would be non-compensable time as the Change Order No. 11 negotiated price settled all outstanding issues. For this additional reason, Milani’s Claim for compensation for the alleged delays must be DENIED.

(Emphasis added.)

February 14, 2023: Milani timely appealed the PO’s final decision to the MSBCA.

April 20, 2023: SHA moved for summary decision, arguing that Milani undisputedly failed to file its notice of claim within thirty days after the basis of its claim was known.

May 24, 2023: Milani filed opposition, contending that its notice of claim was timely filed within thirty days after Milani’s negotiations with District 4 officials concluded with the May 2022 letter denying Milani’s REA for time-related costs.

August 9, 2023: Following a non-evidentiary hearing, a divided panel of the Board granted summary decision in favor of SHA, on the ground that Milani did not file its notice of claim within the thirty-day filing period after it knew or should have known the basis for its claim. We examine the Majority and Dissent in detail below.

December 19, 2023: Milani requested judicial review in the Circuit Court for Baltimore City. *See* SFP §§ 15-220, 15-223; COMAR 21.10.05.06D; Md. Rule 7-207.

June 11, 2024: After written and oral arguments, the circuit court vacated the Board’s decision and remanded for further proceedings, on the ground that there were factual disputes material to determining whether Milani’s notice of claim was timely.

July 10, 2024: SHA noted this timely appeal. Because we are reviewing the Board’s decision, we next summarize the reasoning of both the Majority and the Dissent.

The MSBCA Majority Decision

In its six-page Opinion and Order, the Majority identified the “issues” as “when [Milani] knew or should have known the basis for its claim against [SHA], and whether [Milani] timely filed its notice of claim.” The Majority rejected Milani’s contentions that SHA “had to reject [its] REA to trigger its claim” and that “resolving all inferences in [Milani’s] favor, the Board must find that there is no evidence it knew or should have known the basis for its claim prior to when its REA was rejected.”

Instead, the Majority determined that Milani’s notice of claim was “untimely” because its principals undisputedly “had actual knowledge of the basis for its claim when” Kaplan sent “the September 26, 2018 e-mail stating that global settlement negotiations regarding time delays had failed.” “Alternatively,” the Majority stated that it “finds that at the very latest, [Milani] had actual knowledge of the basis for its claim on September 23, 2020, when it received the notice of liquidated damages assessment letter from [SHA] and

that it had 30 days from that date to file its notice of claim.” “Under both scenarios, the Board finds [Milani’s] May 31, 2021 notice of claim is untimely.”

According to the Majority,

[t]he undisputed facts show that [Milani] knew the basis for its claim on September 26, 2018 when it e-mailed [SHA] about their mutual effort(s) to reach a global settlement on the time issue [delay damages] and characterized such effort(s) as an activity that did not work out. Moreover, [Milani’s] statement that [SHA] should not issue a final decision until it received [Milani’s] REA also shows that it knew the basis for its claim at that time.

In addition to [Milani’s] acknowledgement that a global settlement failed, an adverse action by [SHA] showed that [Milani] knew the basis of the claim not later than September 23, 2020. Specifically, on said date, [Milani] received written notice that [SHA] intended to assess significant liquidated damages for time overruns, the same time overruns that [Milani] was seeking excusable and/or compensable time delays for. Maryland’s Supreme Court has found a claim untimely based on evidence showing the latest date the contractor was aware of the need to file a claim. *See Brawner Builders*, 248 Md. App. at 663-64 (2021). Similarly, we have a latest date of September 23, 2020 that [Milani] knew the basis of its claim and from which it had 30 days to file its notice of claim.

Submitting a[n] REA does not toll the statutory time limit for filing a notice of claim until 30 days after [SHA] issues a final decision on the REA. The statutory scheme requires that a contractor will file the notice of claim within 30 days of the knowledge of the basis of claim. *See COMAR 21.10.04.02.B*. The Board finds that [Milani] had actual knowledge of the basis for its claim when it sent [SHA] the September 26, 2018 e-mail stating that global settlement negotiations regarding time delays had failed. Accordingly, [Milani] was required to file its notice of claim within 30 days from that date. Alternatively, the Board finds that at the very latest, [Milani] had actual knowledge of the basis for its claim on September 23, 2020, when it received the notice of liquidated damages assessment letter from [SHA] and that it had 30 days from that date to file its notice of claim. Under both scenarios, the Board finds [Milani’s] May 31, 2021 notice of claim is untimely.

(Footnote omitted.)

The MSBCA Dissent

In a nineteen-page Dissent, the third Board member (who was then the Board chair) objected to the Majority’s resolution of Milani’s appeal on summary decision without a contested case hearing. Pointing to evidence from the parties’ course of dealing, the Dissent cited multiple emails from both Milani and SHA acknowledging the ongoing negotiations over compensation for delay costs, as well as the language in Change Order No. 11 expressly stating that the parties agreed that, after all work was complete, Milani would make a separate claim for costs associated with delays caused by the additional work otherwise compensated under that change order.

In the Dissent’s view, the Majority erred in treating the two pieces of correspondence between Milani and SHA, from both 2018 and 2020, as undisputed evidence that Milani knew the basis for its claim long before SHA denied its REA in May 2022. The Dissent emphasized that the Majority did not mention, much less credit, documents indicating that SHA and Milani continued to negotiate over how to treat time overruns, right up until May 2022, when the SHA District 4 Engineer denied Milani’s REA. Even then, SHA’s decision was accompanied by an offer to treat some days as compensable and the remaining days as excusable but non-compensable, thereby avoiding any liquidated damages.

Regarding the September 2018 email, in which Milani stated that efforts to reach a global settlement that encompassed both direct costs for the work covered in Change Order No. 11 and additional time-related costs that Milani incurred in performing that work, “did

not work out,” and the September 2020 letter announcing SHA’s intention to collect liquidated damages for 337 days of delay, the Dissent concluded this correspondence is equivocal when viewed in the broader context of the parties’ course of dealing. The Majority erroneously “plucked” Milani’s September 2018 email from a “string of discussions between Mr. Kaplan and Mr. Jesse Free, the Assistant Engineer for” SHA, and “without providing any context surrounding the parties’ discussions of [SHA’s] numerous proposed change orders requesting compensation” for both “direct” and “time-related costs,” then proceeded to “interpret[] Mr. Kaplan’s statement as an ‘acknowledgement’ that [Milani] knew that its request for time-related costs was in dispute.”

In the Dissent’s view, the Majority engaged in “unauthorized fact-finding when it interpreted Mr. Kaplan’s statement as acknowledgement of a dispute” and “conspicuously” ignored other undisputed facts that undermine its interpretation. Specifically, statements made by Free in response to Kaplan’s email, the carve-out language in Change Order No. 11, and correspondence between Kaplan and Free on September 25-26, 2018, regarding SHA’s offer of “60 days compensable as originally discussed” plus “the remaining time” treated as “a non-compensable time extension[,]” are among the course-of-dealing evidence “missing from the Majority’s opinion” that nevertheless give “insight into what [Milani] actually knew as of late September 2018.”

The Dissent objected to “[h]ow Mr. Free’s early-morning statement was interpreted by” the Majority. “The Majority errs in fact-finding that Mr. Free’s statement notified [Milani] that its request for payment was disputed, then further errs in concluding that this

fact is undisputed.” “On the contrary, Mr. Free’s closing statement” after Kaplan replied that it was “premature for a final decision” because Milani would “need to now package our time-related costs into a request for equitable adjustment and then submit it to SHA for its review[,]” telling Kaplan that “we will be reviewing the additional time and await for you [sic] REA cost breakdown[,]” was significant “evidence that [Milani’s] request for time-related compensation was *not* in dispute and that Mr. Free had not *rejected* or *denied*, [Milani’s] request.” Likewise, Milani was “entitled to the reasonable inference that Mr. Free’s response was confirmation that negotiations would resume once the project was completed and [Milani] provided additional information to support its request (i.e., the TIA and the REA), not as a dispute giving rise to a claim.” According to the Dissent, “[i]t is impossible to overlook the obvious—the carve-out language in CO #11 undermines the Majority’s conclusion that [Milani] knew its request for compensation was disputed” because that change order was not even initiated, much less executed, until after Kaplan sent this “Global Settlement” email.

With respect to the “Liquidated Damages” letter from Wolcott on September 23, 2020, the Dissent concluded that what Milani believed about that letter was another factual dispute that the Majority improperly resolved. “If anything,” that letter

is evidence of some confusion on [SHA’s] part about the status of the project, likely due to the revolving door of staff changes that occurred over the course of the project, beginning in late September 2018 when Mr. Free retired and Mr. Bruce Cain took over the project, through the summer of 2019 when Mr. Michael Akers took over the project, and then when Mr. Abraham Kidane took over the project in late September 2020. *See Milani Construction, LLC*, MSBCA 3181 at 3-5 (2022).

Moreover, Milani’s October 17, 2020 response to Kidane’s letter “attempt[ed] to set the record straight[,]” expressing Milani’s surprise about SHA’s liquidated damages position given the carve-out provision in Change Order No. 11 and its prior acknowledgements that the parties “‘agreed that [Milani] should submit a[n] [REA] and [TIA] to identify the compensable portion of the delay and costs associated with it.’” Kaplan expressly disagreed with the liquidated damages assessment, stating that SHA “‘itself has acknowledged that this is incorrect.’” (Emphasis omitted.)

According to the Dissent, SHA’s response to Milani’s October 17 letter, asking for “‘proof that [SHA] agreed to give compensation for time delay and a time impact analysis of the delay along with the associated cost if any[,]’” is additional evidence supporting Milani’s view that the liquidated damages notice was sent in error. Absent any evidence that SHA “revoked Mr. Free’s previous offer of 60 days compensable delay with the remainder as excusable but non-compensable delay,” Kidane’s request for documentation and a TIA indicate that SHA had not yet decided that it would not compensate Milani for time-related costs. Given this documented course of dealing, “what [Milani] believed and knew to be true when it received the September 23rd notice letter” was “a material fact that is genuinely in dispute.”

Finally, the Dissent concluded that, in addition to engaging in improper fact-finding and failing to draw inferences in Milani’s favor, the Majority also erred by failing to address Milani’s contention that SHA “should be estopped from asserting a timeliness defense.” In the Dissent’s view, SHA’s “representations and actions throughout the project

. . . are evidence that [SHA] induced [Milani] to believe there was no dispute as to whether it would be compensated, and thus no need to file any notice of any claim.”

Ultimately, when viewing such evidence in the light most favorable to Milani, the Dissent found factual disputes material to determining when negotiations between SHA and Milani ripened into actual knowledge of the basis for Milani’s claim, i.e., that SHA denied Milani’s request to treat all or a substantial portion of the 328-day delay as either excusable and compensable, or as excusable and non-compensable, so that there were no non-excusable days for which SHA would be assessing liquidated damages. “Absent some unequivocal notification” to Milani that SHA

had changed its position and was no longer willing to compensate [Milani] for the time-related costs of the delays (such as language that generally appears in an agency’s “final agency action” letter denying a contractor’s request), it is reasonable to infer, and the Majority should have inferred, that [Milani] had absolutely no reason to believe the issue was in dispute and every reason to believe it would be compensated for its time-related costs.

(Emphasis omitted.)

In the Dissent’s view, the Majority erred in ignoring such evidence of ongoing negotiations, in drawing factual inferences in favor of SHA rather than Milani, and in resolving disputed facts before discovery or a contested case hearing occurred. Specifically, the Dissent pointed to the correspondence between Milani and District 4 officials as calling into question what Milani knew and when, regarding how SHA would categorize the 328 days of delay in completing the contracted work.

Based on that correspondence and course of dealing, the Dissent found material factual disputes over whether and when Milani actually knew that SHA District 4 was no

longer negotiating over an equitable adjustment for the time/delay issues carved out of the settlement memorialized by Change Order No. 11:

The Majority either overlooks or ignores these disputed facts and, in doing so, fails to draw reasonable inferences in [Milani’s] favor, as we are required to do in the context of a motion for summary decision. Worse yet, the Majority makes several findings of fact, ultimately, and dispositively, interpreting [SHA’s] September 23, 2020 letter as an adverse action by [SHA] that vested in [Milani] actual knowledge that its request for time-related compensation was in dispute and thus the basis of a claim, a finding we are not authorized to make at this time.

Reversal and Remand on Judicial Review

Because the circuit court reviewed the same administrative record that is now before us, reaching the same conclusion that we reach in this appeal, we detail that ruling and reasoning. The circuit court agreed with the Dissent that even though the correspondence in question was “not in dispute[,]” there were material disputes over “the inferences to be drawn from the exhibits.” Examining both pieces of correspondence that the Majority treated as undisputed proof that Milani actually knew the basis for its claim before the District 4 Engineer notified Milani in May 2022 that SHA rejected its REA seeking compensation for the time-related costs in performing the additional work covered by Change Order No. 11, the court explained why neither document constituted undisputed proof of such knowledge.

First, the court concurred with the Dissent that the Majority erred in finding that Milani’s September 2018 statement about not reaching a global agreement with SHA regarding its time-related costs constitutes an undisputed admission that, by that time,

Milani knew the basis for its claim, i.e., that SHA was denying such compensation. The court explained that correspondence supported alternative inferences:

With respect to the September 26, 2018 email, the Board concluded that Milani’s acknowledgement that “we were recently trying to reach a global settlement on the time issue, which did not work out” established knowledge of the basis for its claim. While the Board inferred from the email that Milani knew that the claim was in dispute because it indicated that a global resolution failed, it is equally likely that by use of the term “global resolution” Milani was referring to the inability of the parties to reach agreement on all issues. This interpretation is supported by Milani stating in the email that it would need to “package our time related costs into a request for equitable adjustment and then submit it to SHA for review” and [by] SHA’s response later that day stating it would be reviewing the additional time and awaiting the cost breakdown.

Milani’s knowledge to be inferred from the September 26, 2018 email exchange was a matter in dispute . . . which the Board could not decide on summary decision. The record simply does not support that the only reasonable inference to be drawn from the September 26, 2018, email was that Milani had actual knowledge of its claim. There are facts in the record to support that Milani did not believe that its request for time related costs was in dispute, including a subsequent change order stating that there would be an additional change order submitted by Milani upon completion of the work as “time is being negotiated and shall be processed upon completion of the work.” The Board erred in not resolving all inferences from the September 26, 2018, email in favor of Milani.

(Citations omitted.)

The court next concluded that the Majority’s treatment of the September 23, 2020 liquidated damages letter from SHA to Milani also failed to satisfy the standards for summary decision:

With respect to the September 23, 2020, correspondence from the SHA to Milani regarding liquidated damages, the Board construed the letter to mean that Milani had actual knowledge of its claim no later than the date of the letter. As the Board explained, the letter put Milani on notice that the SHA intended to “assess significant liquidated damages” for the same time

overruns. It also is reasonable to infer, however, that Milani regarded the letter as the SHA preserving its rights to pursue liquidated damages in the future or that it believed that the letter was sent in error. After receiving the letter, Milani responded by letter dated October 17, 2020, referencing the parties’ prior agreement to negotiate time related costs in the future.

(Citations omitted.)

Citing *Manekin Construction, Inc. v. Maryland Department of General Services*, 233 Md. App. 156, 174 (2017), the circuit court agreed with the Dissent that the Majority, by “drawing impermissible inferences from” these two documents in the parties’ lengthy course of dealing regarding compensation for time overruns caused by the work covered in Change Order No. 11, erred in disregarding

genuine issues of material fact in dispute that should not have been resolved at the summary decision stage. The Board “is not authorized to make findings of fact on material issues that remain in dispute.” *Manekin*, 233 Md. App. at 174. In *Manekin*, the Board granted summary decision in favor of the Department of General Services finding that the contractor knew or should have known the basis for its claim more than 30 days prior to its filing with the procurement officer. *Manekin*, 233 Md. App. at 169-70. The Appellate Court of Maryland reversed[,] concluding that the Board erred in granting summary decision and remanded for the Board to hear all the evidence before determining when the contractor knew or should have known the basis for its claim. *Manekin*, 233 Md. App. at 184.

Applying *Manekin* here, the Board erred as a matter of law in making factual findings at the summary decision stage regarding Milani’s knowledge of the basis of its claim. As in *Manekin*, the Board here was required to make a finding of fact identifying the basis for a claim to apply COMAR 21.07.02.05-1 correctly. *Manekin*, 233 Md. App. at 175. The Board must hear all the evidence before making such a determination.

DISCUSSION

At the heart of this appeal is a simple question about a complicated contract: did the Board err in finding that SFP § 15-219(a)’s thirty-day clock on Milani’s notice of claim

began running before May 2022, when SHA District 4 denied Milani’s request for equitable adjustment and Milani filed its notice of claim. Like the Dissent and the circuit court, our answer is yes.

In both *Engineering Management Services, Inc. v. Maryland State Highway Administration*, 375 Md. 211, 229-31 (2003) (“*EMS*”), and *Manekin*, 233 Md. App. at 182, the MSBCA erred in granting summary decision in favor of the SHA because there were factual disputes about when those contractors had sufficient knowledge to start the thirty-day period for filing a notice of claim. In contrast, the record in *Browner Builders* was “not susceptible to” different inferences as to when the contractor knew the basis of its claim, so that claim fell “into the exception to the general rule and therefore, the MSBCA did not err in resolving this case on summary disposition notwithstanding the presence of arguments related to equitable estoppel.” *Browner Builders*, 476 Md. at 42-43.

EMS, *Manekin*, and *Browner Builders* instructively address when the MSBCA may decide an untimeliness defense by summary decision. In those cases, as in this one, the dispositive issue was whether there was a factual dispute about the claimant filing its notice of claim within the thirty-day deadline in SFP § 15-219(a) after the contractor knew the basis for its claim. Applying analogous principles governing summary judgment, the Supreme Court recognized

the general rule that it is often inappropriate to grant summary disposition where there are factual issues related to knowledge, motive, or intent because such issues may require “greater than usual factual development[.]” But this general rule is not absolute, as we have oft observed summary judgment may be appropriate notwithstanding the presence of factual issues concerning knowledge, motive, or intent so long as there are “no genuine issue[s] of

material fact,” and the facts are not susceptible “to inferences supporting the position of the party opposing summary judgment[.]”

Brawner Builders, 476 Md. at 42-43 (citations omitted). In cases where a contractor asserts equitable estoppel, moreover, that defense “is not a procedural panacea that spares all litigants who utter the phrase from summary disposition[.]” but when it rests on “factual determinations related to knowledge, intent, or motive,” it presents “a factual matter, the resolution of which should generally follow a full hearing on the merits.” *Id.* at 43.

Collectively, these cases illustrate when summary decision may be granted under the thirty-day limitations period for filing a notice of claim. Here, as in *Manekin* and *EMS*, and in contrast to *Brawner Builders*, there is sufficient evidence in the administrative record to raise a factual dispute over when the contractor knew the basis for its claim, so as to start the thirty-day clock for filing a notice of claim. Although each of these cases rests on its own unique factual record, we agree with the Dissent and circuit court that the Majority, without the benefit of discovery and a contested case hearing, erred in resolving material factual disputes.

Specifically, the Majority erroneously treated both Milani’s September 2018 “no global settlement” email and SHA’s September 2020 liquidated damages letter as undisputed proof that Milani knew the basis of its claim years before filing its notice of claim. By disregarding and discounting pertinent evidence of the parties’ course of dealing, the Majority failed to view that correspondence in light of the full evidentiary record, then drew inferences favorable to SHA, rather than Milani. Compounding those errors, the Majority relied on its one-sided inferences to make premature factual findings about when

Milani knew the basis of its claim. As the circuit court recognized, “there are genuine issues of material fact in dispute that should not have been resolved at the summary decision stage.”

In our view, the logical but impractical extension of the view taken by SHA and the Majority is that, when contractors like Milani perform additional work not contemplated or compensated under the original construction contract, they are required to immediately file a notice of claim, even before the nature and cost of that additional work is determined. In turn, this “quick-claim” mandate would create the proverbial “hair-trigger” for equitable assessment adjustments subject to SFP § 15-219(a) – a prospect that predictably presents its own set of problems when put into practice, both for contractors and for SHA.

This case highlights the tension between resolving issues that arise during the course of a construction contract through negotiation, rather than prophylactically pressing “go” on adversarial proceedings. The record shows that Milani did not file its notice of claim as soon as questions arose about how SHA would treat the extra days it took Milani to complete additional work required by Change Order No. 11. Instead, Milani and SHA expressly agreed that Milani would file its request for equitable adjustment after all work was complete. Meanwhile, as Milani was working, it began negotiating that equitable adjustment with SHA. Those efforts generated repeated offers by SHA to treat some portion of the 328 calendar days of delay as either excusable and compensable, or excusable but non-compensable, rather than unexcused and subject to per diem liquidated damages.

As shown by the September 26, 2018 email chain between Milani and SHA, and the carve-out provision in Change Order No. 11, these negotiations began before they reached the agreement on direct costs. But because they could not reach a “global settlement” encompassing both direct and time-related costs, SHA and Milani expressly agreed to wait until construction was complete, and only then to address time-related costs in a separate request for equitable adjustment. Consequently, we agree with the circuit court that the Majority erred in finding as an undisputed fact that Milani’s September 2018 email establishes that the parties had reached an impasse over Milani’s REA for time-related costs.

Likewise, the Majority erred in treating Wolcott’s letter of September 23, 2020 as undisputed proof that Milani knew SHA had denied its request for an equitable adjustment for time-related costs. To be sure, the letter notified Milani that SHA intended to treat 337 calendar days of delay as unexcused and grounds for charging liquidated damages. From Milani’s responses and ensuing correspondence with SHA, however, it is clear that Milani challenged that plan, by pointing to prior correspondence and course of dealing during which SHA indicated that it would treat some portion of the delay as excused and compensable, or excused but non-compensable, and therefore not subject to liquidated damages, and otherwise acknowledging ongoing negotiations regarding that question.

SHA’s ensuing requests for documentation and additional information indicate that Wolcott’s liquidated damages letter did not undisputedly constitute either an impasse or a denial. Instead, the administrative record we have detailed shows that, both before and after

Wolcott sent that liquidated damages letter on behalf of SHA, other District 4 officials offered Milani some form of equitable adjustment. Wolcott, perhaps unaware and uninvolved with prior negotiations over Milani's equitable adjustment request for time-related costs, surprised Milani by invoking the liquidated damages provision of the Contract. Milani responded by disputing SHA's plan. Indeed, as the Dissent and circuit court pointed out, even when denying Milani's REA in May 2022, SHA continued negotiating over Milani's claim.

The parties' course of dealing, memorialized in their correspondence, weighs heavily against a finding that Milani undisputedly knew the basis for its claim when the parties parsed out time-related costs from their global settlement negotiations in September 2018, or when negotiations over how much excused time Milani was entitled to continued long after Wolcott sent her liquidated damages letter in September 2020.

Here, as in *Manekin*, the Majority compounded its failure to consider all of the evidence in the record by drawing factual inferences in favor of SHA rather than Milani, as the party opposing summary decision. We agree with the Dissent and the circuit court that the administrative record viewed in its entirety could support a finding that Milani actually and reasonably relied on its ongoing negotiations and communications with SHA as grounds to believe that, up until the District 4 Engineer denied its REA on May 4, 2022, SHA had not yet denied its request for an equitable adjustment for time-related costs.

We again note, since the events giving rise to this Contract dispute, the General Assembly has amended SFP § 15-219(a) to incorporate knowledge standards that reflect

alternative measures of knowledge like those advocated by both sides in this case. Under this revised standard, the thirty-day notice of claim clock starts running on a contractor's request for equitable adjustment based on differing site conditions from "the later of" (1) the date when the District denied that request for equitable adjustment, which is the knowledge measure advocated by Milani; or (2) the date when "one of the parties notif[ied] the other party in writing that the notifying party determined the discussions reached an impasse in attempting to resolve their disagreement regarding the request[,]" which is measure advocated by SHA. *Id.* We take judicial notice that this standard bears a strong resemblance to the following proposal and rationale advocated in the Dissent:

The Board routinely grapples with the issue of determining when a contractor knew or should have known it has a basis for a claim. It is irrelevant when an agency believes a contractor has a basis for a claim—the issue is when the contractor knows it has the basis for a claim. Unfortunately, it is often difficult to ascertain when a contractor acquires such knowledge because State agencies are not always transparent about when a request for payment is, or becomes, disputed, which is when a claim actually arises. *See Manekin Constr., Inc. v. Md. Dept. of Gen. Servs.*, 233 Md. App. 156, 175 (2017). When agency officials request that a contractor provide additional information to support a request for compensation, engage in discussions and negotiations with the contractor about the request, then later deny the request because it was not timely submitted, they create confusion as to when the request actually became a dispute and thus when a notice of claim should be filed.

For example, failure to reach agreement is not the equivalent of a dispute. [Milani's] counsel aptly illustrated this point at the hearing: he and his wife sometimes fail to reach agreement on a critical issue—what should they have for dinner? Their failure to reach agreement, however, is not a dispute; discussion of the available options is likely to lead to an agreement, not an argument or a divorce.

In my view, *a dispute does not arise until the parties reach an impasse and one party unequivocally conveys to the other that it is unwilling to*

*discuss the matter further. Until then, it is reasonable for a contractor to believe that continued discussions and negotiations will lead to an agreement rather than a dispute and a claim. To find otherwise is to promote the resolution of disputes through litigation rather than negotiation and settlement. . . . Therefore, I believe a contractor does not have actual knowledge that it has the basis of a claim until it has submitted a formal request for payment (whether it be a change order or a request for equitable adjustment), with any supporting documentation requested by the agency, and the request is actually **denied**[.]*

(Cleaned up; emphasis added; bolded emphasis retained.)

The amended standard in the newly enacted SFP § 15-219(a)(1)(i)-(ii) closely tracks the Dissent’s view on appropriate triggers for the thirty-day notice of claim period. Indeed, the General Assembly adopted the same “REA denial or negotiations impasse” formula for actual knowledge that was suggested in the Dissent.

In doing so, this new statutory provision addresses the Dissent’s concerns about uncertainty and unfairness arising from ambiguities haunting the undefined meaning of the “knows the basis of its claim” notice provision that the Board and courts were asked to apply in this case. *See generally* SFP § 11-201(a) (articulating that the purpose and policy for processing contract claims includes increasing confidence in State procurement, ensuring fair treatment of those dealing with the system, clarifying governing law, and promoting uniform procedures).

Under the impasse standard, at the very worst for Milani, there is a vigorous factual dispute over whether Kaplan’s September 2018 email memorializing the parties’ failure to reach a global settlement qualifies as the type of notice contemplated by the General Assembly. But under the denial standard, Milani undisputedly filed its notice of claim

within thirty days after District 4 denied its REA on May 4, 2022. Because the new notice period starts running on the *later* of these two triggering events, which is the District’s denial in May 2022, Milani’s notice of claim undisputedly would have been timely filed under this revised standard. *See* SFP § 15-219(a)(1)-(2).

Although we recognize that these new provisions do not govern this appeal because they did not go into effect until July 1, 2026, nevertheless, SHA, contractors, and the Board alike should welcome this level of statutory certainty because it encourages “contractors to do business with this State” while still “obtain[ing] the best goods and services at the lowest cost” for the benefit of Maryland taxpayers. Indeed, on remand, SHA could elect to voluntarily implement these policies by applying this new notice of claim standard to this case.

For the reasons cogently articulated by both the Dissent and the circuit court, we will affirm the judgment vacating the Board’s decision and remand for further administrative proceedings including discovery and a contested case hearing as circumstances may require.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY REVERSING
MSBCA OPINION AND ORDER DATED
NOVEMBER 21, 2023 IN MSBCA NO. 3233,
AND REMANDING TO MARYLAND
STATE BOARD OF CONTRACT APPEALS
FOR FURTHER PROCEEDINGS,
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**