

The Court of Chancery Determines \$2 Billion Dispute Is One for an Independent Auditor to Decide

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In *Chicago Bridge & Iron Company N.V. v. Westinghouse Electric Company LLC*, C.A. No. 12585-VCL (Del. Ch. Dec. 5, 2016), the Court of Chancery granted a buyer's motion for judgment on the pleadings, holding that the plain language of the purchase agreement required the parties to resolve their dispute over the closing date adjustment with an independent auditor.

Westinghouse Electric Company LLC (the "Buyer") designed nuclear power plants, and Chicago Bridge & Iron Company N.V. (the "Seller") built nuclear power plants through its subsidiary, CB&I Stone & Webster, Inc. (the "Company"). Various disputes arose among the three in connection with plants that the Buyer and the Company were hired to construct. The parties agreed to resolve those disputes by having the Buyer acquire the Company. The purchase agreement ("PA") provided that the purchase price of the Company was \$0 at closing, subject to a post-closing adjustment and potential deferred future payments, and, in exchange, the Buyer assumed all current and future Company liabilities. The PA did not cap the closing date adjustment.

The PA required the parties to exchange closing statements with their estimated closing date purchase price that complied with generally accepted accounting principles ("GAAP"). The Seller submitted its Closing Payment Statement estimating a payment from the Buyer of \$428 million and a net working capital amount over \$1.6 billion, exceeding the \$1.174 billion target identified in the PA. In stark contrast, the Buyer's Closing Statement identified the net working capital as negative \$976.5 million and estimated a payment from the Seller of approximately \$2.15 billion. The disparity was due to four changes the Buyer made to the Seller's Closing Payment Statement: (1) reducing an outstanding receivable identified as the "claim cost" on the Company's balance sheet by 30%; (2) adjusting the claim cost receivable to reflect mandated design changes per regulations; (3) increasing the estimated cost to complete projects by 30%; and (4) deducting \$432 million related to a liability that stemmed from the acquisition of the Company.

The parties agreed to extend the Seller's sixty-day objection period provided for in the PA to object to Buyer's Closing Statement. Under the PA, objections on behalf of the Seller would trigger dispute resolution, which required the parties to negotiate for thirty days. If the parties could not resolve their dispute, the PA

required they submit the dispute to an independent auditor whose determination was final, binding and non-appealable.

The Seller raised several objections to the Buyer's Closing Statement; however, before the sixty-day objection period ran, the Seller filed an action in the Court of Chancery, asserting claims for declaratory relief alleging that the Buyer's calculations breached the express terms of the PA and the implied covenant of good faith and fair dealing. In sum, the Seller argued that, pursuant to the PA, the Buyer gave up its right to challenge any of Seller's figures as non-compliant with GAAP. Subsequently, the Buyer filed a Motion for Judgment on the Pleadings (the "Buyer's Motion"), arguing that it never waived the right to object to concerns with respect to GAAP compliance during the closing date adjustment period and regardless, the dispute must be resolved by an independent auditor.

In granting the Buyer's Motion, Vice Chancellor Laster held that the language of the PA was unambiguous – that disputes over the closing date adjustment are to be resolved by an independent auditor. Indeed, the dispute resolution provision of the PA provides an independent auditor with the authority to review "any and all matters that remain in dispute with respect to the Objections Statement, the Closing Statement, and the calculations set forth therein." In reaching its holding, the Court analogized this provision with a comparable provision that arose in a 2015 decision by Chancellor Bouchard, *Alliant Techsystems, Inc. v. MidOcean Bushnell Holdings, L.P.*, 2015 WL 1897659 (Del. Ch. Apr. 24, 2015), in which Chancellor Bouchard held that the language was sufficiently broad to grant the independent auditor authority to determine disputes over GAAP compliance.

This decision is important to buyers and sellers alike in that most purchase agreements contain a provision addressing the dispute resolution mechanism related to post-closing sale price adjustments. This decision reflects the importance of drafting such provisions with a clear objective in mind. Moreover, the Court of Chancery established that the potential size of the adjustment is not a determining factor in assessing whether the dispute is one for an independent auditor to resolve. Indeed, Vice Chancellor Laster rejected the Seller's arguments that in a 2006 opinion then-Vice Chancellor Strine held that one reason for determining that the dispute was not for an independent auditor was because of the potentially large adjustment.

*This case has been appealed.