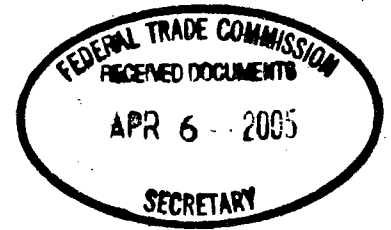


UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



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|                                      |   |                 |
|--------------------------------------|---|-----------------|
| In the Matter of                     | ) |                 |
|                                      | ) |                 |
| CHICAGO BRIDGE & IRON COMPANY, N.V., | ) | PUBLIC          |
| a foreign corporation,               | ) |                 |
|                                      | ) |                 |
| CHICAGO BRIDGE & IRON COMPANY,       | ) | Docket No. 9300 |
| a corporation, and                   | ) |                 |
|                                      | ) |                 |
| PITT-DES MOINES, INC.,               | ) |                 |
| a corporation.                       | ) |                 |

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To: Commission

**COMPLAINT COUNSEL'S RESPONSE TO CB&I'S  
FURTHER BRIEFING ON COMPLAINT COUNSEL'S  
MOTION FOR CLARIFICATION**

Complaint Counsel submit this response to CB&I's March 28, 2005, Further Briefing on Complaint Counsel's Motion for Clarification ("CB&I Briefing"),<sup>1</sup> which was filed in response to the Commission's order of March 15, 2005. That order directs CB&I and Respondent Pitt-Des Moines, Inc. ("PDM") each to submit a brief addressing the feasibility of granting a transitional license to use their respective corporate names and marks to an Acquirer of the Relevant Business to be divested pursuant to the Commission's Final Order.<sup>2</sup>

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<sup>1</sup> Respondents Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company are referred to herein collectively as "CB&I."

<sup>2</sup> On February 2, 2005, Clifford A. Aronson and Charles W. Schwartz, Skadden, Arps, Slate, Meagher & Flom LLP, filed a notice of appearance as counsel representing Respondent CB&I and Respondent Pitt-Des Moines, Inc. ("PDM"). Duane M. Kelley, Jeffrey A. Leon, *et al.*, Winston & Strawn LLP, have withdrawn their appearance as counsel for Respondents. On March 23, 2005, Jennifer L. Gray, Brown Raysman, filed a notice of appearance on behalf of Respondent PDM, now known as Ironbridge Corp. Respondent PDM's successor is now represented by separate counsel and is expected to file a separate brief on the

## I. The “Pitt-Des Moines” and “PDM” Corporate Names and Marks

In its brief, CB&I reiterates that when it acquired PDM’s Engineered Construction (“EC”) and Water Divisions in 2001, it acquired only a one-year, non-renewable, non-exclusive transitional license to the use of the PDM marks, which expired on February 6, 2002.<sup>3</sup> CB&I states that it therefore has no right or title in or to the PDM corporate names or marks that it could transfer to an Acquirer. CB&I Briefing at 1-2; *see also* Response to Complaint Counsel’s Petition for Reconsideration to Clarify Respondents’ Obligations as to the Pitt-Des Moines and CB&I Corporate Names (February 11, 2005).

Complaint Counsel recognize that CB&I does not currently own any rights to the “Pitt-Des Moines” or “PDM” corporate names or marks, and thus is not currently in a position to grant a license to an Acquirer for use of those names and marks. However, the Commission’s Final Order requirements, including the divestiture and asset maintenance obligations, apply to *all* Respondents and therefore apply to Respondent PDM and its successors as well as to CB&I. *See* Final Order ¶ I. N. We understand that PDM has recently retained separate counsel in this matter. CB&I states that it has conferred with PDM’s counsel and reports that it understands that, in the event the Commission’s divestiture order is upheld on appeal, and if the PDM name is available, PDM would consider granting, on some commercially reasonable basis, a transitional

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issue of PDM’s obligations relating to the Pitt-Des Moines corporate names and marks under the Commission’s Final Order. *See* CB&I Briefing at 1, n.1.

<sup>3</sup> *See* “Trademark Assignment and Trademark License Agreement” by and between Pitt-Des Moines, Inc., as assignor and licensor, and Chicago Bridge & Iron Company N.V. and CB&I Constructors, Inc., as assignees and licensees, which was entered into in connection with the Asset Purchase Agreement dated February 7, 2001, between PDM as seller and CB&I as purchaser. *See* CX 328.

license to use the PDM name to a purchaser of the divested assets. CB&I Briefing at 2. We understand that PDM will inform the Commission of the current status of the PDM names and marks, including whether and to what extent such names and marks may currently be licensed to other firms for use outside the EC and Water Division businesses acquired by CB&I from PDM. We anticipate that we may file a response to PDM's brief to the Commission on this issue.

Complaint Counsel believe that, to the extent possible, the Acquirer should have the same rights and ability to use the PDM name and marks in the operation of the Relevant Business, if it chooses,<sup>4</sup> that PDM had prior to the illegal acquisition by CB&I, no matter which entity is ultimately divested.<sup>5</sup> For this reason, we filed the Motion for Clarification and proposed language that we believe would accomplish this result. *See Proposed Order Modifying Final Order.* Assuming the PDM names and marks are available and licensable by at least one of the Respondents for use in connection with the Relevant Business to be divested pursuant to the Commission's Final Order, Complaint Counsel believe that the PDM names and marks should be divested and conveyed to an Acquirer on a *permanent (i.e., not transitional)* and exclusive basis

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<sup>4</sup> Given customer familiarity and the considerable goodwill associated with the Pitt-Des Moines name prior to the Acquisition, it is conceivable that an Acquirer may wish to use that name in connection with its marketing efforts to position itself as a reemerging strong competitor to CB&I in the Relevant Business.

<sup>5</sup> The Final Order currently requires CB&I to reorganize its "Relevant Business," including its corporate name and marks, into two new entities, nominated for purposes of the Final Order "New PDM" and "New CB&I," and then requires Respondents to divest the entity technically nominated "New PDM," or, under certain circumstances, the other entity. As set forth in our Motion for Clarification, Complaint Counsel believe that the Acquirer should in any event acquire and possess, to the extent possible, all rights to the PDM name and marks on a permanent and exclusive basis *no matter which of the two entities is ultimately divested.* We also believe that CB&I should be allowed to retain all rights to its own name and marks on a permanent basis except to the extent necessary to achieve the purpose of, and to assure compliance with, the Final Order, including as discussed herein.

for use within whichever Relevant Business is divested. Respondents should understand that the Final Order requires that the Relevant Business must be divested “at no minimum price.” In general, Complaint Counsel take no position on how the purchase price is allocated among the Respondents or among the assets and business to be divested.

## **II A Transitional License to the CB&I Name and Marks**

CB&I asserts that any use of its name, even on a transitional basis, would create the potential for adverse consequences both in businesses that are subject to the Commission’s Final Order and in its businesses in other markets. CB&I Briefing at 2-3. With no explanation other than the asserted potential for harm, CB&I claims it would not be feasible for it to grant even a transitional license to the use of the CB&I name to an Acquirer. *Id.* at 2.

Complaint Counsel have not suggested that an Acquirer of the Relevant Business should be able to hold itself out and conduct business as “CB&I.” We do not dispute CB&I’s point that having two direct competitors operating in the United States under the CB&I name on a permanent basis creates the potential for a variety of adverse consequences.<sup>6</sup> For these reasons, Complaint Counsel sought clarification of the Final Order’s requirements to assure that CB&I would not be required to divest all of its rights to the CB&I corporate name and marks to an Acquirer. By seeking such clarification, however, Complaint Counsel did not intend for the Final Order’s remedial purpose to be undermined. CB&I’s opposition to granting transitional use of its name and marks has the potential to thwart the Order’s contemplated divestiture relief

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<sup>6</sup> CB&I indicates that the Commission approved a consent agreement in *In re General Mills, Inc.*, FTC File No. 001-0213. CB&I Briefing at 3, n. 4. As a point of clarification, the Commission took no action in that matter. *See* News Release (October 23, 2001), <http://www.ftc.gov/opa/2001/10/pillsbury.htm>.

from the outset.

Since the February 7, 2001, Acquisition, CB&I has used and promoted the CB&I name in connection with the combined business of CB&I and PDM. In promoting the merged company's business over the past four years, CB&I has attributed to "CB&I" credit for, and reputation and goodwill associated with, projects performed by PDM prior to the Acquisition. The divestiture must assure transfer to the Acquirer of this reputation and goodwill as well as a share of the reputation and goodwill developed by the merged firm over the past four years. Having absorbed PDM's reputation and goodwill into the CB&I name, CB&I cannot thwart divestiture relief by now claiming that the CB&I reputation and goodwill should remain the exclusive property of CB&I.

Moreover, it is foreseeable that a purchaser will need a transitional license to use CB&I's name and marks in connection with the operation of the Relevant Business, *e.g.*, the CB&I letterhead or logo may appear on drawings, plans and other materials that would be transferred to the Acquirer in connection with divestiture pursuant to the Final Order. It is therefore reasonable to require CB&I to grant a transitional license to use its name and marks in connection with the ordered divestiture. As a practical matter, the transfer of any business from a selling company to a purchaser frequently requires some form of interim license to use the seller's name and marks as needed in connection with the purchased assets and business. For this reason, transitional licenses are not uncommon whenever a business or product line is sold.

We also believe it is feasible for CB&I to grant a transitional license that includes appropriate limits and safeguards to address its legitimate concerns. CB&I's own transitional license to the PDM corporate name and marks that it acquired in connection with its acquisition

of PDM's EC and Water Divisions<sup>7</sup> illustrates that there are numerous ways for a licensor to protect its ownership rights and the goodwill associated with its name and marks during any transitional period of use by an unrelated third-party purchaser.

Finally, following the Acquisition, CB&I induced PDM's customers to assign their contracts to CB&I. In order to restore competition to the relevant markets, CB&I must now take such actions as are necessary, including, but not limited to, payment of incentives, to obtain the assignment or other transfer of existing business and contracts to the Acquirer to accomplish the divestiture required by the Commission's Final Order. CB&I argues that the existence of non-assignability and default clauses in its customer contracts are the primary factors inhibiting its ability to transfer such contracts to an Acquirer, and that a transitional license to the CB&I name would not address these issues. CB&I Briefing at 3-4. The Final Order requires CB&I to, *inter alia*, accomplish all actions necessary to ensure that Customer Contracts are assigned in connection with the ordered divestiture. *See* Final Order ¶ III.B. Once CB&I has complied with these preliminary requirements, a transitional license would likely be needed following a successful assignment of Customer Contracts to the Acquirer for the reasons discussed herein.

### CONCLUSION

For the reasons herein, Complaint Counsel believe that Respondents should be required to divest and convey the PDM name and marks to an Acquirer on a permanent and exclusive basis. We further believe that CB&I should be required to grant a license for the use of its name and marks to an Acquirer to the extent necessary to achieve the purpose of, and to assure compliance with, the Final Order, including, if necessary, granting a license on a transitional

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<sup>7</sup> *See* note 3, *supra*.

basis to the purchaser of the divested business. Finally, we believe the language we have proposed in the Proposed Order Modifying Order would accomplish these objectives.

DATED: April 6, 2005

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that I today caused:

One original and twelve copies of COMPLAINT COUNSEL'S RESPONSE TO CB&I'S FURTHER BRIEFING ON COMPLAINT COUNSEL'S MOTION FOR CLARIFICATION to be served by hand delivery and one copy to be served by electronic mail upon:

Office of the Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

One copy by facsimile and by first-class mail upon:

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Counsel for Respondents



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Dated: April 6, 2005