UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

RESPONDENTS' FURTHER BRIEFING
ON SPECIFIC REMEDY ISSUES

In its Order Directing Further Briefing on Specific Remedy Issues (the "Briefing Order"), the Commission requested that Respondents Chicago Bridge & Iron Company N.V. and Chicago Bridge & Iron Company (collectively, "CB&I") file a brief to (1) specifically identify those assets in the "Relevant Business" definition that are "unnecessary to build the relevant products and the water tank products" and explain why the inclusion of such assets is unnecessary and (2) "address which assets outside of the United States the 'Relevant Business' definition encompasses and why the inclusion of such assets is unnecessary for an effective divestiture."

CB&I submits this brief without waiving and expressly reserving all arguments and objections to the Opinion and Final Order that CB&I may assert on appeal, including but not limited to its appeal on the substantive findings regarding the existence of an antitrust violation and the propriety of the relief (including the ancillary relief) ordered.

A. The Defined Term "Relevant Business" Encompasses Businesses and Assets Unnecessary to Build the Relevant Products and Water Tanks.

The Final Order requires that CB&I reorganize its "Relevant Business" to create "two independent, stand-alone operating divisions . . . each fully, equally, and independently engaged in all aspects of the Relevant Business." Final Order at III.A. The "Relevant Business" subject to division is defined in the Final Order as "all employees, managers, and supervisors and all assets of every description . . ."

> engaged, directly or indirectly, in all aspects of engineering, designing, estimating, bidding, procuring, fabricating, erecting, rehabilitating, or selling any: water storage tank or system; industrial process system, including but not limited to any digester, absorber, reactor, and tower; flat bottom tank; pressure vessel or sphere; low temperature or cryogenic tank or system; vacuum chamber or system; steel plate fabrication; and specialty structure, including the Relevant Products.

Final Order at I.P.[1]

The stated purpose of the division is "to create two stand-alone business entities, each having approximately equal shares of the markets for the Relevant Products, each fully capable of being divested, and each fully (and, to the extent practicable, equally) engaged in all aspects of the Relevant Business." Final Order at III.A. In its Opinion, the Commission further noted that it included in the assets to be divested "not only those assets necessary to build the four relevant products but also those necessary to build water tank products, similar to those tanks historically built by PDM's Water Division." Op. at 95. The Commission included the water products because "this combination of assets has made a saleable package in the past." *Id.*

Although the Commission's analysis and findings were expressly limited to the U.S. market for the four specific Relevant Products, and the Opinion discusses only divestiture of

[1] It is unclear whether the descriptive provision following the listing of asset categories modifies solely those asset categories or also "employees, managers, and supervisors."

assets "necessary to build the four relevant products [and] . . . to build water tank products," the definition of the "Relevant Business" potentially goes much further. Not only does the definition appear to exceed the description of the business acquired from PDM, which was ostensibly the guidepost for the scope of the necessary divestiture set forth in the Commission's Opinion accompanying the Final Order, but it might arguably include assets acquired and held by CB&I both pre- and post-acquisition, which are neither necessary for or relevant to the construction or sale of the Relevant Products and water tanks.[2] For example, the definition of Relevant Business read literally could conceivably cover every aspect of CB&I's business, extending even to CB&I's corporate headquarters in Hoofddorp, The Netherlands, or a sales office in Shanghai, China ("[a]ll real property . . . wherever located" Order at I.P.), even though those offices have no role in the U.S. tank and water operations and would be of no practical use to New PDM.[3]

1. The Assets Necessary for the Creation of a Viable Competitor in the Relevant Products Are No Different Than the Assets Previously Used by PDM to Compete in Those Products.

CB&I believes that the assets necessary to create two effective competitors in the Relevant Products is best evaluated in light of the assets CB&I acquired from PDM. The offering memorandum dated July 2000 (the "Offering Memorandum"), prepared in connection with the sale of PDM's Engineered and Construction Division (the "EC Division"), reflects that

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[2] Because the Commission's Briefing Order states that the Final Order does not require that CB&I divide its "'Relevant Business' equally," (Briefing Order at 23) CB&I has limited this brief to the nature and scope (rather than the volume) of the assets that should be included within the pool of assets subject to division. CB&I seeks the clarification of the scope of the divestiture order solely to remove any potential ambiguity regarding its application.

[3] Although the acquirer, with the concurrence of the Monitor Trustee, may exclude from the divestiture package assets within the Relevant Business "not necessary to achieve the purposes of" the Final Order (Final Order at IV.A.), CB&I believes that it is critical to clarify the scope of the remedy for appellate and other purposes.

prior to the challenged acquisition, PDM's EC Division owned three U.S. tool and construction equipment facilities in Tennessee, California, and Texas, and one fabrication plant in Provo, Utah. *See* CX 522 at 20.[4] The Offering Memorandum also describes the significant equipment held at each of those facilities. *Id.* at 21-23. As reflected in the Opinion, the Commission found that PDM was a viable competitor in the Relevant Products prior to the acquisition. *See* Op. at 20-21. Accordingly, those assets described in the Offering Memorandum, *i.e.* three U.S. tool and construction equipment facilities and one fabrication plant, with the related equipment identified in the schedules to the Offering Memorandum, reflect the precise assets necessary to compete against CB&I in the tank business. In fact, the assets necessary to be an effective competitor in the tank business may actually be just a subset of those assets acquired from PDM as CB&I is continually learning from the influx of numerous new competitors in the market. Accordingly, at a minimum, any type of asset beyond that described in the Offering Memorandum is, by definition, unnecessary to build the Relevant Products.

In contrast to PDM's EC Division, which primarily was a U.S. tank builder, CB&I's business has always exceeded the scope of PDM's EC Division, and contrary to the implication in the Briefing Order, CB&I's other businesses were not and are not an integrated part of its U.S. tank business. CB&I's projects include not only construction of the Relevant Products and water tanks, but also hydrocarbon processing plants, offshore structures, pipelines, hydrocarbon storage tanks, and other steel structures and their associated systems. CB&I also provides process and technology services and maintenance and repair services, such as turnarounds for petroleum refining and petrochemical plants. Because of the breadth of CB&I's operations and businesses,

[4] The actual closing documents reflect that PDM's EC Division owned only a tool house in Tennessee and a fabrication facility in Utah.

the assets employed by it in its multitude of businesses cannot be the appropriate measure of what type of assets are necessary to include within a divestiture package.

For example, CB&I has 10 U.S. fabrication facilities, six of which are not used in the building of the Relevant Products and water tanks. CB&I has 10 U.S. engineering locations, six of which have nothing whatsoever to do with building the Relevant Products or water tanks. CB&I has 13 U.S. operations locations, six of which with no relationship to building the Relevant Products or the water business. This leaves 13 facilities (including the prior PDM assets) that have any relation, whether significant or not, to the Relevant Products and the water business. This is the maximum of what may have to be divided and then divested to accomplish the purposes of the Final Order. Any assets on top of these, which by definition have nothing whatsoever to do with the tank business in the United States, are "unnecessary to build the relevant products and the water tank products." *See* Briefing Order at 24.

Accordingly, CB&I requests confirmation that the scope of the assets subject to divestiture is not intended to exceed the scope of the assets utilized in the domestic tank and water businesses.

2. The Definition of Relevant Business Is Not Supported by the PDM Offering Memorandum.

According to Complaint Counsel, the products included in the definition of Relevant Business "are derived from the offering memorandum describing the PDM EC Division for the purposes of its proposed sale in July 2000" and "clearly define[] the to-be-divested 'Tank Business.'"[5] The Commission also states that it has defined the Relevant Business "to match

[5] Complaint Counsel's Opposition to Respondents' Petition to Reconsider ("Opposition") at 22-23.

those identified in PDM's offering memorandum."[6] However, a review of the Offering Memorandum demonstrates that the definition of "Relevant Business" goes far beyond what is described in the Offering Memorandum and the assets CB&I bought. *See* CX 522.

The Offering Memorandum describes PDM's business as the design and construction of certain types of storage facilities and their related systems (*id.* at 9-11) (identifying the four Relevant Products, plus flat bottom tanks, pressure spheres, and specialty plate structures, such as wind tunnels and fusion facilities). The Offering Memorandum clearly describes a tank building business. It does not even get close to the potentially all-encompassing description used in the Final Order. For example, the Offering Memorandum does not include any reference to "industrial process systems," a potentially broad catch-all included in the definition of Relevant Business (assets used in "engineering, designing, estimating, bidding, procuring, fabricating, erecting, rehabilitating, or selling any . . . *industrial process system* . . ."). Final Order at I.P. (emphasis added). Indeed, the Offering Memorandum references "systems" only in conjunction with the specific storage tanks and special plate structures of the type actually constructed by PDM. *See, e.g.*, CX 522 at 1 ("storage tanks and their related systems"), 5 ("storage tank facilities and their related systems"), 8 ("storage tanks and related systems"), 9 ("storage tanks and related systems"), 18 ("The [EC] Division designs and constructs storage tanks and related systems . . .").

If the term "industrial process systems," which is not used in the Offering Memorandum, is not limited to the tank business of the type conducted by PDM, it could potentially cover a

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[6] Briefing Order at 24. The PDM Offering Memorandum purports to describe the capabilities and operations of PDM's EC Division, but, as essentially a sales brochure, overstates PDM's business. In fact, two post-closing adjustments were made, reducing the purchase price in excess of $15 million. The Offering Memorandum is addressed in the record as CX 522 and CX 385 (these appear to be separate printings of the same document with no substantive differences).

whole range of products or services at CB&I having nothing whatsoever to do with tanks or water, never before performed by PDM, never addressed at trial or on appeal before the Commission, and which are unnecessary for an effective and complete divestiture.

In addition, as drafted, the Final Order could require that CB&I include within the pool of assets to be divested those assets "engaged, directly or indirectly, in all aspects of engineering, designing, estimating, bidding, procuring, fabricating, erecting, rehabilitating, or selling" steel plate fabrication and specialty structures, even if they are not related to the tank business. While PDM did engage in (or said it engaged in) specialty plate structures to some extent, Complaint Counsel got it right when noting that the intent here is to divest a "Tank Business," not unrelated businesses. *See* Opposition at 22. Accordingly, the definition of Relevant Business should be modified to reflect the Commission's intent to create a competitor in the Relevant Products.

B. CB&I's Foreign Assets Are Unnecessary for an Effective Divestiture.

Both the ALJ and the Commission found that the United States was the relevant geographic market for evaluating the effects of the acquisition. Initial Decision at 5; Op. at 8. Neither the Commission nor the ALJ made factual findings that Respondents' assets and operations outside of the United States were (1) engaged in constructing the Relevant Products and water business in the United States, (2) acquired from PDM, or (3) required to create a viable competitor in the Relevant Products within the United States. Notwithstanding the fact that the Commission specifically focused on the Relevant Products *in the United States* and specifically rejected, as irrelevant, evidence of competition in those businesses outside of the United States,[7] the definition of Relevant Business does not contain any geographic limitation.

[7] *See, e.g.*, Op. at 62 (rejecting evidence of projects in Trinidad and the Bahamas as "shed[ding] no significant light on the competitive landscape in the United States"); Op. at 8 (defining relevant geographic market for all product lines as "the United States"); Op. at 52-53

More importantly, there is no evidence that PDM used or required any non-U.S. assets to compete in the U.S. markets.

With one exception,[8] no foreign assets or operations were even acquired in the acquisition of PDM, and PDM was not actively engaged in the construction of the Relevant Products outside of the United States. Nor are any non-U.S. CB&I assets utilized in U.S. tank projects. The Final Order, however, as written, could be interpreted as requiring CB&I to divest itself of assets and operations in South Africa, Australia or any number of other foreign countries in which CB&I conducts operations (remembering that it is a foreign company) even though they are wholly unrelated to the U.S tank business and, as demonstrated by PDM's success prior to the acquisition, are unnecessary to sustain the competitive viability of a New PDM.

C. Alternative Suggestions For a Divestiture Package Consistent With the Commission's Findings.

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(discounting overseas LNG construction experience of new market entrants and concluding that U.S. customers will discount the applicability of overseas experience to U.S. construction projects).

[8] PDM operated a stand alone profit center within the EC Division in Venezuela. *See* CX 29 at 5. The assets held in Venezuela were not used to support PDM's tank building operations in the United States.

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] CB&I submits that its proposed divestiture package is consistent with the purpose of the Final Order, appropriate to the industry and market conditions at the time, and designed to best "achieve the purposes of the Order."[12]

Dated: June 6, 2005

Respectfully submitted,

Clifford H. Aronson
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
Four Times Square
New York, NY 10036-6522
Telephone No.: 212-735-2644
Facsimile No.: 917-777-2644

Charles W. Schwartz
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1600 Smith, Suite 4400
Houston, TX 77002-7348
Telephone No.: 713-655-5160
Facsimile No.: 888-329-2286

ATTORNEYS FOR RESPONDENTS
CHICAGO BRIDGE & IRON COMPANY N.V.
AND CHICAGO BRIDGE & IRON COMPANY

[12] CB&I submits this proposal subject to the caveat that it may need to be modified based upon market and other conditions existing at the time any divestiture may be required.

CERTIFICATE OF SERVICE

I, Sara L. Bensley, hereby certify that on June 6, 2005, true and correct copies of the foregoing were served on the following persons by hand delivery:

One original and twelve copies to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room H-159
Washington, D.C. 20580

One copy to each of:

Rhett R. Krulla, Esq.
Assistant Director
Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, N.W.
Room NJ-6120
Washington, D.C. 20580

Steven L. Wilensky, Esq.
Federal Trade Commission
601 New Jersey Avenue, N.W.
Washington, D.C. 20580

I further certify that on June 6, 2005, a true and correct copy of the foregoing was served on the following by facsimile and regular mail:

Robert M. Unger
Brown Raysman Millstein Felder & Steiner
900 Third Avenue
New York, NY 10022

Sara L. Bensley