

Order to make clear that the relief does not extend beyond CB&I's domestic business and contracts. On May 10, 2005, we ordered Respondents to file a brief identifying those assets encompassed in the Relevant Business definition that are unnecessary to compete effectively in the Relevant Markets. We also directed Respondents to identify those assets outside of the United States the Relevant Business definition includes and explain why those assets are unnecessary for an effective divestiture.¹

Respondents have now filed their brief,² in which they argue that the Relevant Business definition includes certain assets that were not part of PDM's business and are therefore not necessary for an effective divestiture. For the reasons we discuss below, we find that Respondents have not presented sufficient evidence to rebut our initial findings that such assets are necessary for an acquirer to compete effectively in the Relevant Markets. We therefore deny Respondents' motion to narrow the scope of the Order.³

In addition, Respondents' brief argues that the Relevant Business definition in the Order should be limited to CB&I's domestic assets, because the Commission focused on competition only in the United States and CB&I acquired almost no foreign assets from PDM. We clarify here that the Order's Relevant Business definition does not require CB&I to equally divide its foreign assets. However, because evidence suggests that some foreign assets may be necessary for an effective divestiture to the extent that they provide an acquirer with a sufficient scale of work, we have included a provision to make certain that such assets are available if necessary. Finally, we reject Respondents' alternative suggestions for redefining the scope of the Order's divestiture requirements.

II. The Scope of the Order

Respondents' chief explanation as to why the Order's divestiture requirement is too broad is that CB&I's business "has always exceeded the scope of PDM's EC [Engineered Construction] Division" and that these "other businesses were not and are not an integrated part of its U.S. tank business." Specifically, Respondents state that "CB&I's projects include not only

¹ Decision and Order Partially Denying Respondents' Petition for Reconsideration and Directing Further Briefing on Specific Remedy Issues, issued May 10, 2005 ("Reconsideration Order").

² Respondents' Further Briefing on Specific Remedy Issues, filed June 6, 2005 ("Respondents' Brief").

³ This Order uses the following abbreviations for citations to the record:

Tr. – Transcript of testimony before the Administrative Law Judge

CX – Complaint Counsel's Exhibit

Op. – Commission Opinion issued December 21, 2004 (*in camera*).

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.”⁴ According to Respondents, these complementary assets are unnecessary to compete in the Relevant Markets. Respondents thus seek the Commission to clarify that the assets subject to divestiture do not exceed those used in the Relevant Markets and water tank business.⁵

While we agree with Respondents’ general point that the Commission’s Order should not require CB&I to divest assets that are unnecessary to allow an acquirer to compete effectively in the Relevant Markets, we find that Respondents’ arguments for narrowing the scope of the Order are not supported by the facts. PDM’s Offering Memorandum states that PDM specialized in the “design, engineering, fabrication, field erection and repair of bulk liquid terminals, storage tanks, process vessels, low temperature and cryogenic storage facilities, and other steel plate structures and their related systems.”⁶ It is thus clear that PDM’s EC Division did not focus solely on the design and construction of the Relevant Products but rather on numerous products and services. In addition, PDM’s 2000 Business Plan makes clear that PDM’s EC Division participated in the hydrocarbon industry⁷ and targeted, among other things, pipeline, terminal, and processing plant projects.⁸ Furthermore, CB&I’s analysis of the acquisition specifically notes PDM’s

⁴ Respondents’ Brief at 4.

⁵ We note that this position is inconsistent with the position Respondents took at trial. Specifically, Respondents’ closing argument stated that “the companies have been fully integrated at the management level, at the engineering level, at the fabrication level, at the field erection level, every level, purchasing, estimating.” Tr. at 8311. Respondents also noted that CB&I and PDM prior to the acquisition each made numerous products in addition to the Relevant Products and argued that as a result if the Commission were to “spin off some personnel and assets to make products in these [relevant] markets, that company would wilt like a rose left out too long.” *Id.* They added that the Relevant Products did not have enough business and that the Commission would therefore need to include “all this other stuff to make flat bottom tanks, to make gravel tanks, to make all kinds of other stuff.” Tr. at 8311-12.

⁶ CX 522 at TAN 1003379.

⁷ CB&I’s CEO testified that the hydrocarbon industry is the oil and gas business. Tr. at 4158.

⁸ CX 94 at HOU017570 -71 (analyzing the markets in which PDM participated, including “Domestic Petroleum, Petrochemical, Industrial Gas, & Chemical” and specifically discussing refinery and tank projects); *Id.* at HOU017572–73 (discussing pipeline expansion and terminal projects). See also CX 850 at HOU019220 (tracking 2000 sales in the following market segments: Aerospace, LPG, Liquid Elements of Air (LIN/LOX), LNG, Thermal Energy Storage, Wastewater, Power, Terminals, Petroleum/Chemical, and Transportation); CX 1033 at 3-4,

involvement in the petroleum and petrochemical industries and states that the PDM assets would provide CB&I with “substantial exposure to [the] upturn in [the] hydrocarbon industry.”⁹ This evidence suggests not only that PDM was actively engaged in the types of complementary products Respondents seek to exclude but also that CB&I specifically evaluated PDM’s involvement in these areas and concluded that acquiring PDM assets would enhance their competitive position in them.

In addition, the business practices of both PDM and CB&I suggest that the Relevant Business definition should include assets related to the complementary products. As we have discussed, a single business unit of PDM constructed both the Relevant Products and the complementary products prior to the acquisition.¹⁰ Similarly, CB&I’s Industrial Division, which is responsible for designing and constructing the Relevant Products, was engaged in designing and building the types of complementary projects Respondents identify.¹¹ Once CB&I acquired the PDM assets, it integrated all of the PDM assets into the Industrial Division, which continued to design and construct projects for both the Relevant Products and those complementary products Respondents seek to exclude.¹² Moreover, CB&I’s CEO testified that within the Industrial Division, CB&I’s engineers work on both projects related to the Relevant Markets and other projects, including flat bottom tanks to store hydrocarbons and flat bottom tanks to serve

(CB&I 10-K noting that PDM “specialize[d] in the design and engineering, fabrication and construction of products for the petroleum, petrochemical, cryogenic, liquified natural gas, defense and aerospace industries, as well as water storage and treatment facilities”).

⁹ CX 32 at 1.

¹⁰ See *e.g.*, Tr. at 2906 (Scorsone [former head of PDM’s EC division and current head of CB&I’s Industrial Division] testifying that PDM’s EC division “constructed facilities for the petroleum, petrochemical, natural gas, and aerospace business”).

¹¹ Tr. at 4843-44 (Scorsone testifying that in addition to the Relevant Products, CB&I’s Industrial Division and PDM’s EC division “constructed virtually any type of structure out of plate steel,” including “ambient-temperature flat-bottom storage tanks, pressure spheres, field-erected pressure vessels, specialty-type plate structures, bins, hoppers, aqueducts, [and] wind tunnels”). See *also* Tr. at 4807 (Scorsone testifying that CB&I’s “tank-building resources are fluid throughout all of [CB&I’s] organizations,” including the Industrial and Water Divisions).

¹² See CX 1033 at 44 (CB&I 10-K noting that PDM’s EC and Water Division assets have been integrated with CB&I’s business units); Tr. at 4081 (Scorsone noting that CB&I hoped to achieve efficiencies by eliminating duplication in fabrication capability, construction equipment and tools, sales people, sales offices, and other facilities).

water needs.¹³ This evidence, coupled with the fact that projects in the Relevant Markets “seldom come along,”¹⁴ supports the conclusion that the complementary products provide the necessary scale of work to ensure that an acquirer can compete effectively. This conclusion is further supported by the testimony of CB&I’s CEO, who stated that CB&I would not reduce its engineering capacity or its project manager force in response to a 25% loss of its business in the Relevant Markets because of the “small amount of activity required to respond to the market[s].”¹⁵

We are mindful that the complementary products identified by Respondents comprise a significant component of CB&I’s business.¹⁶ However, Respondents have not convinced us that these assets are unnecessary to a divestiture of an entity that will be economically viable and a competitive force in the Relevant Markets.¹⁷ Without such evidence, we cannot narrow the scope of assets subject to divestiture solely to those assets used in the Relevant Markets and water tank business – especially where we have found that other evidence demonstrates that the complementary assets may be necessary to allow an acquirer to compete effectively in the Relevant Markets. This Order clarifies, however, that if the acquirer already has the necessary

¹³ Tr. at 4058.

¹⁴ Tr. at 4159.

¹⁵ Tr. at 4159. We recognize that at least one of the Relevant Markets – the LNG tank Market – has seen an increase in demand since the acquisition. However, Respondents have presented no evidence to suggest that this increased demand has diminished the need for an LNG supplier to have the ability to perform other types of projects to have a sufficient scale of business.

¹⁶ CX 1033 at 41 (“Projects for the worldwide petroleum and petrochemical industry accounted for approximately 60-70% of [CB&I’s] revenues in 2001, 2000, and 1999.”)

¹⁷ We recognize that the lines of business that the Order requires CB&I to divest may not precisely match those it acquired from PDM. For example, it appears that PDM did not perform turnaround work or construct refinery vessels. CX 108 at PDM-HOU00518. Similarly, it does not appear that PDM was engaged in building “offshore structures,” another type of asset identified by Respondents’ brief. Respondents’ Brief at 4. However, the record establishes that PDM was engaged in a broad range of products and services in the same industries that CB&I identifies as problematic and that these other projects may be necessary to provide an acquirer with a viable scale of business. CB&I has not provided any evidence on the amount of CB&I’s revenues that these assets represent, or any evidence as to the specific hardship that a divestiture of these assets would create for CB&I. Consequently, CB&I has not provided specific evidence to persuade us that these assets are unnecessary for an effective divestiture. We therefore have not excluded these assets from the scope of the Order.

assets to compete effectively, CB&I need not include the complementary assets.¹⁸

In addition to their more general objections to the Order's scope, Respondents argue that some of the Order's language must be modified because it sweeps in a whole range of products that are "unnecessary for an effective and complete divestiture."¹⁹ Specifically, Respondents take issue with the part of the Order that requires CB&I to divest certain assets related to any "industrial process system, including but not limited to any digester, absorber, reactor, and tower."²⁰ According to Respondents, the term "industrial process system" must be limited to the tank business to avoid overreaching.

We find that this argument reads the Order's divestiture requirement far too broadly. The "including but not limited to" language in the Order²¹ suggests CB&I need not necessarily include those assets not enumerated by the Order so long as the divestiture package allows an acquirer to compete effectively in the Relevant Markets. To the extent Respondents are arguing that the Order should not include assets beyond those used in the Relevant Markets, we must reject their argument for the reasons similar to those we have just discussed. The record establishes that PDM participated in the types of industrial process systems enumerated in the Order's language. Furthermore, the evidence discussed above makes clear that an acquirer needs the capability to perform projects other than those in Relevant Markets to compete effectively in those markets. Given these facts, we are unpersuaded that the assets in question are unnecessary for an effective divestiture and the inclusion of those assets will hinder CB&I's ability to compete in the Relevant Markets. Respondents have not provided sufficient evidence to establish that the Order's language includes unnecessary assets or explained any specific concerns related to the divestiture of those assets. We therefore deny Respondents' request to modify the Order.²²

¹⁸ ¶ IV.A. of the Final Order allows the acquirer and monitor trustee to agree to exclude any of the complementary assets if they find them unnecessary for the acquirer to compete effectively in the Relevant Markets.

¹⁹ Respondents' Brief at 7.

²⁰ Final Order, ¶ I.P, Respondents' Brief at 6-7

²¹ See Final Order, ¶ I.P.

²² In addition, Respondents argue that the Order should be modified to exclude "steel plate fabrication and specialty structures" not relevant to the tank business. Respondents' Brief at 7. Respondents admit, however, that these types of assets were acquired from PDM. *Id.* Although we found that the ability to fabricate nine percent nickel steel was not an entry barrier to the LNG tank market, we noted that such facilities may be helpful in other relevant Markets. Op. at 41 n.249. Because Respondents have not presented any evidence to suggest that those types of assets acquired from PDM are not necessary to compete in the Relevant Markets, we

Finally, Respondents argue that the Order should be clarified to exclude the divestiture of assets outside of the United States. Respondents rightly point out that the Commission’s Opinion focused on competition in the U.S. markets, and we agree that U.S. assets are crucial to competing in the U.S. Product Markets. We therefore clarify that the focus of the Opinion and Order are CB&I’s U.S. assets. However, the possibility exists that some foreign assets may be necessary for an acquirer to compete effectively. For example, in its analysis of the PDM acquisition, CB&I noted that PDM’s EC international operations comprised approximately 45% of the division’s revenues.²³ We have thus modified the Order to include language that ensures such assets are available if they are needed to ensure the viability of the Relevant Business but makes clear that CB&I need include foreign assets only to the extent they are necessary for an acquirer to compete in the Relevant Markets. We emphasize that CB&I need not equally divide its foreign assets into the two stand-alone divisions it is required to create under the Order.

III. Respondents’ Alternative Suggestions

As an alternative to the Order, Respondents suggest that the [

]²⁴ It is unclear from this language exactly what package of assets Respondents propose for a divestiture – especially where PDM was engaged in the design and construction of many of the assets that Respondents argue should be excluded from the definition of Relevant Business.²⁵ Furthermore, the remedy in this case must provide the acquirer with the

must reject Respondents’ argument.

²³ CX 32 at 3.

²⁴ Respondents also argue that the tangible assets described in the Offering Memorandum – three U.S. tool and construction equipment facilities, one fabrication plant, and related equipment – constitute the assets necessary to compete in the United States. Respondents’ Brief at 4. For the reasons we discussed at length in both the Opinion and Reconsideration Order, we reject Respondents’ argument. Respondents argument misses that the crucial element for success in the Relevant Markets is experience, including but not limited to having specialized procedures in place to meet the unique challenges of building the relevant products, the ability to access knowledgeable supervisors and local labor, and expertise in dealing with complex regulatory requirements. *See generally*, Op. at 33-49. Reconsideration Order at 18-21. We therefore find that the divestiture suggested by Respondents will not restore the competition from the acquisition and thus decline to narrow the Order’s scope in this way.

²⁵ [

mix of assets necessary to compete effectively in the Relevant Markets. Because CB&I acquired the PDM assets nearly four and a half years ago and has since integrated those assets into its own operations, we cannot be certain that [] will provide an acquirer with the mix of assets necessary to compete with CB&I and thus to adequately restore the competition lost from the acquisition.²⁶

Nonetheless, we take Respondents' point that [

] ²⁷ The possibility exists that the acquirer will already be engaged in some of the lines of business required to be divested under the Order – or in other complementary lines of business – and thus may not need to acquire all assets within the scope of the Order. We therefore have included a provision that allows the complementary assets to be excluded if the acquirer and monitor trustee find them unnecessary and agree to exclude them.²⁸ This provision should ensure that the package of assets necessary to restore competition is not overbroad.

Accordingly,

IT IS ORDERED THAT Respondents' Motion to modify the Order to the extent that it seeks to narrow the scope of the Relevant Business Definition is **DENIED**; and

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²⁶ The Commission has recognized that assets acquired in a transaction do not necessarily form the basis for an effective divestiture. In analyzing the divestiture in *MSC.Software*, for example, the Commission reasoned that “[d]ivestiture of the acquired assets alone would not restore the competitive conditions that existed before the acquisitions (the status quo ante), because the 3-year old UAI and CSAR codes are no longer as commercially viable as they were when MSC acquired them. Licensing of the current version of *MSC.Nastran* is required to give the acquirer or acquirers what UAI and CSAR formerly had: an up-to-date product upon which to base sales and future development efforts.” *MSC.Software Corp.*, Dkt. 9299, (Aug. 14, 2002)(Analysis to Aid Public Comment), available at <<http://www.ftc.gov/os/2002/08/mscsoftwareanalysis.htm>>.

²⁷ []

²⁸ See Final Order, ¶ IV.A.

IT IS FURTHER ORDERED THAT Respondents' Motion to clarify the Order to exclude CB&I's foreign assets is **GRANTED** to the extent it seeks clarification that ¶ I.P. of the Final Order does not require CB&I to equally divide its foreign assets; and

IT IS FURTHER ORDERED THAT Paragraph III.A of the Order is modified to provide that "Within ninety (90) days after the date on which the Order becomes final, CB&I shall reorganize its Relevant Business into two independent, stand-alone operating divisions or subsidiaries, respectively New PDM and New CB&I, each fully, equally, and independently engaged in all aspects of the Relevant Business except that any foreign assets employed by CB&I in the Relevant Business need be allocated to New PDM or New CB&I only to the extent such assets are necessary to enable New PDM and New CB&I to engage fully, equally, and independently in all aspects of the Relevant Business and need ultimately be divested by CB&I only to the extent such assets are necessary to enable the acquirer of New PDM or New CB&I to compete effectively in all aspects of the Relevant Business"; and

IT IS FURTHER ORDERED THAT the monitor trustee include in his final report to the Commission concerning the sale of the divested assets a recommendation with respect to whether any foreign assets, as described in Paragraph III.A, as modified, should be included in the divested assets in order to accomplish the purpose of this Order.

By the Commission.

Donald S. Clark
Secretary

ISSUED: August 30, 2005