

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



In the Matter of )  
 )  
CHICAGO BRIDGE & IRON COMPANY N.V., )  
 )  
a foreign corporation, )  
 )  
CHICAGO BRIDGE & IRON COMPANY, )  
 )  
a corporation. )  
 )  
and )  
 )  
PITT-DES-MOINES, INC., )  
 )  
a corporation. )

**PUBLIC RECORD**

Docket No. 9300

**RESPONDENTS' MOTION FOR LEAVE TO SEEK FOREIGN EVIDENCE**

Pursuant to Rule 3.36 of the Federal Trade Commission's Rules of Practice (FTC Rules"), 16 C.F.R. § 3.36, Respondents Chicago Bridge & Iron Company N.V., Chicago Bridge & Iron Company (collectively known as "CB&I"), and Pitt-Des Moines, Inc. ("PDM") hereby move this Court for leave to seek foreign evidence. In support of this motion, Respondents state as follows:

**I. FOREIGN EVIDENCE IS ESSENTIAL TO RESPONDENTS' DEFENSE.**

1. The Federal Trade Commission ("Complaint Counsel") has sued Respondents on the theory that the merger between Chicago Bridge and Iron and Pitt-Des Moines will have anticompetitive effects in six industrial storage tank markets in the United States. The Complaint defines each type of tank at issue as a product market unto itself (Complaint at ¶¶ 9-39), and defines the geographic market as the entire United States.

(Complaint at ¶ 17) CB&I in its Answer has denied these allegations and asserts the existence of an international market.

2. In addition to the factual dispute over whether the market(s) at issue are international in scope, the parties also disagree as to the ability of foreign companies to enter the United States and sell the tanks at issue in this case. For example, the Complaint states that the acquisition of PDM by CB&I will leave CB&I as the only seller of LNG tanks in the United States. (See Complaint at ¶ 23) However, CB&I believes that several foreign companies, including Technigaz, Technip and Entrepouse (all of France), Skanska/Whessoe (of the United Kingdom and Sweden), TKK (of Japan) and Daewoo (of South Korea) not only can sell LNG tanks in the United States, but that they are actively pursuing LNG tank jobs in this country. CB&I maintains that this competitive activity, which has arisen since the consummation of this acquisition on February 8, 2001, establishes the ease and effectiveness of entry under Section 3 of the 1992 Horizontal Merger Guidelines. Evidence concerning the various factors under which entry is evaluated is thus a critical focus of discovery.

3. On March 14, 2002, Complaint Counsel disclosed its investigation file, **Redacted Pursuant to Protective Order** Based on these recently-disclosed materials, it has become apparent that Complaint Counsel will present **Redacted Pursuant to Protective Order** suggesting that foreign companies cannot effectively compete with CB&I in the sale of these industrial storage tanks.

4. Some of the **Redacted Pursuant to Protective Order** make clear that this point will be a key issue at trial. For example:

**Redacted Pursuant to Protective Order**

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5. Complaint counsel apparently plans to rely primarily on these **Redacted Pursuant to Protective Order** for its argument that foreign companies cannot compete effectively in the domestic cryogenic storage tank market. However, these statements are little more than speculation and conjecture.

**Redacted Pursuant to  
Protective Order**

Redacted Pursuant to  
- Protective Order

In reality, the only way to

determine the ability of these foreign companies to effectively compete in the U.S. is to *obtain evidence directly from those foreign companies*. Respondents have identified a significant number of foreign companies that may have evidence relating to their ability to compete in the U.S., including:

- **Skanska/Whessoe** -- Skanska/Whessoe is a company based in the United Kingdom. It has built dozens of LNG tanks and other similar storage facilities throughout the world. It is also currently bidding on LNG jobs in the United States, such as an LNG facility near Hackberry, Louisiana being built by Dynegey.
- **TKK** -- Tokyo Kanetsu K.K (TKK) is a company based in Japan. TKK has built dozens of LNG tanks in Japan, and it has recently entered into a joint venture with American Tank & Vessel (AT&V) to pursue LNG opportunities in the U.S. That joint venture is currently bidding on the Dynegey project.
- **Entrepose** -- Entrepose is a French company that has built LNG tanks throughout the world. Entrepose has made inquiries about LNG projects in the U.S.
- **Bouygues/Technigaz** -- Technigaz is a major worldwide supplier of LNG tanks and import terminals. Technigaz recently announced a joint venture with San Antonio-based H. B. Zachry to design and construct LNG jobs in the United States. The Technigaz/Zachry venture is also currently bidding on the Dynegey project.
- **Technip** -- The Technip Group of France specializes in LNG facilities throughout the world. In recent weeks, the company has aired radio advertisements in the Houston area to recruit LNG engineers and in the last month was awarded a preliminary engineering and design contract for an LNG import terminal in Freeport, Louisiana being built by Cheniere Energy, Inc..
- **Daewoo** -- Daewoo, a construction company based in South Korea, has been the dominant contractor in the design and construction of LNG terminals and gas main trunklines in Korea over the past decade. Daewoo has announced a partnership with S&B Engineers and Constructors, Ltd. -- a Houston firm -- to jointly pursue LNG construction jobs in North America.
- **MHI** -- Mitsubishi Heavy Industries (MHI) is another global player in the LNG construction business. Recently, the company has competed for LNG jobs internationally, winning a major project in Qatar from a variety of other bidders, including CB&I. The company has also pursued LNG jobs in the Western Hemisphere in Canada and the Bahamas.

- **IHI** -- Ishikawajima-Harima Heavy Industries Co., Ltd. (IHI), is a self-proclaimed world leader in the construction of LNG receiving terminals and tanks. Additionally, IHI is involved in every kind of cryogenic material, including liquefied petroleum gas (LPG), liquefied natural gas (LNG), liquefied ammonia, liquefied oxygen (LOX), liquefied nitrogen (LN2) and liquefied hydrogen (LH2). It has previously sought business in the U.S.
- **BSL** -- BSL Industries of France is one of the largest worldwide suppliers of LIN/LOX tanks. BSL is currently teamed with a U.S. tank constructor -- Bay Tank -- and they are pursuing a LIN/LOX job for Air Liquide in the U.S.

6. Based on the **Redacted Pursuant to Protective Order** CB&I will need to take evidence from these

foreign companies regarding at least the following factual issues:

- What are each of the foreign companies' plans for doing business in the relevant product markets in the United States?
- Why do the foreign companies believe they can compete effectively against CB&I in the United States?
- To what extent would foreign companies need to subcontract to U.S. companies in building relevant storage tanks in the United States?
- What expertise do the foreign companies have in working with the codes, statutes and regulations that are applicable in the U.S.?
- How will the foreign companies manage the field erection process and the management of local construction workers?
- What cost advantages do the foreign companies have over CB&I?
- To what extent are foreign companies familiar with U.S. design codes, and to what extent can foreign companies build storage tanks that meet these codes?
- What are the sunk costs of pursuing jobs in the U.S.?

**II. THE FOREIGN EVIDENCE SOUGHT BY CB&I IS OBTAINABLE VIA THE HAGUE CONVENTION, AND IS UNLIKELY TO BE OBTAINED FROM OTHER SOURCES.**

7. Respondents seek leave to serve each of the companies listed above with a subpoena, seeking to obtain testimonial and documentary evidence on the issues set forth above.

In order to obtain approval to issue subpoenas in a foreign country, Respondents must show this

Court that the subpoenas would satisfy Commission Rules of Practice 3.34 and 3.37. See F.T.C. Rule 3.36. Specifically, Respondents must make a specific showing that: (a) the material is reasonable in scope; (b) the material falls within the limits of Rule 3.31(c)(1); (c) the information sought cannot be reasonably be obtained by other means; (d) that there is a good faith basis for believing that the discovery or evidence requested would be permitted by treaty; (e) any additional procedural requirements have been or will be met before the subpoena is served. See *id.* Each of these requirements is met here.

(a) *Particularity* -- Each subpoena would satisfy Rule 3.34's prescription that it "specify with reasonable particularity the materials to be produced," as it would seek evidence on a limited number of specific topics, including those set forth in paragraph 6, *supra*.

(b) *Reasonableness of process* -- Each subpoena will also specify a "reasonable time, place, and manner of making the inspection and performing the related acts." See F.T.C. Rule 3.37. CB&I will work with each subpoenaed party to minimize the inconvenience associated with this process.

(c) *Reasonableness in scope* -- The material sought in each subpoena would be reasonable in scope, as the requests for information would be limited to the categories set forth above. These categories of information are directly relevant to the assertions made in **Redacted Pursua**  
**Protective Ord**  
by Complaint counsel.

(d) *Material sought is highly relevant* -- As set forth in detail in Paragraphs 1-6, the information sought by these subpoenas is highly relevant as it will establish the ability of foreign firms to compete in the relevant markets, and therefore the absence of competitive harm from the Acquisition.

(e). *Material sought is not available via other means* -- The material sought in these foreign subpoenas is not available via other means. Information of the type sought by these subpoenas is certainly not publicly available, nor is it likely to be available from the files of potential domestic competitors. While some of these foreign firms do have U.S. subsidiaries or joint venture partners<sup>3</sup>, it is not at all clear that these subsidiaries or partners have any involvement in efforts to enter the field-erected cryogenic tank market in the United States. Moreover, Respondents simply do not have the luxury of taking the time to determine whether the information in the possession of these subsidiaries prior to serving discovery on their foreign parents or joint venture partners. The deadline for issuing subpoenas in this case is May 5, 2002 (See Scheduling Order at 1.) Even if Respondents were to serve these U.S. subsidiaries/joint<sup>3</sup> venture partners today, it is unlikely that Respondents could receive a response from the subpoenaed party, determine whether (based on that response) the foreign parent has relevant information, request leave from this Court to seek foreign evidence, and work through the laborious provisions of the Hague Convention to obtain that evidence by May 5. It is probably not possible to even obtain the foreign discovery by June 7 given the cumbersome nature of the Hague Convention procedures. The time pressures on Respondents are further increased by the fact that fact discovery is set to close on June 7. It is probably not possible to even obtain the foreign discovery by June 7 given the cumbersome nature of the Hague Convention procedures. (See *id.* at 2.)

(f). *Respondents believe in good faith that the evidence sought is obtainable via international law* -- Respondents have a good faith basis to believe that their proposed subpoenas would be permitted by treaty, law, custom or practice in the country from which the evidence is

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<sup>3</sup> For example, CB&I believes that Bouyguez/Technigaz has a U.S. subsidiary called Doris Engineering, and will certainly subpoena that entity as soon as possible. However, CB&I does not know whether this entity is, in any



sought. Specifically, the Hague Convention -- an international treaty -- governs efforts to secure evidence for use in litigation. See Hague Convention, Nov. 15, 1965, art. 1 *et seq.*, 20 U.S.T. 361 (hereinafter "Hague Convention"). Most foreign jurisdictions do not recognize civil or pretrial discovery as it exists in the United States. Instead, foreign countries permit evidence to be obtained "for use at trial." The companies CB&I seeks evidence from are located in countries that have agreed to abide by the terms of the Hague Convention. Specifically, the companies set forth in paragraph 4 above either reside or have offices in France, Japan, Sweden, South Korea, or the United Kingdom, all of whom have signed and are members to the Convention. See Hague Convention, at Annex to the Convention.

8. In general, for countries that have adopted the Hague Convention, the international discovery process can be summarized as the following government to government transaction: a U.S. judicial proceeding (i.e., this Court) makes a request to the U.S. government, who in turn makes a request to its foreign government counterpart, who likewise makes a request to its judicial equivalent, who then decides whether or not to grant the request and order the discovery on a particular entity or person. See Hague Convention, at art. 3-6.

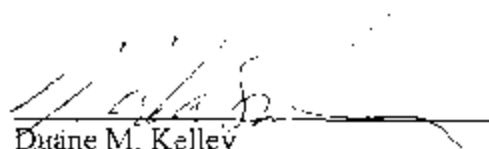
9. The process of securing evidence via the Hague Convention can be costly and time-consuming. For that reason, Respondents have not yet prepared "letters of request" -- the documents that would need to be signed by the Commission and sent to the appropriate foreign authority. Should the Court grant Respondents leave to obtain evidence from foreign companies, Respondents will prepare the necessary papers in conjunction with local counsel in each of the relevant countries. In this way, Respondents can assure the Court that they in good faith believe that the completed letters of request will be honored by each relevant foreign country.

10. As this request for foreign evidence satisfies Rule 3.36, Respondents respectfully ask this Court to grant its request to serve subpoenas on Skanska/Whessoe, TKK, Entrepoc, Bouygues/Technigaz, Dacwoo, MHI, IHI, Technip, and BSL.

Dated: Washington, D.C.

April 10, 2002

Respectfully submitted,



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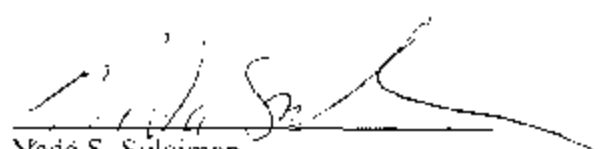
**CERTIFICATE OF SERVICE**

I, **Nada S. Sulaiman**, hereby certify that on this tenth day of April, 2002, I served a true and correct copy of: Respondents' Motion for Leave to Seek Foreign Evidence (Confidential Subject to Protective Order), by hand delivery upon:

The Honorable James P. Timony  
Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W.  
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Nada S. Sulaiman

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**PROPOSED ORDER**

UPON CONSIDERATION of the Respondents' Motion for Leave to Seek Foreign Evidence filed on April 4, 2002, and any opposition thereto, and being fully advised in the premises, it is hereby ordered that, because I find that Respondents' have satisfied the requirements under Rules 3.34, 3.37, and 3.36 of the FTC Rules of Practice, Respondents motion is hereby GRANTED.

ORDERED:

\_\_\_\_\_  
James P. Timony  
Administrative Law Judge

Dated: April \_\_, 2002