

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

**Before the Honorable D. Michael Chappell
Administrative Law Judge**

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

**MOTION FOR *IN CAMERA* TREATMENT OF TRIAL TESTIMONY
OF DAVID KAMRATH**

On behalf of third party witness David Kamrath, and his employer Air Liquide Process and Construction, Inc. (“ALPC”), we respectfully request that the Court accord *in camera* treatment to specific portions of Mr. Kamrath’s testimony, which is expected to occur on November 21, 2002. This motion sets forth the nature of the specific testimony for which *in camera* treatment is requested, and the clearly defined, serious injury that would result should such testimony be placed on the public record.

Counsel for the Commission has indicated that it intends to question Mr. Kamrath on matters related to a specific, field erected LIN/LOX tank project (the “Freeport Project”). The Freeport Project was discussed briefly in Mr. Kamrath’s deposition, taken on June 27, 2002, but ALPC had not, as of that date, awarded the project to a specific

supplier. Kamrath Deposition, p. 21, lines 2-18. Complaint counsel, however, has advised Mr. Kamrath and his counsel that they intend to question Mr. Kamrath at trial on events subsequent to June 27, 2002, including: (a) specific prices quoted by each bidder on the project in question; (b) Air Liquide's reasons for selecting the specific bidder ultimately chosen for the project, and (c) Air Liquide's experience with the contractor for the project to date, which project is on-going. These specific areas of inquiry will require Mr. Kamrath to disclose project-specific pricing information with respect to a current project. Further, Mr. Kamrath's testimony will provide specific information about the competitive performance and capabilities of one supplier, which (a) if known to that supplier's competitors, likely would provide such competitors with significant competitive advantage and (b) if known by the supplier, could be used by that supplier in its on-going relationship with ALPC on the Freeport Project. Finally, Commission counsel intends to elicit from Mr. Kamrath statements related to Air Liquide's competitive strategies for procuring field erected LIN/LOX tanks in the future, information that Air Liquide maintains in the utmost confidence within its organization.

Declaration of Mark Richard ¶ 6.

Under Section 3.45(b) of the Commission's Rules, the standard for granting *in camera* treatment requires a finding that public disclosure "will likely result in a clearly defined, serious injury to the person, partnership or corporation requesting *in camera* treatment." Further, the determination of "clearly defined, serious injury" is to be made on the basis of the standards articulated in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961), and *Bristol-Myers Co.*, 90 F.T.C. 455,456 (1977), as modified by *General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

In *H.P.Hood & Sons*, the Commission noted that the required showing of injury “may consist of extrinsic evidence or, in certain instances, may be inferred from the nature of the documents themselves.” 58 F.T.C. at 1188. In this case, the injury is documented in the attached Declaration of Mark Richard,¹ and may also be inferred from the nature of the anticipated testimony. The essence of complaint counsel’s case is that the acquisition of Pitt-Des Moines by Chicago Bridge & Iron has reduced competition for field erected LIN/LOX tanks, among other products. Mr. Kamrath’s expected testimony concerning the specific prices bid by CB&I, as well as by the three other bidders for ALPC’s Freeport Project, would provide CB&I with vital information that would adversely affect ALPC’s competitive position in procuring such tanks in the future. Richard Declaration, ¶¶ 6 & 8. Equally sensitive is Mr. Kamrath’s expected testimony with respect to the Freeport project itself, and the current contractor’s performance there. Neither the current contractor, nor CB&I, nor any other present or prospective contractor of field erected LIN/LOX tanks should have access to current project performance, or to ALPC’s views on contractors that ALPC would consider for future projects – both subjects that complaint counsel has indicated to Mr. Kamrath that it intends to pursue. As a consequence, CB&I counsel may be expected to pursue such subjects on cross-examination, and both parties can be expected to address such testimony in post-trial briefs.

Bristol-Myers Co. makes it clear that part of movant’s burden is to show that the information is secret and material to the applicant’s business. Using the factors set forth in the Restatement of Torts, as the Commission did in *Bristol-Myers Co.*, we note the

¹ Mr. Kamrath, who would be the logical person to provide the supporting declaration, is currently traveling on business outside the United States, and is unavailable at this time.

following: (a) the information that Mr. Kamrath would provide is not known outside of ALPC's business; (b) even within ALPC, the information is known only to Mr. Kamrath and Mr. Richard, and to Julie Heil, Project Manager; David Powell, Mechanical Engineer; Marc Ragouilliaux, Subsystems Manager and Jeff Lambert, Construction Manager (c) all such persons are under strict instructions not to disclose any of the information in question to any additional persons, whether inside or outside the company; and (d) the information could not be acquired by, and certainly not duplicated by, others except upon breaching the confidentiality obligations established within ALPC. Richard Declaration ¶¶3-7. Further, we note that the information relates to current and future competitive activity, and therefore is of the utmost value at this time. *Cf. General Foods Corp.* 95 F.T.C. at 354 (most of General Foods' information was more than three years old).

Finally, the general public policy in favor of disclosure of information in these proceedings must be weighed against the policy of the antitrust laws not to allow competitors to use the process to acquire present and future information that has the potential to substantially affect competition in their industry. *See, e.g., U.S. v. United States Gypsum Co.*, 438 U.S. 422, 443 (1969) ("Exchanges of current price information, of course, have the greatest potential for generating anticompetitive effects and although not per se unlawful have consistently been held to violate the Sherman Act."). Mr. Kamrath has testified in his deposition that competitive bidding is important to ALPC to obtain fair pricing for field erected LIN/LOX tanks. *See, e.g.,* Deposition of David Kamrath, Page 70, lines 20-25; Page 71, lines 1-20. Public disclosure of Mr. Kamrath's testimony would seriously undermine ALPC's bargaining position with such vendors in

the future, to the detriment of ALPC. Richard Declaration ¶¶ 8-9. Further, neither Mr. Kamrath nor ALPC would be willing to provide information of this sensitive nature in future proceedings, except pursuant to *in camera* treatment.

For the foregoing reasons, we respectfully request that the Court issue an order, in the form attached, granting *in camera* treatment as follows:

- (1) Material subject to *in camera* treatment: Trial testimony of David Kamrath related to Air Liquide Process & Construction's award of the Freeport Project field erected LIN/LOX tank, its subsequent experiences with the contractor, and its future procurement strategies;
- (2) Reasons for *in camera* treatment: Such information is not now publicly known, is material to ALPC's business, is of substantial value in light of its age, cannot be duplicated or discovered by third parties, and the public disclosure of such information would jeopardize the Commission's ability to obtain important, truthful and candid statements from witnesses in future proceedings;
- (3) Duration of *in camera* treatment: Five (5) years from the date of testimony. This period is reasonable, considering the early phase of the Freeport Project, its expected duration, and the low level of current and near term future projects for field erected LIN/LOX tanks, which will produce only a few competitive bid opportunities over the five (5) year period. Richard Declaration ¶9.

Copies of this motion, and of the proposed order, were furnished to Steven Wilensky, counsel for the Commission, and to Jeffrey Leon, counsel for Chicago Bridge & Iron, and on November 11, 2002, each indicated its consent to the filing of this motion, and to the relief requested in the proposed order.

Respectfully submitted,

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November 13, 2002

Certificate of Service

I, Robert A. Lipstein, hereby certify that a copy of the foregoing Motion for *In Camera* Treatment was served this 13th day of November, 2002, as follows:

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