

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



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

ORDER ON RESPONDENTS' MOTION TO STRIKE WITNESSES

I.

On September 26, 2002, Respondents (Chicago Bridge and Iron ("CB&I") and Pitt-Des Moines ("PDM")) filed a Motion to Strike. On October 3, 2002, Complaint Counsel filed its opposition. Complaint Counsel subsequently filed an addendum to its opposition on October 4, 2002. For the reasons set forth below, the motion is GRANTED in part and DENIED in part.

II.

Respondents' motion seeks an order preventing Complaint Counsel from calling as witnesses at trial or otherwise presenting testimony from three fact witnesses on the grounds that the three proposed witnesses were not timely disclosed in accordance with the scheduling orders entered in this matter. The identities of these three witnesses were designated as confidential information by the parties in the confidential versions of their pleadings and need not be revealed in this Order for purposes of ruling on Respondents' motion. They are referred to throughout this Order as the first, second, and third witnesses, in alphabetical sequence, which is also the sequence in which they were first disclosed to Respondents and the sequence in which they are described in Respondents' motion.

Complaint Counsel asserts that there is good cause for permitting Complaint Counsel to present the testimony of these three CB&I customer witnesses who, only through discovery, Complaint Counsel learned may be able to provide relevant information.

III.

Commission Rule 3.21 requires Administrative Law Judges to enter a scheduling order that “establishes a scheduling of proceedings, including a plan of discovery” 16 C.F.R. § 3.21(c)(1). Pursuant to 16 C.F.R. § 3.21(c)(1), Additional Provision Number Four of the Scheduling Order, entered on February 20, 2002, states that “[t]he final proposed witness list may not include additional witnesses not listed in the preliminary or revised preliminary witness lists previously exchanged unless by order of the Administrative Law Judge upon a showing of good cause.” All subsequent revised scheduling orders state that the “Additional Provisions” of the February 20, 2002 Scheduling Order remain in effect. Under the Commission’s Rules of Practice, the Administrative Law Judge may grant a motion to extend any deadline or time specified in the prehearing scheduling order “only upon a showing of good cause.” 16 C.F.R. § 3.21(c)(2).

Pursuant to the Third Revised Scheduling Order, entered on September 10, 2002, Complaint Counsel provided its final proposed witness list by September 16, 2002. Complaint Counsel’s final proposed witness list included three additional witnesses who were not designated on Complaint Counsel’s preliminary or revised witness lists. Complaint Counsel was required to provide its preliminary witness list on April 23, 2002 and its revised witness list on May 28, 2002. Complaint Counsel informed Respondents of its intent to add one of these three additional witnesses on September 5, 2002, and of its intent to add the other two witnesses on September 13, 2002. Discovery closed in this case on September 6, 2002.

Complaint Counsel did not file a motion to add witnesses, demonstrating good cause, as required by the Scheduling Order. Rather, in response to Respondents’ motion to strike, Complaint Counsel argues that it has good cause for adding these witnesses. Specifically, Complaint Counsel asserts that the following circumstances, taken together, demonstrate good cause:

- Complaint Counsel became aware of the important potential information from these individuals only recently through discovery and identified these individuals to Respondents as soon as Complaint Counsel reached an opinion that it would likely include these witnesses in its final witness list.
- Complaint Counsel could not have known the importance of the first witness until August 27, 2002, because Respondents delayed production of certain e-mail files, responsive to Complaint Counsel’s Second Request for Production of Documents, served on June 7, 2002, until August 27, 2002. Complaint Counsel promptly reviewed the August 27, 2002 document production and discovered two e-mail

communications, dated July 17, 2002, from the first proposed witness to CB&I. These e-mail communications alerted Complaint Counsel that the first witness is knowledgeable concerning current competitive conditions in the LNG tank market.

- Complaint Counsel could not have known the importance of the second witness until recently. The second witness is a consultant who is advising a U.S. firm on the purchase of a LNG tank for construction in the United States. Complaint Counsel became aware of him at the end of July 2002, based on a telephone conversation with a third party. Complaint Counsel first interviewed the second witness on July 26, 2002. Through a declaration, this witness states that in April 2002, he requested bids for the project. Complaint Counsel states that the subsequent responses to these bids could not have been known to Complaint Counsel when Complaint Counsel submitted its Preliminary Witness List (April 22, 2002) or its Revised Witness List (May 28, 2002).
- Complaint Counsel did not know about the third witness until Complaint Counsel had a conversation in early September 2002 with a third-party witness who informed Complaint Counsel that during a 1998 bid contest for a LNG tank peak-shaving plant, two foreign LNG tank constructors submitted bids that were higher than the bids submitted by CB&I and PDM. The third witness works for a company that received bids from CB&I and PDM.

IV.

Good cause is demonstrated if a party seeking to extend a deadline demonstrates that a deadline cannot reasonably be met despite the diligence of the party seeking the extension. *Bradford v. Dana Corp.*, 249 F.3d 807, 809 (8th Cir. 2001); *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998); Fed. R. Civ. P. 16 Advisory Committee Notes (1983 amendment). For each of these three witnesses, Complaint Counsel's only argument is that it didn't know about this person or his importance until recently.

Since the original Scheduling Order was entered on February 20, 2002, the scheduling order has been revised three times. In the February 20, 2002 Scheduling Order, Complaint Counsel was required to provide its preliminary witness list on April 23, 2002, and its revised witness list on May 25, 2002. Discovery was scheduled to close on June 7, 2002. In the First Revised Scheduling Order, entered May 6, 2002 upon a motion filed jointly by both parties, the dates for preliminary and revised witness lists remained substantially the same, but the close of discovery was extended by one month. The First Revised Scheduling Order required Complaint Counsel to provide its preliminary witness list on April 23, 2002 and its revised witness list on May 28, 2002. Discovery was scheduled to close on July 8, 2002. In the Second Revised Scheduling Order, entered on June 18, 2002 upon Respondents' motion, which was opposed by Complaint Counsel, the dates for preliminary and revised witness lists remained the same, but the

close of discovery was extended by two additional months, to September 6, 2002. The Third Revised Scheduling Order, entered on September 10, 2002, did not change dates for witness lists or the close of discovery.

The parties, in moving for the first revision of the scheduling order, requested an extension for the close of discovery, but did not seek extensions of time for providing preliminary and revised witness lists. Complaint Counsel, in opposing Respondents' motion for the second revision, did not argue that discovery should not be extended because Complaint Counsel had already served its revised witness list. Thus, although the close of discovery was extended, the deadlines for providing preliminary and revised witness lists remained unchanged.

According to Respondents, Complaint Counsel has been investigating this matter for nearly two years. The Complaint was filed nearly one year ago. Discovery should have been pursued expeditiously soon thereafter, as the parties were forewarned. *Chicago Bridge & Iron Co.*, Docket 9300 (January 4, 2002) ("In the event the parties are not able to settle this matter, the discovery and trial schedule issued will meet the October 28, 2002 deadline."). Simply claiming that the importance of these individuals was learned late in the discovery process does not satisfy the "good cause" standard since diligence is required in pursuing discovery. However, if Complaint Counsel's delay in learning about the information that may be provided by these individuals is attributable to Respondents, Complaint Counsel may have demonstrated good cause.

As to the first witness, Complaint Counsel asserts that it was delayed in learning of the information he may provide due to Respondents' delayed response to Complaint Counsel's Second Request for Production of Documents. Based on that representation, Complaint Counsel has demonstrated that Complaint Counsel's delay in learning about the information that the first witness may provide is attributable to Respondents. Accordingly, Complaint Counsel has demonstrated diligence sufficient to show good cause for including the first witness on Complaint Counsel's final witness list.

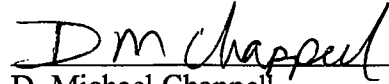
As to the second and third witnesses, Complaint Counsel makes no claim that its delay in learning of these individuals is attributable in any way to Respondents. Complaint Counsel has not demonstrated sufficient diligence to show good cause for including the second and third witnesses on Complaint Counsel's final witness list.

V.

For the reasons set forth above, Respondents' motion is GRANTED in part and DENIED in part. Complaint Counsel has demonstrated good cause for adding the first witness described in Respondents' motion, the author of the e-mail communications that were produced by Respondents on August 27, 2002, to Complaint Counsel's final witness list. The deposition of this witness may be taken beyond the discovery deadline.

This Order does not constitute a ruling on the admissibility of exhibits referred to in Respondents' motion or Complaint Counsel's opposition.

ORDERED:



D. Michael Chappell
Administrative Law Judge

Date: October 23, 2002