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,	)	
	)	Docket No. 9300
and	)	
PITT-DES MOINES, INC.	)	
a corporation.	)	

To: The Honorable D. Michael Chappell
Administrative Law Judge

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STRIKE IMPEACHMENT OF DR. BARRY HARRIS

Complaint Counsel respectfully requests that the tribunal deny Respondents' motion to strike or disregard portions of the cross-examination testimony of Dr. Barry Harris. In support of this request, Complaint Counsel states the following:

1. Complaint Counsel properly impeached Dr. Harris's direct testimony that it is inappropriate to compare budget prices and firm prices by confronting Dr. Harris with sworn statements by an experienced CB&I estimator.

Dr. Harris testified on direct that comparisons between budget prices and actual prices are inappropriate:

> As a general matter, budget prices – not as a general matter, always, budget prices are not appropriate to be compared with actual prices.

Trial Tr. 7274:22-24.

> Comparison between actual price and a budget price? I don't believe its appropriate.

Trial Tr. 7275:3-4.

> I think it's just not an appropriate comparison and again it's a budget price.

Trial Tr. 7279:15-16. Dr. Harris further criticized, in his direct testimony, Dr. Simpson's analysis of prices:

> He [Dr. Simpson] also I think he does postmerger pricing comparisons inappropriately. We spent some time on that. The biggest problem is his use of budget prices, but there are other problems as well.

Trial Tr. 7339:23-7340:1.

During the cross examination of Dr. Harris, Complaint Counsel and counsel for Respondents confirmed to the tribunal that the examination of Dr. Harris that Respondents now move to strike is impeachment relating to statements made by Dr. Harris in his direct testimony:

> JUDGE CHAPPELL: How is this within the scope of the direct exam?
>
> MR. KRULLA: This is to impeach the witness' repeated testimony over and over again, testimony by this witness that margins in budget prices and margins in firm bids are not comparable. This is impeachment, Your Honor.
>
> JUDGE CHAPPELL: Did he testify to what was just said?
>
> MR. KELLEY: He's testified that budget prices are not actual prices, yes, Your Honor, he did.

> JUDGE CHAPPELL: I'll allow it for impeachment. Go ahead. The objection is overruled.

Trial Tr. 7602:11-25.

2. Respondents move to strike the portion of the cross examination of Dr. Harris in which Complaint Counsel asked Dr. Harris if he is aware that Respondents had retained an expert on budget prices. Trial Tr. 7600:19-7601:8. It is proper impeachment of Dr. Harris's testimony regarding the relationship between budget prices and final prices for Complaint Counsel to inquire whether Dr. Harris is aware that Respondents had retained an expert on the subject of budget prices. Respondents' decision not to call their budget price expert does not make it improper for Complaint Counsel to inquire of Dr. Harris whether he is aware that Respondents had retained an expert on budget prices.

3. Respondents move to strike or disregard Respondents' counsel's statement, during the deposition of Dr. Harris, that Dr. Harris should not be examined further regarding use of budget prices because "in fact we have an expert who is specifically testifying about the use of budget prices." Trial Tr. 7603:14-16. The portion of Dr. Harris's cross examination testimony that Respondents move to strike (Trial Tr. 7603:1-19) is proper impeachment of Dr. Harris because it calls into question the foundation for his direct testimony regarding use of budget prices. Complaint Counsel requests that the Tribunal deny Respondents' motion to strike the testimony at Trial Tr. 7603:1-19, as already instructed by Your Honor's overruling of Respondents' objection at Trial Tr. 7604:12-13. The trial transcript testimony at 7603:1-19 cites the Harris deposition. Nowhere in Trial Tr. 7603:1-19 is any portion of CX 1578 referenced.

4. Respondents move to strike the portions of Dr. Harris's cross examination in which Dr. Harris was asked about Mr. Vaughn's experience working for CB&I for 36 years. Respondents move to strike not only the portion of the transcript in which Complaint Counsel asked Dr. Harris to read a statement by Mr. Vaughn contained in his expert report concerning his experience (Trial Tr. 7604:24-7605:8), but also Complaint Counsel's questions to Dr. Harris regarding Mr. Vaughn's 36 years of experience working for CB&I. Trial Tr. 7604:15-23. It is proper impeachment of an expert witness to identify to the expert witness the existence of an experienced employee of CB&I whose sworn statements will be used in the course of impeaching the expert witness.

5. Complaint Counsel asked Dr. Harris to read excerpts from the sworn statements of this former CB&I employee both to lay a foundation for impeachment questions put to Dr. Harris during the

Harris Tr. 7616:9-10. In order to clarify the phrase Complaint Counsel thereupon showed Dr. Harris, and asked him to read, the context in which the phrase was used by a CB&I estimator. Trial Tr. 7616:11-13; 7618:9-20. Respondents move to strike these lines of Dr. Harris's testimony although the material was read by Dr. Harris to answer Dr. Harris's request for clarification and to provide the foundation for the succeeding three questions. After Dr. Harris read the statement by the retired CB&I estimator, Complaint Counsel asked Dr. Harris the following series of questions, and Dr. Harris provided the following answers:

> Q: CB&I sets its margin level on jobs based on its assessment of the competition it faces.
>
> A: I would expect that most bidders, among the things they use is they consider the competition they face.
>
> Q: Anticompetitive effects of the acquisition can be observed by examining margins.
>
> A: The answer is maybe. You have to be very careful when you do that, but the answer is maybe.
>
> Q: It does not matter whether the margin is in a firm fixed price or in a budget price; isn't that correct?
>
> A: Oh, that's absolutely wrong.

Trial Tr. 7618:21-7619:8. Complaint Counsel then showed to Dr. Harris, and asked Dr. Harris to read, a contrary statement by the CB&I estimator (Trial Tr. 7620:3-22), which laid the foundation for the following impeachment question:

> Q: So Mr. Vaughn disagrees, Dr. Harris, with your opinion that it does matter whether the margin is in a firm fixed price or in a budget price?

Trial Tr. 7620:23-25. Dr. Harris stated in response that he cannot answer the question. Trial Tr. 7621:1-4. Complaint Counsel then asked Dr. Harris the following series of questions, and Dr. Harris provided the following answers:

Q: The same philosophy is used by CB&I in setting margins for budget estimates and firm bids.

A: I don't think that's accurate.

Q: It is common practice in CB&I to use pretty much the same range of margin levels for budget estimates and for firm bids; isn't that true?

A:

examination questions put to Dr. Harris and his responses thereto, Complaint Counsel's request to Dr. Harris that he read relevant statements by CB&I's estimator is proper impeachment. In any event, the questions put to Dr. Harris regarding CB&I's practices with respect to formulation of budget prices and final prices is proper cross examination.

7. Complaint counsel further impeached Dr. Harris's testimony regarding the incomparability of budget prices and firm bid prices by asking him about PDM's budget price and final price for a project in Connecticut. Respondents also move to strike this impeachment testimony. Again, respondents move to strike not only the portion of the transcript in which Complaint Counsel confronted Dr. Harris with the statement by an experienced CB&I estimator that the budget price and final price were very close (Trial Tr. 7629:21-7630:5), but also the questions posed to Dr. Harris regarding PDM's prices for the project and his answers thereto. Trial Tr. 7624:20-7625:5. In the context of the above cross-examination questions put to Dr. Harris and his responses thereto, Complaint Counsel's request to Dr. Harris that he read a relevant statement by CB&I's estimator regarding the project is proper impeachment. In any event, the questions put to Dr. Harris regarding the prices for the project is proper cross examination.

8. The use of inconsistent statements in Mr. Vaughn's deposition testimony, as excerpted in Dr. Harris's January 10 testimony and described above, is permissible not as substantive evidence but to impeach Dr. Harris by contradiction.[1] Evidence used to impeach a witness is independently

[1] *See United States v. Warren*, 453 F.2d 738, 742 (2d Cir. 1972); *United States v. Dweck*, 913 F.2d 365, 369 (7th Cir. 1990); and *United States v. Jamieson*, 806 F.2d 949, 952 (10th Cir. 1986).

admissible as impeachment evidence, even if the evidence is inadmissible for other reasons. *United States v. Havens*, 446 U.S. 620, 624-625 (1980); , 446

202-326-2608

CERTIFICATE OF SERVICE

I, Michael A. Franchak, hereby certify that on this 15th day of January, 2003, I caused to be served a true and correct copy of Complaint Counsel's Opposition to Respondents' Motion to Strike Impeachment of Dr. Barry Harris, upon:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Jeffrey Leon
Counsel for Respondents
Winston & Strawn
35 W. Wacker Drive
Chicago, IL 60601-9703

_____
Michael A. Franchak

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PITT-DES MOINES, INC.	)	
a corporation.	)	

PROPOSED ORDER

Upon consideration of Respondents' Motion to Strike Trial Testimony Relating to Exhibits CX 1577 and CX 1578, and Complaint Counsel's opposition thereto, it is HEREBY ORDERED:

THAT Respondents' Motion is denied.

_____
D. Michael Chappell
Administrative Law Judge

Date: _____, 2003