

**BY COURIER**

Our File: PR-2000-015

August 4, 2000

To: Counsel of Record

Subject: **Motion to Dismiss**

On July 17, 2000, counsel representing the Department of Public Works and Government Services Canada brought a motion before the Tribunal requiring that the grounds found at paragraphs 10(a) (iii), 10 (b) and 10 (c) of the revised complaint filed by Trans-Cycle Industries Inc., be dismissed as they were filed outside of the time limits imposed by section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*. The Tribunal has reviewed the submissions and is of the opinion that the above-noted grounds were filed outside of the regulatory time limits. Therefore, the Tribunal grants the motion to dismiss.

With respect to the reply dated August 2, 2000, filed by counsel for the complainant, the Tribunal will not accept this submission as a further reply by the complainant is not provided for in the *Canadian International Trade Tribunal Rules*. Accordingly, the submission is being returned to counsel for the complainant under separate cover.

The reasons for granting the motion will be part of the Determination of the Tribunal. In light of this decision, the Tribunal establishes Friday, August 18, 2000, as the deadline for the submission of the Government Institution Report pursuant to subsection 103 (5) of the *Canadian International Trade Tribunal Rules*.

Yours sincerely,

Michel P. Granger  
Secretary

c.c. Messrs. J. Long and S. Tatrallyay  
Koskie Minsky

Mr. Andrew Roman  
Miller Thompson

Mr. David Attwater  
Lang Michener

Date of Ruling:	August 4, 2000
Date of Reasons:	October 6, 2000
Tribunal Member:	Richard Lafontaine, Presiding Member
Investigation Officer:	Paule Couët
Counsel for the Tribunal:	Michèle Hurteau
Complainant:	Trans-Cycle Industries Inc.
Counsel for the Complainant:	Jeffrey J. Long J. Stephen Tatrallyay
Intervener:	Material Resource Recovery SRBP Inc.
Counsel for the Intervener:	Andrew J. Roman
Government Institution:	Department of Public Works and Government Services
Counsel for the Government Institution:	David M. Attwater

Ottawa, Friday, October 6, 2000

File No.: PR-2000-015

IN THE MATTER OF a complaint filed by Trans-Cycle Industries Inc. under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*, R.S.C. 1985 (4th Supp.), c. 47;

AND IN THE MATTER OF a motion by the Department of Public Works and Government Services for an order dismissing the grounds of complaint found at paragraphs 10(a)(iii), 10(b) and 10(c) of Trans-Cycle Industries Inc.'s revised complaint, on the basis that they were filed outside the time limits set out in section 6 of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.

## STATEMENT OF REASONS

### BACKGROUND

On June 15, 2000, Trans-Cycle Industries Inc. (Trans-Cycle) filed a complaint with the Canadian International Trade Tribunal (the Tribunal) under subsection 30.11(1) of the *Canadian International Trade Tribunal Act*<sup>1</sup> concerning a procurement (Solicitation No. EJ297-8-0005/B) by the Department of Public Works and Government Services (the Department) for the collection, at various locations across Canada, of PCB-contaminated solid and liquid wastes and for their transportation to an authorized facility for disposal or treatment.

In its revised complaint filed on June 16, 2000 (the complaint), Trans-Cycle alleged that the Department violated Articles 1013(1)(h) and (j) and Articles 1015(4)(a) and (d) of the *North American Free Trade Agreement*,<sup>2</sup> Article 506(6) of the *Agreement on Internal Trade*<sup>3</sup> and Articles XII(2) and XIII(4) of the *Agreement on Government Procurement*<sup>4</sup> in the following respects:

- [10](a) the accepted tender of MRR [Material Resource Recovery SRBP Inc.] does not comply with the Request for Submissions [Request for a Standing Offer] in that:
  - (i) it does not provide for the incineration of metals at Bovar, as required by the Request for Submissions (Annex A – s. 5.1) . . .
  - (ii) the MRR facility provided for the destruction or decontamination of the waste is not a “permanent facility with a provincial permit to operate on an approved site” as required by the Request for Submissions (s. 2.2.1, 3.1.2.1, 4.4.4, and Annex A – s. 5.2). . . Furthermore, MRR was not capable of processing the wastes in the tender which may have concentrations in excess of the 30,000 PPM limitation . . . at the time of tender.
  - (iii) the method of calculating the transportation cost employed by MRR was not in accordance with the Request for Submissions (5.26.1). The Request for Submissions

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1. R.S.C. 1985 (4th Supp.), c. 47 [hereinafter CITT Act].
  2. 32 I.L.M. 289 (entered into force 1 January 1994) [hereinafter NAFTA].
  3. As signed at Ottawa, Ontario, on July 18, 1994 [hereinafter AIT].
  4. 15 April 1994, online: World Trade Organization <[http://www.wto.org/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/english/docs_e/legal_e/final_e.htm)> [hereinafter AGP].

does not permit a nil (zero) value for distance to be utilized in calculating transportation cost.

- (b) [The Department] failed to consider the qualifications and experience of Trans-Cycle and MRR in that it:
- (i) failed to properly assess the qualifications and experience of Trans-Cycle in accordance with the point system set forth in the Request for Submissions (3.1.3 and 4.4.1).
  - (ii) failed to properly assess the qualifications and experience of MRR in accordance with the point system set forth in the Request for Submissions (3.1.3 and 4.4.1).
  - (iii) failed to fairly establish a point system which was capable of assessing qualifications and experience.
- (c) [The Department] failed to award the Offer to the lowest qualified bidder in accordance with the terms of the tender.

On June 26, 2000, the Tribunal informed the parties that the complaint had been accepted for inquiry, as it met the requirements of subsection 30.11(2) of the CITT Act and the conditions set out in subsection 7(1) of the *Canadian International Trade Tribunal Procurement Inquiry Regulations*.<sup>5</sup> On July 17, 2000, the Department filed a notice of motion with the Tribunal requesting that the Tribunal dismiss the grounds of complaint found at paragraphs 10(a)(iii), 10(b) and 10(c) of the complaint, as they were filed outside the time limits set out in section 6 of the Regulations.

On November 15, 1999, the Department issued the Request for a Standing Offer for this solicitation. The solicitation closed on December 13, 1999. Proposals were received from a number of bidders, including Trans-Cycle and MRR. On March 8, 2000, the Department advised Trans-Cycle that it had been awarded the primary standing offer for the Pacific Region. On March 16, 2000, the Department informed Trans-Cycle, by facsimile, of MRR's total assessed bid prices, the total value of each standing offer awarded to MRR and the unit prices quoted by MRR for each region. The primary standing offers for the Atlantic, Quebec, National Capital, Ontario and Western regions were awarded to MRR. On March 21, 2000, Trans-Cycle met with representatives of the Department and requested that the Department reconsider its decision. The Department agreed to look into the matter. On March 23, 2000, Trans-Cycle documented its objections to the Department's decision. On April 6, 2000, the Department wrote to Trans-Cycle responding to its objections and indicating that two specific objections, namely, the question of the disposal of metals —as stated in paragraph 10(a)(i)— and the issue of the permit — as stated in paragraph 10(a)(ii)— needed further investigation. On June 5, 2000, the Department wrote to Trans-Cycle, in part, as follows:

Further to our letter of April 6, 2000, this department has thoroughly re-examined the offer received from Material Resources Recovery, and we remain confident in our determination that the offer submitted by Material Resource Recovery was fully compliant.

On June 15, 2000, the Department wrote to Trans-Cycle informing it that, due to an inadvertent error, it had failed to award it the primary standing offer for the Western Region and corrected the situation.

## POSITION OF PARTIES

The Department argued that the Tribunal lacks the jurisdiction to consider the grounds of complaint found at paragraphs 10(a)(iii), 10(b) and 10(c) of the complaint. It submitted that, with respect to the ground

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5. S.O.R./93-602 [hereinafter Regulations].

of complaint in paragraph 10(a)(iii) (the method of calculating the transportation cost), Trans-Cycle acknowledged that this basis of the complaint became known to Trans-Cycle on or about March 16, 2000, on the basis of a letter that it received from the Department. The Department noted that, in Trans-Cycle's letter of March 23, 2000, to the Department, Trans-Cycle did not object to the method of calculating the transportation cost. In the Department's submission, as the method of calculating the transportation cost was not the basis of an objection by Trans-Cycle, the time for filing a complaint is determined by subsection 6(1) of the Regulations. Therefore, Trans-Cycle knew or should reasonably have known the basis of the complaint found at paragraph 10(a)(iii) on or about March 16, 2000, as admitted in its letter of June 19, 2000. In the alternative, should the Tribunal find that Trans-Cycle objected to this issue in its letter of March 23, 2000, the Department submitted that this ground of complaint was still filed late for the same reasons as those set out immediately below in respect of the grounds of complaint found at paragraphs 10(b) and 10(c) of the complaint.

The Department submitted that four grounds of objection were raised by Trans-Cycle in its letter of March 23, 2000. By letter dated April 6, 2000, the Department expressly denied relief in relation to the third and fourth grounds of objection, which correspond to the grounds of complaint found at paragraphs 10(b) and 10(c) of the complaint. The Department argued that, as Trans-Cycle filed an objection regarding the grounds of complaint found at paragraphs 10(b) and 10(c) of the complaint, the time limit for filing a complaint is determined by subsection 6(2) of the Regulations. Therefore, the Department submitted that Trans-Cycle had actual knowledge of the Department's denial of relief with respect to these grounds of objection on April 6, 2000. As Trans-Cycle filed the complaint with the Tribunal on June 16, 2000, these grounds of complaint were filed later than the 10 working days prescribed in the Regulations.

In its reply of July 26, 2000, Trans-Cycle submitted that it raised the issue of the method of calculating the transportation cost (paragraph 10(a)(iii) of the complaint) in its letter of March 23, 2000. In Trans-Cycle's view, the Department specifically acknowledged that the method of calculating the transportation cost was at issue in Trans-Cycle's objection and continued to be at issue after April 6, 2000. Furthermore, with respect to the grounds of complaint found at paragraphs 10(b) and 10(c) of the complaint, Trans-Cycle submitted that, notwithstanding the Department's correspondence of April 6, 2000, the Department continued to thoroughly review MRR's offer, such that the Department did not deliver its final written determination to Trans-Cycle until June 5, 2000. Accordingly, Trans-Cycle submitted, these grounds of complaint were filed on time. Trans-Cycle added that the Department's letter of June 15, 2000, advising it of an inadvertent error and awarding it the primary standing offer for the Western Region is proof positive that the Department was still reviewing this file after June 5, 2000.

Relying upon the Tribunal's decision in *Wang Canada*,<sup>6</sup> Trans-Cycle submitted that, where the denial of relief on an objection is followed by reconsideration, the finality of the decision is less than certain and, as such, the 10-working-day time limit cannot be said to commence until the decision is definitive. Furthermore, in Trans-Cycle's view, the intent of the Regulations is not to require a complainant to file multiple complaints in relation to the same matter. Should the reasoning of the Department be followed, Trans-Cycle argued, it would create multiple points in time at which the limitation period commences, thereby requiring the complainant to file a separate complaint for each ground in dispute, in relation to what is really a single complaint to the Tribunal. It asked that the motion be dismissed.

In its submissions of July 26, 2000, MRR agreed with the Department that the grounds of complaint had been filed outside the time limit. MRR also submitted that: (1) the provisions of subsections 6(3) and (4) of the Regulations extending the time limit cannot apply in this case because the failure of Trans-Cycle to

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6. (4 February 1998), PR-97-034 [hereinafter *Wang*].

file its complaint on time cannot be attributable to a cause beyond its control rather than to mere delay; (2) the complaint does not concern any aspect of the procurement process of a systemic nature; and (3) the complaint was not filed within 30 days after the day on which the basis of the complaint became known or reasonably should have become known to Trans-Cycle, since the complaint was filed on June 16, 2000, and Trans-Cycle knew or should reasonably have known the basis of the complaint regarding the method of calculating the transportation cost on March 16, 2000, and knew that the Department had denied relief, on April 6, 2000, on the objection regarding the grounds of complaint found at paragraphs 10(b) and 10(c).

MRR submitted that, if the Tribunal has the jurisdiction to extend the time limit for filing a complaint, it should not do so in the circumstances of this case because Trans-Cycle gave no valid reasons for the delay in filing nor did it apply, in time, for an extension of the time limit. Any delay in delivering services would be harmful to both the Department and MRR.

Finally, MRR made detailed submissions in respect of all the grounds of complaint raised by Trans-Cycle and argued, in essence, that none of the grounds had any valid basis.

In its reply of July 31, 2000, the Department reiterated its submissions. It argued that its letter of June 5, 2000, must be interpreted in the context of the earlier exchange of correspondence and that it is properly understood as a denial of relief only in relation to the first two grounds of Trans-Cycle's objection of March 23, 2000. The Department expressly denied relief in relation to the third and fourth grounds of objection in its letter of April 6, 2000. As it stated in its letter of June 5, 2000, the Department's further investigation into the first two grounds of the objection entailed a reexamination of the proposal received by MRR and not a reconsideration of Trans-Cycle's proposal. In the Department's view, to inform Trans-Cycle of the Department's inadvertent error, and to correct it, is not related to the matter and, therefore, does not constitute "proof positive" that it "was still reconsidering its position". Furthermore, the Department submitted that the Tribunal's decision in *Wang* does not stand for the proposition suggested by Trans-Cycle, since there was no objection made in that case and, therefore, no denial of relief and, consequently, no reconsideration of a denial of relief. The Department emphasized that the Regulations are clear in requiring a complaint to be filed within 10 working days after the occurrence of certain events and it is possible, as has happened in *Corel Corporation*,<sup>7</sup> for example, that multiple complaints are filed with respect to the same matter.

## TRIBUNAL'S DECISION

Section 6 of the Regulations, provides, as follows:

### *Time Limits for Filing a Complaint*

6. (1) Subject to subsections (2) and (3), a potential supplier who files a complaint with the Tribunal in accordance with section 30.11 of the Act shall do so not later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the potential supplier.

(2) A potential supplier who has made an objection regarding a procurement relating to a designated contract to the relevant government institution, and is denied relief by that government institution, may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to the potential supplier.

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7. (26 October 1998), PR-98-012 and PR-98-014.

(3) A potential supplier who fails to file a complaint within the time limit set out in subsection (1) or (2) may file a complaint within the time limit set out in subsection (4), if the Tribunal determines, after considering all of the circumstances surrounding the procurement, including the good faith of the potential supplier, that

(a) the failure to file the complaint was attributable to a cause beyond the control of the potential supplier at the time the complaint should have been filed in order to meet the requirements of subsection (1) and (2); or

(b) the complaint concerns any aspect of the procurement process, of a systemic nature, relating to a designated contract, and compliance with one or more of Chapter Ten of NAFTA, Chapter Five of the Agreement on Internal Trade and the Agreement on Government Procurement.

(4) A complaint under subsection (3) may not be filed later than 30 days after the day the basis of the complaint became known or reasonably should have become known to the potential supplier.

Having carefully reviewed the evidence and the parties' submissions, the Tribunal finds that the grounds of complaint found at paragraphs 10(a)(iii), 10(b) and 10(c) of the complaint were filed with the Tribunal outside the time limits set out in section 6 of the Regulations.

The Tribunal finds that Trans-Cycle discovered the grounds of complaint found at paragraphs 10(a)(iii), 10(b) and 10(c) on or about March 21, 2000, when it attended the Department's debriefing. The Tribunal also finds that, on March 23, 2000, Trans-Cycle filed an objection with the Department, in writing, outlining the grounds that it raised in paragraphs 10(a)(iii), 10(b) and 10(c) of the complaint filed with the Tribunal on June 16, 2000. In addition, the Tribunal finds that, on April 6, 2000, the Department provided a definitive response to the questions raised in the third and fourth grounds of Trans-Cycle's letter of objection of March 23, 2000, which correspond to the grounds found at paragraphs 10(b) and 10(c) of the complaint. In the Tribunal's opinion, nothing in the Department's letter of April 6, 2000, could lead Trans-Cycle to believe that the Department would revisit or reconsider its decision with respect to these objections. If Trans-Cycle was in disagreement with the Department's response and wanted, as it appears, to raise these matters with the Tribunal, it should have done so within 10 working days from the receipt of the Department's letter of April 6, 2000, which denied Trans-Cycle the relief that it sought. This was not done and, consequently, Trans-Cycle failed to meet the time limit set out in subsection 6(2) of the Regulations.

Trans-Cycle has submitted that the intent of the Regulations is not to require a complainant to file multiple complaints in relation to the same matter. The Tribunal notes that the Regulations are precise as to when the basis of a complaint should form the substance of an objection and/or a complaint, i.e. 10 working days from when a complainant knew or reasonably should have known the basis thereof. The Tribunal noted this point in a preceding determination,<sup>8</sup> wherein it stated that "[t]he procurement review process does not provide for an accumulation of grievances to be put forward only in the event of an unsuccessful bid".<sup>9</sup>

It may be that, on occasion, this filing rule requires a potential supplier to file more than one complaint during the same procurement process. This is no different from when complaints are filed by different potential suppliers on different aspects of the same procurement process. As constructed, the filing obligations require complainants to raise their objections and/or complaints within 10 working days from when the basis of their objections and/or complaints are known or should reasonably have been known so that these matters can be addressed expeditiously.

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8. *Corel Corporation* (21 November 1996), PR-96-011.

9. *Ibid.* at 12.

For the above reasons, the Tribunal, pursuant to subsection 10(c) of the Regulations, has granted the Department's motion to dismiss the grounds of complaint found at paragraphs 10(a)(iii), 10(b) and 10(c) of the complaint.

Richard Lafontaine

Richard Lafontaine

Presiding Member