

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

60187

FILE: ✓B-184242

DATE: November 19, 1975

B-184774

MATTER OF: Cherokee Industries, Inc.

9-7711

**DIGEST:**

GAO will not review Small Business Administration (SBA) Size Appeals Board determination that protester is not small business concern, notwithstanding allegation that protester was denied due process right to present contrary evidence to Board, since by statute SBA is sole adjudicator of size issues and protester has had opportunity to petition Board for reconsideration on basis that relevant information was not initially considered. Allegation that protester's constitutional rights were violated by SBA process may more properly be for consideration by Federal District Court.

Cherokee Industries, Inc. (Cherokee) protests its disqualification from two procurements issued by the Defense Personnel Support Center, Philadelphia, Pennsylvania: Invitation for Bids (IFB) DSA120-75-B-2282 for men's pajamas and IFB DSA100-75-B-1251 for winter hoods. Another protest under IFB DSA100-75-B-0889 for utility trousers has been withdrawn.

Cherokee alleges that the Small Business Administration (SBA) Size Appeals Board violated its own regulations in determining that Cherokee did not qualify as a small business and requests that this Office review the SBA's actions culminating in its adverse determination of May 14, 1975.

On February 24, 1975, the SBA Atlanta Regional Office determined that since Cherokee had fewer than 500 employees, it qualified as a small business for cut and sew type procurements. Subsequently, on March 24, 1975, in regard to IFB DSA100-75-B-0767 for men's field coats the Atlanta Regional Office determined that Cherokee qualified as a small business manufacturer for purposes of that procurement. However, on May 19, 1975, the SBA Size Appeals Board reversed the Atlanta Regional Office's initial determination and found Cherokee to be other than small for purposes of IFB DSA100-75-B-0767. The Board concluded that Cherokee was affiliated with Winfield Manufacturing Company, a large business manufacturer, "by virtue of an identity of interest and continuing family and contractual relationships that have existed between the two firms."

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Cherokee points out that the issue of its affiliation with a large business was not considered by the Atlanta Regional Office in its decision of March 24. Accordingly, Cherokee contends that the Size Appeals Board exceeded its appellate authority as outlined in 13 Code of Federal Regulations (C.F.R.) § 121.3-6(a) (1975 ed.) which provides that:

"The Size Appeals Board shall review appeals from size determinations made pursuant to §§ 121.3-4 and 121.3-5 and from product classifications made pursuant to §§ 121.3-8 and 121.3-10 and shall make final decisions as to whether such determinations or classifications should be affirmed, reversed or modified. The Size Appeals Board only has jurisdiction to consider appeals from formal determinations as to a concern's small business size status and appeals from product or service classification determinations made by contracting officers for the purpose of Government procurements. It has no jurisdiction to consider an appeal from an informal opinion or advice concerning a company's future small business size status based on proposed but unexecuted changes in its organization, management or contractual relations, or an appeal based on an allegation that the small business size standard established by SBA for a particular industry or field of operation is improper for the purpose intended. Size Appeals Board proceedings are essentially fact-finding and nonadversary in nature. The Size Appeals Board shall conduct such proceedings as it determines appropriate to enable it to discharge its duties."

Furthermore, Cherokee maintains that the Board violated 13 C.F.R. § 121.3-6(a) (4) (1975 ed.) and 13 C.F.R. § 121.3-6(c) (1975 ed.) by not sending it the documents which are to be included in the "statutory notice of appeal" thereby denying Cherokee the opportunity to challenge statements relating to the issue of affiliation not previously considered by the Atlanta Regional Office. 13 C.F.R. § 121.3-6(b) (4) provides:

"Notice of appeal. No particular form is prescribed for the notice of appeal. However, the appellant shall submit to the Board an original and four legible copies of such notice and, to avoid time-consuming correspondence, the notice should include the following information:

- (1) Name and address of concern on which the size determination was made;
- (ii) The character of the determination from which appeal is taken and its date;
- (iii) If applicable, the IFB or contract number and date, and the name and address of the contracting officer;
- (iv) A concise and direct statement of the reasons why the decision of a regional director, or his delegatee, the contracting officer or the Associate Administrator for Finance and Investment is alleged to be erroneous;
- (v) Documentary evidence in support of such allegations; and
- (vi) Action sought by the appellant."

13 C.F.R. § 121.3-6(c) states:

"Notice to interested parties. The Size Appeals Board shall promptly acknowledge receipt of the Notice of Appeal to the appropriate regional director or his delegatee and to the contracting officer (if a pending procurement is involved). If the appellant is not the concern whose size status is in question, the Board shall also send a copy of the notice to such concern. The Board shall notify all known interested parties that the appeal has been filed. The Board in its discretion may also provide any of such interested parties with copies of applicant's Notice of Appeal, or parts thereof, when the Board determines that this would be in the interest of fairness or would assist it in the performance of its functions."

Cherokee states that even after specifically requesting those documents, the Board refused to comply. The protester believes that SBA's refusal had the "pernicious effect" of allowing uncontroverted misstatements to be accepted as fact and to be relied upon by the Board in its decision. Therefore, Cherokee

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concludes that the Board's decision was reached in violation of Cherokee's constitutional due process rights.

On August 14, 1975, the Size Appeals Board denied Cherokee's petition for reconsideration and on September 2, 1975, the Atlanta Regional Office declined to recertify Cherokee as a small business. As a result of these administrative actions, Cherokee alleges that it has been unconstitutionally precluded from participating in small business set-aside procurements.

Although Cherokee recognizes that GAO is without jurisdiction to question SBA determinations relative to a firm's size status, 53 Comp. Gen. 434 (1973), it argues that since SBA allegedly violated its own statutorily mandated procedures, GAO is obliged to review and overturn the Board's adverse determination as void ab initio. Alternatively, Cherokee argues that if GAO wishes not to review the Board's actions, this Office should direct the Atlanta Regional Office to conduct a new fact finding relative to its earlier refusal to recertify Cherokee as small.

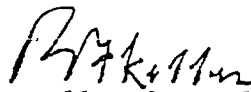
It must be recognized that 13 C.F.R. § 121.3-6(g) (1975 ed.) permits an interested party to petition the Size Appeals Board for reconsideration. Section 121.3-6(g) (3) (1975 ed.) states that "grounds for reconsideration shall be a material error of fact in the original decision or relevant information not previously considered by the Board or relevant information not previously available to any of the parties involved." However, the regulation requires that the petitioner demonstrate that "the grounds for reconsideration involve facts or information which were not previously presented to the Board through no fault or omission of the petitioner." Section 121.3-6(g) (5) states that the decision of the Board shall constitute the final administrative remedy of SBA.

In essence, Cherokee's protest is based upon the alleged denial of its opportunity to present evidence to the Board which would have rebutted the Board's conclusion that Cherokee was affiliated with a large business. The above cited regulations permit a petitioner to present new evidence provided that the evidence was not omitted from consideration on account of the petitioner's fault or omission. Since Cherokee has petitioned the Board for reconsideration and has thereby had the opportunity to present the allegedly omitted evidence to the Board, and since the Board has declined to reconsider Cherokee's case, the Board's decision must be considered final. Pursuant

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to 15 U.S.C. § 637(b) (6) (1970) and the regulations promulgated thereunder, the SBA is the sole adjudicator of small business size classification issues. National Electrical Contractors Association, B-181511, July 15, 1974, 74-2 CPD 29. Therefore, this Office is without authority to review the SBA's final determination. Similarly, we are without authority to question the denial of recertification by the Atlanta Regional Office. However, if Cherokee continues to believe that its constitutional rights have been violated by the SBA, that matter may more properly be for consideration by a Federal District Court.

Finally, we note that the protester has requested a conference on this protest with members of this Office. Section 20.7 of our Bid Protest Procedures provides that the protester may request a conference on the merits of its protest. However, since we have determined that we are without jurisdiction to consider Cherokee's protest on its merits, Cherokee's request for a conference is moot. Frank E. Melchiorre, B-181961, B-182280, November 26, 1974, 74-2 CPD 293.

  
Deputy Comptroller General  
of the United States