

Becker



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: D.R. Construction Company

File: B-265885

Date: September 5, 1995

DECISION

D.R. Construction Company protests the Department of the Navy's issuance of solicitation No. N62467-95-B-2756 under the Department of Defense (DOD) small disadvantaged business (SDB) set-aside program, contending that the set-aside is inconsistent with Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995).

In Adarand, the Supreme Court held that racial classifications must be subject to strict scrutiny and must serve a compelling government interest and be narrowly tailored to further that interest. The protester asserts that the SDB set-aside, with eligibility requirements that in very large measure are based on race, see Defense Federal Acquisition Regulation Supplement §§ 219.001, 252.219-7000; 13 C.F.R. § 124.105 (1995), does not meet the standard set forth in Adarand and therefore is unconstitutional.

Our general position on cases such as this is that there must be clear judicial precedent before we will consider a protest based on the asserted unconstitutionality of the procuring agency's actions. In this regard, we do not view Adarand as providing clear judicial precedent on the constitutionality of the DOD SDB set-aside program. See Elrich Contracting Inc.; The George Byron Company, B-262015; B-265701, Aug. 17, 1995, 95-2 CPD ¶ ____.

In Elrich, we noted that Adarand, which dealt with a Department of Transportation (DOT) program involving financial incentives to prime contractors awarding subcontracts to SDBs, did not determine the constitutionality of the DOT program or any other racially-based program. The Court in Adarand simply announced the standard that is to be applied in determining the constitutionality of such programs and remanded the case to the lower courts for further consideration in light of the principles announced. Thus, whether any particular program is indeed unconstitutional has been left to the lower federal courts to determine in the first instance.

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Thus, there is no basis for us to consider Adarand as clear judicial precedent on the question of the constitutionality of the SDB set-aside program challenged here. Accordingly, consistent with our long-standing practice, the protest is dismissed.

A handwritten signature in cursive script that reads "Ronald Berger". The signature is written in black ink and is positioned above the printed name and title.

Ronald Berger
Associate General Counsel