



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Elrich Contracting Inc.; The George Byron Company

**File:** B-262015; B-265701

**Date:** August 17, 1995

Joel S. Rubinstein, Esq., Bell, Boyd & Lloyd, for Elrich Contracting Inc.,  
and Mariette I. Coolidge for The George Byron Company, the protesters.  
Cynthia S. Guill, Esq., Department of the Navy, for the agency.

### DIGEST

Bid protest challenges to the constitutionality of the Department of Defense's small disadvantaged business set-aside program based on Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995), are dismissed as such challenges are considered only if there is a clear judicial precedent on the issues raised; Adarand set forth the standard to be applied by the federal courts in determining the constitutionality of such programs but did not decide whether the challenged program is unconstitutional.

### DECISION

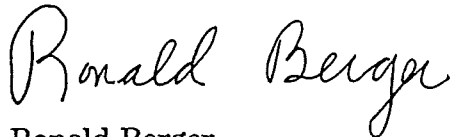
Elrich Contracting Inc. and The George Byron Company each protest a Department of Defense (DOD) small disadvantaged business (SDB) set-aside procurement,<sup>1</sup> contending that the set-aside is inconsistent with Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995).

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 protesters assert that these SDB set-asides, 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), do not meet the standard set forth in Adarand and therefore are unconstitutional.

<sup>1</sup>Elrich protests Department of the Navy solicitation No. N68925-94-B-A305; Byron protests Department of the Army solicitation No. DAAA31-95-B-0017.

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 before it 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 that standard. Thus, whether any particular program is unconstitutional was left to the lower federal courts to determine in the first instance.

There must be clear judicial precedent before we will consider a protest based on the asserted unconstitutionality of the procuring agency's actions. DePaul Hosp. and the Catholic Health Ass'n of the U.S., B-227160, Aug. 18, 1987, 87-2 CPD ¶ 173. For this reason, we have declined to consider allegations that DOD's SDB set-aside program is unconstitutional because of the absence of any clear judicial precedent on the question. C.S. McCrossan Constr., Inc., B-259225, Mar. 16, 1995, 95-1 CPD ¶ 146; JWA Security Servs., B-253836, Oct. 12, 1993, 93-2 CPD ¶ 219; Sletager, Inc., B-241149, Jan. 25, 1991, 91-1 CPD ¶ 74; Seyforth Roofing Co., Inc., B-235703, June 19, 1989, 89-1 CPD ¶ 574. Adarand did not provide that precedent. Accordingly, consistent with our long-standing practice, we dismiss the protests.



Ronald Berger  
Associate General Counsel

**PROCUREMENT**  
**Socio-Economic Policies**  
**Disadvantaged business set-asides**  
**Use**  
**Procedures**