



**Comptroller General  
of the United States**

Washington, D.C. 20548

---

# Decision

**Matter of:** G.H. Harlow Company, Inc.--Reconsideration

**File:** B-266144.3

**Date:** February 28, 1996

---

John F. Bradach, Esq., for the protester.

Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

---

## DIGEST

General Accounting Office denies request for reconsideration of dismissal of protest challenging the constitutionality of the Department of Defense small disadvantaged business set-aside program because there is no clear judicial precedent.

---

## DECISION

G.H. Harlow Company, Inc. requests that we reconsider the dismissal of its protest challenging the issuance by the United States Property and Fiscal Officer for Oregon, National Guard Bureau, of invitation for bids (IFB) No. DAHA35-95-B-0008 as a total small disadvantaged business (SDB) set-aside. In its protest, Harlow argued that the set-aside was inconsistent with Adarand Constructors, Inc. v. Pena, 115 S.Ct. 2097 (1995).

We deny the request for reconsideration.

In Adarand, the Supreme Court held that the proper test for determining the constitutionality of minority business set-aside programs in the federal government is a "strict scrutiny" analysis. The Supreme Court did not determine the constitutionality of any particular racially based program; rather, the Court simply announced the standard that is to be applied in determining the constitutionality of such programs. Since we do not view Adarand as providing clear judicial precedent on the constitutionality of set-aside programs, we dismissed the protest. See Elrich Contracting Inc.; The George Byron Company, B-262015;B-265701, Aug. 17, 1995, 95-2 CPD ¶ 71.

Harlow maintains that "clear judicial precedent" exists in this area. In support of its position, Harlow argues that following the Court's decision in Adarand, racially based set-aside programs imposed by the federal government are subjected to the same level of "strict scrutiny" applied to racially based set-aside programs at the state or local level following the Court's decision in City of Richmond v. Croson Co., 488 U.S. 469 (1989). That decision concerned a municipality's minority set-aside program. According to Harlow, the "clear judicial precedent" which has

developed based on the Croson decision should be considered by our Office in determining the constitutionality of the federal program at issue here. We disagree.

Our position is that there must be clear judicial precedent on the precise issue presented to us before we will consider a protest based on the asserted unconstitutionality of a procuring agency's action. Neither the Adarand nor the Croson decision constitutes clear judicial precedent on the constitutionality or legality of this SDB set-aside program. These decisions addressed the particular set-aside programs that were before the Court, and while they indicate what factors need to be considered to determine the constitutionality of a particular set-aside program, we are unaware of, and the protester does not cite to, any dispositive federal court decisions applying the standards articulated in Adarand and Croson to a set-aside program which is sufficiently similar to DOD's program so as to warrant regarding those decisions as clear judicial precedent here.

In further support of its reconsideration request, Harlow submitted a copy of a "MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS," dated October 23, 1995, from the Under Secretary of Defense, regarding the SDB program. That document suspends various sections of the Department of Defense Federal Acquisition Regulation Supplement applicable to SDB set-asides, and directs contracting officers not to set aside acquisitions for SDBs until further notice. According to Harlow, the "obvious" thrust of that document is that the Department of Defense (DOD) considers the Adarand decision to be clear judicial precedent invalidating DOD's SDB set-aside program.

We do not agree with Harlow that the Under Secretary's instructions to contracting officials reflect DOD's final position with respect to the impact of the Adarand decision on DOD's SDB set-aside program. Rather, the memorandum merely suspends the applicable DFARS provisions while DOD reviews its current SDB set-aside program.

Finally, contrary to the protester's suggestion, the Under Secretary's instructions to contracting officials in his memorandum do not require that the instant procurement be canceled and the IFB reissued. The memorandum specifically

instructs contracting officials to permit acquisitions being conducted as SDB set-asides to proceed undisturbed, where amending the solicitation to withdraw the set-aside would unduly delay the procurement.<sup>1</sup>

The request for reconsideration is denied.

Comptroller General  
of the United States

---

<sup>1</sup>In this case, we have been informed by the Army that the contracting activity proceeded to make award under the IFB as originally issued.