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# THE NASH & CIBINIC REPORT

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from professors ralph c. nash and john cibinic

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## ¶ 33 POSTSCRIPT: IN *SEKRI*, THE FEDERAL CIRCUIT TAKES THE HIGH ROAD TO PROTEST TIMELINESS

*A special column by Nathaniel E. Castellano, Special Counsel at Jenner & Block LLP; the ideas presented here, particularly those that may prove to be in error, are the author's own and should not be attributed to any other.*

In a March 2022 *Guest Appearance, Appeals To Watch: SEKRI Asks the Federal Circuit To Walk Another Protest Timing Tightrope*, 36 NCRNL ¶ 3, I warned of the potential for turbulence created by the appeal of *SEKRI Inc. v. U.S.*, which asked the U.S. Court of Appeals for the Federal Circuit to decide how traditional bid protest timeliness and standing rules apply in the unique context of mandatory source procurements under the Javits-Wagner-O'Day (JWOD) Act, 41 USCA §§ 8501–8506. As Court of Federal Claims Judge Hertling acknowledged when dismissing the protest in the first instance, it is uncomfortable to apply the traditional timeliness and standing rules to a mandatory source supplier. But, absent a Federal Circuit decision acknowledging an exception for this type of case, there was no clear authority to avoid dismissal. 152 Fed. Cl. 742 (2021). This may be one of the rare instances where a trial judge is pleased to be reversed on appeal.

The unanimous opinion—authored by Judge Jimmie V. Reyna and joined by Judges Pauline Newman and Tiffany Cunningham—recognizes *SEKRI* as a case of first impression, details the purpose of the JWOD Act to prioritize federal procurement from the blind and severely disabled, and with that context concludes that the traditional timeliness and standing rules do not bar *SEKRI*'s protest. No. 2021-1936, \_\_\_ F.4th \_\_\_, 2022 WL 1510321 (Fed. Cir. May 13, 2022). As I noted in 36 NCRNL ¶ 3, the Federal Circuit crafted the timeliness rules and interested party standards that apply to bid protests, and when those rules do not serve their intended purpose in a particular case, it is the Federal Circuit's prerogative to recognize exceptions. The panel's bold decision to do so here strikes the balance of reaching the right outcome in this case without disturbing the established rules that apply to the vast majority of bid protests. *Nathaniel E. Castellano*

