

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
BID PROTEST**

AIRBOSS DEFENSE GROUP, LLC,	)	
	)	
Plaintiff,	)	
	)	
and	)	
	)	
STRING KING LACROSSE LLC,	)	
	)	
Plaintiff-Intervenor	)	
	)	
v.	)	No. 24-365
	)	(Judge Lettow)
	)	
THE UNITED STATES,	)	
	)	
Defendant,	)	
	)	
and	)	
	)	
NEW YORK EMBROIDERY STUDIO, INC.,	)	
	)	
Defendant-Intervenor.	)	

**PLAINTIFF AND PLAINTIFF- INTERVENOR’S JOINT MOTION TO REINSTATE
THE REQUIREMENT TO FILE THE ADMINISTRATIVE RECORD**

Plaintiff, AirBoss Defense Group, LLC (“ADG”), and Plaintiff-Intervenor, String King Lacrosse LLC (“StringKing”) (collectively the “Plaintiffs”), respectfully requests that the Court reinstate in part the Court’s April 22, 2024 Scheduling Order (ECF No. 36) and direct the Government to file the administrative record on or before May 10, 2024.

On April 29, 2024, the Court issued an Order suspending all proceedings (ECF No. 36). Although the Court’s April 29 Order states that the Court “considered both proposals as to how this case should proceed” (*i.e.*, the Government’s proposal and the Government’s recitation of Plaintiffs’ proposal), ADG and StringKing were not afforded a meaningful opportunity to present

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their position to the Court. For the foregoing reasons, Plaintiffs respectfully request that the Court reconsider its April 29 Order and partially reinstate the Court's April 22 Scheduling Order with respect to the requirement to file the administrative record. Doing so places no burden on the Government or the Court and will instead facilitate the orderly resolution of this matter.

Plaintiffs file this motion based on three concerns. *First*, as the Court recognized in its April 29 Order, Defendant's April 26, 2024 Status Report was, in fact, a motion. Defendant notified the parties of its intent to file the Status Report at 2:36 PM on April 26, stating that the Status Report would be filed by 5:00 PM. Exhibit A. Defendant's email provided a single sentence explaining Defendant's position regarding suspension. ADG and StringKing accordingly provided Defendant with a single sentence each explaining their position that suspension is inappropriate. Undersigned Counsel did not expect that Defendant would file several pages of legal argument in support of its proposed suspension, let alone that the parties would not receive a similar opportunity to explain their positions. Additionally, because the parties were not able to agree on a redacted copy of Defendant's email, undersigned Counsel were not able to discuss Defendant's email with their clients prior to responding.

Second, nothing changed in the four days between the Court's April 22, 2024 Scheduling Order (ECF No. 36), which directed the Government to file the administrative record on May 3, and Defendant's April 26 Status Report. The Court's April 22 Order recites that "HHS now intends to reconsider its competitive range determination within the next thirty days, issue an amendment to the solicitation revising the current requirements, engage in discussions as needed, and solicit revised final proposals." April 22 Order at 1. Defendant's April 26 Status Report simply adds dates to the Government's plans and identifies two additional aspects of the solicitation that the Government intends to "clarify." Defendant's April 26 Status Report does not

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state which offerors will be included in the competitive range, nor does it state how the solicitation will be revised or clarified, all of which are issues that go to the heart of ADG and StringKing's protests.

Nothing in the Government's April 26 Status Report makes ADG's protest or StringKing's protest any less of a live controversy than four days earlier on April 22. The Government did not take—and still has not taken—any action that moots the protests, and the additional detail provided regarding the Government's planned actions does not make it any more likely that the protests will become moot. The Government has simply called a “mulligan,” but has not actually taken a second swing.

As other Judges on this Court have ruled, “the government lacks carte blanche to end cases unilaterally — whether via a voluntary remand or dismissal for mootness — simply by calling a mulligan in a case challenging a government procurement decision pursuant to 28 U.S.C. § 1491(b).” *AccelGov, LLC v. United States*, 166 Fed. Cl. 606, 609-12 (2023) (citing cases). In *AccelGov*, as here, the Government sought to avoid responding to the merits of a protest by announcing that it would amend the solicitation, reevaluate proposals, and make a new award decision. There, as here, the Government offered no explanation why it was taking these steps, but simply claimed that the decision to take them rendered that case moot. The Court in *AccelGov* rejected the Government's attempt to “jump[] from the blurred silhouette of a proposed corrective action to a focused conclusion that [plaintiffs] have obtained all of the relief they sought.” *Id.* at 611 (alterations added; internal quotation marks omitted). It has been nearly two months since ADG filed its Complaint in this Court, and, according to the Government, it may be another three months before the Government will inform the Court of what corrective action it has actually

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taken. The silhouette of the Government's proposed corrective action in this case is even more blurred than it was in *AccelGov*.

Third, ADG and StringKing were forced to file the instant protests because HHS failed to take the corrective action that it told the Government Accountability Office ("GAO") it would take on October 23, 2023. *See* ADG Compl. ¶¶ 33-35, 84-87 (ECF No. 1); StringKing Compl. ¶¶ 93-98 (ECF No. 37). Indeed, the Government has repeatedly made broad statements about decisions that it plans to make in the future on the eve of deadlines to document its actual decision-making. The Government notified GAO of its 2023 corrective action one week before it was due to file an administrative record in ADG's GAO protest, and the Government's March 26, 2024 Notice of Corrective Action was filed the day before the Government was due to file the administrative record in StringKing's GAO protest. StringKing Compl. ¶¶ 57-58. The Government similarly filed its April 26 request for a suspension of all proceedings one week before the May 3 deadline the Court set for the filing of the administrative record.

Plaintiffs respectfully request that the Court reinstate the requirement for the Government to file the administrative record and direct that the record be filed on or before May 10, 2024 (one week later than previously ordered). ADG and StringKing appreciate the Court's desire to avoid needless litigation, and does not oppose a temporary suspension of further litigation, including briefing on cross-motions for judgment on the administrative record. Proceeding with the filing of the administrative record, however, imposes no burden whatsoever on the Government or the Court. ADG filed its Complaint two months ago, and the administrative record was due on May 3, so the record presumably has been assembled and all that is left is the ministerial task of filing it with the Court.

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Plaintiffs further submit that reinstating the requirement to file the administrative record will facilitate the orderly resolution of these protests. The administrative record will allow Plaintiffs to communicate to the Government with much greater detail and precision the errors that need to be rectified in corrective action. Just as Plaintiffs require an administrative record to demonstrate to this Court why the Government's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), Plaintiffs require an administrative record to demonstrate to the Government why they will prevail on the merits if specific corrective actions are not taken. This, in turn, will help ensure that when the Government reports to the Court what corrective action it has actually taken, Plaintiffs will be able to tell the Court exactly which aspects of this case are moot and which aspects of this case are not. And, if further briefing is necessary at that point, the record will have been produced and Plaintiffs will be prepared to move forward expeditiously with their motions for judgment on the administrative record.

Plaintiffs notified Defendant and Defendant-Intervenor, New York Embroidery Studio Inc. ("NYES"), of their intent to file this Motion. Defendant indicated that it does not consent to Plaintiffs' Motion. NYES indicated that it had no position on the issue and defers to the Court's preference.

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Dated: May 3, 2024

Respectfully submitted,

/s/ Daniel P. Graham

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2024, I caused a copy of the foregoing document to be electronically filed with the clerk using the Court's CM/ECF system. I further certify that I have served the foregoing document via Electronic Mail on the following:

United States Department of Justice
Commercial Litigation Branch
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