

No. 12-699

In the Supreme Court of the United States

RENDA MARINE, INC., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the government's right of action to enforce a contracting officer's decision under the Contract Disputes Act of 1978, 41 U.S.C. 7101 *et seq.*, does not accrue for purposes of the six-year limitations period in 28 U.S.C. 2415(a) until the contracting officer has made that decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-23) is reported at 667 F.3d 651. The opinion of the district court (Pet. App. 24-49) is reported at 750 F. Supp. 2d 755.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2012. A petition for rehearing was denied on September 6, 2012 (Pet. App. 52-53). The petition for a writ of certiorari was filed on December 5, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 2415(a) of Title 28, United States Code, provides as follows:

(1)

Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later * * * .

28 U.S.C. 2415(a).

STATEMENT

1. Congress enacted the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 7101 *et seq.*,¹ to provide “a comprehensive statutory scheme for resolving contractual conflicts between the United States and government contractors.” *United States v. J & E Salvage Co.*, 55 F.3d 985, 987 (4th Cir. 1995). As part of this framework, the CDA requires contracting officers—who have both “expertise in the administration of Government contracts” and “experience in dealing with the parties”—to address disputes between the United States and its contractors in the first instance. *Joseph Morton Co. v. United States*, 757 F.2d 1273, 1280 (Fed. Cir. 1985). Specifically, before the government can file a suit “against a contractor relating to a contract,” its claim must “be the subject of a written decision by the [applicable] contracting officer.”

¹ All references to the CDA can be found in Supplement V to the 2011 edition of Title 41 of the United States Code. The CDA was originally codified at 41 U.S.C. 601 *et seq.* and has since been recodified.

41 U.S.C. 7103(a)(3).² This step is not optional, but a “jurisdictional prerequisite” to bringing an action in court. *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993), overruled on other grounds by *Reflectone, Inc. v. Dalton*, 60 F.3d 1572 (Fed. Cir. 1995) (en banc).

A government contractor can obtain de novo review of a contracting officer’s decision by either (1) appealing it, within 90 days of receipt, to the applicable agency board of contract appeals, 41 U.S.C. 7104(a), or (2) bringing an action, within 12 months of receipt, in the United States Court of Federal Claims (CFC), 41 U.S.C. 7104(b)(1) and (3). If the contractor challenges the contracting officer’s decision in one of those fora but does not prevail, it may further appeal the matter to the United States Court of Appeals for the Federal Circuit. 28 U.S.C. 1295(a)(3) and 28 U.S.C. 1295(a)(10) (Supp. V 2011); 41 U.S.C. 7107(a). “[U]nless an appeal or action is timely commenced” under one of these options, the contracting officer’s decision becomes “final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency.” 41 U.S.C. 7103(g). Accordingly, the government’s “regular practice is not to attempt to enforce contracting officers’ decisions until a proceeding in the Court of Federal Claims has concluded or the time for bringing such a suit has expired.” *United States v. Suntip Co.*, 82 F.3d 1468, 1477 n.12 (9th Cir. 1996), cert. denied, 519 U.S. 1108 (1997).

2. In October 1998, petitioner contracted with the Army Corps of Engineers (Corps) to dredge part of

² Similarly, contractors must submit their claims to a contracting officer before bringing an action against the United States. 41 U.S.C. 7103(a)(1).

the Houston Ship Channel and to construct containment levees and other structures at a disposal site. After encountering difficulties during dredging and construction, petitioner sought additional compensation from the Corps. The Corps was willing to provide petitioner with further compensation, but the parties were unable to reach an agreement on the total amount. Pet. App. 2-3, 25; Compl. 1-2.

In February 2001, petitioner submitted multiple claims for additional compensation to the appropriate contracting officer under the CDA. Pet. App. 25; Pet. C.A. Br. 1. After the contracting officer did not issue a decision on those claims within 60 days, they were deemed to have been denied. 41 U.S.C. 7103(f); 71 Fed. Cl. 782, 784 & n.2.

Accordingly, on April 11, 2002, petitioner brought an action against the government in the CFC, seeking more than \$14 million in damages. See 71 Fed. Cl. at 784. While that suit was pending, the contracting officer issued a decision on November 26, 2002, determining that petitioner owed the United States \$11,860,016 in completion costs, remediation, and liquidated damages resulting from its failure to complete the contract. Pet. App. 54-62.

Petitioner did not timely appeal that decision to the Armed Services Board of Contract Appeals or to the CFC. Instead, on July 1, 2004—more than half a year after the contracting officer’s decision became final—petitioner filed a motion for leave to amend its original complaint in the ongoing CFC litigation to include a challenge to that decision. Pet. App. 26. On July 30, 2004, the CFC denied the motion, observing that petitioner did “not dispute either that it timely received the final decision or that it declined to exercise its

appeal rights under the [CDA].” 71 Fed. Cl. at 785 (citation omitted).

Petitioner nevertheless repeatedly and unsuccessfully attempted to revive its attack on the contracting officer’s decision throughout the proceedings in the CFC, which lasted until June 30, 2006. See 71 Fed. Cl. at 785-786, 788. The CFC held that, because petitioner had failed to timely appeal the contracting officer’s decision, that decision had become “final and conclusive and not reviewable by this court.” *Id.* at 790 (internal quotation marks and citation omitted). Following petitioner’s subsequent appeal, the Federal Circuit affirmed the decision of the CFC on December 11, 2007. 509 F.3d 1372, 1381.

3. On November 24, 2008—less than six years after the contracting officer had issued his decision on November 26, 2002, and less than one year after the Federal Circuit’s December 11, 2007, affirmance of the CFC’s decision—the United States brought an action in federal district court seeking “judgment against [petitioner]” in the amount of \$11,860,016 plus post-judgment interest. Compl. 2-3. The government then moved for judgment on the pleadings, arguing that it was entitled to judgment because “the contracting officer’s decision was ‘final and conclusive’” and petitioner could “not attack it on the merits.” Mot. for J. on the Pleadings 15.

In response, petitioner moved for partial summary judgment. Petitioner conceded that “as a legal consequence of [its] failure to appeal the contracting officer’s final decision, the alleged breaches are deemed to have occurred.” Mot. for Partial Summ. J. 5 n.4. Petitioner argued, however, that the government’s claim was barred by the applicable statute of limita-

tions. *Id.* at 9. Petitioner relied on 28 U.S.C. 2415(a), which provides in relevant part that “every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact” must be “filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.” According to petitioner, the government’s claim had accrued no later than September 18, 2001, when petitioner’s “breaches * * * had all occurred and were known by the Corps.” Mot. for Partial Summ. J. 10. Because the government had not asserted that claim by September 18, 2007, petitioner argued that it was time-barred. *Id.* at 10-11.

The district court granted the government’s motion and denied petitioner’s. Pet. App. 49. In relevant part, the court concluded that the government’s suit was timely under Section 2415(a)’s “one year savings clause.” *Id.* at 44. The district court explained that, until petitioner’s “appeal of the CFC’s decision denying [petitioner] leave to amend its complaint [to challenge the contracting officer’s final decision] was finalized,” there was a possibility that “the Federal Circuit could have changed or reversed” that decision, thereby giving petitioner “the opportunity to litigate the merits of the contracting officer’s decision.” *Id.* at 46. The court accordingly concluded that, because the United States had filed its claim within one year after the Federal Circuit’s December 11, 2007, decision, its suit was timely under Section 2415(a)’s saving clause. *Ibid.*

4. The court of appeals affirmed. Pet. App. 2. Although it “agree[d] with the district court that the Government’s suit was timely,” the court of appeals did not believe that the claim was covered by the saving clause. *Id.* at 14-15. Instead, relying on the conclusion of the “only appellate court to deal with a case on-point,” *id.* at 12 (citing *Suntip Co.*, 82 F.3d at 1475), the court of appeals held that the government’s suit was timely because it was filed within six years after the contracting officer’s November 26, 2002 decision, *id.* at 15. While acknowledging that “traditionally, a contract claim accrues when the contract is breached,” *id.* at 11, the court of appeals observed that “it makes little sense to hold that the Government’s cause of action for [petitioner’s] breach of contract and separate cause of action to enforce a decision regarding that breach accrued on the same date,” *id.* at 12. The court explained that, under the CDA, “[t]he Government cannot seek to enforce a [contracting officer]’s decision until that decision has been rendered, nor do the federal courts have jurisdiction until that time.” *Id.* at 14. Because “time cannot run against the government until it is procedurally possible for it to sue,” *id.* at 12 (citation and alteration omitted), the court of appeals held that Section 2415(a)’s limitations period had commenced to run “when the [contracting officer] issued [his] decision, not when [petitioner] breached the contract,” *id.* at 11.

ARGUMENT

The court of appeals correctly held that the government’s right of action to enforce the contracting officer’s decision did not accrue under 28 U.S.C. 2415(a) until that decision was actually issued. That

conclusion does not conflict with any decision of this Court or of any other court of appeals, and this Court has previously denied review of the question presented here. See *Hampton Tree Farms, Inc. v. United States*, 519 U.S. 1108 (1997). And even if the government’s right of action were found to have accrued at the time of petitioner’s breach, this suit would be timely under Section 2415(a)’s saving clause. Further review is not warranted.

1. Section 2415(a) of Title 28 provides that “every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract” must be “filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later.” Petitioner contends (Pet. 11) that the government’s claim in this case “accrued” when petitioner breached the contract, even though the United States could not have brought suit at that time. That interpretation does not withstand scrutiny.

As this Court has repeatedly observed, “the general limitations rule” is “that a cause of action accrues once a plaintiff has a ‘complete and present cause of action.’” *Merck & Co. v. Reynolds*, 130 S. Ct. 1784, 1793 (2010) (citation omitted); accord *Gabelli v. SEC*, No. 11-1274 (Feb. 27, 2013) slip op. 5; see *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875) (“All statutes of limitation begin to run when the right of action is complete.”). Under this rule, “[u]nless Congress has [said] otherwise in the legislation at issue, a cause of action does not become ‘complete and present’ for limitations purposes until the plaintiff can file suit and obtain relief.” *Bay Area Laundry & Dry*

Cleaning Pension Trust Fund v. Ferbar Corp., 522 U.S. 192, 201 (1997) (*Bay Area Laundry*) (citation omitted).

Section 2415(a) provides no indication that Congress intended to depart from this general limitations rule. Instead, as this Court has recognized, “[i]n 1966, when § 2415(a) was enacted, a commonly used legal dictionary defined the term ‘right of action’ as ‘[t]he right to bring suit[,] * * * with ‘suit’ meaning ‘any proceeding . . . in a court of justice.’” *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) (*BP America*) (some brackets in original) (quoting *Black’s Law Dictionary* 1488, 1603 (4th ed. 1951)). Accordingly, a “right of action accrues” under Section 2415(a) when the United States is able to initiate judicial proceedings. See *id.* at 91-92.

Under this framework, petitioner is therefore correct (Pet. 11, 21) that a claim by the government for a breach of contract ordinarily accrues at the time of breach. See, e.g., *United States v. Kass*, 740 F.2d 1493, 1497 (11th Cir. 1984) (“The general rule in contract actions is that the cause accrues at the time of breach.”). Indeed, suits by the government “founded upon any contract” frequently accrue under Section 2415(a) as soon as the relevant breach occurs. See, e.g., *Phillips Petroleum Co. v. Lujan*, 4 F.3d 858, 861 (10th Cir. 1993) (limitations period begins to run in an action by the government to recover unpaid royalties from an oil and gas lease at the time the contract was breached); *FDIC v. Belli*, 981 F.2d 838, 840 (5th Cir. 1993) (limitations period begins to run in an action by the government to recover the amount due on a promissory note at the time the payor of the note came into breach).

The effect of the CDA, however, is to defer the accrual of the government's cause of action for breach of contract in cases subject to that statute. Where the CDA applies, it withholds the government's "right to bring suit," *BP America*, 549 U.S. at 91 (citation omitted), until it has obtained a decision from the appropriate contracting officer, 41 U.S.C. 7103(a)(3). Petitioner acknowledges that the CDA required the United States to secure the contracting officer's decision in this case "as a prerequisite to suit." Pet. 4 n.4; see *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1489 (5th Cir.) ("The decision, or failure to decide, by a contracting officer is an absolute jurisdictional prerequisite to filing a suit under the Contract Disputes Act."), cert. denied, 493 U.S. 935 (1989). Accordingly, the government's right of action against petitioner was not "complete and present" for purposes of Section 2415(a)'s limitations period until the contracting officer had rendered the decision that allowed the government to "file suit and obtain relief." *Bay Area Laundry*, 522 U.S. at 201.

The nature of an action to enforce a contracting officer's decision confirms this reading. "[B]ecause the merits of the [contracting officer's] decision[] are not subject to attack" in an action to enforce that decision, such an action is "similar to a suit on a judgment." *United States v. Suntip Co.*, 82 F.3d 1468, 1474 (9th Cir. 1996), cert. denied, 519 U.S. 1108 (1997); accord *United States v. Kasler Elec. Co.*, 123 F.3d 341, 345-346 (6th Cir. 1997); *Seaboard Lumber Co. v. United States*, 903 F.2d 1560, 1562 (Fed. Cir. 1990), cert. denied, 499 U.S. 919 (1991). Consequently, a district court "may inquire only as to the finality and unreviewability of the decision that was issued—i.e.,

whether the contractor received notice of a final decision, and whether it timely commenced an appeal or suit in one of the provided forums.” *Kasler Elec. Co.*, 123 F.3d at 346. Indeed, petitioner recognized this fact in the proceedings below. Rather than attempt to re-litigate the merits of the contracting officer’s decision, petitioner conceded that “as a legal consequence of [its] failure to appeal the contracting officer’s final decision, the alleged breaches are deemed to have occurred.” Mot. for Partial Summ. J. 5 n.4.³

It therefore would make little sense for this cause of action—in which the court can consider only the procedural validity of the contracting officer’s decision—to accrue before that decision was made. Cf.

³ Petitioner now appears to resist this conclusion, arguing that there is “no basis to characterize the Government’s ‘right of action’ as anything other than * * * a claim for contract damages.” Pet. 34; see Pet. 31-34. In support of that argument, petitioner relies (Pet. 32) on a decision by the Third Circuit, in which that court observed that the CDA “creates no substantive contractual rights” but “assumes the existence of a traditional contractual cause of action.” *In re Remington Rand Corp.*, 836 F.2d 825, 831 (1988). Petitioner’s reliance on that decision is misplaced. No one contends that the CDA provides the government with a novel contractual right. The relevant question instead is whether, once the government has obtained a decision from a contracting officer that a breach has occurred, its subsequent action to enforce that decision should be treated as an ordinary contract claim for accrual purposes. The Third Circuit’s decision in *Remington*, which held that the government may have a “claim” within the meaning of the Bankruptcy Code before it possesses, by virtue of a contracting officer’s decision, a cause of action on that claim, *id.* at 826-832, does not bear on that question. The Third Circuit distinguished the situation in *Remington* from cases involving the issue “of when a traditional ‘right of action’ accrues” and circumstances where administrative proceedings were “mandatory.” *Id.* at 829. Both of those factors are present here.

Crown Coat Front Co. v. United States, 386 U.S. 503, 515 (1967) (*Crown Coat*) (A litigant cannot “sensibly ask the courts to review a decision which has not yet been made.”). Accordingly, based on a straightforward application of this Court’s general limitations rule, the earliest date on which the government’s “right of action” against petitioner could have “accrue[d]” under 28 U.S.C. 2415(a) was November 26, 2002, when the contracting officer issued his decision.

2. Petitioner offers two reasons why the general limitations rule should not apply to an action to enforce a contracting officer’s decision under the CDA. Neither is convincing.

a. Petitioner argues (Pet. 28-31) that the court of appeals’ decision “invalidates” Section 2415(a)’s saving clause. That saving clause gives the government “one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law” in which to file suit. 28 U.S.C. 2415(a). According to petitioner (Pet. 29), allowing the United States to bring a claim six years after the contracting officer’s decision would render the saving clause superfluous.

Petitioner’s claim ignores the CDA’s framework for administrative appeals. If the only relevant “administrative proceeding[.]” under the CDA was the contracting officer’s decision, petitioner’s argument would have force. It would make little sense for Congress to give the United States one year from the contracting officer’s decision to file suit if it already had six. But under the CDA, the contracting officer’s decision is not the end of the story. Instead, the CDA provides an elaborate appeals process under which a contractor can challenge that decision in either the appropriate

board of contract appeals, 41 U.S.C. 7104(a), or the CFC, 41 U.S.C. 7104(b). And if the contractor loses before one of those tribunals, it can appeal to the Federal Circuit. 28 U.S.C. 1295(a)(3) and 28 U.S.C. 1295(a)(10) (Supp. V 2011); 41 U.S.C. 7107(a).

In total, the process for appealing a contracting officer's decision can easily last up to six years or more. See, e.g., *Suntip Co.*, 82 F.3d at 1472 & n.4, 1473 (although the contracting officer began issuing decisions in March 1987, litigation did not come to a close in the CFC until July 1993). In those situations, the saving clause operates to protect the government's claim after the ordinary limitations period has expired. Applying the general limitations rule to Section 2415(a)'s six-year deadline therefore does not render the saving clause superfluous.⁴

b. Petitioner further contends (Pet. 20-21) that the CDA's "similar accrual language" indicates that apply-

⁴ For similar reasons, there is no merit to petitioner's contention (Pet. 19-20) that the legislative history of Section 2415(a) "undercut[s] any rationale for running the six-year limitations period from [a contracting officer's] decision." Although the Senate Judiciary Committee's report stated that the saving clause was drafted because "[a]n administrative proceeding ordinarily consumes a considerable period of time," S. Rep. No. 1328, 89th Cong., 2d Sess. 3 (1966), the administrative appeals process described in the text is naturally viewed as part of the relevant "administrative proceeding." See *ibid.* ("An example of such an administrative proceeding are those which involve appeals under the 'disputes' clause of Government contracts."). And at any rate, Section 2415(a) was enacted 12 years before the CDA, at a time when government contract disputes were handled differently than they are today. See pp. 16-18, *infra*. This legislative history therefore has little bearing on the application of the saving clause to CDA cases, where a proceeding before a contracting officer is a jurisdictional prerequisite for bringing an action in court.

ing the general limitations rule to Section 2415(a) would be inappropriate. As amended in 1994, the CDA provides that, except in cases of fraud, “each claim by the Federal Government against a contractor relating to a contract” must be “submitted” to a contracting officer “within 6 years after the accrual of the claim.” 41 U.S.C. 7103(a)(4). It is undisputed that, for purposes of the CDA, this “claim” accrues at breach. Gov’t C.A. Br. 23. Based on that fact, petitioner asserts (Pet. 21) that it is necessary to run both the CDA’s and Section 2415(a)’s limitations periods “from the same event” in order to “further[] the purpose of section 2415, which is to prevent the Government from asserting stale claims.” Otherwise, petitioner argues (Pet. 26-27), the United States will have up to 12 years following a contractor’s breach to bring an action in court, an outcome petitioner finds “unsupportable.”

Petitioner’s reading does not comport with the history of the CDA. Before the enactment of the Federal Acquisition Streamlining Act of 1994, the CDA did not limit the time within which the government could submit claims to a contracting officer. Pub. L. No. 103-355, § 2351, 108 Stat. 3322; *Motorola, Inc. v. West*, 125 F.3d 1470, 1473 (Fed. Cir. 1997). Accordingly, prior to 1994, contracting officers could and did issue final decisions more than six years after the conduct underlying the government’s claim had occurred. See *Motorola, Inc.*, 125 F.3d at 1472. For much of the CDA’s history, it therefore was possible for the government to bring an action enforcing a contracting officer’s decision more than six years after the underlying breach. The potential for such delays did not render the CDA’s process for resolving government contract disputes unworkable.

At any rate, contractors now possess ample forms of relief under the CDA to prevent excessive delays by a contracting officer. For “any submitted claim of \$100,000 or less,” a contracting officer must render a decision “within 60 days from * * * receipt of a written request” that it do so. 41 U.S.C. 7103(f)(1). More generally, the CDA requires “[t]he decision of a contracting officer on submitted claims” to “be issued within a reasonable time” and, “in the event of undue delay on the part of the contracting officer,” the statute gives the contractor the right to ask “the tribunal concerned to direct [the] contracting officer to issue a decision within a specified period of time.” 41 U.S.C. 7103(f)(3)-(4). Because the CDA affords contractors multiple protections against the assertion of stale claims, there is no reason to adopt a strained interpretation of Section 2415(a) to provide additional relief.

3. Petitioner asserts (Pet. 12-18) that applying the general limitations rule in this context conflicts with this Court’s decisions in *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59 (1953) (*Unexcelled Chemical*), *Crown Coat*, *supra*, and *BP America*, *supra*. Petitioner’s reliance on those decisions is misplaced.

In *Unexcelled Chemical*, this Court held that the government’s cause of action under the Walsh-Healy Act—which prohibits the use of child labor in government contracts—accrued at the time the contractor knowingly employed child labor rather than at the end of the relevant administrative proceedings. 345 U.S. at 65. Petitioner contends (Pet. 12) that, under that decision, “the presence of administrative proceedings has no relevance to the accrual of an already-existing right of action.” This Court, however, rejected that expansive reading of *Unexcelled Chemical* more than

40 years ago. In *Crown Coat*, the Court pointed out that, in *Unexcelled Chemical*, the government “could have brought suit without first resorting to administrative remedies.” 386 U.S. at 519. Accordingly, the Court held that the analysis in *Unexcelled Chemical* did not “control” a case, like this one, in which the government was required to obtain an administrative decision before bringing an action in court. *Ibid.*

Petitioner’s reliance on *Crown Coat* (Pet. 14-17) is likewise misplaced. In *Crown Coat*, this Court held that a contractor’s claim against the United States had accrued for purposes of the six-year limitations period in 28 U.S.C. 2401 “upon the completion of the administrative proceedings contemplated and required by the provisions of the contract.” 386 U.S. at 511. In the course of that decision, this Court rejected the government’s argument that, for both the United States and its contractors, “the right of action * * * in dispute clause situations first accrues * * * prior to the completion of administrative proceedings.” *Id.* at 520. The Court explained that it was “hesitant to believe that in [enacting Section 2415] Congress consciously extended a one-year saving period to the Government to overcome the effects of protracted administrative proceedings and refused similar relief to the contractor.” *Id.* at 521-522.

In *Crown Coat*, the government thus argued—and this Court apparently assumed—that “the right of action of the United States in *dispute clause situations* first accrues * * * prior to the completion of administrative proceedings.” 386 U.S. at 520 (emphasis added). That fact, however, has no bearing on this case, where the government’s resort to administrative proceedings was required by the CDA rather than

simply by the parties' agreement. Unlike a contracting officer's decision under the CDA, a contracting officer's decision pursuant to a contractual dispute clause is not a jurisdictional prerequisite to the commencement of a breach of contract suit.

To be sure, a party to an agreement with a dispute clause was contractually obligated to submit factual disputes to a contracting officer in the first instance. That requirement, however, was the product of a voluntary agreement and not a statutory command. See *Crown Coat*, 386 U.S. at 505, 507, 511. Accordingly, the suit following those proceedings was not treated as an action to enforce the contracting officer's decision. Instead, the contracting officer's factual findings were reviewed under a substantial evidence standard, which meant that the parties could relitigate the merits of a contract dispute in court. *Id.* at 507, 513.

Thus, as the United States argued in its brief (at 10), *Crown Coat, supra* (No. 66-371), a “voluntary undertaking to defer seeking judicial redress does not affect the character of the cause of action or postpone its accrual; the claim is still one for breach of contract.” (emphasis added; footnotes omitted). As the government explained, in the dispute clause context, “[t]he administrative determination—though reviewable in the judicial proceeding—does not create a new cause of action or extinguish the original cause from which the suit arose.” *Id.* at 12 (citation omitted). It therefore made sense for this Court to assume that a contract claim subject to a dispute clause would accrue at the time of the alleged breach, *i.e.*, before the end of the optional administrative fact-findings. See *id.* at 11-12. That reasoning, however, does not logi-

cally apply to a claim to enforce a contracting officer’s decision under the CDA, where the relevant administrative decision is a jurisdictional prerequisite to suit and is not subject to review on the merits in the course of an enforcement proceeding.

Nor does *BP America* help petitioner. In *BP America*, this Court held that, because Section 2415(a)’s limitations period “applies only to court actions,” it did not govern the amount of time the Department of the Interior had to issue an administrative payment order demanding that a party pay oil and gas royalties. 549 U.S. at 101. Because petitioner does not dispute that the CDA—and not Section 2415(a)—controls the time the government has to issue an administrative order (*i.e.*, the contracting officer’s decision), see Pet. 4 n.4, 26, it is unclear how *BP America*’s holding bears on this case. And although petitioner contends (Pet. 18) that this Court’s distinction between administrative and judicial proceedings in *BP America* is “dispositive” here, petitioner fails to explain how that is so.⁵

⁵ Petitioner also relies on the Court’s statement in *BP America* that, “[t]o the extent that any doubts remain regarding the meaning of § 2415(a),’ the statute must be ‘construed narrowly against the Government.’” Pet. 12 (quoting 549 U.S. at 95). In context, however, that language supports the government’s position in this case rather than petitioner’s. The Court grounded its rule of narrow construction in the longstanding interpretive principle “that when the sovereign elects to subject itself to a statute of limitations, the sovereign is given the benefit of the doubt if the scope of the statute is ambiguous.” 549 U.S. at 96. The Court’s point was that, in cases where Section 2415(a) is invoked against the government, the statute (to the extent it is ambiguous) “must be ‘construed narrowly’”—*i.e.*, in the government’s *favor*. Pet. 12 (quoting 549 U.S. at 95).

4. a. Contrary to petitioner’s contention (Pet. 6-7, 22-26), the decision below does not conflict with any decision of another court of appeals. Like the Fifth Circuit in this case, the only other court of appeals to have considered the question presented here—the Ninth Circuit—held that, in claims by the government to enforce a contracting officer’s decision under the CDA, Section 2415(a)’s six-year limitations period does not begin to run until that decision is made. See *Suntip Co.*, 82 F.3d at 1476.

Petitioner argues (Pet. 22-26) that both *Suntip Co.* and the decision below conflict with the Eleventh Circuit’s decisions in *Kass, supra*, and *United States v. American States Insurance Co.*, 252 F.3d 1268 (2001) (*American States*). According to petitioner (Pet. 24-26), those decisions stand for the proposition that the requirement of administrative proceedings does not delay the accrual of a cause of action under Section 2415(a). Neither of those cases, however, involved suits akin to a claim to enforce a contracting officer’s decision under the CDA.

Kass was a suit by the government against a doctor to “recover funds erroneously paid to him for provision of services under the Medicare program.” 740 F.2d at 1494. In that case, the Eleventh Circuit rejected the argument that the government’s cause of action did not accrue until the six-month period for the defendant to “request[] an administrative hearing had passed.” *Id.* at 1496. Under the governing statutory and regulatory regime, however, those administrative hearings were not a prerequisite to the government’s suit. See *United States v. Bragg*, 493 F. Supp. 470, 474 (M.D. Fla. 1980) (“[T]he assumption that the Government could not commence its suit until

it had offered defendants an administrative hearing of some sort * * * is without support in the Medicare Act, the regulations adopted thereunder, and the applicable statute of limitations.”), overruled on other grounds by *United States v. Sanet*, 666 F.2d 1370 (11th Cir. 1982). The Eleventh Circuit therefore applied this Court’s general limitations rule and held that a contract claim by the government accrues upon breach. *Kass*, 740 F.2d at 1497.

American States likewise does not implicate the question presented here. There, the Eleventh Circuit held that the government’s right of action against the surety of a government contractor accrued under Section 2415(a) when the contractor breached its contract and the surety refused to honor its bond obligation. 252 F.3d at 1272. The Eleventh Circuit rejected the argument that the government’s cause of action did not accrue until after the contracting officer made his decision. *Ibid.* The Eleventh Circuit’s holding was based, however, on the court’s recognition that “[a] suit for breach of a surety agreement is not a CDA claim, and therefore such claim does not have to be litigated according to the procedures established by the CDA.” *Ibid.*; accord *United States v. Seaboard Sur. Co.*, 817 F.2d 956, 962-963 (2d Cir.), cert. denied, 484 U.S. 855 (1987). The court therefore concluded that, as soon as the surety announced that it would not honor its bond obligation, “the Government had the right to sue for breach of contract” without invoking any additional administrative procedures. *American States*, 252 F.3d at 1272. That analysis is inapplicable where, as here, a contracting officer’s decision is a statutory prerequisite to the government’s suit.

To be sure, the Eleventh Circuit went on to state in dicta that its reasoning in *Kass* would apply “[r]egardless of whether the CDA * * * requires a contracting officer’s final decision” “before the Government may sue a surety.” *American States*, 252 F.3d at 1273. That comment, however, was unnecessary to the Eleventh Circuit’s judgment in light of its conclusion that a suit for breach of a surety’s obligations need not be litigated according to the requirements of the CDA. See *id.* at 1272. Because this Court “reviews judgments, not statements in opinions,” *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956), there is no need at this time for the Court to address the dicta in *American States* discussing *Kass*.

b. Even if a circuit conflict did exist regarding the accrual date of a government cause of action under the CDA, this case would present a poor vehicle in which to resolve it. Regardless of when Section 2415(a)’s six-year limitations period began to run, the government’s suit was timely under the statute’s saving clause because it was filed “within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law.” 28 U.S.C. 2415(a).

According to the court of appeals (Pet. App. 15), the contracting officer’s decision in this case became final on November 26, 2003, due to petitioner’s failure to pursue a timely appeal within the year following that decision. Under the court of appeals’ view, the one-year grace period under the saving clause therefore ended on November 26, 2004. *Ibid.* Under ordinary circumstances, that application of the saving clause would be correct. Beginning on July 1, 2004, however, petitioner spent more than three years pur-

suing various challenges to the contracting officer's decision in both the CFC and the Federal Circuit. See 71 Fed. Cl. at 785-786, 788. The district court correctly recognized that, in light of petitioner's conduct, the court could not have considered the government's claim "until [petitioner's] appeal of the CFC's decision denying [it] leave to amend its complaint was finalized." Pet. App. 46. As the district court explained, there was always a chance, however remote, that "the Federal Circuit could have changed or reversed the CFC's decision and thereby allowed [petitioner] the opportunity to litigate the merits of the contracting officer's decision." *Ibid.* Because the United States filed this action within one year of the Federal Circuit's decision of December 11, 2007, the suit was timely under the saving clause.

Petitioner does not directly address this problem with its argument, choosing instead to rely (Pet. 9-10) on the court of appeals' disagreement with the district court's application of the saving clause. Pet. App. 14-15. The court of appeals believed that petitioner's attack on the contracting officer's decision did not constitute an applicable administrative proceeding because it was not "required by law." *Id.* at 15. Under that reading of Section 2415(a), however, it is hard to see how an administrative appeal to the CFC or board of contract appeals would qualify, since a contractor is not legally obligated to pursue those avenues of redress either.

More importantly, requiring the government to file a protective suit in court while petitioner's challenge in the CFC (and subsequently the Federal Circuit) was pending would invite duplicative and potentially wasteful litigation. Such parallel proceedings would

undermine the CDA’s “two-step review process” designed “to streamline the settlement of controversies over federal government contracts.” *Bethlehem Steel Corp. v. Avondale Shipyards, Inc.*, 951 F.2d 92, 93 (5th Cir. 1992); cf. *Crown Coat*, 386 U.S. at 515 (requiring a “protective suit” in the context of government contracts would create “a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts”).⁶ Therefore, even if the government’s right of action “accrued” under Section 2415(a) at the time petitioner breached the contract, this suit was still timely under the statute’s saving clause. Further review is not warranted.

⁶ The court of appeals also suggested that the saving clause was inapplicable because an appeal to the Federal Circuit—an Article III court—cannot constitute an “applicable administrative proceeding.” Pet. App. 13-15 (alteration omitted). That reasoning ignores the history of 28 U.S.C. 2415. When Section 2415(a) was enacted in 1966, contractors could seek review of the decisions of contracting officers before the applicable board of contract appeals, with a right of appeal to the United States Court of Claims, an Article III tribunal. There is no evident reason that Congress would have intended such an appeal to fall outside the scope of the saving clause. See *United States v. General Elec., Inc.*, 556 F. Supp. 801, 805 (D.N.J. 1983). But see *United States v. Dawkins*, 629 F.2d 972, 975 (4th Cir. 1980) (rejecting, without analysis, the argument that “the final decision in the applicable administrative proceedings in this case included the final judgment of the Court of Claims”).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 2013