



DECEMBER 2012

BP's Suspension Highlights Risk of Exclusion for Government Contractors

In its [November 28 suspension of British Petroleum p.l.c.](#) (BP) and many BP-related entities from contracting with the United States government, the Environmental Protection Agency (EPA) utilized one of the most powerful enforcement tools available to federal agencies: preventing companies from doing business with the United States. While BP's \$4.5 billion settlement of criminal charges and the risk of another multibillion-dollar penalty in connection with the upcoming civil trial represent unprecedented fines, the inability to contract with the US government has the potential to be the single most significant penalty imposed on BP as a result of the 2010 Deepwater Horizon incident. For companies that do business with the US government, BP's contracting ban illustrates the often overlooked and underestimated role that suspension and debarment play in connection with federal enforcement cases.

Suspension and debarment are intended to ensure that government agencies only contract with "responsible" companies. While exclusion is not meant to further punish companies that do business with the United States, that result is inescapable. In the environmental arena, violations of statutes such as the Clean Water Act (CWA) and the Clean Air Act (CAA) can result in the automatic disqualification of contractors who have engaged in prohibited conduct. In many instances, debarment comes as a result of "integrity" offenses such as embezzlement, forgery, bribery, tax evasion, etc. Exclusion under environmental statutes does not require such morality offenses and can include simple unpermitted discharges under the CWA or violations of new source performance standards under the CAA. Suspension and debarment are two separate procedures. Suspension, which is BP's current status, renders a contractor ineligible from obtaining new government contracts or receiving certain federal assistance, loans, or other benefits for some period of time determined by the agency, usually during the pendency of an investigation or a related legal proceeding. Debarment typically follows suspension and removes a contractor's eligibility for a fixed period of time (generally no longer than three years) following a determination of liability or a formal agency determination that the contractor is not presently responsible, as defined in the regulations. Once excluded, a contractor may do business with the United States only by obtaining a waiver from the contacting agency or by entering into an administrative agreement with the government, under which the banning agency may impose a series of additional compliance obligations.

In the BP case, the EPA's suspension came as a surprise to many industry watchers. Given

the fact that BP is one of the top one hundred contractors supplying goods and services to the US government and is the US military's single largest fuel supplier, the company was viewed by many as "too big" to suspend or debar. In addition, public statements by BP following the November 15 settlement of the criminal case indicated that its post-incident compliance efforts, including leadership changes and new drilling standards, had resolved the types of concerns that government exclusion is intended to address regarding the business integrity of government contractors.

Although BP's suspension could have wide-ranging consequences for the company on future government work, it does not affect its existing contracts, which include \$1.3 billion in new contracts announced on September 20. BP is the single largest operator and investor in the Gulf, and since the blowout, it has received more than 50 new drilling leases. Those ongoing drilling and production operations will not be affected by the suspension; however, BP did not submit any bids on a recent sale of leases on 20 million acres of offshore oil and gas prospects in the Western Gulf. The next Gulf lease sale will be held on March 20 when 38 million acres off the coast of Louisiana, Mississippi, and Alabama are made available. The EPA has not said how long the suspension will last. Federal regulations generally limit suspensions to 18 months, but the suspension could be lifted as soon as the agency and BP reach an administrative agreement, which typically includes additional compliance measures and often remains in place for up to three years. While BP has the right to contest the suspension, the company has stated that it is actively engaged in discussions with the EPA and anticipates a draft administrative agreement soon. It also is possible that the suspension will remain in place until the conclusion of the government's civil case against the company, scheduled to begin in February. A number of public interest groups are calling for BP's exclusion to continue throughout its five-year probation period.

For companies that do business with the US government, exclusion is often viewed as the "nuclear option" in an enforcement proceeding. While monetary penalties and mandatory compliance programs can be severe, that exposure can be readily quantified, reserved, and capped. Those penalties also are formulated in connection with a judicial process in which the court provides an oversight function. Suspension and debarment determinations, on the other hand, are made exclusively by the agency only following the resolution of a criminal case, and the standard for judicial review is very high. As a result, even after difficult and costly negotiations or a trial, the harshest reckoning for companies that do business with the US may still be yet to come.

FOR MORE INFORMATION

Robinson & Cole's [Environmental Practice Group](#) regularly defends clients in enforcement matters and represents clients in administrative and judicial proceedings. Our [Admiralty and Maritime Law Practice Group](#) represents vessel owners and managers and coastal businesses on a wide variety of compliance and regulatory matters. For more information, please contact one of the following attorneys:

[Peter R. Knight](#)
(860) 275-8387
pknight@rc.com

[Christopher Foster](#)
(617) 557-5908
cfoster@rc.com

© 2012 Robinson & Cole LLP. All rights reserved. No part of this document may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without prior written permission. This document should not be considered legal advice and does not create an attorney-client relationship between Robinson & Cole and you. Consult your attorney before acting on anything contained herein. The views expressed herein are those of the authors and not necessarily those of Robinson & Cole or any other individual attorney of Robinson & Cole. The contents of this communication may contain attorney advertising under the laws of various states. Prior results do not guarantee a similar outcome.

