

# Alert: BP Temporarily Banned From New Contracts With U.S. Government

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On November 28, 2012, the EPA suspended oil giant BP PLC from bidding on any new federal contracts, citing the company's "lack of business integrity" in connection with the 2010 Deepwater Horizon disaster which caused 11 deaths and the largest offshore oil spill in U.S. history. The company-wide suspension affects all new contracts, including military supply deals and drilling leases. EPA did not indicate how long the suspension would last, but representatives of BP said they expected to receive a draft administrative agreement lifting the suspension "soon." The temporary ban was announced the same day that the Department of Interior held a sale of leases on 20 million acres of offshore oil and gas prospects in the western Gulf of Mexico.

EPA's suspension and debarment program began in 1982 as part of an attempt by the Office of Management and Budget to respond to and correct government-wide inadequacies in the management of federal contracts and assistance with regard to contractor waste, fraud, abuse, and poor performance. Suspension and debarment by the EPA, or any other federal agency, is either mandatory or discretionary. In the environmental context, mandatory debarment is imposed by operation of law under Section 508 of the Clean Water Act and Section 306 of the Clean Air Act. Those provisions prohibit a federal agency from entering into any contract with a person convicted of a criminal violation of the respective statutes if the contract is to be performed at the facility where the violation occurred and if such facility is owned, leased, or supervised by such person. Thus, mandatory debarment prohibits the government from granting contracts or subcontracts *only* to the specific facility where the violation occurred. Further, although the ban is government-wide, it can be lifted by correcting the violation that gave rise to the conviction.

BP's suspension came under EPA's discretionary authority to suspend and debar. Discretionary suspension and debarment is much broader. Federal agencies have general authority to suspend or debar a company for any of a number of causes set out in the Federal Acquisition Regulation. Such causes include the "[c]ommission of any . . . offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor," which was the stated grounds for BP's suspension. See FAR 9.406-2(a)(5). Further, unlike mandatory debarment, discretionary suspension or debarment can be company-wide and of an indefinite duration.

There are three main differences between suspension and debarment: (1) the length of the ban; (2) the standard of proof required to impose the ban; and (3) the timing of the imposition of the ban. First, debarment

imposes a much lengthier term of exclusion than suspension. In general, a period of debarment cannot exceed three years, while a period of suspension cannot exceed eighteen months. Second, the standard of proof required to debar a company is more stringent than the standard of proof required to suspend a company. A debarring official must conclude, based on a preponderance of the evidence, that the contractor has engaged in conduct that warrants debarment. A suspending official, on the other hand, can impose a suspension on the basis of adequate evidence, upon a determination that immediate action is necessary to protect the government's interest. Third, a debarment is imposed only after giving the respondent notice of the action and an opportunity to contest it. A suspension, by contrast, is first imposed by the suspending official, who thereafter notifies the suspended person and provides him an opportunity to contest the suspension.

As a matter of political reality, it is mostly small companies that find themselves cut off from federal business because they are found to be irresponsible. Indeed, the top 100 government contractors (as measured by total amount of federal dollars awarded through government contracts) have paid more than \$25 billion in penalties for fraud, bribery, falsifying records, and other violations over the past fifteen years, but only four of them – Boeing, IBM, L-3 Communications, and Agility (formerly PWC Logistics) – have been suspended from government contracting on a company-wide basis during that time, and none have been debarred. Further, none of those suspensions involved an environmental violation. Thus, BP's suspension is unprecedented.

EPA's press release regarding the disaster provided few details as to why the suspension was being handed down. It remains to be seen whether this is a harbinger of things to come or an anomaly driven by the unprecedented size and scope of the Deepwater Horizon disaster. Regardless, the EPA's move demonstrates that no government contractor is too big to suspend or debar.

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