

PAST PERFORMANCE POLICY

This policy is to be used by Cal OES when considering past performance issues of existing subrecipients who apply for new Cal OES funding. It has been developed in consultation with Cal OES's advisory groups.

I. GENERAL POLICY

From time to time, Cal OES solicits applications for funding by issuing a Request for Proposal (RFP), and awards funding through a competitive selection process. Oftentimes, applications are received from existing Cal OES subrecipients.

Recognizing that Cal OES's funds are limited and often highly competitive, and to better meet its fiscal and legal obligations, Cal OES developed this policy in an effort to fairly and consistently address past performance issues of existing subrecipients in the awarding of new state and federal funding.

This policy is only intended to result in a penalty, if necessary, to existing subrecipients that have serious performance problems (not minor problems), and is to be utilized only in connection with the RFP process and the awarding of grants for new funding cycles.

Furthermore, while this policy addresses Cal OES's provision of technical assistance to help subrecipients comply with their subaward requirements this policy is not intended to result in Cal OES regulating the day-to-day internal operations of subrecipients.

II. PENALTY LEVELS

There are two levels of penalties for serious performance problems:

Level A: Complete disqualification from RFP process;

Level B: 10% point reduction of total possible points from an applicant's score

The level that will be applied will depend on the severity and frequency of the performance problems, among other factors, as discussed further below.

III. STANDARD FOR INVOKING THIS POLICY

The standard for invoking either penalty is whether the applicant's compliance with grant terms and conditions falls **significantly** below average – far below the level to be expected of other subrecipients, and not minor incident(s) of non-compliance with Cal OES policies.

A. Serious Performance Problems That Are Eligible For Consideration

Types of performance problems that would qualify under this policy include, but are not limited to:

1. Significant failure to account for use of funds, mishandling/misuse of funds, fraud or embezzlement, or other material accounting irregularities or violation(s), as documented in an audit report, monitoring report, police report, or other similar objective documentation;
2. Violation(s) of material statutory requirements related to the Subaward;

A willful or grossly negligent violation of a material Cal OES policy, term or condition of the subaward, but only after the subrecipient has been provided:

- a. technical assistance by Cal OES, including a site visit if necessary, to remedy the violation;
- b. at least one written notice (per violation); and
- c. a reasonable opportunity to remedy the violation. Any such notice will be provided to the subrecipient's Executive Director and will specify that failure to remedy the violation may negatively impact the subrecipient's eligibility for future funding, including disqualification from the next RFP process.

It is not necessary for a criminal conviction to have occurred for Cal OES to consider actions which appear to constitute fraud, embezzlement, mishandling of funds, or other types of statutory violations. Cal OES must only have reliable evidence that this conduct occurred. Moreover, only properly documented performance problems will be considered.

Occasional minor performance issues (even if continual), such as failure to return phone calls, "hostile" attitudes, personality conflicts, slightly late paperwork, and modest accounting irregularities not rising to the level of mishandling of funds or lack of controls are not subject to this policy. However, subrecipients still are expected to comply in all respects with Cal OES' policies, *Subrecipient Handbook*, and the terms and conditions of their subaward; and these minor performance problems will be addressed by the program specialist, monitor, or other means, as appropriate and irrespective of this policy.

B. Factors Considered

In determining an appropriate penalty, factors to be considered include, but are not limited to:

1. The seriousness of the problem(s);
2. Whether the problem or problems identified were intentional;
3. Whether the problem or problems reveal dishonest behavior by the applicant;
4. Whether the interests of the State or the public were harmed by the problem or problems;
5. Whether the problem or problems were a one-time occurrence or represent an ongoing pattern of behavior;
6. Whether the problem has been documented objectively; and
7. Whether Cal OES has attempted to assist the subrecipient in remedying the problem.

C. Specific Examples

All performance problems should be considered on a case-by-case basis, with the totality of the circumstances to be considered. The following examples are to be used as guidance, and are not intended to be exhaustive, binding, or in any way restrictive of Cal OES's authority to determine the appropriate penalty in any particular case:

1. Cal OES conducts a monitoring visit of Project Z, and makes the following findings:
 - a. the shelter failed to pay overtime on two occasions;
 - b. three timesheets did not contain a supervisor's approval; and
 - c. the project's doors opened at 9:30 a.m. instead of 9:00 a.m. as stated on its RFP application.

A corrective action plan is developed and the project takes steps to implement the monitoring recommendations. A follow-up with the subrecipient four months later shows that the monitoring findings have been corrected.

Penalty: None

2. Project A inadvertently has adopted policies that violate the Americans with Disabilities Act. It operates shelter facilities that “cannot accommodate the handicapped.” It has declined services to disabled persons on this basis. Cal OES and/or the Department of Justice alert the subrecipient that this policy is illegal. Several months later, the project has not changed its policies. Only after Cal OES notifies the project in writing that future funds may not be subawarded based on this violation does the project change its policy.
Penalty: Level B
3. During an audit, it is discovered that a year ago an employee of Project V has embezzled \$300 of Cal OES funds. The audit concludes that this occurred in part because of inadequate management controls and supervision by the project. The employee was fired and the case submitted to the district attorney’s office for prosecution. The recipient has implemented new accounting and management policies and procedures, and promises to better supervise its employees. No other problems with the recipient are known.
Penalty: Level B
4. Same facts as in example (3), except that the embezzlement has occurred on multiple occasions, totaling \$20,000.
Penalty: Level A
5. Same example as in (3), except that the embezzlement was a one-time occurrence in the amount of \$5,000 committed by a member of the project’s management (executive officer, financial officer, administrative officer) and/or board member.
Penalty: Level A
6. Project M is habitually late in turning in Cal OES-required progress reports and needs frequent reminders, including repeated letters from Cal OES. The project always complies but is generally viewed as “difficult” to work with because of their frequent tardiness.
Penalty: None
7. Project C engages in racial discrimination in the provision of Cal OES-funded services. It continues to deny services to the public on the basis of race, despite repeated letters from Cal OES.
Penalty: Level A
8. Project O supervisor sexually harasses their employee, their conduct does not affect the provision of Cal OES-funded services
Penalty: None
9. Project Y has agreed to provide victim advocacy services in County X. The project spends \$40,000 on other things and provides no services.
Penalty: Level A

IV. PROCESS OF INVOKING THIS POLICY

A. Recommendation Memo

Either the unit chief or division chief (who is not part of the rating team) of the division that is conducting the RFP may request a performance penalty. The unit or division chief must write a memo discussing in detail the performance problems with the applicant. The memo must be specific and must identify the basis for invoking a penalty. The memo must be sufficiently supported by dates and details, and recommend the appropriate penalty, either Level A or Level B. This memo, along with all supporting documentation, must be submitted to the Cal OES Legal Office prior to the commencement of the rating process.

B. Final Decision

If the Cal OES Legal Office agrees, the memo shall be submitted to the Director, who may choose to:

- a. impose the recommended penalty;
- b. impose a lesser penalty than the recommended penalty; or
- c. not to impose any penalty.

A penalty will be applied only after it has been determined that the applicant has scored within the funding range. If the applicant did not score within the funding range, then no penalty is necessary.

V. NOTIFICATION TO THE APPLICANT AND APPEAL OF DECISION

As with all applicants that are denied funding, a letter regarding the denial will be sent by certified mail to applicants denied funding due to past performance problems. The applicant shall be provided with a summary of why the performance problem penalty was invoked. An applicant is entitled to appeal this denial of funding on the same basis as other appeals of denial of funding, pursuant to the Appeals Guidelines. That is, an applicant may appeal on the basis that the "criteria and priorities" included in the RFP, including this Past Performance Policy, were not followed.