
MEMORANDUM

TO: US DEPARTMENT OF VETERANS AFFAIRS

FROM: NASAA CONTRACT COMMITTEE

SUBJECT: FY 2019 CONTRACT NEGOTIATIONS

DATE: JULY 26, 2018

We are providing you this document as our Contract Committee's final points regarding the status of negotiations to the present.

- **7 Calendar Days to Respond**, Article I, Item 2 in the draft Cooperative Agreement (“draft”). Your original proposal was 5 calendar days. We requested 14. We remind you that we have surveyed the entire NASAA membership. We received 48 responses to this issue; 27% suggested 10 calendar days, 44% said 14 calendar days, 27% said 21 calendar days. We will accept a 14 calendar day response time. Again, we believe the issues you have experienced leading to your desire to include this request have been far too limited to warrant a member-wide demand of an unreasonable response time.
- **Will Take into Account**, Article II, Item 2, and at various other locations. You have proposed removing the language that was agreed upon between VA and NASAA last year. Removing the phrase “will take into account” gives you the opportunity to elevate your interpretations of Title 38 to the status of law. This is impermissible. The vehicle for an authorized Federal agency to interpret statute is the CFR via the Federal Register where the public is provided a comment period. As we have previously stated, States are not bound by Federal interpretations; even those that come from Federal courts (other than the US Supreme Court)! We will accept continuing with the previously agreed upon language.
- **Mandatory VA Phrase in State Approval Letters**, Article II, Item 5. We reject any requirements about the content of our approval letters that are not already present in statute or regulation. We polled our members regarding your request that we include a statement in our approval letters that VA may discontinue benefit payments if you determine that a program fails to meet Title 38 requirements. We had 48 responses; 60% said they did not want to be required to do this and 40% agreed. We suggested that this Item be rephrased to say that SAAs are “encouraged” to include this statement. We also remind you that you are not to “control” the State Approving Agencies. Dictating the content of our

approval letters is exercising statutorily forbidden control over our agencies. Instead, we suggest that the SCO handbook be updated to reflect this information as you already have areas in the handbook that discuss discontinuance of payments under certain circumstances. This will ensure your message is available to the target audience for those sites under the jurisdiction of an SAA that does not wish to include this information in an approval letter.

- **Performance Measures**, at various locations in the draft. We requested that no performance measure be set higher than 90%. We began requesting review of these performance measures over a year ago. You suggested that if we were to “open this up” that they instead be increased to 100%. You also stated that these were negotiated with NASAA in the past but admitted that this occurred prior to SAAs conducting compliance surveys on behalf of the VA. Compliance surveys are a workload so demanding that you have given it as much or more impact on our funding model as our approvals workloads. We have seen our ability to provide outreach shrink more and more as we devote so much more time to trying to keep up with not only the increased workload, but also with all of the high pressure performance and deadlines requirements. We need a little relief on some of these measures.
- **Uploading Approvals to EForce**, Article II, Item 11 Table. “(For FY20 and beyond, including uploading to Salesforce).” This is premature. We respectfully request that this be removed while the working group of SAAs and VA is still figuring this whole process out.
- **Original Date of Receipt**, Article II, Item 11 Table. We requested that you include the word “completed” in the phrase that states, “Submit accurate program approval packages, including original date of receipt of approval package.” At one point you agreed. At some point, you changed your mind. Regardless, we will read the phrase “approval package” when referencing a date as to the date upon which we actually received everything we need to complete the approval action. Anything short of that does not make any sense.
- **RPO Referral Spreadsheet**, Article III, Item 1. Use of this spreadsheet has been permissive to now and should remain that way. Additionally, because PII is transmitted, it requires full access to VA systems because you want it sent to you via the VA email accounts you give to us. We have asked for some concessions in various areas of the draft given that there appears to be no clear picture as to whom is involved at what stage of the various actions leading to ultimately gaining access to VA systems and the process takes numerous months to complete even after an SAA has properly submitted everything to VA. We appreciate that you are looking into this situation. We ask that you be reasonable in dictating workload, performance measures, and other tasks requiring access to these systems while you figure out what the problem is. The experience is so varied that VA does not even put an estimate on how long it takes.

- **Number of Completed Compliance Surveys**, Article III, Item 6 Table. We were assured that language was forthcoming that would properly credit an SAA for completing all survey work on time (last visit by August 15, referrals timely submitted) despite not being able to take an “end product” due to some delay beyond the SAA’s control. Please include this language.
- **Reduction in Staff**, Article III, Item 7 – VA agreed in our last talks to change the word “VA” to “JPRG” or something of similar import to reflect that mitigating circumstances are considered by the joint peer review group of both SAAs and VA panelists and not solely considered by VA. Please amend.
- **TRBR**, Article IV, Item 2 – VA has requested that we initiate a targeted risk based review within 7 calendar days of your request. Again, this is not enough time. Please amend to 14 calendar days.
- Article IV, Item 2 – Typo; “SAAs” in second sentence is a double entry.
- **Hard Copies of Approval actions**, Article V, Item 2 – We discussed the addition that was submitted by VA to this Item that refers to Salesforce and made it seem as though an SAA could upload a disapproval to Salesforce and then trash the hard copy. We do not believe that this is permissible. To avoid confusion, we request the language be revised.
- **Background Clearance**, Article VII, Item 3. You have added a new requirement that an SAA both apply for *and* receive back the NCHC background clearance before being placed on the contract. You had discussed that for SAAs that use a State clearance procedure that this could substitute for the NCHC until that is received back. Please amend. Additionally, we again request that you agree that an SAA would be reimbursed from the time a new hire begins work through the date the NCHC clearance is returned favorably. Otherwise, for SAAs that do not have a State clearance system or who will have to make legislative changes in order to use such a system, it will be impossible for many agencies to cover the costs of the new hire. In addition to normal turnover, funding is increasing for this upcoming fiscal year and we anticipate many agencies will need to hire. We will agree to ensure such new hires have nothing to do with veterans’ PII or VA systems pending the return of the NCHC so that we can be properly reimbursed for other work under the agreement; such as approvals.
- **VA Access**, Article VII, Item 6 – two issues. First, VA agreed to change “VA” to JPRG (same as above bullet “Reduction in Staff”). Second, mitigating circumstances is not enough. An SAA ought not have to hope for mitigating circumstances to cure issues beyond SAA’s control; especially when it comes to first getting access. How can you assign workload to us at the start of the fiscal year that requires systems access but not provide that access for months and months into the year and still expect that 90% of that workload be completed? We

proposed a pro rata reduction of compliance surveys until you have given access to all personnel needed to complete the workload. This number is easily attainable from the funding allocation model. We urge you to see reason and reconsider.

- **VA Laptops**, Article VII, Item 6, last sentence – “VA will explore issuing a VA owned-government laptop to each SAA Director and SAA staff listed with the VA beginning in FY19.” We again reject this idea at this stage as we have nothing to evidence that having a VA laptop will cure our continued issues with attaining and maintaining access to VA systems. Respectfully, please remove the language and pilot this as a project with those SAAs willing to try it and revisit the topic as a member-wide issue next year.
- **Annual Evaluation**, Article XI, Item 1 – You have altered the language regarding an annual evaluation to state that, “If a joint decision cannot be reached, the Director, Education Service, will exercise his authority per 38 USC Section 3674A on behalf of the Secretary, and make the final appeal determination.” No such authority exists in the statute that you reference (nor in its companion CFR) so we are unsure what you are referring to. The statute simply states that the Secretary shall, “conduct, in conjunction with State approving agencies, an annual evaluation of each State approving agency on the basis of standards developed by the Secretary in conjunction with the State approving agencies, and (B) provide each such agency an opportunity to comment on the evaluation.” There’s no tie-breaker authority in the statute. You cannot create new law in a cooperative agreement or contract. Such authority can be obtained through a change in the CFR via the Federal Register or through a change in the statute via Congress.
- **VA Termination**, Article XI, Item 2 – This section is still inadequate. In moving to a cooperative agreement, you remove from SAAs a whole body of regulations and case law that provides for proper disputes remedies. In discussing your desire to move to a cooperative agreement, you referenced the agreement between the various state National Guard entities and the National Guard Bureau (a Federal agency). That instrument allows for utilization of an alternative dispute resolution process. We request the same if an instance would ever arise in which VA would seek to terminate an agreement outside of the annual evaluation process that is specified in law.

Additionally, we requested that SAAs be given a **regional point of contact at VA** for each of the RPO regions; 4 in total. That VA point of contact would serve as a contact for SAAs to work solely with regarding our problems with attaining and maintain access to VA systems. We cannot accomplish the mission without being able to timely attain and then consistently maintain access. We need a few people at VA who actually know who we are and what we do to help us when things are not getting solved through the current channels available to us. Please agree and add language in the draft to reflect this.

Last, we again respectfully request that this entire process start early enough in the fiscal year to allow for reasonable amounts of time to negotiate. It is clear that waiting until February is too late. We requested our first sit down to occur in November at the conclusion of JPRG. We renew that request.

Our hope is that the Committee and VA's involved personnel can work out most of the issues between October and February so that our executive leadership can sit down with VA executive leadership at the conference in February to resolve lingering points of disagreement. That would allow several more months for us to work together to ensure a smooth implementation of any needed changes for the next fiscal year and avoid any confusion leading into the final conference in August where we hope to be training more and explaining less.

We thank you for any changes to the draft that you have already made at our request and we look forward to final favorable resolution of our concerns. See you in Anaheim!

Sincerely,

NASAA Contract Committee