THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON
July 14, 2015

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I am writing in response to your letter of June 19, 2015, regarding a May 14 *Washington Post* article reflecting criticism of Department of Veterans Affairs (VA) procurement activities by VA's Deputy Assistant Secretary for Acquisition and Logistics, Mr. Jan Frye.

In recent months, Mr. Frye has disclosed to Deputy Secretary Sloan Gibson and me, and has testified before the House Committee on Veterans' Affairs, about what he characterizes as "lawlessness and chaos" in the Department's contracting practices. Mr. Frye asserts that VA's contracting practices waste money and put Veterans' health and safety at risk. I have referred his specific complaints to the VA Office of Inspector General for review, but in general I can tell you that the allegations are neither new nor revelatory. VA has been working diligently since 2012 to strengthen procurement controls while ensuring timely service to Veterans. While we must continue to improve our financial and supply-chain management system, our programs for purchasing non-VA care and devices are critical to the continuing success of VA's health care delivery program. To suggest that these activities are somehow inherently wasteful or corrupt without disclosing that these actions have been previously identified and have been addressed or have on-going plans for remediation irresponsibly causes Veterans and taxpayers needless concern. I appreciate the opportunity your letter affords me to correct the record.

VA meets Veterans' health care needs through a variety of VA-provided and purchased care solutions. VA contracts for care in the community to augment VA health care in underserved geographical areas and hard-to-fill medical specialties. VA also contracts for prosthetic devices, sensory aides, and surgical and other medical supplies necessary to support Veterans' health and well-being. These contracts enable VA to meet Veterans' needs timely and cost-effectively, and are subject to robust audit processes to ensure VA spends taxpayer dollars wisely.

VA's Procurement Authorities and the Federal Acquisition Regulation (FAR)

VA is committed to whistleblower protections and embraces employees whose disclosures help us to improve VA programs and services. That said, it must be noted that Mr. Frye is a senior VA official with responsibility for oversight of the programs about which he has complained. His central complaint arises from the fact that VA does not always follow the FAR when it purchases care or supplies. VA has statutory authorization to contract with non-governmental facilities to furnish medical services to Veterans.[1] VA strives to comply with all FAR and all other applicable statutes and regulations when it purchases care for Veterans. VA has identified certain circumstances where this was not the case; however, to ensure complete and timely care,

[1] 38 U.S.C. § 1703

VA must leverage its flexibility in delaying immediate compliance. In these instances where FAR-based contracts are insufficient to meet the needs of the Veterans, VA has relied on individual authorizations to ensure there is no lapse in care. VA also has statutory authorization to procure prosthetic appliances and related services "through any manner the Secretary may determine to be proper,"[2] which it exercises through both formal (FAR-based) and less formal means. These decades-old practices are vital to the Department's ability to meet Veterans' health care needs quickly and at reasonable cost.[3] VA's use of these authorities to meet Veterans' needs is neither inherently wasteful nor harmful. Exercising these authorities is often necessary to ensure that Veterans receive timely care.

The interplay of FAR and VA's purchased care authorities has been debated since 2009, when a private dialysis service provider challenged VA's authority to negotiate dialysis reimbursement rates lower than those on the Medicare fee schedule. In September 2009, VA's Office of General Counsel opined that negotiated individual authorizations for non-VA care constitute contracts that govern the amount VA owes the provider for the services provided. The Department of Justice has opined that VA's individual authorizations are in fact contracts subject to the FAR, but two different judges from the United States Court of Federal Claims have offered different—and mutually incompatible—interpretations.[4]

Given these conflicting interpretations, and to ensure our practices remain legally sound, we have proposed legislation to clarify VA's authority to purchase care in certain circumstances through agreements that are not subject to the FAR, with providers treated similarly to providers in the Medicare program. This legislative proposal, which VA submitted to Congress on May 1, is a measured reform that protects procurement integrity, provider qualifications, and price reasonableness while also ensuring that VA is able to provide local care to Veterans in a timely and responsible manner. In the interim, VA continues to rely on its long-standing practice, as to do otherwise would severely and unacceptably disrupt necessary Veteran care.

Care in the Community

It is important to understand VA's purchased care authorities in terms of their value to Veterans. For more than 30 years, VA has used individual authorizations to meet critical health care needs of Veterans who would otherwise have to wait too long or forego necessary care.

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[2] 38 U.S.C. § 8123

[3] More recently, Congress authorized VA through the Veterans Access, Choice, and Accountability Act of 2014, Public Law 113-146, to contract with Medicare-participating private providers and other Federal health care programs to furnish care for Veterans who would otherwise have to wait too long or travel too far to receive needed services. This authority expires when the associated funding is exhausted or on August 7, 2017, whichever comes first.

[4] In DaVita, Inc. v. United States, 110 Fed. Cl. 71 (2013), the court found that individual authorizations, while created pursuant to contracting authority, were simply offers to enter into a unilateral contract, subject to certain related procurement rules, and the terms of which would be determined by regulation. In Bio-Medical Application of Aquadilla, Inc. v. United States, Fed. Cl. Docket No. 14-187C (December 19, 2014), the court found that VA authority to purchase care using individual authorizations stemmed from the Secretary's rule making authority at 38 U.S.C. § 501, and was not subject to any other procurement statutes or regulations.

Individual authorizations are particularly valuable where demand for a particular service is infrequent or the required care is of insufficient volume to support a formal contract.

The individual authorization process is not lawless or chaotic, as has been alleged, but well-documented and intentionally Veteran-centered. It starts with the Veteran's VA primary care provider documenting the Veteran's need for non-VA care in VA's Computerized Patient Record System (CPRS). The CPRS consult request is reviewed to confirm that the Veteran meets statutory and regulatory eligibility requirements and that the required care is not available at any local VA facility. The individual authorization is then documented on official VA paperwork, which notifies the non-VA provider that the Government has approved services, obligated appropriate funds, and is liable for payment. Under current practice, Veterans may generally select a non-VA provider of their choice. If the provider of the non-VA medical care is known at the time of the issuance of the authorization, the provider is also sent an authorization for the care. If the provider is not known, the Veteran is offered assistance in selecting a provider. The process is governed by VA regulations,[5] which set eligibility and pre-authorization requirements, establish pricing parameters, and limit approval authority to $10,000 per individual authorization. A few real-life examples are helpful to illustrate how the purchased care authority is used to ensure Veterans receive timely and effective care:

- A Veteran in California presented to a Community-Based Outpatient Clinic (CBOC) with a full-term pregnancy on a Wednesday morning. An individual authorization was used to acquire obstetrical services for the Veteran, who went into labor that Friday evening. She delivered a healthy baby Saturday morning.
- A Veteran in Tennessee presented at the VA Hematology clinic with acute myelocytic leukemia needing immediate treatment that the VA Medical Center could not provide. An individual authorization was used to obtain treatment from a qualified community provider.
- A Veteran in Michigan needed physical therapy. The closest VA facility that could provide the service was more than 60 miles away. VA used an individual authorization to procure the care so the Veteran did not have to drive that distance repeatedly for a 30-minute therapy session.
- A Veteran in Washington State needed a course of radiation therapy for cancer. His small employer could not afford to give him the day off to drive to another part of the state for his treatments. VA used an individual authorization to acquire treatment near his home so the Veteran did not have to choose between his job and cancer therapy.

Where frequent Veteran demand and adequate provider availability make competitive bidding for purchased care feasible, VA of course avails itself of the cost savings that may flow from that process. That said, it is simply not accurate to suggest that individual authorizations are necessarily more costly than other more formal arrangements. In the past two years, VA has spent a total of $11.3 billion to provide care in the community, including preauthorized care, emergency care, and care purchased under formal contract. Fifty-nine percent of the $11.3 billion was spent at or below the comparable Medicare rates; much of the remaining 41 percent was spent in areas that are underserved in terms of overall medical care.

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[5] VA Acquisition Regulation and 38 CFR §§ 17.52 – 17.56

VA simply must maintain flexibility to meet Veterans' health care needs through the most timely and cost-effective means available within a given community. We owe our Veterans nothing less.

Prosthetics and VA's Government Purchase Card Program

Mr. Frye has also questioned VA's use of government purchase cards to purchase prosthetics and other medical devices for Veterans. These devices—surgical implants, artificial limbs, hearing aids, blind and low vision aids, durable medical equipment, adaptive equipment and the like—improve the quality of life for Veterans and their families. VA policy requires warranted contracting officers to handle purchases over $3,000, but affords greater flexibility for purchases below that threshold.

In fiscal year (FY) 2014, VA provided 3.5 million devices to Veterans at a cost of $1.8 billion. Ninety-seven percent of those devices were purchased for under $3,000. The 3 percent of purchases over $3,000 were handled through FAR-based contracting by a dedicated team of warranted contracting officers who are specially trained in prosthetic procurement. These higher-ticket items include artificial limbs, surgical implants, and customized wheelchairs that are truly vital to the health and well-being of our most severely disabled and vulnerable Veterans.

VA relies on government purchase cards for a large segment of its prosthetics procurement business. Government-purchase-card procurements constitute legitimate contracts, no more inherently risky or wasteful than similar purchases by private sector companies or individual consumers. Moreover, the use of purchase cards for below-threshold procurements is both faster and cheaper than other purchase mechanisms. The General Services Administration estimates administrative savings of $70 per transaction when purchase cards are used in place of a written purchase order. Based on this estimate, VA saved $427 million in FY 2014 using purchase cards. Purchase cards also save time, enabling VA to serve Veterans' needs more responsively. Purchase card procurements take an average of 3 days, while procurements using a purchase order average up to 30 days.

In 2011, at Mr. Frye's recommendation, VA embarked on a multi-year plan to strengthen oversight of prosthetics procurement activities. This reform process included the revocation of a number of contracting warrants and the promulgation of specific policy for procurements above the micro-threshold. Prosthetics procurement reform was the subject of three oversight hearings in 2012; at that time, the House Committee on Veterans' Affairs (HVAC) Oversight & Investigations Subcommittee encouraged VA to move quickly to reduce warrants and strengthen oversight, while the HVAC Health Subcommittee urged VA to proceed cautiously to ensure the reform process did not hinder Veterans' access to prosthetic devices. As a result of reforms implemented effective October 1, 2013, VA's oversight of purchase card use is fulsome and robust, including audits for unauthorized commitments made by cardholders without warrants or in excess of the cardholder's warrant; reduction of the number of cardholders with single-purchase limits above $3,000; and mandatory role-based training for cardholders and approving officials. We have also clarified policy to set minimum and maximum penalties for employees

found to have misused purchase cards and are tracking disciplinary actions of this type across the Department.

In enhancing procurement oversight over the past few years, we have worked closely with Veterans Service Organizations to address their concerns that unduly inflexible procurement processes could harm Veterans by increasing the time they must wait for the devices they need. Consistent with our ICARE core values, we must maintain the flexibilities necessary to respond timely to individual Veterans' needs, procuring non-VA health care and devices quickly and flexibly, while ensuring accountability and good stewardship of resources.

The summary above responds to your questions 1, 3, and 4. I understand that VA OIG will respond to you directly regarding question 2. I anticipate that VA OIG's report on Mr. Frye's concerns, once complete, will inform our responses to questions 5-7, and I look forward to updating this response after I receive that report.

I hope this information is helpful. Should you or your staff have additional questions, please have a member of your staff contact Lesia Mandzia, Office of Congressional and Legislative Affairs, at (202) 461-6177 or by email at Lesia.Mandzia@va.gov.

I appreciate the opportunity to provide this information. Thank you for your continued service to our Nation's Veterans.

Sincerely,

Robert A. McDonald