



This document is scheduled to be published in the Federal Register on 04/10/2013 and available online at <http://federalregister.gov/a/2013-08366>, and on FDsys.gov

DEPARTMENT OF VETERANS AFFAIRS

8320-01

38 CFR Part 59

RIN 2900-AO60

Grants to States for Construction or Acquisition of State Homes

AGENCY: Department of Veterans Affairs.

ACTION: Interim final rule.

SUMMARY: This interim final rule amends the Department of Veterans Affairs (VA) regulation on the prioritization of State applications for VA grants for the construction or acquisition of State home facilities that furnish domiciliary, nursing home, or adult day health care to veterans. As amended, the regulation gives preference to State applications that would use grant funds solely or primarily (under certain circumstances) to remedy cited life or safety deficiencies. This rulemaking also makes certain necessary technical amendments to regulations governing State home grants.

DATES: Effective date: This interim final rule is effective [Insert date of publication in the FEDERAL REGISTER].

Comment date: Comments must be received by VA on or before [Insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted by email through <http://www.regulations.gov>; by mail or hand-delivery to Director, Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Avenue, NW.,

Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. (This is not a toll-free number.) Comments should indicate that they are submitted in response to “RIN 2900-AO60 – Grants to States for Construction or Acquisition of State Homes.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1068, between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Brandi Fate, Director, Capital Asset Management and Support (10NA5), Veterans Health Administration, 810 Vermont Avenue, NW., Washington, DC 20420, (202) 632-7901. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: Pursuant to subchapter III of chapter 81 of title 38, United States Code, VA is authorized to provide grant funds to support the acquisition, construction, expansion, remodeling or alteration by States of State home facilities that furnish domiciliary, nursing home, or adult day health care to veterans. States that desire such assistance must submit to VA an application that VA must assess and prioritize in accordance with the criteria set forth in 38 U.S.C. 8135(c)(2)(A) through (H). VA has implemented this statutory authority in part 59 of title 38, Code of Federal Regulations.

Under 38 U.S.C. 8135(c)(2) and 38 CFR 59.50, VA prioritizes the applications for the construction grant funds each fiscal year. Pursuant to these authorities, VA must generally give the top priority to applications with certified State matching funds, which are prioritized in priority group 1 under 38 CFR 59.50(a)(1). VA further subprioritizes the priority group 1 applications based on the type of project described in the application. Prior to this rulemaking, there were six subpriority groups for priority group 1 applications (i.e., applications with certified State matching funds). This rulemaking adds one more subpriority group to better reflect VA's emphasis on the safety of State home residents and program participants. As a result, there are now a total of seven subpriority groups.

Priority group 1, subpriority group 1, at 38 CFR 59.50(a)(1)(i), is for applications for projects that remedy life or safety deficiencies and that have matching State funding. This interim final rule makes a number of changes to this subpriority group that will allow VA to more effectively prioritize life or safety projects when awarding State home construction grants.

First, under paragraph (a)(1)(i), as amended, VA prioritizes in subpriority group 1 applications for projects that are solely or primarily intended to remedy a condition or conditions at an existing facility that have been cited as threatening the life or safety of the residents or program participants. Formerly, § 59.50(f) directed that projects with multiple components be categorized in the priority group towards which the preponderance of the costs in the application would be dedicated. Therefore, an application could be prioritized in priority group 1, subpriority group 1, at § 59.50(a)(1)(i), if a State combined a project to remedy a citation with another type of project, as long

as the larger share of the project cost was used to remedy the citation. Prior to this rulemaking, there were no stated limits on combining life or safety projects and projects unrelated to protecting residents and participants' life or safety. As revised, the rule allows for such "mixed" projects only when the total cost of the life or safety project on its own would be under the \$400,000 minimum required by § 59.80 and 38 U.S.C. 8134(d)(2)(A), and the majority of the funds sought will be used to remedy a citation. Allowing States to submit applications with components unrelated to life or safety under these limited circumstances will help VA ensure that less costly life or safety projects are ranked in subpriority group 1 for VA grant funding. This rulemaking will ensure that VA does not rank projects in priority 1, subpriority group 1, where it is unnecessary to mix life or safety projects and projects unrelated to protecting life or safety (i.e., where the life or safety project by itself meets the statutory minimum), and in this manner will better ensure that VA directs the maximum amount of grant funds to projects that protect the lives and safety of the residents and participants.

Second, under § 59.50(a)(1)(i), as amended, we clarify which VA staff members may issue citations for threats to life or safety in a State home. Prior to this rulemaking, this paragraph provided that such citations may be issued by a "VA Life Safety Engineer." This position is not currently used by VA. Therefore, we have replaced this reference with language that adequately identifies the VA offices responsible for issuing these citations.

Third, we specify that applications for projects for the addition or replacement of building utility systems or features may be included in priority group 1, subpriority group 1, if the projects are necessary to remedy a cited threat to the life or safety of residents

and program participants. Prior to this amendment, VA could only prioritize applications for projects adding or replacing utility systems or features in priority group 1, subpriority group 4. In order to best protect the lives and safety of residents or program participants in State veterans homes, we believe it is necessary to include these projects in subpriority group 1 under the limited circumstances that they are needed to remedy a life or safety threat.

Fourth, revised § 59.50(a)(1)(i) now specifically refers to “[s]ecurity” projects. Under the prior rule, all applications for projects that would remedy cited threats to life or safety conditions were further prioritized in the following order: seismic, building construction, egress, building compartmentalization, fire alarm/detection, asbestos/hazardous materials, and “all other projects.” In the past, security projects such as video cameras to monitor the inside or outside of the building or other devices to watch or secure the premises have been prioritized as “other projects.” Based on our administration of the State home program, we believe that security projects should be given higher priority. Therefore, we add “[s]ecurity” following “[f]ire alarm/detection” to the list of conditions used to prioritize applications ranked in subpriority group 1. We also reorganize the listed prioritizations in separate paragraphs, so that the list is easier to identify and read.

Fifth, VA has noticed instances in which States with outstanding citations for life or safety threats submit and are provided funding for applications for grants for projects unrelated to protecting residents and participants’ lives or safety. Prior to this amendment, VA’s regulations did not provide any mechanism for VA to encourage States to remedy outstanding life or safety citations. Therefore, this rulemaking adds a

new penultimate subpriority group in priority group 1 for applications from States that have failed to demonstrate they have remedied, or will remedy, a life or safety citation. Under revised § 59.50(e), a State that has an existing State home with an outstanding citation must include in all of its applications for grant funds a description of a reasonable plan to remedy the citations. Revised paragraph (e) does not require the State to seek a VA grant to fund such remedy; however, failure to provide such a plan would result in decreased prioritization of the State's applications in the manner described in paragraph (e)(1), which states that applications from that State for a project for which the State has authorized matching funds will be placed in priority group 1, new subpriority group 6, or paragraph (e)(2), which states that applications from that State with an outstanding citation for a project without matching funds will be placed in a new priority group 7 that is described in paragraph (a)(7). By doing so, VA will reduce the likelihood of funding new grants from States with outstanding safety citations. VA's authority to establish this new subpriority group is 38 U.S.C. 8135(c)(2)(G), which authorizes VA to prioritize applications that "meet[] other criteria as the Secretary [of Veterans Affairs] determines appropriate and has established in regulations."

The final change to § 59.50(a)(1)(i) clarifies that not all residents or participants need to be threatened by a condition or conditions for an application to be ranked in priority group 1, subpriority group 1. In fact, we believe the statutory language authorizes including applications that remedy conditions that only threaten one resident or participant. For example, if a condition threatens the safety of a resident in only one nursing home or domiciliary bed, we believe an application to remedy that condition could be ranked in subpriority group 1.

In addition to the changes to priority group 1, subpriority group 1 described above, this interim final rule amends certain other priority and subpriority groups; the amendments are described as follows.

Section 59.50(a)(1)(iv) is revised to reorganize the listed prioritizations to make them easier to read. We also clarify VA's authority to provide grants for certain types of renovations in new paragraph (a)(1)(iv)(A) and (B). VA has interpreted its authority to prioritize States' applications for grants for renovations at 38 U.S.C. 8135(c)(2)(E) as authorizing the same prioritization for applications to replace an existing building when needed to serve the same purposes as a renovation. This is consistent with VA's current procedures and is reflected in the example set forth in the note to § 59.50(a)(1) which indicates that priority group 1, subpriority group 4, includes applications for "Nursing Unit Renovation/Replacement."

The note to § 59.50(a)(1), which contains a chart to aid readers' understanding how VA prioritizes projects in priority group 1, will be amended to conform with the changes to this section.

VA will continue to perform a final prioritization of applications in each priority or subpriority group based on the date that VA receives the application, with the applications received earlier given higher priority. The prior rule had that stipulation in each priority and subpriority group paragraph, but the revised rule states it only once at new § 59.50(d).

This rule updates delegations of VA's authority for administration of the State home construction grant program. VHA recently changed its organizational structure, and has aligned management of the State home construction grant program under the

director of the Office of Capital Asset Management and Support. These authorities were previously assigned to the Chief Consultant of the Office of Geriatrics and Extended Care. VHA is, therefore, revising its regulations at §§ 59.4 and 59.5 to reflect the new organizational structure.

Once a priority list is approved by the Secretary, VA cannot change it unless a change is needed as a result of an appeal. See 38 CFR 59.50(g). This rulemaking, therefore, will not affect the ranking of projects on a priority list that has been approved by the Secretary.

Administrative Procedure Act

The Secretary finds that there is good cause, under 5 U.S.C. 553(b)(B) and (d)(3), to dispense with the opportunity for advance notice and opportunity for public comment and good cause to publish this rule with an immediate effective date. As stated above, VA's current regulations do not provide the necessary tools to use public funds more effectively in the interest of veterans' safety. For example, during its fiscal year 2011 survey of State homes, VA cited nearly 2.5 percent of State homes for deficiencies in emergency power, to include illuminating exit signs, and powering emergency communication systems; these deficiencies pose threats to veterans' safety. This regulation would close a loophole whereby a State with a cited safety deficiency in one State home could still apply for, and be likely to receive, a grant from VA to construct or acquire a different State home. VA finds that continuing to fund applications in this manner is contrary to VA's priorities of ensuring veterans' safety.

Because this interim final rule will help VA ensure veterans' lives and safety are protected in State homes, the Secretary finds that it is contrary to the public interest to

delay this rule for the purpose of soliciting advance public comment or to have a delayed effective date. Furthermore, it would be against the public interest to award publicly funded grant money to States that have not remedied, or do not have a plan for remedying, safety citations in existing State homes. For the above reasons, the Secretary issues this rule as an interim final rule, effective immediately upon publication. VA will consider and address comments that are received within 60 days of the date this interim final rule is published in the Federal Register.

Effect of Rulemaking

Title 38 of the Code of Federal Regulations, as revised by this interim final rulemaking, represents VA's implementation of its legal authority on this subject. Other than future amendments to this regulation or governing statutes, no contrary guidance or procedures are authorized. All existing or subsequent VA guidance must be read to conform with this rulemaking if possible, or, if not possible, such guidance is superseded by this rulemaking.

Paperwork Reduction Act

This interim final rule contains no provisions constituting a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501-3521).

Regulatory Flexibility Act

The Secretary hereby certifies that this interim final rule will not have a significant economic impact on a substantial number of small entities as they are defined in the

Regulatory Flexibility Act, 5 U.S.C. 601-612. This interim final rule will directly affect only States and will not directly affect small entities. Therefore, pursuant to 5 U.S.C. 605(b), this rulemaking is exempt from the initial and final regulatory flexibility analysis requirements of 5 U.S.C. 603 and 604.

Executive Order 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a “significant regulatory action,” requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or

policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined, and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates Reform Act

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any one year. This interim final rule will have no such effect on State, local, and tribal governments, or on the private sector.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.005, Grants to States for Construction of State Home Facilities; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.022, Veterans Home Based Primary Care; 64.024, VA Homeless Providers Grant and Per Diem Program; and 64.026, Veterans State Adult Day Health Care.

Signing Authority

The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. John R. Gingrich, Chief of Staff, Department of Veterans Affairs, approved this document on March 11, 2013 for publication.

List of Subjects in 38 CFR Part 59

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Grant programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Reporting and recordkeeping requirements, Travel and transportation expenses, Veterans.

Dated: April 5, 2013

William F. Russo,
Deputy Director, Office of Regulation Policy and Management,
Office of the General Counsel,
Department of Veterans Affairs.

For the reasons stated in the preamble, the Department of Veterans Affairs amends 38 CFR part 59 as follows:

PART 59—GRANTS TO STATES FOR CONSTRUCTION OR ACQUISITION OF STATE HOMES

1. The authority citation for part 59 continues to read as follows:

Authority: 38 U.S.C. 101, 501, 1710, 1742, 8105, 8131-8137.

§ 59.4 [Amended]

2. Amend § 59.4 by removing “Chief Consultant, Geriatrics and Extended Care” and adding, in its place, “Director, Capital Asset Management and Support”.

§ 59.5 [Amended]

3. Amend § 59.5 by removing “Chief Consultant, Geriatrics and Extended Care (114)” and adding, in its place, “Director, Capital Asset Management and Support (10NA5)”.

4. Amend § 59.50 by:

a. In paragraph (a) introductory text, removing “paragraphs (b) and (c) of” and adding “otherwise” immediately after “Except as”.

b. Revising paragraphs (a)(1)(i) through (vi) and adding paragraph (a)(1)(vii).

c. Revising paragraphs (a)(2) through (7) and adding paragraph (a)(8).

d. Removing paragraph (f).

e. Redesignating paragraph (d) as new paragraph (f).

- f. Adding a new paragraph (d).
- g. Redesignating paragraph (g) as paragraph (i).
- h. Redesignating paragraph (e) as new paragraph (g).
- i. Adding new paragraph (e).
- j. Adding paragraph (h).

The revisions and additions read as follows:

§ 59.50 Priority list.

(a) * * *

(1) * * *

(i) Priority group 1--subpriority 1. An application for a life or safety project, which means a project to remedy a condition, or conditions, at an existing facility that have been cited as threatening to the lives or safety of one or more of the residents or program participants in the facility by a VA safety office, VA engineering office, or other VA office with responsibility for life and safety inspections; a State or local government agency (including a Fire Marshal); or an accrediting institution (including the Joint Commission on Accreditation of Healthcare Organizations). Unless an addition or replacement of building utility systems or features is necessary to remedy a cited threat to the lives or safety of residents and program participants, this priority group does not include applications for the addition or replacement of building utility systems or features; such applications will be prioritized in accordance with the criteria in subpriority group 5 of priority group 1. An application may be included in this subpriority group only if all of the funds requested would be used for a life or safety project; or, if the estimated

cost of the life or safety project is under \$400,000.00, and the majority of the funds requested would be used for such a project. Projects in this subpriority group will be further prioritized in the following order:

- (A) Seismic;
- (B) Building construction;
- (C) Egress;
- (D) Building compartmentalization (e.g., smoke barrier, fire walls);
- (E) Fire alarm/detection;
- (F) Security;
- (G) Asbestos/hazardous materials; and
- (H) All other projects (e.g., nurse call systems, patient lifts).

(ii) Priority group 1--subpriority 2. An application from a State that has not previously applied for a grant under 38 U.S.C. 8131-8137 for construction or acquisition of a State nursing home.

(iii) Priority group 1--subpriority 3. An application for construction or acquisition of a nursing home or domiciliary from a State that has a great need for the beds that the State, in that application, proposes to establish.

(iv) Priority group 1--subpriority 4. An application from a State for renovations to a State Home facility other than renovations that would be included in subpriority group 1 of priority group 1. Projects will be further prioritized in the following order:

(A) Adult day health care renovation and construction of a new adult day health care facility that replaces an existing facility;

(B) Nursing home renovation (e.g., patient privacy) and construction of a new nursing home that replaces an existing nursing home;

(C) Code compliance under the Americans with Disabilities Act;

(D) Building systems and utilities (e.g., electrical; heating, ventilation, and air conditioning (HVAC); boiler; medical gasses; roof; elevators);

(E) Clinical-support facilities (e.g., for dietetics, laundry, rehabilitation therapy);
and

(F) General renovation/upgrade (e.g., warehouse, storage, administration/office, multipurpose).

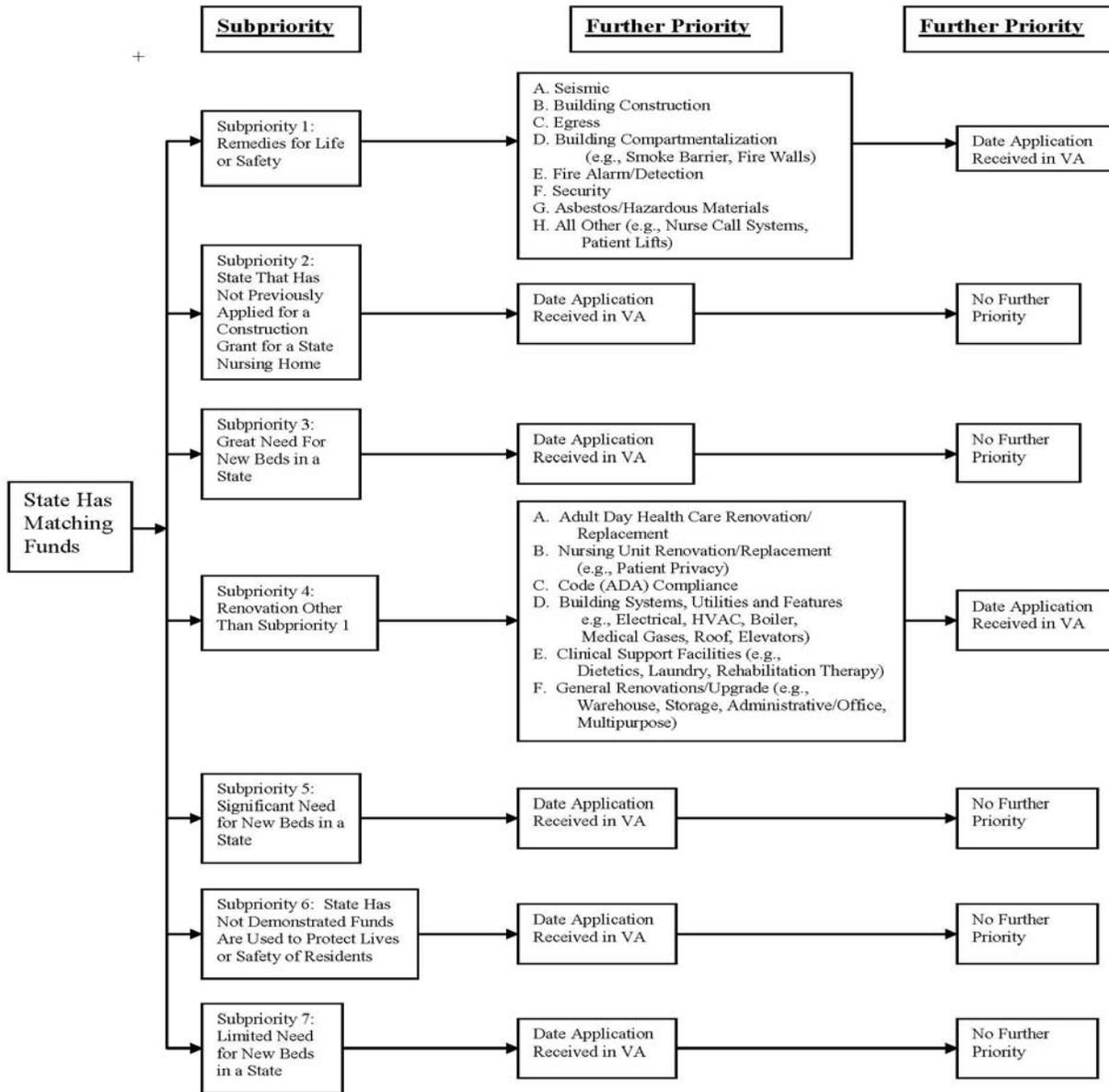
(v) Priority group 1--subpriority 5. An application for construction or acquisition of a nursing home or domiciliary from a State that has a significant need for the beds that the State in that application proposes to establish.

(vi) Priority group 1--subpriority 6. An application for construction or acquisition of a nursing home or domiciliary from a State that has not demonstrated that State funds are being used to protect the lives or safety of the residents and program participants of the facility as required in § 59.50(e).

(vii) Priority group 1--subpriority 7. An application for construction or acquisition of a nursing home or domiciliary from a State that has a limited need for the beds that the State, in that application, proposes to establish.

Note to paragraph (a)(1): The following chart is intended to provide a graphic aid for understanding priority group 1 and its subpriorities.

Example – Prioritization for Priority Group 1



(2) Priority group 2. An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(i) of this section. Projects within this priority group will be further prioritized the same as in paragraphs (a)(1)(i)(A) through (a)(1)(i)(H) of this section.

(3) Priority group 3. An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(ii) of this section.

(4) Priority group 4. An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(iii) of this section.

(5) Priority group 5. An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(iv) of this section. Projects within this priority group will be further prioritized the same as in paragraphs (a)(1)(iv)(A) through (a)(1)(iv)(F) of this section.

(6) Priority group 6. An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(v) of this section.

(7) Priority group 7. An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(vi) of this section.

(8) Priority group 8. An application not meeting the criteria of paragraph (a)(1) of this section but meeting the criteria of paragraph (a)(1)(vii) of this section.

* * * * *

(d) Applications in each priority or subpriority group will be further prioritized based on the date the application was received in VA (the earlier the application was received, the higher the priority given). Projects will be prioritized under this paragraph after all prioritization is completed under the projects' priority or subpriority group, as specified in paragraph (a) of this section, and only if necessary to give separate priorities to applications that have the same priority ranking after the prioritization specified in paragraph (a) of this section is accomplished.

(e) If any State home in a State has been cited by a VA safety office, VA engineering office, or other VA office with responsibility for life and safety inspections; a State or local government agency (including a Fire Marshal); or an accrediting institution (including the Joint Commission on Accreditation of Healthcare Organizations) for conditions that threaten the lives or safety of one or more of the residents or program participants in the facility, the State must include in any application submitted under § 59.20 or its updates to such application its plan to address all such citations. If VA determines that the State's plan fails to set forth how it will address such citations in a reasonable period of time, then VA will prioritize all applications of such State as follows:

(1) Applications that meet the criteria of paragraph (a)(1) of this section, but do not meet the criteria of paragraphs (a)(1)(i) or (vii) of this section, will be prioritized in subpriority group 6 of priority group 1 (paragraph (a)(1)(vi) of this section).

(2) Applications not meeting the criteria for placement in priority group 1 (paragraph (a)(1) of this section) and not meeting the criteria of subpriority group 1 of priority group 1 (paragraph (a)(1)(i) of this section) will be prioritized in priority group 7 (paragraph (a)(7) of this section).

* * * * *

(h) Except for applications that must be included in subpriority group 1 of priority group 1, applications for projects with components that could be prioritized in more than one priority group will be placed in the priority group toward which the largest share of the cost of the project is allocated. Once the correct priority group is determined, applications for projects with components that could be prioritized in more than one subpriority group in that priority group will be placed in the subpriority group toward which the largest share of the cost of the project is allocated. For example, if a project for which 25 percent of the funds needed would address seismic issues and 75 percent of the funds needed would be for building construction in a State with a great need for new beds, the project would be placed in subpriority group 3. If the highest-cost component of an application for multiple projects does not meet the criteria for placement in priority group 1, subpriority group 1, because it is estimated to cost \$400,000.00 or more, it will be prioritized based on the component with the next largest share of the cost.

* * * * *

[FR Doc. 2013-08366 Filed 04/09/2013 at 8:45 am; Publication Date: 04/10/2013]