This document sets out our preliminary findings, as at 8 January 2016, in relation to a number of issues in our investigation into the procurement of services from the North East London Treatment Centre. We shared these preliminary findings with Barking and Dagenham CCG, Havering CCG, Redbridge CCG and Waltham Forest CCG (the CCGs), Care UK and Barking, Havering and Redbridge University Hospitals NHS Trust. The document sets out the reasoning and evidence we used to reach our preliminary findings at that time. The purpose of preparing and sharing these preliminary findings was for the parties to comment on our assessment, reasoning and the evidence used in order to help ensure that these findings were sound before any decision would be reached. These preliminary findings therefore do not constitute a formal view or any decision by NHS Improvement or Monitor on the issues that we investigated. The preliminary findings set out do not take into account any later submissions we received from any party.

We subsequently closed our investigation by accepting undertakings from the CCGs on 26 May 2016 without reaching any finding on breach. Our decision to accept undertakings is our final decision in this investigation and can be found here.

Monitor
Making the health sector work for patients

8/1/2016

[✂]

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Investigation into procurement of services from the North East London Treatment Centre

We write in relation to our investigation into the procurement process carried out by Barking and Dagenham CCG, Havering CCG, Redbridge CCG and Waltham Forest CCG (the CCGs) to select a provider to provide specified services from the North East London Treatment Centre.

This investigation was triggered by a complaint from Care UK and its scope was set out in our *Statement of Issues.*[1] The investigation encompasses a broad range of issues and relates to compliance with the *Procurement, Patient Choice and Competition Regulations*[2] and the *National Tariff Payment System*[3] (the National Tariff).

The purpose of this letter is to seek your feedback on our views, our reasoning and the evidence we have cited on what we see as the key issues, in particular those where it appears to us that the CCGs have breached the Procurement, Patient Choice and Competition Regulations and the National Tariff rules. These issues are:

- the CCGs' process for selecting providers and the information that was taken into account as part of that process to identify the best option for the delivery of elective care services at the North East London Treatment Centre
- transparency:
    - as to how the CCGs reached their conclusions
    - as to the criteria against which the bids would be judged.

Our views on these issues, and our reasoning, are provided in the annex to this letter. The CCGs, Care UK and Barking, Havering and Redbridge University Hospitals NHS Trust received a version of this letter and the annex. These documents are confidential and we expect that you will not share them or discuss the content of these documents with third parties, other then your legal advisers.

Please provide any comments on our assessment, reasoning and the evidence used together with any additional evidence you believe may affect our analysis on these issues. If you wish to make a submission addressing the issues raised, we request that you provide us with that written response by **Monday 25 January 2016 at noon**. Please let us know in writing if you believe a response by this date is not achievable, together with the reasons for this. We will carefully consider all submissions and evidence that we receive in response.

[1] Monitor's Statement of Issues. Available from: www.gov.uk/government/uploads/system/uploads/attachment_data/file/455179/Care_UK_SOI_August_2015.pdf [Accessed 21 December 2015]
[2] The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. Available from: www.legislation.gov.uk/uksi/2013/500/pdfs/uksi_20130500_en.pdf. [Accessed 7 January 2016]
[3] Section 115 of the Health and Social Care Act 2012 and the rules outlined in the 2014/15 National Tariff Payment System. Available from: www.gov.uk/government/publications/national-tariff-payment-system-2014-to-2015. [Accessed 7 January 2016]

Remedies

If we reach a decision that the CCGs have breached the Regulations, we have a range of enforcement actions potentially available, including:

- the power to declare that an arrangement for the provision of healthcare services for the NHS is ineffective
- the power to direct commissioners to take action to prevent, mitigate or remedy breaches of the Regulations.

In the event that we find breaches of the National Tariff rules, we have the power to direct commissioners to take steps to secure that the failure does not continue to recur or to restore the position to what it would have been if they had complied with the rules.

In deciding what action is most appropriate we would have regard to the circumstances of the case, the seriousness of the breach, matters relating to compliance (and deterrence of non-compliance), mitigation of the effect of the breach, and proportionality. These factors, and the different enforcement action options, are further explained in section 3.4 of our *Enforcement Guidance on the Procurement, Patient Choice and Competition Regulations*[4] and our guidance on *Enforcement of the National Tariff.*[5]

We are open to any representations you may wish to make in relation to remedies at this stage and, in any event, would consult before reaching a final decision. We have not ruled out any remedial options at this stage.

Summary of next steps and timing

- Submission on substance and facts: **25 January 2016 at noon**
- We will update the indicative timetable in **January 2016**.

Yours sincerely

[✂]

Competition Inquiries Director

[4]Enforcement guidance on the Procurement, Patient Choice and Competition Regulations. Available from: www.gov.uk/government/uploads/system/uploads/attachment_data/file/283508/EnforcementGuidanceDec13.pdf. [Accessed 7 January 2016]

[5] Enforcement of the National Tariff. Available from: www.gov.uk/government/publications/nhs-national-tariff-enforcement-guidance. [Accessed 7 January 2016]

ANNEX

1. Introduction

1. Monitor is investigating the process carried out by Barking and Dagenham CCG, Havering CCG, Redbridge CCG and Waltham Forest CCG (the CCGs) to select a provider to provide specified services from the North East London Treatment Centre.

2. The investigation encompasses a broad range of issues and relates to compliance with the Procurement, Patient Choice and Competition Regulations[6] and the National Tariff rules in relation to local variations.[7]

3. This document sets out our preliminary views on the issues where, based on the evidence received to date, it appears to us that the CCGs have breached the Procurement, Patient Choice and Competition Regulations and the National Tariff rules. These are:

    - the CCGs' process for selecting a provider and the information that was taken into account as part of that process to identify the best option for the provision of elective care services at the North East London Treatment Centre

    - transparency:

        - as to how the CCGs reached their conclusions

        - as to the factors that would be taken into account when evaluating the bids.

    Our analysis of these issues is set out below in sections 4 and 5 respectively.

4. We have not yet reached a view on the other issues that form part of this investigation (summarised in section 3). However, in relation to these other issues that are not addressed in this document, at this stage it appears to us that there has not been a breach of the Procurement, Patient Choice and Competition Regulations or the National Tariff rules.

5. In conducting this investigation so far we have gathered information from parties including the complainant, the CCGs, Barking, Havering and Redbridge University Hospitals NHS Trust (the Trust), the NHS Trust Development Authority (the TDA), the Care Quality Commission (the CQC) and other healthcare providers.

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[6] The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. Available from: www.legislation.gov.uk/uksi/2013/500/pdfs/uksi_20130500_en.pdf [Accessed 21 December 2015]

[7] Section 115 of the Health and Social Care Act 2012 and the rules outlined in the 2014/15 National Tariff Payment System, Available from: www.gov.uk/government/publications/national-tariff-payment-system-2014-to-2015. [Accessed 21 December 2015]

6. In order to assist us in our analysis we augmented out internal expertise by obtaining input from individuals with practical commissioning experience.

7. The remainder of this annex is structured as follows:

    - Section 2 sets out the context, the events leading to the procurement process, a description of the procurement process and the complaint from Care UK
    - Section 3 describes Care UK's complaint
    - Section 4 addresses the CCGs' process for selecting providers and the information that was taken into account as part of that process, including the legal framework, factual context and our assessment
    - Section 5 addresses transparency, including the legal framework, factual context and our assessment
    - Section 6 sets out our proposed next steps
    - Appendix 1 provides a timeline of events.

2. Context

8. In this section we describe the events leading to the procurement process, including how the CCGs developed their commissioning strategy and the steps they took during their procurement process.

Background

9. The North East London Treatment Centre (a facility on the site of King George Hospital in Ilford) opened as one of the independent sector treatment centres commissioned by the Department of Health to improve NHS capacity and reduce waiting times for elective care. In 2006, after a competitive tender, Partnership Health Group (a joint venture between Care UK and Life Healthcare which was subsequently fully acquired by Care UK in 2008) was awarded a five-year contract to provide services at the North East London Treatment Centre. When the original contract (and lease) expired in 2011, the local primary care trust ran a tender process for a three-year contract to provide services at the North East London Treatment Centre. The contract, and the lease, were again awarded to Care UK. In 2013 the CCGs took over commissioning responsibility from the primary care trust and in February 2014, with Care UK's contract and lease due to end in December 2014, the CCGs established an elective care programme to develop a commissioning strategy for elective care services to be provided from the facility. Care UK's contract and lease were extended by commissioners to 31 October 2015 to enable a procurement process to take place. Care UK's contract and lease have been further extended by the commissioners to 31 March 2016.

10. The contract to provide elective care services from the North East London Treatment Centre is coterminous with a lease for the premises from NHS Property Services Ltd, which holds the head lease for the property. In practice the decision on the award of the lease is determined by the commissioners: currently the CCGs and previously the primary care trust.

11. The key dates in the development of the commissioning strategy and the subsequent process for commissioning services to be provided from the North East London Treatment Centre are set out in Appendix 1 and described in more detail below.

Description of events

Development of the commissioning strategy

12. In April 2014 an Elective Care Commissioning Task & Finish Group was formed to support the implementation of the elective care programme. The purpose of the group was to complete a review of the use of the North East London Treatment Centre and to develop the CCGs' strategy for the procurement of services to be provided from the centre.

13. Between March 2014 and July 2014, the CCGs sought input from stakeholders to help shape the commissioning strategy and service specification. The CCGs analysed the feedback they received on the current elective care services, as well as suggestions for the new North East London Treatment Centre contract, and incorporated it into the commissioning strategy. The CCGs revised the service specification to reflect feedback from stakeholders. As a result, the CCGs sought a provider that would provide additional services to those that had previously been provided at the North East London Treatment Centre, namely gynaecology and urology for patients aged 18 years and over and ENT for patients under 18 years. The referral criteria, which describe the type of patients that should be accepted by the treatment centre as defined by their state of health and fitness, were widened to make them more comparable with those usually applied in similar circumstances. This would mean that a wider mix of patients could be treated at the centre.

14. In June 2014 the CCGs decided to include a pre-market phase in the procurement process. This phase provided an opportunity to test the CCGs' assumptions and proposals with potential providers in advance of the procurement. The outcome of the discussions informed the development of the invitation to tender document and specification.

15. In July 2014 the CCGs decided to use a restricted competitive procedure procurement. The restricted competitive procurement process used by the CCGs had two stages: a pre-qualification questionnaire (PQQ) stage to assess provider suitability, followed by an invitation to tender (ITT) stage to choose the preferred

bid. In order for a bidder to be invited to the ITT stage it had to meet the minimum criteria that were set at the PQQ stage.

16. The CCGs formally agreed on the procurement plan in executive committee meetings during October and November 2014.

Pre-procurement engagement events

17. On 11 November 2014 the CCGs published a notice in the Official Journal of the European Union informing potential providers of the upcoming procurement process and pre-market engagement events. The CCGs held two market engagement events before the start of the procurement to brief potential bidders on the planned procurement and to seek their views.

18. The pre-procurement events did not form part of the formal procurement process. The findings of the market engagement events were published on the e-tendering website along with the contract notice in order that potential bidders who did not have the opportunity to attend these events were not disadvantaged.

Pre-qualification questionnaire (PQQ)

19. On 12 January 2015 the CCGs started the PQQ stage by issuing the relevant PQQ documentation to potential bidders. At the same time an advert was released on Contracts Finder and a contract notice was published on the Official Journal of the European Union. Potential bidders had to register and express interest in the procurement to access the online questionnaire. Potential bidders were invited to express interest and submit a completed questionnaire by 16 February 2015.

20. The PQQ criteria are set out in Table 1 below.

21. The PQQ contained a section of questions on the potential bidders' technical and professional capability (section F of the PQQ). This included questions on potential bidders' quality standards, systems and assurances processes and policies, clinical governance processes, their approach to patient safety incidents and examples of previous contracts which demonstrate expertise, experience and capabilities. The PQQ also requested details of any regulatory reports, complaints, alerts or notices to and/or by any regulatory body during the past two years relating to any of the bidder's services relevant to the requirements.

22. Between 13 January and 26 January 2015 potential bidders were able to submit clarification questions to the CCGs. Anonymised copies of the questions and the CCGs' answers were available to all potential bidders.

23. The CCGs received expressions of interest from seventeen providers. From these expressions of interest, the CCGs received completed questionnaires from the following five bidders:

    - Care UK Clinical Services Ltd (Care UK)

- Barking, Havering and Redbridge University Hospitals NHS Trust (the Trust)
- [✂]
- [✂]
- [✂].

The Trust's response to the PQQ

24. [✂]

25. [✂]

26. [✂]

27. [✂]

References provided by the Trust

28. [✂]

29. [✂]

30. [✂]

31. [✂]

PQQ evaluation

32. The PQQ stage of the procurement process was in two phases: phase one was based on non-scored pass/fail questions while phase two was based on scored questions. For the scored questions in phase two, the evaluators gave the submissions a score between 0 (unacceptable) and 10 (excellent). Bidders had to pass all questions in phase one to proceed to the second PQQ phase. In order for bidders to progress to the ITT stage of the procurement process they needed to satisfy all questions at phase one of the PQQ stage and achieve a mark of at least 50% at phase two.

33. [✂] were unsuccessful at phase one of the PQQ (pass/fail) as they did not pass all of the relevant questions.

34. The Trust, Care UK and [✂] passed both phases of the PQQ and were invited to the ITT stage. The final scores are shown in Table 1.

Table 1: PQQ criteria and scores

Areas / section	Weighting	Trust score	Care UK score	[✂]
A) Details of the potential bidder and its business structure	Not scored	-	-	-
B) Financial and economic standing	Pass/fail	-	-	-
C) Legal and regulatory	Pass/fail	-	-	-

D) Insurance	Pass/fail	-	-	-
E) Health & safety	Pass/fail	-	-	-
F) Technical and professional capability	40%	[✂]	[✂]	[✂]
G) Information management and technology	20%	[✂]	[✂]	[✂]
H) Workforce	20%	[✂]	[✂]	[✂]
I) Transfer of undertaking and protection employment	10%	[✂]	[✂]	[✂]
J) Property, facilities management and equipment	10%	[✂]	[✂]	[✂]
K) Applicant's declaration	Pass/fail	-	-	-
	Total score	[✂]	[✂]	[✂]

Invitation to tender (ITT)

35. On 12 March 2015 the CCGs started the ITT stage by providing the Trust, Care UK and [✂] with the relevant ITT documentation. The providers were invited to provide their ITT bids by 4 May 2015.

36. The CCGs' ITT questionnaire consisted of 49 questions in 11 sections, including service delivery, clinical governance, performance and quality, and information governance. The questions asked bidders to share their proposals in relation to the future delivery of the service.

37. Half of the total available marks were for the financial and commercial requirements criterion. For this criterion, the bids were to be assessed in terms of the price they provided when compared to the current service using the same level of activity. [✂]

38. The other half of the marks were attributable to criteria that were intended, directly or indirectly, to deal with quality. These criteria are set out in Table 2. Bidders had to achieve a score of at least 30% out of the total 50% of the marks attributable to quality in order to meet the pass threshold established by the CCGs.

39. From 12 March to 8 April 2015 all bidders had an opportunity to ask the CCGs clarification questions. A list of anonymised clarification questions and responses was published on the e-tendering system to ensure that all bidders had access to the same information. On 1 April 2015 Care UK used this process to ask the CCGs whether the procurement approach satisfied the requirements for a local price variation to the National Tariff. The CCGs responded on 30 April 2015 stating that they were assured that they had met the requirements.

40. The CCGs received bids from the Trust and Care UK. [✂] did not submit a bid.

ITT Evaluation

41. The ITT responses of the Trust and Care UK were assessed by an evaluation panel of thirteen people, including managerial leads, specialists, patient representative and representatives from Barking & Dagenham and Redbridge CCG, North and East London Commissioning Support Unit and General Practitioners from Barking & Dagenham, Redbridge and Havering. All evaluators received training prior to the procurement to ensure that they understood the evaluation process and their role in that process.

42. The members of the evaluation panel began their individual evaluation of the bids on 5 May 2015. The evaluators were responsible for evaluating the questions relevant to their expertise. As in the PQQ evaluation, each evaluator individually scored the responses to the questions they were assessing from 0 (unacceptable) to 10 (excellent).

43. For the financial and commercial requirements criterion, the ITT document said that bids would be assessed in terms of total contract price and would be assessed in terms of the level of price efficiency they provided when compared to the current service using the same level of activity. [✂]

44. As part of the evaluation process, Care UK and the Trust were each invited to give a presentation on their bid submissions to members of the evaluation panel on 3 June 2015. The purpose of these presentations was to provide clarification on aspects of the original bid submission as identified by the CCGs. The CCGs asked bidders to present on how they would ensure the delivery of the service specification requirements with particular reference to:

    - the mobilisation of services that are currently provided from the North East London Treatment Centre and for children's services[8]
    - proposed innovations and their impact
    - delivery, capacity and productivity measures
    - key risks and mitigations.

45. In addition, evaluators had the opportunity to ask the Trust and Care UK relevant questions about their written bids. The CCGs told us that no new criteria were introduced for the purpose of presentations and that the presentations were not separately scored.

46. After the presentations, on 4 June 2015, the evaluation panel held a moderation meeting to moderate and to agree consensus scores for each submission before the scores were finalised. The panel members were able to adjust their scores

[8] Children's services were relevant because ear, nose and throat services for people aged 3 – 17 was one of three new services included in the service specification.

during the moderation process in light of the clarification provided through the presentations.

47. Not all sections of the ITT were moderated in this way. Some sections were scored and moderated by multiple evaluators and other sections were scored by individuals (see Table 2 below).

48. After the moderation meetings the evaluation panel finalised the scores and the outcome of the procurement process. The final scores are shown below in Table 2.

Table 2: ITT criteria and scores

Areas / section	Weighting	Trust score	Care UK score
A) Offer details	pass/fail	-	-
Financial & Commercial Requirements Criteria (50% of overall score)			
B) Financial and commercial requirements	50.00%	[✂]	[✂]
Quality Criteria (50% of overall score)			
C) Service delivery[✂]	10.00%	[✂]	[✂]
D) Clinical governance, performance & quality[✂]	7.00%	[✂]	[✂]
E) Workforce[✂]	5.00%	[✂]	[✂]
F) Patient focus[✂]	5.00%	[✂]	[✂]
G) Information management & technology[✂]	5.00%	[✂]	[✂]
H) Information governance[✂]	4.00%	[✂]	[✂]
I) Transfer of undertaking and protection of employment [✂]	4.00%	[✂]	[✂]
J) Property, facilities management and equipment[✂]	4.00%	[✂]	[✂]
K) Contract management and performance[✂]	6.00%	[✂]	[✂]
Quality criteria subtotal		[✂]	[✂]
Total score		[✂]	[✂]

[✂]

49. In June 2015 the CCGs' governing bodies approved the outcome of the procurement process and standstill letters were sent to the successful bidder (the Trust) and the unsuccessful bidder (Care UK) on 30 June 2015.

3. Care UK's complaint

50. Care UK, the incumbent provider and losing bidder, complained to us on 3 July 2015 about the CCGs' decision to award the contract to the Trust. Care UK's complaint covered a number of aspects of the CCGs' procurement process. With regard to the issues addressed in this document:

- Care UK submitted that the CCGs had applied an irrational approach to the assessment criteria and the scoring of bids for the procurement, not making due allowance for bidders' performance records (clinical outcomes, patient experience and access times). Care UK submitted that the CCGs in their evaluation did not appear to have taken into account that the Trust had been placed into special measures by the CQC in December 2013. Care UK submitted that it was concerned that, in order to arrive at the scores allocated to the bids for the Trust and Care UK, the CCGs had accepted at face value assurances from the Trust about future improvements to the quality of care.

- Care UK submitted that the CCGs had failed to follow the principles and process set out in the National Tariff for agreeing a local variation in tariff price.

- Care UK submitted that failure to provide adequate information about the application of the evaluation criteria and scoring of the bids amounted to a failure to be transparent.

51. Our analysis on these issues is set out in the following two sections: section 4 addresses the CCGs' process for selecting a provider (in the context of both the Procurement, Patient Choice and Competition Regulations and the National Tariff rules relating to local variations) and section 5 addresses transparency.

52. Issues that form part of our investigation but which are not addressed in this document include:

    - whether the criteria, and the relative weights assigned to them, used to evaluate bids in the procurement process enabled commissioners to procure services from the provider or providers that would best meet patients' needs, improve the quality and efficiency of services and provide best value for money

    - whether the CCGs' approach to scoring bids was consistent with their obligations to act in a proportionate way and to treat providers equally

    - whether the CCGs' approach to commissioning the elective care services to be provided at the North East London Treatment Centre was appropriate given the nature of the services, which are mainly services for which patients have a right to choose a provider, and in circumstances where the contract to provide elective care services was associated with a lease to provide services at the treatment centre which is owned by NHS Property Services Ltd

    - whether the CCGs' approach to commissioning elective care services to be provided at the North East London Treatment Centre was discriminatory because they have not run a comparable procurement process for NHS services provided by other organisations.

4. Provider selection and payment approach

53. In this section we assess the way in which the CCGs designed and carried out their procurement exercise. We assess whether the CCGs' procurement process enabled them to identify and select the best option for the provision of elective care services at the North East London Treatment Centre. This was important for the CCGs in order to be satisfied that they were buying services from the provider or providers that were most capable of delivering the CCGs' objective of securing the needs of patients and improving the quality and efficiency of

services, and provided best value for money in doing so. We also assess whether the local payment approach proposed by the CCGs was in the best interests of patients. This is relevant to Regulation 3(3) of the Procurement, Patient Choice and Competition Regulations (read in conjunction with Regulation 2) and the National Tariff rules relating to local variations.

54. This section begins with a description of the relevant legal framework and then sets out the relevant parts of Care UK's complaint and the CCGs' submissions. We then set out our analysis and preliminary views on this issue and particularly focus on whether the CCGs have done enough to ensure that the bidder they selected to provide the elective care services at the North East London Treatment Centre would deliver the best result for patients and value for money. This analysis includes whether the CCGs took into account those aspects of the Trust's clinical challenges that were relevant to elective services and therefore the Trust's ability to deliver on its bid. These questions are analysed in the context of the Procurement, Patient Choice and Competition Regulations and the National Tariff rules relating to local variations.

55. The background facts underpinning our assessment of this issue are set out above from paragraphs 19 to 48.

Legal context

56. In order to commission healthcare services which work for patients CCGs must follow the relevant legal framework. Of particular relevance to this investigation, the CCGs must comply with:

- the *National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013)*
- the National Tariff rules
- the *Public Contracts Regulations 2006*[9] (these are not enforced by us).

Regulations to ensure good commissioning

57. The Procurement, Patient Choice and Competition Regulations are designed to ensure that commissioners secure high-quality, efficient NHS healthcare services that meet the needs of people who use those services. In particular:

- Regulation 2 sets out the objective that commissioners must pursue whenever they are procuring NHS healthcare services. That is, to act with a view to securing the needs of patients who use the services and to improving the quality and efficiency of the services, including through the services being

[9] In April 2016 the *Public Contracts Regulations 2006* are being replaced by the *Public Contracts Regulations 2015* (which implement the EU Public Contracts Directive 2014/24/EU) in respect of healthcare services

provided in an integrated way (including with other health care services, health-related services or social care services).

- Regulation 3 sets out that when procuring healthcare services for the purpose of the NHS,
    - Regulation 3(2)(a) requires commissioners to act in a transparent and proportionate way
    - Regulation 3(2)(b) requires commissioners to treat providers equally and in a non-discriminatory way, including by not treating a provider, or type of provider, more favourably than any other provider, in particular on the basis of ownership
    - Regulation 3(3) requires commissioners to procure NHS healthcare services from one or more providers that are most capable of delivering the objective referred to in Regulation 2 and provide best value for money in doing so.

58. These requirements follow a principle-based approach, and our assessment of compliance is necessarily fact-specific. We have published Substantive Guidance[10] on the application of these rules,

Agreeing prices in accordance with the National Tariff and rules on local variation

59. Under section 115 of the *Health and Social Care Act 2012* (the 2012 Act), the price payable for the provision of NHS healthcare services must be in accordance with the National Tariff. Under sections 116 to 118 and Chapter 3 of Part 3 of the 2012 Act, we are responsible for publishing the National Tariff (as agreed with NHS England) and for enforcement where licensed providers and commissioners fail to comply with its provisions. Section 116 of the 2012 Act provides that the National Tariff must specify national prices for certain healthcare services. However, it also provides that the National Tariff may include rules under which a commissioner and provider can agree to vary the national price for a healthcare service.

60. The *2014/15 National Tariff Payment System* (the 14/15 Tariff) sets out national prices for a range of services, including the services subject to this complaint. It provides the rules under which commissioners and providers can agree a local variation from a national price; these are set out in Subsection 7.2 of the 14/15 Tariff.

61. The 14/15 Tariff explains that local variations may be desirable in a variety of situations, for example, where commissioners and providers want to offer

[10]Substantive guidance on the Procurement, Patient Choice and Competition Regulations. Available from: http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283505/SubstantiveGuidanceDec2013_0.pdf [Accessed 21 December 2015]

innovative clinical treatments, deliver integrated care pathways or deliver care in new settings, and need to change the payment approach to support these changes. The 14/15 Tariff also says that it is not appropriate for local variations to be used to introduce price competition that could create risks to the safety or quality of care for patients.

62. Subsection 7.2.2 of the 14/15 Tariff specifies the rules under which a commissioner and provider may agree a local variation. In particular, they provide that for a local variation to be compliant with the 14/15 Tariff, commissioners and providers must apply the principles for local variations, modifications and prices set out in Subsection 7.1. The relevant principles are:

- Local payment approaches must be in the best interests of patients;
- Local payment approaches must promote transparency to improve accountability and encourage the sharing of best practice; and
- Providers and commissioners must engage constructively with each other when trying to agree local payment approaches.

63. The first of these principles is relevant to this investigation. Subsection 7.1.1 explains this principle in more detail: it provides that local variations should support a mix of services and delivery models that are in the best interests of patients today and in the future. It states that, in agreeing a locally determined price, commissioners and providers should consider:

- Quality – will the agreement maintain or improve the outcomes, patient experience and safety of healthcare today and in the future?
- Cost effectiveness – will the agreement make healthcare more cost effective, without reducing quality, to enable the most effective use of scarce resources for patients today and in the future?
- Innovation – will the agreement allocate the risks associated with unit costs, patient volumes and quality in a way that protects the best interests of patients today and in the future?
- Allocation of risk – will the agreement allocate the risks associated with unit costs, patient volumes and quality in a way that protects the best interests of patients today and the future?

Commissioning in accordance with public procurement law

64. The EU Public Contracts Directive 2004/18/EC, implemented into UK law by the *Public Contracts Regulations 2006*, applies to the award of contracts for

healthcare services before April 2016.[11] These rules distinguish between Part A and Part B services:

- Part A services are subject to a procurement regime which mandates particular timescales and procedures that must be followed (for example, the open, restricted, competitive dialogue or negotiated procedures).
- Part B, which includes health and social care services, is much less prescribed and does not set out a particular procedure.

65. A relatively flexible regime therefore applies to a procurement relating to the award of a contract for healthcare services, such as the contract that is the subject of the present investigation.

66. Although these are Part B services (and therefore not subject to the prescriptive rule set out in Part A), commissioners are still required by the *Public Contracts Regulations 2006*[12] to act in accordance with the overarching principles of transparency, proportionality, equality of treatment and non-discrimination.

67. The *Public Contracts Regulations 2006* are being replaced by the *Public Contracts Regulations 2015* (which implement the EU Public Contracts Directive 2014/24/EU). Amongst other changes, the distinction between Part A and Part B services has been removed and a new light-touch regime introduced for social and health and some other services.[13]

68. We do not enforce compliance with public procurement law. However, it is relevant to this procurement and, as set out in paragraphs 76 and 77, the CCGs have raised public procurement law in the context of explaining the procurement process that they designed and why they acted in the way they did.

The key questions applying the relevant legal framework

69. Applying the relevant legal framework, our analysis focuses on the following issues:

- Did the CCGs do enough to ensure that they selected the best option for the provision of elective care services at the North East London Treatment Centre? This was important for the CCGs in order to be satisfied that they were buying services from the provider or providers that were most capable of delivering the CCGs' objective of securing the needs of patients and

[11] The Public Contracts Regulations 2006. Available from: www.legislation.gov.uk/uksi/2006/5/contents/made. [Accessed 21 December 2015]
[12] Regulation 4(3) of the Public Contracts Regulations 2006. Available from: www.legislation.gov.uk/uksi/2006/5/contents/made. [Accessed 21 December 2015]
[13] See further A Brief Guide to the EU Public Contracts Directive (2014). Available from: www.gov.uk/government/uploads/system/uploads/attachment_data/file/472985/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Oct_2015__1_.pdf [Accessed 21 December 2015]

improving the quality and efficiency of services, and provided best value for money in doing so (and thereby comply with Regulation 3(3)).

- Did the CCGs apply the principle that local payment approaches must be in the best interests of patients when agreeing a local variation (and thereby comply with Subsection 7.1 of the 14/15 Tariff)?

70. Key to these questions is whether the CCGs designed a process which ensured that relevant information was taken into account. This was important to enable the CCGs to objectively evaluate the ability of the different providers to deliver on their bids and give the CCGs confidence that selecting a particular provider was the best way to get good outcomes for patients, and to ensure that the local payment approach was in the best interests of patients.

Care UK's submissions

71. Care UK submitted that the CCGs' evaluation methodology and scoring of bids for the procurement was unlawful, as it did not comply with the CCGs' obligations under the Procurement, Patient Choice and Competition Regulations.[14] Care UK submitted that the CCGs failed to properly evaluate the clinical quality of services being offered by failing to identify appropriate and compliant evaluation criteria for the assessment process, which gave rise to higher scores for a bidder with a record of quality which was objectively and demonstrably inferior to that of Care UK (and Care UK said was known to be so by the CCGs).

72. Care UK said that it was concerned to understand whether the Trust's bid was clear about the Trust's governance and procedural failings and its failure to achieve national waiting time standards, as well as misreporting against those targets. Care UK said that it wanted to understand how this information was taken into account by the CCGs' scoring of the Trust's bid.

73. Care UK said that, when evaluating proposals, the CCGs did not appear to have taken into account the external and objective evidence from regulatory findings concerning clinical quality and safety of direct relevance to the service being procured. Care UK submitted that the CCGs had ignored external regulatory findings, such as the fact that the Trust was placed into special measures by the CQC in December 2013.

74. Care UK submitted that it was concerned that in order to arrive at the scores allocated to the bids for the trust and Care UK, the CCGs had accepted, at face value, assurances from the Trust about future improvements to the quality of care. Care UK said that the Trust's assertion that it could achieve these

[14] The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. Available from: www.legislation.gov.uk/uksi/2013/500/pdfs/uksi_20130500_en.pdf [Accessed 21 December 2015]

improvements lacked credibility in view of its poor record over a significant period of time, and the serious nature of the views expressed about quality and performance of the Trust in the CCGs' own Board papers.

The CCGs' submissions on provider selection and payment approach

75. The CCGs told us that they believed they had developed a commissioning strategy and a procurement process that was consistent with the Procurement, Patient Choice and Competition Regulations. They told us that they believed they had acted with a view to securing the needs of patients and procuring services from a provider most capable of delivering on that objective. The CCGs told us that, as part of meeting their commissioning objectives of securing the needs of patients, the procurement had been designed to address the particular needs of the local health economy and most effectively to utilise a facility.

Ability to take into account information

76. The CCGs told us that they had designed the tender in a way that would comply with public procurement rules. The CCGs told us that, in doing so, they had to ensure that the process for gathering information, and criteria in particular, should only draw in for consideration relevant information and that evaluators should not consider any information which was not before them as part of this exercise.

77. The CCGs told us that to have included selection criteria designed specifically to focus on the Trust's CQC issues, which in its view were generally not relevant to the services being tendered, would have amounted to inclusion of irrelevant criteria. The CCGs also told us that to have taken into account information about bidders (such as information contained in the 2013 CQC report), which had not been asked for, would also have been a breach of public procurement law as this would have amounted to the use of undisclosed selection criteria.

Consideration of the 2013 CQC report

78. The CCGs explained that, in their view, the issues relating to the successful bidder's CQC report, and its special measures position, focused largely on non-elective and emergency care and did not relate to planned care. [✂].

79. The CCGs said that the issues relating to the Trust's CQC report and special measures focused largely on non-elective and emergency care and that they did not believe they were directly relevant to this procurement process which related to elective services. The CCGs told us that issues raised in the 2013 CQC report, and which were referred to in the Trust's PQQ response, had been considered at the PQQ stage to the extent they were considered relevant but that the Trust had passed this stage and progressed to ITT.

80. The CCGs told us that, separately, they had carried out work to address the issues raised in the CQC report but not as part of the procurement process as it

was not considered sufficiently relevant. They said they would not cross-contaminate a procurement of elective care services with non-elective issues.

81. The CCGs' PQQ question F.4 asked for information regarding regulatory reports, including CQC reports. This was a pass/fail question which asked bidders to provide details of any reports, complaints, alerts and notices to and/or by any regulatory body during the past two years relating to any of the bidder's services relevant to the Requirements. The CCGs told us that they considered the 2013 CQC report in relation to this criterion and took it into account to the extent that it would impact on the ability to deliver the elective services being procured. The CCGs concluded that the CQC report and the Trust's response, which set out a number of steps taken to address the issues raised in the report, did not require the bidder to be disqualified from the procurement of this particular service.

82. With regard to the 2013 CQC report, the CCGs said that the CQC had reported that many of the services were safe but required some improvements to maintain their safety. The CCGs said three services were rated as inadequate following the initial inspection in 2013 and the specific improvement actions recommended by the CQC related to resolving problems in the A&E departments of King George Hospital and Queens Hospital to deliver safe care. The CCGs said the CQC also recommended that the Trust address its discharge planning and patient flow problems which required improved working with local partners. Urgent and emergency care was outside the scope of this procurement and, the CCGs contend, not relevant to the delivery of elective care services provided from the North East London Treatment Centre.

83. The CCGs also said that a re-inspection by the CQC in 2015[15] noted that significant improvement had been made and no services were rated inadequate in the domains of safety[16], effectiveness, caring or well led. The CCGs said an inadequate rating remained for the domain responsiveness, again noting the challenges in A&E and patient flow. The CCGs said that arrangements in children and young persons' services were rated inadequate for responsiveness with concerns regarding neonatal care and environmental design.

Referral to treatment

84. The CCGs told us that the Trust had applied controls to minimise cancelled operations but was not reporting against the 18-week referral to treatment (RTT) targets as a result of introducing a new IT system and issues with capacity and

[15] The CQC re-inspected the Trust in March 2015 and published their report on 2 July 2015. They noted significant improvements however overall the Trust was rated requires improvement with the recommendation that it should remain in special measures. Outpatient and diagnostic imaging services at King George Hospital were rated inadequate, while surgery and services for children and young people at both sites were rated as require improvement.

[16] We note that outpatient and diagnostic imaging at King George Hospital and urgent and emergency services at Queen's Hospital were rated inadequate in the domain of safety.

demand. Improving RTT was being managed as a separate improvement plan with the Trust.

Local payment approaches in the best interests of patients

85. The CCGs said that they were confident that the proposed use of a locally agreed price was consistent with the rules for establishing a local variation from the National Tariff and they were satisfied that quality would be maintained and improved.

86. In explaining why they believed the local payment approach was in the best interest of patients, the CCGs said in relation to quality that they were moving away from tariff to a local price that reflected what they considered to be the limited range of activity and simpler than average services that the North East London Treatment Centre would be delivering. The CCGs said that in doing this they were ensuring that the right price would be paid for the right service and therefore improving cost-effectiveness whilst maintaining the outcomes, patient experience and safety of healthcare. The CCGs also said that the revised service specification provided a number of benefits to patients that could be delivered within the locally agreed price, including new services, borough based outpatient services (which they said will be established where there is a demand) and proposed new 'one stop shop' models to streamline the patient pathways.

87. The CCGs said the procurement process tested the bidders' capabilities of delivering a quality service and that further assurance was provided through the presentation stage where bidders were asked to describe how their proposed service innovations would deliver the service specification.

Our analysis

88. In this section we set out our analysis of the way in which the CCGs designed and carried out their procurement process. First we address the ability of commissioners to take into account information relevant to bidders' capabilities to deliver on the proposals contained in their bids. We then analyse whether the Trust's clinical challenges (including some of the issues raised in the 2013 CQC report and aspects of the Trust's improvement plan) were relevant to the Trust's delivery of elective care services and therefore the Trust's ability to deliver on its bid. We then assess whether, by not taking bidders' existing circumstances—to the extent that they may have impacted on the bidders' abilities to deliver on their bids—into account, the CCGs were unable to commission in accordance with the requirements of Regulation 3(3) of the Procurement, Patient Choice and Competition Regulations and breached the National Tariff rules.

Information relevant to delivery of bids

89. Under general public procurement law, having assessed, at the PQQ stage, bidders' potential competence to perform the contract based on whether bidders meet a minimum set of conditions (including with regard to their ability and past

performance), it is usually not permissible for the evaluation criteria, at the ITT stage, to reassess this. The quality of the bids must be assessed on the basis of the bids themselves and not on that of the experience acquired by the bidders with the contracting authority in connection with previous contracts. Nevertheless, commissioners can and should be able to verify that the contents of bids are deliverable. A good procurement process will enable the commissioner to have confidence that what is in the bids is deliverable and the existing circumstances of the bidders are relevant to this.

90. In our view, the CCGs should have designed a process that solicited information to enable them to be confident that the bidders could deliver on the proposals contained in their bids. In the context of assessing the deliverability of bids it is permissible for CCGs to request and take into account information about the circumstances of bidders to the extent this is relevant to the services in question and the CCGs' evaluation criteria.

Relevance of information stemming from CQC report

Services falling within the scope of this procurement

91. The CCGs' service specification lists the services falling within the scope of the procurement. These are the management of specified outpatient activity and procedures, required diagnostics / investigations, specified surgical procedures, all associated pre and post-operative care, and inpatient services as required. Where we use the term 'elective care services' in this document, we are referring to the activities that fall within the scope of the North East London Treatment Centre service specification (as set out above).

The 2013 CQC report

92. We reviewed the 2013 CQC report and the Trust's improvement plan, both referred to by the Trust in its PQQ response, as well as certain related Governing Body/Board papers of the CCGs and the Trust. We reviewed the documents for issues relevant to the Trust's delivery of elective care services and therefore to the North East London Treatment Centre procurement and the Trust's ability to deliver on its bid.

93. For the reasons set out in more detail below, in our view the following are relevant issues that are raised in these documents:

- Trust wide governance and leadership issues which have implications for patient safety and quality of care across all services
- Issues directly related to elective care services namely issues with outpatient care
- Issues likely to be relevant to elective care services namely radiology quality concerns

- Issues likely to be relevant to elective surgery including poor infection control and hygiene in theatres
- Issues which may impact on elective care services including bed shortages and patient flow issues
- Issues related to Referral to Treatment (RTT) standards which are important to the delivery of elective care services
- The Trust's delivery against its improvement plan.

94. Our views on issues raised in the 2013 report and their relevance to the procurement process are not a statement of the Trust's current performance or capabilities and we note that the report findings are not necessarily still current.

Trust wide issues which by nature affect all clinical services

95. The 2013 CQC report included a number of findings which in our view indicated that these were organisational wide issues, thereby having implications for patient safety and quality of care across all services. These include a lack of engagement and support from all senior clinical staff regarding addressing challenges, more visible and greater focus being needed at Board level to resolve longstanding and significant patient safety issues, more work needing to be done to improve understanding of risk, unclear processes for ensuring NICE guidelines were implemented, the Clinical Audit Committee struggling with Directorate engagement and therefore itself being reviewed and poor results on national staff surveys. The CQC report also said that the Trust must improve on its sharing of information to monitor performance and quality of care. We note from the report that the CQC was not assured that the Trust's quality monitoring systems within the surgical departments were accurate or effective.

Issues directly relevant to elective care services

96. The 2013 CQC report identified issues within the Trust's planned care services. The CQC report said that more work was needed to make outpatient services safe and effective. Administration in the outpatients department at King George Hospital was found to be very poor which impacted adversely on patient care. Management of the appointment times in some of the outpatient clinics was one of the areas the CQC reported the Trust must improve on. The CQC report said that patients attending outpatient clinics were not always seeing their named doctor due to clinics being cancelled when the consultant did not arrive due to other planned activities or when leave was required at short notice; outpatient appointment times sometimes being reduced due to clinics being delayed or over booked and appointment delays of between 50 and 90 minutes, with some of these delays being due to consultants carrying out scheduled ward rounds or other duties at the same time. Other outpatient issues identified in the CQC report included cancelled appointments, missing notes and patients receiving multiple appointment letters or receiving none. The CQC report said that

complaints about the appointment process were discussed at the Trust's July 2013 Board meeting and that some patients only had three days' notice that their appointment had been cancelled. The CQC report said that while the Trust had been aware of the problems and had started to take action, progress was slow.

97. We note from CCG Governing Body papers from January 2015 that the CCGs were taking formal contractual action in relation to the cancellation of outpatient appointments at the Trust. These actions were aimed at driving improvement in the quality of outpatient services. The CCGs reported in a Board paper that whilst further improvement was still required to enhance patient experience, some improvement had been delivered.[17] They reported that there was still a significant amount of work to do to see the improvements they required.

Issues likely to be relevant to elective care services

98. We note from the same Board paper that the CCGs had issued a contract query notice related to radiology quality concerns at the Trust which in our view is also likely to be relevant to elective care services. The CCGs reported that the Trust was required to develop an improvement plan that detailed how the services were going to improve and what actions were required to achieve this. In the board paper the CCGs said that to date progress had been slow and as a result there had been further internal escalation of the concerns.

Issues likely to be relevant to elective surgery

99. The 2013 CQC report also included findings likely to be relevant to elective surgery. The report said the hospitals must improve on the care provided in the surgical care services. We note that while Queen's Hospital provides predominantly acute surgical procedures, King George Hospital undertakes more elective procedures. The CQC report said that people at the Trust were put at risk of infection in theatres due to inadequate cleaning and poor practices by staff. The inspectors observed some poor practices at theatres in King George Hospital including staff not washing hands and not using stickers to show when equipment has been cleaned (as per Trust policy) and some equipment was quite dusty. They also observed poor infection control practices during a surgical procedure. The CQC report also referred to problems with the environment in the theatres at King George Hospital. The CQC found that corridors were cluttered with trollies and equipment due to a lack of available storage space.

Issues which may impact on elective care services

100. In addition, the 2013 CQC report identified bed shortages, patient flow issues, and poor capacity planning which in our view may impact on elective care

[17] NHS Barking and Dagenham Clinical Commissioning Group Governing Body meeting, p195. Available from: www.barkingdagenhamccg.nhs.uk/ONELBarking/Downloads/news-and-publications/Governing-body-papers/27%20January%202015/BD%20CCG%20Governing%20Body%2027%20Jan%202015%20Combined.pdf. [Accessed 21 December 2015]

services. They report said delayed discharges and high occupancy rates meant the services could not be as responsive as required and this put unnecessary pressure on departments and increased the risk of poor outcomes for patients. The inspectors found that some day-case patients had their surgery cancelled two or three times. The CQC report noted that at the time of their inspection the day case ward at King George Hospital was being used as an over-flow area for when other surgical wards were full. The CQC observed that patients were also being nursed in the theatre recovery area and discharged home from there and reported that staff told them this was commonplace due to a shortage of beds elsewhere in the trust.

Referral to treatment (RTT) issues

101. In our view, a provider's ability to perform against and report on performance against RTT standards is important to the delivery of elective care services. In recently published guidance NHS England said: "The accurate recording and reporting of RTT waiting times information is extremely important. Patients can and do use this information to inform their choice of where to be referred and also to understand how long they might expect to wait before starting their treatment. NHS providers and commissioners also need to use this information to ensure they are meeting their patients' legal right to start consultant-led non-emergency treatment within a maximum of 18 weeks from referral – and to identify where action is needed to reduce inappropriately long waiting times."[18]

102. It is documented in Trust Board papers and CCG Governing Body papers that implementation of a new Patient Administration System in December 2013 revealed that internal errors and capacity issues had affected the Trust's RTT performance. RTT reporting was suspended in January 2013 until the issues were resolved. We note from a recent Trust Board paper that in April 2014 the Trust identified that it had been using an incorrect methodology to manage waiting lists which significantly overstated its compliance with RTT standards. The Trust said that, for example, applying the correct methodology resulted in admitted performance of 65%, not 89% as originally thought. They said that this information was reported to the Board in August 2014.[19]

103. We note from CCG Governing Body papers from January 2015 that the Trust's RTT reporting remained suspended with the full cost of the RTT backlog reduction at the Trust being reviewed and calculated. The CCGs said that NHS England had agreed additional funding of £4.2m in relation to the RTT waiting list reduction activity and that the CCGs were in discussion with NHS England with a view to increasing the level of funding available. Commissioners meet with the

[18] NHS England (2015), Recording and reporting referral to treatment (RTT) waiting times for consultant-led elective care, p 6. Available from: www.england.nhs.uk/statistics/wp-content/uploads/sites/2/2013/04/Recording-and-reporting-RTT-guidance-v24-2-PDF-703K.pdf.[Accessed 21 December 2015]

[19] Barking, Havering and Redbridge University Hospitals NHS Trust Board Meeting, Wednesday 7th October 2015, p 109 Available from: www.bhrhospitals.nhs.uk/Boardpapers131015.pdf.[Accessed 21 December 2015]

Trust on a weekly basis to review progress, which is also reviewed monthly in the Oversight and Escalation Group meeting with NHS England and the TDA. The CCGs report that penalties for 52 week waits are classed as serious incidents and that Trust data submitted in November 2014 indicated 2,202 such cases (this was subject to further validation).[20]

The Trust's improvement plan

104. We note from Trust Board papers that its improvement plan included five work streams: leadership and organisational development; outpatients; patient care and clinical governance; patient flow; and workforce. In February 2015 the Trust Board papers reported on progress against the plan as at December 2014.[21] Overall delivery remained behind plan. The Trust rated their progress against the outpatients, patient care and clinical governance and patient flow work streams as amber-red. Workforce was rated red-red and leadership and organisational development were rated green-amber.

Assessment of relevance of information stemming from CQC report

105. Our view is therefore that aspects of the Trust's improvement plan and some of the issues identified by the 2013 inspection are relevant to the Trust's delivery of elective care services and therefore the contract being tendered and the Trust's ability to deliver on its bid. The CQC's 2013 inspection findings include both trust wide governance and leadership issues which have implications for patient safety across all services (including therefore elective care services), as well as issues directly related to elective care services, and other issues that are likely to be relevant or may impact on elective care services or elective care surgery. The CCGs' Board papers also further demonstrate relevant concerns regarding outpatient services, RTT performance and reporting and radiology quality.

Local payment approaches in the best interests of patients

106. As described above in paragraphs 59 to 61 the 2012 Act and National Tariff provide a principles-based framework which gives providers and commissioners the flexibility to depart from national prices and/or currencies where they are not appropriate due to local circumstances. Such arrangements are called local variations.

107. As described above in paragraph 62, in order to be compliant with the National Tariff, commissioners and providers must apply the principles for local variations,

[20] NHS Barking and Dagenham Clinical Commissioning Group Governing Body meeting, 27th January 2015, p 195. Available from: www.barkingdagenhamccg.nhs.uk/ONELBarking/Downloads/news-and-publications/Governing-body-papers/27%20January%202015/BD%20CCG%20Governing%20Body%2027%20Jan%202015%20Combined.pdf. [Accessed 21 December 2015]

[21] Barking, Havering and Redbridge University Hospitals NHS Trust Board Meeting, Wednesday 4th February 2015, p13-18..Available from: www.bhrhospitals.nhs.uk/Downloads/about/2015%2002%2004%20TB%20P1%20papers%20final.pdf. [Accessed 21 December 2015]

modifications and prices set out in Subsection 7.1 when agreeing a local variation.

108. Our investigation has focused on the first of these three principles: the requirement for local payment approaches to be in the best interests of patients. As described in paragraph 63, Subsection 7.1.1 of the National Tariff explains this principle in more detail. In agreeing local variations, providers and commissioners are required to consider a number of factors – quality, cost-effectiveness, innovation and the allocation of risk – which are described in the subsection.

109. Our analysis had focused on one of these factors in particular: quality. In agreeing local variations, providers and commissioners are required to consider whether the agreement will maintain or improve outcomes, patient experience and the safety of healthcare today and in the future.

110. When assessing compliance with the National Tariff rules for local variations, we examine whether providers and commissioners have considered all of the factors relevant to the best interests of patients. The extent to, and way in, which the four factors listed in Subsection 7.1.1 of the National Tariff need to be considered will differ according to the characteristics of the services and the circumstances of the agreement.

111. In order to have considered a relevant factor properly, we would expect a commissioner to have:

- Obtained sufficient information;
- Used appropriately qualified/experienced individuals to assess the information;
- Followed a reasonable appropriate process to arrive at a conclusion; and
- Reached a reasonable conclusion.

112. Our assessment of the relevance of the findings of the 2013 CQC inspection to the procurement is set out above in paragraphs 92 to 100. In our view, the findings of the CQC report are relevant to a significant extent to the Trust's delivery of elective care services and therefore to the North East London Treatment Centre procurement.

113. In our view the CCGs should therefore have taken them into account when considering whether the proposed agreement would maintain or improve outcomes, patient experience and the safety of healthcare today and in the future.

114. The CCGs have advised us that they 'did look at the CQC report and take it into account to the extent that they considered it to be relevant, in other words to the

extent that it would impact on the ability to deliver the elective services being procured'. However, they have not indicated which elements they considered to be relevant, nor have they provided detailed evidence as to how any elements they considered to be relevant were taken into account in assessing whether the proposed pricing arrangement would maintain or improve outcomes, patient experience and the safety of healthcare today and in the future. Equally, the CCGs have not provided any evidence of the steps they took to arrive at the conclusion that some (or all) of the report was not relevant to their consideration of whether the proposed pricing arrangement complied with the principles for local variations, nor have they provided us with the reasons for those conclusions to allow us to assess whether they were reasonable in the circumstances. Based on the available evidence, at this stage our preliminary view is that the CCGs have not complied with the principles for local variations set out in the 14/15 Tariff.

Preliminary views

Provider selection

115. On the basis of the evidence we have received to date, in our view the CCGs' design and execution of the procurement process did not adequately draw out nor enable an appropriate consideration of the bidders' ability to deliver on their bids.

116. In our view, the CCGs could have and should have designed and implemented a process that requested information that was pertinent to each stage of the evaluation process, provided the evaluators with an appropriate opportunity to take into account relevant information and/or ensured an appropriate degree of verification of the bids submitted. Such steps would have enabled the CCGs to scrutinise appropriately the bidders' abilities to deliver on the proposals contained in their bids, taken specifically in the context of the CCGs' evaluation criteria.

117. Our view is that some of the concerns raised in the 2013 CQC report, the Trust's RTT issues and aspects of the Trust's ongoing improvement plan, were relevant to the Trust's ability to deliver on its bid to provide elective care services at the North East London Treatment Centre. Although the 2013 CQC report's findings mainly related to emergency care, some findings concerned trust-wide issues of governance and leadership which could risk patient safety across all services and several findings were related to elective care specific issues. In our view the CCGs were wrong to conclude this information was not relevant.

118. The CCGs' process should have enabled it to be confident that whichever bidder won could deliver on its bid, but the CCGs' process failed to take into account relevant information about the Trust's ability to deliver on its bid (ie those aspects of the Trust's clinical challenges that were relevant to elective services). For this

reason in our view, the CCGs did not do enough to ensure that the bid they selected for the elective care services at the North East London Treatment Centre was the best option for patients. As a result, the CCGs could not ensure they were buying services from the provider or providers that were most capable of delivering the CCGs' objective of securing the needs of patients and improving the quality and efficiency of services, and provided best value for money in doing so (as required by Regulation 3(3)). It is therefore our preliminary view that the CCGs have breached the Procurement, Patient Choice and Competition Regulations.

National Tariff rules

119. Our preliminary view is that the CCGs failed to apply the principle that local payment approaches must be in the best interests of patients. The reason we have taken this view is that, based on the evidence received to date, we are not satisfied that the CCGs properly considered the findings of the 2013 CQC inspection of the Trust in reaching its decision about the appropriate payment approach for provision of the services at the North East London Treatment Centre. Accordingly, if the CCGs were to enter into the proposed local variation with the Trust, our preliminary view is that it would be a breach of the 15/16 National Tariff.

5. Acting in a transparent way

120. In this section we address whether the CCGs met their obligations to act transparently.

121. We focus on the following issues:

- Did the CCGs breach transparency requirements by not being able to explain how they reached their conclusions?
- Did the CCGs breach transparency requirements by not providing enough clarity to potential bidders about the criteria that would be taken into account when assessing bids?

122. We provide below the relevant legal and factual context, and our analysis on the above questions.

Legal context

123. Regulation 3(2)(a) of the Procurement, Patient Choice and Competition Regulations requires commissioners to act in a transparent way when procuring healthcare services for the purposes of the NHS.

124. Commissioners should be able to explain how they have reached their key decisions and their reasons for those decisions. Suitable record-keeping assists commissioners to be able to do this.

125. While the Procurement, Patient Choice and Competition Regulations are not prescriptive about a commissioner's internal record-keeping, our substantive guidance states that commissioners must ensure that they conduct all of their procurement activities openly and in a manner that enables their behaviour to be scrutinised. This transparency is fundamental to accountability. An important element of transparency of process is producing and retaining suitable records of key decisions that a commissioner has taken and the reasons for those decisions.

126. In our view the requirement to act transparently under Regulation 3(2)(a) includes a requirement that commissioners properly disclose to providers all the factors they intend to take into account when evaluating providers' bids.

Inadequate records to explain key decisions

127. In this section we assess whether the CCGs breached their transparency obligation by not being able to explain how they reached their conclusions. We expect commissioners to have suitable records of their key decisions and the reasons for them to allow their behaviour to be scrutinised.

Factual context

128. There were a number of key steps in the CCGs' procurement process, including those set out below:

- The ITT bids of Care UK and the Trust were initially assessed by individual evaluators on the evaluation panel.
- Care UK and the Trust were then invited to present their service proposals to members of the evaluation panel to provide clarification on aspects of the original bid submission. The CCGs told us at that the start of the presentations both the bidders and the evaluators were informed that what was said could be taken into account as part of the moderation process. The panel members were therefore able to adjust their scores during the moderation process in light of the clarification provided through the presentations.
- After the presentations, the evaluation panel held a moderation meeting to moderate, and to agree consensus scores for each submission, before the scores were finalised. The moderation process applied to sections C, D and F of the ITT impacted on the overall scoring of the non-price criteria.

Care UK's complaint

129. Care UK submitted that it failed to understand how its bid scored lower than the Trust's bid for the clinical governance, performance and quality criterion. Care UK also submitted that it was concerned about the application of the evaluation criteria and scoring of the bids. Care UK submitted that the CCGs had provided no breakdown of their scores for each sub-criterion and only cited two issues in

support of the application of slightly higher scores to the Trust for 'Service Delivery-Safeguarding' and 'Clinical Governance, Performance and Quality'. Care UK submitted that this information was crucial to understanding how the CCGs could have rationally and reasonably come to the conclusion to award higher scores for Clinical Quality to the Trust.

The CCGs' submissions

130. The CCGs said that, in relation to the initial assessment, the members of the evaluation panel conducted an individual evaluation of the bids. The evaluators were responsible for evaluating the questions relevant to their expertise.

131. In relation to the presentation stage, the CCGs have told us that no notes or records were made.

132. In relation to the notes of the moderation process, the CCGs stated that, once a score was agreed, only the outcome of that agreement was recorded and not the verbatim conversation around the agreement. The notes of the moderation process for some questions do not indicate whether the marks have been changed as a result of the presentation or further to discussion of the materials submitted as part of the bid.

Analysis

133. The obligation to act in a transparent way means that commissioners should be able to explain how they reached their key decisions and the reasons for those decisions. Documentation relating to process and decision-making is a core component of transparency as it assists commissioners to explain their key decisions. The accountability created by transparency is fundamental to ensuring a procurement process is carried out properly. Transparency is also an overarching principle of procurement law, with the expectation that commissioners should retain an auditable documentation trail which is itself transparent, regarding key decisions[22].

134. We have reviewed the evaluators' comments and notes of the moderation process, which include the individual scores and comments of evaluators as well as the moderated scores and additional comments setting out the reasons for awarding the score. In the notes, for a number of individual scores, the evaluator has not provided any comments explaining or supporting their score. While the CCGs had a scoring scheme which provided general guidance as to what was required to achieve the different scores, where scores are qualitative in nature further explanation may be needed to understand how the score given was judged to be appropriate. Where comments were provided, in our view they were often insufficient to explain the basis upon which scores were awarded.

[22] Department of Health Procurement Guide for commissioners of NHS-funded services, para 1.26. Available from: www.gov.uk/government/uploads/system/uploads/attachment_data/file/216280/dh_118219.pdf [Accessed 21 December 2015]

135. In relation to final marks awarded after the moderation exercise, in our view the moderation notes do not provide enough information to understand on what basis consensus scores were reached or why individuals decided to change their scores [✂] There is not a summary of the discussion which led to the evaluators agreeing on consensus scores and the notes are not consistent in terms of length or detail. When a consensus score could not be reached, in some instances [✂] an average score was applied, but in another instance [✂] was applied. We have not seen an explanation of why these different approaches to moderation were taken.

136. When examining whether the CCGs' scoring was appropriate, the lack of sufficient records of the key discussions and decision-making meetings acts as an obstacle to a meaningful assessment of the evaluation and moderation decisions.

Preliminary views

137. For the reasons set out above, our preliminary view is that the CCGs breached the transparency requirements of the Procurement, Patient Choice and Competition Regulations by not being able to explain certain of their conclusions. In this case this is principally as a result of the CCGs failing to have adequate records of the evaluation and moderation process to enable them to do this.

Insufficient information about evaluation criteria

138. In this section we assess whether the CCGs breached their transparency obligations in relation to the information they provided to bidders about the evaluation criteria, specifically in relation to children's safeguarding. We expect commissioners to disclose to bidders all criteria that will be taken into account when assessing their bids, to allow the bidders to participate fully in the procurement process.

Factual context

139. The ITT questionnaire consisted of 49 questions across a range of criteria. Question D.8 specifically referred to the new ENT services for 3-17 year olds and asked bidders to provide information about their children's safeguarding policy. No other questions explicitly asked bidders to discuss children's services or children's safeguarding.

140. On each of questions C.1, C.4 and D.2, the Trust and Care UK received at initial evaluation stage [✂] a post-moderation score as set out below in Table 3.

Table 3: moderation of scores

	Individual scores - average		Post moderation	
	Care UK	**Trust**	**Care UK**	**Trust**
C.1	[✂]	[✂]	[✂]	[✂]

C.4	[✂]	[✂]	[✂]	[✂]
D.2	[✂]	[✂]	[✂]	[✂]

141. [✂].

142. [✂].

Care UK's complaint

143. Care UK submitted that the CCGs' letter to Care UK of 30 June 2015 appeared to suggest that Care UK had lost just under 1% of the 10% available for service delivery for not making sufficient mention of children or safeguarding implications. Care UK also submitted that the feedback it received from the CCGs was that it scored 1.05% less than the Trust for clinical quality due to a failure to provide the evaluation panel with the confidence of a comprehensive safeguarding policy. Care UK questioned how this explained Care UK scoring 1.05% lower than the Trust when question D.8 (the question related to the children's safeguarding policy) was only worth 0.88% of the 7% available marks for clinical quality.

The CCGs' submissions

144. The CCGs said that the ENT service for 3-17 year olds was a new service and was discussed at the pre-market event held on 18 December 2014 and attended by both Care UK and the Trust. The CCGs also noted that the Trust and Care UK has also been asked to present on how they would ensure the delivery of the service specification with particular reference to the mobilisation of additional children's services as part of the bidder presentations.

Analysis

145. A focus on the new children's services may have been implied in section C of the ITT which dealt with service delivery. However, in our view it was neither explicit nor implicit that the CCGs expected providers to refer to children's safeguarding in section D of their ITT bids, which dealt with clinical governance, performance and quality, except for their response to question D.8 which specifically addressed the children's safeguarding issue. [✂]

146. Section D was worth 7% of the overall marks available for the ITT and question D.2 was worth 12.5% of the total marks available for section D. [✂].

Preliminary views

147. For the reasons set out above, at this stage our preliminary view is that the CCGs breached the transparency requirement by not providing enough clarity to potential bidders about the criteria that would be taken into account when assessing bids. The CCGs' conduct on this issue did not appear to materially impact on the outcome of the procurement process.

6. Next steps

148. Please provide any comments on our assessment, reasoning and the evidence used together with any additional evidence you believe may affect our analysis on these issues. If you wish to make a submission addressing the issues raised, we request that you provide us with that written response by **Monday 25 January 2016 at noon**.

Appendix 1: Description of events

Date	Event
Feb 2014	The CCGs establish an elective care programme to develop a commissioning strategy for elective care services. Waltham Forest CCG is invited to be part of the programme
Apr 2014	The Elective Care Task & Finish Group is formed to develop the commissioning plan and service specification
Mar – Jul 2014	The CCGs seek input from stakeholders to help shape the commissioning plan and service specification
Jun 2014	The CCGs' Governing Board approves the procurement of services at the North East London Treatment Centre
Jul 2014	The CCGs' Executive Committees agree on the commissioning strategy and decide to jointly procure the services using a restricted procurement process
Oct - Nov 2014	The CCGs formally agree on the revised procurement plan
11 Nov 2014	The CCGs issue a notice informing the market of the procurement of the North East London Treatment Centre and the upcoming pre-procurement events
26 Nov 2014	The CCGs hold a market engagement event to brief potential bidders on the planned procurement and seek their views
18 Dec 2014	The CCGs hold a second market engagement event to test the CCGs' assumptions and discuss the proposed service requirements
9 Jan 2015	The CCGs approve the proposed service specification
12 Jan 2015	The CCGs start the first stage of the procurement process by issuing the pre-qualification questionnaire documents. An advert is released on Contracts Finder and a contract notice is published on the Official Journal of the European Union
13 Jan - 26 Jan 2015	Potential bidders can submit clarification questions to the CCGs
16 Feb 2015	Potential bidders must submit their expressions of interest and completed pre-qualification questionnaires
Feb – Mar 2015	Bidder evaluation panel evaluates the 5 completed pre-qualification questionnaires received by the CCGs
12 Mar 2015	The three bidders shortlisted from the pre-qualification stage are invited to tender and are issued with the relevant invitation to tender documents
12 Mar – 8 April 2015	Potential bidders can submit clarification questions to the CCGs
4 May 2015	Potential bidders must submit their bids. The CCGs receive bids from Care UK and the Trust
5 May 2015	The evaluators start individually assessing the bids
3 Jun 2015	Care UK and the Trust (the shortlisted bidders) give presentations to the bidder evaluation panel
4 Jun 2015	The bidder evaluation panel meets to moderate the individual scores and agree consensus scores for each bidder and to finalise the outcome of the procurement process
Jun 2015	The CCGs' governing bodies approve the outcome of the procurement process
30 Jun 2015	The successful/unsuccessful bidders are informed of the outcome of the procurement process