

## **Statement of issues**

**Case reference: CCD 01/15: Investigation into NHS Northern, Eastern and Western Devon Clinical Commissioning Group's commissioning of certain community services for the eastern part of the area**

### **Executive summary**

1. This statement of issues sets out the scope of our investigation into NHS Northern, Eastern and Western Devon Clinical Commissioning Group's (NEW Devon CCG's) commissioning of certain community services for the eastern part of the CCG's area. We launched this investigation on 21 January 2015, following a complaint from Northern Devon Healthcare NHS Trust (Northern Devon Healthcare Trust).
2. We explained in the notice of initiation of investigation that we would publish an update on the case in the coming weeks. The purpose of this document is to set out the issues we have identified to date and seek views from all interested parties.
3. The matters we plan to investigate concern NEW Devon CCG's decision to select Royal Devon and Exeter NHS Foundation Trust (Royal Devon and Exeter) as the provider of certain community services for the eastern part of the CCG's area. We will examine whether this decision, and the process used to reach this decision, was consistent with the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013 (the Procurement, Patient Choice and Competition Regulations).
4. Interested parties, including NEW Devon CCG, Northern Devon Healthcare Trust, other providers and NHS healthcare service users are invited to respond to this statement of issues by close of business on Wednesday 11 February 2015. Please email your response to [coopandcompcases@monitor.gov.uk](mailto:coopandcompcases@monitor.gov.uk). We intend to publish all submissions received. If your submission contains confidential information, please identify which information is confidential and explain why.

### **Introduction**

5. On 21 January 2015 Monitor opened an investigation into a complaint by Northern Devon Healthcare Trust. The complaint concerns NEW Devon CCG's commissioning of community services for adults with complex care needs in the eastern part of the CCG's area. Northern Devon Healthcare Trust submits that NEW Devon CCG acted in breach of various provisions of the Procurement, Patient Choice and Competition Regulations.

6. Based on the information we have received to date, it appears to us that the complaint raises important issues which it is appropriate for Monitor to investigate. In particular, that it raises issues about the best way to achieve better integration of care.
7. The purpose of this document is to set out the issues we have identified to date and seek views from all interested parties. We have not reached conclusions on any of the issues set out in this statement.

## **Background**

8. Northern Devon Healthcare Trust employs around 4,300 staff. It provides acute services from North Devon District Hospital in Barnstaple. It also provides integrated health and social care community services in the northern and eastern parts of Devon across a network of 17 community hospitals and nine health and social care teams.
9. NEW Devon CCG is the largest CCG in England with an annual budget of £1.1 billion. It is also the largest commissioner of NHS services in Devon (excluding the area of Torbay), and is responsible for commissioning services for a population of 900,000. These include elective, urgent and emergency, community, and mental health services. Devon has been identified by Monitor, NHS England and the NHS Trust Development Authority as one of the most challenged health economies in England.<sup>1</sup>
10. The complaint relates to the commissioning of community services for adults with complex care needs in an area of east Devon referred to by NEW Devon CCG as the Eastern Locality.<sup>2</sup>
11. Responsibility for the provision of community services in east Devon transferred to Northern Devon Healthcare Trust in April 2011 as part of the government's Transforming Community Services<sup>3</sup> programme for the NHS.
12. Northern Devon Healthcare Trust currently provides community services, including community services for adults with complex care needs in the Eastern Locality, under a contract with NEW Devon CCG which expires on 30 September 2015.

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<sup>1</sup> For further information see *Making local health economies work better for patients* 22 December 2014 [www.gov.uk/government/publications/making-local-health-economies-work-better-for-patients](http://www.gov.uk/government/publications/making-local-health-economies-work-better-for-patients)

<sup>2</sup> The CCG describes the Eastern Locality as comprising the following towns and cities, and their surrounding areas: Axminster, Budleigh Salterton, Crediton, Cullompton, Exeter, Exmouth, Honiton, Moretonhampstead, Okehampton, Ottery St Mary, Seaton, Sidmouth and Tiverton.

<sup>3</sup> From 2009 to 2011, as part of the Department of Health's Transforming Community Services programme, primary care trusts transferred responsibility for the provision of community services to existing providers or created new providers.

13. In May 2014 NEW Devon CCG began a consultation on its plans for the future provision of community services,<sup>4</sup> including its proposal to commission services for adults with complex care needs in the Eastern Locality from Royal Devon and Exeter. The consultation period finished on 8 July 2014. In September 2014 NEW Devon CCG published its updated view on its proposals to procure community services in which it said that it would undertake an options appraisal to consider the options for procuring community services for adults with complex care needs.
14. At the same time NEW Devon CCG invited local providers to take part in an assessment process to identify the most capable provider, in parallel with its options appraisal. The outcome of the options appraisal, to continue with the assessment process to identify the most capable provider, was put to the CCG's governing body at its meeting on 5 November 2014.
15. In November 2014 NEW Devon CCG announced that it had selected Royal Devon and Exeter as the provider of community services for adults with complex care needs in the Eastern Locality. We understand that NEW Devon CCG is currently undertaking due diligence and proposes to award a contract to Royal Devon and Exeter with an anticipated start date of 1 October 2015.<sup>5</sup>

## **Summary of the complaint**

16. Northern Devon Healthcare Trust has complained that NEW Devon CCG's decision to select Royal Devon and Exeter as the provider of community services for adults with complex care needs in the Eastern Locality, and the process used to select Royal Devon and Exeter as the provider, was in breach of the Procurement, Patient Choice and Competition Regulations. In particular, Northern Devon Healthcare Trust submits that:
- The process used by NEW Devon CCG did not enable NEW Devon CCG to identify the most capable provider that provided the best value for money. In particular, the criteria used by NEW Devon CCG to assess prospective providers, and the omission of any financial assessment, made it impossible for the CCG to assure itself of the quality, efficiency and value for money of service provision.
  - The process used by NEW Devon CCG was not a truly competitive process, and was tantamount to the direct award of a contract without competition. This process was not proportionate to the significant value of the contract (over £100 million).

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<sup>4</sup> See CCG document *Integrated, personal and sustainable: Community services for the 21st Century: A Strategic Framework* Available at: [www.newdevonccg.nhs.uk/permanent-link/?rid=101736](http://www.newdevonccg.nhs.uk/permanent-link/?rid=101736)

<sup>5</sup> NEW Devon press release, 7 November 2014 [www.newdevonccg.nhs.uk/about-us/latest-news/archive-news/november-2014/101346](http://www.newdevonccg.nhs.uk/about-us/latest-news/archive-news/november-2014/101346).

- NEW Devon CCG failed to act transparently and discriminated in favour of the local provider of accident and emergency services (Royal Devon and Exeter). By discriminating in favour of Royal Devon and Exeter, NEW Devon CCG acted anti-competitively.
- There were conflicts of interest which affected the integrity of NEW Devon CCG's proposed contract award to Royal Devon and Exeter.

17. Northern Devon Healthcare Trust told us that it made several attempts to resolve the matter locally, however these were unsuccessful. The most recent of these was a meeting that took place between NEW Devon CCG and Northern Devon Healthcare Trust on 8 January 2015. This meeting did not lead to successful resolution between the parties.

## **Legal context**

18. New Devon CCG is required to comply with the Procurement, Patient Choice and Competition Regulations when commissioning healthcare services for the purposes of the NHS.

19. Monitor is responsible for enforcing the Procurement, Patient Choice and Competition Regulations. Our approach to enforcing these regulations is set out in published guidance.<sup>6</sup>

20. Regulation 2 sets out the overarching objective that commissioners must pursue when procuring NHS healthcare services. Regulation 3 sets out general requirements, and regulations 4 to 12 set out particular requirements that commissioners must comply with when procuring NHS healthcare services. It appears to us that this case raises a number of potential issues around NEW Devon CCG's compliance with some of these rules. Our investigation will cover the issues set out below.

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<sup>6</sup> Monitor, Substantive guidance on the Procurement, Patient Choice and Competition Regulations. Available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/283505/SubstantiveGuidanceDec2013\\_0.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283505/SubstantiveGuidanceDec2013_0.pdf); Monitor, Enforcement guidance on the Procurement, Patient Choice and Competition Regulations. Available at: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/283508/EnforcementGuidanceDec13.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283508/EnforcementGuidanceDec13.pdf)

## **Issues**

### **Whether the process used by NEW Devon CCG enabled it to assure itself of the quality, efficiency and value for money of service provision**

21. We will examine whether the process used by NEW Devon CCG, and in particular, the criteria it used to assess prospective providers, enabled it to select the provider that:
  - a. was most capable of securing the needs of NHS healthcare service users and improving the quality of services and the efficiency with which they are provided and
  - b. provided best value for money.
22. We will also examine whether the process used by NEW Devon CCG to select Royal Devon and Exeter as the provider of community services for adults with complex care needs was proportionate to the value, complexity and clinical risk associated with the provision of the services in question.
23. We will look at whether NEW Devon CCG considered appropriate ways of improving the quality and efficiency of the services including through services being provided in a more integrated way, enabling providers to compete to provide services and allowing patients a choice of provider.
24. This issue is relevant to compliance with regulations 2, 3(2), 3(3), 3(4) and 5 of the Procurement, Patient Choice and Competition Regulations.

### **Whether NEW Devon CCG acted in a transparent way**

25. We will examine Northern Devon Healthcare Trust's allegation that NEW Devon CCG failed to act transparently by:
  - a. not providing enough clarity to potential providers, or at least to Northern Devon Healthcare Trust, about the procurement process, with changes and delays to the process occurring without explanation
  - b. delaying and failing to respond to Northern Devon Healthcare Trust's requests for information
  - c. refusing to identify which CCG senior officers were involved in the evaluation process.
26. This issue is relevant to compliance with regulation 3(2)(a) of the Procurement, Patient Choice and Competition Regulations.

**Whether NEW Devon CCG treated providers equally and in a non-discriminatory way**

27. Northern Devon Healthcare Trust contends that NEW Devon CCG was biased in favour of the local provider of accident and emergency services (Royal Devon and Exeter) and that the CCG failed to treat providers in an equal and non-discriminatory way.

28. We will examine whether there is evidence of bias, or of providers being treated differently without objective justification.

29. This issue is relevant to compliance with regulation 3(2)(b) of the Procurement, Patient Choice and Competition Regulations.

**Whether there were conflicts of interest which affect the integrity of the proposed contract award**

30. Northern Devon Healthcare Trust submits that:

- a. Anyone involved in the thinking, development and production of the original proposal to transfer the service without competition to Royal Devon and Exeter should have made clear the conflict of interest before the process undertaken in September and October leading to the governing body decision in November and not taken any further part in the process. This included taking part in, and voting at, the governing body meeting.
- b. As some key commissioning GPs in the Eastern Locality were also employees of the service being procured, they should not have been involved in either the thinking, development and production of the original proposal, or the process undertaken in September and October leading to the governing body decision in November.

31. We will examine whether there is evidence to support these allegations and, if so, whether they amount to conflicts (or potential conflicts) of interest that affect, or appear to affect, the integrity of the proposed contract award to Royal Devon and Exeter.

32. This issue is relevant to compliance with regulation 6 of the Procurement, Patient Choice and Competition Regulations.

**Whether NEW Devon CCG acted anti-competitively**

33. Northern Devon Healthcare Trust submits that by discriminating in favour of Royal Devon and Exeter, NEW Devon CCG has acted anti-competitively in breach of regulation 10 of the Procurement, Patient Choice and Competition Regulations.

34. At this stage in our investigation it appears to us that the issues which have been raised by the complainant in relation to anti-competitive conduct can properly be as-

sessed under the regulations set out above. In particular, in this case it appears to us that if NEW Devon CCG acted in a discriminatory way, this can be addressed through our assessment under regulation 3. For these reasons and based on the information we have received to date it does not appear to us that regulation 10 should be the focus of our investigation. However, if we receive submissions from any stakeholder (including patients or other providers) who believes that patients' interests may have been affected as a result of anti-competitive behaviour which cannot be addressed through the other aspects of our investigation we may consider this again.

## **Responses to statement of issues**

35. We invite responses to this statement of issues, including the issues identified and the scope of our investigation, from all parties, including NEW Devon CCG, Northern Devon Healthcare Trust and other providers in Devon. We also welcome responses from any other third parties, including NHS healthcare service users, providers and clinicians.

- a. Please provide your responses by close of business on Wednesday 11 February 2015.
- b. Please email your response to [coopandcompcases@monitor.gov.uk](mailto:coopandcompcases@monitor.gov.uk)
- c. We intend to publish all submissions received. If your submission contains confidential information,<sup>7</sup> please identify which information is confidential and explain why.<sup>8</sup>

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<sup>7</sup> This may include information that would be contrary to the public interest, contains business secrets and/or information relating to private affairs.

<sup>8</sup> We will take the explanation into account in deciding whether the specified information should be excised from the published submission.