

21 August 2015

## Statement of issues

**Case reference: Pricing/CCD 07/15 – Investigation into commissioning of elective care services at the North East London Treatment Centre by Barking and Dagenham CCG, Havering CCG, Redbridge CCG and Waltham Forest CCG**

1. We are investigating the commissioning of elective care services at the North East London Treatment Centre London by Barking and Dagenham Clinical Commissioning Group (CCG), Havering CCG, Redbridge CCG and Waltham Forest CCG (together the CCGs). We launched this investigation on 30 July 2015, following a complaint from Care UK Clinical Services Limited (Care UK).
2. This document provides background to the complaint, sets out the issues we intend to investigate and seeks views from all interested parties about the scope of the investigation.
3. The issues we intend to investigate relate to the CCGs' process to select Barking, Havering and Redbridge University Hospitals NHS Trust as a provider of elective care services to be provided at the North East London Treatment Centre (the treatment centre) and the proposed pricing arrangements for those services. We will examine whether the CCGs' actions were consistent with the Procurement, Patient Choice and Competition Regulations<sup>1</sup> and the National Tariff Payment System.<sup>2</sup>
4. Monitor has not yet reached a conclusion about any of the issues set out in this document.
5. Interested parties, including the CCGs, Care UK, Barking, Havering and Redbridge University Hospitals NHS Trust and other providers and service users, are invited to provide information or views in response to this statement of issues by 11 September 2015. Please email responses to [nelectiveservices@monitor.gov.uk](mailto:nelectiveservices@monitor.gov.uk). We intend to publish all submissions received. If your submission contains information that you do not wish to be published, please indicate the information that is confidential and explain why it is confidential.

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<sup>1</sup> See the National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013. Available at: [www.legislation.gov.uk/uksi/2013/500/contents/made](http://www.legislation.gov.uk/uksi/2013/500/contents/made)

<sup>2</sup> See section 115 of the Health and Social Care Act 2012 (price payable by commissioners for NHS services. Available at: [www.legislation.gov.uk/ukpga/2012/7/contents](http://www.legislation.gov.uk/ukpga/2012/7/contents)) and the rules outlined in the 2014/15 National Tariff Payment System ('the national tariff'. Available at: [www.gov.uk/government/publications/national-tariff-payment-system-2014-to-2015](http://www.gov.uk/government/publications/national-tariff-payment-system-2014-to-2015)).

## **Background to the complaint**

6. The CCGs are responsible for commissioning a range of NHS services for a combined population of about 965,000 people in north east London.
7. Barking and Dagenham CCG, Havering CCG and Redbridge CCG are separate entities but share some staff and functions; for example, one chief officer serves all three CCGs.
8. Care UK is an independent provider of care homes, social care and NHS healthcare services. It currently holds a contract with the CCGs to provide services at the treatment centre. Care UK also holds a lease for the treatment centre premises. The premises are owned by NHS Property Services Ltd.

### *The North East London Treatment Centre*

9. At the treatment centre patients receive a range of elective care services, including outpatient appointments, surgical procedures, follow-up appointments and some inpatient services where required. The treatment centre is located on the site of King George Hospital in Goodmayes (London Borough of Redbridge).
10. The elective care services currently provided at the treatment centre include ear, nose and throat services, gastroenterology, general surgery, ophthalmology, and trauma and orthopaedics. Patients needing these services can choose to be treated from a list of providers on eReferral (previously Choose and Book), including the treatment centre.
11. The treatment centre opened as one of the independent sector treatment centres commissioned by the Department of Health (DH) a decade ago to improve NHS capacity and reduce waiting times for elective care. In 2006, DH awarded a five-year contract to provide services at the treatment centre to Partnership Health Group (a joint venture between Care UK and Life Healthcare), which was subsequently fully acquired by Care UK in 2008.
12. When the original contract expired in 2011, the local primary care trust (PCT) ran a tender process for a three-year contract to provide services at the treatment centre, with payment based on national prices. The contract was again awarded to Care UK. In 2013, the CCGs took over commissioning responsibility from the PCT, with Barking and Dagenham CCG as lead commissioner and the three other CCGs as associate commissioners. In 2014, the CCGs extended the contract with Care UK for one year.
13. Care UK's contract with the CCGs to provide services at the treatment centre expires in October 2015. Care UK's lease for the premises also expires in October 2015.

### *The CCGs' process to select a provider*

14. In November and December 2014, the CCGs invited interested providers to attend two engagement events to discuss their plans for services at the treatment centre, including a plan to tender the contract to provide services there.
15. In January 2015, the CCGs advertised a tender process seeking bids for a five-year contract to provide services at the treatment centre. The CCGs also asked providers to bid to provide services in addition to those currently provided at the treatment centre, including services at satellite locations. The CCGs invited providers to state as part of their bids the price at which they would provide services.
16. In June 2015, the CCGs selected Barking, Havering and Redbridge University Hospital NHS Trust as the successful bidder. Care UK had bid to provide the services and was notified on 30 June 2015 that it had been unsuccessful. Care UK submitted a complaint to Monitor on 3 July 2015 about the tender process and the proposed pricing arrangements.

### **The complaint**

17. Care UK set out a number of concerns about the CCGs' decision to tender the contract, the tender design and the conduct of the tender process. In our view these concerns raise a number of issues with regard to the Procurement, Patient Choice and Competition Regulations and national tariff that merit further investigation. The issues described in the complaint that we intend to investigate are set out in more detail below.
18. The complaint also raised broader questions about how the winning bidder, as an NHS trust, is funded. These fall outside the scope of the Procurement, Patient Choice and Competition Regulations and national tariff, and we do not propose to address them in our investigation.

### **Legal context**

19. The issues in this investigation arise under the Procurement, Patient Choice and Competition Regulations and under Chapter 4 of Part 3 of the Health and Social Care Act 2012 (the 2012 Act).

#### *Procurement, Patient Choice and Competition Regulations*

20. CCGs are required to comply with the Procurement, Patient Choice and Competition Regulations when commissioning healthcare services for the purposes of the NHS.

21. 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>3</sup>
22. Regulation 2 sets out the overarching objective that commissioners must pursue when procuring NHS healthcare services. Regulation 3 sets out general requirements for good commissioning, and Regulations 4 to 12 set out particular requirements that commissioners must comply with when procuring NHS healthcare services. The particular requirement set out under Regulation 7 describes how commissioners must establish and apply qualification criteria for selecting providers where patients have a choice of provider or where providers are included in a framework. Based on the information that we have received so far, it appears that this case raises issues regarding the CCGs' compliance with Regulations 2, 3 and 7.

### *The national tariff*

23. Under section 115 of the 2012 Act, the price payable for NHS healthcare services is to be determined in accordance with the National Tariff Payment System. Section 117 of the 2012 Act gives Monitor enforcement powers against commissioners for non-compliance with the national tariff. Our approach to enforcing the national tariff is set out in published guidance.<sup>4</sup>
24. Section 7.2 of the national tariff sets out the rules for agreeing local variations to the national prices contained in the national tariff. One rule set by Section 7.2<sup>5</sup> is that local variations must comply with the principles set out in Section 7.1:

“Commissioners and providers should apply the following principles when agreeing a local payment approach:

- 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.”

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<sup>3</sup> *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); *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)

<sup>4</sup> *Enforcement of the national tariff* available at: [www.gov.uk/government/publications/nhs-national-tariff-enforcement-guidance](http://www.gov.uk/government/publications/nhs-national-tariff-enforcement-guidance)

<sup>5</sup> Paragraph 7.2.2(1) of the 2014/15 National Tariff Payment System: [www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/300547/2014-15\\_National\\_Tariff\\_Payment\\_System\\_-Revised\\_26\\_Feb\\_14.pdf](http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/300547/2014-15_National_Tariff_Payment_System_-Revised_26_Feb_14.pdf)

## Issues

### **Did the commissioners' process to select a provider enable them to assure themselves of the quality and efficiency of the services?**

25. Care UK said that the CCGs placed too much weight on price and too little weight on quality in the criteria they used to evaluate bids; therefore Care UK thinks the process did not allow the CCGs to identify a provider most capable of meeting patients' needs and improving the quality and efficiency of services. This issue is relevant to compliance with Regulations 2 and 3(3) of the Procurement, Patient Choice and Competition Regulations.
26. Care UK also said that the CCGs were not justified in scoring Care UK lower than the winning bidder on certain criteria. This issue is relevant to compliance with Regulation 3(2) of the Procurement, Patient Choice and Competition Regulations.
27. We will examine whether the commissioners used a process to select a provider that was consistent with their obligations under the Procurement, Patient Choice and Competition Regulations. In particular, we will look at whether the criteria, and the relative weights assigned to them, used to evaluate bids in the tender 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.
28. We will also examine whether the CCGs' approach to scoring bids was consistent with their obligations to act in a transparent and proportionate way and to treat providers equally.

### **Was the commissioners' process to select a provider of services at the treatment centre appropriate for these elective services?**

29. Care UK said that because the services at issue are elective services, the CCGs should have renewed its contract for as long as Care UK continued to qualify to provide the services. Care UK has also said it is concerned that the CCGs' decision to tender the services was discriminatory because they have not run a comparable procurement process for NHS services provided by other organisations. This issue is relevant to compliance with Regulations 3(2)(b) and 7 of the Procurement, Patient Choice and Competition Regulations.
30. We will examine whether the CCGs' approach to commissioning the elective care services to be provided at the treatment centre was appropriate given the nature of the services, which are mainly services for which patients have a right to choose a provider. This will include looking at whether the CCGs' approach was appropriate 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.

31. In examining the CCGs' approach, we will also look at whether the decision to use this process was discriminatory.

**Was the commissioners' proposed use of a locally agreed price consistent with the rules for establishing a local variation from the national tariff?**

32. Care UK said that the CCGs did not follow the required principles for establishing a local variation from the national prices set out in the national tariff. Care UK also said that use of price competition to achieve a price for services below the national price represents a risk to the quality and safety of those services.

33. We will examine whether the commissioners complied with the rules relating to locally determined prices outlined in Section 7 of the national tariff when agreeing a price for services at the treatment centre and satellite locations, in particular, whether the first principle in Section 7.1 of the national tariff – that local payment approaches must be in the best interests of patients – was complied with.

**Responses to statement of issues**

34. We invite responses to this statement of issues, including the issues identified and the scope of our investigation, from all parties, including the CCGs, Care UK and other providers in north east London. 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 11 September 2015.
- b. Please email your response to [nelelectiveservices@monitor.gov.uk](mailto:nelelectiveservices@monitor.gov.uk)
- c. We intend to publish all submissions received. If your submission contains confidential information,<sup>6</sup> please identify which information is confidential and explain why.<sup>7</sup>

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<sup>6</sup> This may include information where disclosure would be contrary to the public interest, information that contains business secrets and/or information relating to private affairs.

<sup>7</sup> We will take the explanation into account in deciding whether the information should be excised from the published submission.