

This document sets out our preliminary findings, as at 10 February 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](#).

10/02/2016

[✂]

By email

[✂]


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Pricing/CCD 07/15: 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 by 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 Regulations² and the National Tariff Payment System³ (the National Tariff).

The purpose of this letter is to seek your feedback on our views on salient issues that have formed part of our investigation but in relation to which, at this stage, it appears that the CCGs have not breached the Procurement, Patient Choice and Competition Regulations or National Tariff rules. These issues are:

- the CCGs' decision to run a competitive procurement process for elective care services, including whether that decision was discriminatory
- the CCGs' decision to ask bidders to make proposals about how the national price could be varied for the purposes of agreeing a local variation under the 2014/15 National Tariff Payment System
- the criteria, and the relative weightings assigned to them, used by the CCGs to evaluate bids in the procurement process.

In the annex to this letter we set out the context of the procurement process and our investigation as well as our analysis and assessment of the issues described above. Please provide any additional evidence and/or reasoning you believe may affect our analysis on these issues as set out in the annex. If you wish to make a submission addressing the issues raised, we request that you provide us with that written response by **noon on 24 February 2016**. Please let us know in writing if you have reason to believe a response by this date is not achievable, together with the reasons for this position. We will carefully consider all submissions and evidence that we receive in response.

We are mindful that you will wish to see this investigation concluded in as timely a fashion as possible.

Yours sincerely

[S]

Competition Inquiries Director

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 8 February 2016]

² *The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013*. Available from: www.legislation.gov.uk/ukxi/2013/500/pdfs/ukxi_20130500_en.pdf [Accessed 5 February 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 5 February 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 Regulations⁴ and the National Tariff rules in relation to local variations.⁵
3. This document sets out our preliminary views on a number of issues that have formed part of our investigation but in relation to which, at this stage, it appears that the CCGs have not breached the Procurement, Patient Choice and Competition Regulations or National Tariff rules. These are:
 - the CCGs' decision to run a competitive procurement process for elective care services, including whether that decision was discriminatory
 - the CCGs' decision to ask bidders to make proposals about how the national price could be varied for the purposes of agreeing a local variation under the 2014/15 National Tariff Payment System (the 14/15 Tariff)
 - the criteria, and the relative weightings assigned to them, used by the CCGs to evaluate bids in the procurement process.
4. This document does not revisit the issues set out in our letter of 8 January 2016.
5. This document and our letter of 8 January 2016 set out our views on what we see to be the key issues. As discussed in section 7 below, you now have an opportunity to comment on our reasoning on the issues covered in this letter and any outstanding issues in this investigation.
6. 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.

⁴ The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. Available from: www.legislation.gov.uk/ukxi/2013/500/pdfs/ukxi_20130500_en.pdf [Accessed 5 February 2016]

⁵ 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 5 February 2016]

7. In order to assist us in our analysis we augmented our internal expertise by obtaining input from individuals with practical commissioning experience.
8. The remainder of this document is structured as follows:
 - Section 2 sets out the context, the events leading to the procurement process and a description of the procurement process
 - Section 3 describes Care UK's complaint
 - Section 4 addresses the CCGs' decision to run a competitive procurement process for elective services, including whether the holding of a competitive procurement process in the particular circumstances of this case complied with the rules imposed by Regulation 7 and the principle of equal treatment and non-discrimination
 - Section 5 addresses the CCGs' decision to ask bidders to make proposals about how the national price could be varied for the purposes of agreeing a local variation under the 14/15 Tariff
 - Section 6 addresses the criteria, and relative weightings assigned to them, used by the CCGs to evaluate bids in the procurement process
 - Section 7 sets out our next steps.

2. Context

9. 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

10. 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 procurement process, 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 procurement 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.

11. 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 Limited (NHS Property Services), 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.
12. The key events 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 described in more detail below.

Description of events

Development of the commissioning strategy

13. 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.
14. 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. The CCGs decided to seek 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.
15. 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.

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

Pre-procurement engagement events

18. 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.
19. The pre-procurement events did not form part of the formal procurement process. The findings of the market engagement events were made available 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)

20. 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.
21. The PQQ criteria are set out in Table 1 below.
22. 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.

23. 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.
24. 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)
 - [REDACTED]
 - [REDACTED]
 - [REDACTED].

PQQ evaluation

25. 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 from 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.
26. [REDACTED] were unsuccessful at phase one of the PQQ (pass/fail) as they did not pass all of the relevant questions.
27. The Trust, Care UK and [REDACTED] 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	[X] 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%	[X]	[X]	[X]
G) Information management and technology	20%	[X]	[X]	[X]
H) Workforce	20%	[X]	[X]	[X]
I) Transfer of undertaking and protection employment	10%	[X]	[X]	[X]
J) Property, facilities management and equipment	10%	[X]	[X]	[X]
K) Applicant's declaration	Pass/fail	-	-	-
Total score		[X]	[X]	[X]

Invitation to tender (ITT)

28. On 12 March 2015 the CCGs started the ITT stage by providing the Trust, Care UK and [X] with the relevant ITT documentation. The providers were invited to provide their ITT bids by 4 May 2015.
29. The CCGs' ITT questionnaire consisted of 49 questions in 11 sections, including service delivery, clinical governance, performance and quality, and information governance. These ITT sections and their relative weightings are set out in Table 2 below. The questions asked bidders to share their proposals in relation to the future delivery of the service.
30. 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. [X].
31. 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.

32. 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.
33. The CCGs received bids from the Trust and Care UK. [X] did not submit a bid.

ITT Evaluation

34. 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 CCGs, 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.
35. 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).
36. 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. [X]
37. 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 services⁷
 - proposed innovations and their impact
 - delivery, capacity and productivity measures
 - key risks and mitigations.
38. 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.
39. 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 during the moderation process in light of the clarification provided through the presentations.
40. 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).
41. 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.

⁷ 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.

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%	[X]	[X]
Quality Criteria (50% of overall score)			
C) Service delivery[X]	10.00%	[X]	[X]
D) Clinical governance, performance & quality[X]	7.00%	[X]	[X]
E) Workforce[X]	5.00%	[X]	[X]
F) Patient focus[X]	5.00%	[X]	[X]
G) Information management & technology[X]	5.00%	[X]	[X]
H) Information governance[X]	4.00%	[X]	[X]
I) Transfer of undertaking and protection of employment [X]	4.00%	[X]	[X]
J) Property, facilities management and equipment[X]	4.00%	[X]	[X]
K) Contract management and performance[X]	6.00%	[X]	[X]
Quality criteria subtotal		[X]	[X]
Total score		[X]	[X]

[X]

42. 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

43. 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 set out a number of concerns about the CCGs' decision to tender the contract, the design of the procurement process and the conduct of the procurement process. With regard to the issues addressed in this document:

- Care UK submitted that the services it provides to the CCGs from the North East London Treatment Centre are elective services to which CCGs have a duty to give patient choice. Care UK submitted that, following the Any Qualified Provider policy, it was not necessary or appropriate for the procurement to have taken place at all.

- Care UK submitted that the CCGs do not appear to have undertaken comparable procurement process for any services currently provided by NHS Trusts or Foundation Trusts, or for other elective services. Care UK submitted that it was concerned that the procurement amounts to unequal treatment and discrimination between public and privately funded providers, in contravention of Regulation 3(2) of the Procurement, Patient Choice and Competition Regulations.
- Care UK submitted that the CCGs had sought to use the procurement process to introduce price competition for elective services. Care UK submitted that this was inconsistent with statutory guidance on the National Tariff, and the aims and objectives of the *Health and Social Care Act 2012* (the 2012 Act).
- Care UK submitted that the CCG's evaluation methodology and scoring of bids for the procurement was unlawful and did not comply with the CCG's express obligation under the Procurement, Patient Choice and Competition Regulations.

44. Our analysis on these issues is set out in the following three sections.

4. Decision to run a competitive procurement process to identify tenant of a lease and provider of elective care services

45. Care UK has been providing elective care services from the North East London Treatment Centre since 2006. Care UK's contract to provide these services from the treatment centre was coterminous with a lease for the premises from NHS Property Services. In February 2014, with Care UK's contract and lease due to end in December 2014, the CCGs decided on a commissioning strategy for the services in question and the use of the premises. In this section we examine the concerns raised by Care UK about the CCGs' use of a competitive procurement process in relation to the provision of services from the North East London Treatment Centre.

Legal context

46. The NHS Constitution establishes the principles and values of the NHS in England and sets out rights to which patients, public and staff are entitled, including the right of patients to high-quality care that is safe, effective and right for them. Part of this is the right for patients requiring planned or elective care to choose the organisation which provides their treatment from a list of qualified providers which meet NHS service quality requirements, prices and normal contractual obligations. This right is supported by a framework of regulations and

associate guidance including the Standing Rules⁸, the National Tariff Payment System, the Procurement, Patient Choice and Competition Regulations and the NHS Constitution.

47. It is against this background that Regulation 7 of the Procurement, Patient Choice and Competition Regulations operates. Amongst other things, regulation 7 governs the conduct of commissioners when determining which providers qualify to be included on a list from which a patient is offered choice of provider in respect of a first outpatient appointment with a consultant or a member of the consultant's team (consistent with their rights set out in the NHS Constitution). Under Regulation 7(3), a commissioner may not refuse to include a provider on the list from which a patient is offered a choice if that provider meets the criteria established by the commissioner.
48. Regulation 3(2)(b) of the Procurement, Patient Choice and Competition Regulations, which is relevant to Care UK's complaint as discussed below at paragraph 60, 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.

Factual context

Establishment of the North East London Treatment Centre

49. The North East London Treatment Centre opened as one of the independent sector treatment centres commissioned by the Department of Health. It was government policy at the time to use a competitive procurement to identify providers of services from the treatment centres.⁹ Care UK has provided elective care services from the treatment centre since 2006, having won competitive procurement processes in 2006 and 2011. The contract to provide elective care services from the North East London Treatment Centre is linked to a lease for the premises from NHS Property Services.
50. Further detail on the establishment of the North East London Treatment Centre, and the means by which Care UK came to hold the contract for provision of services from it, is in paragraph 10 above.

⁸ *National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012*

⁹ House of Commons Health Committee (2006). Independent Sector Treatment Centres. Fourth Report of Session 2005-06. Volume I. HC 934-I, p 10. Available from: <http://www.publications.parliament.uk/pa/cm200506/cmselect/cmhealth/934/934i.pdf>. [Accessed 10 February 2016]

Ownership and lease of the North East London Treatment Centre

51. The head-lease for the North East London Treatment Centre premises (ie the buildings) is held by NHS Property Services.
52. NHS Property Services was created as a consequence of the Health and Social Care Act and manages, maintains and improves NHS properties, working in partnership with NHS organisations.¹⁰ NHS Property Services hold property for the delivery of health services as dictated by the local CCG.
53. On 23 December 2011, Barking and Dagenham Primary Care Trust (as landlord) and Care UK (as tenant) entered into a lease relating to the North East London Treatment Centre. This followed Care UK winning the procurement process that was run in 2011 to select a provider of services at the treatment centre. Barking and Dagenham Primary Care Trust, like all primary care trusts, ceased to exist on 31 March 2013. NHS Property Services replaced Barking and Dagenham Primary Care Trust as the landlord under the lease with Care UK for the treatment centre at that time.
54. In the context of the current procurement process, NHS Property Services would sub-let the premises to whichever service provider was selected by the CCGs through their procurement process. The successful provider would then take a lease and become the tenant. NHS Property Services would set and receive the rent, which is set by an independent valuation and offered to all bidders in the process.

Patient choice

55. Patients receive a range of elective care services at the North East London Treatment Centre. The treatment centre provides outpatient appointments, surgical procedures and follow-up appointments. Generally patients who have been referred to elective care services by their GP can choose to be treated from a list of providers across England on eReferral (previously Choose and Book). The provider operating from North East London Treatment Centre is included in the list of providers on eReferral.

Care UK's submissions

56. Care UK told us that the services it provides from the North East London Treatment Centre, and the services under the procurement, are elective care services to which the CCGs have a duty to offer patients choice under the NHS Constitution and the Standing Rules¹¹.

¹⁰ NHS Property Services (2016). *About us*. Available from: www.property.nhs.uk/about-us/. [Accessed 8 February 2016]

57. Care UK said that, taking into account the relevant legislation, guidance and any expected benefits to service users, it was not necessary or appropriate for the procurement to have taken place at all.
58. Care UK told us that in its opinion the CCGs should have taken account of Monitor's substantive guidance on the Procurement, Patient Choice and Competition Regulations which says that "once a provider has been qualified to offer its services to patients, a commissioner should not run a new process to re-qualify the provider when its contract with the provider comes to an end, unless there are specific reasons for doing so." Care UK told us that by holding the procurement process the CCGs have, without 'specific reasons', run a process to re-qualify a provider and have limited the number of providers of elective care services, contrary to Regulation 7(3).
59. Care UK told us that the lease for the premises is interrelated to the existing elective care contract. It said that once its contract with the CCGs comes to an end, Care UK will be unable to continue to provide the elective care services it currently provides to patients from the premises. Care UK had told us that, in its view, this outcome is not in patients' interests and undermines patients' right to choose their provider.
60. Care UK also submitted that the CCGs did not seem to have used comparable procurement processes for any services currently provided by NHS trusts or foundation trusts, or for other elective care services. Care UK said that no procurement process was entered into when the Queen's Hospital elective care services (which Care UK provides) were transferred to King George Hospital. Care UK submitted that it was therefore concerned that the procurement for elective care services at the North East London Treatment Centre amounted to unequal treatment as between public and privately funded providers, in contravention of Regulation 3(2)(b).

The CCGs' submissions

61. The CCGs told us that the North East London Treatment Centre was originally procured by the Department of Health in 2006 as part of the Independent Sector Treatment Centre initiative. The CCGs told us that, after a competitive procurement process, a single provider was appointed to run the North East London Treatment Centre and was granted a lease to operate from the premises. The lease would revert to the NHS (specifically NHS Property Services) at the end of the contract term.

¹¹ Regulation 39, *National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012*

62. The CCGs said that the current procurement process was run with a view to again appointing a single provider. The CCGs said this meant there was no basis for Care UK to be considered as already qualified or entitled to remain qualified to provide the service once the current contract expires.
63. The CCGs decided that a single provider contract was most appropriate for the provision of services from the premises. In determining the process they should use to secure elective care services to be provided from the North East London Treatment Centre, the CCGs said that they took into account the following considerations:
- there was more than one possible provider
 - on all previous occasions the services from the premises had been tendered
 - the services are, and will continue to be, provided from NHS premises; the legal rights to which are not vested in Care UK on an ongoing basis and from which the CCGs have a responsibility to make arrangements for service provision
 - they did not believe an Any Qualified Provider approach to be an appropriate option because of the high value of the contract and the multiplicity of contracts to which an Any Qualified Provider approach would give rise
 - they believed that the nature of the Any Qualified Provider approach would require a provider to provide a service from its own premises
 - they were aware of the competitive procurement process approach having been adopted by CCGs in other areas, including Southampton, Nottingham, Portsmouth and Bradford.
64. The CCGs said that, taking these into account, they decided that a competitive procurement process was the most appropriate means by which they could identify the most capable provider who could provide best value for money and afford all potential providers with an equal opportunity to express an interest in providing the service. The award of the contract would, as a matter of practicalities, also include a lease to the premises. The CCGs said that, in these circumstances, they concluded that the automatic award of the new contract to Care UK, or an uncontested award of the contract to any other provider, was not appropriate.
65. The CCGs have also stated that they were motivated by their belief that a competitive procurement process would help them achieve a number of their commissioning objectives, including improving patient experience and delivering efficiencies across a pathway of care.
66. The CCGs also told us that the procurement process was open to both NHS and private providers, who were all given equal opportunity to bid to become the

provider of elective care services at the North East London Treatment Centre. The CCGs said that they treated the bidders equally during the procurement process and did not give the Trust any unfair advantage over Care UK via the process.

Our analysis

67. In this section, we examine the issues raised by Care UK about the CCGs' use of a competitive procurement process in relation to a contract for the provision of services from the North East London Treatment Centre and the grant of a lease of the site.

Use of a competitive process to identify a provider of elective care services from specified premises

68. The procurement process in question concerned the award of a contract and the grant of a lease to a provider to provide elective care services for a fixed term at specific premises controlled by NHS Property Services/the CCGs, namely the North East London Treatment Centre.
69. With Care UK's contract and lease due to expire, the CCGs decided to award the contract and the lease to the provider it considered would make most effective use of the premises. It decided to hold a competitive procurement process to determine that.
70. It is not generally necessary for commissioners to run a competitive procurement exercise when seeking to commission elective care services. However, in this case the CCGs were seeking to choose a provider to provide elective care services from the North East London Treatment Centre. In allocating the contract and the lease for the treatment centre, the CCGs were seeking to identify a provider who would make most effective and efficient use of the premises for the benefit of patients.
71. In these circumstances, and with more than one possible provider, the CCGs concluded that a competitive procurement process was an appropriate way of securing the services. This process was designed to ensure providers were able to express an interest in providing the services at the treatment centre and were treated equally.
72. A competitive procurement process also helped the CCGs to be sure that the provider they awarded the contract and lease to was most capable of delivering the CCGs' objective and providing best value for money in doing so. Renewing Care UK's contract and lease, or directly awarding the contract to another provider, would not have allowed the CCGs to test whether another provider, or even Care UK itself, could deliver something better for patients and the local health economy than the existing offer.

73. Given the need to award the lease and the contract together, and the CCGs' desire to make most effective use of the North East London Treatment Centre, in our view a competitive procurement process was reasonable in the circumstances.

Provider qualification

74. Our Substantive Guidance explains how Regulation 7 operates. It provides that once a provider has been qualified to offer its services to patients, a commissioner should not run a new process to re-qualify the provider when its contract with the provider comes to an end, unless there are specific reasons for doing so.
75. As Care UK won the previous procurement process and now provides elective care services to patients through eReferral, Care UK could be considered 'qualified' for the purposes of Regulation 7.¹² However, in the current case, the CCGs were not running a process to re-qualify Care UK; they were running a process to choose a provider to provide elective care services from the North East London Treatment Centre. The CCGs' decision to award the contract (and lease) to the Trust is therefore not a decision to refuse to include Care UK on a list from which a patient is offered a choice as prohibited by Regulation 7(3) of the Procurement, Patient Choice and Competition Regulations. As long as Care UK continues to be a 'qualified' provider it can provide elective care services to patients, albeit from another location.

Discrimination and equal treatment

76. The requirement under Regulation 3(2)(b) to treat providers equally and in a non-discriminatory way does not require commissioners to follow a prescribed process when they procure services. Acting within the framework set out in the Procurement, Patient Choice and Competition Regulations, commissioners should decide what is best for the people they serve. As set out above, in this case the CCGs decided to use a competitive procurement process. This decision does not amount to unequal treatment or discrimination against Care UK merely because the CCGs did not always use a similar procurement process across all of the services that they procure.

¹² Further detail on Regulation 7 is provided in paragraph 47 above.

77. A finding that a commissioner has acted in an unequal or discriminatory way requires us to be satisfied that a provider or class of providers was treated differently from other providers and that any difference in treatment was not objectively justified. We are not satisfied that is the case here. The CCGs' procurement process did not, in our view, generally favour publicly funded providers over privately funded providers. Nor do we find that the CCGs

discriminated against any of the bidders during the course of the procurement process.

Preliminary views

78. As we consider the CCGs' decision to use a competitive procurement process was reasonable in the circumstances, and our preliminary view is that the CCGs did not discriminate between publicly and privately funded providers, we do not intend to uphold these aspects of Care UK's complaint.

5. Proposals for a local variation

79. In this section we assess whether the CCGs' decision to ask bidders to make proposals about how the national price could be varied for the purposes of agreeing a local variation under the 14/15 Tariff, was in compliance with the provisions of the 2012 Act and the rules in the 14/15 Tariff.

Legal context

80. Under section 115 of the 2012 Act the price payable for the provision of NHS health care services must be in accordance with the National Tariff. Section 116 of the 2012 Act provides that the National Tariff must specify national prices for certain health care 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 health care service.
81. The 14/15 Tariff sets out national prices for a range of services, including the services subject to this complaint. It also contains rules under which commissioners and providers can agree a local variation from a national price; these are set out in Subsection 7.2.2 of the 14/15 Tariff.
82. One of the rules for local variations is that in agreeing a local variation, commissioners and providers must apply the principles for local variations, modifications and prices set out in subsection 7.1 of the 14/15 Tariff.
83. In order to assist in interpreting the rules for local variations, 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 innovative clinical treatments, deliver integrated care pathways or deliver care in new settings, and need to change the payment approach to support these changes. However, it

provides 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.

Factual context

84. We set out the background facts that underpin our assessment of this issue in paragraphs 10 to 42 above.

Care UK's submissions

85. Care UK submitted that the CCGs' had sought to use the procurement process to introduce price competition for elective services and that this was inconsistent with the national tariff and the aims and objectives of the 2012 Act.
86. Care UK also submitted that the CCGs' objective during the procurement was to introduce price competition and not to improve the quality or delivery model for services. Care UK submitted that there was no meaningful change to the service specifications issued by the CCGs and that the national tariff document makes it clear that the use of local variations is only appropriate in situations where a CCG is seeking to transform a care pathway.

The CCGs' submissions

87. The CCGs told us that the proposed local variation was permissible under the pricing rules and that they had followed the principles for agreeing locally determined prices contained in the National Tariff during the procurement process.
88. The CCGs said that, while delivering value for money for taxpayers is a focus of the procurement, the principal commissioning objective of the procurement is to improve patient experience of inpatient services and patient outcomes, and to maintain and improve waiting times for these services.
89. The CCGs submitted that the revised service specification provides a number of benefits to patients, including improved access and reduced waiting times. They also told us that the revisions to the service specifications would result in higher utilisation of the North East London Treatment Centre, leading to improvements in efficiency.
90. The CCGs told us that their decision to use a local payment approach for the services was informed by their view that the North East London Treatment Centre contract was for a prescribed and limited range of activity, which is less complex and requires a significantly lower range of support services compared to averages, on which reference costs and national prices are based. In their view, a local payment approach would therefore improve the cost-effectiveness of services whilst maintaining the outcomes, patient experience and safety of healthcare.

91. The CCGs told us that they did not set or propose a local variation, but that they allowed potential bidders to propose local variations based on delivering innovative models of care they thought were viable in line with the level of complexity of the range of HRGs that would be delivered through the treatment centre service. [X]

Our analysis

92. The health care services that are the subject of this procurement process are services for which the National Tariff specifies national prices. As such, we would usually expect commissioners to pay the provider of these services the national prices. However, the 2012 Act and the 14/15 Tariff recognise that, for a variety of possible reasons, it may be that the national price is not appropriate for local circumstances. The 2012 Act and the related 14/15 Tariff rules therefore enable commissioners and providers to depart from national prices, subject to various restrictions. This provision for local variation is intended to enable flexibility, for example, to support innovation in service delivery or integration of services. Commissioners and providers can therefore design alternative payment approaches that better support the services required by patients.
93. In this case, the CCGs decided to use a local payment approach as a means of driving changes to the pattern of service provision. They invited potential bidders to make proposals which would include a departure from national prices using local variations, with a view to making most effective use of the North East London Treatment Centre. The CCGs took the view that there was scope for a local payment approach because the activity at the North East London Treatment Centre is, in their view, less complex and requires a lower range of support services compared to averages on which national prices are based.
94. As discussed in paragraphs 70 to 73, this procurement process (in which the CCGs were seeking to allocate a contract and a lease) was driven by the CCGs' desire to make the most effective use of the North East London Treatment Centre. In this context, it was open to the CCGs to invite bidders to propose local variations. However, in agreeing any local variation commissioners and providers must comply with the National Tariff rules for such variations, which require them to apply the principles for local payment approaches outlined in the Tariff. We have already considered whether the local payment approach proposed by the CCGs complied with the principles for local payment approaches—specifically the principle that local payment approaches must be in the best interests of patients—in our letter of 8 January 2016.

Preliminary views

95. Our letter of 8 January 2016 sets out our preliminary view on whether the local payment approach proposed by the CCGs complied with the principles set out in the National Tariff and we do not consider this issue further in this letter. However, we have received the parties' submissions in response to our preliminary views on this issue and are considering whether they impact upon our view. We will issue our final decision in due course.

6. Evaluation criteria and relative weightings

96. In this section we examine Care UK's complaint that the criteria used to evaluate bids in the procurement process, and the relative weights assigned to them, did not enable the CCGs to identify and select the best option for the provision of elective care services at the North East London Treatment Centre.
97. We provide below the relevant legal and factual context, and our analysis of the above question.

Legal context

98. The Procurement, Patient Choice and Competition Regulations are intended to ensure that commissioners secure high quality, efficient NHS healthcare services that meet the needs of people who use those services. Specifically:
- 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 improve the quality and efficiency of the services, including through the services being provided in an integrated way.
 - 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(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.
 - Regulation 3(4) requires commissioners in acting with a view to improving quality and efficiency in the provision of NHS healthcare services to consider appropriate means of making such improvements, including through the services being provided in a more integrated way, enabling

providers to compete to provide the services, and allowing patients a choice of provider.

99. Our substantive guidance on the application of these rules explains that it is for commissioners to decide what services to procure and how best to secure the needs of patients; there is no one process that commissioners must use.

Factual context

100. Background to the ITT evaluation criteria, and the relative weightings, is set out at paragraphs 29 to 31 above.

Care UK's submissions

101. Care UK submitted that the evaluation criteria employed by the CCGs failed to give sufficient weight to the CCGs' duty to secure the needs of patients, improve the quality of the services and improve efficiency in the provision of the services. Care UK submitted that the CCGs should have placed substantially greater weight, in the evaluation criteria, on clinical quality in order to ensure that the winning provider was most capable of improving the quality of services.
102. Care UK submitted that the weighting given to price was disproportionate (50% of the overall score), particularly in the context of the scoring methodology and the weighting given to clinical quality. Care UK submitted that the CCGs had acted unlawfully, and failed to comply with their duties under the Procurement, Patient Choice and Competition Regulations, by employing a scoring methodology that could result in a bid that used the National Tariff for elective care receiving a score of zero for pricing.
103. Care UK submitted that the CCGs applied very similar weightings to the areas of clinical governance, performance and quality (7%) and information management and technology (5%). Care UK submitted that in giving quality and performance criteria a similar weighting to criteria relating to back office functions and facilities management (which in their view should have had a much lower weighting) the CCGs had failed to comply with their obligation under Regulations 2 and 3 of the Procurement, Patient Choice and Competition Regulations.
104. Care UK submitted that these low weightings were of particular importance given that using this approach the CCGs have selected a provider with demonstrable and very serious weaknesses in clinical quality.

The CCGs' submissions

105. The CCGs told us that the evaluation criteria and weightings were designed to ensure that they could select a provider which could best deliver the CCGs' aims for the North East London Treatment Centre. The CCGs said that they

had evaluated bids on the basis of quality and price as opposed to awarding a contract on the basis of the lowest priced bid.

106. In their letter to Care UK of 11 September 2015 the CCGs said that the Procurement, Patient Choice and Competition Regulations and the Public Contracts Regulations make it clear that in general the selection of evaluation criteria and their weighting is a matter for the procuring entity. The CCGs told us that there is no fixed or generally recommended weighting for quality and price, but rather the choice of weighting typically depends on the requirements of each individual procurement.
107. The CCGs said that in this case the evaluation criteria and their weightings were decided by subject matter experts, including clinicians, taking due account of the CCGs' obligations and associated guidance. They also said that the criteria and weightings had been approved by the CCGs' project steering group.
108. The CCGs submitted that they had assigned equal weightings to the quality and finance elements to reflect the objectives of improving patient outcomes and securing value for money. As set out in paragraph 31 above, the CCGs told us that bidders were required to achieve a score of at least 30% out of a possible score of 50% for the quality criteria (ie 60% of the overall quality score). The CCGs said that they included this minimum pass threshold to ensure bids that did not demonstrate the sufficient level of quality would be rejected. The CCGs said that setting a quality threshold like this was appropriate where quality and finance criteria were equally weighted.
109. The CCGs told us that nine of these criteria were classed as quality elements, comprising 50% of the total score. The CCGs told us that the high level criteria reflect those that are commonly used in healthcare procurements.

Our analysis

110. Determining evaluation criteria and their relative weightings is a complex process which must take into account the nature of the services and the commissioner's objectives. The Procurement, Patient Choice and Competition Regulations are not prescriptive about the process and criteria that commissioners use to select providers of services. They do not make any statements about the appropriate balance between quality and financial criteria.
111. In this case, the CCGs decided to allocate half of the available marks to the financial and commercial requirements criterion and half to the quality criteria. On the basis of the information and submissions we have received, in our view it was open to the commissioners to choose the weightings they did for the evaluation criteria in this procurement process.
112. We have already set out in our letter of 8 January 2016 our view that the CCGs'

process failed to take into account relevant information about the Trust's ability to deliver on its bid and that the CCGs did not do enough to ensure that the bid they selected was the best option for patients. In our view, the flaw in the CCGs' procurement process was not that the quality criteria had too low a weighting, but rather that the CCGs' process did not sufficiently take into account relevant quality information and/or ensure an appropriate degree of verification of the bids submitted.

113. We also note that the CCGs' approach to weighting the evaluation criteria did not itself lead to the selection of the Trust as the preferred bidder. [X]

Preliminary views

114. As we consider it was open to the CCGs to choose the weightings they did for the evaluation criteria in this procurement process we do not intend to uphold this part of the complaint.

7. Next steps

115. Please provide any additional evidence and/or reasoning you believe may affect the above analysis. If you wish to make a submission addressing the issues raised, we request that you provide us with that written response by **noon 24 February 2016**.