Dear Monitor

I am submitting this information on behalf of Northern Devon Staff and Staffside for your final report:

Information about the organisation, the staff, CQC and other reports.

We would like to highlight the staff opinion survey conducted by Northern Devon Healthcare Trust as more than 56% of staff working in this organisation believe this transfer will have a negative or very negative impact on patients.

We have always expressed our concerns that the CCG have never involved staff in this process who are the key providers of these services. We would like to highlight the staff's concerns and ask that you consider their comments as documented in attachments.

We submit the findings of the CQC re the Community Services that Northern Devon provide. These services in particular we given a "good" outcome from CQC and yet there appears to be no acknowledgement of this from the CCG even though the report (and available here) was available before they made their decision.

The staff have settled into this organisation providing good care for the local communities. In this time of continual unease in our political climate and some of the cut backs in services Northern Devon Healthcare Trust has managed this well, that is evident in the National NHS Staff Survey.

The report highlighted a few areas for improvement but overall they were exceptional results based on Composite Scores. The trust was identified as a Trust with significant achievement moving from 28th in England in 2013 to 4th in 2014.

We would like to highlight the most significant results:
Team working
Staff enjoying their job
Job satisfaction with support from line manager and team.
Northern Devon Healthcare NHS Trust's overall ranking is 4th out of 138 trusts.
The Trust came 1st in the South West in comparison with neighbouring trust those being:
South Devon Healthcare NHS Foundation Trust: 45th
Taunton and Somerset NHS Foundation Trust: 74th
Royal Devon and Exeter NHS Foundation Trust: 54th
Plymouth Hospitals NHS Trust: 129th
Royal Cornwall Hospitals NHS Trust: 136th
All this data is available but clearly does not appear to have been taking into consideration by the CCG.

Statements and concerns relating to the Provisional Finding
Our understanding from your report is that the contract hasn't formally been awarded to the Royal Devon & Exeter Hospital but they are still ploughing ahead with the transfer and informing staff and patient groups that the transfer of services will still go ahead in October 2015. I know we spoke in the past about risk and I was concerned

that the RD&E were going ahead even though this investigation was ongoing but there is an arrogance by the RD&E that the transfer is going ahead even though the contract hasn't been formally awarded.

I have been involved in many transfers of services and I have never seen an organisation blatantly moving forward and discussing the future of services in such a way. This situation is causing great confusion to staff owing to the outcome of your pre-report.

Staff have grave concerns that the CCG does not record or keep e-mails regarding such an important transfer of services and by this action the transparency of this transfer is placed in question.

We are confused re this issue as stated in your report below:

At the stage at which NEW Devon CCG selected Royal Devon & Exeter Foundation Trust as the preferred provider, it had not obtained a level of detailed information from the prospective providers that would give it an adequate understanding of the scope of services to be provided, how the providers would deliver them and the cost of the services. Without this information the CCG could not, in our view, properly assess the prospective providers' capability of meeting the CCG's objective under the Procurement, Patient Choice and Competition Regulations1 and whether the providers' proposals represented value for money. However, because NEW Devon CCG plans to gather further information and carry out more analysis before reaching a final decision to award a contract, the CCG has not breached the Procurement, Patient Choice and Competition Regulations (section 6 of our report).

NEW Devon CCG has not breached the Procurement, Patient Choice and Competition Regulations in relation to proportionality (section 6 of our report), considering ways of improving the quality and efficiency of the services (section 6 of our report), equal and non-discriminatory treatment (section 7 of our report), transparency (section 8 of our report) and conflict of interest (section 9 of our report). In its submission the CCG has set out that it still does not know the model of care that will be applied and is open to variations and innovation through dialogue with ONE provider. This suggests strongly it cannot demonstrate best value either now but even when it signs whatever contract emerges.

Questions

Please can you tell us if it is normal practice for commissioners to announce who their preferred provider is before all the appropriate detailed information regarding services has been gathered from all the prospective providers and a value for money exercise has been done?

Why did the CCG not obtain the level of detailed information from the prospective providers that would give them an adequate understanding of the scope of services to be provided, how the providers would deliver them and the cost of the services? Without this information how could they properly assess the prospective providers' capability of meeting their objectives under the Procurement, Patient Choice and Competition Regulations and whether the providers' proposals represented value for money."

Monitor's (Catherine Davies) has been quoted in the HSJ saying “Our view is that the CCG still needs to take a number of steps to ensure it gets to the right result for patients.” Why did the CCG not take these steps at the start of the process?

If the CCG is to comply with the various elements of concern from your report how can this possibly be achieved by October 2015?

Staffside have sought advice from our Trade Union's re your provisional report which has highlighted some genuine concerns about the process, this document is attached (see Trade Union Advice re Monitor).

We hope that the information that we have sent will be taken into consideration when making your final report.

Yours faithfully

Staffside of Northern Devon Healthcare Trust

Trade Union Advice

Context

When making decisions about significant changes to service provision within the NHS there is a complex set of requirements that have to be met by commissioners.

The five key requirements are:-

- Comply with the National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013. This aspect is what is being considered by Monitor
- Comply with Public Contracts Regulations 2006 (now superseded with a 2015 version)
- Comply with a duty around public involvement under S 14Z2 of the NHS 2006 as amended by S 26 of H&SC Act 2012
- Comply with Planning and Delivering Service Change for Patients (NHS England 2013)
- Comply with NHS Constitution

The investigation by Monitor has only covered the first point. There are arguments to develop elsewhere which suggest that the CCG did not comply with other requirements.

Monitor Investigation and Provisional Findings

Monitor is considering whether there has been any breach of the National Health Service (Procurement, Patient Choice and Competition) (No 2) Regulations 2013 (PPCR). In considering whether there has been any breach Monitor applies the principles it has set out

in its Substantive Guidance to the Procurement Patient Choice and Competition Regulations and developed further in its Enforcement Guidance. This is a very narrow remit.

In its Guidance Monitor sets out that the PPRC Regulations apply alongside the existing Public Contracts Regulations 2006 (which have since been superseded by a 2015 version). The PPCR are a bespoke set of rules for the health care sector and provide a mechanism for Monitor, as sector regulator, to investigate complaints and take enforcement action. Monitor states that:-

> *"The regulations are designed as an accessible and effective alternative to challenging decisions in the courts."*

If this is the case then Monitor arguably has to take a view on compliance with the Public Contracts Regulations which in reality are inextricably linked to PPCR anyway – a point made repeatedly by Ministers during the passage of the legislation..

In its provisional findings Monitor states that:-

> *Some of the submissions are framed in language related to the Public Contracts Regulations 2006 (including the reference to technical reasons or urgency in paragraph 95 and cross-border interest in paragraph 96). As noted in paragraph 11 above, we have not assessed NEW Devon CCG's compliance with these requirements as we are not responsible for enforcing the Public Contracts Regulations 2006. We have examined the parties' submissions which are relevant to the Procurement, Patient Choice and Competition Regulations.*

This is wrong on two grounds. Firstly as set out above if Monitor is a sector regulator then it has to have a view of all regulations that apply to the sector (insofar as they relate to the matter being considered) – it may not have enforcement powers but if it has the remit to offer an alternative to the Courts then it cannot ignore actions taken which would lead to potential court proceedings. It can't have it both ways.

Secondly PPCR 3(3) requires commissioners **when procuring services** to provide best value for money. This would apply to the process being followed as well as the outcome. If a commissioner is acting in a manner which is potentially unlawful and which risks the costs that litigation could involve then it is not procuring through a best value process.

The findings make no assessment against PCR requirements or even against best practice in procurement.

General Challenge

Despite the earlier claims of the CCG the contract being considered is clearly of significant value and there are several organisations potentially capable of delivering it. The way it is defined clearly places it within the scope of the Public Contract Regulations. In such

circumstances the only way to demonstrate compliance with the procurement regulations is to run a proper procurement exercise with all the rigour and discipline that entails. Whilst that brings an overhead the costs of not doing it properly have already been admirably demonstrated by the CCG.

Using the competitive tender - OJEU - route (with or without invoking Part B exemption) has apparently been rejected for reasons that are opaque, aside from the idea that it is expensive. It is not as expensive as doing things badly. If the CCG was unable to provide a detailed specification, and it has still not done so, it could have used the competitive dialogue option, as used many times elsewhere in the NHS.

It is surprising that Monitor has not made this point or even considered it.

The Public Contracts Regulations implement the EU Procurement Directive which has enormous scope and so any consideration of use of these regulations can be seen within the context of extensive experience, volumes of best practice and many court cases clarifying specific points. Rather than going back and inventing the wheel it would be sensible for Monitor, when applying its own analysis, to apply similar standards and tests as those that would be applied to any challenge under PCR. By using the extensive body of evidence around such considerations the impression that Monitor was making things up as it goes along could be avoided.

Specific Challenges to Findings

Proportionality PPCR 3(2)(a)

The regulations expect the process to be appropriate to the scale of the contract. The value of this contract is clearly highly significant. As set out above the failure to use a proper procurement methodology is in no way justified by the grounds set out by the CCG or the reasons suggested by Monitor to justify a flawed process.

On this scale nothing short of a proper OJEU process is acceptable, unless there are overwhelming grounds such as extreme urgency or the existence of only one possible provider – neither apply. Many procurement 'experts' advise that a full Part A OJEU procurement is essential for any significant procurement of this nature as the only safe basis to avoid challenge.

Similar arguments apply to the criteria that were used – the 6 questions. This falls far short of the kind of structure of criteria, sub criteria, weightings, scoring methods which would apply normally to a contract on this scale. The use of multiple people in various roles in the scoring, moderation and decision making does not overcome the very limited scale and scope of the criteria – and as pointed out there were NO financial criteria. It is also always required that criteria and scoring methods should be fully defined and made known to potential providers at the outset of the process.

Best Value PPCR 3(3).

Monitor has found in P81 quite categorically that the process so far does not comply with the PPCR. It does however suggest that this can be rectified by something that is being termed due diligence and applied only to Royal Devon and Exeter.

In its submission the CCG has set out that it still does not know the model of care that will be applied and is open to variations and innovation through dialogue with ONE provider. This suggests strongly it cannot demonstrate best value either now but even when it signs whatever contract emerges.

Most Economically Advantageous (Tender) is the term used within procurement regulations more generally and is better defined than Best Value but generally analogous. To avoid definitional problems it is part of the normal procurement process for a contract notice to indicate that the MEAT criterion will be used to award the contract. The details of the individual award criteria are be stated in the contract notice and must be stated in the contract documentation.

Because no Best Value or MEAT criteria were ever established and because no financial analysis of any substance was carried out the process used by the CCG is flawed and will remain flawed even if the suggestions from Monitor are implemented.

Non discrimination and equal treatment PPRC 3(2)(b)

The principle of equal treatment runs throughout the whole of procurement law and regulation.

What is being suggested is some modest steps are now taken to remedy the serious defects in the process so far and the obvious lack of any evidence of best value. This additional part of the process is applied only to Royal Devon and Exeter. Thus only one of the potential providers is being subjected to further evaluation. This is obviously not equal treatment.

This is made worse by the undisputed fact that early in the process Royal Devon and Exeter were announced as the preferred provider and the public were consulted on the basis that they would provide the services.

Monitor suggest in various ways that steps taken by the CCG since its initial and unwise declaration of support for Royal Devon and Exeter mitigate the possibility of discrimination. This is not plausible.

The only remedy is not to continue to allow Royal Devon favourable treatment and further opportunities to argue its case – a fair process involving all possible providers has to be followed.