MONITOR: 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

SUBMISSION TO MONITOR

1. Introduction and Summary:

1.1. Care UK is the incumbent provider of elective care at the North East London NHS Treatment Centre ("the NEL Centre") and this submission is its response to Monitor's Statement of Issues, of 21 August 2015, in relation to its investigation into the commissioning of elective care services by Barking and Dagenham CCG, Havering CCG, Redbridge CCG and Waltham Forest CCG ("the CCGs").

1.2. The CCGs' evaluation methodology and scoring of bids for the procurement was unlawful, as it did not comply with the CCG's express obligations under the Procurement, Patient Choice and Competition (No. 2) Regulations 2013 ("the 2013 Regulations"). Having inappropriately sought to introduce price competition for a tariff based service, and established a scoring system which aggressively weighted price, the CCGs had a particular responsibility to properly evaluate the clinical quality of services being offered. They failed to do this in two respects:

1.2.1 the evaluation of quality was inappropriate and did not enable the CCG to identify the provider most capable of delivering the objectives referred to in Regulations 2, 3(3)(a) and 3(4) of the 2013 Regulations, in that the CCG's weighting of the scoring of clinical quality and performance was similar to the weighting attributed to back office functions and facilities management, and much lower than that applied to price;

1.2.2 the failure to identify appropriate and compliant evaluation criteria was manifested in the assessment process, which gave rise to higher scores for a bidder with a record of quality which was objectively and demonstrably inferior to that of Care UK (and known to be so by the CCGs).

1.3. The CCGs failed to comply with their duties under the 2013 Regulations, by applying a scoring methodology which the CCG claimed could properly result in a tender that used the National Tariff for elective care receiving a score of zero for pricing.

1.4. There is no legitimate justification for the procurement to have taken place at all. Regulation 7 of the 2013 Regulations stipulates that, when a CCG decides which providers qualify to be included in a list from which a patient is offered a choice in respect of a first outpatient appointment with a consultant or member of a consultant's team, the CCG may not refuse to include a provider on a list where that provider meets the criteria established by the CCG.

1.5. The CCGs' use of the procurement process to introduce price competition for elective services contravened Government policy on the introduction of the Health and Social Care Act 2012 ("the 2012 Act"), which is that NHS competition should be on the basis of quality and not price.

1.6. The use of local price variations should only be used when the national tariff guidance is followed, for example, when whole care pathways are being redesigned and a range of specific criteria are met, which was clearly not the case in relation the North East London procurement. The procurement specification did not involve changes in the care pathway, despite the addition of gynaecology, ENT and paediatrics and additional satellite locations.

1.7. We are concerned that the CCGs' approach to pricing will have negative consequences on the safety and quality of elective care services in North East London and, if this approach was taken by CCGs across the country, more widely.

1.8. Monitor will be aware of the risks to safety, quality and performance against national standards resulting from unsustainably low funding of contracts and of the evidence that. Trusts with chronic funding problems tend to have higher mortality, infection and complication rates.

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

Weighting: Price

2.1. The CCGs have imposed and applied an approach to the evaluation criteria, allocation of weightings and the scoring methodology of bids as set out in the initial tender documentation (Annex 1) and their letter of 30 June 2015 (Annex 2) that means that they are unable to comply with:

2.1.1 the law and guidance in relation to National Tariff; and

2.1.2 statutory duties and obligations under the 2013 Regulations.

2.2. The evaluation criteria applied by the CCGs in scoring of bids was not compliant with the obligations under the 2013 Regulations to secure the needs of people who use the services and act with a view to improve quality and efficiency in the provision of the services (*Regulation 2, 3(3)(a) and 3(4) of the 2013 Regulations*).

2.3. Compliance with these obligations is particularly important given the CCGs' decision to run a procurement process heavily weighted towards price competition. The CCGs' approach contravened Government policy in relation to competition in the NHS which only allows local variations from National Tariff in limited and clearly defined circumstances, and when the relevant rules on National Tariff are followed; for example, when care pathways are being re-designed, which is not the case in this procurement. In situations, such as this procurement, where the care pathway remains unaltered Government policy clearly requires competition to be on quality and innovation rather than price (see Section 4 below).

2.4. Specifically, the evaluation criteria employed by the CCGs failed to give sufficient weight to the CCGs' duty to secure needs of people who use the services, improve quality of the services, and improve efficiency in the provision of the services:

2.4.1 the Procurement bids were marked out of a total score of 100%;

2.4.2 Price accounted for 50% of the total score available (Annex 2, page 2); and

2.4.3 Of the remaining 50%, only 7% was directly attributed to clinical quality of the services (in our experience a uniquely low weighting) and only some of the remaining marks were (indirectly) attributable to quality issues.

2.5. The CCGs did not have a discretion to introduce price competition into the procurement (see Section 4, below). However, even if this were not the case, the

CCGs' weighting of "Price" was disproportionate (50% of the overall total score), particularly in the context of the scoring methodology and the weighting given to clinical quality.

2.6. More particularly, the CCGs purported to award a score of 0% to a price submission where no reduction in tariff (excluding national deflators or adjustments) was submitted in the bid. This approach was set out in the CCGs' scoring matrix, "Bid price equal to or more expensive than the current service price of a comparable level of activity in year 1" (Annex 3, Scoring Matrix).

2.7. It is submitted that the CCGs acted unlawfully, and failed to comply with their duties under the 2013 Regulations, by employing a scoring methodology that could result in a tender that used the National Tariffs for elective care receiving a score of zero for pricing because this approach treats National Tariff as a cap on pricing, rather than a price which has been properly set by Monitor and NHS England. In formulating the methodology in this way, the CCGs were effectively seeking a discount from the nationally set price without properly considering the impact of sub-tariff pricing on the quality of services and the CCGs' obligation to secure improvements to the pathway.

Weighting: Quality

2.8. For any competitive procurement, and more particularly one which was seeking to depart from national tariff arrangements, the CCGs should have placed substantially greater weight, in the evaluation criteria, on clinical quality in order to discharge the duty to ensure that the winning provider was most capable of improving the quality of the services.

2.9. The CCGs have applied very similar weightings to the areas of "Clinical Governance, Performance & Quality" (7%), and "Information Management & Technology" (5%). Equally, clinical quality and performance were awarded a similar weighting to back office functions and facilities management. Such weighting of these functions, and the allocation of equivalent weighting to clinical quality and performance (Annex 2, page 2) gave disproportionately high weighting to factors which are not of equal importance to an assessment of clinical quality and so failed to comply with the obligation arising under Regulations 2 and 3 of the 2013 Regulations.

2.10. These low weightings are of particular importance given that, using this approach, the CCGs have selected a provider with demonstrable and very serious weaknesses in clinical quality, as shown in the comparisons between the Trust and the NEL Centre, along with other local providers, in Annex 10. For example, the Trust has a rate of unplanned readmission within 28 days of 12.54%, which is worse than the all England average of 11.45%, whereas Care UK's rate is 0.41%. Additionally, Care UK have a 100% record of patients receiving harm free care, whereas the Trust has a record of 92.84% which is worse than the all England average.

Scoring: Quality

2.11. The CCGs do not appear to have taken into account, when evaluating proposals, the external and objective evidence, in the form of regulatory findings concerning clinical quality and safety of direct relevance to the services being procured. The CCGs have raised and published its own concerns about the quality and safety of clinical services at the Trust. These concerns are a regular and important feature of the reports to its Board. In excluding the material on which such conclusions were based when assessing the bid submissions, the CCG substantially failed in its duties to satisfy its obligations under Regulation 2, 3(3)(a) and Regulation 3(4) of the 2013 Regulations.

2.12. The CCG furthermore ignored external regulatory findings regarding the services of both the Trust and Care UK. The Trust was placed into special measures by the Care Quality Commission ("CQC") in December 2013. It is currently shown to be "high risk" on several CQC indicators and is a persistent outlier on some key quality of care indicators (http://www.cqc.org.uk/provider/RF4). In a recent review the CQC maintained the Trust in special measures because of an insufficient culture of safety (Annex 5, page 5).

2.13. The CQC's report particularly refers to surgery (Annex 5, page 25). The Trust achieved the following ratings at both King George Hospital and Queens Hospital:

	Safe	Effective	Caring	Responsive	Well-led	Overall
Surgery	Requires improvement	Good	Good	Requires improvement	Requires improvement	Requires improvement

2.14. This is in contrast to the performance of Care UK's service provision at the NEL Centre, as shown by its KPI dashboard results below, which show that Care UK

achieved or exceeded the NHS/All England/National Average in the majority of its patient satisfaction, clinical outcomes and waiting lists KPIs.

North East London Treatment Centre		NHS / All England / National Average		2013 - 2014	Achieved/Exceeded NHS / All England / National Average
Friends and Family Test Scores - Inpatients - Net Promoter Score		72	NHS	96	
Friends and Family Test Scores - Inpatients - Would Recommend %		95%	NHS	N/A	N/A
Friends and Family Test Response Rate - Inpatients		29%	NHS	65%	
PLACE Assessments 2013	Cleanliness	95.8%	All England	98.9%	
	Food	85.4%	All England	86.9%	
	Privacy, Dignity and Wellbeing	88.9%	All England	91.3%	
	Condition Appearance and Maintenance	88.8%	All England	93.8%	
Surgical Site Infections	Hip Replacements	1.2%	All England	0.5%	
	Knee Replacements	1.7%	All England	2.1%	
Referral to Treatment times	% waiting within 18 weeks	94.1%	National Avg	98.3%	
	% Inpatients seen within 18 weeks	91.2%	National Avg	96.5%	
	% Outpatients seen within 18 weeks	96.8%	National Avg	97.9%	
	Typical waiting times (weeks)	5.8	National Avg	4.2	
	Typical Inpatient waiting times (weeks)	8.8	National Avg	6.4	
	Typical Outpatient waiting times (weeks)	5.1	National Avg	4.5	

North East London Treatment Centre		NHS / All England Average		2014 - 2015	Achieved/Exceeded NHS / All England / National Average
Friends and Family Test Scores - Inpatients - Net Promoter Score		72	NHS	93	
Friends and Family Test Scores - Inpatients - Would Recommend %		95%	NHS	98%	
Friends and Family Test Response Rate - Inpatients		37%	NHS	42%	
PLACE Assessments 2014	Cleanliness	97.3%	All England	99.7%	
	Food overall	88.8%	All England	95.9%	
	Privacy, Dignity and Wellbeing	87.7%	All England	75.0%	
	Condition Appearance and Maintenance	91.7%	All England	97.4%	
Healthcare-associated Infections (HCAIs)	MRSA bacteraemia	0.9	NHS	Awaiting Results	
	C difficile infection	41.0	NHS	Awaiting Results	
	MSSA bacteraemia	28.5	NHS	Awaiting Results	
	E. coli bacteraemia	103.3	NHS	Awaiting Results	
Surgical Site Infections	Hip Replacements	1.2%	All England	Awaiting Results	
	Knee Replacements	1.7%	All England	Awaiting Results	
Referral to Treatment times	% waiting within 18 weeks	93.3%	National Avg	98.8%	
	% Inpatients seen within 18 weeks	88.7%	National Avg	97.2%	
	% Outpatients seen within 18 weeks	95.5%	National Avg	97.6%	
	Typical waiting times	6.0	National Avg	4.3	
	Typical Inpatient waiting times	9.2	National Avg	8.0	
	Typical Outpatient waiting times	5.4	National Avg	4.8	

2.15. The CQC's Inspection Report into the NEL Centre (January 2014), makes clear that the Centre met all the standards it was assessed against (Consent to Care and treatment, care and welfare of people who use services, cleanliness and infection control, supporting workers and complaints) (Annex 9, page 1). It goes on to say that, "People we spoke with were very positive about the care being provided and the service they had received (Annex 9, page 4). The NEL Centre

under Care UK's leadership has a Friends and Family "Would Recommend" score for 2014-15 of 98% (as shown in the table at paragraph 2.14 above).

2.16. In informing Care UK of the outcome of the procurement the CCGs identified two issues as providing support for the application of scores to the Trust's bid which were slightly higher than those awarded to Care UK's bid on issues relating to clinical quality. The first was the provision of children's services, which represented only 0.88% of the value of the procured services. The second related to a governance policy; the scoring awarded was plainly wrong in circumstances where Care UK's policy has been subject to successful CQC oversight in contrast to the CQC's criticisms of the Trust's governance policy. (Annex 2, page 3).

2.17. On the basis of this objective, publicly available evidence, there was no reasonable basis to award higher scores for clinical quality (and other sub-criteria within "Quality") to the Trust's bid than were awarded to Care UK's bid. In doing so, the CCGs breached their obligations of equality of treatment and non-discrimination under Regulation 3(2)(b) of the 2013 Regulations.

2.18. The CCGs' own board papers from 23 June 2015 make detailed and ongoing references to failures of quality and performance at the Trust, making it clear that contractual penalties are being used in response to these along with a range of other interventions to support the Trust in dealing with serious and long standing challenges. For example, "There have been a number of Quality concerns raised with the Trust, based on recent performance... A letter has been sent to the Trust (9 March 2015) related to their recent MRSA cases, requesting that route cause analysis and lessons learnt are shared with Commissioners. A Contract Performance Notice was issued to BHRUT on MSA breaches for their performance in April 2015." (Annex 12, page 281). The board papers also state that "The Trust has failed to deliver national performance standards" (Annex 12, page 36), and the Trust "are currently not reporting on RTT due to longstanding data quality issues" (Annex 12, page 278).

2.19. Considering the points set out above, the CCGs' approach to the scoring of bids has clearly failed to comply with the requirements of the 2013 Regulations that in procuring services the CCG must act with a view to securing the needs of the people who use the services; improving the quality of the services; and improving the efficiency in the provision of the services (*Regulation 2 of the 2013*

Regulations). The CCGs have stated to us that the evaluators did not consider factors outside those specifically included in the response from bidders, adding "*The CCGs… would not have been entitled to take into account additional published information outside the relevant bids*" (Annex 13, page 2).

2.20. We do not know the details of the Trust's bid, despite repeated requests for information. We are concerned at the CCGs' unwillingness to share their scoring of the quality elements of the successful bidder and submit that this this an issue that Monitor should review in detail.

2.21. We are concerned that in order to arrive at the scores allocated to the bids for the trust and Care UK, the CCGs accepted, at face value, assurances from the Trust about future improvements to the quality of care. [redacted].

2.22. Equally, the Trust is unable to complete their own lists and has been using the NEL Centre as a subcontractor.

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

3.1. The services should not have been competitively procured in the manner undertaken, as Care UK is on a "list" for the purposes of Regulation 7 of the 2013 Regulations and provides consistently high quality services.

3.2. The services Care UK provides to the CCGs from the NEL Centre are elective services. The services under the procurement are the same as those currently provided by Care UK, except for two new services (satellite location services, and children's services).

3.3. These services are all services to which CCGs under the NHS Constitution and the National Health Service Commissioning Board and Clinical Commissioning Groups (Responsibilities and Standing Rules) Regulations 2012 (Regulation 39) have a duty to give patients a choice.

3.4. The 2013 Regulations require that, when a CCG decides which providers qualify to be included in a list from which a patient is offered a choice in respect of a first outpatient appointment with a consultant or member of a consultant's team, the CCG may not refuse to include a provider on the list where that provider meets the criteria established by the CCG (*Regulations 7(2)(a) and 7(3) of the 2013 Regulations*).

3.5. Regulation 7(2)(a) of the 2013 Regulations clearly states that a CCG is not permitted to limit the number of providers qualified onto that list where the service relates to this choice of first outpatient appointment with a consultant.

3.6. Monitor's substantive guidance on the Procurement, Patient Choice and Competition Regulations (December 2013), provide 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*". The guidance goes on to note that "*if, for example, a provider of acute elective care wants to continue to offer services at the relevant tariff and the commissioner is satisfied that the provider continues to meet the necessary quality standards, it should simply extend or renew the contract*" (Annex 6, page 40).

3.7. By holding this procurement process, the CCGs have, without "specific reasons" run a new process to re-qualify a provider and have decided to limit the number of providers of elective services. The CCG has ample evidence as to the high quality of services being provided at National Tariff prices, in that the NEL Centre has a high record of patient satisfaction, with a score of 96 on the Friends and Family Test in 2013-14 and a score of 93 in 2014-15, with 98% of respondents stating they would recommend the NEL Centre in 2014-15, excellent clinical outcomes and well managed waiting lists, as shown in the table at paragraph 2.144 above.

3.8. It would have been entirely possible for the CCGs to have awarded a new contract with no volumes guaranteed. This would have ensured that activity was driven by patient choice, and that the risk as to the actual level of activity undertaken was wholly with Care UK i.e. it would only have been paid for actual activity if patients decided to use the NEL Centre.

3.9. Care UK's lease of its premises and its existing elective care contract with the CCGs are coterminous, so Care UK will be unable to continue to provide the services once its contract with the CCGs has come to an end. NHS Property Services ("NHS PS") have stated to Care UK that its policy, in relation to leasing properties used for providing NHS services is that "*If the CCG confirms its original stance that the property is indeed surplus then [NHS PS] will have to complete the competitive tender before [it] lease[s] the property. However if the CCG confirms that the property is not surplus then [NHS PS] would be in a position to*

agree a new lease with Care UK at market rent." (email dated 25 August 2015 in relation to Care UK's Peninsula NHS Treatment Centre (Annex 11) That the NEL Centre is not surplus to requirements is clearly evidenced by the procurement process. Consequently, the ending of the initial lease period did not provide a legitimate basis, or necessity, for undertaking a procurement process.

3.10. The outcome of this procurement will mean that Care UK is no longer able to provide elective care services to patients through E-Referral / choose and book. The direct and immediate consequence of the CCGs' decision is therefore that patients will be deprived of the opportunity to exercise a choice to receive care and treatment from an established provider of high-quality elective care services in the North East London area. This represents a breach of the CCGs' obligations under Regulation 7 of the 2013 Regulations, and undermines the right to patient choice under the NHS Constitution.

3.11. Furthermore, the CCGs do not appear to have undertaken comparable procurement processes for any services currently provided by NHS Trusts or Foundation Trusts, or indeed of other elective services. Specifically, when the Queen's Hospital elective services were transferred to King George Hospital (Annex 14, page 85), no procurement process was entered into. This is in contrast to the procurement for the elective services being provided at the NEL Centre.

3.12. Care UK is therefore concerned that the procurement amounts to unequal treatment and discrimination between public and privately funded providers, in contravention of Regulation 3(2) of the 2013 Regulations.

3.13. We have requested further information from the CCGs on the basis of their decision by way of a request under the Freedom of Information Act 2000, but have not received a response at the time of writing.

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

The CCG's obligations

4.1. The CCGs have sought to use the procurement process to introduce price competition for elective services. This is inconsistent with statutory guidance on National Tariff, and the aims and objectives of the 2012 Act.

Aims and objectives of the 2012 Act

4.2. On 3 March 2011 the Government introduced amendments to the Health and Social Bill (at clause 104 to clause 111)1 removing the words "or maximum prices" (or similar) from the relevant pricing clauses2. This had the effect of removing the possibility of price competition for NHS services. Without a maximum price there was no longer the possibility for providers to discount against others on price but rather to compete on quality. This position is evidenced by comments from Government minsters and senior NHS England officials during the passage of the Bill.

4.3. On 13 March 2012 the then Secretary of State for Health, Andrew Lansley, said "The Bill means competition for quality, not price." This echoes comments to the Bills Committee on 3 March 2011 from Simon Burns (Minister of State, Department of Health) "*Our policy on competition in the NHS is, and always has been, that it should be based on quality rather than price." On 8 February 2011 Sir David Nicholson said that "The economic regulator and the pricing arrangements that we are going to have in place, which for most services will be a fixed tariff across the country, are about competition on quality, not on price*."

National Tariff Guidance

4.4. The 2012 Act requires both commissioners and providers to follow the rules set out by NHS England and Monitor for agreeing local variations to nationally determined prices and related currencies. These rules are contained in Monitor's 2014/15 National Tariff Payment System guidance (the "Guidance").

4.5. The Guidance makes clear that elective care services are subject to national prices and are governed by a specific "currency". The Guidance says there are only limited circumstances in which commissioners are entitled to determine prices for services locally (section 7).

4.6. Crucially, the Guidance goes on to say that local variations are only allowed where national pricing is not appropriate for local circumstances and commissioners and providers are required to apply a set of clearly defined principles in order to agree a local payment approach. These principles are

[1] http://www.publications.parliament.uk/pa/cm201011/cmbills/132/amend/pbc1320303m.123-129.html
[2] http://www.publications.parliament.uk/pa/cm201011/cmbills/132/11132.94-100.html#j232

specifically designed to ensure that it is not possible to introduce price competition for NHS services.

4.7. The principles are as follow:

4.7.1 local variations should support a mix of service and delivery models that are in the best interests of patients, so in agreeing a locally determined price commissioners should consider quality, cost effectiveness, innovation, and allocation of risk;

4.7.2 local variations should be transparent, where possible and appropriate, to improve accountability; and

4.7.3 providers and commissioners must engage constructively with each other to decide on the payment approach that delivers the best value for patients in their local area.

4.8. The Guidance specifically says that it is **not appropriate for local variations to be used to introduce price competition that could create a risk to the safety or quality of care for patients.**

4.9. The CCGs have failed to follow the principles and process set out in the Guidance to agree local variations to tariff price.

4.10. The Guidance further makes clear that the use of local variations is only appropriate in situations where a CCG is seeking to transform a care pathway: "*Commissioners and providers may want to offer innovative clinical treatments, deliver integrated care pathways or deliver care in new settings, and may need to change the payment system to support these changes.*"

<u>The CCG's approach</u>

4.11. There was no meaningful change to the service specifications issued by the CCGs, aside from the addition of satellite and children's services (both of which are covered by existing NHS tariff prices). Equally, the elective services provided by the NEL Centre were already very efficient; our submission is that the CCGs' objective was not to improve the quality or delivery model of services – it was simply to introduce price competition for the services and treated the existing NHS tariff as a cap (with only a discount being scored).

4.12. Whilst there is no dispute that there was communication from the CCGs on this issue as part of the procurement. However, what was missing from the CCGs'

approach was constructive engagement, as set out in guidance, with Care UK in relation to the introduction of price competition. Care UK made it clear to CCGs that it was concerned about the impact on patient safety and the introduction of local variant pricing on 11 December 2014, stating "*We note that the CCGs would like to use locally agreed tariffs for this service. [….] Given the current activity, the indicative values published by the CCGs would suggest a discount on the national price of perhaps 20%. A price this low will not be viable as we do not believe it is possible to provide services at such a low cost without compromising patient safety.*" (Annex 4, page 4)

4.13. It is also clear that the CCGs fundamentally misunderstood the rules set out in the Guidance for agreeing local variations. These are that:

4.13.1 The commissioner and provider must apply the principles for local variations, modifications and prices set out in when agreeing a local variation. These are to: act in the best interests of patients; be transparent; and constructively engage with providers and other stakeholders.

4.13.2 The agreed local variation must be documented in the commissioning contract between the commissioner and provider which covers then service to which the variation relates.

4.13.3 The commissioner must use the summary template provided by Monitor when preparing the written statement of the local variation, which must be published as required by the 2012 Act.

4.13.4 The commissioner must also submit the written statement of the local variation to Monitor.

These requirements were not met.

4.14. The CCGs' Board Paper of 18 December 2014 betrays a fundamental misunderstanding of the obligations on the CCG and the constraints on price competition, recording that "*Monitor only needs to be consulted if the tariff proposed will be above PbR. Otherwise, Monitor just needs to be notified of the below PbR tariff. PbR is an averaged tariff of all levels of patient complexity*." (Annex 7, page 4)

4.15. Apart from the incorrect references to PbR (which we assume are intended to be reference to National Tariff), the CCGs have not taken into account the process for agreeing local variations and more particularly, have not taken into account

the constructive and transparent engagement with providers. There is no indication that the principles for local variations were acknowledged or applied.

4.16. It is clear from even the limited disclosure provided by the CCG as to the scores awarded to the Trust that the Trust has offered to provide the elective care services for lower than the National Tariff.

Current and future payment arrangements

4.17. The CCGs acted unreasonably by allowing, and awarding a higher score to, a "below–tariff" bid from the Trust. This failure, and the resultant risk to the quality and safety of services to patients, is compounded in circumstances where the Trust is (and is known by the CCG to be), unable to demonstrate that it can provide services which meet national quality and performance standards for services paid even at at National Tariff (see paragraph 2.12.10 above); the Trust is, as far as Care UK is aware, currently being paid for elective activity through a "block contract".

4.18. Taking this in account, it appears likely that, if a contract is awarded to the Trust, the price being paid by the CCGs would not be limited to the (artificially and unlawfully discounted) rate set out in the Trust's proposal, which was awarded an inappropriate high score, but would be "cross-subsidised" by the overall block contract being paid to the Trust and any additional funding that the Trust is allocated to tackle its performance challenges. This does not provide the required transparency or satisfy the CCG's obligation to act with a view to improving efficiency (Regulation 2(c) of the 2013 Regulations) and that services are procured from the provider that provides the best value for money (Regulation 3(b) of the 2013 Regulations).

4.19. The Trust has been unable to publish waiting list data accurately due to longstanding data quality issues (Annex 12, page 277) and there are repeated references in the CCGs' board papers to difficulties at the Trust in producing rectification plans for performance challenges. The CCGs could not therefore properly have satisfied itself as to the ability of the Trust to demonstrate that services could be provided in a manner maintaining and improving quality at rates below National Tariff.

Impact on patient services

4.20. Care UK is very concerned about the consequences that the CCG's approach to this procurement, and its purported outcome, will have on the safety and quality of elective care services in North East London. Care UK considers that the CCG cannot, acting in accordance with its obligations, have been satisfied that the Trust was the provider most capable of improving quality and efficiency while delivering best value.

4.21. Specifically, we are concerned that, presuming the Trust is required to address its overall financial deficits, an underfunded service may result in:

4.21.1 higher mortality, infection and complication rates;

4.21.2 running a reduced service, with staff only working within standard working hours, resulting in an increase in waiting time; and

4.21.3 cutting back on non-direct clinical roles such as governance, infection control, safeguarding and falls prevention expertise.

4.22. Care UK raised concerns about the introduction of price competition with the CCGs as a clarification question during the procurement (on 1 April 2015) and was told that "*The Commissioner has been in communication with Monitor as to the possibility and validity of determining a local price variation for the Elective Care Service. The Commissioner is assured they have met the requirements set out by the Monitor guidance and have checked these back with Monitor. The Commissioner had extensive engagement sessions with potential bidders prior to the commencement of the procurement and the local price variation was discussed at these sessions*".

4.23. Care UK subsequently raised this point with Monitor's Cooperation and Competition Directorate on 27 May 2015 (Annex 8).

4.24. Care UK has submitted its management accounts in confidence to Monitor and this demonstrates that the NEL Treatment Centre, even when operated by an efficient and effective provider, has no scope to safely offer discounted activity. This is significantly due to the challenging labour market in the local area, a factor which Trust Board reports show affects the Trust at least as much as Care UK.

4.25. It is submitted also that the commercial pressures Care UK faces are similar to those of the Trust and therefore we can see no rational explanation for the Trust's ability to offer a discount on these services.

4.26. It is also submitted that the narrow margins at NEL is highlighted by our limited ability to charge less than tariff when acting as a subcontractor to Trust. Care UK has been only been able to offer the Trust a discount of 7.42% despite the fact that: (i) the activity remains Trust activity so far as reporting and responsibility for performance targets goes i.e. the Trust is penalised not Care UK for 18 week breaches; (ii) the initial referral from the GP is to the Trust and so Care UK does not incur costs in managing the initial referral; (iii) the Trust may also have carried out pre-operative diagnostic tests which saves further costs being incurred by Care UK.

4.27. The CCGs therefore manifestly failed to adopt the process outlined in the National Tariff for agreeing local variations, as CCGs failed to consider the best interests of patients or engage constructively with providers on the basis set out in guidance. This failure raises significant concerns for patient best interests, as it is unclear the basis upon which the Trust is able to deliver a reduction.

Conclusion

4.28. The CCGs applied an approach to the weighting and scoring of bids for the procurement which was unlawful and inconsistent with the 2013 Regulations, giving clinical quality and performance a similar weighting to back office functions and facilities management, in a manner which failed to reflect the obligation to identify the provider best able to improve the quality of services. In addition, the CCGs placed disproportionate emphasis on pricing and introduced price competition. This creates a significant risk of having a negative impact on the quality of elective care services in North East London.

4.29. Taking into account the relevant legislation, guidance and expected benefits to service users, it was not necessary or appropriate for the procurement to have taken place at all. The 2013 Regulations make it clear that when a CCG decides which providers qualify to be included in a list from which a patient is offered a choice in respect of a first outpatient appointment with a consultant or member of a consultant's team, the CCG may not refuse to include a provider on a list where that provider meets the criteria established by the CCGs.

4.30. The CCGs' use of the procurement process to introduce price competition for elective services contradicts the aims and objectives of the 2012 Act, which has as its objective competition on quality for NHS services rather than price.

4.31. The CCGs' use of local variation to introduce price competition for elective services wholly contradicted Government policy, that competition in the NHS should be on quality and not on price. We are concerned that the CCGs' approach to pricing under the procurement will have negative consequences on the safety and quality of elective care services in North East London.