NHS Improvement

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05/08/2016

By email:

Dear

Request under the Freedom of Information Act 2000 (the FOI Act)

I refer to your request of 3 June 2016 under the FOI Act, which you clarified on 8 July 2016. As explained in my letter of 16 June 2016, for the purposes of this letter, references to NHS Improvement mean Monitor.

Your request

You made a request for information on 3 June 2016 in relation to our investigation into the commissioning of elective care services at the North East London Treatment Centre, which is set out in Annex A. In response to our letter of 16 June 2016 requesting clarification of the information required, you provided the following clarification on 8 July 2016:

"I now restrict my request to the following:

final documents relating to the following, if mo final documents were produced, then I seek the latest draft.

Meetings with the CCGs, information gathering and review and analysis of the evidence	*August to November 2015*
Inviting submissions from parties on preliminary findings	*December 2015 to February 2016*
Information gathering and review and analysis of the evidence (if necessary)	*February 2016*
Publish conclusions of the investigation / Final decision	

"

Clarification

We have understood your request to be for final documents (and where there is no final document, the latest draft) of the documents listed in the table above and any documents relevant to the investigation steps outlined above.

Publicly available information about this investigation

Some of the information you have requested is already published.

We have already published the following information in relation to our investigation into the commissioning of elective care services at the North East London Treatment Centre:

- a notice of initiation, which sets out the background to this investigation;
- a Statement of Issues, which summarises the complaint and sets out further detail of the circumstances in which NHS Improvement decided to open a formal investigation and the potential breaches that the investigation would look at;
- responses to the Statement of Issues
- our preliminary findings dated 8 January and 10 February 2016; and
- a decision document with undertakings.

This information is available on our website.

Decision

NHS Improvement holds the information that you have requested.

NHS Improvement has decided to withhold some of the information it holds on the basis of the applicability of the exemptions in section 21, 31, 41 and 43 of the FOI Act as explained in detail below.

The attached Annex B sets out the details of the relevant information that we hold and whether that information is to be disclosed (in whole or in part) or withheld from disclosure. Where information is being withheld, we have identified in the Annex those exemptions which we consider to be relevant, being one or more of section 21, 31, 41 and 43 of the FOI Act.

Where we are able to disclose information to you, it will be provided to you electronically. In this case, this information is two letters dated 8 January and 10 February 2016 to the investigation parties containing our preliminary findings at that time. This information was also published on our website today. We are withholding the other information you requested, for the reasons explained below.

Section 21 – Information accessible to applicant by other means

Section 21(1) of the FOI Act provides that information is exempt if it is reasonably accessible to the applicant by other means.

We have published on our website our final decision in this case, which was to accept undertakings instead of continuing our investigation. This information is reasonably accessible to you on our website so we consider it to be exempt from disclosure under section 21 of the FOI Act.

Section 31 – prejudice to law enforcement – exercise of NHS Improvement's functions

We have published a number of documents, including our preliminary findings and final decision, and these explain our approach and the information we used. We have decided that, other than as set out in published materials, information you requested in relation to meetings with the CCGs, information gathering and review and analysis of evidence is exempt from disclosure under section 31 of the FOI Act. This is for the reasons explained below.

Section 31(1)(g) of the FOI Act provides a qualified exemption from disclosure where such disclosure would be likely to prejudice the exercise by a public authority of its functions for any of the purposes set out in section 31(2) of the FOI Act. One of these purposes, contained in section 31(2)(c), is ascertaining whether the circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

NHS Improvement is responsible for, amongst other things, enforcing the Procurement, Patient Choice and Competition Regulations[1] (the Regulations) and the national tariff[2]. Monitor has the powers to take formal action against a commissioner if it has failed to comply with the Regulations and/or the rules contained in the national tariff.

Your request covers a considerable amount of information gathered by NHS Improvement during the course of its investigation and internal analysis and discussion of that information. It includes information gathered from the relevant Clinical Commissioning Groups[3] (the CCGs), Barking Havering and Redbridge NHS Trust (the Trust) Care UK and the Care Quality Commission about the procurement process and related matters we investigated. This information includes free and frank views of those organisations as well as confidential information. The disclosure of this information would prejudice NHS Improvement's ability to exercise its regulatory functions under the Regulations and the national tariff.

The effectiveness of NHS Improvement's regulatory action depends on the maintenance of confidentiality and ensuring free, full and frank exchanges with individuals and organisations in relation to any of our enforcement functions, including formal investigations in response to complaints.

Making available some of the information requested would prejudice the exercise of NHS Improvement's functions by, among other things:

(a) deterring commissioners, providers and other stakeholders from co-operating with NHS Improvement on a voluntary basis;

(b) decreasing the amount of information supplied voluntarily to NHS Improvement from commissioners, providers and other stakeholders;

(d) disclosing information that is commercially sensitive and provided expressly on a confidential basis; and

(e) deterring NHS Improvement officers from engaging in free and frank discussions about the appropriate regulatory approach to take in a particular case.

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[1] The National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013.
[2] See relevant documents and guidance on our website about our role in relation to the NHS payment system: click here.
[3] These are Barking and Dagenham CCG, Having CCG, Redbridge CCG and Waltham Forest CCG.

Section 43(2) – prejudice commercial interests

We have published a number of documents, including our preliminary findings and final decision. We have excised information from those documents that is exempt from disclosure under section 43(2) of the FOI Act. There is also information in other documents we have not published that is exempt from disclosure under section 43(2) FOI Act.

Under section 43(2) of the FOI Act, information is exempt from disclosure if its disclosure would, or would be likely to, prejudice the commercial interests of any person. In the present case, disclosing information provided to NHS Improvement about the procurement process we investigated, including information about individual bids and the scoring of those bids could potentially harm the commercial interests of the commissioners and the bidders concerned.

As explained in our final decision, the CCGs rescinded their decision to award a contract to provide elective care services from the North East London Treatment Centre to the Trust and abandoned the procurement process we investigated. The CCGs extended Care UK's existing contract to provide elective care services from the treatment centre until 30 June 2017 to ensure the on-going provision of those services, and will run a new procurement process in the near future to decide who will provide those services when Care UK's extended contract ends. Disclosure of information such as the bids and scoring of individual bidders in the previous procurement process could be used by potential bidders in the forthcoming procurement process to gain a commercial advantage. This would be prejudicial to the commercial interests of the bidders and the CCGs.

Public interest test

Sections 31 and 43 of the FOI Act are qualified exemptions and therefore require us to consider the public interest test in determining whether the exemptions should be maintained. We have balanced the arguments in favour of maintaining the exemptions with the factors in favour of disclosing the information we consider falls within these exemptions.

It is in the public interest for third parties to be able to freely exchange views and commercially sensitive information with NHS Improvement and for NHS Improvement officers to openly discuss the appropriate regulatory approach to take in a particular case, without needing to disclose the same to a wider audience. If information could not be freely exchanged and discussed, it is likely that this would severely inhibit the content of such exchanges in future, and may dissuade individuals and organisations from exchanging information and views on an informal or formal basis. There is a real risk that having to disclose information received and generated by NHS Improvement in the course of its regulatory investigations would hinder the frankness with which future discussions are conducted, which would not be conducive to the exercise by NHS Improvement of its functions for the purpose of ascertaining whether circumstances which would justify regulatory action exist, or may arise.

We note that there is a public interest in disclosing information about NHS Improvement's performance of its functions so that NHS Improvement may be held to account. As already mentioned, NHS Improvement has already published certain information on its website regarding this investigation.

NHS Improvement also publishes the following documents to assist commissioners, providers and the public to understand how NHS Improvement performs its functions and makes decisions:

- NHS Improvement's Annual Report includes a summary of activity undertaken in relation to its functions under the Regulations and the national tariff;
- NHS Improvement's website includes a number of hypothetical scenarios to assist understanding of how the Regulations might apply;
- on-going efforts to capture wider lessons for the sector, for example in blog entries; and
- we publish details of enforcement action that we take, including the basis for taking that action.

These steps ensure transparency in NHS Improvement's performance of its functions under the Regulations and relating to the national tariff. We believe this approach strikes a correct balance between keeping the public informed of our actions and approach and maintaining trust and confidence between us and third parties with whom we correspond, on whose trust and confidence we rely in order to ascertain whether circumstances which would justify regulatory action exist, or may arise. It also ensures there is adequate space for NHS Improvement officers to freely discuss with each other the appropriate regulatory approach to take in each case without fear of those discussions being shared with a wider audience.

In light of the information set out above, I consider that the public interest is in favour of withholding the information falling under these exemptions.

Section 41 – Information provided in confidence

We have published a number of documents, including our preliminary findings and final decision. We have excised information from those documents that is exempt from disclosure under section 41 of the FOI Act. There is also information in other documents we have not published that is exempt from disclosure under section 41 FOI Act.

Under section 41 of the FOI Act, information is exempt if it was obtained by NHS Improvement from any other person and disclosure of the information to the public would constitute a breach of confidence actionable by that other person.

The information requested includes confidential information about bids submitted by tenderers and the scoring of those bids and information that is not otherwise in the public domain. The information was provided in circumstances giving rise to an obligation of confidence and disclosing the information to the public without consent would amount to an unauthorised use of the information to the detriment of the bidders concerned.

Section 41 is an absolute exemption and does not require the application of the public interest test under section 2(2) of the FOI Act. However, when determining whether an action for breach of confidence would be likely to succeed it is necessary to consider whether the public interest in favour of disclosure outweighs the interest in withholding the information. In the present circumstances, NHS Improvement does not consider that there is

a strong public interest in disregarding the duty of confidence owed to the bidders and CCGs.

Review rights

If you consider that your request for information has not been properly handled or if you are otherwise dissatisfied with the outcome of your request, you can try to resolve this informally with the person who dealt with your request. If you remain dissatisfied, you may seek an internal review within NHS Improvement of the issue or the decision. A senior member of NHS Improvement's staff, who has not previously been involved with your request, will undertake that review.

If you are dissatisfied with the outcome of any internal review conducted by NHS Improvement, you may complain to the Information Commissioner for a decision on whether your request for information has been dealt with in accordance with the FOI Act.

A request for an internal review should be submitted in writing to FOI Request Reviews, NHS Improvement, Wellington House, 133-155 Waterloo Road, London SE1 8UG or by email to nhsi.foi@nhs.net.

Publication

Please note that this letter will shortly be published on our website. This is because information disclosed in accordance with the FOI Act is disclosed to the public at large. We will, of course, remove your personal information (e.g. your name and contact details) from the version of the letter published on our website to protect your personal information from general disclosure.

Yours sincerely,

Timothy Geer

Senior Inquiries Lead

Direct line: 020 3747 0793

Annex A

Dear Sir or Madam

Your website has the following dated 26 May 2016.

Ensuring continuity of elective care services for patients in North East London

Published on:

26 May 2016

We've agreed with the decision of commissioners in North East London to extend the contract of elective care services at a local treatment centre.

Barking and Dagenham, Redbridge, Havering, and Waltham Forest Clinical Commissioning Groups (CCGs) have told us *that they will not proceed with the award of a contract to operate the North East London NHS Treatment Centre to Barking, Havering and Redbridge University NHS Trust. ENDs*

Under the Freedom of Information act I request all the documents listed in the timetable below, whether draft or final regarding the bid by the NHS to run the treatment centre.

Publish statement of issues enabling interested parties to respond	*21 August 2015*
Responses received to statement of issues	*11 September 2015*
Meetings with the CCGs, information gathering and review and analysis of the evidence	*August to November 2015*
Inviting submissions from parties on preliminary findings	*December 2015 to February 2016*
Information gathering and review and analysis of the evidence (if necessary)	*February 2016*
Publish conclusions of the investigation / Final decision	*March/April 2016 (estimated)*

Annex B

Information	Decision on disclosure	Applicable exemptions	Additional information
Documents relating to meetings with CCGs including agendas and meeting notes	Withhold	31, 41, 43	
Documents relevant to information gathering including requests for information to CCGs and responses to those requests	Withhold	31, 41, 43	
Documents relevant to analysis of evidence including internal documents and correspondence relating to the investigation	Withhold	31, 41, 43	
Letters dated 8 January and 10 February 2016 to investigation parties containing preliminary findings	Partial disclosure	31, 41, 43	
Decision to accept undertakings	Withhold	21	This is available on our website via the following link: click here

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

[✂]

Monitor

Making the health sector work for patients

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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 Regulations[2] and the National Tariff Payment System[3] (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

[✂]
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/uksi/2013/500/pdfs/uksi_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 Regulations[4] 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.

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[4] The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. Available from: www.legislation.gov.uk/uksi/2013/500/pdfs/uksi_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)
    - [✂]
    - [✂]
    - [✂].

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. [✂] 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 [✂] 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	[✂] 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%	[✂]	[✂]	[✂]
G) Information management and technology	20%	[✂]	[✂]	[✂]
H) Workforce	20%	[✂]	[✂]	[✂]
I) Transfer of undertaking and protection employment	10%	[✂]	[✂]	[✂]
J) Property, facilities management and equipment	10%	[✂]	[✂]	[✂]
K) Applicant's declaration	Pass/fail	-	-	-
	Total score	[✂]	[✂]	[✂]

Invitation to tender (ITT)

28. On 12 March 2015 the CCGs started the ITT stage by providing the Trust, Care UK and [✂] 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. [✂].

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. [✂] 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. [✂]

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 services[7]
- 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%	[✂]	[✂]
Quality Criteria (50% of overall score)			
C) Service delivery[✂]	10.00%	[✂]	[✂]
D) Clinical governance, performance & quality[✂]	7.00%	[✂]	[✂]
E) Workforce[✂]	5.00%	[✂]	[✂]
F) Patient focus[✂]	5.00%	[✂]	[✂]
G) Information management & technology[✂]	5.00%	[✂]	[✂]
H) Information governance[✂]	4.00%	[✂]	[✂]
I) Transfer of undertaking and protection of employment [✂]	4.00%	[✂]	[✂]
J) Property, facilities management and equipment[✂]	4.00%	[✂]	[✂]
K) Contract management and performance[✂]	6.00%	[✂]	[✂]
	Quality criteria subtotal	[✂]	[✂]
	Total score	[✂]	[✂]

[✂]

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 Rules[8], 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 Rules[11].

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[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.

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[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 the14/15 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. [✂]

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. [✂]

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**.

This document sets out our preliminary findings, as at 8 January 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.

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8/1/2016

[✂]

By email

[✂]

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 from 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 Regulations*[2] and the *National Tariff Payment System*[3] (the National Tariff).

The purpose of this letter is to seek your feedback on our views, our reasoning and the evidence we have cited on what we see as the key issues, in particular those where it appears to us that the CCGs have breached the Procurement, Patient Choice and Competition Regulations and the National Tariff rules. These issues are:

- the CCGs' process for selecting providers and the information that was taken into account as part of that process to identify the best option for the delivery of elective care services at the North East London Treatment Centre
- transparency:
    - as to how the CCGs reached their conclusions
    - as to the criteria against which the bids would be judged.

Our views on these issues, and our reasoning, are provided in the annex to this letter. The CCGs, Care UK and Barking, Havering and Redbridge University Hospitals NHS Trust received a version of this letter and the annex. These documents are confidential and we expect that you will not share them or discuss the content of these documents with third parties, other then your legal advisers.

Please provide any comments on our assessment, reasoning and the evidence used together with any additional evidence you believe may affect our analysis on these issues. If you wish to make a submission addressing the issues raised, we request that you provide us with that written response by **Monday 25 January 2016 at noon**. Please let us know in writing if you believe a response by this date is not achievable, together with the reasons for this. We will carefully consider all submissions and evidence that we receive in response.

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[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 21 December 2015]

[2] The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. Available from: www.legislation.gov.uk/uksi/2013/500/pdfs/uksi_20130500_en.pdf. [Accessed 7 January 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 7 January 2016]

Remedies

If we reach a decision that the CCGs have breached the Regulations, we have a range of enforcement actions potentially available, including:

- the power to declare that an arrangement for the provision of healthcare services for the NHS is ineffective
- the power to direct commissioners to take action to prevent, mitigate or remedy breaches of the Regulations.

In the event that we find breaches of the National Tariff rules, we have the power to direct commissioners to take steps to secure that the failure does not continue to recur or to restore the position to what it would have been if they had complied with the rules.

In deciding what action is most appropriate we would have regard to the circumstances of the case, the seriousness of the breach, matters relating to compliance (and deterrence of non-compliance), mitigation of the effect of the breach, and proportionality. These factors, and the different enforcement action options, are further explained in section 3.4 of our *Enforcement Guidance on the Procurement, Patient Choice and Competition Regulations*[4] and our guidance on *Enforcement of the National Tariff.*[5]

We are open to any representations you may wish to make in relation to remedies at this stage and, in any event, would consult before reaching a final decision. We have not ruled out any remedial options at this stage.

Summary of next steps and timing

- Submission on substance and facts: **25 January 2016 at noon**
- We will update the indicative timetable in **January 2016**.

Yours sincerely

[✂]

Competition Inquiries Director

[4] Enforcement guidance on the Procurement, Patient Choice and Competition Regulations. Available from: www.gov.uk/government/uploads/system/uploads/attachment_data/file/283508/EnforcementGuidanceDec13.pdf. [Accessed 7 January 2016]

[5] Enforcement of the National Tariff. Available from: www.gov.uk/government/publications/nhs-national-tariff-enforcement-guidance. [Accessed 7 January 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 Regulations[6] and the National Tariff rules in relation to local variations.[7]

3. This document sets out our preliminary views on the issues where, based on the evidence received to date, it appears to us that the CCGs have breached the Procurement, Patient Choice and Competition Regulations and the National Tariff rules. These are:

   - the CCGs' process for selecting a provider and the information that was taken into account as part of that process to identify the best option for the provision of elective care services at the North East London Treatment Centre
   - transparency:
     - as to how the CCGs reached their conclusions
     - as to the factors that would be taken into account when evaluating the bids.

   Our analysis of these issues is set out below in sections 4 and 5 respectively.

4. We have not yet reached a view on the other issues that form part of this investigation (summarised in section 3). However, in relation to these other issues that are not addressed in this document, at this stage it appears to us that there has not been a breach of the Procurement, Patient Choice and Competition Regulations or the National Tariff rules.

5. 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.

[6] The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. Available from: www.legislation.gov.uk/uksi/2013/500/pdfs/uksi_20130500_en.pdf [Accessed 21 December 2015]
[7] 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 21 December 2015]

6. In order to assist us in our analysis we augmented out internal expertise by obtaining input from individuals with practical commissioning experience.

7. The remainder of this annex is structured as follows:

- Section 2 sets out the context, the events leading to the procurement process, a description of the procurement process and the complaint from Care UK
- Section 3 describes Care UK's complaint
- Section 4 addresses the CCGs' process for selecting providers and the information that was taken into account as part of that process, including the legal framework, factual context and our assessment
- Section 5 addresses transparency, including the legal framework, factual context and our assessment
- Section 6 sets out our proposed next steps
- Appendix 1 provides a timeline of events.

2. Context

8. 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

9. 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 tender, 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 tender 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.

10. 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 Ltd, 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.

11. The key dates 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 set out in Appendix 1 and described in more detail below.

Description of events

Development of the commissioning strategy

12. 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.

13. 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. As a result, the CCGs sought 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.

14. 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.

15. 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.

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

Pre-procurement engagement events

17. 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.

18. The pre-procurement events did not form part of the formal procurement process. The findings of the market engagement events were published on the e-tendering website 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)

19. 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.

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

21. 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.

22. 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.

23. 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)
- [✂]
- [✂]
- [✂].

The Trust's response to the PQQ

24. [✂]

25. [✂]

26. [✂]

27. [✂]

References provided by the Trust

28. [✂]

29. [✂]

30. [✂]

31. [✂]

PQQ evaluation

32. 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 between 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.

33. [✂] were unsuccessful at phase one of the PQQ (pass/fail) as they did not pass all of the relevant questions.

34. The Trust, Care UK and [✂] 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	[✂]
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%	[✂]	[✂]	[✂]
G) Information management and technology	20%	[✂]	[✂]	[✂]
H) Workforce	20%	[✂]	[✂]	[✂]
I) Transfer of undertaking and protection employment	10%	[✂]	[✂]	[✂]
J) Property, facilities management and equipment	10%	[✂]	[✂]	[✂]
K) Applicant's declaration	Pass/fail	-	-	-
	Total score	[✂]	[✂]	[✂]

Invitation to tender (ITT)

35. On 12 March 2015 the CCGs started the ITT stage by providing the Trust, Care UK and [✂] with the relevant ITT documentation. The providers were invited to provide their ITT bids by 4 May 2015.

36. The CCGs' ITT questionnaire consisted of 49 questions in 11 sections, including service delivery, clinical governance, performance and quality, and information governance. The questions asked bidders to share their proposals in relation to the future delivery of the service.

37. 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. [✂]

38. 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.

39. 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.

40. The CCGs received bids from the Trust and Care UK. [✂] did not submit a bid.

ITT Evaluation

41. 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 CCG, 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.

42. 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).

43. 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. [✂]

44. 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 services[8]
- proposed innovations and their impact
- delivery, capacity and productivity measures
- key risks and mitigations.

45. 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.

46. 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

[8] 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.

during the moderation process in light of the clarification provided through the presentations.

47. 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).

48. 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.

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

[✂]

49. 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

50. 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's complaint covered a number of aspects of the CCGs' procurement process. With regard to the issues addressed in this document:

- Care UK submitted that the CCGs had applied an irrational approach to the assessment criteria and the scoring of bids for the procurement, not making due allowance for bidders' performance records (clinical outcomes, patient experience and access times). Care UK submitted that the CCGs in their evaluation did not appear to have taken into account that the Trust had been placed into special measures by the CQC in December 2013. Care UK submitted that it was concerned that, in order to arrive at the scores allocated to the bids for the Trust and Care UK, the CCGs had accepted at face value assurances from the Trust about future improvements to the quality of care.

- Care UK submitted that the CCGs had failed to follow the principles and process set out in the National Tariff for agreeing a local variation in tariff price.

- Care UK submitted that failure to provide adequate information about the application of the evaluation criteria and scoring of the bids amounted to a failure to be transparent.

51. Our analysis on these issues is set out in the following two sections: section 4 addresses the CCGs' process for selecting a provider (in the context of both the Procurement, Patient Choice and Competition Regulations and the National Tariff rules relating to local variations) and section 5 addresses transparency.

52. Issues that form part of our investigation but which are not addressed in this document include:

- whether the criteria, and the relative weights assigned to them, used to evaluate bids in the procurement process enabled commissioners to procure services from the provider or providers that would best meet patients' needs, improve the quality and efficiency of services and provide best value for money

- whether the CCGs' approach to scoring bids was consistent with their obligations to act in a proportionate way and to treat providers equally

- whether the CCGs' approach to commissioning the elective care services to be provided at the North East London Treatment Centre was appropriate given the nature of the services, which are mainly services for which patients have a right to choose a provider, and in circumstances where the contract to provide elective care services was associated with a lease to provide services at the treatment centre which is owned by NHS Property Services Ltd

- whether the CCGs' approach to commissioning elective care services to be provided at the North East London Treatment Centre was discriminatory because they have not run a comparable procurement process for NHS services provided by other organisations.

4. Provider selection and payment approach

53. In this section we assess the way in which the CCGs designed and carried out their procurement exercise. We assess whether the CCGs' procurement process enabled them to identify and select the best option for the provision of elective care services at the North East London Treatment Centre. This was important for the CCGs in order to be satisfied that they were buying services from the provider or providers that were most capable of delivering the CCGs' objective of securing the needs of patients and improving the quality and efficiency of

services, and provided best value for money in doing so. We also assess whether the local payment approach proposed by the CCGs was in the best interests of patients. This is relevant to Regulation 3(3) of the Procurement, Patient Choice and Competition Regulations (read in conjunction with Regulation 2) and the National Tariff rules relating to local variations.

54. This section begins with a description of the relevant legal framework and then sets out the relevant parts of Care UK's complaint and the CCGs' submissions. We then set out our analysis and preliminary views on this issue and particularly focus on whether the CCGs have done enough to ensure that the bidder they selected to provide the elective care services at the North East London Treatment Centre would deliver the best result for patients and value for money. This analysis includes whether the CCGs took into account those aspects of the Trust's clinical challenges that were relevant to elective services and therefore the Trust's ability to deliver on its bid. These questions are analysed in the context of the Procurement, Patient Choice and Competition Regulations and the National Tariff rules relating to local variations.

55. The background facts underpinning our assessment of this issue are set out above from paragraphs 19 to 48.

Legal context

56. In order to commission healthcare services which work for patients CCGs must follow the relevant legal framework. Of particular relevance to this investigation, the CCGs must comply with:

- the *National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013)*
- the National Tariff rules
- the *Public Contracts Regulations 2006*[9] (these are not enforced by us).

Regulations to ensure good commissioning

57. The Procurement, Patient Choice and Competition Regulations are designed to ensure that commissioners secure high-quality, efficient NHS healthcare services that meet the needs of people who use those services. In particular:

- 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 improving the quality and efficiency of the services, including through the services being

[9] In April 2016 the *Public Contracts Regulations 2006* are being replaced by the *Public Contracts Regulations 2015* (which implement the EU Public Contracts Directive 2014/24/EU) in respect of healthcare services

provided in an integrated way (including with other health care services, health-related services or social care services).

- 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(2)(b) 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
  - 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.

58. These requirements follow a principle-based approach, and our assessment of compliance is necessarily fact-specific. We have published Substantive Guidance[10] on the application of these rules,

Agreeing prices in accordance with the National Tariff and rules on local variation

59. Under section 115 of the *Health and Social Care Act 2012* (the 2012 Act), the price payable for the provision of NHS healthcare services must be in accordance with the National Tariff. Under sections 116 to 118 and Chapter 3 of Part 3 of the 2012 Act, we are responsible for publishing the National Tariff (as agreed with NHS England) and for enforcement where licensed providers and commissioners fail to comply with its provisions. Section 116 of the 2012 Act provides that the National Tariff must specify national prices for certain healthcare 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 healthcare service.

60. The *2014/15 National Tariff Payment System* (the 14/15 Tariff) sets out national prices for a range of services, including the services subject to this complaint. It provides the rules under which commissioners and providers can agree a local variation from a national price; these are set out in Subsection 7.2 of the 14/15 Tariff.

61. 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

[10]Substantive guidance on the Procurement, Patient Choice and Competition Regulations. Available from: http://www.gov.uk/government/uploads/system/uploads/attachment_data/file/283505/SubstantiveGuidanceDec2013_0.pdf [Accessed 21 December 2015]

innovative clinical treatments, deliver integrated care pathways or deliver care in new settings, and need to change the payment approach to support these changes. The 14/15 Tariff also says 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.

62. Subsection 7.2.2 of the 14/15 Tariff specifies the rules under which a commissioner and provider may agree a local variation. In particular, they provide that for a local variation to be compliant with the 14/15 Tariff, commissioners and providers must apply the principles for local variations, modifications and prices set out in Subsection 7.1. The relevant principles are:

- Local payment approaches must be in the best interests of patients;
- Local payment approaches must promote transparency to improve accountability and encourage the sharing of best practice; and
- Providers and commissioners must engage constructively with each other when trying to agree local payment approaches.

63. The first of these principles is relevant to this investigation. Subsection 7.1.1 explains this principle in more detail: it provides that local variations should support a mix of services and delivery models that are in the best interests of patients today and in the future. It states that, in agreeing a locally determined price, commissioners and providers should consider:

- Quality – will the agreement maintain or improve the outcomes, patient experience and safety of healthcare today and in the future?
- Cost effectiveness – will the agreement make healthcare more cost effective, without reducing quality, to enable the most effective use of scarce resources for patients today and in the future?
- Innovation – will the agreement allocate the risks associated with unit costs, patient volumes and quality in a way that protects the best interests of patients today and in the future?
- Allocation of risk – will the agreement allocate the risks associated with unit costs, patient volumes and quality in a way that protects the best interests of patients today and the future?

Commissioning in accordance with public procurement law

64. The EU Public Contracts Directive 2004/18/EC, implemented into UK law by the *Public Contracts Regulations 2006*, applies to the award of contracts for

healthcare services before April 2016.[11] These rules distinguish between Part A and Part B services:

- Part A services are subject to a procurement regime which mandates particular timescales and procedures that must be followed (for example, the open, restricted, competitive dialogue or negotiated procedures).
- Part B, which includes health and social care services, is much less prescribed and does not set out a particular procedure.

65. A relatively flexible regime therefore applies to a procurement relating to the award of a contract for healthcare services, such as the contract that is the subject of the present investigation.

66. Although these are Part B services (and therefore not subject to the prescriptive rule set out in Part A), commissioners are still required by the *Public Contracts Regulations 2006*[12] to act in accordance with the overarching principles of transparency, proportionality, equality of treatment and non-discrimination.

67. The *Public Contracts Regulations 2006* are being replaced by the *Public Contracts Regulations 2015* (which implement the EU Public Contracts Directive 2014/24/EU). Amongst other changes, the distinction between Part A and Part B services has been removed and a new light-touch regime introduced for social and health and some other services.[13]

68. We do not enforce compliance with public procurement law. However, it is relevant to this procurement and, as set out in paragraphs 76 and 77, the CCGs have raised public procurement law in the context of explaining the procurement process that they designed and why they acted in the way they did.

The key questions applying the relevant legal framework

69. Applying the relevant legal framework, our analysis focuses on the following issues:

    - Did the CCGs do enough to ensure that they selected the best option for the provision of elective care services at the North East London Treatment Centre? This was important for the CCGs in order to be satisfied that they were buying services from the provider or providers that were most capable of delivering the CCGs' objective of securing the needs of patients and

[11] The Public Contracts Regulations 2006. Available from: www.legislation.gov.uk/uksi/2006/5/contents/made. [Accessed 21 December 2015]
[12] Regulation 4(3) of the Public Contracts Regulations 2006. Available from: www.legislation.gov.uk/uksi/2006/5/contents/made. [Accessed 21 December 2015]
[13] See further A Brief Guide to the EU Public Contracts Directive (2014). Available from: www.gov.uk/government/uploads/system/uploads/attachment_data/file/472985/A_Brief_Guide_to_the_EU_Public_Contract_Directive_2014_-_Oct_2015__1_.pdf [Accessed 21 December 2015]

improving the quality and efficiency of services, and provided best value for money in doing so (and thereby comply with Regulation 3(3)).

- Did the CCGs apply the principle that local payment approaches must be in the best interests of patients when agreeing a local variation (and thereby comply with Subsection 7.1 of the 14/15 Tariff)?

70. Key to these questions is whether the CCGs designed a process which ensured that relevant information was taken into account. This was important to enable the CCGs to objectively evaluate the ability of the different providers to deliver on their bids and give the CCGs confidence that selecting a particular provider was the best way to get good outcomes for patients, and to ensure that the local payment approach was in the best interests of patients.

Care UK's submissions

71. Care UK submitted that the CCGs' evaluation methodology and scoring of bids for the procurement was unlawful, as it did not comply with the CCGs' obligations under the Procurement, Patient Choice and Competition Regulations.[14] Care UK submitted that the CCGs failed to properly evaluate the clinical quality of services being offered by failing to identify appropriate and compliant evaluation criteria for 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 Care UK said was known to be so by the CCGs).

72. Care UK said that it was concerned to understand whether the Trust's bid was clear about the Trust's governance and procedural failings and its failure to achieve national waiting time standards, as well as misreporting against those targets. Care UK said that it wanted to understand how this information was taken into account by the CCGs' scoring of the Trust's bid.

73. Care UK said that, when evaluating proposals, the CCGs did not appear to have taken into account the external and objective evidence from regulatory findings concerning clinical quality and safety of direct relevance to the service being procured. Care UK submitted that the CCGs had ignored external regulatory findings, such as the fact that the Trust was placed into special measures by the CQC in December 2013.

74. Care UK submitted that it was concerned that in order to arrive at the scores allocated to the bids for the trust and Care UK, the CCGs had accepted, at face value, assurances from the Trust about future improvements to the quality of care. Care UK said that the Trust's assertion that it could achieve these

[14] The National Health Service (Procurement, Patient Choice and Competition) (No. 2) Regulations 2013. Available from: www.legislation.gov.uk/uksi/2013/500/pdfs/uksi_20130500_en.pdf [Accessed 21 December 2015]

improvements lacked credibility in view of its poor record over a significant period of time, and the serious nature of the views expressed about quality and performance of the Trust in the CCGs' own Board papers.

The CCGs' submissions on provider selection and payment approach

75. The CCGs told us that they believed they had developed a commissioning strategy and a procurement process that was consistent with the Procurement, Patient Choice and Competition Regulations. They told us that they believed they had acted with a view to securing the needs of patients and procuring services from a provider most capable of delivering on that objective. The CCGs told us that, as part of meeting their commissioning objectives of securing the needs of patients, the procurement had been designed to address the particular needs of the local health economy and most effectively to utilise a facility.

Ability to take into account information

76. The CCGs told us that they had designed the tender in a way that would comply with public procurement rules. The CCGs told us that, in doing so, they had to ensure that the process for gathering information, and criteria in particular, should only draw in for consideration relevant information and that evaluators should not consider any information which was not before them as part of this exercise.

77. The CCGs told us that to have included selection criteria designed specifically to focus on the Trust's CQC issues, which in its view were generally not relevant to the services being tendered, would have amounted to inclusion of irrelevant criteria. The CCGs also told us that to have taken into account information about bidders (such as information contained in the 2013 CQC report), which had not been asked for, would also have been a breach of public procurement law as this would have amounted to the use of undisclosed selection criteria.

Consideration of the 2013 CQC report

78. The CCGs explained that, in their view, the issues relating to the successful bidder's CQC report, and its special measures position, focused largely on non-elective and emergency care and did not relate to planned care. [✂].

79. The CCGs said that the issues relating to the Trust's CQC report and special measures focused largely on non-elective and emergency care and that they did not believe they were directly relevant to this procurement process which related to elective services. The CCGs told us that issues raised in the 2013 CQC report, and which were referred to in the Trust's PQQ response, had been considered at the PQQ stage to the extent they were considered relevant but that the Trust had passed this stage and progressed to ITT.

80. The CCGs told us that, separately, they had carried out work to address the issues raised in the CQC report but not as part of the procurement process as it

was not considered sufficiently relevant. They said they would not cross-contaminate a procurement of elective care services with non-elective issues.

81. The CCGs' PQQ question F.4 asked for information regarding regulatory reports, including CQC reports. This was a pass/fail question which asked bidders to provide details of any reports, complaints, alerts and 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. The CCGs told us that they considered the 2013 CQC report in relation to this criterion and took it into account to the extent that it would impact on the ability to deliver the elective services being procured. The CCGs concluded that the CQC report and the Trust's response, which set out a number of steps taken to address the issues raised in the report, did not require the bidder to be disqualified from the procurement of this particular service.

82. With regard to the 2013 CQC report, the CCGs said that the CQC had reported that many of the services were safe but required some improvements to maintain their safety. The CCGs said three services were rated as inadequate following the initial inspection in 2013 and the specific improvement actions recommended by the CQC related to resolving problems in the A&E departments of King George Hospital and Queens Hospital to deliver safe care. The CCGs said the CQC also recommended that the Trust address its discharge planning and patient flow problems which required improved working with local partners. Urgent and emergency care was outside the scope of this procurement and, the CCGs contend, not relevant to the delivery of elective care services provided from the North East London Treatment Centre.

83. The CCGs also said that a re-inspection by the CQC in 2015[15] noted that significant improvement had been made and no services were rated inadequate in the domains of safety[16], effectiveness, caring or well led. The CCGs said an inadequate rating remained for the domain responsiveness, again noting the challenges in A&E and patient flow. The CCGs said that arrangements in children and young persons' services were rated inadequate for responsiveness with concerns regarding neonatal care and environmental design.

Referral to treatment

84. The CCGs told us that the Trust had applied controls to minimise cancelled operations but was not reporting against the 18-week referral to treatment (RTT) targets as a result of introducing a new IT system and issues with capacity and

[15] The CQC re-inspected the Trust in March 2015 and published their report on 2 July 2015. They noted significant improvements however overall the Trust was rated requires improvement with the recommendation that it should remain in special measures. Outpatient and diagnostic imaging services at King George Hospital were rated inadequate, while surgery and services for children and young people at both sites were rated as require improvement.

[16] We note that outpatient and diagnostic imaging at King George Hospital and urgent and emergency services at Queen's Hospital were rated inadequate in the domain of safety.

demand. Improving RTT was being managed as a separate improvement plan with the Trust.

Local payment approaches in the best interests of patients

85. The CCGs said that they were confident that the proposed use of a locally agreed price was consistent with the rules for establishing a local variation from the National Tariff and they were satisfied that quality would be maintained and improved.

86. In explaining why they believed the local payment approach was in the best interest of patients, the CCGs said in relation to quality that they were moving away from tariff to a local price that reflected what they considered to be the limited range of activity and simpler than average services that the North East London Treatment Centre would be delivering. The CCGs said that in doing this they were ensuring that the right price would be paid for the right service and therefore improving cost-effectiveness whilst maintaining the outcomes, patient experience and safety of healthcare. The CCGs also said that the revised service specification provided a number of benefits to patients that could be delivered within the locally agreed price, including new services, borough based outpatient services (which they said will be established where there is a demand) and proposed new 'one stop shop' models to streamline the patient pathways.

87. The CCGs said the procurement process tested the bidders' capabilities of delivering a quality service and that further assurance was provided through the presentation stage where bidders were asked to describe how their proposed service innovations would deliver the service specification.

Our analysis

88. In this section we set out our analysis of the way in which the CCGs designed and carried out their procurement process. First we address the ability of commissioners to take into account information relevant to bidders' capabilities to deliver on the proposals contained in their bids. We then analyse whether the Trust's clinical challenges (including some of the issues raised in the 2013 CQC report and aspects of the Trust's improvement plan) were relevant to the Trust's delivery of elective care services and therefore the Trust's ability to deliver on its bid. We then assess whether, by not taking bidders' existing circumstances—to the extent that they may have impacted on the bidders' abilities to deliver on their bids—into account, the CCGs were unable to commission in accordance with the requirements of Regulation 3(3) of the Procurement, Patient Choice and Competition Regulations and breached the National Tariff rules.

Information relevant to delivery of bids

89. Under general public procurement law, having assessed, at the PQQ stage, bidders' potential competence to perform the contract based on whether bidders meet a minimum set of conditions (including with regard to their ability and past

performance), it is usually not permissible for the evaluation criteria, at the ITT stage, to reassess this. The quality of the bids must be assessed on the basis of the bids themselves and not on that of the experience acquired by the bidders with the contracting authority in connection with previous contracts. Nevertheless, commissioners can and should be able to verify that the contents of bids are deliverable. A good procurement process will enable the commissioner to have confidence that what is in the bids is deliverable and the existing circumstances of the bidders are relevant to this.

90. In our view, the CCGs should have designed a process that solicited information to enable them to be confident that the bidders could deliver on the proposals contained in their bids. In the context of assessing the deliverability of bids it is permissible for CCGs to request and take into account information about the circumstances of bidders to the extent this is relevant to the services in question and the CCGs' evaluation criteria.

Relevance of information stemming from CQC report

Services falling within the scope of this procurement

91. The CCGs' service specification lists the services falling within the scope of the procurement. These are the management of specified outpatient activity and procedures, required diagnostics / investigations, specified surgical procedures, all associated pre and post-operative care, and inpatient services as required. Where we use the term 'elective care services' in this document, we are referring to the activities that fall within the scope of the North East London Treatment Centre service specification (as set out above).

The 2013 CQC report

92. We reviewed the 2013 CQC report and the Trust's improvement plan, both referred to by the Trust in its PQQ response, as well as certain related Governing Body/Board papers of the CCGs and the Trust. We reviewed the documents for issues relevant to the Trust's delivery of elective care services and therefore to the North East London Treatment Centre procurement and the Trust's ability to deliver on its bid.

93. For the reasons set out in more detail below, in our view the following are relevant issues that are raised in these documents:

- Trust wide governance and leadership issues which have implications for patient safety and quality of care across all services
- Issues directly related to elective care services namely issues with outpatient care
- Issues likely to be relevant to elective care services namely radiology quality concerns

- Issues likely to be relevant to elective surgery including poor infection control and hygiene in theatres
- Issues which may impact on elective care services including bed shortages and patient flow issues
- Issues related to Referral to Treatment (RTT) standards which are important to the delivery of elective care services
- The Trust's delivery against its improvement plan.

94. Our views on issues raised in the 2013 report and their relevance to the procurement process are not a statement of the Trust's current performance or capabilities and we note that the report findings are not necessarily still current.

Trust wide issues which by nature affect all clinical services

95. The 2013 CQC report included a number of findings which in our view indicated that these were organisational wide issues, thereby having implications for patient safety and quality of care across all services. These include a lack of engagement and support from all senior clinical staff regarding addressing challenges, more visible and greater focus being needed at Board level to resolve longstanding and significant patient safety issues, more work needing to be done to improve understanding of risk, unclear processes for ensuring NICE guidelines were implemented, the Clinical Audit Committee struggling with Directorate engagement and therefore itself being reviewed and poor results on national staff surveys. The CQC report also said that the Trust must improve on its sharing of information to monitor performance and quality of care. We note from the report that the CQC was not assured that the Trust's quality monitoring systems within the surgical departments were accurate or effective.

Issues directly relevant to elective care services

96. The 2013 CQC report identified issues within the Trust's planned care services. The CQC report said that more work was needed to make outpatient services safe and effective. Administration in the outpatients department at King George Hospital was found to be very poor which impacted adversely on patient care. Management of the appointment times in some of the outpatient clinics was one of the areas the CQC reported the Trust must improve on. The CQC report said that patients attending outpatient clinics were not always seeing their named doctor due to clinics being cancelled when the consultant did not arrive due to other planned activities or when leave was required at short notice; outpatient appointment times sometimes being reduced due to clinics being delayed or over booked and appointment delays of between 50 and 90 minutes, with some of these delays being due to consultants carrying out scheduled ward rounds or other duties at the same time. Other outpatient issues identified in the CQC report included cancelled appointments, missing notes and patients receiving multiple appointment letters or receiving none. The CQC report said that

complaints about the appointment process were discussed at the Trust's July 2013 Board meeting and that some patients only had three days' notice that their appointment had been cancelled. The CQC report said that while the Trust had been aware of the problems and had started to take action, progress was slow.

97. We note from CCG Governing Body papers from January 2015 that the CCGs were taking formal contractual action in relation to the cancellation of outpatient appointments at the Trust. These actions were aimed at driving improvement in the quality of outpatient services. The CCGs reported in a Board paper that whilst further improvement was still required to enhance patient experience, some improvement had been delivered.[17] They reported that there was still a significant amount of work to do to see the improvements they required.

Issues likely to be relevant to elective care services

98. We note from the same Board paper that the CCGs had issued a contract query notice related to radiology quality concerns at the Trust which in our view is also likely to be relevant to elective care services. The CCGs reported that the Trust was required to develop an improvement plan that detailed how the services were going to improve and what actions were required to achieve this. In the board paper the CCGs said that to date progress had been slow and as a result there had been further internal escalation of the concerns.

Issues likely to be relevant to elective surgery

99. The 2013 CQC report also included findings likely to be relevant to elective surgery. The report said the hospitals must improve on the care provided in the surgical care services. We note that while Queen's Hospital provides predominantly acute surgical procedures, King George Hospital undertakes more elective procedures. The CQC report said that people at the Trust were put at risk of infection in theatres due to inadequate cleaning and poor practices by staff. The inspectors observed some poor practices at theatres in King George Hospital including staff not washing hands and not using stickers to show when equipment has been cleaned (as per Trust policy) and some equipment was quite dusty. They also observed poor infection control practices during a surgical procedure. The CQC report also referred to problems with the environment in the theatres at King George Hospital. The CQC found that corridors were cluttered with trollies and equipment due to a lack of available storage space.

Issues which may impact on elective care services

100. In addition, the 2013 CQC report identified bed shortages, patient flow issues, and poor capacity planning which in our view may impact on elective care

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[17] NHS Barking and Dagenham Clinical Commissioning Group Governing Body meeting, p195. Available from: www.barkingdagenhamccg.nhs.uk/ONELBarking/Downloads/news-and-publications/Governing-body-papers/27%20January%202015/BD%20CCG%20Governing%20Body%2027%20Jan%202015%20Combined.pdf. [Accessed 21 December 2015]

services. They report said delayed discharges and high occupancy rates meant the services could not be as responsive as required and this put unnecessary pressure on departments and increased the risk of poor outcomes for patients. The inspectors found that some day-case patients had their surgery cancelled two or three times. The CQC report noted that at the time of their inspection the day case ward at King George Hospital was being used as an over-flow area for when other surgical wards were full. The CQC observed that patients were also being nursed in the theatre recovery area and discharged home from there and reported that staff told them this was commonplace due to a shortage of beds elsewhere in the trust.

Referral to treatment (RTT) issues

101. In our view, a provider's ability to perform against and report on performance against RTT standards is important to the delivery of elective care services. In recently published guidance NHS England said: "The accurate recording and reporting of RTT waiting times information is extremely important. Patients can and do use this information to inform their choice of where to be referred and also to understand how long they might expect to wait before starting their treatment. NHS providers and commissioners also need to use this information to ensure they are meeting their patients' legal right to start consultant-led non-emergency treatment within a maximum of 18 weeks from referral – and to identify where action is needed to reduce inappropriately long waiting times."[18]

102. It is documented in Trust Board papers and CCG Governing Body papers that implementation of a new Patient Administration System in December 2013 revealed that internal errors and capacity issues had affected the Trust's RTT performance. RTT reporting was suspended in January 2013 until the issues were resolved. We note from a recent Trust Board paper that in April 2014 the Trust identified that it had been using an incorrect methodology to manage waiting lists which significantly overstated its compliance with RTT standards. The Trust said that, for example, applying the correct methodology resulted in admitted performance of 65%, not 89% as originally thought. They said that this information was reported to the Board in August 2014.[19]

103. We note from CCG Governing Body papers from January 2015 that the Trust's RTT reporting remained suspended with the full cost of the RTT backlog reduction at the Trust being reviewed and calculated. The CCGs said that NHS England had agreed additional funding of £4.2m in relation to the RTT waiting list reduction activity and that the CCGs were in discussion with NHS England with a view to increasing the level of funding available. Commissioners meet with the

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[18] NHS England (2015), Recording and reporting referral to treatment (RTT) waiting times for consultant-led elective care, p 6. Available from: www.england.nhs.uk/statistics/wp-content/uploads/sites/2/2013/04/Recording-and-reporting-RTT-guidance-v24-2-PDF-703K.pdf.[Accessed 21 December 2015]

[19] Barking, Havering and Redbridge University Hospitals NHS Trust Board Meeting, Wednesday 7th October 2015, p 109 Available from: www.bhrhospitals.nhs.uk/Boardpapers131015.pdf.[Accessed 21 December 2015]

Trust on a weekly basis to review progress, which is also reviewed monthly in the Oversight and Escalation Group meeting with NHS England and the TDA. The CCGs report that penalties for 52 week waits are classed as serious incidents and that Trust data submitted in November 2014 indicated 2,202 such cases (this was subject to further validation).[20]

The Trust's improvement plan

104. We note from Trust Board papers that its improvement plan included five work streams: leadership and organisational development; outpatients; patient care and clinical governance; patient flow; and workforce. In February 2015 the Trust Board papers reported on progress against the plan as at December 2014.[21] Overall delivery remained behind plan. The Trust rated their progress against the outpatients, patient care and clinical governance and patient flow work streams as amber-red. Workforce was rated red-red and leadership and organisational development were rated green-amber.

Assessment of relevance of information stemming from CQC report

105. Our view is therefore that aspects of the Trust's improvement plan and some of the issues identified by the 2013 inspection are relevant to the Trust's delivery of elective care services and therefore the contract being tendered and the Trust's ability to deliver on its bid. The CQC's 2013 inspection findings include both trust wide governance and leadership issues which have implications for patient safety across all services (including therefore elective care services), as well as issues directly related to elective care services, and other issues that are likely to be relevant or may impact on elective care services or elective care surgery. The CCGs' Board papers also further demonstrate relevant concerns regarding outpatient services, RTT performance and reporting and radiology quality.

Local payment approaches in the best interests of patients

106. As described above in paragraphs 59 to 61 the 2012 Act and National Tariff provide a principles-based framework which gives providers and commissioners the flexibility to depart from national prices and/or currencies where they are not appropriate due to local circumstances. Such arrangements are called local variations.

107. As described above in paragraph 62, in order to be compliant with the National Tariff, commissioners and providers must apply the principles for local variations,

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[20] NHS Barking and Dagenham Clinical Commissioning Group Governing Body meeting, 27th January 2015, p 195. Available from: www.barkingdagenhamccg.nhs.uk/ONELBarking/Downloads/news-and-publications/Governing-body-papers/27%20January%202015/BD%20CCG%20Governing%20Body%2027%20Jan%202015%20Combined.pdf. [Accessed 21 December 2015]

[21] Barking, Havering and Redbridge University Hospitals NHS Trust Board Meeting, Wednesday 4th February 2015, p13-18..Available from: www.bhrhospitals.nhs.uk/Downloads/about/2015%2002%2004%20TB%20P1%20papers%20final.pdf. [Accessed 21 December 2015]

modifications and prices set out in Subsection 7.1 when agreeing a local variation.

108. Our investigation has focused on the first of these three principles: the requirement for local payment approaches to be in the best interests of patients. As described in paragraph 63, Subsection 7.1.1 of the National Tariff explains this principle in more detail. In agreeing local variations, providers and commissioners are required to consider a number of factors – quality, cost-effectiveness, innovation and the allocation of risk – which are described in the subsection.

109. Our analysis had focused on one of these factors in particular: quality. In agreeing local variations, providers and commissioners are required to consider whether the agreement will maintain or improve outcomes, patient experience and the safety of healthcare today and in the future.

110. When assessing compliance with the National Tariff rules for local variations, we examine whether providers and commissioners have considered all of the factors relevant to the best interests of patients. The extent to, and way in, which the four factors listed in Subsection 7.1.1 of the National Tariff need to be considered will differ according to the characteristics of the services and the circumstances of the agreement.

111. In order to have considered a relevant factor properly, we would expect a commissioner to have:

- Obtained sufficient information;
- Used appropriately qualified/experienced individuals to assess the information;
- Followed a reasonable appropriate process to arrive at a conclusion; and
- Reached a reasonable conclusion.

112. Our assessment of the relevance of the findings of the 2013 CQC inspection to the procurement is set out above in paragraphs 92 to 100. In our view, the findings of the CQC report are relevant to a significant extent to the Trust's delivery of elective care services and therefore to the North East London Treatment Centre procurement.

113. In our view the CCGs should therefore have taken them into account when considering whether the proposed agreement would maintain or improve outcomes, patient experience and the safety of healthcare today and in the future.

114. The CCGs have advised us that they 'did look at the CQC report and take it into account to the extent that they considered it to be relevant, in other words to the

extent that it would impact on the ability to deliver the elective services being procured'. However, they have not indicated which elements they considered to be relevant, nor have they provided detailed evidence as to how any elements they considered to be relevant were taken into account in assessing whether the proposed pricing arrangement would maintain or improve outcomes, patient experience and the safety of healthcare today and in the future. Equally, the CCGs have not provided any evidence of the steps they took to arrive at the conclusion that some (or all) of the report was not relevant to their consideration of whether the proposed pricing arrangement complied with the principles for local variations, nor have they provided us with the reasons for those conclusions to allow us to assess whether they were reasonable in the circumstances. Based on the available evidence, at this stage our preliminary view is that the CCGs have not complied with the principles for local variations set out in the 14/15 Tariff.

Preliminary views

Provider selection

115. On the basis of the evidence we have received to date, in our view the CCGs' design and execution of the procurement process did not adequately draw out nor enable an appropriate consideration of the bidders' ability to deliver on their bids.

116. In our view, the CCGs could have and should have designed and implemented a process that requested information that was pertinent to each stage of the evaluation process, provided the evaluators with an appropriate opportunity to take into account relevant information and/or ensured an appropriate degree of verification of the bids submitted. Such steps would have enabled the CCGs to scrutinise appropriately the bidders' abilities to deliver on the proposals contained in their bids, taken specifically in the context of the CCGs' evaluation criteria.

117. Our view is that some of the concerns raised in the 2013 CQC report, the Trust's RTT issues and aspects of the Trust's ongoing improvement plan, were relevant to the Trust's ability to deliver on its bid to provide elective care services at the North East London Treatment Centre. Although the 2013 CQC report's findings mainly related to emergency care, some findings concerned trust-wide issues of governance and leadership which could risk patient safety across all services and several findings were related to elective care specific issues. In our view the CCGs were wrong to conclude this information was not relevant.

118. The CCGs' process should have enabled it to be confident that whichever bidder won could deliver on its bid, but the CCGs' process failed to take into account relevant information about the Trust's ability to deliver on its bid (ie those aspects of the Trust's clinical challenges that were relevant to elective services). For this

reason in our view, the CCGs did not do enough to ensure that the bid they selected for the elective care services at the North East London Treatment Centre was the best option for patients. As a result, the CCGs could not ensure they were buying services from the provider or providers that were most capable of delivering the CCGs' objective of securing the needs of patients and improving the quality and efficiency of services, and provided best value for money in doing so (as required by Regulation 3(3)). It is therefore our preliminary view that the CCGs have breached the Procurement, Patient Choice and Competition Regulations.

National Tariff rules

119. Our preliminary view is that the CCGs failed to apply the principle that local payment approaches must be in the best interests of patients. The reason we have taken this view is that, based on the evidence received to date, we are not satisfied that the CCGs properly considered the findings of the 2013 CQC inspection of the Trust in reaching its decision about the appropriate payment approach for provision of the services at the North East London Treatment Centre. Accordingly, if the CCGs were to enter into the proposed local variation with the Trust, our preliminary view is that it would be a breach of the 15/16 National Tariff.

5. Acting in a transparent way

120. In this section we address whether the CCGs met their obligations to act transparently.

121. We focus on the following issues:

- Did the CCGs breach transparency requirements by not being able to explain how they reached their conclusions?
- Did the CCGs breach transparency requirements by not providing enough clarity to potential bidders about the criteria that would be taken into account when assessing bids?

122. We provide below the relevant legal and factual context, and our analysis on the above questions.

Legal context

123. Regulation 3(2)(a) of the Procurement, Patient Choice and Competition Regulations requires commissioners to act in a transparent way when procuring healthcare services for the purposes of the NHS.

124. Commissioners should be able to explain how they have reached their key decisions and their reasons for those decisions. Suitable record-keeping assists commissioners to be able to do this.

125. While the Procurement, Patient Choice and Competition Regulations are not prescriptive about a commissioner's internal record-keeping, our substantive guidance states that commissioners must ensure that they conduct all of their procurement activities openly and in a manner that enables their behaviour to be scrutinised. This transparency is fundamental to accountability. An important element of transparency of process is producing and retaining suitable records of key decisions that a commissioner has taken and the reasons for those decisions.

126. In our view the requirement to act transparently under Regulation 3(2)(a) includes a requirement that commissioners properly disclose to providers all the factors they intend to take into account when evaluating providers' bids.

Inadequate records to explain key decisions

127. In this section we assess whether the CCGs breached their transparency obligation by not being able to explain how they reached their conclusions. We expect commissioners to have suitable records of their key decisions and the reasons for them to allow their behaviour to be scrutinised.

Factual context

128. There were a number of key steps in the CCGs' procurement process, including those set out below:

- The ITT bids of Care UK and the Trust were initially assessed by individual evaluators on the evaluation panel.
- Care UK and the Trust were then invited to present their service proposals to members of the evaluation panel to provide clarification on aspects of the original bid submission. The CCGs told us at that the start of the presentations both the bidders and the evaluators were informed that what was said could be taken into account as part of the moderation process. The panel members were therefore able to adjust their scores during the moderation process in light of the clarification provided through the presentations.
- After the presentations, the evaluation panel held a moderation meeting to moderate, and to agree consensus scores for each submission, before the scores were finalised. The moderation process applied to sections C, D and F of the ITT impacted on the overall scoring of the non-price criteria.

Care UK's complaint

129. Care UK submitted that it failed to understand how its bid scored lower than the Trust's bid for the clinical governance, performance and quality criterion. Care UK also submitted that it was concerned about the application of the evaluation criteria and scoring of the bids. Care UK submitted that the CCGs had provided no breakdown of their scores for each sub-criterion and only cited two issues in

support of the application of slightly higher scores to the Trust for ‘Service Delivery-Safeguarding’ and ‘Clinical Governance, Performance and Quality’. Care UK submitted that this information was crucial to understanding how the CCGs could have rationally and reasonably come to the conclusion to award higher scores for Clinical Quality to the Trust.

The CCGs’ submissions

130. The CCGs said that, in relation to the initial assessment, the members of the evaluation panel conducted an individual evaluation of the bids. The evaluators were responsible for evaluating the questions relevant to their expertise.

131. In relation to the presentation stage, the CCGs have told us that no notes or records were made.

132. In relation to the notes of the moderation process, the CCGs stated that, once a score was agreed, only the outcome of that agreement was recorded and not the verbatim conversation around the agreement. The notes of the moderation process for some questions do not indicate whether the marks have been changed as a result of the presentation or further to discussion of the materials submitted as part of the bid.

Analysis

133. The obligation to act in a transparent way means that commissioners should be able to explain how they reached their key decisions and the reasons for those decisions. Documentation relating to process and decision-making is a core component of transparency as it assists commissioners to explain their key decisions. The accountability created by transparency is fundamental to ensuring a procurement process is carried out properly. Transparency is also an overarching principle of procurement law, with the expectation that commissioners should retain an auditable documentation trail which is itself transparent, regarding key decisions[22].

134. We have reviewed the evaluators’ comments and notes of the moderation process, which include the individual scores and comments of evaluators as well as the moderated scores and additional comments setting out the reasons for awarding the score. In the notes, for a number of individual scores, the evaluator has not provided any comments explaining or supporting their score. While the CCGs had a scoring scheme which provided general guidance as to what was required to achieve the different scores, where scores are qualitative in nature further explanation may be needed to understand how the score given was judged to be appropriate. Where comments were provided, in our view they were often insufficient to explain the basis upon which scores were awarded.

[22] Department of Health Procurement Guide for commissioners of NHS-funded services, para 1.26. Available from: www.gov.uk/government/uploads/system/uploads/attachment_data/file/216280/dh_118219.pdf [Accessed 21 December 2015]

135. In relation to final marks awarded after the moderation exercise, in our view the moderation notes do not provide enough information to understand on what basis consensus scores were reached or why individuals decided to change their scores [✂] There is not a summary of the discussion which led to the evaluators agreeing on consensus scores and the notes are not consistent in terms of length or detail. When a consensus score could not be reached, in some instances [✂] an average score was applied, but in another instance [✂] was applied. We have not seen an explanation of why these different approaches to moderation were taken.

136. When examining whether the CCGs' scoring was appropriate, the lack of sufficient records of the key discussions and decision-making meetings acts as an obstacle to a meaningful assessment of the evaluation and moderation decisions.

Preliminary views

137. For the reasons set out above, our preliminary view is that the CCGs breached the transparency requirements of the Procurement, Patient Choice and Competition Regulations by not being able to explain certain of their conclusions. In this case this is principally as a result of the CCGs failing to have adequate records of the evaluation and moderation process to enable them to do this.

Insufficient information about evaluation criteria

138. In this section we assess whether the CCGs breached their transparency obligations in relation to the information they provided to bidders about the evaluation criteria, specifically in relation to children's safeguarding. We expect commissioners to disclose to bidders all criteria that will be taken into account when assessing their bids, to allow the bidders to participate fully in the procurement process.

Factual context

139. The ITT questionnaire consisted of 49 questions across a range of criteria. Question D.8 specifically referred to the new ENT services for 3-17 year olds and asked bidders to provide information about their children's safeguarding policy. No other questions explicitly asked bidders to discuss children's services or children's safeguarding.

140. On each of questions C.1, C.4 and D.2, the Trust and Care UK received at initial evaluation stage [✂] a post-moderation score as set out below in Table 3.

Table 3: moderation of scores

	Individual scores - average		Post moderation	
	Care UK	**Trust**	**Care UK**	**Trust**
C.1	[✂]	[✂]	[✂]	[✂]

C.4	[✂]	[✂]	[✂]	[✂]
D.2	[✂]	[✂]	[✂]	[✂]

141. [✂].

142. [✂].

Care UK's complaint

143. Care UK submitted that the CCGs' letter to Care UK of 30 June 2015 appeared to suggest that Care UK had lost just under 1% of the 10% available for service delivery for not making sufficient mention of children or safeguarding implications. Care UK also submitted that the feedback it received from the CCGs was that it scored 1.05% less than the Trust for clinical quality due to a failure to provide the evaluation panel with the confidence of a comprehensive safeguarding policy. Care UK questioned how this explained Care UK scoring 1.05% lower than the Trust when question D.8 (the question related to the children's safeguarding policy) was only worth 0.88% of the 7% available marks for clinical quality.

The CCGs' submissions

144. The CCGs said that the ENT service for 3-17 year olds was a new service and was discussed at the pre-market event held on 18 December 2014 and attended by both Care UK and the Trust. The CCGs also noted that the Trust and Care UK has also been asked to present on how they would ensure the delivery of the service specification with particular reference to the mobilisation of additional children's services as part of the bidder presentations.

Analysis

145. A focus on the new children's services may have been implied in section C of the ITT which dealt with service delivery. However, in our view it was neither explicit nor implicit that the CCGs expected providers to refer to children's safeguarding in section D of their ITT bids, which dealt with clinical governance, performance and quality, except for their response to question D.8 which specifically addressed the children's safeguarding issue. [✂]

146. Section D was worth 7% of the overall marks available for the ITT and question D.2 was worth 12.5% of the total marks available for section D. [✂].

Preliminary views

147. For the reasons set out above, at this stage our preliminary view is that the CCGs breached the transparency requirement by not providing enough clarity to potential bidders about the criteria that would be taken into account when assessing bids. The CCGs' conduct on this issue did not appear to materially impact on the outcome of the procurement process.

6. Next steps

148. Please provide any comments on our assessment, reasoning and the evidence used together with any additional evidence you believe may affect our analysis on these issues. If you wish to make a submission addressing the issues raised, we request that you provide us with that written response by **Monday 25 January 2016 at noon**.

Appendix 1: Description of events

Date	Event
Feb 2014	The CCGs establish an elective care programme to develop a commissioning strategy for elective care services. Waltham Forest CCG is invited to be part of the programme
Apr 2014	The Elective Care Task & Finish Group is formed to develop the commissioning plan and service specification
Mar – Jul 2014	The CCGs seek input from stakeholders to help shape the commissioning plan and service specification
Jun 2014	The CCGs' Governing Board approves the procurement of services at the North East London Treatment Centre
Jul 2014	The CCGs' Executive Committees agree on the commissioning strategy and decide to jointly procure the services using a restricted procurement process
Oct - Nov 2014	The CCGs formally agree on the revised procurement plan
11 Nov 2014	The CCGs issue a notice informing the market of the procurement of the North East London Treatment Centre and the upcoming pre-procurement events
26 Nov 2014	The CCGs hold a market engagement event to brief potential bidders on the planned procurement and seek their views
18 Dec 2014	The CCGs hold a second market engagement event to test the CCGs' assumptions and discuss the proposed service requirements
9 Jan 2015	The CCGs approve the proposed service specification
12 Jan 2015	The CCGs start the first stage of the procurement process by issuing the pre-qualification questionnaire documents. An advert is released on Contracts Finder and a contract notice is published on the Official Journal of the European Union
13 Jan - 26 Jan 2015	Potential bidders can submit clarification questions to the CCGs
16 Feb 2015	Potential bidders must submit their expressions of interest and completed pre-qualification questionnaires
Feb – Mar 2015	Bidder evaluation panel evaluates the 5 completed pre-qualification questionnaires received by the CCGs
12 Mar 2015	The three bidders shortlisted from the pre-qualification stage are invited to tender and are issued with the relevant invitation to tender documents
12 Mar – 8 April 2015	Potential bidders can submit clarification questions to the CCGs
4 May 2015	Potential bidders must submit their bids. The CCGs receive bids from Care UK and the Trust
5 May 2015	The evaluators start individually assessing the bids
3 Jun 2015	Care UK and the Trust (the shortlisted bidders) give presentations to the bidder evaluation panel
4 Jun 2015	The bidder evaluation panel meets to moderate the individual scores and agree consensus scores for each bidder and to finalise the outcome of the procurement process
Jun 2015	The CCGs' governing bodies approve the outcome of the procurement process
30 Jun 2015	The successful/unsuccessful bidders are informed of the outcome of the procurement process