

Monitor

Making the health sector
work for patients

Investigation into NEW Devon CCG's commissioning of community services for adults with complex care needs in eastern Devon: provisional findings

Case reference: CCD01/15



About Monitor

As the sector regulator for health services in England, our job is to make the health sector work better for patients. As well as making sure that independent NHS foundation trusts are well led so that they can deliver quality care on a sustainable basis, we make sure: essential services are maintained if a provider gets into serious difficulties; the NHS payment system promotes quality and efficiency; and patients do not lose out through restrictions on their rights to make choices, through poor purchasing on their behalf, or through inappropriate anti-competitive behaviour by providers or commissioners.

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Invitation to comment on provisional findings

This report presents our provisional findings on the investigation into the commissioning of community services for adults with complex care needs in eastern Devon by NHS Northern, Eastern and Western Devon Clinical Commissioning Group (NEW Devon CCG). These represent our current view of the case and set out our reasoning and the evidence we have used. The purpose of preparing and publishing these provisional findings is to enable interested parties to comment on our assessment, reasoning and the evidence used in order to help ensure that our findings are sound. After consulting on our provisional findings, we intend to publish a final report of our decision in July 2015.

Summary of our provisional findings

Our provisional findings are set out in the remainder of this report. What follows is a brief summary.

In relation to NEW Devon CCG's decision and the process used to select Royal Devon & Exeter NHS Foundation Trust as the preferred provider of community services for adults with complex care needs in eastern Devon, we provisionally conclude that:

- At the stage at which NEW Devon CCG selected Royal Devon & Exeter Foundation Trust as the preferred provider, it had not obtained a level of detailed information from the prospective providers that would give it an adequate understanding of the scope of services to be provided, how the providers would deliver them and the cost of the services. Without this information the CCG could not, in our view, properly assess the prospective providers' capability of meeting the CCG's objective under the Procurement, Patient Choice and Competition Regulations¹ and whether the providers' proposals represented value for money. However, because NEW Devon CCG plans to gather further information and carry out more analysis before reaching a final decision to award a contract, the CCG has not breached the Procurement, Patient Choice and Competition Regulations (section 6 of our report).
- NEW Devon CCG has not breached the Procurement, Patient Choice and Competition Regulations in relation to proportionality (section 6 of our report), considering ways of improving the quality and efficiency of the services (section 6 of our report), equal and non-discriminatory treatment (section 7 of our report), transparency (section 8 of our report) and conflict of interest (section 9 of our report).

¹ National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013.

Our provisional findings set out a number of further steps NEW Devon CCG needs to take in order to comply with the Procurement, Patient Choice and Competition Regulations before awarding a contract. We also make recommendations on how NEW Devon CCG's record-keeping and practice of managing conflicts of interest could be improved.

Invitation to comment

We invite responses to our provisional findings from all interested stakeholders:

- please provide your responses by close of business on Friday 26 June
- please email your response to coopandcompcases@monitor.gov.uk
- we intend to publish all submissions received; if your submission contains confidential information,² please identify which information is confidential and explain why³
- submissions received will be taken into account before we make our final decision.

² For example, this may include information that it would not be in the public interest to disclose, contains business secrets and/or information relating to private affairs.

³ We will take the explanation into account in deciding whether the specified information should be excised from the published submission.

1. Introduction

1. On 21 January 2015 we opened a formal investigation into the commissioning of community services for adults with complex care needs in eastern Devon by NHS Northern, Eastern and Western Devon Clinical Commissioning Group (NEW Devon CCG) after a complaint from Northern Devon Healthcare NHS Trust (Northern Devon Healthcare Trust).

2. Northern Devon Healthcare Trust complained that NEW Devon CCG's decision to select Royal Devon & Exeter NHS Foundation Trust (Royal Devon & Exeter Foundation Trust) as the preferred provider of community services for adults with complex care needs in eastern Devon, and its decision-making process, were not consistent with the CCG's obligations under the Procurement, Patient Choice and Competition Regulations.⁴

3. A summary of the steps we took in our investigation is set out in [Appendix 1](#). We gathered information from parties including the complainant, NEW Devon CCG, Royal Devon & Exeter Foundation Trust, other healthcare providers, the public, local councils and local patient groups.

4. We also asked our Clinical Reference Group⁵ and a number of people with practical commissioning experience⁶ to contribute to specific aspects of our investigation relating to clinical matters or commissioning practice.

5. Before making its formal complaint, Northern Devon Healthcare Trust asked us for informal advice. Between March and November 2014 we provided informal advice to Northern Devon Healthcare Trust, NEW Devon CCG and Royal Devon & Exeter Foundation Trust. We often provide informal advice on the Procurement, Patient Choice and Competition Regulations in order to help stakeholders ensure that commissioners' decisions work well for patients. When giving informal advice we do not form a definitive view of compliance with the regulations. We only decide whether there has been a breach of the Procurement, Patient Choice and Competition Regulations through a formal investigation. In this case, when we began our investigation, we invited the parties to make fresh submissions on the matters raised in Northern Devon Healthcare Trust's complaint. We did not take account of information received at the informal advice stage in our investigation.

⁴ National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013.

⁵ Further information about our Clinical Reference Group can be found [here](#).

⁶ These included senior managers of CCGs and an academic who was previously a Director in a primary care trust.

6. This document sets out our provisional findings on the investigation.
- In section 2, we describe the legal context for our investigation, as well as describing the parties and the services relevant to the investigation.
 - In sections 3 and 4, we summarise Northern Devon Healthcare Trust's complaint and set out the relevant provisions of the Procurement, Patient Choice and Competition Regulations.
 - In section 5, we describe the chronology of events and give an overview of our analysis.
 - In section 6, we examine Northern Devon Healthcare Trust's submission that the process made it impossible for NEW Devon CCG to assure itself of the quality, efficiency and value for money of service provision. We also assess whether the process was proportionate, and whether the CCG considered appropriate ways of improving the quality and efficiency of the services.
 - In section 7, we assess whether NEW Devon CCG failed to treat providers equally and in a non-discriminatory way.
 - In section 8, we examine whether NEW Devon CCG failed to act transparently.
 - In section 9, we assess alleged conflicts of interest in NEW Devon CCG's process.
 - In section 10, we set out our provisional conclusions and next steps.
7. These provisional findings represent our current view of the case and set out our reasoning and the evidence we have used. The purpose of preparing and publishing these provisional findings is to enable interested parties to comment on our assessment, reasoning and the evidence used in order to help ensure that our findings are sound. After consulting on our provisional findings, we intend to publish a final report of our decision in July 2015.

2. Background

Legal context

8. Commissioners (clinical commissioning groups and NHS England) must comply with the Procurement, Patient Choice and Competition Regulations when commissioning healthcare services for the purposes of the NHS. The regulations are designed to ensure that commissioners secure high quality and efficient NHS healthcare services which meet the needs of people who use those services.

9. We can investigate complaints under the Procurement, Patient Choice and Competition Regulations where we consider that the complainant has sufficient

interest in the arrangement to which the complaint relates.⁷ We are satisfied that Northern Devon Healthcare Trust, which submitted a bid to provide community services for adults with complex care needs in the eastern part of NEW Devon CCG's area, and is the incumbent provider of the services, has sufficient interest in the CCG's decision about these services to make a complaint.

10. We conducted this investigation having regard to our guidance on the Procurement, Patient Choice and Competition Regulations.⁸

11. We did not examine NEW Devon CCG's compliance with other legislative requirements (including the Public Contracts Regulations 2006) as we are not responsible for enforcing these.

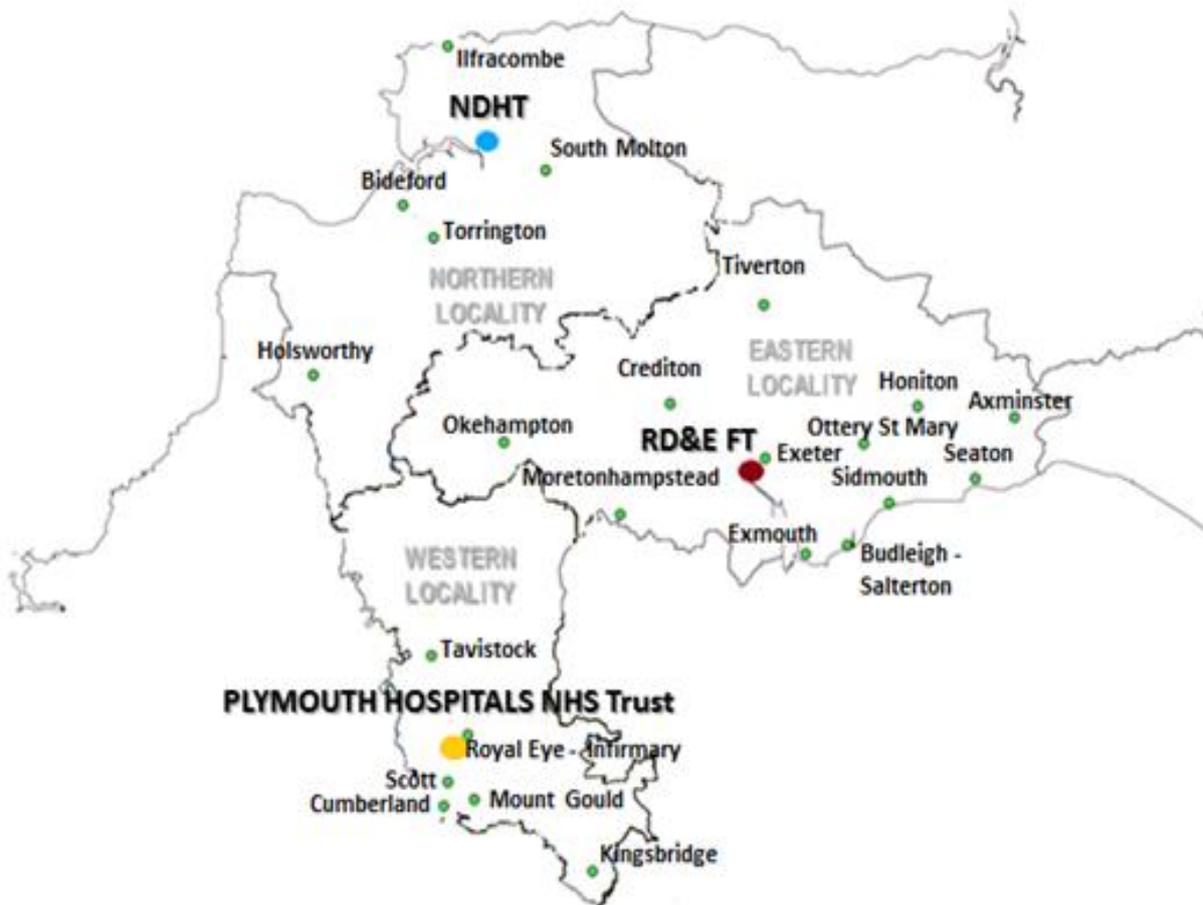
NHS Northern, Eastern and Western Devon Clinical Commissioning Group

12. NEW Devon CCG is one of two clinical commissioning groups in Devon and is the largest CCG in England in terms of the population it covers. There are 130 general practices in the CCG's area. It has an annual budget of £1.1 billion and is responsible for commissioning healthcare services for a population of 900,000. The CCG is divided into three localities: northern, western and eastern. A map of the CCG's area and the localities is shown in Figure 1.

⁷ Section 76(2) of the Health and Social Care Act 2012.

⁸ Our substantive guidance on the Procurement, Patient Choice and Competition Regulations is available [here](#). Our enforcement guidance on the Procurement, Patient Choice and Competition Regulations is available [here](#).

Figure 1: map of NEW Devon CCG's area



Source: NEW Devon CCG's website

Northern Devon Healthcare Trust

13. Northern Devon Healthcare Trust employs 4,300 staff. It provides acute healthcare services from North Devon District Hospital (NDHT in Figure 1 above) and community services across northern, eastern, mid and central Devon. Northern Devon Healthcare Trust currently operates 17 community hospitals: Axminster, Bideford, Budleigh-Salterton, Crediton, Exeter, Exmouth, Holsworthy, Honiton, Ilfracombe Tyrrell, Moretonhampstead, Okehampton, Ottery St Mary, Seaton, Sidmouth, South Molton, Tiverton and Torrington. It also has nine health and social care teams across NEW Devon CCG's area in the northern and eastern localities.

Other providers

Royal Devon & Exeter Foundation Trust

14. Royal Devon & Exeter Foundation Trust employs 7,000 staff. It provides acute healthcare services at two hospital sites in Exeter: Wonford and Heavitree (these sites are near to each other and are depicted as RD&E FT in Figure 1 above).

Virgin Care Ltd

15. Virgin Care Ltd (Virgin Care) is an independent sector provider of a range of community and mental health services across the UK. Within NEW Devon CCG's area, Virgin Care holds a contract to provide integrated children's services to children and young adults.

Devon Partnership NHS Trust

16. Devon Partnership NHS Trust (Devon Partnership Trust) provides mental health and learning disability services to the populations of Devon and Torbay (excluding Plymouth) and a dementia wellbeing service in Bristol. The trust employs 2,500 staff and has an estimated turnover of £133 million for 2015/16. It provides a range of inpatient and community services across the county from over 60 locations.

Devon Doctors

17. Devon Doctors is a social enterprise owned by Devon's GP practices. It provides out-of-hours primary care services (including urgent dental services and specialist services such as end-of-life care) across Devon. The organisation directly employs nine managers and several nurses. Most of the workforce is drawn from local GP practices.

Care UK

18. Care UK is an independent sector provider of a wide range of health and social care services. It runs 10 NHS surgical treatment centres, GP out of hours and 111 services, healthcare for people in prison, diagnostic and GP services. It operates 113 residential and nursing care homes across the UK.

Relevant services

19. Our investigation relates to the commissioning of community services for adults with complex care needs in the eastern locality.

20. Community services are provided outside of acute hospitals in people's homes, community clinics and community hospitals. Their objectives include promoting health and healthy behaviours, helping people manage long-term conditions, and providing treatment in a person's home or in the community to avoid hospital or residential care.

21. Patients with complex care needs have one or more long-term conditions, frailty or disability. Community services for patients with complex care needs are designed to help them remain as well as possible in their own home, access hospital care when necessary and then facilitate their early discharge.

22. In the eastern locality, current services for adults with complex care needs include district nursing, a community matron nursing service, therapy services, rapid

response/crisis services (to avoid admission to hospital), re-ablement teams (which help patients re-learn skills for daily living after illness) and services provided in the 12 community hospitals such as general medicine.

23. The eastern locality also has complex care teams, which are multidisciplinary integrated health and social care teams that co-ordinate and deliver care. They include therapists, nurses, community matrons, social care professionals and voluntary sector representatives. Each team provides services for a geographic area, between them covering all the eastern locality. Examples include a respiratory outreach service, community nursing and community rehabilitation. These services are described in [Appendix 2](#).

24. Services for adults with complex care needs link with urgent care through crisis response initiatives, which are described in [Appendix 2](#). The existing link with acute care is through Northern Devon Healthcare Trust's onward care team (based at Royal Devon & Exeter Foundation Trust's Wonford Hospital), which works with complex care teams (to prevent admission/facilitate early discharge) and the hospital at home team (a multidisciplinary, consultant-led team providing time-limited care at home).

3. Summary of the complaint

25. Northern Devon Healthcare Trust submitted in its complaint that NEW Devon CCG's decision to select Royal Devon & Exeter Foundation Trust as the preferred provider of community services for adults with complex care needs in the eastern locality, and its decision-making process, breached the Procurement, Patient Choice and Competition Regulations. Northern Devon Healthcare Trust submitted that:

- the process used by NEW Devon CCG did not enable the CCG to identify the most capable provider that provided the best value for money. In particular, the criteria used by the CCG to assess prospective providers, and the omission of any financial assessment, made it impossible for the CCG to assure itself of the quality, efficiency and value for money of service provision
- the process used by NEW Devon CCG was not a truly competitive process, and was, in effect, the direct award of a contract without competition; this process was not proportionate to the value of the contract (around £50 million per year)⁹

⁹ The precise contract value has not yet been determined. However, based on NEW Devon CCG's existing contract with Northern Devon Healthcare Trust, the CCG estimates that the value of community services for adults with complex care needs in the eastern locality will be around £50 million per year. It submitted that the contract duration will be three years with the option to extend for a further two years.

- NEW Devon CCG failed to act transparently, discriminated in favour of the local provider of accident and emergency services (Royal Devon & Exeter Foundation Trust), and failed to treat providers in an equal and non-discriminatory way; by discriminating in favour of Royal Devon & Exeter Foundation Trust, the CCG acted anti-competitively
- there may have been conflicts of interest which may have affected the integrity of NEW Devon CCG's proposed contract award to Royal Devon & Exeter Foundation Trust.

4. Summary of relevant regulations

26. The provisions of the Procurement, Patient Choice and Competition Regulations that are relevant to this investigation are:

- Regulation 2: requires commissioners, when procuring healthcare services for the purposes of the NHS, to act with a view to:
 - securing the needs of people who use the services
 - improving the quality of the services
 - improving efficiency in the provision of the services, including through the services being provided in an integrated way (including with other healthcare services, health-related services, or social care services).
- Regulation 3(2)(a): requires commissioners, when procuring healthcare services for the purposes of the NHS, to act in a transparent and proportionate way.
- Regulation 3(2)(b): requires commissioners, when procuring healthcare services for the purposes of the NHS, 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, when procuring healthcare services for the purposes of the NHS, to procure services from one or more providers that are most capable of delivering the commissioner's objective referred to in regulation 2 and provide best value for money in doing so.
- Regulation 3(4): requires commissioners, when procuring healthcare services for the purposes of the NHS in acting with a view to improving quality and efficiency in the provision of services, to consider appropriate means of making such improvements, including through the services being provided in a more integrated way (including with other healthcare services, health-related services, or social care services), enabling providers to compete to

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

- Regulation 6(1) prohibits commissioners from awarding a contract for the provision of healthcare services for the purposes of the NHS where conflicts, or potential conflicts, between the interests involved in commissioning such services and the interests involved in providing them affect, or appear to affect, the integrity of the award of that contract.
- Regulation 6(2) requires commissioners, in relation to each contract entered into for the provision of healthcare services for the purposes of the NHS, to maintain a record of how they managed any conflict that arose between the interests in commissioning the services and the interests involved in providing them.

27. Northern Devon Healthcare Trust submitted that regulations 5(1) and 5(2)¹⁰ were applicable because the process was in effect the direct award of a contract without competition. As set out in paragraph 105, it appears to us that this was not an accurate reflection of the process. It therefore appears to us that regulation 5 was not relevant in the circumstances of the case.

28. Northern Devon Healthcare Trust also alleged that by discriminating in favour of Royal Devon & Exeter Foundation Trust, NEW Devon CCG acted anti-competitively. In our statement of issues we said that we would address allegations of discrimination under regulation 3 rather than regulation 10 (anti-competitive behaviour). We did not receive any submissions suggesting that this issue could not be addressed in this way. For these reasons, we have not investigated whether the CCG breached regulation 10.¹¹

5. Description of events

29. Adult community services in the eastern locality, including those for adults with complex care needs, are currently provided by Northern Devon Healthcare Trust¹² under a contract with NEW Devon CCG that is due to expire on 30 September 2015.¹³ NEW Devon CCG has selected Royal Devon & Exeter Foundation Trust as its preferred provider of these services in future. The CCG is currently conducting a due diligence process in relation to Royal Devon & Exeter Foundation Trust before deciding to award a contract. We note that this process

¹⁰ Regulations 5(1) and 5(2) relate to the award of a new contract without a competition.

¹¹ For further information, see [Statement of issues](#).

¹² In 2011, responsibility for providing community services in east Devon transferred to Northern Devon Healthcare Trust from NHS Devon primary care trust's arms-length provider, Devon Provider Services. This occurred following the government's transforming community services programme for the NHS.

¹³ The contract includes provision for an extension up to 31 March 2016 if required.

(which is described in paragraph 62) appears to go further than what is typically described as due diligence.

30. Since May 2013, NEW Devon CCG has undertaken a programme to transform community services in Devon. The programme related to four categories of services in all three localities: services for adults with complex care needs, urgent care services in the community, personalised and support services, and specialist community services. Our investigation focuses on services for adults with complex care needs in the eastern locality.¹⁴

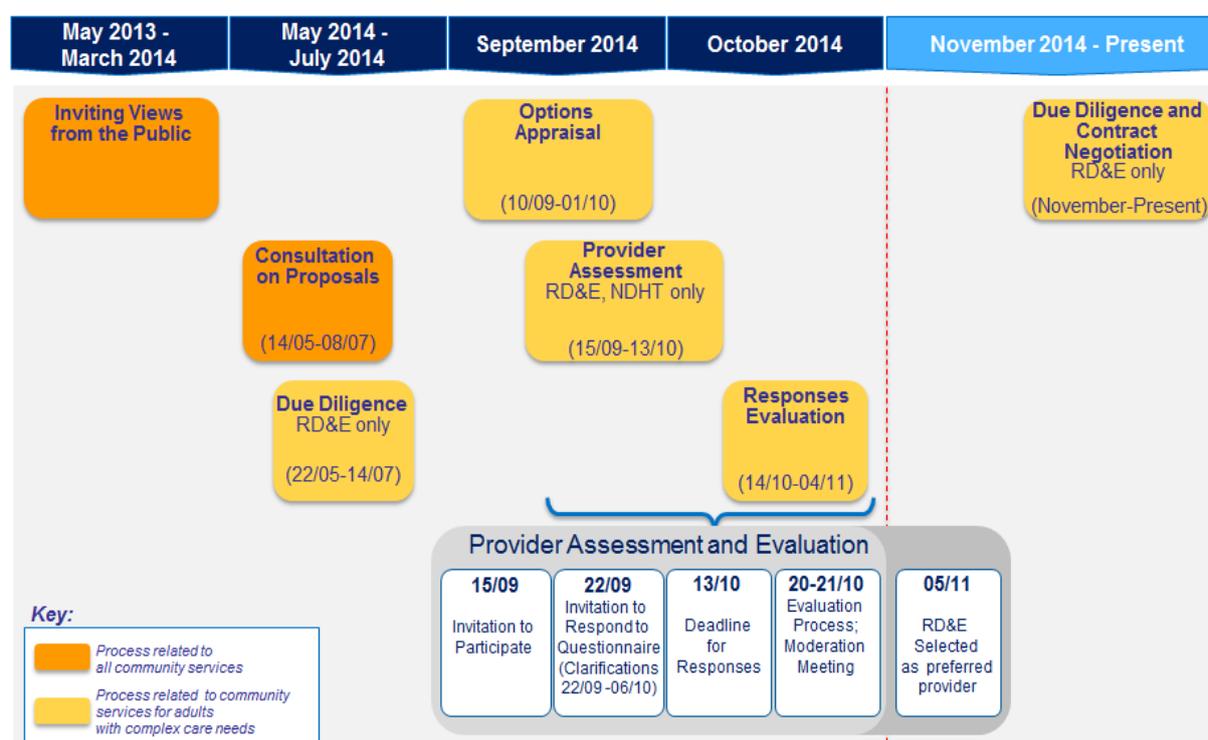
31. NEW Devon CCG's programme to transform community services included these phases:

- inviting views from the public to inform the CCG's plans to transform community services
- publicly consulting on the CCG's proposals for future community services
- a provider assessment to select preferred providers of services for adults with complex care needs in each locality
- conducting a due diligence process and contract negotiations with the preferred providers of services for adults with complex care needs.

32. We set out more detail on each phase below. The timings of these phases are illustrated in Figure 2 below.

¹⁴ The other services and localities are outside the scope of our investigation. The CCG's proposals for other services and localities are described in more detail in [Appendix 4](#) because they provide relevant context.

Figure 2: NEW Devon CCG's programme to transform community services



May 2013 to March 2014: inviting views from the public

33. Between May 2013 and March 2014, NEW Devon CCG asked stakeholders for their views on the future provision of community services. The CCG referred to this as the 'co-production phase'. It consisted of public meetings and involved over 2,000 people including patients, the public, local healthcare professionals, councillors and providers. The co-production phase focused on collecting different stakeholders' views on the important features of community services for the future. Their feedback informed the CCG's plans to transform community services, and at the end of the process it published a summary report of the stakeholders' feedback for each locality.¹⁵

34. NEW Devon CCG then set out 10 commissioning principles for designing future community services (see [Appendix 5](#)). The CCG also developed its proposed approach to commissioning community services on which it would subsequently consult. The CCG proposed to commission community services for adults with complex care needs in the eastern locality from Royal Devon & Exeter Foundation Trust.

¹⁵ See the report for the eastern locality, 'Pathways for the future: Transforming community health and integrated social care services in the eastern locality of NEW Devon CCG - Public Engagement Report' [here](#).

March 2014 – April 2014: communications with Northern Devon Healthcare Trust

35. On 5 March 2014, NEW Devon CCG told Northern Devon Healthcare Trust that it planned to commission community services for adults with complex care needs in the eastern locality from Royal Devon & Exeter Foundation Trust from 1 October 2015. Two days later, Northern Devon Healthcare Trust wrote to the CCG expressing concerns about New Devon CCG's proposal as it had expected the services to be formally procured and to have an opportunity to bid for them.

36. On 18 March 2014, NEW Devon CCG replied to Northern Devon Healthcare Trust and met the trust. In this response the CCG said it intended to publish its proposed approach to the future provision of community services and associated rationale.

14 May 2014 – 8 July 2014: publicly consulting on NEW Devon CCG's proposals

37. On 14 May 2014, NEW Devon CCG published its 'draft Strategic Framework' in which it set out the proposed approach to commissioning community services in future. The CCG invited feedback on its proposal by 8 July 2014.

38. The draft Strategic Framework set out NEW Devon CCG's proposal to commission community services for adults with complex care needs in the eastern locality from the local acute provider (Royal Devon & Exeter Foundation Trust). In the other localities, NEW Devon CCG proposed to commission community services for adults with complex care needs from Northern Devon Healthcare Trust (northern locality), and Plymouth Community Healthcare (western locality). The draft Strategic Framework said the CCG did not propose to invite providers to compete to provide these services in any of the 3 localities.

39. NEW Devon CCG received 268 responses to its consultation, including from healthcare providers, community services staff, MPs, local councillors, patients, carers and the public. According to the CCG's report on the consultation,¹⁶ the responses supported the CCG's proposed approach. The report noted that many respondents said care should be delivered closer to home (with a concern that gaps in present services would require the development of new models) while recognising that access to beds in local community facilities would still be needed.

40. In relation to NEW Devon CCG's proposal on commissioning services for adults with complex care needs in the eastern locality, the CCG's report said that some respondents supported the provision of community services by the local acute

¹⁶ See the report 'Integrated, personal and sustainable: community services for the 21st century feedback report for governing body' [here](#). Feedback report on the consultation to the CCG's governing body [here](#).

provider. The report noted that respondents submitted that this form of service provision could be achieved in different ways: although some argued for competitive tendering, others supported a non-competitive approach.

41. Between 17 and 19 June 2014, the Department of Health conducted a 'gateway review' of the outcomes and objectives of NEW Devon CCG's programme to transform community services. These reviews are independent peer reviews by Department of Health staff teams at key stages of a project or programme. This review was requested by the CCG. The review team's assessment said that [redacted]. The review team highlighted that [redacted]. The team recommended that [redacted].

42. On 8 July 2014, Northern Devon Healthcare Trust responded publicly to the consultation. On the same day, it sent a private letter to NEW Devon CCG raising concerns about the CCG's proposals and seeking more information.

43. From May to July 2014, at the same time as NEW Devon CCG consulted on the draft Strategic Framework, it conducted a due diligence exercise with Royal Devon & Exeter Foundation Trust regarding services for adults with complex care needs in the eastern locality. This included an assessment process in stages including baseline questions; scoring responses; asking Royal Devon & Exeter Foundation Trust to address key themes at a site visit; executive to executive meetings and an interview with the trust. The CCG told us that the purpose of the exercise was to assure itself that Royal Devon & Exeter Foundation Trust (as the proposed provider of services for adults with complex care needs in the eastern locality) had the necessary capacity and capability to deliver integrated, personal and sustainable care and support to patients in the eastern locality. A further due diligence phase and contract negotiation was expected to follow after the governing body decision on 16 July 2014 on a preferred provider.

16 July 2014: draft Strategic Framework to be updated

44. At NEW Devon CCG's governing body meeting on 16 July 2014, it was agreed to update the draft Strategic Framework in the light of consultation feedback and finalise it for the governing body meeting in September. The governing body was not asked to decide on procurement approaches at this stage. The CCG would undertake further strategic work relating to procurement.

4 September 2014: revised Strategic Framework and Case for Change

45. On 4 September 2014, NEW Devon CCG's governing body approved the revised Strategic Framework. The CCG removed its procurement proposals from the revised version and set them out in the 'draft Case for Change'. In this document the CCG identified Royal Devon & Exeter Foundation Trust as the CCG's preferred provider of community services for adults with complex care needs in the eastern locality. Northern Devon Healthcare Trust and Plymouth Community Healthcare

were identified as NEW Devon CCG's preferred providers of services for adults with complex care needs in the northern and western localities respectively.

46. The CCG noted in the draft Case for Change that further work was required to evaluate and assess the procurement options. The governing body supported the recommendations in the draft Case for Change and agreed the next steps which, in relation to services for adults with complex care needs, were to appraise the procurement options and carry out further analysis to identify the providers most capable of delivering the services in each locality.

September 2014: options appraisal

47. In September 2014, NEW Devon CCG conducted an options appraisal to decide the process for commissioning community services for adults with complex care needs for all the three localities. The CCG considered the following options:

- awarding a contract to the current providers
- competitive tendering
- assessing which providers were most capable of delivering the services and awarding them contracts.

48. The options appraisal was conducted by a panel comprising 15 members of NEW Devon CCG (including executive members and leads from each locality). Each panel member independently scored each of the three options from 0 (unacceptable) to 5 (excellent) against six criteria. The criteria were based on the priorities and principles in the draft Strategic Framework and draft Case for Change (see [Appendix 5](#)).

49. The preferred option was to assess which providers were most capable of delivering the services and to award contracts to them. The governing body discussed the results of the options appraisal and agreed to pursue the preferred option in a meeting held in private on 1 October 2014.

September – October 2014: assessing prospective providers of services for adults with complex care needs

50. On 15 September 2014, NEW Devon CCG invited providers who had responded to the consultation on the draft Strategic Framework to participate in the CCG's provider assessment to select the preferred provider. Three providers formally expressed interest in doing so for the eastern locality: Northern Devon Healthcare Trust, Royal Devon & Exeter Foundation Trust and Virgin Care. Devon Partnership told us it had an interest in and the capability to provide the services and made this clear to NEW Devon CCG in its response to the public consultation on the draft Strategic Framework.

51. On 22 September 2014, NEW Devon CCG sent Northern Devon Healthcare Trust, Royal Devon & Exeter Foundation Trust and Virgin Care the assessment documents (which the CCG referred to as the 'invitation to propose a solution for pathways for people with complex needs'). The documents consisted of a question and submission booklet with six questions, each with a word limit of 1,500 words for the response, and instructions for completing the answers in the booklet. Providers were invited to submit their responses by 13 October 2014.

52. NEW Devon CCG received responses from two providers: Northern Devon Healthcare Trust and Royal Devon & Exeter Foundation Trust. Virgin Care did not submit a response.

The evaluation and moderation process

53. Provider responses were evaluated by evaluation and moderation panels.

54. The process was undertaken for all three localities and involved four stages:

- separate evaluation of providers' responses to the six questions by each evaluator
- moderation by a panel of the evaluators' scores and comments
- presentation of the moderation panel's recommended scores to the transforming community services executive¹⁷
- approval of the recommended scores by the governing body.

55. NEW Devon CCG told us that it designed the process so that at each stage a different group of people was involved. It said its intention was that this would provide independence and challenge at each stage.

56. The evaluation panel comprised seven individuals: three staff members of the CCG, two GP members of the CCG, one lay person who was a member of the eastern locality reference group,¹⁸ and one member of Devon County Council. The members of the panel were not part of the CCG's governing body or the transforming community services executive. All evaluators were given training and were asked to confirm that they understood their duties before they were given the responses. Each evaluator individually scored the responses to each question from 0 (deficient) to 5 (excellent). The evaluators were given one week to independently assess the submissions.

¹⁷ This was an executive committee formed within NEW Devon CCG to oversee its project to transform community services.

¹⁸ The eastern locality reference group comprised members of voluntary sector organisations, patient participation groups and hospital leagues of friends, Healthwatch Devon and Devon County Council, as well as lay representatives and public health and health service professionals.

57. South West Commissioning Support Unit (CSU) collated the assessments and presented them to a moderation panel on 21 October 2014. Unless each evaluator's score was the same for a question, the result would be reviewed and decided by the moderation panel. Because the scores given for each question were not the same for all evaluators, the moderation panel's role was to review the scores and commentary from each evaluation panel member and for each moderation panel member to give a score based on their review. The moderation panel consisted of four moderators from NEW Devon CCG and a chair from South West CSU. The moderation panel did not include any of the evaluators. Each moderator was asked to sign a declaration before the start of the moderation process confirming that they were independent from the organisations they were assessing. These were reviewed by the Chair before the panel's review began.

58. The Chair of the moderation panel asked each panel member for their scores and as each gave the same scores, the moderation panel was able to reach a consensus score for each question. Royal Devon & Exeter Foundation Trust had the highest score (see Table 1 below). Its total weighted score was 11 points higher than that of Northern Devon Healthcare Trust.¹⁹ The scores were presented in a report to the transforming community services executive.

59. Following the review of the process, the transforming community services executive prepared a report which was presented to the CCG's governing body for a decision on 5 November 2014. The CCG's governing body was asked to approve or reject the recommendation to select Royal Devon & Exeter Foundation Trust as the preferred provider of community services for adults with complex care needs in the eastern locality. The recommendation was approved. This meant that NEW Devon CCG would carry out a further due diligence process and contract negotiations with the trust. The governing body also approved the final Case for Change document which set out the CCG's process for awarding new contracts for community services across Devon.

¹⁹ Question 1 was given a weighting of 25%. The other questions were equally weighted at 15% each.

Table 1: Prospective providers' final scores for the eastern locality

Royal Devon & Exeter Foundation Trust			Northern Devon Healthcare Trust		
Question	Final score	Weighted score	Question	Final Score	Weighted score
1	4	20	1	3	15
2	3	9	2	3	9
3	3	9	3	3	9
4	3	9	4	3	9
5	4	12	5	3	9
6	3	9	6	2	6
Total score 68			Total score 57		

60. NEW Devon CCG followed the same process for the other localities. Following the assessment, Northern Devon Healthcare Trust and Plymouth Community Healthcare were selected as the preferred providers of services for adults with complex care needs in the northern and western localities respectively.

61. The Department of Health carried out a second gateway review of NEW Devon's programme to transform the provision of community services between 21 and 23 October 2014. The review team acknowledged that [redacted]. The review team highlighted [redacted]. It recommended that [redacted].

November 2014 – present: due diligence phase and contract negotiation

62. Since November 2014, NEW Devon CCG has conducted what it described a detailed due diligence process with Royal Devon & Exeter Foundation Trust to finalise the scope, resource requirements and outcomes for services for adults with complex care needs in the eastern locality, and to assure itself that the transition will be safe and effective. As part of this process a detailed business plan will be produced, designed to confirm Royal Devon & Exeter's Foundation Trust's readiness to respond to the commissioning plan and achieve the desired outcomes and benefits.

6. Analysis of the process used by NEW Devon CCG

63. In this section, we assess whether the process used by NEW Devon CCG enabled it to assure itself of the quality, efficiency and value for money of service provision. In particular, we examine whether:

- the process, and the criteria used to assess prospective providers, enabled the CCG to select the provider or providers that
 - were most capable of meeting the commissioner's objective to secure the needs of NHS health care service users, improve the quality of services and the efficiency with which they are provided
 - provided best value for money
- the process was proportionate to the value, complexity and clinical risk of providing community services for adults with complex care needs
- NEW Devon CCG considered appropriate ways of improving quality and efficiency in the provision of the services.

64. The issues outlined above are relevant to compliance with regulations 2, 3(2), 3(3) and 3(4) of the Procurement, Patient Choice and Competition Regulations. These regulations are set out in section 4.

Process and criteria for assessing prospective providers

Northern Devon Healthcare Trust's submission

65. Northern Devon Healthcare Trust submitted that:

- On the basis of NEW Devon CCG's assessment of proposals from providers (which comprised six answers with a word limit of 1,500 words for each answer), it was impossible for the CCG to assure itself that Royal Devon & Exeter Foundation Trust was the most capable provider of the services.
- NEW Devon CCG could not be satisfied that Royal Devon & Exeter Foundation Trust would provide best value for money because the CCG did not conduct any financial assessment of the providers. Northern Devon Healthcare Trust told us it would be unreasonable for the CCG to assume all providers used the same financial assumptions when developing their proposals because:
 - the scope of services had not been finalised and the provider assessment did not distinguish between the different service provisions within the localities

- Royal Devon & Exeter Foundation Trust did not know the existing cost base for the services
- the Strategic Framework had no underpinning financial strategy
- providers could not assume that the financial situation would remain the same (as Devon is a challenged health economy)
- NEW Devon CCG confused a best value for money assessment with a financial sustainability assessment, and did not take into account the likely costs involved in transferring the services; it submitted that the CCG should have stipulated assumptions and/or parameters within which to provide value for money information to ensure parity of the provider assessment
- it was inappropriate for NEW Devon CCG to determine the precise scope of services and their price during the due diligence phase because any possibility of competition was lost by this stage
- NEW Devon CCG undertook no detailed or comparative due diligence of Northern Devon Healthcare Trust or Royal Devon & Exeter Foundation Trust before it selected Royal Devon & Exeter Foundation Trust as the preferred provider.

NEW Devon CCG's submission

66. NEW Devon CCG submitted that, having taken the views from stakeholder engagement and particularly feedback from the provider system into account, it could see various ways forward. It said that it was open to proposals, including partnership working, and its procurement approach enabled providers to develop proposals. It told us that inviting providers' proposed solutions in response to clear published questions led to a fair evaluation process.

67. NEW Devon CCG said its process for assessing prospective providers enabled it to select providers that were most capable of improving the quality and efficiency of services, that provided value for money. These requirements were incorporated into the questions used to assess prospective providers, which were designed to look beyond core capabilities to solutions that would best achieve a step change in integrated community services to deliver the CCG's vision. The CCG submitted that the questions were appropriate and fair.

68. NEW Devon CCG had invited providers to answer six questions, set out in [Appendix 3](#). In summary, these invited providers to demonstrate:

- question 1: how service delivery would fit within the locality's urgent care system
- question 2: clinical and financial sustainability

- question 3: that delivery of care would be integrated
- question 4: quality and safety of services
- question 5: delivery of a single governance process working effectively in the locality's urgent care system
- question 6: a consistent model and outcomes across the CCG's localities.

69. NEW Devon CCG told us that the six questions were linked to the priorities and principles set out in the draft Strategic Framework, draft Case for Change and the results of public engagement. The 10 commissioning principles and 6 strategic priorities established by the CCG are described in [Appendix 5](#).

70. NEW Devon CCG told us that it tested quality, efficiency and value for money in questions 4, 1 and 2 respectively. It told us that the need to integrate services was reflected in question 3, the need for clearer patient pathways was reflected in question 1 and the need to place patients at the centre of the care plan was reflected in question 4.

71. NEW Devon CCG told us that the word limit was specifically set to enable succinct strategic responses. The CCG said that none of the providers assessed raised concerns with the CCG about the word limit at the time; it was only asked whether diagrams and images contributed to the length of the submission.

72. On value for money, NEW Devon CCG noted that Northern Devon Healthcare Trust and Royal Devon & Exeter Foundation Trust scored equally for their responses to question 2 of the provider assessment. The CCG said this question was designed to test the sustainability of service provision, and that the contract value would vary as the contract progressed and the CCG's strategic vision of moving care closer to home was achieved. The CCG said it planned to develop an outcomes-based commissioning model and move away from lump sum payments for community services.²⁰

73. We asked NEW Devon CCG if it considered asking providers to quantify the cost of providing the services in their responses. The CCG told us that it was not looking for savings in the current contract for the services but was looking for

²⁰ Community services generally do not have national prices specified in the national tariff. They are usually agreed by commissioners and providers according to the national tariff local pricing rules. Currently CCGs pay for almost all community services through annual lump sums (also known as block payments or block contracts). Providers receive a lump sum for a range of community services for the population registered with GPs in the local area. This type of contractual agreement is independent of the number of patients treated or the type and quality of treatment provided. Outcomes-based remuneration does not always depend on activity – it can be a lump sum or capitated payment.

system-wide savings. The CCG told us that cheaper community services might not lead to value for money for the whole system. The CCG said it was therefore not looking to change the cost of the current contract but wanted a provider that could achieve value for money for future services. The CCG said it recognised that the services would change over time, as would cost, and it wanted to encourage innovation.

74. NEW Devon CCG told us that the aim of the process was to appoint a preferred provider to take through to the next stage of detailed due diligence before awarding the contract. The CCG told us that it would further assess the preferred provider's strategic readiness during the due diligence process, including the provider's ability to achieve financial sustainability and allocate resources effectively and efficiently based on the population's health needs. The CCG said providers would need to produce a business plan and transition plan as part of the strategic diligence work to assure the CCG about how the services would be delivered.

75. NEW Devon CCG told us that if, after completing its due diligence process, [REDACTED].

Royal Devon & Exeter Foundation Trust's submission

76. Royal Devon & Exeter Foundation Trust submitted that NEW Devon CCG had designed and followed a robust process to establish the model of care it wished to commission and a fair, transparent and challenging process to test the capabilities of organisations to meet the service requirements. The trust submitted that the appropriate form of integration was to realign local community services with the local acute hospital through a service transfer, that is, a fully integrated pathway approach driven by a single organisation.

Our assessment

77. Regulation 3(3) requires commissioners, when awarding a contract for NHS healthcare services, to ensure they procure them from the provider or providers most capable of meeting the commissioner's objective to secure patients' needs and improve the quality and efficiency of services. Commissioners must also procure services from the provider or providers that provide best value for money in doing so.

78. In our view, understanding the scope of services, how a provider will deliver them (for example, the clinical pathways) and the cost of the services (including anticipated activity levels or other assumptions) is intrinsic to any assessment of a provider's capability to meet the commissioner's objective to secure the needs of patients and improve the quality and efficiency of services, and to any assessment of value for money. Accordingly, regulation 3(3) requires commissioners to understand these factors before awarding a contract.

79. We examined the provider assessment process conducted by NEW Devon CCG in order to establish whether the CCG had reached its decision to select Royal

Devon & Exeter Foundation Trust as the preferred provider in a manner that is consistent with the Procurement, Patient Choice and Competition Regulations as described above. We reviewed the questions asked by the CCG, the responses to those questions by Royal Devon & Exeter Foundation Trust and Northern Devon Healthcare Trust and the evaluation and moderation process that the CCG followed.

80. We examined the six questions NEW Devon CCG asked providers and the responses it received. The six questions broadly corresponded to the CCG's objectives as stated in the CCG's draft Case for Change. However, the responses from Northern Devon Healthcare Trust and Royal Devon & Exeter Foundation Trust lacked detail and did not answer some questions. In particular, although the responses described both providers' intentions, the responses did not describe in any detail how the providers would deliver the services in practice. Nor did the questions or responses include information about the cost of the services.

81. Having reviewed the information it appears to us that at the stage at which NEW Devon CCG selected Royal Devon & Exeter Foundation Trust as the preferred provider of community services for adults with complex care needs in the eastern locality, it had not obtained a level of detailed information from the prospective providers that would give it an adequate understanding of the scope of services to be provided, how the providers would deliver them and the cost of the services. Without this information the CCG could not, in our view, properly assess the prospective providers' capability of meeting the CCG's objective under regulation 2 and whether the providers' proposals represented value for money.

82. However, NEW Devon CCG has not yet concluded its process and made a final decision to award a contract to Royal Devon & Exeter Foundation Trust. The CCG told us that as part of the further due diligence process it plans, it will test Royal Devon & Exeter Foundation Trust's ability to secure patients' needs and to improve the quality and efficiency of service provision. The CCG told us that it plans to work with Royal Devon & Exeter Foundation Trust to refine the specification and contract value and find a way to develop these over the life of the contract.

83. Because NEW Devon CCG plans to gather further information and carry out more analysis before reaching a final decision to award a contract, our provisional conclusion is that the CCG has not breached regulation 3(3).

84. Before reaching its decision to award the contract, NEW Devon CCG will need to assure itself, and be able to assure the public, that it has met its obligations under regulation 3(3). Based on the matters raised in our investigation, we have set out a number of observations below to assist the CCG going forward (see paragraphs 85 to 91 below).

85. We recognise that in some circumstances, commissioners decide not to produce a detailed service specification and instead invite innovative proposals from providers (for example, where commissioners want to transform services, or may

have incomplete information about current service provision). Whilst it is not always necessary to produce a detailed service specification at the outset, it is necessary for a commissioner to assure itself, and to be able to assure the public, that it has commissioned services from one or more providers that: are most capable of meeting its objective to secure the needs of patients and deliver service improvements; and that provide value for money, in line with regulation 3(3).

86. Where there is more than one prospective provider of the services, some form of process to invite offers from providers and assess them will often be the most effective way to meet these obligations. If providers know that commissioners have more than one offer to choose from they are more likely to put forward more innovative solutions that offer better outcomes and better value for money.

87. In order to ensure that it meets the requirements of regulation 3(3) before awarding a contract, NEW Devon CCG will need to know the scope of services to be provided, how Royal Devon & Exeter Foundation Trust will deliver them, and how much it will cost to deliver these services. It will also need to reach a view on whether and how Royal Devon & Exeter Foundation Trust's proposal represents value for money and be able to explain this. This is likely to require an analysis of what the proposal delivers compared to its cost. It would be reasonable to take whole system effects, including cost effects, into account.

88. There are a number of ways in which the CCG could assess value for money. One way would be to compare Royal Devon & Exeter Foundation Trust's proposal against one or more alternative options.

89. We have set out below some examples of possible alternatives against which NEW Devon CCG could compare Royal Devon & Exeter Foundation Trust's proposal. These are just examples and it may not be useful or practicable to do a detailed comparison against all of these, but ultimately the CCG needs to assure itself that it is getting the best for patients and be able to explain how it has reached that view. No benchmark will be perfect, since all alternatives will be different from Royal Devon & Exeter Foundation Trust's proposals, so in making any comparison the CCG should take account of any differences (for example, in terms of geographical area, population size, and population demographics):

- a service scope and price established by engaging in further dialogue with other potential providers
- the current scope and price of the relevant services in the eastern locality
- the scope and price of community services for adults with complex care needs in the other two Devon localities
- the scope and price of similar NHS services elsewhere in the UK.

90. In our view, NEW Devon CCG should not enter into a contract for these services without obtaining the further information and assuring itself of the matters described above. If the CCG was to proceed to award a contract to Royal Devon & Exeter Foundation Trust on the basis of the limited information it holds from the provider assessment process, without assuring itself of these additional matters, this would be likely to be in breach of the Procurement, Patient Choice and Competition Regulations.

91. If following its due diligence process NEW Devon CCG was not satisfied that proceeding with Royal Devon & Exeter Foundation Trust was the best way to secure the needs of patients, improve the quality and efficiency of the services and provide value for money, we would expect the CCG not to award a contract. The CCG would then need to consider alternatives, [§<].

Proportionality of the process

92. The Procurement, Patient Choice and Competition Regulations require commissioners, when procuring healthcare services for the purposes of the NHS, to act in a proportionate way.²¹ In this section we examine the proportionality of the process undertaken by NEW Devon CCG.

Northern Devon Healthcare Trust's submission

93. Northern Devon Healthcare Trust submitted that NEW Devon CCG's provider assessment was not proportionate to the value of the services. The trust submitted that the CCG should either conduct a more detailed competitive process or roll over the contract to Northern Devon Healthcare Trust.

94. Northern Devon Healthcare Trust told us that the NEW Devon CCG did not engage appropriately to establish whether or not there may have been other interested parties. It said other providers may have assumed there was little or no point expressing an interest given the CCG's stated preference for Royal Devon & Exeter Foundation Trust.

95. Northern Devon Healthcare Trust further submitted that the process was, in effect, the direct award of a contract without competition because the provider assessment was so weak and pre-determined as to render true competition meaningless. The trust submitted that there were no technical reasons or urgency to justify NEW Devon CCG directly awarding a contract without competition.

NEW Devon CCG's submission

96. NEW Devon CCG said it took the view from its early discussions with system leaders that the impact of competitive tendering would be a major distraction to the

²¹ Regulation 3(2)(a), set out in Section 4 above.

wider healthcare system. The CCG said its market assessment of approaches to community services throughout the country had identified no apparent interest across EU borders. In addition, despite significant media attention, no organisations other than existing providers approached the CCG. Having taken into account the feedback from its stakeholder engagement, the CCG said it decided that it needed to undertake some form of competitive assessment. The process for assessing providers was designed to allow selection of a provider offering services to meet local people's changing needs.

97. NEW Devon CCG undertook an options appraisal to decide what process to use to commission community services for adults with complex care needs. This is described in paragraphs 47 to 49 above. For further information on the scoring of the options appraisal, see [Appendix 6](#).

Royal Devon & Exeter Foundation Trust's submission

98. Royal Devon & Exeter Foundation Trust submitted that it was successful because its solution better met the requirements of the commissioner, the public and patients. It told us that the CCG's process was more than adequate to ensure a proper assessment of the most capable provider for the CCG's needs for a contract of that value, complexity and clinical risk.

Our assessment

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

100. The Procurement, Patient Choice and Competition Regulations do not prescribe the process commissioners must use to procure healthcare services for the NHS. For the purpose of the Procurement, Patient Choice and Competition Regulations, commissioners must adopt a process that will assure them of the quality, efficiency and value for money of service provision and is proportionate to the value, complexity and clinical risk associated with the relevant services.

101. The services being commissioned in this case were of considerable value and were important to the effective working of the local health economy. It was therefore imperative that any process to commission them would identify the best solutions for patients and that appropriate time and resources were devoted to commissioning decisions.

102. NEW Devon CCG conducted a phased process to gather views and feedback, present its plans, and assess providers' proposals over more than two

years. It appears to us that the time and resources the CCG devoted to commissioning community services for adults with complex care needs was commensurate to the value, complexity and clinical risk of the services, although in our view the process could have been completed more quickly.

103. The CCG considered several ways of procuring the services and designed a process to appraise which option was most likely to achieve its objectives. As a result, the CCG therefore decided to assess providers' capability of delivering its objectives.

104. We note that NEW Devon CCG undertook extensive public engagement and consultation, with national media attention, and had not received interest from providers other than those with which it was already in contact. In those circumstances we think it was acceptable to invite only providers who had responded to the CCG's consultation on the draft Strategic Framework to be assessed and not to extend the invitation more broadly.²²

105. NEW Devon CCG invited providers to submit proposals which were evaluated and moderated according to specified criteria. The process did include competition between providers. For this reason it appears to us that the process did not amount to the direct award of a contract without competition. It therefore appears to us that therefore regulation 5 does not apply in the circumstances of this case.

106. We therefore provisionally conclude that NEW Devon CCG did not breach regulation 3(3)(a) by failing to act in a proportionate way.

Did NEW Devon CCG consider appropriate ways of improving the quality and efficiency of the services?

107. Regulation 3(4) requires commissioners, in acting with a view to improving quality and efficiency in the provision of 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 of the services.

Northern Devon Healthcare Trust's submission

108. Northern Devon Healthcare Trust submitted that NEW Devon CCG's process made it impossible for the CCG to assure itself that changing provider would improve service quality and efficiency.

²² We consider the allegation that other providers may have assumed there was little or no point expressing an interest given the CCG's stated preference for Royal Devon & Exeter Foundation Trust in section 7 below.

NEW Devon CCG's submission

109. NEW Devon CCG said it considered a range of ways to improve service quality and efficiency to enhance choice for patients and the benefits and risks of tendering to allow patients a choice of provider.

110. NEW Devon CCG said that questions 3 and 4 of the provider assessment concerned quality and integration, and the formal process to evaluate providers did include competition. The importance of integration was reflected in the 10 principles and 6 strategic priorities identified through the CCG's public engagement (see [Appendix 5](#)).

Royal Devon & Exeter Foundation Trust's submission

111. Royal Devon & Exeter Foundation Trust said that NEW Devon CCG did consider appropriate ways of improving service quality and efficiency, including the services being provided in a more integrated way. It said this was the basis of the CCG's approach in its public consultation.

Our assessment

112. As Northern Devon Healthcare Trust submitted that NEW Devon CCG did not consider appropriate ways of improving the quality and efficiency of the services, our assessment of this issue has focused on regulations 3(4)(a) and 3(4)(b).

113. NEW Devon CCG undertook extensive public engagement when considering how community services could be improved. It established clear objectives for services to be improved by being provided in an integrated way. Through the options appraisal, it considered whether the services could be improved by enabling providers to compete to provide the services, whether through a competitive tender or participating in an assessment of their capability.

114. We therefore provisionally conclude that NEW Devon CCG did not breach regulations 3(4)(a) and 3(4)(b) of the Procurement, Patient Choice and Competition Regulations.

115. NEW Devon CCG told us that allowing patients a choice of provider was not appropriate for services for adults with complex care needs, and that its focus was on integration and continuity of care. In our view, commissioners should assess whether choice is an appropriate way of improving services whenever appropriate, and it is regrettable that the CCG did not give more consideration to whether choice could be used to further improve care in this case. However, we did not make a finding on whether the CCG adequately considered improving services by allowing patients a choice of provider, as this was outside the scope of Northern Devon Healthcare Trust's complaint.

7. Equal treatment and non-discrimination

116. The Procurement, Patient Choice and Competition Regulations require commissioners, when procuring healthcare services for the purposes of the NHS, to treat providers equally and in a non-discriminatory way. This includes not treating a provider, or type of provider, more favourably than any other provider, in particular on the basis of ownership.²³

117. In this section, we assess Northern Devon Healthcare Trust's allegation that NEW Devon CCG discriminated in favour of Royal Devon & Exeter Foundation Trust as the local provider of accident and emergency services and that the CCG failed to treat providers in an equal and non-discriminatory way.

Was the outcome of the provider assessment pre-determined?

118. In this section we examine whether the decision to select Royal Devon & Exeter Foundation Trust as the provider of community services for adults with complex care needs in the eastern locality was pre-determined and whether NEW Devon CCG failed to treat providers in an equal and non-discriminatory way.

Northern Devon Healthcare Trust's submission

119. Northern Devon Healthcare Trust submitted that:

- NEW Devon CCG's intention was always to adopt the proposals outlined in the draft Strategic Framework regardless of feedback on its consultation
- The fact the options appraisal was conducted at the same time as the provider assessment demonstrated that the outcome of the options appraisal was pre-determined
- The fact that the provider assessment resulted in selecting the same provider as in the draft Strategic Framework demonstrated that the process was predetermined

120. The involvement of individuals in the evaluation and moderation panels who may have previously been involved in the co-production and consultation phase may therefore have prejudiced the outcome of the provider assessment.

NEW Devon CCG's submission

121. NEW Devon CCG said it was not biased towards a particular provider and its provider assessment was not pre-determined. It told us that although its original intention was to select Royal Devon & Exeter Foundation Trust as set out in the draft Strategic Framework, it had since re-designed the process and opened the process

²³ Regulation 3(2)(b), set out in Section 4 above.

to providers in the local system who had a fair and equal chance of engaging. The CCG wrote to providers explaining the change to the process and to confirm their interest or otherwise in going forward. The CCG said it conducted its options appraisal and its provider assessment in parallel due to the need to maintain momentum in addition to continuing to be ready for other options if they were preferred. In relation to the provider assessment the CCG told us that:

- it was run by the procurement team from South West CSU to ensure independence
- it was designed so that different people were involved in the decision making at each stage of the process
- evaluators were trained to ensure that the submissions were approached fairly, and with an open mind
- the selection and weighting of criteria, the assessment of bids, and the scoring of bids against the criteria were fair and unbiased.

Royal Devon & Exeter Foundation Trust's submission

122. Royal Devon & Exeter Foundation Trust said that the process gave NEW Devon CCG the opportunity to assess different solutions and capabilities of different providers.

Submissions from other providers

123. Care UK told us that as part of its initial assessment of the services in the period before July 2014 it reached the view that the decision to select Royal Devon & Exeter Foundation Trust had already been made by NEW Devon CCG. Therefore, Care UK decided not to express an interest in providing the services.

124. Devon Partnership told us that from its discussions with NEW Devon CCG's representatives before and during the formal consultation period it concluded that the CCG's preferred option was to transfer the community services from Northern Devon Healthcare Trust to Royal Devon & Exeter Foundation Trust. The trust said that as a result, it decided that there was little point in participating in the provider assessment. The trust also said that it expressed its concerns about the CCG's process and proposals verbally and in writing to the CCG on a number of occasions.

Our assessment

125. At the time NEW Devon CCG consulted on the draft Strategic Framework (up to July 2014), it was explicit about its proposal to select Royal Devon & Exeter Foundation Trust as provider of these services and its communications with Northern Devon Healthcare Trust reflected this. The basis for NEW Devon CCG's preference, as set out in the draft Strategic Framework, was that it wanted to integrate and co-

ordinate services with pathways of care centred on what it called ‘natural locality geographies’.

126. We have not assessed NEW Devon CCG’s rationale for its initial proposal to select Royal Devon & Exeter Foundation Trust. However, we note that there are examples of innovative and effective community services, well integrated with acute care, which are not provided by an acute provider.²⁴ In our view, integrated care does not need to be delivered by a single organisation.²⁵

127. In this case, NEW Devon CCG changed its approach following its consultation on the draft Strategic Framework. Instead of confirming Royal Devon & Exeter Foundation Trust as the provider of the services, it invited providers which responded to its consultation to submit proposals and attempted to design a process that gave them an equal opportunity to participate. In the circumstances, given the CCG had an initial preference for a particular provider, it seems appropriate that it identified that preference in the draft Strategic Framework. However, once the CCG changed its approach it was important to ensure the subsequent process did not unfairly favour a particular provider and that the outcome of the remaining process was not affected by the CCG’s initial preference for Royal Devon & Exeter Foundation Trust.

128. We reviewed the CCG’s documents, options appraisal process and provider assessment process to examine whether the outcome of the process was pre-determined. The results of our review are set out below. We also reviewed allegations by Northern Devon Healthcare Trust and other providers that statements made by CCG members and third parties contributed to creating a perception that the outcome of provider assessment was pre-determined.

Draft Case for Change

129. In September 2014 NEW Devon CCG’s governing body endorsed the recommendations in the draft Case for Change. The options appraisal and provider assessment commenced afterwards. This document contained several statements which commented favourably on Royal Devon & Exeter Foundation Trust, such as: “It is our view that the Royal Devon & Exeter Foundation Trust is best placed to deliver our requirements and therefore are currently our preferred option.” It is

²⁴ For example, the rapid response service for older people delivered by Oxleas NHS Foundation Trust and Royal Borough of Greenwich adult community services. The community service includes joint emergency teams of health and social care professionals who respond to GP, accident and emergency and paramedic referrals to prevent hospital admission.

²⁵ We have published guidance on our approach to integrated care on our website: guidance on complying with our integrated care requirements ([here](#)); guidance on the integrated care licence condition ([here](#)); Our substantive guidance on the Procurement, Patient Choice and Competition Regulations ([here](#)).

difficult to reconcile the statements endorsed in the draft Case for Change with the CCG's intention to invite other providers to bid for the services. However, the draft Case for Change does not appear to have been taken into account in the CCG's evaluation and moderation process to assess proposals from providers.

Options appraisal

130. We reviewed the scores and comments by the panel and examined whether they aligned with the outcome of the options appraisal. We also considered whether the fact that the options appraisal was conducted in parallel with the provider assessment demonstrated that the outcome was pre-determined. It appears to us that the scores align with the outcome of the options appraisal. The evidence did not suggest that the panel members were biased or that the outcome of the options appraisal was pre-determined.

Provider assessment

131. We examined whether NEW Devon CCG's questions in the provider assessment favoured a particular type of provider. It appears to us that they were capable of being answered by a non-acute provider or a provider based outside the locality. Such a provider could demonstrate its connection to the locality urgent care system (for example, by designing care pathways that worked with urgent care). Although providers were also asked how they would ensure delivery of one governance process, the explanatory remarks to this question indicated that this could be achieved by formal partnership arrangements. In our view the weighting of the questions (with question 1 given a higher weighting than other questions) seems consistent with the CCG's focus on improving the integration of services.

132. We reviewed the scoring and comments of the evaluators and moderators. The evidence did not suggest that the outcome was pre-determined, nor that involvement of persons in the evaluation and moderation panels who had previously been involved in the co-production and consultation phase necessarily prejudiced the outcome of the provider assessment. We note that a comment by one of the evaluators appeared to prefer a particular provider. The evaluator preferred Royal Devon & Exeter Foundation Trust as a "single provider" above Northern Devon Healthcare Trust as "not a single provider". However, we found that this evaluator's score for Northern Devon Healthcare Trust was discounted in the moderation process and did not affect the overall outcome of the provider assessment.

Statements by the CCG

133. We also assessed whether NEW Devon CCG contributed to creating a perception (held by Northern Devon Healthcare Trust, Care UK and Devon Partnership Trust) that its decision to select Royal Devon & Exeter Foundation Trust was pre-determined. The records of the CCG's communications with these providers about the provider assessment do not suggest the outcome was pre-determined.

However, the CCG was unable to provide us with a complete record of its communications with providers because it did not keep records of calls and deleted most emails. We asked the relevant providers to submit details of their communications with the CCG which created their perception that this part of the process was not genuine. The providers did not give us statements of what CCG members said. Without such evidence we are unable to substantiate the allegation.

Conclusion to our assessment

134. As discussed above, the evidence did not substantiate Northern Devon Healthcare Trust's allegation that the outcome of NEW Devon CCG's provider assessment was pre-determined by the CCG's earlier preference for Royal Devon & Exeter Foundation Trust. However, in our view the CCG's record-keeping practices on this matter were unsatisfactory. As a public body, and in particular during a procurement process such as this, we would expect a CCG to maintain proper records of communications with external parties, including communications by email or phone.

Did Royal Devon & Exeter Foundation Trust have an unfair advantage in the provider assessment?

135. In this section we examine whether Royal Devon & Exeter Foundation Trust had an unfair advantage in the provider assessment because of the due diligence exercise the CCG conducted during an earlier stage of the process (see paragraph 43 above).

Northern Devon Healthcare Trust's submission

136. Northern Devon Healthcare Trust submitted that the fact NEW Devon CCG conducted an initial due diligence exercise with Royal Devon & Exeter Foundation Trust during its consultation on the draft Strategic Framework gave Royal Devon & Exeter Foundation Trust an unfair advantage in the subsequent provider assessment.

NEW Devon CCG's submission

137. NEW Devon CCG submitted that it conducted the due diligence exercise in relation to Royal Devon & Exeter Foundation Trust during the consultation stage so that it could award the contract should the consultation support the CCG's choice of preferred provider. The CCG told us that this exercise was only undertaken with Royal Devon & Exeter Foundation Trust since Northern Devon Healthcare Trust was deemed to be capable as an existing community services provider. The CCG also said that Northern Devon Healthcare Trust, as the incumbent provider of the services, was not disadvantaged.

Royal Devon & Exeter Foundation Trust's submission

138. Royal Devon & Exeter Foundation Trust said that as the incumbent provider, Northern Devon Healthcare Trust's position created much greater opportunity to shape the CCG's thinking on the future design of the services than was available to other potential providers.

Our assessment

139. In our view NEW Devon CCG's decision to conduct the due diligence exercise in relation to Royal Devon & Exeter Foundation Trust at the consultation stage was consistent with its stated preference to select this provider. The risk with this approach was that the CCG devoted unnecessary resources to the exercise if the consultation did not support the CCG's preferred approach. Another risk was if the information obtained from Royal Devon & Exeter Foundation Trust at this stage was relied on in the subsequent provider assessment, this could have disadvantaged other providers being assessed. However, it does not appear that this was the case. Providers were assessed based on their responses to the six questions ([Appendix 3](#)), and information obtained earlier in the process was not taken into account by the evaluation or moderation panel.

140. The evidence did not suggest the CCG's previous due diligence exercise on Royal Devon & Exeter Foundation Trust affected the outcome of the provider assessment. We found that the evaluation and moderation panels' scores determined the outcome and the CCG's governing body approved it. None of the evaluators in the final assessment was present during Royal Devon & Exeter Foundation Trust's presentation to the CCG on 7 July 2014. One moderator of the final assessment was present during this meeting. However, this person was the chair of the evaluation panel without voting rights to reach the final score. Therefore our view is that the CCG's initial due diligence exercise with Royal Devon & Exeter Foundation Trust did not disadvantage Northern Devon Healthcare Trust.

141. For the reasons above, we provisionally conclude that NEW Devon CCG did not breach regulation 3(2)(b) of the Procurement, Patient Choice and Competition Regulations by failing to treat providers equally and in a non-discriminatory way.

8. Transparency

142. The Procurement, Patient Choice and Competition Regulations require commissioners, when procuring healthcare services for the purposes of the NHS, to act in a transparent way.²⁶

²⁶ Regulation 3(2)(a), set out in Section 4.

143. In this section, we assess the transparency of the process. Specifically we assess Northern Devon Healthcare Trust's allegation that NEW Devon CCG failed to act transparently by:

- not providing enough clarity to potential providers, or at least to Northern Devon Healthcare Trust, about the procurement process, with changes and delays to the process occurring without explanation
- delaying and failing to respond to Northern Devon Healthcare Trust's requests for information, including not identifying which CCG senior officers were involved in the evaluation.

Clarity provided to potential providers about the procurement process

Northern Devon Healthcare Trust's submission

144. Northern Devon Healthcare Trust submitted that the process to be followed was never made clear to potential providers, or at least to it, by NEW Devon CCG. It also submitted that changes and delays to the process occurred without any explanation from the CCG.

NEW Devon CCG's submission

145. NEW Devon CCG told us that it communicated with provider chief executives at key points throughout the entire process through letters, meetings and phone calls. In addition, the CCG shared key documents with providers such as papers submitted to its governing body. Although the timing of the process changed, the CCG submitted that this occurred mainly as a result of taking views into account, and the overall starting point for the future arrangements remained consistent. It submitted that throughout the provider assessment process, it gave documentation to all providers at the same time, and shared responses to requests for clarification with all organisations.

146. NEW Devon CCG said that its initial proposal to give providers and the public a chance to comment demonstrated absolute transparency. It said that the fact it then took views into account and adjusted its approach also demonstrated a transparent approach and a genuine desire to listen.

Submission from Royal Devon & Exeter Foundation Trust

147. Royal Devon & Exeter Foundation Trust said that in its view NEW Devon CCG designed and followed a robust process that was fair and transparent. It told us that all communication with the CCG was formal and written.

Our assessment

148. We reviewed the information NEW Devon CCG provided to Northern Devon Healthcare Trust and other providers who expressed interest in providing services

for adults with complex care needs in the eastern locality. These were Northern Devon Healthcare Trust, Royal Devon & Exeter Foundation Trust, Devon Partnership Trust²⁷ and Virgin Care. [Appendix 7](#) provides an overview of communications between the CCG and these providers from April 2014 onwards; the relevant points are described in the main text.

149. In its consultation on the draft Strategic Framework, NEW Devon CCG said it would decide its procurement approach at its governing body meeting on 16 July 2014. Following the consultation the CCG changed its approach, and informed Northern Devon Healthcare Trust before this meeting that it would make no decision on procurement at the meeting.

150. Prior to its governing body meeting on 4 September 2014, NEW Devon told the providers' chief executives of the timescales of the provider assessment. The remainder of the process ran according to these timescales.

151. From our review of the documents it appears that NEW Devon CCG shared relevant documents with providers who expressed an interest in providing the services (including copies of relevant draft documents in advance of publication). Before assessing the providers, the CCG sent to the four providers identified above:

- the draft Case for Change
- the draft Strategic Framework
- a letter explaining the proposed provider assessment process and inviting providers to express interest in participating
- the assessment documents, sent to providers who expressed an interest in participating in the provider assessment.

152. NEW Devon CCG also published documents informing providers of its overall process and subsequent changes, including governing body meeting notes, the draft Strategic Framework and the draft Case for Change. The CCG gave Northern Devon Healthcare Trust and other providers advance notice of the change to its process following consultation on the draft Strategic Framework.

153. NEW Devon CCG shared key documents and information about the process with all interested providers and it provided sufficient information to enable them to participate in the provider assessment. We therefore provisionally conclude that it did not breach regulation 3(2)(a) of the Procurement, Patient Choice and Competition Regulations.

²⁷ Although Devon Partnership did not formally express an interest in participating in the provider assessment, it told us that it had an interest in and the capability to provide the services and made this clear to NEW Devon CCG in its response to the public consultation on the draft Strategic Framework.

154. NEW Devon CCG was unable to provide us with a complete record of its communications with all interested providers because records of telephone calls were not kept and emails were deleted. We have therefore not been able to take account of these communications. The CCG's record-keeping practices in this case were unsatisfactory. However, the Procurement, Patient Choice and Competition Regulations are not prescriptive about a commissioner's internal record keeping, and we do not find a breach of the transparency requirement of the regulations in this case. In the future we would expect the CCG to maintain proper records of communications with external parties, including communications by email or phone.

Did NEW Devon CCG delay and fail to respond to Northern Devon Healthcare Trust's requests for information?

155. Northern Devon Healthcare Trust submitted that it requested information from NEW Devon CCG and the CCG either delayed its responses or failed to respond to these requests.

156. We examined the following occasions on which Northern Devon Healthcare Trust requested information: 8 July 2014, 7 November 2014, 10 November 2014 and 17 November 2014. We have set out our assessment of the 8 July 2014 request separately because this information was requested prior to the provider assessment. Then we set out our assessment of NEW Devon CCG's alleged failure to respond to Northern Devon Healthcare Trust's other requests together.

Information requested on 8 July 2014

Northern Devon Healthcare Trust's submission

157. On 8 July 2014 Northern Devon Healthcare Trust sent a private response to NEW Devon CCG's consultation on the draft Strategic Framework. The response challenged the CCG's procurement proposals relating to services for adults with complex care needs and asked several questions seeking to understand the rationale of the CCG. Northern Devon Healthcare Trust asked for responses to its questions by 22 July 2014, the date of its board meeting. Northern Devon Healthcare Trust said that the CCG did not respond until 2 October 2014, and did not answer some questions because by this time it had begun the provider assessment. Northern Devon Healthcare Trust said that the CCG could have responded to all the questions and shared its response with all potential providers. The trust said it reminded the CCG on several occasions that this request was outstanding. The trust submitted that both the response and its delay were evidence of a lack of transparency.

NEW Devon CCG's submission

158. NEW Devon CCG said Northern Devon Healthcare Trust's letter of 8 July 2014 was a private and confidential response related to the content of the draft Strategic Framework, which was subsequently revised after the consultation. The

CCG responded to the letter on 24 July 2014 explaining that it was unable to respond to the trust in the required timescales due to the volume of information it had received in the consultation and the need to review this information in developing the its final procurement approach. The CCG also indicated that a number of questions would be answered in the Case for Change.

159. NEW Devon CCG responded to the 8 July 2014 information request on 1 October 2014 explaining that the procurement process was ongoing and providing all publicly available information in response to the questions. The CCG said that it acknowledged that this response was delivered outside the 20 working days from the request but the CCG said the request was not a request under the Freedom of Information Act 2000 (which specifies a period for response) and it had communicated that some questions would be answered in the draft Case for Change.

160. NEW Devon CCG also said it was not appropriate to share further information at this time on the basis that this would have given Northern Devon Healthcare Trust an unjust advantage in the procurement process. The CCG told us the delay in responding to the 8 July 2014 request for information had no adverse impact on Northern Devon Healthcare Trust's ability to respond to the provider assessment, and emphasised that the trust had not argued it was unable to respond to the provider assessment.

Our assessment

161. We note that NEW Devon CCG informed Northern Devon Healthcare Trust on 24 July 2014 that it was unable to respond to the 8 July information request until it had considered the consultation responses. Whilst we think it was reasonable for the CCG to assess the consultation responses before responding, we would generally expect a commissioner to provide a timely response to questions about its process.

162. In any event, the questions asked in the 8 July letter related to the CCG's initial proposal as outlined in the draft Strategic Framework. The CCG subsequently changed its proposed approach and informed providers of the proposed assessment process in September 2014. In our view, the information requested by the trust on 8 July 2014 was superseded by the change to the process. For this reason, the CCG's failure to provide a complete and timely response did not affect Northern Devon Healthcare Trust's ability to participate in the provider assessment, or lead to it being disadvantaged in the process.

Other information requested

Northern Devon Healthcare Trust submission

163. Northern Devon Healthcare Trust told us it also requested the following information:

- On 7 November 2014, the trust requested copies of the evaluations by the Department of Health Gateway Team. Northern Devon Healthcare Trust said that NEW Devon CCG decided to withhold the information.
- On 7 and 17 November 2014, the trust requested information about the evaluation process. The trust said that NEW Devon CCG refused to identify which CCG senior officers were involved in the evaluation.
- On 10 November 2014, the trust requested information about the due diligence process. The trust said that the CCG answered that this process had not yet been designed and further information would be issued during the week commencing 24 November 2014.

NEW Devon CCG's submission

164. NEW Devon CCG told us that it responded to all of Northern Devon Healthcare Trust's requests made under the Freedom of Information Act 2000. The CCG told us it did decline to identify the individuals involved in the evaluation process. The CCG said this was standard practice, and said this was a sensible step to avoid individuals being put in a position where direct lobbying may be applied to them.

Our assessment

165. We examined the content of the information requested and the responses provided. We have not commented on whether NEW Devon CCG's decisions to withhold information by reference to exemptions set out in the Freedom of Information Act 2000 were appropriate because we are not responsible for enforcing this Act. However, we have considered whether the CCG should have provided the information requested under its obligation to act in a transparent way under the Procurement, Patient Choice and Competition Regulations. Our assessment of the information requested and provided is set out below.

166. It appears to us that the Department of Health's gateway reviews were external advice to help NEW Devon CCG achieve its objectives, and were not relevant to Northern Devon Healthcare Trust's ability to participate in the CCG's provider assessment. In our view, the CCG did not breach the transparency requirements of the Procurement, Patient Choice and Competition Regulations by not disclosing this information.

167. As the trust asked the CCG to identify senior officers involved in the process only after the CCG had completed the provider assessment, its absence did not in our view affect the trust's ability to participate in the provider assessment, or lead to it being disadvantaged in the process.

168. We reviewed the information request of 10 November 2014 and the response provided. NEW Devon CCG initially responded that the due diligence process had not been designed yet, but that further information would be provided during the week commencing 24 November 2014. On 28 November 2014, the South West CSU emailed details of the transition framework to Northern Devon Healthcare Trust. We conclude that NEW Devon CCG provided a timely and sufficient response to this request.

169. For the reasons set out above we provisionally conclude that the CCG did not breach the transparency requirement in regulation 3(2)(a) of the Procurement, Patient Choice and Competition Regulations.

9. Conflict of interest

170. CCGs are prohibited from awarding contracts for NHS healthcare services where conflicts, or potential conflicts, between the interests involved in commissioning such services and the interests in providing them affect, or appear to affect, the integrity of the award of that contract. CCGs are also required to maintain a record of how any conflicts that have arisen have been managed. These requirements are set out in regulations 6(1) and 6(2) of the Procurement, Patient Choice and Competition Regulations.

171. In this section, we assess whether there were any conflicts, or potential conflicts, of interest which affected, or appeared to affect, the integrity of NEW Devon CCG's decision to select Royal Devon & Exeter Foundation Trust as the preferred provider of services for adults with complex care needs in the eastern locality. We also assess whether any conflicts, or potential conflicts, of interest that arose were appropriately managed.

172. Our analysis focuses on NEW Devon CCG's process for assessing providers as this was the basis for the CCG's decision to select Royal Devon & Exeter Foundation Trust as the preferred provider. More specifically, our analysis relates to the CCG's evaluation and moderation of the proposals from providers.

Were there any conflicts of interest which affected, or appeared to affect the integrity of selecting Royal Devon & Exeter as the preferred provider?

173. The first alleged conflict of interest related to individuals being involved in more than one stage of the process, and the second related to individuals who were employees of the providers involved in the process.

Northern Devon Healthcare Trust's submission

Involvement in various stages of the process

174. Northern Devon Healthcare Trust told us that people involved in the development and production of the original proposal to select Royal Devon & Exeter

Foundation Trust may have also been involved in evaluating and/or moderating of providers' proposals. The trust submitted that any person involved in the process in this way would have a conflict of interest insofar as they had stated a preference for Royal Devon & Exeter Foundation Trust in the earlier stages of the process and then gone on to be involved in the provider assessment.

175. Northern Devon Healthcare Trust submitted that these persons should have made clear the conflict of interest and not taken any part in the assessment process, including refraining from voting at the governing body meeting.

176. Northern Devon Healthcare Trust submitted that while this type of conflict is not referred to in Monitor's guidance on the Procurement, Patient Choice and Competition Regulations, any individual who has explicitly stated their preferred provider before a procurement exercise should either not be involved in any way in the procurement process or decision, or their conflict of interest should be noted.

Involvement as an employee of a provider in the process

177. Northern Devon Healthcare Trust also told us that there were commissioning GPs in the eastern locality employed by the providers in the process.

178. Northern Devon Healthcare Trust also submitted that the [redacted] (who also chaired the moderation panel that assessed providers' proposals), had previously worked for Royal Devon & Exeter Foundation Trust and therefore had a conflict of interest.

NEW Devon CCG's submission

Involvement in various stages of the process

179. NEW Devon CCG told us it did not think this particular issue fell within the meaning of the Procurement, Patient Choice and Competition Regulations relating to conflict of interest because it did not disclose any conflict between the interests involved in providing services and those involved in commissioning.

Involvement as an employee of a provider in the process

180. NEW Devon CCG told us that one of the evaluators, [redacted] in [redacted] role as a community hospital practitioner, was employed by Northern Devon Healthcare Trust the time when the evaluation took place to provide cover on the wards to his practice's patients during their stay at community hospitals within the eastern locality. The CCG said [redacted] provided cover at both the [redacted] Community Hospital and the [redacted] Community Hospital and this cover was up to five hours per week. The CCG told us that this interest was not identified at the time of the evaluation because [redacted] did not declare it when asked to declare [redacted] independence from the two providers. The CCG also told us that [redacted] provided services for Northern Devon Healthcare Trust on the same basis [redacted].

181. NEW Devon CCG told us it recognised that these interests should have been declared as the process required declaration of interests.

182. NEW Devon CCG also told us that one of the moderators, [X] declared an interest because [X] worked within [X] at Northern Devon Healthcare Trust at the time of the moderation. The CCG said the position of [X] was well known within the eastern locality and that no one raised this as an issue throughout the process. The CCG said the Chair of the moderation panel considered [X] interest and concluded there to be no conflict in relation to the contract for services for adults with complex care needs. [X] was not connected, or in any position of authority, regarding the services in question and as such there would be no impact on his remuneration or other professional standing.

183. NEW Devon CCG told us that [X], who was on the CCG's governing body, declared an interest because his [X] was a [X] at Royal Devon & Exeter Foundation Trust at the time when the governing body met. The CCG did not consider this to be a conflict of interest in relation to the decision as there was no impact on either [X] or [X] as a result of the decision in community services.

184. New Devon CCG told us [X] was previously employed by Royal Devon & Exeter in 2013. [X].

185. The CCG said that [X] role as Chair of the moderation panel was to chair the meeting and to collate the scores of the moderators.

Our assessment

Involvement in various stages of the process

186. The involvement of people on the evaluation and moderation panel whom were involved at previous stages of the process does not amount to a conflict of interest as defined in the Procurement, Patient Choice and Competition Regulations. We have examined Northern Devon Healthcare Trust's allegations that the result of the provider assessment was pre-determined in Section 7 above.

Involvement as an employee of a provider in the process

187. NEW Devon CCG told us that there were four individuals involved in the process with an interest in one or the other of the two providers. We set out below our analysis and conclusion on whether their interests affected, or appeared to affect, the integrity of the decision to select Royal Devon & Exeter Foundation Trust as the preferred provider.

188. In our substantive guidance we describe what interests in providing services may conflict with the interests in commissioning them. This includes a CCG member's financial interest in awarding a contract to a provider because, for example, that provider employs the individual or their spouse. In this case, [X] and

[X] were employees of Northern Devon Healthcare Trust (for up to five hours a week) and not Royal Devon & Exeter Foundation Trust. While it is the case that this interest could have been a potential conflict of interest, in practice it is not material and at odds with the decision to select Royal Devon & Exeter Foundation Trust as the preferred provider. [X] was one of seven evaluators and, based on the individual scores and the scores of the moderation panel, it does not appear that his scores affected the outcome of the moderation.

189. We note that both [X] and [X] were each employed by one of the providers in services unrelated to community services for adults with complex care needs. In relation to [X], we also note that [X] role was as a member of the governing body and its decision was limited to approving or rejecting the recommendation of the moderation panel. In relation to [X], we also note that [X] was employed by Northern Devon Healthcare Trust, which was not selected as the preferred provider. For these reasons, our view is that in the circumstances of this case, these interests were remote and not material.

190. [X] was previously employed by Royal Devon & Exeter Foundation Trust, however, it is our view that in this circumstance this does not give rise to a conflict of interest. In any event, [X] did not have a decision-making role in this process. It is our view therefore that this did not affect, or appear to affect the integrity of selecting Royal Devon & Exeter Foundation Trust as the preferred provider.

191. For the reasons set out above we have provisionally concluded that the four interests described above did not affect, or appear to affect, the integrity of selecting Royal Devon & Exeter Foundation Trust as the preferred provider. While we do not find a breach of the Procurement, Patient Choice and Competition Regulations it is our view that NEW Devon CCG could have taken steps to better manage these interests.

192. In relation to [X] we would expect commissioners to review and cross-check declarations of independence to identify where an individual may have failed to declare an interest. This did not happen in this case.

193. In relation to [X] and [X] both of these individuals declared an interest and it was decided in both cases that the interest was not material enough to be a conflict of interest. Even though NEW Devon CCG made this assessment, we would expect the CCG to disclose these potential conflicts publicly with information such as that listed in our guidance.

10. Conclusions

194. We have drawn together our provisional findings below in relation to the issues examined in our investigation:

- **Analysis of the process (section 6):** whether the process used enabled NEW Devon CCG to assure itself of the quality, efficiency and value for money of service provision
- **Equal treatment and non-discrimination (section 7):** whether NEW Devon CCG treated providers equally and in a non-discriminatory way
- **Transparency (section 8):** whether NEW Devon CCG acted in a transparent way
- **Conflict of interest (section 9):** whether there were conflicts of interest which affected, or appeared to affect, the integrity of the proposed contract award.

Analysis of the process

195. In section 6 of this document, we examined NEW Devon CCG's compliance with regulations 2, 3(2), 3(3) and 3(4) of the Procurement, Patient Choice and Competition Regulations.

Process and criteria for assessing prospective providers

196. We examined whether the process, and the criteria used to assess prospective providers, enabled NEW Devon CCG to select the provider or providers that:

- were most capable of meeting the commissioner's objective to secure the needs of NHS health care service users, improve the quality of services and the efficiency with which they are provided; and
- provided best value for money.

197. As set out in paragraph 81, we found that at the stage at which NEW Devon CCG selected Royal Devon & Exeter Foundation Trust as the preferred provider of community services for adults with complex care needs in the eastern locality, it had not obtained a level of detailed information from the prospective providers that would give it an adequate understanding of the scope of services to be provided, how the providers would deliver them and the cost of the services. Without this information the CCG could not, in our view, properly assess the prospective providers' capability of meeting the CCG's objective under regulation 2 and whether the providers' proposals represented value for money.

198. However, NEW Devon CCG has not yet concluded its process and plans to gather further information from Royal Devon & Exeter Foundation Trust at the due diligence stage before awarding a contract. Because NEW Devon CCG plans to gather further information and carry out more analysis before reaching a final

decision we provisionally conclude that the CCG has not breached regulation 3(3) of the Procurement, Patient Choice and Competition Regulations (see paragraph 82).

199. In section 6 we explain that in order to ensure that it meets the requirements of regulation 3(3) before awarding a contract, NEW Devon CCG will need to know the scope of services to be provided, how Royal Devon & Exeter Foundation Trust will deliver them, and how much it will cost to deliver these services. It will also need to reach a view on whether and how Royal Devon & Exeter Foundation Trust's proposal represents value for money and be able to explain this. This is likely to require an analysis of what the proposal delivers compared to its cost. In section 6 we provide examples of how the CCG could assess value for money.

200. If NEW Devon CCG was to proceed to award a contract to Royal Devon & Exeter Foundation Trust without obtaining further information and assuring itself of the matters as described above, this would be likely to be in breach of the Procurement, Patient Choice and Competition Regulations. We would also expect that if, following its due diligence process, the CCG was not satisfied that proceeding with Royal Devon & Exeter Foundation Trust was the best way to secure the needs of patients, improve the quality and efficiency of the services, and provide value for money, we would expect the CCG not to award a contract. The CCG would then need to consider other alternatives [§<].

Proportionality of the process

201. We examined whether NEW Devon CCG's process was proportionate to the value, complexity and clinical risk associated with the provision of community services for adults with complex care needs.

202. It appeared to us that the time and resources the CCG devoted to commissioning community services for adults with complex care needs was commensurate to the value, complexity and clinical risk of the services. Therefore we provisionally conclude that NEW Devon CCG did not breach regulation 3(3)(a) by failing to act in a proportionate way.

Improvements to services

203. We examined whether NEW Devon CCG considered appropriate ways of improving the quality and efficiency of the services.

204. We found that NEW Devon CCG considered appropriate means of improving the services through providing them in a more integrated way and enabling providers to compete to provide services.

205. We therefore provisionally conclude that NEW Devon CCG did not breach regulations 3(4)(a) and 3(4)(b) of the Procurement, Patient Choice and Competition Regulations.

Equal treatment and discrimination

206. In section 7 of this document, we examined whether NEW Devon CCG breached regulation 3(2)(b) of the Procurement, Patient Choice and Competition Regulations by discriminating in favour of Royal Devon & Exeter Foundation Trust and failing to treat providers in an equal and non-discriminatory way.

207. The evidence did not indicate that NEW Devon CCG's assessment of providers was pre-determined by the CCG's earlier preference (expressed in its consultation on the draft Strategic Framework) for Royal Devon & Exeter Foundation Trust to provide the services.

208. We also found that Royal Devon & Exeter Foundation Trust did not have an unfair advantage in the provider assessment by virtue of the initial due diligence exercise which NEW Devon CCG had conducted with it during the CCG's consultation on the draft Strategic Framework

209. We therefore provisionally conclude that the CCG did not breach regulation 3(2)(b) of the Procurement, Patient Choice and Competition Regulations.

Transparency

210. In section 8 of this document, we examined whether NEW Devon CCG failed to act in a transparent way, in breach of regulation 3(2)(a) of the Procurement, Patient Choice and Competition Regulations, by not providing enough clarity to providers about the process and delaying and failing to respond to Northern Devon Healthcare Trust's requests for information.

211. We found that NEW Devon CCG provided sufficient information to interested providers to enable them to participate in the provider assessment. Where the CCG did not provide information that was requested by Northern Devon Healthcare Trust we found that this did not affect the trust's ability to participate in the provider assessment and therefore did not lead to it being disadvantaged in the process.

212. We therefore provisionally conclude that NEW Devon CCG did not breach regulation 3(2)(a) of the Procurement, Patient Choice and Competition Regulations.

213. In the course of our investigation it became apparent that NEW Devon CCG's record-keeping practices in this case were unsatisfactory. However, the Procurement, Patient Choice and Competition Regulations are not prescriptive about a commissioner's internal record keeping, and we do not find a breach of the transparency requirement of the regulations in this case. In the future we would expect the CCG to maintain proper records of communications with external parties, including communications by email or phone.

Conflict of interest

214. In section 9 of this document, we examined NEW Devon CCG's compliance with regulations 6(1) and 6(2) of the Procurement, Patient Choice and Competition Regulations. In particular, we examined whether there were any conflicts, or potential conflicts, of interest which affected, or appeared to affect, the integrity of NEW Devon CCG's decision to select Royal Devon & Exeter Foundation Trust as the preferred provider of services for adults with complex care needs in the eastern locality. We also examined whether any conflicts, or potential conflicts, of interest that arose were appropriately managed.

215. We found that the alleged conflicts of interest were not material and did not affect, or appear to affect, the integrity of NEW Devon CCG's decision to select Royal Devon & Exeter Foundation Trust as the preferred provider.

216. We therefore provisionally conclude that NEW Devon CCG did not breach regulations 6(1) and 6(2) of the Procurement, Patient Choice and Competition Regulations. However, in section 9 we make some recommendations on how the CCG's practice of managing conflicts could be improved.

Next steps

217. We invite responses to these provisional findings from all interested stakeholders including NEW Devon CCG, Northern Devon Healthcare Trust and other providers in Devon. We also welcome responses from any other interested third parties, including NHS healthcare service users, providers and clinicians:

- please provide your responses by close of business on Friday 26 June
- please email your response to coopandcompcases@monitor.gov.uk
- we intend to publish all submissions received; if your submission contains confidential information,²⁸ please identify which information is confidential and explain why²⁹
- the submissions received will be taken into account before we make our final decision.

The [indicative timetable](#) we have published gives an estimated publication date for the final decision by the end of June 2015. We have amended this to July 2015. This extension is due the time we spent gathering further information and to ensure that interested parties have sufficient time to respond to our provisional findings.

²⁸ For example, this may include information that it would not be in the public interest to disclose, contains business secrets and/or information relating to private affairs.

²⁹ We will take the explanation into account in deciding whether the specified information should be excised from the published submission.

Appendix 1: Conduct of our investigation

On 18 December 2014, we received a complaint from Northern Devon Healthcare Trust relating to the commissioning of certain community services in Devon by NEW Devon CCG. On 21 January 2015, we opened a formal investigation into this matter and published an [administrative timetable](#) for the investigation.

Since opening the investigation, we:

- published a [statement of issues](#) and requested views from interested parties
- received submissions on the statement of issues from Northern Devon Healthcare Trust, NEW Devon CCG, Royal Devon & Exeter Foundation Trust and other interested parties, including the public, local councils, local GPs and local groups.
- held meetings with Northern Devon Healthcare Trust, NEW Devon CCG and Royal Devon & Exeter Foundation Trust
- held a hearing with NEW Devon CCG
- gathered information from various parties, including North Devon Healthcare Trust staff and other providers in Devon (Care UK, Devon Partnership NHS Trust, [redacted], [redacted], Devon Doctors, [redacted] and Virgin Care)
- issued a number of information requests to NEW Devon CCG.

We published on our [website](#) submissions received in response to our statement of issues.

A non-confidential version of our provisional findings has been published on our [website](#).

Appendix 2: Examples of services currently provided in the eastern locality for adults with complex care needs

Respiratory outreach service

The respiratory outreach service provides respiratory nursing and physiotherapy expertise to patients, carers and other health professionals. It aims to help manage respiratory problems in the community, facilitate earlier discharge for patients from acute hospital beds, and liaise with other agencies to provide care and ongoing support to promote health and independence.

Community nursing team

The community nursing team provides a service in the community for people with acute needs or needs related to chronic illness but who do not need hospitalisation. Additionally, the community nursing teams work with other healthcare professionals to actively prevent hospital admission so that patients can be cared for at home. Each team is based at either a community hospital or GP surgery and covers a geographical area.

Community rehabilitation service

The community rehabilitation service is provided by a multidisciplinary team of physiotherapists, occupational therapists, speech and language therapists, community rehabilitation nurses and a rehabilitation doctor. The team aims to help patients become as independent as possible.

Crisis response service

Crisis response services involve a rapid response to an urgent referral, aiming to prevent admission. For example, Northern Devon Healthcare Trust's rapid assessment at home service assesses patients within two hours of GP referral and puts in place an individual support plan.

Appendix 3: Six questions asked in the provider assessment for adults with complex care needs

The explanatory remarks are in italics.

Question number	Question (with explanatory notes)
1	<p>Recognising that care and support is required across organisational boundaries and care pathways how do you propose to deliver fully embedded solutions within the locality urgent care systems to meet patients' needs and deliver the best clinical outcomes for the future?</p> <p><i>Please reference relevant rationale and/or transferable expertise and/or evidence that would provide early assurance of why you consider your organisation to be most capable to deliver.</i></p> <p><i>Please ensure your response is applicable to the locality.</i></p> <p><i>Your response will be assessed against the extent to which it answers the question, including by demonstrating effective solutions to:</i></p> <ul style="list-style-type: none"> <i>• Achieving governance and partnerships designed around the natural flow of patients to meet needs and deliver the best clinical outcomes</i> <i>• Delivering clear and straightforward pathways that minimise the complexity of service provision and maximise integration</i> <i>• Ensuring services and experiences that are consistently joined up and wrapped around individuals</i>
2	<p>With reference to the Strategic Framework, Draft Case for Change; JSNA and health and wellbeing strategy how do you propose to deliver community services in a clinically and financially sustainable and improving manner, recognising the financially challenged economy status?</p> <p>Please describe with supporting plans, workings, assumptions and models.</p> <p><i>Please reference relevant rationale and/or transferable expertise and/or evidence that would provide early assurance of why you consider your organisation to be most capable to deliver.</i></p> <p><i>Please ensure your response is applicable to the locality.</i></p> <p><i>Your response will be assessed against the extent to which it answers the question, including by demonstrating effective solutions to:</i></p> <ul style="list-style-type: none"> <i>• Delivering financial sustainability and value for money</i> <i>• Driving a shift in resources towards prevention and home based models</i>

Question number	Question (with explanatory notes)
	<ul style="list-style-type: none"> • <i>Achieving flexible, resilient and responsive clinical and care delivery that reflects identified health needs and priorities in the locality</i>
3	<p>How do you propose to deliver in an integrated system that makes a step change beyond current integration, takes into account the changing landscape of health and social care commissioning, and includes and supports integrated health and social care delivery?</p> <p><i>Please reference relevant rationale and/or transferable expertise and/or evidence that would provide early assurance of why you consider your organisation to be most capable to deliver.</i></p> <p><i>Please ensure your response is applicable to the locality.</i></p> <p><i>Your response will be assessed against the extent to which it answers the question, including by demonstrating effective solutions to:</i></p> <ul style="list-style-type: none"> • <i>Progressing a step change in integration in health and between health and social care as a milestone towards integrated or accountable care provision</i> • <i>Achieving effective arrangements with the local authority (s) in relation to integration including formal partnerships</i> • <i>Delivering personalised and localised models that bring about choice and control in quality services</i>
4	<p>How do you propose to design and deliver services that meet the needs of patients in a high quality, safe manner and are easy for patients to use and understand? This will require approaches to overcoming the current complexity in the system to deliver sustained high quality, safe, and easy to understand and use services for patients - striving for excellence and providing the greatest opportunity for local communities to engage in their design.</p> <p><i>Please reference relevant rationale and/or transferable expertise and/or evidence that would provide early assurance of why you consider your organisation to be most capable to deliver.</i></p> <p><i>Please ensure your response is applicable to the locality.</i></p> <ul style="list-style-type: none"> • <i>Your response will be assessed against the extent to which it answers the question, including by demonstrating effective solutions to:</i> • <i>Responding to the principle of individuals and carers at the centre –with individuals and their carers seen as partners and at the heart of their care and support plan</i> • <i>Increasing the opportunity and impact of engagement with local</i>

Question number	Question (with explanatory notes)
	<p><i>communities in shaping services</i></p> <ul style="list-style-type: none"> • <i>Simplifying and streamlining delivery working within the locality to achieve co-ordinated care and meets local needs and addresses inequalities</i> • <i>Ensuring services are delivered in a high quality and safe manner</i>
5	<p>How do you propose to ensure delivery of one governance process working effectively within the locality urgent care system recognising that where pathways cross organisations it is imperative to maintain, develop and enhance any formal partnership arrangements?</p> <p><i>Please reference relevant rationale and/or transferable expertise and/or evidence that would provide early assurance of why you consider your organisation to be most capable to deliver.</i></p> <p><i>Please ensure your response is applicable to the locality.</i></p> <p><i>Your response will be assessed against the extent to which it answers the question, including by demonstrating effective solutions to:</i></p> <ul style="list-style-type: none"> • <i>Providing a single and achievable process of governance that reflects patient flow between community and acute care</i> • <i>Achieving and maintaining formal partnership arrangements where pathways cross organisations delivering healthcare in the locality</i>
6	<p>Recognising that within the CCG localities there are different starting points, provision landscapes and different short/medium term priorities for transformation how would you ensure, that as a locality community delivery system leader you fulfilled your responsibilities towards a consistent model and outcomes across the CCG in a 3 year period?</p> <p><i>Please reference relevant rationale and/or transferable expertise and/or evidence that would provide early assurance of why you consider your organisation to be most capable to deliver.</i></p> <p><i>Please ensure your response is applicable to the locality.</i></p> <p><i>Your response will be assessed against the extent to which it answers the question, including by demonstrating effective solutions to:</i></p> <ul style="list-style-type: none"> • <i>Achieving transformation of the community delivery system through collaboration with colleagues across the CCG area</i> • <i>Delivering to an outcomes based approach as described in the design principles of consistent outcomes that are jointly evaluated.</i>

Appendix 4: Commissioning plans for other categories of community services

NEW Devon CCG's commissioning plans with respect to the other categories of services included in its transforming community services programme are shown in Figure 3.

Figure 3: commissioning plans for other categories of community services

NEW Devon CCG's Transforming Community Services Programme (other categories of community services)		Description	Procurement arrangements			
			Northern Locality	Eastern Locality	Western Locality	
Services	1	Urgent care services in the community	Urgent minor injury and illness services	Currently Tendering	Currently Tendering	Currently Tendering
	2	Personalised and support services	Services to help people who are older, frail or otherwise have complex health needs to remain well, support them to recover and enable them to have choice and control of their own care	To Be Tendered <i>(Work underway towards a joint procurement for personalised support)</i>	To Be Tendered <i>(Work underway towards a joint procurement for personalised support)</i>	To Be Tendered <i>(Work underway towards a joint procurement for personalised support)</i>
	3	Specialist community services	A range of services that support people who may be vulnerable and require more specialist input from professional in podiatry, bladder and bowel care, specialist nursing etc	Under Review <i>(report to be reviewed by CCG Governing Body in October 2015)</i>	Under Review <i>(report to be reviewed by CCG Governing Body in October 2015)</i>	Under Review <i>(report to be reviewed by CCG Governing Body in October 2015)</i>

Appendix 5: Commissioning principles, priorities and objectives

NEW Devon CCG's 10 commissioning principles identified from stakeholder engagement for community services:

- integrated and seamless delivery
- clear pathways and access
- consistent outcomes
- evidence-based foundations
- individuals and carers at the centre
- personalised and localised models
- honest and open relationships
- care that reflects health needs
- sustainable, agile and flexible responses
- shifts of resources and innovation.

NEW Devon CCG's six strategic priorities as outlined in the Strategic Framework for community services:

- help people to stay well
- integrate care
- personalise support
- co-ordinate pathways
- 'think carer, think family'
- home as the first choice.

NEW Devon CCG's objectives for community services for adults with complex care needs:

- The system has aligned incentives to deliver clinical outcomes in the best interest of patients, removing strategic and operational barriers to change and minimising system inefficiency. Providers of such services will need to be able to be fully embedded in the locality urgent care system.

- Services which are financially sustainable, and that enable effective and flexible allocation of resources between acute and community services.
- The system has integrated health and social care provision, and is supported by local authority partners.
- Services that meet the needs of patients in a high quality, safe manner, which are easy for patients to understand, and that encourage the involvement of communities in their design.
- Services have a single process of governance designed around the natural flow of patients throughout the healthcare system. Where pathways cross organisations the CCG would wish to ensure that formal partnership arrangements are in place.
- Providers are identified that are focused on achieving a consistent model across the CCG in the long term, taking account of different starting points, different provision landscapes and different short/medium-term priorities for transformation in each of the localities.

Appendix 6: Options appraisal – scoring

The scores of each of the 15 panel members were weighted according to the table below to generate an overall score for each person against each of the options.

Question	Options appraisal questions	Weighting
1	The system has aligned incentives to deliver clinical outcomes in the best interest of patients, removing strategic and operational barriers to change and minimising system inefficiency. Providers of such services will need to be able to be fully embedded in the locality urgent care system.	25%
2	Services which are financially sustainable, and that enable effective and flexible allocation of resources between acute and community services.	15%
3	The system has integrated health and social care provision, and is supported by local authority partners	15%
4	Services that meet the needs of patients in a high quality, safe manner, which are easy for patients to understand, and that encourage the involvement of communities in their design.	15%
5	Services will have a single process of governance designed around the natural flow of patients throughout the healthcare system. Where pathways cross organisations we would wish to ensure that formal partnership arrangements are in place	15%
6	Providers are identified that are focused on achieving a consistent model across the CCG in the long term. Taking account of different starting points, different provision landscapes and different short/medium-term priorities for transformation in each of our localities.	15%

The results of this process are shown in the table below:

Options appraisal questions	Option 1	Option 2	Option 3
Number of Responses	15	15	15
Maximum Score	3	4	4
Minimum Score	1	1	3
Average Score	1.8	2.3	3.7

Appendix 7: Overview of NEW Devon CCG's communication with providers

Date	Action	Northern Devon Healthcare Trust	Royal Devon & Exeter Foundation Trust	Devon Partnership	Virgin Healthcare
Consultation phase					
28/04/2014	Draft Strategic Framework shared with providers	✓	✓	✓	✓
14/05/2014 - 08/07/2014	Provider asked CCG questions about draft Strategic Framework	✓	n/a	n/a	n/a
08/07/2014	Response to consultation	✓	✓	✓	✓
10/07/2014	Announcement that no procurement decision would be made at CCG governing body on 16/07 (by a call)	✓	✓	✓	✓
Strategic Framework and Case for Change					
27/08/2014 - 29/08/2014	Final Strategic Framework and Draft Case for Change shared with providers (announced by a call)	✓	✓	✓	✓
Provider assessment					
15/09/2014	Invitation to express interest in participating in the process sent to providers	✓	✓	✓	✓
15/09/2014 - 22/09/2014	Additional communication with providers (calls/meetings/correspondence)	✓	✓	✓	n/a
19/09/2014	Interest expressed by providers	✓	✓		✓
22/09/2014	Assessment booklet sent to interested providers	✓	✓		✓
22/09/2014 - 13/10/2014	Additional communication with providers (calls/meetings/correspondence)	✓	✓		-
13/10/2014	Response to assessment booklet sent by providers	✓	✓		-
06/11/2014	Results of the provider assessment process shared with providers	✓	✓	✓	✓

Legend

- ✓ Evidence available, copy of communication available
- ✓ Evidence available, copy of communication not available
- n/a We are not aware of communication
- No communication



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