



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:  
final report**

**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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## Summary

We have completed our 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). We have found no breach of the Procurement, Patient Choice and Competition Regulations.<sup>1</sup>

NEW Devon CCG's work carried out so far does not yet place the CCG in a position where it can enter into a contract with Royal Devon and Exeter NHS Foundation Trust. Before entering into any such contract the CCG will need to do further work to:

- determine the scope and pricing arrangements of the proposed contract
- evaluate the value for money that would result
- satisfy itself, and be able to satisfy the public, that proceeding in this way is the best way to secure the needs of patients, improve the quality and efficiency of the services and provide best value for money in doing so.

If NEW Devon CCG were not satisfied that proceeding with Royal Devon and Exeter NHS Foundation Trust is the best way to secure the needs of patients, improve the quality and efficiency of the services and provide best value for money in doing so, we would not expect the CCG to award the contract. Instead the CCG would need to consider what other action would be appropriate.

We summarise below the major points from our investigation.

## Our investigation

On 21 January 2015 we opened a formal investigation having received a complaint from Northern Devon Healthcare NHS Trust that NEW Devon CCG had breached the Procurement, Patient Choice and Competition Regulations. We gathered information from parties including the complainant, the CCG, Royal Devon and Exeter NHS Foundation Trust, other healthcare providers, the public, local councils and local patient groups.

Our analysis covered the issues raised by Northern Devon Healthcare NHS Trust that had related to the fairness and adequacy of NEW Devon CCG's process, equal treatment and non-discrimination, transparency and conflicts of interest:

- **The process and criteria that NEW Devon CCG adopted for assessing prospective providers:** we examined whether the process used by the CCG to select Royal Devon and Exeter NHS Foundation Trust enabled it to assure

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<sup>1</sup> The National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013.

itself of the quality, efficiency and value for money of Royal Devon and Exeter NHS Foundation Trust's offer. We found that:

- given the circumstances and the work the CCG had done, it was acceptable and consistent with the requirements of the Procurement, Patient Choice and Competition Regulations for the CCG to have invited prospective providers to propose solutions and based on that to select a preferred provider with which to do further work
- the CCG's provider assessment allowed it to reasonably conclude that Royal Devon and Exeter NHS Foundation Trust's proposal was more likely to meet its commissioning objectives than Northern Devon Healthcare NHS Trust's proposal
- the CCG had not failed to act in a proportionate way.
- **Equal treatment and non-discrimination:** we examined NEW Devon CCG's process, its correspondence and various statements that Northern Devon Healthcare NHS Trust said had been made; we found that the CCG had not failed to comply with the requirement to treat providers equally and in a non-discriminatory way.
- **Transparency:** we examined whether NEW Devon CCG had provided enough clarity to potential providers and whether it had delayed and failed to respond to Northern Devon Healthcare NHS Trust's requests for information in breach of the transparency requirements; we found that it had not breached the transparency requirements.
- **Conflict of interest:** we examined Northern Devon Healthcare NHS Trust's submissions regarding conflicts of interest and assessed NEW Devon CCG's conduct; we found that the possible conflicts of interest we examined were not material and did not affect, or appear to affect, the integrity of the CCG's decision to select Royal Devon and Exeter NHS Foundation Trust as the preferred provider.

## 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.
2. Northern Devon Healthcare NHS Trust complained that NEW Devon CCG's decision to select Royal Devon and Exeter NHS 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.<sup>2</sup>
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 and Exeter NHS Foundation Trust, other healthcare providers, the public, local councils and local patient groups.
4. We also asked our Clinical Reference Group<sup>3</sup> and a number of people with practical commissioning experience<sup>4</sup> to contribute to specific aspects of our investigation relating to commissioning practice.
5. We prepared and published provisional findings to enable all interested stakeholders to comment on our assessment, reasoning and the evidence used as set out in our provisional findings. The responses received have been taken into account in reaching this decision.
6. Before making its formal complaint, Northern Devon Healthcare NHS Trust asked us for informal advice. Between March and November 2014 we provided informal advice to Northern Devon Healthcare NHS Trust, NEW Devon CCG and Royal Devon and Exeter NHS Foundation Trust. We often provide informal advice on the Procurement, Patient Choice and Competition Regulations 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 formal investigation, we invited the parties to make fresh submissions on the matters raised in Northern Devon

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<sup>2</sup> National Health Service (Procurement, Patient Choice and Competition) (No.2) Regulations 2013.

<sup>3</sup> Further information about our Clinical Reference Group is available at:

[www.gov.uk/government/groups/co-operation-and-competition-clinical-reference-group](http://www.gov.uk/government/groups/co-operation-and-competition-clinical-reference-group) here.

<sup>4</sup> These included senior managers of CCGs and an academic who was previously a director in a primary care trust.

Healthcare NHS Trust's complaint. This report is therefore based on information gathered during our formal investigation.

7. This document sets out our decision on the complaint.
- Section 2 describes the legal context for our investigation, the parties and the relevant services.
  - Sections 3 and 4 summarise Northern Devon Healthcare NHS Trust's complaint and set out the relevant provisions of the Procurement, Patient Choice and Competition Regulations.
  - Section 5 describes the chronology of events and gives an overview of our analysis.
  - Section 6 examines Northern Devon Healthcare NHS 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 examine whether the process was proportionate, and whether the CCG considered appropriate ways of improving the quality and efficiency of the services.
  - Section 7 examines whether NEW Devon CCG failed to treat providers equally and in a non-discriminatory way.
  - Section 8 examines whether NEW Devon CCG failed to act transparently.
  - Section 9 examines potential conflicts of interest in NEW Devon CCG's process.
  - Section 10 sets out our conclusions and next steps.

## 2. Background

### Legal context

8. The Procurement, Patient Choice and Competition 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. Commissioners (clinical commissioning groups and NHS England) must comply with the regulations when commissioning healthcare services for the purposes of the NHS.
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.<sup>5</sup> We are satisfied that

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<sup>5</sup> Section 76(2) of the Health and Social Care Act 2012.

Northern Devon NHS 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 to make a complaint.

10. We conducted this investigation having regard to our guidance on the Procurement, Patient Choice and Competition Regulations.<sup>6</sup>
11. We did not examine NEW Devon CCG's compliance with other legislative requirements (for example the Public Contracts Regulations 2006), as we are not responsible for enforcing these).
12. In addition to submissions from Northern Devon Healthcare NHS Trust, we also received separate submissions from Staffside, who represent the interests of the staff of Northern Devon Healthcare NHS Trust. Staffside submitted that we should express a view on whether NEW Devon CCG complied with the Public Contracts Regulations 2006 in this case. Staffside said that this was because in their view the Public Contracts Regulations 2006 are inextricably linked to the Procurement, Patient Choice and Competition Regulations and, as the sector regulator, we should have a view of all regulations that apply to the sector insofar as they relate to the matter being considered.
13. As noted above, we have no authority to investigate complaints under the Public Contracts Regulations 2006. To the extent that there is overlap between the requirements of the Procurement, Patient Choice and Competition Regulations and the Public Contracts Regulations 2006 or EU procurement law, we have applied the Procurement, Patient Choice and Competition Regulations in a way that does not lead to any conflict between the CCG's obligations under the various laws.

## Key parties

### **NHS Northern, Eastern and Western Devon Clinical Commissioning Group**

14. 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 divides the area it covers into three localities: northern, western and eastern. A map of the CCG's area and the localities is shown in Figure 1.

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<sup>6</sup> 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: Draft Case for Change on NEW Devon CCG's website

### **Northern Devon Healthcare NHS Trust**

15. Northern Devon Healthcare NHS Trust employs 4,300 staff. It provides acute healthcare services from North Devon District Hospital in Barnstaple and community services across northern, eastern, mid and central Devon. Northern Devon Healthcare NHS 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 and Exeter NHS Foundation Trust*

16. Royal Devon and Exeter NHS Foundation Trust employs 7,000 staff. It provides acute healthcare services at two hospital sites in Exeter: Wonford and Heavitree.

### *Virgin Care Ltd*

17. 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 children's services to children and young adults.

### *Devon Partnership NHS Trust*

18. Devon Partnership NHS 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*

19. Devon Doctors is a social enterprise owned by a number of 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*

20. 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**

21. Our investigation relates to the commissioning of community services for adults with complex care needs in the eastern locality of NEW Devon CCG's area.
22. Community services are provided outside acute hospitals in people's homes, community clinics and community hospitals. They are typically not provided by general practitioners or consultants. The objectives of community services 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.
23. 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.

24. In the eastern locality, current community services for adults with complex care needs<sup>7</sup> 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.
25. 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.
26. 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 NHS Trust's onward care team (based at Royal Devon and Exeter NHS 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

27. Northern Devon Healthcare NHS Trust submitted in its complaint that NEW Devon CCG's decision to select Royal Devon and Exeter NHS 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 NHS 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
  - Northern Devon Healthcare NHS Trust submitted that 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. The trust submitted that this

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<sup>7</sup> Current at the time of our investigation.

process was not proportionate to the value of the contract (around £50 million per year).<sup>8</sup>

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

#### 4. Summary of relevant regulations

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

- 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.

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<sup>8</sup> The contract value has not yet been determined. However, based on NEW Devon CCG's existing contract with Northern Devon Healthcare NHS 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.

- 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.
29. Northern Devon Healthcare NHS Trust submitted that Regulations 5(1) and 5(2) (which relate to the award of a new contract without a competition) were applicable because the process was in effect the direct award of a contract without competition. In our view Regulations 5(1) and 5(2) are not relevant to the issues in this case for the reasons set out below in paragraph 133.
30. Northern Devon Healthcare NHS Trust also submitted that by discriminating in favour of Royal Devon and Exeter NHS Foundation Trust, NEW Devon CCG acted anti-competitively. In the course of the investigation we said that we would address submissions of discrimination under Regulation 3 rather than Regulation 10 (anti-competitive behaviour). We did not receive any further submissions relating to Regulation 10. Accordingly, we have not investigated whether the CCG breached Regulation 10.

## 5. Description of events

31. Adult community services in the eastern locality, including those for adults with complex care needs, are currently provided by Northern Devon Healthcare NHS Trust<sup>9</sup> under a contract with NEW Devon CCG that was due to expire on 30 September 2015 and is now formally extended until 31 March 2016. The CCG has selected Royal Devon and Exeter NHS Foundation Trust as its preferred provider of these services in future. The CCG is currently conducting what it describes as a due diligence process in relation to Royal Devon and Exeter NHS Foundation Trust before deciding to award a contract. For ease of reference we refer to this process as due diligence and it is described further in paragraph 63.
32. Since May 2013, NEW Devon CCG has been undertaking a programme to transform community services in Devon. The programme relates 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 is into services for adults with complex care needs in the eastern locality.<sup>10</sup>
33. NEW Devon CCG's programme to transform community services included these phases:
  - inviting views from the public to inform its plans to transform community services
  - publicly consulting on its proposals for future community services
  - a provider assessment to select preferred providers of services for adults with complex care needs in each locality
  - further work and contract negotiations with the preferred providers of services for adults with complex care needs.
34. We set out more detail on each phase below. The timings of the phases in relation to all three localities are shown in Figure 2 below.

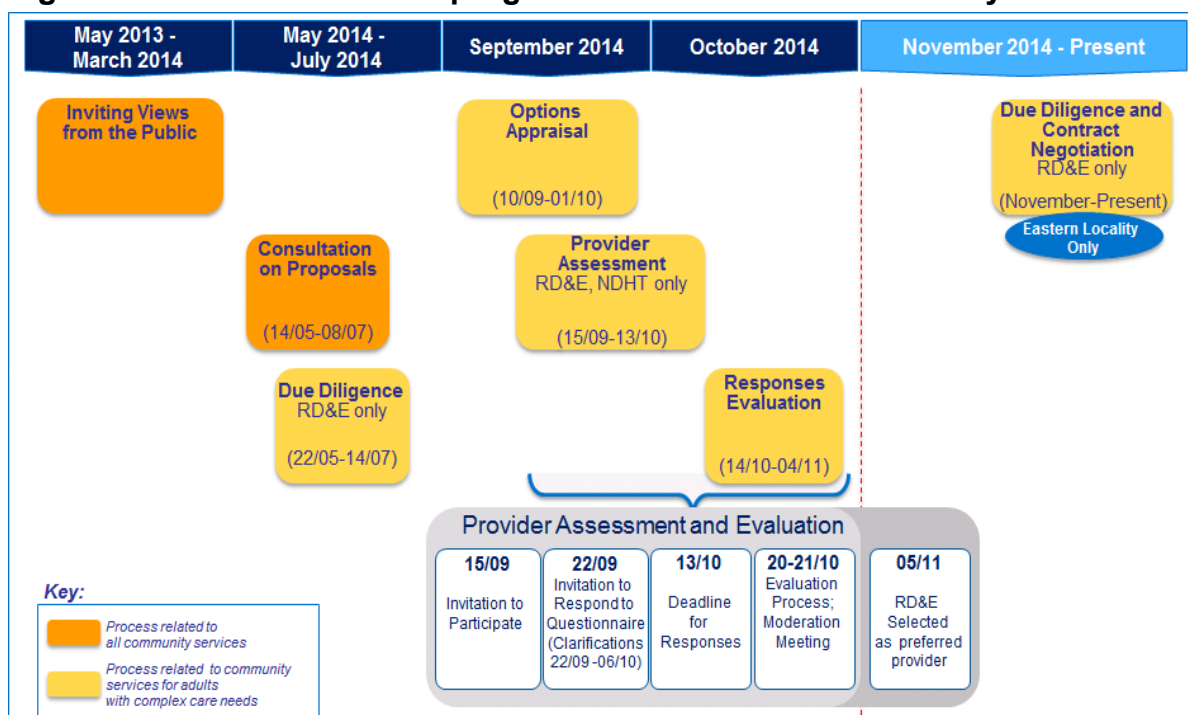
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<sup>9</sup> In 2011, responsibility for providing community services in east Devon transferred to Northern Devon Healthcare NHS Trust from NHS Devon primary care trust's arms-length provider, Devon Provider Services. This occurred following the government's transforming community services programme for the NHS.

<sup>10</sup> The other services and localities are outside the scope of our investigation but 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

35. 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. This 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.<sup>11</sup>
36. NEW Devon CCG then set out its 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. As part of that the CCG proposed to commission community services for adults with complex care needs in the eastern locality from Royal Devon and Exeter NHS Foundation Trust.

<sup>11</sup> 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 NHS Trust

37. Having developed its proposals, on 5 March 2014 NEW Devon CCG told Northern Devon Healthcare NHS Trust that it planned to commission community services for adults with complex care needs in the eastern locality from Royal Devon and Exeter NHS Foundation Trust from 1 October 2015. Two days later, Northern Devon Healthcare NHS 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.
38. On 18 March 2014, NEW Devon CCG replied to Northern Devon Healthcare NHS Trust and met the trust. In its reply 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

39. On 14 May 2014, NEW Devon CCG published its draft *Strategic framework* setting out its proposed approach to commissioning community services in future. The CCG invited feedback on its proposal by 8 July 2014.
40. 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 and Exeter NHS Foundation Trust). In the other localities, NEW Devon CCG proposed to commission community services for adults with complex care needs from Northern Devon Healthcare NHS 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 three localities.
41. NEW Devon CCG received 268 responses to its consultation, from healthcare providers, community services staff, MPs, local councillors, patients, carers and the public. According to the CCG's report on the consultation,<sup>12</sup> 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.

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<sup>12</sup> 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](#).



42. 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 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.
43. 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 gateway reviews are independent peer reviews by teams at key stages of a project or programme. This review was requested by the CCG. The review team's assessment was that [§]. It highlighted that [§]. The team recommended that [§]
44. On 8 July 2014, Northern Devon Healthcare NHS 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.
45. 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 and Exeter NHS 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 and Exeter NHS 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 and Exeter NHS 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

46. 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 the process for commissioning community services at this stage. The CCG planned to undertake further strategic work relating to procurement.

#### 4 September 2014: revised *Strategic framework* and draft *Case for change*

47. 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 and Exeter NHS Foundation Trust as the preferred provider of community services for adults with complex care needs in the eastern locality. Northern Devon Healthcare NHS 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.

48. The CCG said 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 preferred providers in each locality.

#### **September 2014: options appraisal**

49. In September 2014, NEW Devon CCG conducted an options appraisal to decide its 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.
50. 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).
51. 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 private meeting on 1 October 2014.

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

52. On 15 September 2014, NEW Devon CCG invited providers who had responded to the consultation on the draft *Strategic framework* to take part in the CCG's provider assessment to select the preferred provider. Northern

Devon Healthcare NHS Trust (northern and eastern locality), Plymouth Community Healthcare (western locality), Royal Devon and Exeter NHS Foundation Trust (eastern locality), [3<] (western locality) and Virgin Care (all three localities) formally expressed interest in doing so. Devon Partnership NHS Trust 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*.

53. On 22 September 2014, NEW Devon CCG sent Northern Devon Healthcare NHS Trust, Royal Devon and Exeter NHS 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.
54. NEW Devon CCG received responses from two providers for the eastern locality: Northern Devon Healthcare NHS Trust and Royal Devon and Exeter NHS Foundation Trust. Virgin Care did not submit a response.

### **The evaluation and moderation process**

55. Evaluation and moderation panels evaluated the provider responses for all three localities. This 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 executive<sup>13</sup>
  - approval of the recommended scores by the governing body.
56. 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.
57. The evaluation panel for the eastern locality comprised seven individuals: three staff members of the CCG, two GP members of the CCG, one lay person who

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<sup>13</sup> This was an executive committee formed within NEW Devon CCG to oversee its project to transform community services.

was a member of the eastern locality reference group,<sup>14</sup> 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.

58. South West Commissioning Support Unit (CSU) collated the assessments for all the three localities and presented them to a moderation panel on 21 October 2014. The moderation panel consisted of four moderators from NEW Devon CCG and a chair from South West CSU for all the three localities. 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 of the organisations they were assessing. These declarations were reviewed by the Chair before the panel's review began. For each question unless all the evaluators' scores were the same, the result would be reviewed and decided by the moderation panel. The moderation panel reviewed the scores and commentary from each evaluation panel member and for each moderation panel member to give a score based on their review.
59. The chair of the moderation panel asked each panel member for their scores. As each panel member gave the same scores, the moderation panel was able to reach a consensus score for each question. Royal Devon and Exeter NHS Foundation Trust had the highest score (see Table 1 below). Its total weighted score was 11 points higher than that of Northern Devon Healthcare NHS Trust.<sup>15</sup> The scores were presented in a report to the transforming community services executive.
60. Following the review of the process, the transforming community services executive prepared a report which was presented to NEW Devon 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 and Exeter NHS 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 the CCG would carry out a further process (which it referred to as due diligence<sup>16</sup>) and contract negotiations with the trust. The governing body also approved the final *Case for change* document which

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<sup>14</sup> 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.

<sup>15</sup> Question 1 was given a weighting of 25%. The other questions were equally weighted at 15% each.

<sup>16</sup> See further below at paragraph 63.

set out the CCG's process for awarding new contracts for community services across Devon.

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

Royal Devon and Exeter NHS Foundation Trust			Northern Devon Healthcare NHS 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		

61. NEW Devon CCG followed the same process for the other localities. Following the assessment, Northern Devon Healthcare NHS 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.
62. 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 [X]. However, the review team highlighted [X]. It recommended that [X].

### November 2014 – present: due diligence phase and contract negotiation

63. Since November 2014, NEW Devon CCG has been conducting what it described as a due diligence process with Royal Devon and Exeter NHS 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 it will produce a detailed business plan, designed to confirm Royal Devon and Exeter NHS Foundation Trust's readiness to respond to the commissioning plan and achieve the desired outcomes and benefits. We note that this further process appears to include more than what is typically described as due diligence.

## 6. Analysis of the process used by NEW Devon CCG

64. In this section, we examine whether the process used by NEW Devon CCG to select Royal Devon and Exeter NHS Foundation Trust enabled it to be assured of the quality, efficiency and value for money of Royal Devon and Exeter NHS Foundation Trust's offer. In particular, we examine:

- whether NEW Devon CCG's process enabled it to select the provider or providers that:
  - were most capable of meeting the commissioner's objective to secure the needs of NHS healthcare service users, improve the quality of services and the efficiency with which they are provided and
  - provided best value for money in doing so
- whether the process was proportionate, taking account of relevant factors including the value, complexity and clinical risk of providing community services for adults with complex care needs
- whether NEW Devon CCG considered appropriate ways of improving quality and efficiency in the provision of the services.

65. 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 described in Section 4).

### Process and criteria for assessing prospective providers

66. Regulation 3(3) of the Procurement, Patient Choice and Competition Regulations requires commissioners to procure NHS healthcare services from one or more providers that are most capable of delivering the commissioner's objective referred to in Regulation 2 in relation to the services, and provide the best value for money in doing so. In this section we examine whether the process and criteria used by NEW Devon CCG for assessing prospective providers complied with Regulation 3(3). Some of the discussion in this section informs our thinking in later sections.

### Northern Devon Healthcare NHS Trust's submission

67. Northern Devon Healthcare NHS Trust submitted that it had been unfairly ruled out as the preferred provider as a result of a process that did not comply with the Procurement, Patient Choice and Competition Regulations. In particular, Northern Devon Healthcare NHS Trust raised concerns about: the six questions in the provider assessment; the 1500 word limit for responding to each of these questions; the absence of any specifications for the services; the absence of

any financial assessment; and NEW Devon CCG's failure to conduct detailed or comparative assessments in relation to both providers.

68. Northern Devon Healthcare NHS Trust submitted that on the basis of NEW Devon CCG's assessment of proposals from providers it was impossible for the CCG to assure itself that Royal Devon and Exeter NHS Foundation Trust was the most capable provider of the services and would provide best value for money. It told us that the CCG had selected Royal Devon and Exeter NHS Foundation Trust as a preferred provider on the basis of inadequate information and should have made further inquiries of both Royal Devon and Exeter NHS Foundation Trust and Northern Devon Healthcare NHS Trust before proceeding.
69. Northern Devon Healthcare NHS Trust submitted that 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 would be lost by this stage.
70. Northern Devon Healthcare NHS Trust submitted that the only way for NEW Devon CCG to proceed was for it to undertake a comparative assessment of Northern Devon Healthcare NHS Trust and Royal Devon and Exeter NHS Foundation Trust to identify which of them was the most capable provider and offered best value for money. Northern Devon Healthcare NHS Trust submitted that the CCG should have taken into account the costs Northern Devon Healthcare NHS Trust would incur as a result of the transfer of services. To conduct this assessment, Northern Devon Healthcare NHS Trust said that the CCG should have invited detailed submissions from both providers in response to refined service specifications and a medium term financial model.
71. In our provisional findings we suggested some possible alternatives against which NEW Devon CCG could compare Royal Devon and Exeter NHS Foundation Trust's proposal. Northern Devon Healthcare NHS Trust submitted that some of these examples were not useful or practicable for various reasons. In particular the trust told us that it was difficult to conduct an equitable and transparent comparison of services in different geographical areas. It also told us that other providers may not be willing to engage in further dialogue with the CCG. Northern Devon Healthcare NHS Trust also said that it would have to consider the impact taking part in a comparative exercise would have on its resources and that it would not be obliged to disclose commercially sensitive information.

#### **NEW Devon CCG's submission**

72. NEW Devon CCG submitted that its procurement approach enabled providers to develop proposals to reform community services in line with its objectives as set out in its draft *Case for change* and *Strategic framework*. It told us that

inviting providers to propose solutions in response to clear published questions led to a fair evaluation process.

73. 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, and 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.
74. 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 in the eastern locality
  - question 2: clinical and financial system sustainability including value for money
  - 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 eastern locality's urgent care system
  - question 6: a consistent model and outcomes across the CCG's localities.
75. 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.<sup>17</sup> The 10 commissioning principles and six strategic priorities established by the CCG are described in Appendix 5.
76. NEW Devon CCG told us that the word limit had been specifically set to encourage succinct strategic responses. The CCG said that none of the providers had 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.
77. NEW Devon CCG submitted that, although a detailed service specification had not been developed at the point at which the preferred provider was selected, the overall scope, nature and outcomes for services had already been set out, in the *Strategic framework*, draft *Case for change*<sup>18</sup> and further clarified in the

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<sup>17</sup> These documents are set out in paragraphs 39 and 40, 47 and 48 and 60 respectively.

<sup>18</sup> See page 28 of the draft *Case for change*.



final *Case for change*.<sup>19</sup> It also told us that work was underway to finalise the full scope of services as part of its due diligence phase.

78. On value for money, NEW Devon CCG noted that Northern Devon Healthcare NHS Trust and Royal Devon and Exeter NHS Foundation Trust scored equally for their responses to question 2 of the provider assessment. The CCG said this question was designed to test how the service provision would contribute to the financial sustainability of the local health economy, and noted that the contract value would vary throughout the contractual term. The CCG said it planned to develop an outcomes-based commissioning model and to move away from lump sum payments for community services.<sup>20</sup>
79. We asked NEW Devon CCG if it had considered asking providers to quantify the cost of providing the services in their responses. The CCG told us that it was not necessarily focused on reducing spend on community services as these are seen as an enabler of wider system change in the redesign of healthcare provision within Devon. The CCG told us that cheaper community services might not lead to value for money for the whole system as it would be counterproductive to unlocking the whole system flow. The CCG said it was therefore not focused on reducing 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. It told us that the process was not aimed at delivering lowest price but best value to incorporate both price and quality aspects.
80. NEW Devon CCG told us that the aim of the process was to appoint a preferred provider which would continue to the due diligence phase before awarding the contract. The CCG told us that it would further assess the preferred provider's strategic readiness during the due diligence phase, including the provider's ability to contribute to the financial sustainability of the local health economy and its ability to allocate resources effectively and efficiently based on the

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<sup>19</sup> The final *Case for change* was approved by the CCG's governing body after the provider assessment.

<sup>20</sup> 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.

population's health needs. The CCG said the provider would need to produce a business plan and transition plan during this phase of negotiations.

81. In response to our provisional findings, NEW Devon CCG described the steps it planned to take as part of the due diligence phase, including identifying benchmarks against which it would compare Royal Devon and Exeter NHS Foundation Trust's proposal.
82. NEW Devon CCG told us that these steps will enable it to conclude whether the award of a contract to Royal Devon and Exeter NHS Foundation Trust would be consistent with its obligations under Regulation 3(3) of the Procurement, Patient Choice and Competition Regulations.
83. NEW Devon CCG told us that if, after completing the due diligence phase, it concluded that the preferred provider was unable to deliver its commissioning objectives and offer value for money in doing so, it would consider<sup>21</sup> whether it was appropriate to open discussions and negotiations with the alternative bidder (Northern Devon Healthcare NHS Trust). The purpose of these discussions would be to find out if that bidder was willing and capable of delivering the service as required by the CCG. If the CCG was still unable to agree satisfactory arrangements, it told us it would seek and assess further proposals from providers as part of an advertised competitive dialogue process.

### **Royal Devon and Exeter NHS Foundation Trust's submission**

84. Royal Devon and Exeter NHS Foundation Trust submitted that NEW Devon CCG had designed and followed a robust process to establish the model of care it wished to commission. Royal Devon and Exeter NHS Foundation Trust also submitted that the CCG had designed and followed a fair, transparent and challenging process to test the capabilities of organisations to meet the service requirements.

### **Submissions from other parties**

#### ***Staffside***

85. In addition to Northern Devon Healthcare NHS Trust's submissions, we also received separate submissions from Staffside, which represents the interests of the staff of Northern Devon Healthcare NHS Trust. Staffside submitted that NEW Devon CCG's process to assess prospective providers fell far short of what would normally apply to a contract of this scale (in terms of criteria, sub-criteria, weightings and scoring methods). Staffside also said that involving multiple people in various roles in the scoring, moderation and decision-making

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<sup>21</sup> In the light of information available to the CCG, including the reasons for the breakdown in the process.

did not overcome the flaws in the process arising from the limited scale and scope of the assessment criteria. In particular, Staffside said that no best value or most economically advantageous tender criteria were established and no financial analysis was carried out. Staffside submitted that criteria and scoring methods should be fully defined and made known to potential providers at the beginning of a process.

86. Staffside further submitted that proceeding to the due diligence phase with only Royal Devon and Exeter NHS Foundation Trust was not equal treatment and that the only remedy would be to follow a fair process involving all possible providers.
87. Staffside provided us with the results of a survey which the trust's human resources team had conducted. This showed that surveyed staff felt that the potential impact on patients and staff of the transfer of services would be negative. The results of this survey are summarised in Appendix 6.

### **Others**

88. One respondent said that it would expect NEW Devon CCG to engage with the public on a provider's detailed proposal to ensure this reflected the public's wishes. Another respondent raised concerns about the fairness of the process. In particular, the respondent submitted that the CCG always had intended to award the contract to Royal Devon and Exeter NHS Foundation Trust and could not compare providers' proposals fairly without any information about cost. Other respondents were supportive of the CCG's process and decision.

### **Our assessment**

89. Regulation 3(3) requires commissioners to procure NHS healthcare services from one or more providers that are most capable of delivering the commissioner's objective referred to in Regulation 2 in relation to the services and provide best value for money in doing so.
90. The Procurement, Patient Choice and Competition Regulations are not prescriptive about the process and criteria commissioners should use to select one or more providers of services. It is a matter for a commissioner to satisfy itself that the requirements of Regulation 3(3) are met. The assessment may be complex and is likely to require commissioners to weigh up various factors. Commissioners must be transparent about the way in which they conduct their assessment and should be able to explain the basis on which they have met the requirements of the Procurement, Patient Choice and Competition Regulations in each case.
91. We examined whether the process and criteria NEW Devon CCG used to assess prospective providers of community services for adults with complex care needs in the eastern locality enabled the CCG to comply with the

requirements of Regulation 3(3). As part of our examination we considered whether it was reasonable for the CCG to select Royal Devon and Exeter NHS Foundation Trust as the preferred provider with which to undertake further work on the proposal on the basis of the information available to the CCG at the time.<sup>22</sup>

92. The provider assessment process was the same for each of the three localities, including the northern locality where Northern Devon Healthcare NHS Trust was selected as the preferred provider. The same six questions were asked for each locality, with the same word limit for responses. Responses were scored by evaluation panels and, if necessary, moderation panels against the same assessment criteria. The outcome for each locality was approved by the governing body, with the preferred provider then proceeding to work with the CCG to develop its proposal in detail. As neither Northern Devon Healthcare NHS Trust nor any other party raised a complaint about the process in the northern locality or the western locality we have not investigated the CCG's process in these areas.

*NEW Devon CCG's approach in the eastern locality*

93. NEW Devon CCG's aim was to change the way in which community services were provided to patients to deliver better integrated care in each locality. NEW Devon consulted on its plans publicly and set out the nature of services to be delivered and the outcomes it intended to achieve in published documents, including the *Strategic framework* and the draft *Case for change*. The CCG conducted an options appraisal to decide how it would select a provider of community services for adults with complex care needs in each locality. The CCG decided to run a process to identify a preferred provider by reference to its commissioning objectives. The CCG referred prospective providers to the *Strategic framework* and the draft *Case for change* and invited providers to answer the six questions set out in Appendix 3 and paragraph 74. The questions invited providers to make proposals for transforming community services and asked them to explain how they would deliver financial sustainability and value for money.
94. The preferred provider identified through the assessment would then proceed to what the CCG described as due diligence. As part of that further process, the CCG would finalise the scope, resource requirements and outcomes for services for adults with complex care needs in the eastern locality, and assure itself that the transition would be safe and effective before awarding a contract. We note that this further process appears to include more than what is typically described as due diligence.

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<sup>22</sup> NEW Devon CCG refers to this as due diligence.

95. NEW Devon CCG recognised that there were various ways in which the services could be delivered. The CCG decided to carry out an assessment of proposals from prospective providers. This approach was chosen in preference to publishing a detailed service specification and inviting providers to bid, and was intended to enable providers to submit innovative proposals.
96. Although it did not specify the service model design, NEW Devon CCG consulted on and informed the public and prospective providers of its vision to transform community services in detail through its draft *Strategic framework*, *Strategic framework* and draft *Case for change*. Informed by that work the CCG invited prospective providers to make proposals. Based on the proposals the CCG selected a preferred provider with which to do further work. At that stage the CCG had not reached a final view and was still able to pursue alternative options if it was not satisfied with the outcome. Our view is that in these circumstances and given the work it had done it was acceptable and consistent with the requirements of the Procurement, Patient Choice and Competition Regulations for the CCG to have invited prospective providers to propose solutions to address its objectives and based on that to select a preferred provider with which to do further work.

#### *The provider assessment*

97. We then examined the provider assessment process conducted by NEW Devon CCG for the eastern locality, including the information provided to prospective providers, the questions asked by the CCG, the responses to those questions by both respondents and the evaluation and moderation process.
98. The CCG referred providers to the *Strategic framework* and draft *Case for change*. The six questions and assessment criteria appeared to us to correspond to the CCG's objectives as stated in the CCG's draft *Case for change*. The questions and criteria, together with an explanation of how proposals would be scored, were disclosed to providers in the provider assessment documentation.
99. We observed that the responses from both respondents (paragraph 54) lacked detail and did not fully answer some questions. In particular, although both responses described the provider's intentions, neither response described in any detail how the provider would deliver the services in practice. Nor did either of the responses include information about the cost to deliver these services. It appears to us that within the 1500 word limit for each answer there was scope to include more detail than the providers gave.
100. We also reviewed the scores and comments of the evaluation and moderation panels to ascertain how well the scores corresponded to the answers provided. It appears to us that the scoring broadly reflected the relative quality of the providers' responses by reference to the CCG's objectives and did not take into

account unreasonable or irrelevant considerations. As well as this assessment, in investigating the other aspects of the complaint<sup>23</sup> we have found that the CCG's process was proportionate and non-discriminatory, that it had considered appropriate ways of improving the quality and efficiency of the services, and that it had provided sufficient information about the process to potential providers. We also found that the integrity of the CCG's decision was not affected by any conflicts of interest.

101. In our provisional findings, we expressed the view that at the stage at which NEW Devon CCG selected Royal Devon and Exeter NHS Foundation Trust as the preferred provider it had not obtained a level of detailed information from the 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. We said that 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 best value for money.
102. NEW Devon CCG told us that its purpose in conducting the provider assessment was not to gather all the information that it would need to award a contract but to select a preferred provider by reference to its commissioning objectives and do further work with that provider. It explained how the work that it had done in the *Strategic framework* and the draft *Case for change* had informed the provider assessment. Those documents had set out the nature of services to be delivered and the outcomes the CCG intended to achieve. The documents were referenced in the provider assessment documents which asked providers to make proposals for transforming community services and invited them to explain how they would deliver financial sustainability and value for money.
103. Having reviewed NEW Devon CCG's process in light of these submissions and as described in paragraph 99 it appears to us that, although the providers' responses were incomplete and lacked detail, taken in context there was sufficient information to enable the CCG to compare the proposals by reference to its commissioning objectives and determine a preferred option. The CCG will need to do further work before awarding a contract, as described below.
104. For the reasons set out above our view is that it was reasonable for NEW Devon CCG to conclude that Royal Devon and Exeter NHS Foundation Trust's proposal was the more likely of the two proposals to meet its commissioning objectives.

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<sup>23</sup> See sections 7, 8 and 9 of this report.

## **Our conclusion on the process and criteria NEW Devon used to assess prospective providers**

105. Our review of NEW Devon CCG's process has led us to the view that in the circumstances of this case it was acceptable for the CCG to adopt a process where it invited prospective providers to propose solutions to address its objectives and use those proposals to select a preferred provider with which to do further work. Although the providers' proposals did not address all relevant points, including value for money, our review of the work of the evaluation and moderation panels led us to conclude that the CCG was able to compare the proposals in the context of its commissioning objectives and to determine which proposal was preferable. For these reasons we are satisfied that it was reasonable for NEW Devon CCG to rely on the outcome of the evaluation and moderation process to select Royal Devon and Exeter NHS Foundation Trust as the preferred provider and proceed to do further work with that provider. For the reasons set out above, we conclude that, at this stage, NEW Devon CCG has not breached Regulation 3(3) by failing to procure services from the provider or providers most capable of delivering the commissioner's objective referred to in Regulation 2 in relation to the services, and provide the best value for money in doing so.

## **Further work to be undertaken by NEW Devon CCG**

106. To comply with its obligations under Regulation 3(3), NEW Devon CCG needs to understand a number of factors before procuring services. In particular, it must understand the scope of services to be provided, how a provider will deliver them (for example, the clinical pathways) and how much it will cost to deliver these services (taking account of anticipated activity levels and other assumptions).<sup>24</sup> In our view, these matters are intrinsic to any assessment of whether procuring services from a particular provider will meet the CCG's objective to secure the needs of patients, improve the quality and efficiency of services, and deliver best value for money in doing so. Before reaching a decision to award a contract, NEW Devon CCG will need to assure itself, and be able to assure the public, that it has commissioned services from the provider or providers that will best enable it to meet this objective.

107. NEW Devon CCG recognised that it needed to do further work before awarding a contract. It said that it had focused its attention on the provider that demonstrated through the provider assessment that it could achieve the commissioning objectives and do further work with that provider before awarding a contract.

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<sup>24</sup> By this we mean how much the CCG will pay the provider for providing these services.

108. At the time of this decision NEW Devon CCG has not completed its process to award the contract. It therefore remains for the CCG to satisfy itself that, going forward, it reaches a final decision which is consistent with the requirements of the Procurement, Patient Choice and Competition Regulations. Given that we have not found a breach of the regulations and we understand that NEW Devon CCG is taking steps to complete its process in line with the Procurement, Patient Choice and Competition Regulations, we have not sought undertakings from the CCG.
109. If, following its due diligence phase, NEW Devon CCG is not satisfied that proceeding with Royal Devon and Exeter NHS Foundation Trust is the best way to secure the needs of patients, improve the quality and efficiency of the services and provide best value for money in doing so, we would expect the CCG not to award the contract to Royal Devon and Exeter NHS Foundation Trust. The CCG would need to consider what other action would be appropriate. In the circumstances, appropriate next steps would be likely to include further discussions with Northern Devon Healthcare NHS Trust and/or seeking and assessing further proposals from other providers.

### ***Best value for money***

110. NEW Devon CCG told us it plans to undertake further work in relation to securing best value for money, by reference to price, quality and system savings. The CCG told us that a key part of its further work will be to ascertain the availability of appropriate benchmarks and comparators<sup>25</sup> to assess whether Royal Devon and Exeter NHS Foundation Trust offers best value for money when delivering against the CCG's commissioning objectives. The scope of this exercise is still being developed.<sup>26</sup>
111. Northern Devon Healthcare NHS Trust submitted that when assessing best value for money, NEW Devon CCG must undertake a comparative assessment between Northern Devon Healthcare NHS Trust and Royal Devon and Exeter NHS Foundation Trust. Northern Devon NHS Trust submitted that the CCG cannot comply with the requirements of Regulation 3(3) by carrying out a value for money assessment solely in relation to Royal Devon and Exeter NHS Foundation Trust.
112. Having reached the view that it was reasonable for the CCG to conclude that Royal Devon and Exeter NHS Foundation Trust's proposal was better aligned with the CCG's commissioning objectives than Northern Devon NHS Trust's,<sup>27</sup>

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<sup>25</sup> NEW Devon CCG has not yet decided what those appropriate benchmarks may be.

<sup>26</sup> NEW Devon CCG has submitted that it intends to consult external advisers as part of its work in this area. Whether or not to consult advisers to be confident of complying with the Procurement, Patient Choice and Competition Regulations is a matter for the CCG.

<sup>27</sup> See paragraph 104 above.



we see no reason to oblige the CCG to reappraise Northern Devon NHS Trust's proposal. Whether to do so is a matter for the CCG.

113. We have set out below some relevant guidance for NEW Devon CCG to assist it in completing its process.
114. An understanding of value for money in circumstances such as these will necessitate an evaluation of costs to the CCG for the service to the CCG and the benefits of that service. The price agreed between the CCG and the provider may incorporate or reflect some of the set-up costs of the new arrangements. Both costs and benefits are likely to include some indirect elements such as effects on patients' experiences in other parts of the healthcare system and reductions or increases to costs for other services. Where appropriate and proportionate, the CCG should have regard to any material effects of its decision on other parts of the local health economy, including other providers. The context in which this evaluation takes place will necessarily inform the CCG's conclusions as to best value for money.<sup>28</sup>
115. What constitutes value for money can only be assessed in context and any assessment may usefully involve one or more comparative exercises. For example, it may be useful to assess costs and/or system savings by reference to one or more of the following: costs of current services,<sup>29</sup> alternative offers or comparable benchmarks. What can usefully be done will depend on the availability of information and the ability to isolate or control for variables (eg between different geographies, demographics or service offerings). Finding direct comparators may be particularly challenging in the context of a redesign of multiple services or a pathway of care. NEW Devon CCG has placed a great deal of importance on seeking external advice to assist it in developing benchmarks. In this context it is a matter for the CCG to determine what assistance it needs to be confident that its decision is robust.
116. Generally, a CCG should be well placed to decide what is appropriate for its local circumstances. NEW Devon CCG will need to be able to explain its decision and its reasons to interested parties and the public.

### Proportionality of the process

117. The Procurement, Patient Choice and Competition Regulations require commissioners, when procuring healthcare services for the purposes of the

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<sup>28</sup> Relevant contextual factors include the transaction costs to the commissioner, budget constraints, the progress of negotiations with Royal Devon and Exeter NHS Foundation Trust and effects of the particular commissioning decision on other aspects of the local health economy for which the commissioner is responsible.

<sup>29</sup> For example, based on information already available to the commissioner.

NHS, to act in a proportionate way.<sup>30</sup> In this section we examine the proportionality of the process undertaken by NEW Devon CCG.

### **Northern Devon Healthcare NHS Trust's submission**

118. Northern Devon Healthcare NHS 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 NHS Trust.
119. Northern Devon Healthcare NHS Trust told us that 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 and Exeter NHS Foundation Trust.
120. Northern Devon Healthcare NHS 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 predetermined as to render true competition meaningless. The trust submitted that the CCG had not complied with Regulation 5 because there were no technical reasons or urgency to justify NEW Devon CCG directly awarding a contract without competition.
121. Northern Devon Healthcare NHS Trust submitted that spending significant time and resources on a commissioning approach is not a determining factor in assessing whether a commissioner acted in a proportionate way as required by Regulation 3(2)(a). Northern Devon Healthcare NHS Trust said that the CCG devoted a relatively long period of time to gathering the views of local stakeholders and other consultation type exercises and in contrast a relatively brief amount of time to assessing the providers. Northern Devon Healthcare NHS Trust said that far too little time had been spent on this key stage in the commissioning approach and that the process was not proportionate.

### **NEW Devon CCG's submission**

122. 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 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 had approached the CCG. Having taken into account the feedback from its stakeholder engagement,

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<sup>30</sup> Regulation 3(2)(a), set out in Section 4 above.

the CCG said it decided that it needed to undertake some form of competitive assessment.

123. 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 49 to 51 above.

### **Royal Devon and Exeter NHS Foundation Trust's submission**

124. Royal Devon and Exeter NHS Foundation Trust submitted that it had been 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.

### **Submissions from other parties**

125. Staffside told us that NEW Devon CCG did not engage sufficiently with them about its proposals and that the process fell short of what would normally apply to a contract of this scale.
126. One respondent submitted that NEW Devon CCG's engagement was not sufficiently robust to capture the public's informed views. In particular, it expressed concerns about a reduction in inpatient facilities. We also received three other responses raising concerns about the closure of community inpatient beds.

### **Our assessment**

127. Some of the submissions we received were framed in language related to the Public Contracts Regulations 2006 (for example, the reference to technical reasons or urgency and cross-border interest (see paragraphs 120 and 122)). 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.
128. 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 best value for money of service provision and is proportionate to the value, complexity and clinical risk associated with the relevant services.

129. 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.
130. NEW Devon CCG conducted a phased process over more than two years to gather views and feedback, present its plans and assess providers' proposals. It appears to us that the time and resources the CCG devoted to commissioning community services for adults with complex care needs were commensurate with the value, complexity and clinical risk of the services, although in our view the process could have been completed more quickly. We note that the CCG's consultation on the draft *Strategic framework* received extensive feedback from a number of organisations and individuals, including 31 members of staff of Northern Devon Healthcare NHS Trust.
131. NEW Devon 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.
132. We note that NEW Devon CCG undertook public engagement and consultation about its proposals for community services for adults with complex care needs, with national media attention, and did not receive 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.<sup>31</sup> It appears to us that adequate time was allowed for the provider assessment. Providers' responses were scrutinised in two stages and the evidence does not indicate that the process was in any way compromised by the time allowed. We further note that Northern Devon Healthcare NHS Trust did not raise concerns about the timeframe at the time of the assessment.
133. Northern Devon Healthcare NHS Trust also said that the process amounted to a direct award of a contract without competition in breach of Regulation 5. Having reviewed the process NEW Devon CCG undertook as a whole, including in particular the provider assessment as set out above, it appears to us that this did not amount to a direct award of a contract. We have not therefore gone on to consider the application of Regulation 5 any further.

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<sup>31</sup> Our assessment of the submission that other providers may have assumed there was little or no point expressing an interest given the CCG's stated preference for Royal Devon and Exeter NHS Foundation Trust is in Section 7 below.

134. For the reasons set out above we conclude that NEW Devon CCG did not breach Regulation 3(2)(a) by failing to act in a proportionate way.

### **Improving the quality and efficiency of the services**

135. 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 NHS Trust's submission**

136. Northern Devon Healthcare NHS 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.

### **NEW Devon CCG's submission**

137. NEW Devon CCG said it considered a range of ways to improve service quality and efficiency and enhance choice for patients. It told us that it also considered the benefits and risks of tendering to allow patients a choice of provider.

138. 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 CCG said that the importance of integration was reflected in the 10 principles and six strategic priorities identified through the CCG's public engagement (see Appendix 5).

139. NEW Devon CCG said its view was 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.

140. NEW Devon CCG submitted that:

- Patient choice is a core element of service provision that needs to be considered during the commissioning process for any service.
- One of the aims of the CCG's programme to transform community services was to improve the allocation of resources. The CCG said that this approach would give service users choice in how they received their care. This was set out within the *Strategic framework* and *Case for change* in relation to the personalised and preventive care category of community services. The CCG was also considering whether to introduce choice within the specialty community services category.
- The CCG strongly believes in a single system of governance around the patient to ensure that services are provided safely and for the wellbeing of

patients. Increasing the number of providers in a complex system delivery model can increase the risk of inconsistent governance arrangements.

- Meeting financial challenges is only possible through streamlining the provision of services, not by the creation of many providers within one locality. The CCG said it would encourage partnership arrangements between providers.
- The CCG is committed to adopting an approach to give individuals and their carers choice. The CCG already has progressed personal health budgets and is working with the local authority to advance personal care.<sup>32</sup>

### **Royal Devon and Exeter NHS Foundation Trust's submission**

141. Royal Devon and Exeter NHS Foundation Trust said that NEW Devon CCG did consider appropriate ways to improve 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**

142. Based on what Northern Devon Healthcare NHS Trust submitted in support of its contention 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).

143. NEW Devon CCG undertook public engagement when considering how community services could be improved. It established clear objectives for improving services 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 taking part in an assessment of their capability.

144. We therefore conclude that NEW Devon CCG did not breach Regulations 3(4)(a) and 3(4)(b) of the Procurement, Patient Choice and Competition Regulations by failing to consider appropriate ways to improve service quality and efficiency through integration and competition.

145. In our view, commissioners should assess whether choice is an appropriate way of improving services whenever appropriate. In our report *Commissioning better community services for NHS patients*<sup>33</sup> we explained how allowing patients a

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<sup>32</sup> The CCG told us that 'personal care' is now called 'Living Well at Home' and is currently out to an OJEU Procurement process led by Devon County Council.

<sup>33</sup> *Commissioning better community services for NHS patients* is available at: [/www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/397429/Improving\\_community\\_services.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/397429/Improving_community_services.pdf).

choice can improve the quality and efficiency of community services. Our approach to integrated care is set out in a number of publications.<sup>34</sup>

146. We do not agree with a number of the propositions raised by NEW Devon CCG about plurality of provision and regret that NEW Devon CCG did not give more consideration to whether choice could be used to further improve care for services for adults with complex care needs 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 NHS Trust's complaint.

## 7. Equal treatment and non-discrimination

147. Regulation 3(2)(b) of the Procurement, Patient Choice and Competition Regulations requires 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.
148. In this section, we examine Northern Devon Healthcare NHS Trust's submission that NEW Devon CCG favoured Royal Devon and Exeter NHS Foundation Trust and that the CCG failed to treat providers in an equal and non-discriminatory way.

### Northern Devon Healthcare NHS Trust's submission

149. Northern Devon Healthcare NHS 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 trust pointed to several factors which it submitted were evidence that the outcome of the provider assessment was prejudiced or pre-determined. These were that:
- NEW Devon CCG conducted an initial due diligence exercise with Royal Devon and Exeter NHS Foundation Trust during its consultation on the draft *Strategic framework*
  - the options appraisal was conducted at the same time as the provider assessment
  - the provider assessment resulted in selecting the same provider as selected in the draft *Strategic framework*

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<sup>34</sup> We have published guidance on our approach to integrated care on our website: [guidance on complying with our integrated care requirements](#) ; [guidance on the integrated care licence condition](#). We have also published [substantive guidance on the Procurement, Patient Choice and Competition Regulations](#).

- the evaluation and moderation panels involved individuals who may previously have been involved in the co-production and consultation phase
- the draft *Case for change* identified NEW Devon CCG's preference for Royal Devon and Exeter NHS Foundation Trust and must have been taken into account by members of the evaluation and moderation panels
- members of NEW Devon CCG made discriminatory statements at a public transforming community services engagement event in Axminster on 21 October 2014. The discriminatory statements reported by Northern Devon Healthcare Trust were: "Whilst we transition between providers"; "Discussions with the Royal Devon and Exeter Foundation Trust are underway" and "Given the provider we have, we can't keep the beds as they are".

### **NEW Devon CCG's submission**

150. NEW Devon CCG said it was not biased towards a particular provider and its provider assessment was not predetermined. It told us that although its original intention was to select Royal Devon and Exeter NHS Foundation Trust as set out in the draft *Strategic framework*, it had since re-designed the process and opened the process 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 asking them to confirm their interest. The CCG said it conducted its options appraisal and its provider assessment in parallel because of the need to maintain momentum. In relation to the provider assessment the CCG told us that:

- the provider assessment was run by the procurement team from South West CSU to ensure independence
- the provider assessment 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.

151. NEW Devon CCG submitted that it had conducted the initial due diligence exercise in relation to Royal Devon and Exeter NHS 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 and Exeter NHS Foundation Trust since Northern Devon Healthcare NHS Trust, as an existing community services provider, was deemed to be capable. The CCG also said that Northern



Devon Healthcare NHS Trust, as the incumbent provider of the services, was not disadvantaged.

### **Royal Devon and Exeter NHS Foundation Trust's submission**

152. Royal Devon and Exeter NHS Foundation Trust said the process gave NEW Devon CCG the opportunity to assess different solutions and the capabilities of different providers. The trust told us that as the incumbent provider, Northern Devon Healthcare NHS Trust had much greater opportunity to shape the CCG's thinking on the future design of the services than other potential providers.

### **Submissions from other providers**

153. Care UK told us that as part of its initial assessment of the potential opportunity in the period before July 2014 it reached the view that the decision to select Royal Devon and Exeter NHS Foundation Trust had already been made by NEW Devon CCG. As a result, Care UK decided not to express an interest in providing the services.
154. Devon Partnership NHS Trust 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 NHS Trust to Royal Devon and Exeter NHS Foundation Trust. Devon Partnership NHS Trust said that as a result it decided that there was little point in participating in the provider assessment. Devon Partnership NHS 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**

155. 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 and Exeter NHS Foundation Trust as provider of these services and its communications with Northern Devon Healthcare NHS 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'.
156. We have not assessed NEW Devon CCG's rationale for its initial proposal to select Royal Devon and Exeter NHS 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.<sup>35</sup> In our view, integrated care does not need to be delivered by a single organisation.<sup>36</sup>

157. In this case, NEW Devon CCG changed its approach following its consultation on the draft *Strategic framework*. Instead of confirming Royal Devon and Exeter NHS Foundation Trust as the provider of the services, it invited the providers that responded to its consultation to submit proposals and attempted to design a process that gave them an equal opportunity to take part. 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*. In our view, the fact that NEW Devon CCG had expressed an initial preference for Royal Devon and Exeter NHS Foundation Trust does not of itself indicate that the provider assessment was compromised. However, once the CCG had 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 unfairly affected by the CCG's initial preference for Royal Devon and Exeter NHS Foundation Trust.

158. 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 submissions by Northern Devon Healthcare NHS Trust and other providers that statements made by CCG members and third parties in correspondence and at public meetings contributed to creating a perception that the outcome of provider assessment was predetermined.

### ***Our review of the CCG's process***

159. We examined whether NEW Devon CCG's questions in the provider assessment favoured a particular provider. It appeared to us that the questions could be 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 a single 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) seemed consistent with the CCG's focus on improving the integration of services.

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<sup>35</sup> 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.

<sup>36</sup> See footnote 34.

160. We considered whether the draft *Case for change*, which contained several favourable statements about Royal Devon and Exeter NHS Foundation Trust, prejudiced the outcome of the provider assessment. The draft *Case for change* was one of three documents the CCG told providers to read alongside the assessment documents. The other two documents were the *Strategic framework* and the engagement report on NEW Devon CCG's community services consultation. The process for assessing proposals was explained to providers in the invitation to propose a solution. Proposals were evaluated and moderated in accordance with specified assessment criteria, scoring methodology and weightings. Members of the evaluation and moderation panels were trained in the importance of being fair, open and transparent to all potential providers and trained to evaluate in an open, proportionate and transparent manner. The evaluation and moderation panels' scores and comments were recorded and reported to providers after the CCG's decision. None of the evaluators in the final assessment was present during Royal Devon and Exeter NHS Foundation Trust's presentation to the CCG on 7 July 2014. The chair of the moderation panel was present during this meeting.
161. We reviewed the scoring and comments of panel members for the options appraisal, evaluation and moderation. It appears to us that the scores reflected the outcomes of each stage, and that panel members did not have regard to considerations that were unreasonable or irrelevant to the assessment criteria.
162. We note that a comment by one of the evaluators appeared to favour a particular provider. The evaluator preferred Royal Devon and Exeter NHS Foundation Trust as a 'single provider' above Northern Devon Healthcare NHS Trust as 'not a single provider'. However, we found that this evaluator's score for Northern Devon Healthcare NHS Trust was discounted in the moderation process and did not affect the overall outcome of the provider assessment.
163. We conclude that the evidence did not indicate that the outcome of the provider assessment was predetermined, nor that involvement of people in the evaluation and moderation panels who had previously been involved in the co-production and consultation phase prejudiced the outcome of the provider assessment.

### ***Our view of other communications and statements made by the CCG***

164. We reviewed the content of the information available to us and found that in its communications with providers (including Northern Devon Healthcare NHS Trust), the CCG was transparent about its initial preference for Royal Devon and Exeter NHS Foundation Trust and about the assessment it subsequently undertook to select a preferred provider of the services.
165. We also sought to review NEW Devon CCG's communications with providers to examine whether they contributed to creating a perception that the outcome of

provider assessment was predetermined. We saw no communications that were likely to have that effect. 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 also asked the relevant providers to submit details of their communications with the CCG that created their perception that this part of the process was pre-determined. These providers did not give us statements of what CCG members had said. Based on the evidence we have we are unable to substantiate these claims. We consider whether Northern Devon Healthcare NHS Trust's submission that the CCG's failure to keep proper records constitutes a breach of the transparency requirements of the Procurement Patient Choice and Competition Regulations in paragraph 182 below.

166. It appears to us that the statements reported by Northern Devon Healthcare NHS Trust (paragraph 149) related to matters which were public at the time<sup>37</sup> and were made outside the provider assessment context. In our view these comments, if they were made, cannot by themselves reasonably be interpreted as demonstrating unequal treatment or discrimination. Taken with our review of NEW Devon CCG's conduct in assessing the proposals as set out in paragraphs 55-59, we conclude that the integrity of the CCG's assessment was not affected by the statements reported by Northern Devon Healthcare NHS Trust.

### **Our conclusions on equal treatment and non-discrimination**

167. For the reasons above, we 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**

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

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

- not providing enough clarity to potential providers, or at least to Northern Devon Healthcare NHS Trust, about the procurement process, with changes and delays to the process occurring without explanation

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<sup>37</sup> For example, information about the CCG's plans to transform community services (including its initial preference for Royal Devon and Exeter NHS Foundation Trust) was available to the public in several published documents and the plans had been the subject of consultation earlier in the year

- not keeping a complete record of communications with interested providers
- delaying and failing to respond to Northern Devon Healthcare NHS Trust's requests for information, including not identifying which CCG senior officers were involved in the evaluation.

### Clarity provided about the procurement process

#### **Northern Devon Healthcare NHS Trust's submission**

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

#### **NEW Devon CCG's submission**

171. 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. The CCG also said it 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.

172. 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 and Exeter NHS Foundation Trust**

173. Royal Devon and Exeter NHS 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 of the transparency of the process**

174. We reviewed the information NEW Devon CCG provided to Northern Devon Healthcare NHS 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 NHS Trust, Royal Devon and Exeter NHS

Foundation Trust, Devon Partnership Trust<sup>38</sup> 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 below.

175. From our review of these 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* (paragraphs 47 and 48)
- the draft *Strategic framework* (paragraph 40)
- a letter explaining the proposed provider assessment process and inviting providers to express interest in participating (paragraph 52)
- the assessment documents, sent to providers who expressed an interest in participating in the provider assessment. (paragraph 53)

176. 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 NHS Trust before this meeting that it would make no decision on procurement at the meeting.

177. 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 rest of the process ran according to these timescales. 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 NHS Trust and other providers advance notice of the change to its process following consultation on the draft *Strategic framework*.

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

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<sup>38</sup> Although Devon Partnership did not formally express an interest in taking part in the provider assessment for the eastern locality, 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*.

## Record-keeping

179. NEW Devon CCG was unable to provide us with a complete record of its communications with all interested providers because records of telephone calls had not been kept and emails had been deleted. We have therefore not been able to take account of these communications.

### **Submission from Northern Devon Healthcare NHS Trust**

180. Northern Devon Healthcare NHS Trust submitted that the CCG's failure to keep proper records in this case demonstrated a lack of transparency in breach of the Procurement, Patient Choice and Competition Regulations.

### **Submission from NEW Devon CCG**

181. The CCG acknowledged that in some cases information was not available because of individuals managing their email account by only retaining those emails that require action or because of inbox capacity constraints. The CCG told us it was currently reviewing its policies in light of our provisional findings. It also said that retaining all emails (regardless of content) and making notes of all calls with providers (outside a procurement process) would be unnecessarily burdensome and resource intensive.

### **Our assessment**

182. The Procurement, Patient Choice and Competition Regulations are not prescriptive about a commissioner's internal record-keeping. We examined whether the CCG provided sufficient information to potential providers to enable them to take part in the process, taking into account the communications that were made available to us. We concluded, based on this information, that the information available to providers was adequate for the purpose. We therefore did not find a breach of the transparency requirement of the Procurement, Patient Choice and Competition Regulations in this case.

183. 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. In the future we would expect the CCG to maintain proper records of communications with external parties, including communications by email or phone, relating to procurement processes and we therefore encourage the steps the CCG is taking to improve its practices.

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

### Northern Devon Healthcare NHS Trust's submission

184. Northern Devon Healthcare NHS Trust told us that it requested information from NEW Devon CCG on several occasions and the CCG either delayed its responses or failed to respond to these requests.

### NEW Devon CCG's submission

185. NEW Devon CCG told us that it responded to Northern Devon Healthcare NHS Trust's requests. In some cases the CCG did not provide the trust with the information it requested. 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 lobbied directly. The CCG also said that in one instance where it declined to provide information that was not publicly available it took the view that sharing all the information requested would have given Northern Devon Healthcare NHS Trust an unfair advantage in the assessment process. The CCG told us the delay in responding to the trust in this instance had no adverse impact on Northern Devon Healthcare NHS 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

186. As set out in our guidance, the transparency requirement under the Procurement, Patient Choice and Competition Regulations is fundamental to the accountability of commissioners who must ensure that they conduct all their procurement activities openly and in a manner that enables scrutiny of their behaviour.<sup>39</sup>

187. We examined the information requested by Northern Devon Healthcare NHS Trust and the responses provided by NEW Devon CCG. 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. 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.

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<sup>39</sup>Our substantive guidance on the Procurement, Patient Choice and Competition Regulations is available at: [www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance](http://www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance)



188. We found three instances where the CCG did not provide information requested by Northern Devon Healthcare NHS Trust. In two instances the information requested was not in our view material to the process; for example, because it was external advice that the CCG had sought or it had been superseded by changes to the CCG's process. In another instance, the information, which was requested when the trust was already in the process of lodging a formal complaint with us, was not material to the trust's ability to challenge the process. It therefore appears to us that where the CCG did not provide information requested by Northern Devon Healthcare NHS Trust this did not affect the trust's decision or ability to take part in the procurement process, or to challenge that process.
189. Our findings in this case are not intended to suggest that it is necessary to prove disadvantage to establish a breach of Regulation 3(2)(a) of the Procurement, Patient Choice and Competition Regulations. Rather, in our view the relevance of the information requested by Northern Devon Healthcare NHS Trust to its ability to take part in the provider assessment was key to establishing whether the CCG was obliged to provide it. The obligation to act transparently does not, in our view, of itself, mean that a CCG must respond to every information request it may receive. Transparency is concerned with ensuring the fundamental fairness and openness of commissioning and it is with this purpose in mind that we have interpreted Regulation 3(2)(a).
190. For the reasons set out above we conclude that the CCG did not breach Regulation 3(2)(a) of the Procurement, Patient Choice and Competition Regulations by failing to act in a transparent way.

## 9. Conflicts of interest

191. 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.
192. In this section, we examine 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 and Exeter NHS 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.
193. 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 and Exeter

NHS Foundation Trust as the preferred provider. More specifically, our analysis relates to the CCG's evaluation and moderation of the proposals from providers.

194. The first possible 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 NHS Trust's submission**

#### *Involvement in various stages of the process*

195. Northern Devon Healthcare NHS Trust told us that people involved in the development and production of the original proposal to select Royal Devon and Exeter NHS Foundation Trust may have also been involved in evaluating and/or moderating providers' proposals. The trust submitted that anyone involved in the process in this way would have a conflict of interest as they had stated a preference for Royal Devon and Exeter NHS Foundation Trust in the earlier stages of the process and then gone on to be involved in the provider assessment.
196. Northern Devon Healthcare NHS 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.
197. Northern Devon Healthcare NHS 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*

198. Northern Devon Healthcare NHS Trust also told us that there had been commissioning GPs in the eastern locality employed by the providers involved in the process.
199. Northern Devon Healthcare NHS Trust also submitted that [X] (who also chaired the moderation panel that assessed providers' proposals), had previously worked for Royal Devon and Exeter NHS Foundation Trust and therefore had a conflict of interest.

## **NEW Devon CCG's submission**

### *Involvement in various stages of the process*

200. 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*

201. NEW Devon CCG told us that one of the evaluators, [X] in [X] role as a community hospital practitioner, was employed by Northern Devon Healthcare NHS Trust when the evaluation took place to provide cover on the wards up to five hours per week to [X] practice's patients during their stay at community hospitals within the eastern locality. The CCG told us that this interest was not identified at the time of the evaluation because [X] did not declare it when asked to declare [X] independence from the two providers. The CCG also told us that [X] provided services for Northern Devon Healthcare NHS Trust on the same basis as [X].
202. NEW Devon CCG told us it recognised that these interests should have been declared as the process required declaration of interests.
203. NEW Devon CCG also told us that one of the moderators, [X] declared an interest because [X] worked within [X] at Northern Devon Healthcare NHS 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 was no conflict in relation to the contract for services for adults with complex care needs. The CCG took the view that [X] was not connected, or in any position of authority, regarding the services in question so there would be no impact on [X] remuneration or other professional standing.
204. NEW Devon CCG told us that [X] who was on the CCG's governing body as [X], declared an interest because [X] worked as an [X] at Royal Devon and Exeter NHS Foundation Trust 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 [X], as [X] or on [X] as a result of the decision in community services.
205. New Devon CCG told us that [X] had been previously employed by Royal Devon and Exeter NHS Foundation Trust [X].
206. NEW Devon 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 as an employee of a provider in the process*

207. 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 and Exeter NHS Foundation Trust as the preferred provider.
208. In our substantive guidance we describe which 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 NHS Trust (for up to five hours a week) and not of Royal Devon and Exeter NHS Foundation Trust. While this interest could have been a potential conflict of interest, in practice the interest was not material or at odds with the decision to select Royal Devon and Exeter NHS Foundation Trust as the preferred provider. It is our view therefore that this interest did not affect, or appear to affect, the integrity of selecting the decision to select Royal Devon and Exeter NHS Foundation Trust as the preferred provider.
209. We note that both [X] and [X] were 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 NHS 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.
210. [X] was previously employed by Royal Devon and Exeter NHS Foundation Trust; however, it is our view that in this circumstance this did 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 and Exeter NHS Foundation Trust as the preferred provider.
211. For the reasons set out above we found that the four interests described above did not affect, or appear to affect, the integrity of the decision to select Royal Devon and Exeter NHS Foundation Trust as the preferred provider. We have therefore concluded that NEW Devon CCG did not breach the conflicts of interest obligations in Regulation 6 of the Procurement, Patient Choice and Competition Regulations.

### *Involvement in various stages of the process*

212. The involvement of people on the evaluation and moderation panel who were involved at previous stages of the process does not amount to a conflict of interest as defined in Section 6 of the Procurement, Patient Choice and Competition Regulations. We have examined Northern Devon Healthcare NHS Trust's submission that the result of the provider assessment was predetermined in Section 7 above.

### **Further work on the CCG's processes**

213. Although we did not find a breach of the regulations in this case, in our view NEW Devon CCG could take steps to better manage conflicts of interest in future. For example, 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. We would also expect CCGs to disclose details of all relevant interests and the CCG's assessment of them, even if the CCG decides that an interest is not material enough to be a conflict of interest. Our guidance includes information about disclosing relevant interests.<sup>40</sup>

214. NEW Devon CCG said that it is in the process of revising its standard of business conduct policy. The CCG told us that it will ensure that part of this revision will capture NHS England's updated guidance on conflict of interest. It should also reflect our guidance.<sup>41</sup> Once this work has been completed, the CCG told us it will ensure that there are enhanced processes in place for the management of conflicts of interest in line with its business conduct policy. In addition its legal and procurement experts have been commissioned to provide further training sessions to its senior managers with regards to the impact of changes to procurement legislation, conflicts of interest and consultation guidance. We welcome the steps the CCG is taking to improve its practices.

## **10. Conclusions**

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

- Analysis of the process used by NEW Devon CCG (Section 6): whether the process used enabled NEW Devon CCG to assure itself of the quality,

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<sup>40</sup>Our substantive guidance on the Procurement, Patient Choice and Competition Regulations is available at: [www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance](http://www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance).

<sup>41</sup>Our substantive guidance on the Procurement, Patient Choice and Competition Regulations is available at: <https://www.gov.uk/government/publications/procurement-patient-choice-and-competition-regulations-guidance>.

efficiency and best value for money of Royal Devon and Exeter NHS Foundation Trust's offer; we also examined whether the process was proportionate and whether the CCG considered appropriate ways of improving the quality and efficiency of the services

- 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
- Conflicts 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 used by NEW Devon CCG**

216. In Section 6 of this document, we examined whether NEW Devon CCG's process was compliant 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**

217. 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.

218. We conclude that in the circumstances of this case it was acceptable for NEW Devon CCG to adopt a process where it invited prospective providers to propose solutions to address its objectives and use those proposals to select a preferred provider with which to do further work. Although the providers' proposals did not address all relevant points, our review of the work of the evaluation and moderation panels led us to conclude that the CCG was able to compare the proposals in the context of its commissioning objectives and to determine which proposal was preferable. For the reason we are satisfied that it was reasonable for the CCG to rely on the outcome of the evaluation and moderation process to select Royal Devon and Exeter NHS Foundation Trust as the preferred provider and proceed to do further work with that provider. Therefore we conclude that, at this stage, NEW Devon CCG has not breached Regulation 3(3) by failing to procure services from the provider or providers most capable of delivering the commissioner's objective referred to in Regulation 2 in relation to the services and provide the best value for money in doing so

219. NEW Devon CCG has not completed its process to award the contract. In Section 6 we explain that to meet the requirements of Regulation 3(3) before awarding a contract, the CCG will need to understand the scope of services to be provided, how they will be delivered, and how much it will cost to deliver these services. In our view, these matters are intrinsic to any assessment of whether procuring services from a particular provider will meet the CCG's objective to secure the needs of patients, improve the quality and efficiency of services, and deliver best value for money in doing so. Before reaching a decision to award a contract, the CCG will need to assure itself, and be able to assure the public, that it has commissioned services from the provider or providers that will best enable it to meet this objective.

220. It is for NEW Devon CCG to satisfy itself that, going forward, it reaches a final decision that is consistent with the requirements of the Procurement, Patient Choice and Competition Regulations. If following its due diligence phase, the CCG is not satisfied that proceeding with Royal Devon and Exeter NHS Foundation Trust is the best way to secure the needs of patients, improve the quality and efficiency of the services, and provide best value for money in so doing, we would expect the CCG not to award a contract. Instead the CCG would need to consider what other action would be appropriate.

### **Proportionality of the process**

221. We examined whether NEW Devon CCG's process was proportionate.

222. 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, although in our view the process could have been completed more quickly. We therefore conclude that NEW Devon CCG did not breach Regulation 3(2)(a) by failing to act in a proportionate way.

### **Improvements to services**

223. We examined whether NEW Devon CCG considered appropriate ways of improving the quality and efficiency in the provision of community services for adults with complex care needs.

224. 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. We therefore conclude that NEW Devon CCG did not breach Regulations 3(4)(a) and 3(4)(b) of the Procurement, Patient Choice and Competition Regulations by failing to consider appropriate ways to improve service quality and efficiency through integration and competition.

## Equal treatment and discrimination

225. 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 favouring of Royal Devon and Exeter NHS Foundation Trust and failing to treat providers in an equal [and non-discriminatory way].
226. In our view, that NEW Devon CCG had expressed an initial preference for Royal Devon and Exeter NHS Foundation Trust does not of itself indicate that the provider assessment was compromised. Our conclusions set out below are based on the CCG's revised approach to the process as explained in Section 7.
227. We concluded that the evidence we reviewed did not indicate that the outcome of the provider assessment was predetermined, nor that the favourable statements about Royal Devon and Exeter NHS Foundation Trust or the involvement of people in the evaluation and moderation panels who had previously been involved in the coproduction and consultation phase prejudiced the outcome of the provider assessment.
228. Based on the communications and statements made by NEW Devon CCG, that we reviewed, we did not find that the provider assessment process was predetermined. We therefore conclude that the 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.

## Transparency

229. 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 NHS Trust's requests for information.
230. We found that NEW Devon CCG provided sufficient information to interested providers to enable them to take part in the provider assessment. Where the CCG did not provide information that was requested by Northern Devon Healthcare NHS Trust or the information was delayed we found that this did not affect the trust's ability to take part in the provider assessment, or to challenge that process. We therefore conclude that NEW Devon CCG did not breach Regulation 3(2)(a) of the Procurement, Patient Choice and Competition Regulations by failing to act in a transparent way.

## Conflicts of interest

231. 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 and Exeter NHS Foundation Trust as the preferred provider of services for adults with complex care needs in the eastern locality. We also assessed whether any conflicts, or potential conflicts, of interest that arose were managed appropriately.

232. We found that the submitted 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 and Exeter NHS Foundation Trust as the preferred provider. We therefore conclude that the CCG did not breach Regulations 6(1) and 6(2) of the Procurement, Patient Choice and Competition Regulations.

### **Enforcement action requested by Northern Devon Healthcare NHS Trust**

233. We considered Northern Devon Healthcare NHS Trust's request that we secure an undertaking from NEW Devon CCG to prevent a failure to comply with the requirements of the Procurement, Patient Choice and Competition Regulations. The CCG has set out a number of actions it intends to take comply with Regulation 3(3).<sup>42</sup> These steps have informed our decision. We will consider opening an investigation under the Procurement, Patient Choice and Competition Regulations if we receive a complaint that the CCG has failed to satisfy itself it met its commissioning objectives to secure the needs of patients, improve the quality and efficiency of services, and deliver best value for money in doing so.

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<sup>42</sup> Paragraph 81.

## Appendix 1: Conduct of our investigation

On 18 December 2014, we received a complaint from Northern Devon Healthcare NHS 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 our statement of issues from Northern Devon Healthcare NHS Trust, NEW Devon CCG, Royal Devon and Exeter NHS Foundation Trust and other interested parties, including the public, local councils, local GPs and local groups
- held meetings with Northern Devon Healthcare NHS Trust, NEW Devon CCG and Royal Devon and Exeter NHS Foundation Trust
- held a hearing with NEW Devon CCG
- gathered information from various parties, including Staffside and other providers in Devon (Care UK, Devon Partnership NHS Trust, [X], [X], Devon Doctors, [X] and Virgin Care Limited)
- published provisional findings and requested views from interested parties
- received submissions on our provisional findings from Northern Devon Healthcare NHS Trust, NEW Devon CCG, Royal Devon and Exeter NHS Foundation Trust and other interested parties, including Staffside, the public, local GPs and local groups
- issued a number of information requests to NEW Devon CCG.

We have published on our website submissions received in response to our statement of issues and provisional findings.

## **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. The community nursing teams also work with other healthcare professionals to actively prevent hospital admission so that patients can be cared for at home. Each team is based at 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 NHS 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><b>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?</b></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"> <li>• <i>Achieving governance and partnerships designed around the natural flow of patients to meet needs and deliver the best clinical outcomes</i></li> <li>• <i>Delivering clear and straightforward pathways that minimise the complexity of service provision and maximise integration</i></li> <li>• <i>Ensuring services and experiences that are consistently joined up and wrapped around individuals</i></li> </ul>
2	<p><b>With reference to the Strategic Framework, Draft Case for Change; JSNA [Joint Strategic Needs Assessment] 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?</b></p> <p><b>Please describe with supporting plans, workings, assumptions and models.</b></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"> <li>• <i>Delivering financial sustainability and value for money</i></li> <li>• <i>Driving a shift in resources towards prevention and home based models</i></li> <li>• <i>Achieving flexible, resilient and responsive clinical and care delivery that reflects identified health needs and priorities in the locality</i></li> </ul>
3	<p><b>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?</b></p>

Question number	Question (with explanatory notes)
	<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"> <li><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></li> <li><i>• Achieving effective arrangements with the local authority (s) in relation to integration including formal partnerships</i></li> <li><i>• Delivering personalised and localised models that bring about choice and control in quality services</i></li> </ul>
4	<p><b>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.</b></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"> <li><i>• Your response will be assessed against the extent to which it answers the question, including by demonstrating effective solutions to:</i></li> <li><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></li> <li><i>• Increasing the opportunity and impact of engagement with local communities in shaping services</i></li> <li><i>• Simplifying and streamlining delivery working within the locality to achieve co-ordinated care and meets local needs and addresses inequalities</i></li> <li><i>• Ensuring services are delivered in a high quality and safe manner</i></li> </ul>
5	<p><b>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?</b></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>

Question number	Question (with explanatory notes)
	<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"> <li>• <i>Providing a single and achievable process of governance that reflects patient flow between community and acute care</i></li> <li>• <i>Achieving and maintaining formal partnership arrangements where pathways cross organisations delivering healthcare in the locality</i></li> </ul>
6	<p><b>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?</b></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"> <li>• <i>Achieving transformation of the community delivery system through collaboration with colleagues across the CCG area</i></li> <li>• <i>Delivering to an outcomes based approach as described in the design principles of consistent outcomes that are jointly evaluated.</i></li> </ul>

## Appendix 4: Commissioning plans for other categories of community services

NEW Devon CCG's commissioning for the other categories of services 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)		Procurement arrangements		
Services		Northern Locality	Eastern Locality	Western Locality
	1 Urgent care services in the community	Currently Tendering	Currently Tendering	Currently Tendering
	2 "Living well at home" services	Currently Tendering*	Currently Tendering*	Currently Tendering*
	3 Specialist community services	Under Review**	Under Review**	Under Review**

\* Through a OJEU Procurement Process

\*\* Report to be reviewed by CCG Governing Body in October 2015

## 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 as outlined in the draft *Case for change*:

- 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 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: Staff survey by Northern Devon Healthcare NHS Trust

After NEW Devon CCG's announcement that Royal Devon and Exeter NHS Foundation Trust was the preferred provider for the reconfiguration of community services for adults with complex care needs in the eastern locality, Northern Devon Healthcare NHS Trust's communications department invited all the trust staff members to complete a survey. They were asked what they thought the potential impact the transfer of services to Royal and Devon and Exeter NHS Foundation Trust would be on: patients; staff; the financial position of health services in Devon; and Northern Devon Healthcare NHS Trust. Staffside told us that 422 staff members completed the survey:

- 56% of surveyed staff said that the potential impact on patients would be negative or very negative. 71% said that it would be slightly negative, negative or very negative.
- 73% of surveyed staff said that the impact of the transfer on staff would be negative or very negative. Around 84% of staff said that the impact would be slightly negative, negative or very negative.

The key concerns highlighted by Staffside in relation to the impact of the transfer of services to Royal Devon and Exeter NHS Foundation Trust on staff were:

- A change in working practice: staff would need to adjust to a new set of rules and procedures and would need to build relationships with Royal Devon and Exeter NHS Foundation Trust's staff. All of this would require time and effort to adopt and embed.
- Staffside were worried that the above might take time/effort away from treating patients and there could be disruptions to patient services.
- The change brings about uncertainty about future services provision; and related concern about job security following the move.
- Staff efforts to integrate with Northern Devon Healthcare NHS Trust over the last four years (in terms of policies, IT, culture) have been wasted; this leaves them demoralised and with less incentive to make the same effort in integrating within Royal Devon and Exeter NHS Foundation Trust.
- Staffside commented on how happy staff members are with support from management and the training they received at Northern Devon Healthcare NHS Trust.

Staffside submitted that this was demonstrated by the results of the latest national staff survey (2014), which showed that the trust scored higher than average (compared with all acute trusts) for questions relating to staff satisfaction (job satisfaction, staff recommending the trust as a place to work or receive treatment

and staff motivation at work). Staff also scored the trust highly for effective team working and support from immediate managers. Staffside noted that Northern Devon Healthcare NHS Trust was given a rating of 'good' by the Care Quality Commission in its most recent inspection.

## 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	✓	✓	✓	✓

### Key

- ✓ 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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