



Great Yarmouth and Waveney

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Dear Andrew

COOPERATION AND COMPETITION PANEL

CONDUCT COMPLAINTS BY THE ASSOCIATION OF CHIEF EXECUTIVES OF VOLUNTARY ORGANISATIONS AND BY THE NHS PARTNERS NETWORK

Response

INTRODUCTION

We refer to the conduct complaint made to the Panel by the Association of Chief Executives of Voluntary Organisations ("**ACEVO**") dated 17 December 2009 and to the undated conduct complaint made to the Panel by NHS Partners Network ("**NHSPN**") (together the "**Complainants**") and to the Panel's notice of acceptance published by the Panel on its website on 5 January 2010 (the "**Notice of Acceptance**").

The purpose of this document is to respond to the claims made by the Complainants.

BACKGROUND AND CONTEXT

In line with its commitment to be a World Class Commissioner and to deliver high quality community services, the NHS Great Yarmouth & Waveney Board fully endorsed the Transforming Community Services ("**TCS**") programme. TCS aims to improve community services so that they can provide modern personalised and responsive care of a consistently high standard and value for money.

After having carried out an options appraisal process and having taken market soundings, the Trust decided that the best way of achieving compliance with TCS would be to divest itself of its provider services by way of a competitive process which would be open to NHS organisations as well as to the independent and voluntary sectors (the "**Independent Sector**"). In making this decision, the Trust also took into account the requirements of the Principles and Rules on Cooperation and Competition ("**PRCC**") which were introduced in December 2007 in Annex D of "The NHS in England; The Operating Framework for 2008/9" to reflect Department of Health policy at that time.

The PCT held an information day on 5 October 2009 which was attended by both NHS and Independent Sector bodies, including trade members of NHSPN and ACEVO (as opposed to officers of those organisations).

On 13 October 2009, the Chief Executive of the NHS wrote to SHA and PCT Chief Executives (the "**Chief Executive's Letter**") to explain how it was proposed to take the policy contained in a speech made by the Secretary of State at the Kings Fund on 17 September 2009 forwards (the "**Preferred Provider Policy**"). The Chief Executive's Letter attached a copy of the letter dated 25 September 2009 from the Secretary of State to the General Secretary of the TUC (the "**Secretary of State's Letter**").

In line with this policy statement and in a genuine attempt to be as open and transparent as possible, on 24 November 2009, the PCT informed those parties that had attended an open day in relation to the Transfer on 5 October 2009 that it would now only accept bids from NHS organisations, although it was made very clear in the letters sent that Independent Sector parties were able to partner with bidding NHS bodies. The terms of that letter positively encouraged such bids. In a further attempt to assist in the establishment of such collaborative bids, a further open day was held by the Trust on 9 December, which was attended by 20 non-NHS organisations and by 8 NHS bodies.

On 17 December 2009, the Trust advertised the process that would lead to the transfer of its provider services (the "**Transfer**") in the Health Service Journal as well as on the Supply2Health and the Trust's own websites. A copy of the text of the advertisement is attached to this paper. It should be noted that the advertisements placed also stated clearly that, whilst the Trust would now only accept bids from NHS organisations, Independent Sector parties were able to partner with bidding NHS bodies.

CONDUCT COMPLAINTS

Each of the NHSPN and ACEVO has complained to the Panel that the Trust's exclusion of the Independent Sector from its proposed transfer of provider services amounts to a breach of principles 1 and 4 of the PRCC.

Principle 1 states that:

"Commissioners should commission services from the providers who are best placed to deliver the needs of their patients and populations."

One of the Rules that falls within the scope of this principle (and which is referred to in both complaints) states:

"PCT provider services should be subject to these competition rules in the same manner as any other provider and be managed on equal terms to other providers."

Principle 4 states that:

"Commissioners and providers should foster patient choice."

One of the Rules that falls within the scope of this principle (and which is referred to in both complaints) states:

"Commissioners of NHS services must not restrict choice via collusive behaviour or any other action."

THE TRUST'S RESPONSE TO THE CONDUCT COMPLAINTS

It is the Trust's contention that the complaints by each of the Complainants are incorrectly made in that they:

1. claim that the Trust has excluded the Independent Sector from the bidding process in relation to the Transfer;
2. ignore the affect of the Preferred Provider Policy on the PRCC; and
3. claim that the Trust' provider services have been treated differently to any other provider.

Exclusion of the Independent Sector

The Trust feels it is important for the Panel to recognise that the key foundation on which both complaints have been made is false. Both complaints allege that the Trust has excluded Independent Sector organisations from the bidding process. This is incorrect. The letter sent by the Trust to interested parties 24 November 2009 makes it very clear that the Independent Sector remains able to participate:

".....the PCT plans to proceed with the procurement process as planned but limiting the pool of potential bidders to NHS organisations whilst at the same time acknowledging that NHS organisations could collaborate with independent or voluntary sector parties in arrangements where the NHS body would take the prime role. The PCT would welcome such collaborations where they would help to bring innovative ideas and approaches to the delivery of community services.

Our vision of the new provider has therefore become an NHS organisation who is able (either by itself or through a collaboration with others (whether NHS or non-NHS, and whether from the independent or voluntary sectors)) to drive continuous improvement, develop clinical pathways, provide innovative solutions and ensure value for money.

We hope that the best available knowledge and experience from across all health care sectors can be harnessed within the new scope of the procurement and engaged to provide truly innovative community services which give the best service for our patients."

With the above in mind, it is clear that Independent Sector remain entitled to participate in the procurement process and were positively encouraged to do so.

The immediate impact of the Chief Executive's Letter

In the Chief Executive's letter, it was made clear that the core principles contained in the Secretary of State's letter were to be followed "from now" and that the six draft scenarios set out processes that PCTs were expected to follow "henceforth". It also stated that the Preferred Provider Policy has implications for Transferring Community Services which were to be looked at and developed. In addition, it made it clear that the PRCC would be amended to reflect the Preferred Provider Policy.

It is clear from this that with effect from the date of the Chief Executive's Letter (and in the absence of an amended PRCC), the original PRCC should be interpreted in the light of:

1. the Preferred Provider Policy;
2. the Secretary of State's Letter; and
3. the Chief Executive's Letter.

With this in mind, it is wrong to make conduct complaints on the basis of a failure to comply with the PRCC unless the requirements of the documents referred to at 1 to 3 above are taken into account.

As a result, discussions took place with the SHA to identify how best to set the Transfer in the context of the Preferred Provider Policy.

As a result of those discussions, it was determined that in order to reflect the Preferred Provider Policy, the Trust should seek to establish a prime contracting relationship with an NHS Provider, whilst preserving the ability of the Independent Sector to participate in partnership with NHS providers.

It was felt that such a structure would allow the Trust to identify a provider who would be able to provide high quality care to patients, thereby enabling the Trust to comply with the PRCC, as amended by the Preferred Provider Policy.

ABUSE OF PROCESS

The complaints

The Trust is disappointed that the Complainants have sought to use the Transfer as a test case in relation to the interpretation and effects of the Preferred Provider Policy. Indeed, it is clear from the letters sent by the Complainants (as well as from their statements in the press) that they are less about the Trust's conduct and more about challenging the Preferred Provider Policy.

The Panel is not the appropriate forum for a debate about policy and, as such, the Trust feels that both complaints amount to an abuse of the Panel's process.

Acceptance criteria 3.1(vi)

The Trust is further disappointed at the way the Panel has interpreted its own acceptance criteria 3.1(vi) which states:

"Where a complaint relates to potentially anti-competitive conduct, complainants should use all reasonable endeavours to engage with parties at a local level, including appropriate engagement with the relevant SHA, prior to referring the matter to the Panel. This does not apply in the case of complaints regarding potentially collusive behaviour which would be referred directly to the Panel."

Save for the letters from ACEVO to the Trust dated 16 December 2009 (the day before the date of ACEVO's complaint to the Panel) and the copy of the complaint letter sent by NHSPN to the Panel, the Trust has not had contact with either and neither has the SHA. The Trust feels that this procedural flaw is the only reason that collusive behaviour between the Trust and its Provider Arm has been alleged, albeit without any shred of evidence to support it. The Trust has carried out a transparent, fair and non-discriminatory process thus far (in the context of the Preferred Provider Policy). It has not sought to (and neither has it) treated its provider services arm any differently to any other bidder. The Trust feels that the Panel should disregard the claim about Rule 3 of Principle 1 and consider the unfounded and untrue allegation of collusion as a cynical attempt to avoid the engagement pre-condition.

As such, we do not feel that either Complainant has discharged the engagement pre-conditions and that as a result, the acceptance of this case by the Panel is premature.

MERGER INQUIRY

The Trust acknowledges that (subject to the satisfaction of the Panel's own criteria) it has an obligation to refer the Transfer to the Panel at the appropriate time for consideration as a merger.

The Trust is of the view that this is the most appropriate time to consider the costs and benefits of the Transfer and whether the Trust has complied with the requirements of the PRCC (as amended by the Preferred Provider Policy).

IMPACT OF THE COMPLAINTS ON THE TRANSFER AND THE TRUST

The Trust is conscious that the complaints and the timing of their consideration by the Panel could have serious consequences for the delivery of the Transfer and wider implications for the trust.

In carrying out the Transfer, the Trust's aims have always been to improve services so that they are more effective and appropriate for patients and offer better value for the tax payer. In this regard, it is important for the Panel to bear in mind that the public health challenges faced by the Trust are significant by any standards. Great Yarmouth has the second worst deprivation score and the highest unemployment rate in the east of England, and in Waveney, one in seven of the population lives in a deprived area. There has been an identified 18-year gap in life expectancy between the least and most deprived wards in NHS Great Yarmouth & Waveney.

The Trust feels that it would penalise its local population for the Panel to go beyond a Phase 1 review.

There are other compelling reasons for the CCP to reach a speedy conclusion on the issues raised bearing in mind the very real risk that delays to the process will have an adverse impact on the Trust's employees. Staff need to be retained and recruited in order to maintain a safe service. A delay to the Trust's plans will inevitably cause uncertainty in the minds of staff to the extent that the Trust's ability to achieve these key objectives may be affected, thereby increasing the risk of service failure. The potential for reputational damage should also be considered.

CONCLUSION

1. The aim and structure of the Transfer remains to commission services from providers who are best placed to meet the needs of its patients and population.
2. The aim and structure of the Transfer remains to foster patient choice.
3. There is no evidence of any collusion between the Trust and its provider arm.
4. The Trust has complied with the PRCC in light of the change in circumstances required by the Preferred Provider Policy.

Yours sincerely,

Dr Sushil Jathanna
Chief Executive



Great Yarmouth and Waveney

Transfer of Community Services

Applications to Pre-Qualify for Invitation to Tender

NHS Great Yarmouth & Waveney (NHS GYW), a Norfolk and Suffolk based Primary Care Trust, is inviting suitably qualified and experienced NHS healthcare providers to apply to deliver a wide range of community services within NHS GYW's catchment area.

NHS GYW would welcome bids from NHS organisations which involve other organisations, independent, voluntary or NHS, that could add value to the bid by bringing innovative ideas and approaches to the delivery of community services. The NHS organisation will be the lead contractor.

NHS GYW will transfer its community services provider arm, Great Yarmouth & Waveney Community Services (GYWCS), to the successful bidder, who will work with NHS GYW to effect a safe and timely transfer and then assume responsibility for the delivery of the 34 community healthcare services GYWCS currently provides to the local population. These include community hospital in-patient services, district nursing, health visiting, prison healthcare, sexual health, physiotherapy and occupational therapy services, children's services and other specialist services. GYWCS operates from a range of locations across Great Yarmouth and Waveney including GP practices, patients' homes, schools and a prison.

This opportunity is one of the first of its kind in the NHS. It will give the successful bidder a crucial footing in the community services market, which is set to expand nationally. The successful provider will benefit from working with the current GYWCS management and experienced clinical teams.

The Community Services contract will be for three years, with a possible renewal for up to two years.

TUPE regulations will apply to the circa 600 whole time equivalent staff currently employed within GYWCS.

Further information and instructions on how to take part in the procurement process, can be obtained by visiting the NHS Supply2Health portal: <http://www.supply2health.nhs.uk> Copies of the Memorandum of Information and the Pre Qualifying Questionnaire can be obtained from NHS GYW's website: <http://www.gywpct.nhs.uk>

Closing date for return of the PQQ is 12:00 noon on Friday 15 January 2010.