



CO-OPERATION & COMPETITION PANEL  
FOR NHS-FUNDED SERVICES

## **Cooperation and Competition Panel**

**Commissioning and procurement of secure mental health services by North West Specialised Commissioning Group: investigation of a complaint by Hanover Healthcare**

**Recommendation on remedies**

**16 December 2010**

## INTRODUCTION

1. This document sets out the recommendations of the Cooperation and Competition Panel (CCP) to the Secretary of State for Health in relation to the complaint<sup>1</sup> submitted by Hanover Healthcare (Hanover)<sup>2</sup> regarding the conduct of North West Specialised Commissioning Group (NWSCG).<sup>3</sup>
2. Hanover submitted that NWSCG had acted in breach of the Principles and Rules for Cooperation and Competition (the Principles and Rules) in the commissioning and procurement of secure mental health services in the North West of England. On 18 November 2010 the CCP found that NWSCG had breached the Principles and Rules by putting in place four year exclusive<sup>4</sup> framework agreements for the provision of medium and low secure mental health services in the North West (the Framework Agreements).<sup>5</sup>
3. We found that the Framework Agreements impose material costs on patients and/or taxpayers in three ways. First, costs arise from NWSCG's limiting competition to providers appointed to the Framework Agreements for the duration of the Framework Agreements, and therefore restricting its ability to purchase from non-Framework Agreement providers that may have developed a superior service offering since the Framework Agreements were put in place. Second, costs to patients and taxpayers arise from NWSCG calling off services under the Framework Agreements based on rankings awarded at the time of the tender rather than using mini competitions between providers appointed to the Framework Agreements. Finally, NWSCG's conduct can be expected to give rise to costs to patients and taxpayers by deterring the possible entry of a new service provider with a better service offer than existing providers.
4. These costs were not outweighed by any benefits associated with the Framework Agreements. In particular, the CCP found that, given NWSCG's powerful position as a buyer of the relevant services in the North West of England, long term exclusivity did not materially enhance NWSCG's bargaining position and therefore did not lead to material benefits to patients or taxpayers in terms of higher quality services or lower prices. In addition, we found that the benefit of administrative cost savings associated with not holding another competitive tender for four years was modest at best. Overall, we decided that the costs associated with the Framework Agreements were not outweighed by the modest benefits we identified and we therefore concluded that NWSCG had breached Principle 4 Rule 2 and Principle 1 of the Principles and Rules. The CCP's advice (the Advice) is available at: [www.ccp-panel.org.uk](http://www.ccp-panel.org.uk).

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<sup>1</sup> The complaint was accepted by the CCP on 2 June 2010; see Notice of Acceptance, [www.ccp-panel.org.uk](http://www.ccp-panel.org.uk).

<sup>2</sup> Hanover Healthcare is the trading name of Revona LLP which operates Hanover House. Hanover House is an independent hospital registered by the CQC in November 2009 as a mental health hospital which can detain patients. It has 74 beds and is located in Widnes, Cheshire.

<sup>3</sup> North West Specialised Commissioning Group is a joint sub-committee of the 24 Primary Care Trusts (PCTs) in the North West of England in accordance with Regulations 9 and 10 of the National Health Service (Functions of Strategic Health Authorities and Primary Care Trusts and Administrative Arrangements) (England) Regulations 2002. The relevant PCTs have delegated responsibility for commissioning specialised and secure services to NWSCG.

<sup>4</sup> In this document, when we refer to the Framework Agreements as 'exclusive' we mean that NWSCG has decided to operate them on an exclusive basis.

<sup>5</sup> The Framework Agreements relate to (i) low secure services for women in the North West (advertised under reference number SC1/08/0001 on Supply2Health) and (ii) secure services (advertised under reference number SC1/08/0002 on Supply2Health).

## CCP'S INVITATION TO COMMENT ON SUITABLE REMEDIES

1. On 19 November 2010, the CCP invited comments from interested parties on how the breach of the Principles and Rules might best be remedied. To facilitate comments, the CCP outlined a range of possible remedies that might be appropriate. These are set out below.
  - i. From now until the expiry of the Framework Agreements, NWSCG will not be bound to acquire medium or low secure mental health services for one off placements or spot purchases exclusively from those suppliers admitted to the Framework Agreements; accordingly NWSCG will publicly state that it will acquire services from suppliers not included within the Framework Agreements where such suppliers represent better value for money in respect of the relevant services.
  - ii. NWSCG will hold a new competitive tender for all medium and low secure mental health services for one off placement and spot purchases (and any block contracts, where relevant) in the North West of England forthwith (or before 31 December 2011). Resulting contracts should not be exclusive and should not give providers any volume guarantees. Following this tender, NWSCG should keep the market under review and hold additional procurements when it appears beneficial to do so.
  - iii. NWSCG will hold a competitive tender within a certain timescale for a limited range of secure mental health services in respect of which it appears that market developments have been particularly significant, for example in relation to secure services for patients with personality disorder.
  - iv. NWSCG will hold one or more mini competitions involving relevant providers appointed to the Framework Agreements within a certain timeframe before placing further patients on a spot basis or awarding further block contracts within the context of the Framework Agreements.
  - v. NWSCG will refrain from entering into similar exclusive agreements in future and will make this clear in a public statement of its commissioning intent.
  - vi. Relevant NWSCG staff will undertake training to improve commissioning and procurement of secure mental health services.
  - vii. A combination of any of the above.
  
5. In response to its invitation to comment, the CCP received 12 written responses, including from NWSCG, Hanover and a range of NHS and private providers of mental health services. One respondent represents a number of organisations: the Independent Mental Health Services Alliance (imhsa) is a group of nine independent providers of mental health services, including both Framework Agreement and non-Framework Agreement providers.<sup>6</sup> All the remaining responses, except one, were by providers who have been admitted to the Framework Agreements. All but one of the responses were published on our website. Overall, many respondents were of the view that the remedies put forward by the CCP were reasonable and that long term exclusive framework agreements are not desirable in the circumstances of this case.

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<sup>6</sup> Responses were received from NWSCG, Hanover, imhsa (Independent Mental Health Services Alliance), Partnerships in Care, Pennine Care NHS Foundation Trust, Cheshire and Wirral NHS Foundation Trust, Alpha Hospitals, 5 Boroughs Partnership NHS Foundation Trust, Ridgeway, Calderstones NHS Foundation Trust, Optima Care. All but one of the responses were published on our website. One respondent considered that its response was sensitive and therefore requested that publication be withheld.

6. Before setting out our analysis of the responses, it may be useful to clarify that the proposed remedies only relate to the purchasing of additional capacity for low and medium secure mental health services by NWSCG. In our Advice we explain that this additional capacity is different from core contracted capacity purchased using block contracts. Additional capacity accounts for a significant proportion of total demand for low and medium secure services in the North West and is purchased on the spot or through use of cost and volume contracts under the Framework Agreements.<sup>7</sup> The Advice refers to the purchasing of core contracted capacity by way of context, but we did not consider whether or not commissioning and procurement of core contracted capacity in the North West complies with the Principles and Rules and we reached no conclusion on this point.<sup>8</sup> In the following paragraphs we set out the main substantive comments received in respect of each of the recommended remedies as well as our views on those comments.
7. In relation to the first proposed remedy (no longer considering Framework Agreements to be exclusive) six respondents broadly supported this recommendation. One respondent (NWSCG) pointed out that, in its opinion a legal challenge could arise if this option were implemented. Other respondents (including those currently admitted to the Framework Agreements) did not appear to share this view. One respondent noted that the consent of the provider may be required to vary the relevant contract(s). Another noted that purchasing outside of the Framework Agreements could compromise the level playing field in that those who had been admitted to the Framework Agreements would be bound by the prices they had submitted in that context but others would not; also ad hoc providers would not be subject to the same rigorous assessment process as Framework providers. Three providers admitted to the Framework Agreements noted that they could be affected by implementation of the remedy if it would make it less likely that they would supply services to NWSCG. One of them considered that the remedy was nevertheless proportionate given the CCP's findings. Another noted that it may have submitted higher prices if the Framework Agreements had been non-exclusive. Finally, the point was raised that the remedy might not be effective if NWSCG did not regularly publish details of placements because without this visibility there was a concern that NWSCG would continue to acquire services exclusively from suppliers admitted to the Framework Agreements.
8. We have decided to recommend this remedy. In our view the risk of legal challenge arising from this remedy is low. This is because the terms of the Framework Agreements state that they are non-exclusive and the relevant contracts do not give providers volume guarantees. This is also why we do not consider that contracts would necessarily need to be varied. In addition, it is not the CCP's intention that implementation of the remedy would distort competition between those admitted to the Framework Agreements and those not admitted to the Framework Agreements. Instead, it is envisaged that where services are procured outside the Framework Agreements, the commissioner will afford equal opportunities to all potential providers to submit offers, including new prices, and will impose similar quality requirements. In our decision, we considered the possibility of potential providers submitting lower offers in return for exclusivity, but ultimately we did not find this persuasive given NWSCG's position as a powerful buyer of the relevant services in the North West of England. Finally, we decided that the

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<sup>7</sup> CCP Advice, paragraph 55.

<sup>8</sup> CCP Advice, paragraph 153.

proposed remedy would be more effective if NWSCG were to publish details of contracts awarded.

9. NWSCG submitted that designation of new entrants would address the CCP's concerns in relation to new entrants, while providing assurances relating to safety, security and quality. In our view, designation itself does not offer an effective remedy to the concerns identified because it does not deal with the concern that NWSCG has restricted its ability to purchase from non-Framework Agreement providers that may have developed a superior service offering since the Framework Agreements were put in place.
10. In relation to the second proposed remedy (holding a new competitive tender for medium and low secure mental health services within a specified timeframe), four organisations, including Hanover, were in favour of this option, although Hanover pointed out that holding competitive tenders for urgent placements was impractical. Others did not express a particular view but commented that it was not clear when the tenders would be held. One respondent commented that the procurement under the Framework Agreements had provided NWSCG with an opportunity to carry out an in-depth assessment of bidders and that it was unlikely to be able to do this again outside a formal procurement process. This organisation also noted that the cost to providers of bidding for contracts was more significant than the CCP had suggested in its Advice. Another provider commented that implementation of this remedy could negatively affect the outcome delivered to patients. Finally, the view was expressed that this remedy would be disproportionate and wasteful in terms of the costs imposed on the taxpayer and private organisations.
11. We have decided not to recommend this remedy because we concluded that, although it would be as effective as the first remedy in addressing the CCP's concerns, it would be more restrictive. Potential concerns raised by respondents therefore fall away. It is nevertheless worth clarifying that there is a distinction between awarding a contract to a provider and placing patients with that provider under a particular contract. It is possible to hold a competitive tender to award contracts which do not provide any volume guarantees, and to make urgent placements of patients pursuant to this contract as required.
12. The third proposed remedy (holding a competitive tender for a limited range of secure mental health services), was supported by three respondents. Most other respondents did not comment substantively on this proposed remedy. One respondent noted that the remedy would be disproportionate and wasteful in terms of the costs imposed on the taxpayer and private organisations, without any discernible benefit beyond that achieved by the first proposed remedy. We have decided not to recommend this particular remedy, so the potential concerns raised by respondents fall away.
13. The fourth proposed remedy (holding mini competitions under the Framework Agreements) was supported by one respondent and another commented that, in its view, this was already foreseen under the Framework Agreements. Other respondents said that they were uncertain of the scope of the remedy. Two respondents stated that in their view the remedy did not deal with the main concerns identified by the CCP in its report. NWSCG noted that it would be impractical to implement this for urgent placements. Finally, one respondent noted that mini

competitions would result in duplication of work for providers and tendering would represent an unnecessary use of public funds.

14. The CCP found that the four year exclusive nature of the Framework Agreements, combined with the way contracts are called off, reduces the levers available to NWSCG to maintain and improve quality, with NWSCG having to rely on enforcing quality standards through contractual mechanisms rather than using competition to create the incentives for providers to improve. We therefore consider that mini competitions under the Framework Agreements would go some way towards improving competition - albeit only between providers appointed to the Framework Agreements - thereby ensuring better outcomes for patients and taxpayers. We are not suggesting that mini competitions would be suitable for urgent placements, but mini competitions would be an option, for example, to award contracts under which patients would subsequently be placed. We agree that mini competitions are usually foreseen under framework agreements, but NWSCG does not operate its Framework Agreements in this way. Finally, we do not agree that holding mini competitions would be a waste of public or private funds. Mini competitions should only be held where they would lead to an improved price/quality proposition and these cost savings would outweigh the administrative costs associated with them. We have decided to recommend this remedy; it has been incorporated in remedy (i) below.
15. Five respondents specifically supported the fifth proposed remedy (no exclusive framework agreements in the future). NWSCG said that it was willing to engage with the CCP and the Department of Health regarding the details of new arrangements. Most other respondents did not comment on it. We have decided to recommend this remedy.
16. The sixth remedy (training) was supported by five respondents. One respondent noted that the remedy would be disproportionate. Most others did not comment on this option. We have decided not to recommend this remedy because we concluded that it would be preferable for NWSCG to determine itself how it can best ensure that it is in a position to implement the recommended remedies, for example by providing training for staff or by obtaining the relevant expertise externally. Since we are not recommending this option, potential concerns raised by respondents fall away.
17. On a more general point, a small number of respondents noted that they considered that value for money should not be the main criterion for the selection of providers in this sector because quality of services is also very important. In this context it is worth clarifying that when the CCP refers to value for money we refer to a combination of price and quality, so the service that provides best value for money is the one that consists of the highest quality service for the lowest price.

## **RECOMMENDED REMEDIES**

18. Having considered all responses, the CCP decided to recommend to the Secretary of State the following remedies in relation to the commissioning and procurement of additional capacity (see paragraph 7 above) for medium and low secure mental health services by NWSCG in the North West (the Relevant Services):

- i. From now on, NWSCG will acquire the Relevant Services from providers whether or not they are admitted to the Framework Agreements, basing its purchasing decisions on value for money considerations, taking full account of the CCP's Advice in this case and acting in compliance with the Principles and Rules and the Procurement guide for commissioners of NHS-funded services;<sup>9</sup> accordingly NWSCG will make a public statement reflecting this.
- ii. NWSCG will refrain from entering into exclusive long term framework agreements in future and will make this clear in a public statement of its commissioning intent.
- iii. NWSCG will publish on its website details of contracts it has entered into, such details to include the services provided under each contract and the identity of the provider.<sup>10</sup> NWSCG will also keep complete and accurate records of the reasons for its decisions.

## EFFECTIVENESS

19. The CCP expects that, for the reasons set out below, these recommended remedies are likely to be effective in addressing the costs to patients and taxpayers identified in the Advice.
20. The first recommendation (non-exclusivity) deals effectively with the concern identified by the CCP that NWSCG would not be able to take advantage of improvements in the service offer of providers not appointed to the Framework Agreements, even where they offer better value for money. It is also intended to deal with the concern that competition for contracts under the Framework Agreements is limited because of the way that contracts are called off. This is because under the terms of the recommendation we would expect NWSCG to hold mini competitions if this would be likely to improve value for money. The remedy has the effect of ensuring the NWSCG will actively consider its purchasing decisions, rather than using the Framework Agreements regardless of whether or not these provide the highest quality services for patients at the lowest price to the taxpayer.
21. This recommendation leaves a high degree of discretion to NWSCG as to how it will procure the relevant services to ensure that they obtain value for money. However, in reaching any decisions on the commissioning and procurement of medium and low secure mental health services, the recommendation provides that NWSCG will take into account the considerations highlighted in the Advice, and comply with the Principles and Rules as well as the Procurement Guide for NHS-funded services. The recommendation is also in line with NWSCG's objectives under the Establishment Agreement.<sup>11</sup>
22. The second recommendation (non-exclusivity in future) deals effectively with the concern identified by the CCP that entry of new service providers with a better service offering than existing providers is likely to be deterred if NWSCG enters into new exclusive four year framework agreements when the current Framework Agreements expire.
23. The third recommendation (transparency) deals with concerns identified by a respondent that it would be difficult to monitor NWSCG's commissioning and procurement decisions unless there was an appropriate level of transparency that would help providers to hold NWSCG to account

<sup>9</sup> Department of Health, *Procurement guide for commissioners of NHS-funded services* (30 July 2010).

<sup>10</sup> Details of prices and patient placements should not be published.

<sup>11</sup> NWSCG, Establishment Agreement (July 2007).

for its decisions. NWSCG currently publishes some information relating to contracts awarded following tenders on the Supply2Health website. It also stated that details of contracts awarded are contained in board minutes that are published on NWSCG's website. We took the view that this level of transparency is insufficient because the information that is published is not easily accessible. We did not find it appropriate for NWSCG to publish information relating to the number of placements because of the potentially sensitive nature of this type of information.

24. The CCP's informal advice function is available to NWSCG and providers if questions arise as to the effective implementation of any of the remedies.<sup>12</sup> It would also be open to providers to bring a formal complaint to the CCP.

## **PROPORTIONALITY**

25. The CCP expects that, for the reasons set out below, the costs associated with implementing the remedies are likely to be proportionate to the objectives that they are expected to achieve.
26. In relation to the first recommendation (non-exclusivity), we expect NWSCG to take into account the costs and benefits as outlined the CCP's Advice in reaching any commissioning decisions, with the aim of procuring services from whichever supplier provides value for money and is therefore best placed to deliver the needs of patients. As such, we consider that this remedy is designed so that the costs are proportionate to the benefits. The remedy also reflects NWSCG's existing obligations under the Department of Health's commissioning policy and therefore does not impose material additional costs.
27. In relation to the second recommendation (non-exclusivity in the future) we concluded that there were no material costs associated with implementation of this remedy. This is in line with the CCP's Advice which found that in the circumstances under consideration the costs of long term exclusive framework agreements outweigh any benefits associated with them.
28. In relation to the third recommendation (transparency) we concluded that the costs associated with providing an appropriate level of publicity are not material, given that NWSCG already publishes some information on websites. Our recommended remedy requires NWSCG to consolidate this information and publish it in a manner that makes it readily accessible.

## **CONCLUSION**

29. The CCP has concluded that the remedies set out in paragraph 18 would be effective in addressing the costs to patients and taxpayers identified in the CCP's Advice and that they would be proportionate to the breach of the Principles and Rules in terms of the costs associated with their implementation.
30. The Secretary of State for Health will now decide whether or not to accept the CCP's Advice regarding the breach of the Principles and Rules and these recommendations.

16 December 2010

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<sup>12</sup> CCP, *Conduct guidelines* (4 October 2010), Appendix 3.