



Hanover and North West Specialised Commissioning Group

Intention to proceed to Phase II

EXECUTIVE SUMMARY

1. The Cooperation and Competition Panel (CCP) has reviewed the complaint by Hanover Healthcare (Hanover)¹ and the response to the complaint by North West Specialised Commissioning Group (NWSCG) and North West Specialised Commissioning Team (NWSCT).² The CCP has also carefully considered the responses received to the issues letter dated 7 July 2010 (the Issues Letter).
2. Phase I of this case has raised a number of potential concerns under the Principles and Rules for Cooperation and Competition (the Principles and Rules).³ The Panel considers that further analysis is warranted and will proceed to Phase II analysis of this case.

BACKGROUND

3. On 2 June 2010 the CCP accepted a conduct complaint submitted by Hanover in relation to the conduct of NWSCG/NWSCT.⁴ Hanover submitted that NWSCT has acted in breach of Principles 1, 3 and 4 of the Principles and Rules in the context of the commissioning and procurement of secure mental health services in the North West. These principles lay down a requirement for commissioners to commission services from providers who are best placed to deliver the needs of their patients and populations; a requirement to commission and procure services in a transparent and non-discriminatory manner; and a requirement to foster patient choice.
4. In particular, Hanover submitted that NWSCT acted inconsistently with the relevant Principles and Rules by not admitting it to framework agreements (either in the normal course of putting these in place or retrospectively), or alternatively in deciding not to commission services from Hanover outside of the framework agreements. The framework agreements relate to: (i) low secure females and (ii) medium secure males and females/low secure males (the Framework Agreements). These agreements were let by NWSCT in 2009.
5. Hanover also raised concerns in relation to NWSCT's strategy of 'managing demand by controlling capacity' and contended that NWSCT's management of commissioning creates barriers to entry for new providers. Hanover considered this may have a detrimental impact on patients because many NHS facilities are more than 25 years old and struggle to meet the requisite standards. Hanover contends that this may be inconsistent with the Principles and

¹ Hanover Healthcare is the trading name of Revona LLP. It is a privately owned provider of secure mental health services.

² Primary Care Trusts (PCTs) across the North West have delegated responsibility for commissioning specialised and secure services to NWSCG. NWSCG is a joint sub-committee of the 24 North West PCTs 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 group is supported in this work by the North West Specialised Commissioning Team (NWSCT).

³ The Principles and Rules are available at: www.ccp-panel.org.uk/reports-and-guidance/index.html.

⁴ Notice of Acceptance, www.ccp-panel.org.uk

Rules because it means that the commissioner may not be commissioning services from those providers best placed to deliver the needs of their patients and populations (Principle 1); the approach may also discriminate against independent sector (IS) providers (in breach of Principle 3) and it may have an adverse effect on choice and competition (in breach of Principle 4).

6. NWSCT/NWSCG have responded that its intention is to commission services on the basis of the right provider, right time and right place as set out in its commissioning strategy, and that as a result demand for secure services will continue to reduce. They have also stated that the relevant framework agreements provide an optimum way of ensuring that Principles 1 and 3 are respected and implemented in practice; that the commissioning arrangements are appropriate given the specialised nature of the services in question and in light of national policy; and that Principle 4 is not relevant because patients receiving specialised low and medium secure services are not in a position to exercise choice or control as they are either detained under the Mental Health Act or committed to secure care by courts or police stations.
7. After reviewing the application, response, third party submissions and other information requested from the parties, the CCP sent a letter to Hanover and NWSCT/NWSG on 7 July 2010, setting out the issues identified to date in the context of this case. The parties had an opportunity to respond to the Issues Letter before the CCP decided whether to close the case or to proceed to Phase II. The relevant Strategic Health Authority (SHA), North West SHA, was also given an opportunity to comment on the Issues Letter.⁵
8. Based on a careful examination of the evidence available to date and the responses to the Issues Letter, this paper explains why the Panel considers that the issues raised in the context of this case need to be considered further.

CCP REMIT

9. In its reply to the Issues Letter, NHS North West stated that the complainant had not used all reasonable endeavours to engage at a local level and that it was of concern that the CCP appeared to have assumed that this requirement had been satisfied.
10. The CCP's *Draft interim guidance on the assessment of conduct* provides that in order for the CCP to accept a case relating to anti-competitive conduct it must be satisfied (*inter alia*) that the complainant has used 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.⁶ In this case we consider that the requirement of engagement at local level has been met because there is ample evidence of correspondence between the complainant and NWSCT on the matter of commissioning of secure mental health services. In addition, we note that Hanover approached the SHA seeking its input to resolve Hanover's concerns, consistent with the CCP's requirements for local engagement prior to the CCP accepting a conduct dispute. Hanover was advised by the SHA to utilise its dispute avoidance and resolution process. We note that there is

⁵ CCP Draft interim guidelines on the assessment of conduct (January 2009), Paragraph 5.6.

⁶ CCP, Draft interim guidance on the assessment of conduct (January 2009), paragraph 3.9 (vi), available at: www.ccp-panel.org.uk.

no requirement for a conduct complaint to go through the SHA's formal dispute resolution process before coming to the CCP.

11. NHS North West also submits that the complaint includes elements relating to procurement processes as well as conduct issues, and they would welcome clarification on how combined complaints are considered for acceptance by the CCP. The CCP considers that procurement cases should be dealt with through the formal dispute resolution processes at PCT and SHA level prior to being considered by the CCP. Conduct complaints should be subject to local engagement prior to consideration by the CCP (without having to go through formal dispute resolution processes at the PCT and SHA level). Where a complaint raises both procurement and conduct related matters, this should not, in general, obviate the need for procurement concerns to be dealt with through PCT and SHA dispute resolution processes prior to consideration by the CCP.⁷
12. The CCP considers that Hanover's complaint raises both procurement and conduct related issues. However, for the reasons set out below, the CCP does not consider it appropriate in this case to separate out narrow procurement questions from broader conduct issues, and thereby require the procurement issues to be subject to PCT and SHA dispute processes prior to consideration by the CCP.
13. First, NWSCT did not make a procurement dispute resolution process readily available to Hanover. The applicant has stated that NWSCT/NWSCG took the view that its complaints procedure was not available to providers that had failed the PQQ, and NWSCT did not provide feedback to Hanover on why it was unsuccessful at the pre-qualification stage. Our understanding is that NWSCT's dispute resolution process is contained in its Establishment Agreement.⁸ The relevant section provides that facilitation and/or arbitration may be required if the Chair of the SCG [Specialised Commissioning Group] requests facilitation because an impasse has been reached between the SCG (or the Specialised Services Commissioning Team representing the SCG) and one or more providers of the service if the provider is not a Foundation Trust. The CCP understands that NWSCT interpreted this as meaning that the availability of its dispute resolution mechanism is limited to providers of services (thereby excluding potential providers). It was not until March 2010 that Hanover was referred to the dispute resolution process of the host PCT, NHS West Cheshire. The approach taken by NWSCT/NWSCG also meant that Hanover would first have needed to challenge the lack of feedback before it could potentially challenge NWSCT/NWSCG on the substantive issue of pre-qualification. In these circumstances, where the process for challenge has been obscure and relatively difficult, due process is best served by allowing Hanover to raise its procurement concerns alongside the broader conduct issues for consideration by the CCP.
14. Second, in this case the issues relating to procurement and conduct appear difficult to disentangle, and it would not be helpful to seek to separate these issues only for there to be duplication and delay between the PCT, SHA and CCP in looking at the various issues that have been raised.

⁷ See also *Cooperation and Competition Panel, Final draft rules of procedure* (January 2009).

⁸ NWSCT, *Establishment Agreement* (July 2007), paragraph 15.

ISSUES FOR FURTHER CONSIDERATION

15. The CCP assesses whether or not conduct is consistent with the Principles and Rules. Based on the evidence currently available to us, we consider that this case raises a number of potential issues about the conduct of NWSCT/NWSCG in relation to the commissioning and procurement of secure mental health facilities in the North West that may give rise to an adverse effect on patients or taxpayers, to which the Principle and Rules apply. The CCP considers that the evidence it has seen may suggest a tendency on the part of NWSCT/NWSCG to treat some providers differently from others and make the entry of new providers of secure mental health facilities more difficult. This raises potential concerns under the Principles and Rules.
16. Where a commissioner treats some providers differently from others (without objective justification), or there is a lack of transparency, it may be inconsistent with Principle 3 and the PCT Procurement Guide: which provide that procurement and commissioning should be transparent and non-discriminatory.⁹ It may also be inconsistent with Principle 1, since unequal, discriminatory or non-transparent treatment may mean that services are not commissioned from those best placed to meet the needs of patients and populations (for example because entry of new providers is more difficult). This could have an adverse impact on patients and taxpayers by distorting the competitive process and could mean that services are not procured from those providing the highest quality services at the most advantageous price.
17. Principle 4 states: 'Commissioners and providers should foster patient choice and ensure that patients have accurate and reliable information to exercise more choice and control over their healthcare.' Where patient choice is under-developed, or constrained by other factors (as may be the case for patients in need of secure mental health services), the patient choice element of Principle 4 may be relevant to the extent that others exercise choice on behalf of patients. Hanover has pointed out that it may also be appropriate for patients to be able to exercise some degree of choice where appropriate and possible. NWSCT's view is that Principle 4 is not relevant (or less relevant) to secure mental health services where patients are detained against their will under the Mental Health Acts and are subject to restriction orders due to their high risk.
18. The CCP notes that Principle 4 Rule 2 prohibits restrictions on choice via collusive behaviour or any other action. This Principle is not limited to patient choice but also extends to commissioner choice. Therefore, even if patient choice is inherently limited, conduct that restricts commissioner choice (for example by limiting the pool of bidders in a competitive procurement process) may have an adverse effect on patients or taxpayers when, as a result of reducing the intensity of competition between service providers, it reduces the quality of services patients receive and/or increases the prices paid by commissioners.¹⁰

⁹ Department of Health, *PCT Procurement Guide for Health Services* (May 2008), page 4: The key principles of good procurement and procurement strategy are: [...] non-discrimination – ensuring consistency of procurement rules, transparency on timescale and criteria for shortlist and award; and equality of treatment – ensuring that all providers and sectors have equal opportunity to compete where appropriate; that financial and due diligence checks apply equally and are proportionate; and that pricing and payment regimes are transparent and fair.

¹⁰ CCP, Draft interim guidance on the assessment of conduct (January 2009), paragraph 6.9.

19. The following paragraphs outline the conduct that is potentially inconsistent with the Principles and Rules. It should be noted that the CCP has not reached any conclusions on these issues.

CONTRACTING WITH PROVIDERS

20. NWSCT/NWSCG commissions all high, medium and low secure mental health services for residents, over the age of 18 years, on behalf of the 24 PCTs in the North West (excluding North Cumbria).¹¹ NWSCT/NWSCG has a policy of placing patients requiring secure services with NHS providers wherever possible before considering the use of independent sector providers.

21. The CCP understands that around 80 per cent of patients are placed with their designated local NHS catchment unit under block contracts.¹² The CCP understands that many of the block contracts have not been competitively tendered. NWSCT/NWSCG has explained that three block contracts (for a total of around 50 beds) were competitively tendered between 2007 and 2009, in addition to the Framework Agreements relating to: (i) low secure females and (ii) medium secure males and females/low secure males, that were let in 2009. NWSCT has stated that its policy is in line with the *PCT Procurement Guide for Health Services* (May 2008).

22. For the four year term of the two Framework Agreements, NWSCT/NWSCG intends to only award contracts for the provision of secure services to providers appointed to the Frameworks.¹³ This approach has three effects. Firstly, it limits the extent of any competition for contracts to those providers appointed to the relevant Framework Agreement. This may affect the incentives of these providers to maintain or improve the quality of their services during the term of the Framework.¹⁴ Secondly, it protects appointed providers from any changes to the external competitive landscape during the term of the Framework, for example entry by a new provider or improvement by an existing provider not appointed to the Framework. Again, this may affect the incentives of appointed providers to maintain or improve the quality of their services during the term of the Framework but may also result in the commissioner paying higher prices than would otherwise be the case.¹⁵ Thirdly, it may affect the incentives that potential entrants have to construct new capacity in the North West which may impact on the extent of competition in the future. This is because the time that the facilities take to become operational will have to coincide approximately with the time of a future procurement exercise.

23. As NWSCT/NWSCG has pointed out, the use of framework agreements can reduce transaction costs and may enhance the bargaining strength that a buyer has with respect to its suppliers, thereby leading to better quality and/or lower prices. NWSCT/NWSCG has stated that as a result of the Framework Agreements it has forecast annual cost savings of around £800,000 (or £3.25

¹¹ The total number of patients receiving secure services in the North West is currently around 1060.

¹² There are six low secure and three medium secure NHS catchment units located across the North West which together are operated by six different NHS mental health trusts. Each catchment unit has a defined geographic area over which it accepts referrals from.

¹³ This includes both the purchasing of current capacity, where an existing contract expires during the term of the Frameworks, and the purchasing of additional capacity, and covers both spot and block purchases. The Framework Agreement for low secure females is effective from 1 July 2009 until 30 June 2013 and the Agreement for medium secure males and females/low secure males Framework is effective from 1 January 2010 until 31 December 2013.

¹⁴ This would be the case where competition between providers on the Framework is weak, for example because of the way services are called off under the Frameworks. As prices are fixed for the term of the Frameworks the effect of this would be limited to a reduction in quality rather than an increase in price.

¹⁵ This would be the case where providers not appointed to the Framework, but which entered or improved during the term of the Framework, could provide higher quality services at lower prices than those providers appointed to the Framework.

million over the duration of the Framework Agreements). There have also been costs savings associated with including specialising costs in Framework Agreements (when a patient needs additional staffing, for example 2:1 care, this is known as 'specialising'), potentially in the region of £4 million over the duration, and there have also been administrative cost savings. Moreover, NWSCT/NWSCG is of the view that the Framework Agreements were organised in accordance with relevant public procurement law and the relevant PCT procurement guidelines and it is therefore wrong to suggest that its conduct in this context could breach principles of competition.

24. Hanover has submitted that it is open to NWSCT/NWSCG to admit Hanover to the Framework Agreements retrospectively, or to commission services from them outside the Framework Agreements. NWSCT/NWSCG has stated that in line with their contractual obligations and commissioning intent they will use the providers appointed under the Framework Agreements.

DESIGNATION

25. In order to be able to provide secure mental health services, the relevant facilities need to be 'designated'. Designation is a formal process of checking that the providers of specialised services meet quality and other standards. It appears that for providers not admitted to the Framework Agreements for medium secure services (such as Hanover), designation was delayed (both in comparison to automatic designation of those admitted to the Framework Agreements and according to NWSCT's expected timeframe of completing the designation process by end 2009). This means it may have been treated less favourably than providers admitted to the framework. NWSCT has explained that a decision was taken on 29 January 2010 that each of the medium secure units appointed to the Framework Agreements would be automatically designated, whereas those medium secure units not admitted to the Framework Agreements would be required to undertake a separate designation process using the national framework for designation developed by the National Specialised Commissioning Group. Moreover, NWSCT/NWSCG has submitted that the process for agreeing the designation documentation and structure is managed nationally; that the standards have been in use since publication of the Best Practice Guide 2007; and that there is no evidence that the designation process has been used as a barrier to competition.

TENDER DESIGN AND EVALUATION

26. Hanover has submitted that tenders for the Framework Agreements were designed or evaluated in such a way as to disadvantage certain providers (including Hanover); for example the requirement for organisations to submit audited accounts could hinder new entry. NWSCT/NWSCG has responded that the onus is on the bidder to provide the necessary information in their submission, together with supporting documentation. According to NWSCT/NWSCG, Hanover could have submitted this information and it is not the role of the evaluating panel to seek additional information from a bidder's bank to support the bidder's progress through the tender. Hanover did not ask clarification questions on this point.

TRANSPARENCY AND CHALLENGE AT PQQ STAGE

27. Hanover has submitted that it was prevented from challenging the decision that it had been unsuccessful at the PQQ stage. Hanover was told in a letter dated 18 March 2010 from NWSCT that NWSCT had been advised that there is only a requirement to provide formal feedback at the ITT stage and that no dispute resolution process is available at PQQ stage. NWSCT has responded that all unsuccessful applicants were provided with the same information, if requested. In the letter dated 18 March 2010 the bidder was provided with a copy of the resolution process of NHS Western Cheshire, NWSCT/NWSCG's host PCT.

SUPPORT FOR NHS PROVIDERS

28. Hanover has submitted that NWSCT/NWSCG supported the development of new capacity or improvement of facilities by NHS providers (for example, by providing purchasing commitments, sitting on project boards, and actively supporting such developments through planning inquiries). Similar expansion or improvement by independent sector providers (such as Hanover) does not appear to be underwritten or supported by commissioners in the same way. NWSCT/NWSCG has responded that NWSCT/NWSCG has either not given such commitments, or that the support given relates to the development of step down beds, which are non secure mental health services, or that it was part of an overall strategic plan for mental health services in the area.

INTENTION TO PROCEED TO PHASE II

29. This case raises a number of potential concerns under the Principles and Rules. Since the Panel considers that further analysis is warranted, this case will now proceed to Phase II. In Phase II we expect to analyse whether the conduct of NWSCT in the context of the procurement of secure mental health services in the North West has been inconsistent with the Principles and Rules. The deadline for Phase II is 18 November 2010.

28 July 2010