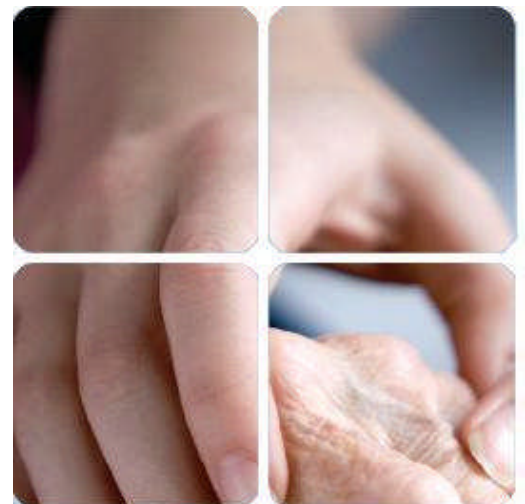




## Delivery of Public Services by the Third Sector – a snapshot of progress

November 2009



All rights reserved. No part of this publication may be reproduced in any material form, whether by photocopying, scanning, downloading onto computer or otherwise without the written permission of TPP Law except in accordance with the provisions of the Copyright, Designs and Patents Act 1988.

Whilst all reasonable care has been taken in the preparation of this publication, TPP Law cannot accept any responsibility for any loss occasioned by any person acting or refraining from action as result of relying on its contents. The publication is intended as a general guide and is not a substitute for specific legal advice.

The authors assert their right under the Copyright, Designs and Patents Act 1988 to be identified as the authors of this work.

---

## Contents

Foreword	6
Executive Summary	7
Survey Results	9
Profile of respondents	9
General Perceptions	10
Capacity Building	11
Availability of Funding	15
Terms of Funding	17
Procurement Process	18
Conclusion	25
Glossary	27

## TPP Law Limited

TPP Law works with charities, social enterprises, local authorities, NHS bodies and service providers to create innovative structures for the commissioning and delivery of health, social care, education and local government services.

We aim to be your trusted partner in navigating the myriad of options, commercial, legal and regulatory issues which arise during the process of initiating change and creating new market conditions.

Our team of specialist lawyers is focused on delivering cost-effective commercial solutions in complex public service environments. Our aim is to provide practical guidance and support through a hand-picked team which stays with you throughout to help you and your organisation achieve your goals.

We are the only law firm in the UK with a unique and dedicated focus on delivering successful public service partnerships, providing you with access to real expertise at every level in our team.

---

## Foreword

*"There has never been a better time to be a third sector organisation seeking to provide public services,"* – said Angela Smith, Minister for the Third Sector, writing in The Times, 4 September 2009.

Since 2006, the Office of the Third Sector in the Cabinet Office has been working on a major programme to bring more third sector organisations into the delivery of public services. This has involved various initiatives – a national training programme for public sector commissioners, the launch of Futurebuilders investment fund, as well as various grant programmes for modernisation and a hardship fund. In 2006-7, NCVO estimated that third sector organisations earned £7.8 billion in income from public service contracts.

This piece of research from TPP Law sets out to explore how this policy is working on the frontline. We asked our respondents some key questions – Are they optimistic about future contract opportunities? What challenges do they face in bidding for contracts? Is Government doing enough to transform service delivery?

The results will make interesting reading for policy makers, third sector readers, funders and anyone interested in the sector.

Mark Johnson

Managing Director, TPP Law Limited

e [mark@tpplaw.co.uk](mailto:mark@tpplaw.co.uk)

## Executive Summary

Just under 50 organisations out of the 500 approached responded to our online survey carried out in October 2009.

Respondents were asked questions under the following five main headings about the current market and opportunities for third sector organisations to get involved in public service delivery:

- General perceptions about the market
- Success of capacity-building initiatives
- Availability of funding
- Terms of funding
- Procurement processes for public service contracts

More than 50% of respondents were optimistic about the opportunities to deliver more services. However, respondents had real concerns about the complexity of the procurement process, tendering formalities and over-zealous contract monitoring by public authorities. An overwhelming 71% of respondents thought that the process for bidding for public service contracts is not getting any easier. Many cited the costs, bureaucracy and an unrealistic attitude to risk allocation by commissioners as significant obstacles.

Many respondents pointed to the need for longer-term contracts from public sector agencies (at least 5 years) to encourage new entrants to invest time and resources in bidding and provide more certainty of income. Another common theme was the need for contracts to focus more on outcomes than outputs.

Most respondents wanted to see Government do more to stimulate the market for third sector delivery. Suggestions included setting targets for Departments to award more contracts to the third sector, greater use of social clauses in procurement, engaging and consulting more with third sector organisations before going out to tender.

---

Several respondents felt infrastructure organisations 'often lack the right skills' and Government should instead channel more money directly to frontline organisations. Respondents were, overall, sceptical of the value of the National Programme for Third Sector Commissioning. The target audience of commissioners was not broad enough, that senior leaders and decision makers were noticeably absent and despite the programme, there were still strong regional and local variations in commissioning practice. Respondents felt many Government departments are "still not well-informed about the third sector and the principles of the Compact."

49% of respondents felt that the range of funding available to third sector service providers was still not satisfactory, and many respondents cited problems with the terms and conditions, monitoring requirements and eligibility criteria for certain types of funding.

It was evident from our study that third sector organisations were keen to engage on this topic and overall remained positive about the benefits of and opportunities for the delivery of public services by the third sector. There were many impassioned comments about letting the third sector have its chance to shine. There are some strong signals for Government and policy-makers amid these findings.

## Survey Results

### Profile of respondents

Just under 50 organisations responded to our online survey carried out during October 2009. 500 organisations were approached for their views. The respondents were a mixture of managers in, consultants to, trustees and officers of third sector organisations.

Respondents were from a range of organisations including not-for-profit and charitable organisations, infrastructure organisations, social enterprises and housing associations.

69% of the organisations were currently delivering a public service under contract to a public sector commissioner, 2% used to deliver such services, 7% were thinking of delivering the services and 21% were not currently involved in delivering services.

## General Perceptions

Overall, how do you feel about the opportunities for the third sector to deliver more public services?

- **51% were 'Optimistic'**
- 30% were 'Pessimistic'

Respondents' views:

*"Although the opportunities to deliver public services are available, the level of funding fails to meet the expectation of delivery..."*

*"...annually renewable contracts can mean uncertainty for those delivering the service..."*

*"There are opportunities, but clear issues about failure to include and specify added value brought to contracts by third sector organisations (social return on investment), and contract specifications focused on outputs, not outcomes."*

*"Procurement processes are often disproportionate to the size of the contract and exclude smaller organisations".*

*"The nature of the tendering is favouring increasingly large organisations, who encourage third sector organisations on board to win contracts, then ignore them in the delivery if it is going to cost money".*

*"We can get basic project funding to take forward projects for district councils, but we can't get core funding to keep the organisation running".*

*"Any cuts in public sector funding will be passed to us to absorb. Or we will not be offered the work as a way of saving money".*

*"I believe that the opportunities to offer employment, service improvement and local economic growth lies within the social sector and these are many and varied. The sector itself requires a stronger sense of self and to recognise its own value. A clear message, similar to that of 'fair trade', needs to be developed to ensure the message and value of the social economy is communicated".*

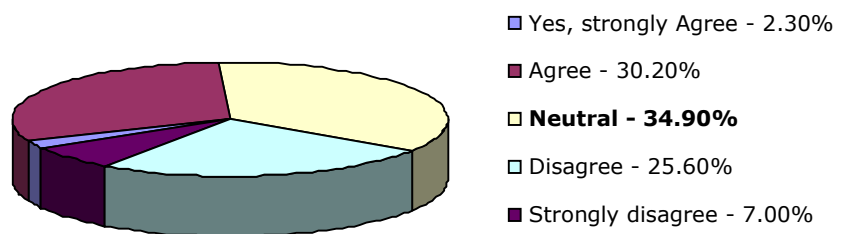
*"...annually renewable contracts can mean uncertainty for those delivering the service..."*

*"Any cuts in public sector funding will be passed to us to absorb. Or we will not be offered the work as a way of saving money".*

## Capacity building

Do you think the Government is doing enough to build capacity of third sector organisations to take on more contracts?

33% think the Government is not doing enough, whilst 35% are neutral on the issue.



*"...it is for regional business and third sector support infrastructure to build capacity..."*

### Respondents' views:

*"Unless the public bodies in a local area have a strategy for third sector support, then there remains patchy local provision..."*

*"...Third Sector organisations should be brought in to help design capacity building programmes".*

*"I do not think that the government understands how to build capacity in the third sector, we are often offered schemes that are largely irrelevant, or do not fit the sort of service that we deliver".*

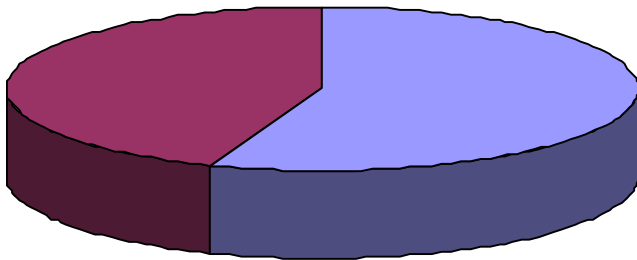
*"...it is for regional business and third sector support infrastructure to build capacity..."*

*"The programmes that are in place are not very effective - too much money is spent on infrastructure organisations that are not passed down to frontline organisations. Some infrastructure organisations do not have the skills to support organisations in public sector delivery".*

*"...Third Sector organisations should be brought in to help design capacity building programmes".*

Are you aware of the National Training Programme for Commissioners?

No - 44%

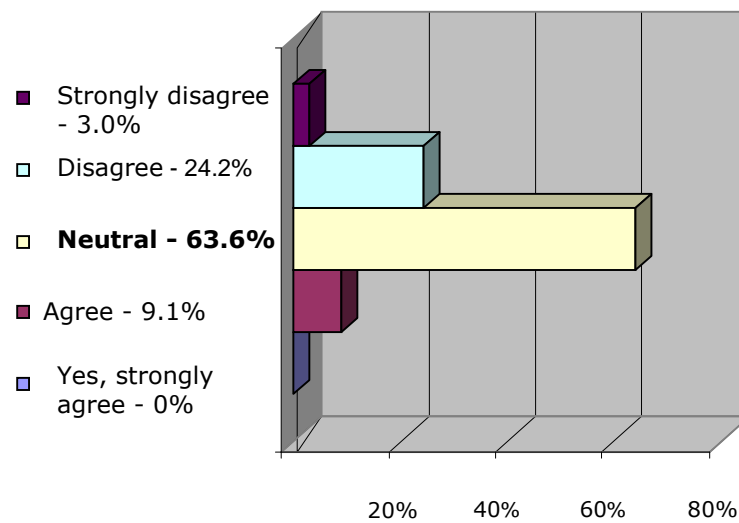


Yes - 56%

*"It's made a start on a major undertaking - needs to be continued and geared up".*

*"It only addresses commissioners, not procurement specialists".*

Do you think the National Training Programme for Commissioners has been successful?



Surprisingly the overwhelming majority expressed no firm view, whilst 27% took a negative view.

Just 9% felt it had been successful. This suggests that the promoters of this programme have a lot more work to do in raising its profile.

Respondents' views:

*"It's made a start on a major undertaking - needs to be continued and geared up".*

*"It only addresses commissioners, not procurement specialists".*

*"Anecdotal evidence suggests that commissioners still find it difficult to implement policies and processes that open the commissioning process up to smaller organisations".*

*"Inconsistencies are still apparent among commissioners from different localities an, in particular the NHS and PCTs seem to be operating in a vacuum".*

*"It is very challenging to reach all commissioners and procurement officers across all public sector bodies and geographical areas. There is still much to be done to embed good practice".*

*"Early days, but really not convinced that the real "decision makers" are being engaged".*

*"Whilst the Government's attempts to standardise commissioning practices nationwide are welcome, there are still clear regional variations in how commissioning is undertaken. More needs to be done to standardise commissioning practice".*

In what ways (if any) do you think the National Training Programme for Commissioners could be improved?

Respondents' views:

*"Needs to have more heavyweight input from Ministers and national level health and social care leaders".*

*"There needs to be an effective means of cascading the programme to reach more commissioners at a local level".*

*"Abolish it and incorporate it into strategic bodies operating closer to organisations such as PCTs and Local Authorities".*

*"It seems more geared to World Class Commissioning "box ticking" than tackling the real underlying issues restricting commissioning from the third sector".*

*"Early days, but really not convinced that the real "decision makers" are being engaged".*

*"It seems more geared to World Class Commissioning "box ticking" than tackling the real underlying issues restricting commissioning from the third sector"*

*"Needs to have more heavyweight input from Ministers and national level health and social care leaders".*

What more could be done to improve this situation?

Respondents' views:

*"Many charities/organisations delivering good quality services do not fit the criteria to obtain support to bid for contracts".*

*"More funding for smaller organisations, e.g. Capacitybuilders funding had minimum turnover requirement, made many smaller organisations ineligible".*

*"The third sector should have direct access to central government funding instead of having to bid through local authorities for these funds. This would cut out the middle man and reduce costs".*

*"The range of sources (which has decreased) is not the key issue. The key issues are continuity of funding, extent of funding and complexity of bidding and reporting".*

*"More funding for smaller organisations, e.g. Capacitybuilders funding had minimum turnover requirement, made many smaller organisations ineligible".*

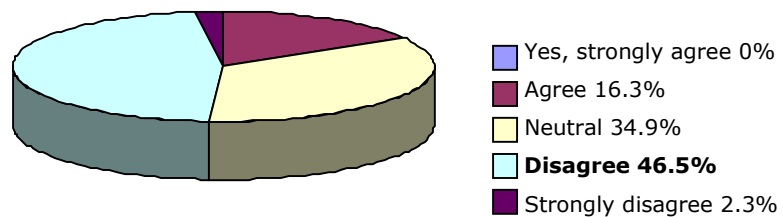
*"There is a wide range. Issue is that these are constantly shifting. It takes a lot of time to keep on top of the different funding streams and opportunities..."*

*"Many charities/organisations delivering good quality services do not fit the criteria to obtain support to bid for contracts".*

### Availability of funding

Do you think there is sufficient range of funding sources available to support third sector organisations in bidding for public services contracts?

49% disagreed/strongly disagreed



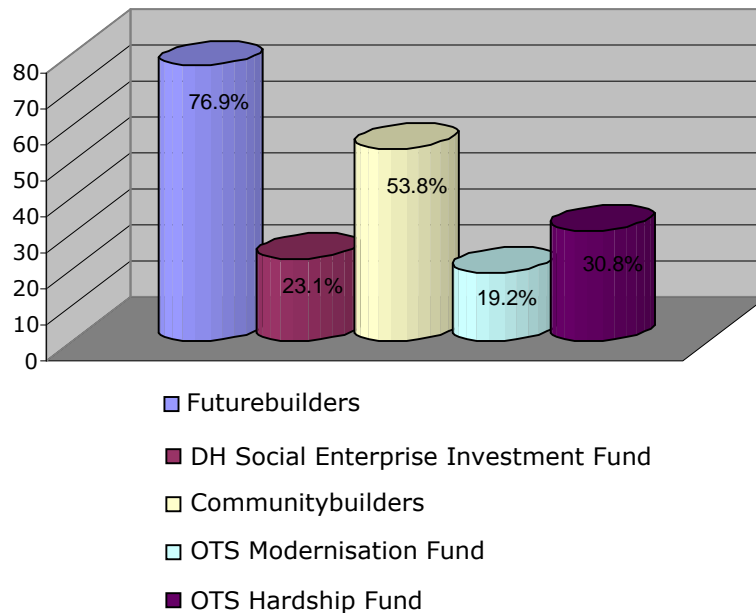
*Most of the time it is not funding that is needed but a simpler process especially for small contracts and tenders”.*

*“...There should be more funding, and more time built into bidding, for third sector organisations to form partnerships and consortia”.*

*“There could also be funding for a programme to inform private service deliverers of the advantages of working with third sector organisations and to build their capacity to work in a more diverse market”.*

Which of the following sources of funding have you considered applying for or applied for in the past 12 months?

**Futurebuilders** was the main source of funding considered by respondents.



## Terms of funding

What issues (if any) have you had with the terms of funding an offer to support public services contracts?

Respondents' views:

*"Issues around minimum turnover thresholds, set too high".*

*"They are too short term and increasingly burdensome to operate because of monitoring requirements and stricter output definitions".*

*"Issues around minimum turnover thresholds, set too high".*

*"Can't get full cost recovery..."*

*"Can't get full cost recovery..."*

*"Intellectual property rights clauses tend to suggest all IP transfers from contractor to commissioner, so don't end up owning what one does".*

*"Futurebuilders is a loan and only a small part of it is grant funding. DH SEIF is hugely competitive and therefore one has a small percentage of winning".*

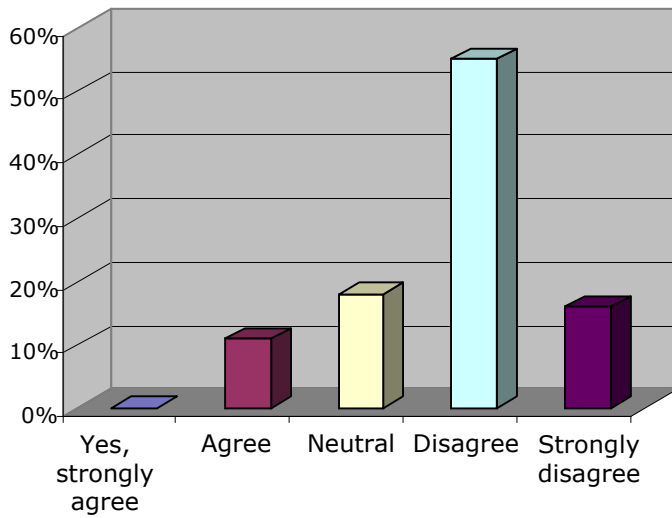
*"We have come across a number of problems in relation to terms and conditions, including inadequate notice periods, disproportionate monitoring requirements and payment in arrears. Also 'payment by results' approaches which can inappropriately transfer risks onto third sector organisations where the demand for services is unpredictable".*

## Procurement Process

Do you think the process of bidding for public services contracts is getting any easier?

An overwhelming 71% of respondents thought that the process for bidding for public service contracts is **not** getting any easier.

Yes, strongly agree	0%
Agree	11%
Neutral	18%
Disagree	55%
Strongly disagree	16%

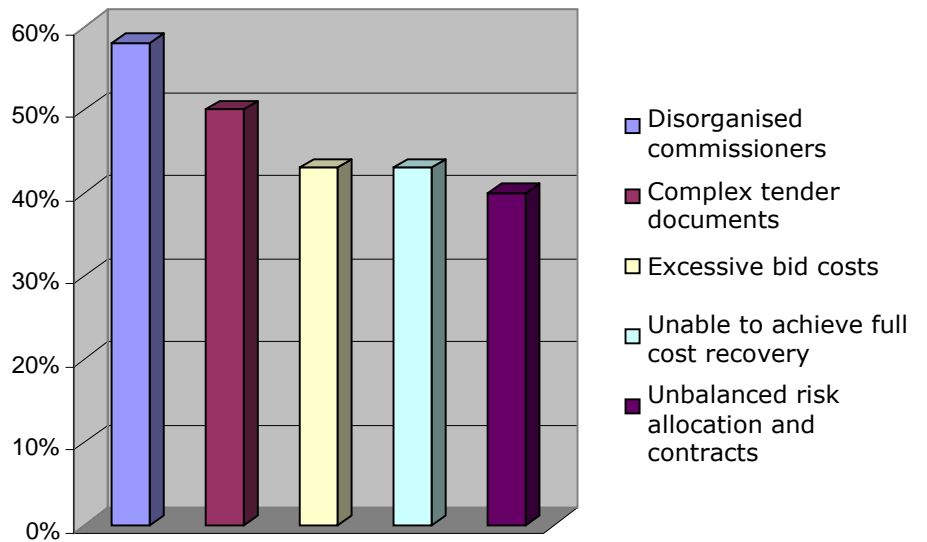


What are the issues you are facing in bidding for contracts?

We asked recipients which of the following five issues they ranked as most important:

Rank	Issue	% ranking as 1 or 2
1	<b>Disorganised commissioners</b>	58%
2	Complex tender documents	50%
3	Excessive bid costs	43%
3	Unable to achieve full cost recovery	43%
5	Unbalanced risk allocation and contracts	40%

Respondents cited disorganised commissioners and overly complex tender procedures as the biggest issues they are facing.



In your view, what are the biggest obstacles to third sector organisations playing a bigger role in public service delivery?

Respondents' views:

### **Procurement Process**

*"Too much and too complex bureaucracy. Most third sector organisations are lean by design, preferring to put their resources into delivery. Streamlining the bidding process would remove a considerable barrier to third sector delivery".*

*"The time to complete what is often complex documents. The timetable for submissions..."*

*"If you have to spend a lot of time bidding for work and applying for funding, then as a small charity, you don't have time to then get on with your core work and to do your job. The funding you can get starts directing your work, rather than being able to assist communities".*

*"Complex bidding processes and over-zealous conditions and monitoring, which detract resource and time away from core delivery and social benefit."*

### **Lack of Understanding/Experience or Support**

*"Failure to recognise the added value they add to public service delivery, and focus on outputs rather than outcomes in tender specifications".*

*"Lack of understanding by commissioners".*

*"Culture of many government departments (e.g. DCSF) and their agencies is still not well-informed about Third Sector or the Compact. Consultation is neither genuine nor effective".*

*"Change in culture: many organisations not yet experienced in tendering".*

*"Club mentality: Opportunities made known to organisations with good contacts first".*

*"...more support for consortium delivery by a number of smaller providers".*

*"The time to complete what is often complex documents. The timetable for submissions..."*

*"Lack of understanding by commissioners".*

*"...more support for consortium delivery by a number of smaller providers".*

"Scale: local organisations too small for contracts and only able to subcontract".

"...too much emphasis on national accreditation schemes e.g. ISO, IIP".

**Level of Risk**

"...accepting increased levels of risk...No return on investment..."

**Size of Contracts/Tenders**

"Large scale contracts which means that third sector cannot compete on price when competing with the private sector".

"Scale: local organisations too small for contracts and only able to subcontract".

"Shifting funding streams: too short-term contracts, even with commissioned services".

"The larger generic tenders that appear to be in favour at the moment, for example by use of hubs".

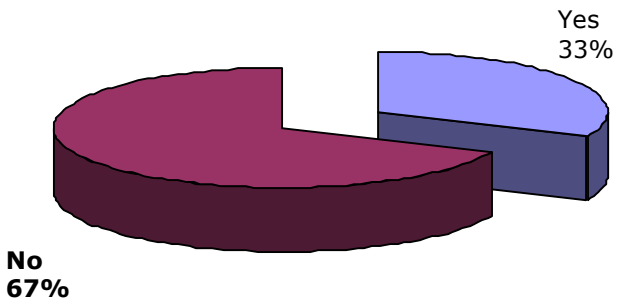
**Regulation**

"...too much emphasis on national accreditation schemes e.g. ISO, IIP".

"...the trading history of social businesses... European regulations and directives perpetuating increased regulatory adherence to access for the third sector and their involvement"

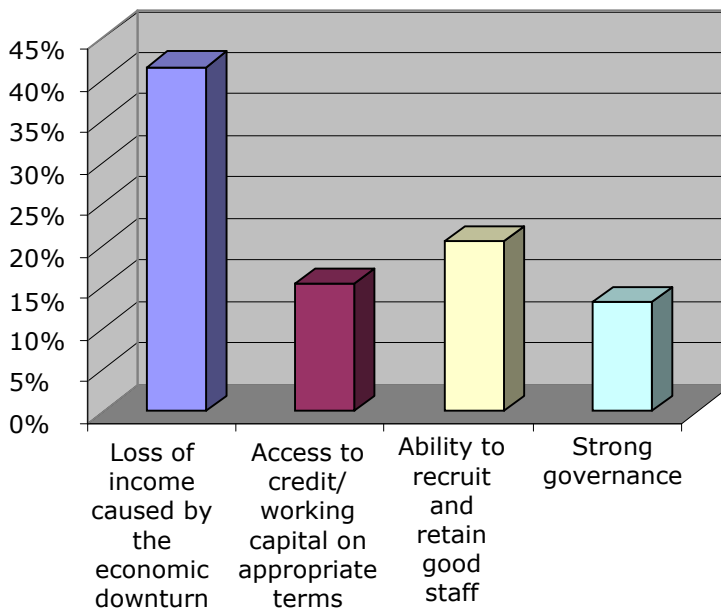
Have you made use of the Office of Third Sector's single portal for contract opportunities [www.fundingcentral.org.uk](http://www.fundingcentral.org.uk)?

67% have **not** used the new OTS portal for contract opportunities.



What are the biggest commercial issues your organisation is facing right now?

Rank	Issue	% ranking as 1 or 2
1	<b>Loss of income caused by the economic downturn</b>	<b>42%</b>
2	Ability to recruit and retain good staff	21%
3	Access to credit/working capital on appropriate terms	15%
4	Strong governance	13%



What more should the Government be doing to stimulate the greater involvement of third sector organisations in public service delivery?

Respondents' views:

*"...force local authorities to have a percentage of all their contracts delivered by third sector".*

*"Rewarding best practice in the third sector by scaling up organisations that are delivering".*

*"Make the bidding process easier and offer more long term contracts (5 years or more) to allow services to develop properly".*

*"...force local authorities to have a percentage of all their contracts delivered by third sector".*

*"Setting increased targets for outsourcing to the third sector within all Government departments..."*

*"Authorities to empower their local third sector to tender by providing training sessions, understanding tender documents and the process..."*

*"Simplify the processes of bidding, monitoring, reporting and evaluation".*

*"Concentrate on front-line delivery and outputs. Use longer-term contracts. Use local expertise, which understands local communities. Allow some element of funding for capacity building (not just output driven)..."*

*"Stop expecting us to deliver the impossible - high standards of delivery to increasing numbers of services users on minimum funding".*

*"Recognise the added value they add to public service delivery, and focus on outcomes rather than outputs in tender specifications".*

*"Need local commissioning, smaller lots to get local multiplier effect. Need full cost recovery and surplus. Better balance of risk in contracts. Give teeth to local Compacts".*

*"Simplify the processes of bidding, monitoring, reporting and evaluation".*

*"Setting increased targets for outsourcing to the third sector within all Government departments..."*

*"Encouraging us to participate in service development, so we are part of the discussions before the service is contracted".*

*"Require public bodies to incorporate social objectives into tendering criteria, which reflect the wider benefits of third sector organisations that are rooted in their local communities..."*

*"More options for credit and working capital on better terms..."*

*"...full cost recovery is almost impossible on some contracts and the short term nature or non-existent of contracts sometimes makes the risk far too great to bear..."*

*"Have a consistent approach to commissioning from all public sector organisations to the third sector, even if this is only by using the same documentation and ensuring that when necessary joint commissioning of services are considered".*

*"Provide more opportunities to share cross-sector learning including sharing risk, collaborations and raising finance, providing insurances, in the delivery of services and successfully securing tenders..."*

*"...provide information to communities on the benefits of social enterprises delivering services and promoting the ethos of excellent service, localised delivery, employment and service enhancement..."*

*"...offering incentives for franchising and replicating models that work".*

*"...offering incentives for franchising and replicating models that work".*

*"More options for credit and working capital on better terms..."*

## Conclusion

The most significant findings to come out of this research were around respondents' views on the current market and opportunities for third sector organisations to get involved in public service delivery.

More than 50% were optimistic about the opportunities to deliver more services. However, respondents had real concerns about the complexity of the procurement process, tendering formalities and over-zealous contract monitoring by public authorities. Many cited the cost, bureaucracy and an unrealistic attitude to risk allocation by commissioners as significant obstacles. Some felt that bidding for contracts was increasingly the preserve of an elite of larger national organisations, to the exclusion of smaller local players who have a lot to offer. Several people called for more focus on enabling consortium working and collaboration between organisations.

Many respondents pointed to the need for longer-term contracts from public sector agencies to encourage new entrants to invest time and resources in bidding and give them more certain income streams. Another common theme was the need for contracts to focus more on outcomes than outputs. There is an opportunity to align financial incentives to delivery of real results – surely an attractive policy in times of fiscal restraint.

Most respondents wanted to see Government do more to stimulate the market for third sector delivery. Suggestions included setting targets for Departments to award a percentage of spend to the third sector, greater use of social clauses in procurement, engaging and consulting more with third sector organisations before going out to tender – soft market-testing proposals first.

Several respondents called on Government to stop pouring money into regional and national infrastructure organisations, whom they felt 'often lack the right skills' and instead channel more money directly to frontline organisations. Respondents were overall, sceptical of the value of the National Programme for Third Sector Commissioning. Only 9% of respondents felt it had been successful. Common criticisms were that the target audience of commissioners was not broad enough, that senior leaders and decision makers were noticeably absent and despite the programme, there were still strong regional and local variations in commissioning practice. One respondent wanted to go further by 'abolishing it and incorporating it into strategic bodies operating closer to organisations such as PCTs and local authorities'.

---

Managing perceptions continues to be an important theme. As one respondent put it, "A clear message, similar to that of 'fair trade', needs to be developed to ensure the message and value of the social economy is communicated." Many Government departments are "still not well-informed about the third sector and the principles of the Compact."

In respect of sources of funding, 49% of respondents still do not believe that the range of funding available to third sector organisations who want to deliver public services is satisfactory. In addition, many respondents cited problems with the terms and conditions, monitoring requirements and eligibility criteria for certain types of funding.

In conclusion, it was evident from our study that third sector organisations were keen to engage on this topic and overall remained positive about the benefits of and opportunities for delivery of public services by the third sector. There were many impassioned comments about letting the third sector have its chance to shine.

There are some strong signals for Government and policy-makers amid these findings. We hope these will be taken up by the main parties in the debate about public service reform in the run-up to the General Election. We are most grateful to all those who took the time to participate in this research at a critical time for the third sector.

## Glossary

### Commissioning

the process of deciding what works or services are needed to address the needs and wishes of the individual service user; whether they should be sought by delegation, the use or setting up of some new body, or by competition and, if by competition, what sort of contract to use, making use of market intelligence, research, and planning accordingly.

### The Compact

the Compact is an agreement between Government and the voluntary and community sector in England. It recognises shared values, principles and commitments and sets out guidelines for how both parties should work together.

### Full Cost Recovery

the inclusion of a relevant portion of central overheads in cost estimates for providing a service, thereby ensuring that management costs, internal and external infrastructure, strategic development and governance are properly funded.

### PCT

Primary Care Trust - a local health organisation responsible for managing local health services. PCTs work with Local Authorities and other agencies that provide health and social care locally to make sure the community's needs are being met.

### Social Clauses

Social clauses are requirements within contracts or the procurement process which allow the contract to provide added social value through fulfilling a particular social aim.

### World Class Commissioning

the Department of Health's programme to develop a more strategic and long-term approach to commissioning services, with a clear focus on delivering improved health outcomes. There are four key elements: a vision for world class commissioning, a set of world class commissioning competencies, an assurance system and a support and development framework.

## How TPP Law can help

### Navigating tender processes:

- Conducting a tender
- EU procurement rules
- Bid evaluation
- Risk analysis
- Contract drafting, negotiation and funding

### Regulatory issues:

- Legal powers and statutory duties
- Delegation
- Consents and approvals
- Governance
- Charity Law

### Protecting your workforce:

- TUPE
- Workforce Code
- Pension rights

### Information transfer:

- Intellectual property protection
- Data protection
- Freedom of information
- Technology licences

### Managing your property assets:

- Leases
- Transfers
- Title investigation

## For further information contact

Mark Johnson, Managing Director

**e** [mark@tpplaw.co.uk](mailto:mark@tpplaw.co.uk)

**w** [tpplaw.co.uk](http://tpplaw.co.uk)

Head Office: 53 Great Suffolk Street London SE1 0DB  
**t:** 020 7620 0888

Manchester: Regent House Heaton Lane Stockport SK4 1BS  
**t:** 0161 480 1616

TPPlaw is a trading name and registered trademark of TPP Law Limited. Registered in England No. 4074139. Registered Office: 53 Great Suffolk Street London SE1 0DB UK. VAT Registration No. GB 766 6088 87. Regulated by the Solicitors Regulation Authority. A list of directors (who are all solicitors) and their qualifications is open to inspection at the Registered Office.

