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Public Sector Procurement and Cloud Computing

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With their high ICT spend, public sector agencies, including local government, state and local government-owned enterprises, have the ability to influence how cloud computing develops both within agencies and in the wider economy. There is much that public sector agencies can do, but promise is not always met by action. This article looks at some of the strategic and process issues, and also discusses how to introduce cloud computing when, at first sight, the agency seems to be stuck with contracts for legacy services.

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Summary

A higher level overview of the public sector issues is in our article, *Cloud Computing for Public Sector Lawyers.*

This article is part of a group of papers, including: (a) *Cloud Computing the reality; government procurement; and regulation/anti-trust Address at Communicasia Singapore* (b) *Cloud Computing for public sector lawyers* and (c) *Cloud Computing: Regulatory/Anti-trust risks and solutions.*

An informative speech by the EC Commissioner responsible for ICT highlights some of the cloud computing challenges and opportunities. A report by a UK regulator notes the impact of public sector cloud computing decisions beyond the public sector agency alone (the spend is so high that choices have a wider impact on the economy). This points to a strategic and forward looking approach.

This article then turns to the detail of procurement issues, noting some key advisory material such as the SSC *Government Use of Offshore Information and Communication Technologies (ICT) Service Providers: Advice on Risk Management*.

A major issue is public sector lock-in with legacy vendors. This can delay cloud computing implementation. Often, it will be possible to expedite termination of those arrangements, to enable cloud solutions, or to re-negotiate or re-structure, to achieve change.

Public sector cloud computing opportunities and challenges

Cloud computing will revolutionise ICT in the public sector including local government, state-owned and local government-owned enterprises, etc. A single big bang approach is unlikely. A combination of different types of legacy and cloud solutions is likely, driven by a variety of requirements ranging from the

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difficulty of getting out of legacy contracts through to the lack of sufficient maturity for a particular cloud computing solution.

This raises procurement issues. In particular, it raises strategic decisions early on, when there is a tech refresh, as to whether to include or require cloud solutions in an RFP.

Cloud computing solutions often offer ability for agencies to move away from locked-in supplier relationships. But that is not always the case as shown in our article, *Cloud Computing: regulatory/anti-trust risk and issues indicates*. Cloud computing, among other solutions such as open source, can offer the opportunity for inter-operability, a key step towards being locked into a particular supplier for an extended period.

This is a major challenge in the public sector, and one that in June 2010 was addressed by European Commissioner Kroes (when she covered ICT standards and interoperability, which is one of the key issues for cloud computing). She said:[1]

> …we want to help ICT procurers to avoid missed opportunities. [The European Commission] will draw up detailed guidance on how to analyse a technology buyer's requirements in order to make best use of ICT standards in tender specifications. This is a complex exercise where the market situation, current requirements and future developments have to be weighed carefully. I am sure many of you could testify from your own experience that the skills of public authorities vary greatly when it comes to this aspect of procurement. Many authorities have found themselves unintentionally locked into proprietary technology for decades.
>
> After a certain point that original choice becomes so ingrained that alternatives risk being systematically ignored, no

matter what the potential benefits. This is a waste of public money that most public bodies can no longer afford.

> It is even worse when such decisions result in the waste of private money on top. That happens where the public authorities' decisions force citizens to buy specific products (rather than any product compliant with an applicable standard) in order to make use of a public service. This could be your kid's school insisting on the use of a specific word processing system or your tax department's online forms requiring a specific web browser.
>
> ...For me, it is a fundamental tenet that public administrations spending tax-payers' money should opt for the least constraining solution that meets the requirements for a given need. Such a rule, as the default, would shield public authorities from the dangers of long-term lock-in. It would also ensure competition between suppliers for follow-up contracts and for services. Opting for closed solutions would be possible, but on the basis of a clear justification, rather than because it was the easy option. Several Member States have comparable policies in place... For example, the "comply or explain" policy in The Netherlands. In my view the Commission has a unique opportunity... to reaffirm its lead in this area.

Public sector procurement decisions at this key turning point

These decisions have a broader impact on the economy which purchasing public sector agencies may take into account. The public sector's ICT spend is so high that it can influence the broader market. Just as the public sector influences the market by

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[1] http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/300&format=HTML.

regulation, taxes, and so on, it does so through its procurement decisions.

This reinforces the desirability of a strategic approach to procurement at major turning points such as cloud computing.

There are useful insights, on the influence of government spend on markets, in publications produced by for the UK regulator, Office of Fair Trading, namely:

. the OFT's report, *Government in Markets – Why competition matters - A guide for policy matters,* and;

• the March 2010 Report, under the same name, prepared for OFT by Frontier Economics.

This material is helpful internationally as to the strategic and policy approach to cloud computing procurement.

Stuck with long term legacy contracts?

There is a problem with legacy contracts. As Commissioner Kroes notes:

> After a certain point that original choice [of a now-legacy] service becomes so ingrained that alternatives risk being systematically ignored, no matter what the potential benefits. This is a waste of public money that most public bodies can no longer afford.

A related issue is the perception that, under contract, the agency is stuck with the current supplier and type of service.

These perceptions can delay the introduction of the benefits of new services such as cloud computing.

However, this is not always the case. By various means the agency may be able to, entirely legitimately, get out of the existing agreement, or re-negotiate, more easily than appears at first sight. A close review by legal specialists may show there is the ability to do so. Re-negotiation, applying a broader and more lateral approach, may be possible. After all, many contracts are re-negotiated during their term. While legacy suppliers have incentives to retain their legacy revenues, some may be persuaded that it is best to try and move with the public sector customer as it migrates to cloud solutions.

In a different context, but equally informative, we have dealt with the ability to re-negotiate contracts mid-term. See our article, *New Deals for Tough Times*.

Public sector procurement requirements

Many countries must follow certain public sector processes when making and implementing procurement decisions. Sometimes they can be improved, as Commissioner Kroes suggests for the EU in her speech referred to above, in relation to change to applicable standards. In Europe, required use of obsolete standards can hold back initiatives such as cloud computing.

The procurement regime in New Zealand is sufficiently flexible to allow innovative solutions.[2] The big issue, as elsewhere, lies in the planning of and taking a strategic approach. Often that is where problems arise, not because of the rules. For the reasons noted by Commissioner Kroes, there is a risk that agencies will default back into not taking action to move from legacy computing.

Cloud computing will evolve over time in the public sector. Agencies may start with some cloud apps working alongside legacy services. Solutions ranging from IaaS, SaaS to PaaS will be considered. Risks and benefits can be balanced: for example, New Zealand Post minimises its risk in using Google platforms by restricting transfer of its data to Australasia only.

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[2] Such as the Mandatory Rules, the Auditor-General's guidelines and the SSC guidelines for large ICT projects.

Public sector cloud computing evolving "from the centre"

By its nature, central control and/or coordination achieve greatest benefit in the cloud. This should see increasingly mandated, or facilitative, intervention from the centre of government, such as via the NZ Department of Internal Affairs' Government Technology Services (or in the UK, via the Efficiency and Reform Group, recently established under Cabinet control)[3]. This raises challenges, particularly in decentralised CIO decision making models.

Valuable insights

The specific concerns of the public sector are increasingly being addressed, ranging from Digital Britain proposals to use only Government infrastructure for cloud computing (the so-called G-Cloud), to the State Services Commission's (SSC's) informative 2009 publication, *Government Use of Offshore Information and Communication Technologies (ICT) Service Providers: Advice on Risk Management*.[4]
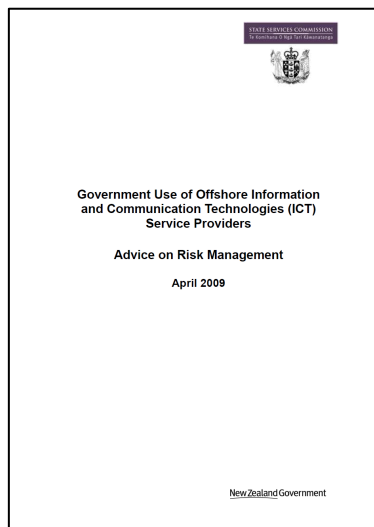
The public sector has unique concerns such as control over particularly sensitive

information. However, all public sector data processing, storage and confidentiality does not have to be equally handled, as the SSC publication notes above. Additionally, many of the earlier problems are being addressed, to the point where cloud computing, correctly applied, will be preferable, quite apart from cost saving.

For example, one of the big concerns about cloud computing was security, But the Guardian Newspaper reports as to the UK:[5]

> Kate Craig-Wood, co-founder and managing director of cloud hosting firm Memset, based in Guildford, has been heavily involved in the development of the G-Cloud strategy...Craig-Wood insists a move to the cloud would mean improved security, because individuals couldn't download a large volume of data to CD – and then leave it on a train. Services would be classified – and then clustered – according to "impact levels", so low-security projects such as government information sites could be hosted on public clouds, and confidential data hosted in a private, secure government cloud. (Under the plans the security services would remain separate from the G-Cloud).

So it is important to consider the wider perspective carefully before defaulting to a legacy solution. Superficially it may appear difficult. In practice cloud computing may be the better solution.

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[3] http://www.information-age.com/channels/management-and-skills/news/1261343/govt-it-procurement-taken-over-by-cabinet-office.thtml.

[4] http://www.e.govt.nz/policy/trust-security/offshore-ICT/.

[5] http://www.guardian.co.uk/cloud-computing/g-cloud-would-help-the-government-to-save.

We welcome your feedback on this article and any enquiries in relation to its contents. This article is intended to provide a summary of the material covered and does not constitute legal advice. We can provide specialist legal advice on the full range of matters contained in this article.

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