

## External Web-Hosting – A Business Critical Decision?

The market for external web-hosting has looked decidedly shaky for a while. Some of the biggest names in the business have either gone bankrupt or have been snapped up by more established players in the technology field. You could be forgiven for thinking that now may not be the best time to move business critical web systems to an external web hosting provider. Despite the recent high profile demise of companies such as Exodus and Digital Island, the niche market for web hosting services is, in fact, stabilising and maturing. Established service providers such as Cable and Wireless (which acquired Digital Island and much of the assets of Exodus), IBM, Worldcom and Intel are expanding in the market. Customers are once again dipping their toes in the water and realising that they can benefit from these arrangements as long as they are prudent in their choice of provider and ensure that they have the necessary legal protections in place.

### What is Web Hosting?

The term 'web hosting' covers a broad scope of services from the simplest 'co-location' services (which means that a customer just rents space and access to the provider's network) to the most sophisticated managed hosting services provision of 24x7 monitoring and support of a customer's web platform and applications.

### Why Use an External Web-Hoster?

Given the current uncertainty in the web hosting market and the potential risk to a customer's business if such mission critical systems fail, why do companies opt for external hosting rather than running the web applications in-house? The answer lies in the comprehensive service offerings that some of the leading hosting providers are able to offer and the potential cost savings that can be made by the customer. For a fully managed service, the majority of the leading providers offer a broad range of services, which may include state of the art security protection, such as biometric hand geometry readers, 24x7 support and maintenance, dedicated monitoring of the customer's web environment and proactive intervention based upon pre-determined triggers. From the customer's perspective, such an end-to end service offering is attractive, as long as the costs are

comparable to an internal set-up. The continuing skills shortage in areas such as internet security also represents a barrier to companies continuing to host their applications in-house. An added bonus is that the customer is able to draw upon specialised professional services on an *ad hoc* basis, such as a security architect, without needing to employ that resource on a full time basis.

### Taking the Plunge

Once a company takes the decision to outsource its web applications, the process of selecting the most appropriate hosting provider begins. Many businesses underestimate the complexity of this process and the time it may take. There are a myriad of types of hosting providers in the market, ranging from companies which provide little more than basic co-location services to those which can offer a fully managed service for large corporate customers with specialised services such as content caching, secure vaults and global dedicated networks.

Once you have decided on the type of web hosting provider that you require, you will need to develop a request for proposal ('RFP') that clearly sets out your key commercial requirements and possibly your key legal requirements. This RFP can then be sent to all your chosen web hosting providers. You should also consider attaching the form of contract (or at least the key contractual provisions) that you require the provider to respond to when submitting its bid. The advantage of attaching your own contract from a customer's perspective is that you can ensure that the base contract contains terms which concentrate on the quality of the services to be provided rather than the provider's standard terms which are likely (by their very nature) to be aimed at protecting the provider from perceived risks of hosting your content.

### Key Issues

The overriding objectives of the contractual process/commercial negotiation from a customer's perspective, should be that::

- the web hosting provider is obliged to continue providing services to the customer in all but an extremely limited set of circumstances;

- there is clear risk allocation between the customer and the provider with respect to the various responsibilities of the parties;
- there is flexible, predictable pricing, for both volume increases and decreases which may be required by the customer's business.

These overriding requirements should be reflected in the final negotiated agreement with the web hosting provider. It is important to remember (and most web hosting providers will be at pains to point out otherwise) that this is not an equal risk relationship. If you decide to take a fully managed solution, the customer's primary obligation is to continue paying for the services. The reality of the customer's dependency upon the provider continuing to provide managed services of a reasonable quality, may well mean the difference for the success or failure of the customer's online business.

## Some Issues to Consider

- Ensure you negotiate robust termination assistance provisions which the provider is obliged to perform, at predictable prices, even in the event of termination by the provider for non-payment by the customer.
- Limit the termination rights of the provider to non-payment by the customer or in the event of the insolvency of the customer. Any other breach by the customer can be addressed by a claim for damages. The provider should not be in a position to threaten the continuity of the service in any other circumstances.
- Agree a well defined, measurable service level schedule with the provider that addresses the key risk factors that might affect the customer's online applications and provides for significant price adjustments in the event critical service levels are not met.
- Consider what remedies you may need if the provider consistently fails to meet the agreed service levels or fails a critical service level by a large margin: termination plus the ability to sue the provider for damages may be appropriate for certain key relationships.
- Consider what technical security services your provider is willing to offer and, more importantly, what happens if these pre-defined activities or responses are not carried out by the provider.

Ensure you have agreed upon the ownership or licensing rights which may apply to all the various types of intellectual property rights which may be provided to the other party during the term of the agreement or are created during the term.

Make sure you have anticipated at least the short to medium term capacity requirements of your business and that you have agreed variable, predictable pricing with your chosen provider. The pricing should be clearly set out in the agreement and should deal with volume increases or decreases with a mechanism to deal with more fundamental changes during the life of the agreement (such as disposals or acquisitions) which affect the demand for web hosting services.

There are a variety of other factors which will need to be considered during the negotiation process and should be adequately dealt with in the final agreement, such as, indemnities and warranties, defined cost of living adjustments during the term of the agreement and adequate data protection provisions that properly protect the customer's personal data etc.

## Conclusion

It is a business critical decision for most prospective web hosting customers to consider using an external hosting provider. In the current economic climate, customers have significant leverage to strike favourable deals with external web hosters. By spending sufficient time and resource on selecting an appropriate provider and negotiating the deal, the risks in using an external provider can be minimised.

For further advice on the issues raised in this Alert please contact Luke Grubb (Email: [luke.grubb@shawpittman.com](mailto:luke.grubb@shawpittman.com); Tel: 020 7847 9597) or Alistair Maughan (Email: [alistair.maughan@shawpittman.com](mailto:alistair.maughan@shawpittman.com); Tel: 020 7847 9562).

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