

Ease of Doing Business in India - Challenges and Recommendations for IT Sector

As Amcham, we represent interests of various IT and Telecom American companies eager to partner with Government of India in transformational initiatives like Digital India, Swachh Bharat Abhiyan, Smart Cities etc. With access to cutting edge technologies and industry solutions in spaces of cloud, analytics, mobile and social, our member companies can empower and take forward crucial programs for enhancing Government services to all citizens.

We wish to take this opportunity to highlight some major challenges that adversely impact the IT industry's performance and investment sentiment. It is critical that these challenges are looked into and addressed at the earliest by relevant departments in Government of India.

1. Need for progressive approach in government policies and economic reforms

The Industry expects a greater focus on policies that foster industry development and lead to improving competitiveness in skills, innovation, R&D, capacity building etc. This can be achieved through fiscal benefits and global collaborations. These progressive measures will encourage investment in technology by IT vendors and will go a long way in empowering development projects of Government of India.

Regressive and protectionist measures like mandatory conditions of value addition, as prescribed under preferential market access and the upcoming National Offset Policy should not be expanded as it limits access to global technologies at competitive prices. Regressive policies mandating data localization and restricting data flows across borders, should also be discouraged. It is well researched and proven that trans-border data flows contribute immensely to the GDP and growth of economies (especially of developing ones like ours). Industry urges GoI to look at ways and means to incentivize organizations that invest in data centres in India, rather than penalize ones who uphold cross border flows. (*ECIPE studies indicate that restrictive practices like these, on data flow, may adversely impact the country's GDP upto 0.8%*).

2. Need to enhance 'Ease of doing Business in India'

Inward-looking protectionist measures, lack of global harmonization, regressive regulatory requirements, irrational compliance needs, all add to the list of barriers that ensure that difficulties continue on ground and ease of doing business index is not improved for the IT industry in India:

- Urgent need to streamline the unplanned rollout of IT Product safety –While compliance costs are prohibitively high, there are operational hurdles with respect unrealistic timelines, tedious processes, unique labeling requirements, certificate / test validity periods and per factory testing requirements.

Industry requests: exclusion of Highly Specialized equipment from the scope of these rules; harmonization of labeling requirements with global practices; harmonization of validity period of test reports and certification; doing away with repetitive and unnecessary retesting of same products coming from different factories or under different brand names.

- Reduce adverse impact of regressive Telecom Security Testing requirements under the 'Safe to Connect' project. With lack of India-specific certification requirements and no labs on the ground, it is essential for Govt to postpone the initiative till clarity and guidelines are in place.

Industry proposes larger consultation with the government departments, towards consideration of self or mutual certifications. Industry also feels that the (past) deadline for compliance (April, 2015) was unrealistic and a formal notification with details and a feasible timeline should be released soon.

- Lift restriction on rightful import of equipment used in R&D in Engineering Projects
IT Industry's R&D Sector has over 800+ India based Centers. Due to bureaucratic and regulatory issues, many of them are looking at migrating to other countries. One of the major reasons is the humungous turnaround time of 3 months+ for equipment used in R&DE projects. As there are always, multiple, globally teams working simultaneously on researching/ solving technology problems, timelines are of critical importance. The major roadblock faced is for import of used electronics equipment under the MOEF hazardous waste/e-waste rules. The current process of clearance is archaic and time-consuming. Multiple representations from the industry made MoEF agree that R&DE requirements are neither bulk, nor initiated by malafide intent – and can be exempt from the demanding clearance process. **While DeitY has supported this in principle, notification exempting R&D imports from such a time-consuming process are still pending.**
- Lift restriction rightful import of spare parts
As India is gearing to enhance in-country IT component and sub-component manufacturing, it is essential to understand that it will indeed, take some logical time till India becomes a fully independent economy that needs zero electronics imports. As supply chains for IT components are truly globalized, as on date, IT industry in India depends on Indian manufactured and globally sourced components. Similarly, while companies are increasing local repair capabilities, a very small percentage (less than 2% of total installed base) of the critical 'certified spare parts' (that are not being manufactured anymore) ,need to be refurbished abroad and imported- not for sale, but only for warranty replacement.

Today, the IT industry is facing severe consumer warranty issues as companies are not able to export, refurbish and import refurbished IT components such as motherboards, hard disks, tape drives, Flat panel display for Laptop/Monitors, Microprocessors and other IT support related parts .As a result, consumers including Government and Corporate, are facing inordinate delays in servicing of their IT Products. Additionally, not allowing refurbished import leads to junking of repairable parts leading to increase in e-Waste. It is unfair for GoI to restrict rightful imports (under the guise of promoting Make in India) and expect industry to procure nationally when these components are not manufactured or repaired in India.

- Support growth of the E-commerce industry in India
Due to the existing policy restrictions, lack of clarity persists for rules on “inventory-led e-commerce”. This complexity in the operating environment has impacted several state tax authorities' ability to comprehend e-commerce models thereby directing marketplaces or online intermediaries to become accountable for paying taxes on behalf of their merchants. This creates a direct conflict with the FDI regulations of the central government, which prohibits organizations from acting as agents on behalf of the sellers. The essence of the problem, therefore, is that of intermediary technology platforms being asked to discharge obligations, which fall under the

supplier/seller or manufacturer of goods. This interpretation manifests itself in several ways: raising undue tax obligations, levying penalties on behalf of merchants' for the latter's violations.

This clarity needs to be presented across the board for E-commerce marketplaces to provide a robust platform for small and medium businesses, who are providing an easy and affordable access for goods and services for consumers across income levels and states. This puts American companies at a unique disadvantage and creates barriers for them to grow within a level playing field in the domestic environment.

- Support Work Force Policy Reforms – While IT was the sunshine sector of India in the last decade, in the recent past, there has been an emergence of competitive locations across the globe for investment considerations by this sector causing a slowdown in the growth in India. A significant contributor to the success of the IT services exports sector is the ease with which the IT/ITES sector is able to adopt the global delivery business models and adapt its workforce accordingly. In addition, the IT/ITES sector is in the vanguard of the adoption of new workforce management models that take advantage of globalization and new technologies. This ease is rapidly diminishing in the Indian operational environment as the Indian IT/ITES sector of late, has experienced attempts by the Government to force fit the archaic labour laws on this sector. If this trend continues, India risks losing its investment attractiveness to other countries. IT industry in India assures commitment to employee welfare and requests that backward thinking laws are not imposed on employees of this sector.
- Expedite Legitimate applications on Remote Access (RA) from licensed telecom companies that have been delayed for over a year

RA is the functional ability of telecom service providers and / or equipment manufacturers to remotely view elements of a telecom infrastructure (not content of traffic) from a central Networks Operations Center(s) usually located overseas. RA is undertaken for proactively managing the health and safety of the network infrastructure.

RA Guidelines were formulated in 2007 as a part of Press Note 3 of 2007 dated April 19, 2007. This was based on an extensive cabinet review involving key ministries like Home Affairs, Defence and Communications & IT and inputs from industry. The Guidelines and more importantly, the approval process continues to be subject to different interpretations nearly every other year. There is continued uncertainty surrounding the RA implementation and security approvals, resulting in either rejection of applications or keeping the approvals pending for indefinite periods of time. This poses serious risk to the health of network and impacts ability to provide world class enterprise services to customers in India. Industry seeks a change in this environment of uncertainty impacting both the current and future investments in India.

3. **Remove the multiple entry barriers in public procurement policy**

Members of the industry have been participating in various Tenders floated by Public Sector Undertakings and other Ministries and Departments (“Nodal Agencies”) who have been entrusted by the Government to implement Digital India and other e-Governance projects. In our opinion, certain terms and conditions in Public Tenders are extremely onerous on the Bidders / System Integrators (“SI”) and Original Equipment Manufacturers (“OEM”). These conditions which when coupled with condition of

'zero deviation bid' either lead to a very high priced bid or non-participation by major SIs/OEMs thereby depriving the Government from evaluating some of the best in league solutions which meet or exceed their requirements.

The IT industry, at large, stepped ahead and supported the RFP standardization process undertaken by DeitY. Adoption of these RFP's will go a long way in establishing robust governance that ensures streamlined tender processing, standardization of requirements, consistency in bid evaluation process, reduction in constraints for entry by foreign bidders etc. These will help government projects benefit from global expertise and high technological value.

Unfortunately, we have not seen these being adopted for any major procurement, including under the Digital India initiative. We request relevant stakeholders of the Government of India to kindly direct Nodal Agencies to adopt Model RFP *terms* for Digital India initiative and other e-Governance projects, to the extent feasible after incorporating some of the suggestions given in this representation. **We also request concerned Government of India stakeholders to plan the National Offset Policy, only after extensive intra- governmental and industry consultations.**

Another critical issue is that, in a majority of these Tenders, excessive weightage is given to the lowest cost bid / (L1) criteria. We have seen that typically, each bidder is required to achieve a set of minimum marks to qualify for commercial bid opening. Subsequently the successful bidder is chosen solely on basis of cheapest/ most cost effective bid. In the process, technically superior solutions / offerings are often overlooked. This leads to technical solutions with less compatibility and scalability getting selected by the Nodal Agencies over solutions which may not be the lowest cost bid but are more cost effective in the long run and strategically more suitable to meet long-term objectives of the Government.

We recommend that for Tenders of strategic National importance where cutting-edge, latest technological solutions are needed, a more balanced view is taken by the nodal agencies by providing equal weightage to quality and cost effectiveness of the solution. This would also ensure that the Government procures solutions which are technically more suitable and are backed by more reliable technologies and organizations that are needed for making Programs successful in the long run. Some Tenders did come out with a more balanced criteria of evaluation but were later changed to the traditional L1 evaluation method.

As an example, we recommend that rather than sole L1 criteria of selection, the bidder is selected by following a formula on similar lines as below:

B = Total marks after complete bid evaluation

Tn = Normalised technical marks

Fn = Normalised financial marks

$$B = 0.70 * Tn + 0.3 * Fn$$

Please find enclosed a summary of the key issues that we come across in these Tenders and our recommendations on the same. We request you to kindly consider these and advise the Nodal Procurement Agencies to consider them in a fair and non-biased way. We are confident that a resolution of these issues will enhance ease of doing business for not only the IT Industry, but for the entire industry at large.

Summary of Key Issues- Public Procurement

Sr. No.	Clause in Tenders	Recommendation
1	No Deviation Bids	We request that a more detailed and structured Pre-bid exercise is conducted by the consultants of the Nodal Agencies where the terms and conditions are discussed with teams of bidders and valid concerns are addressed. Also, bidders should be allowed to provide their deviations to Tender conditions which should be discussed and agreed upon before the commercial bids are opened and bidder is shortlisted. A clear process for such discussion should be provided in the tenders to avoid any preferred treatment to a bidder. If parties are unable to converge on the deviations, the bidder should be declared as unsuccessful bidder without any implications- commercial or otherwise.
2	Joint and Several Liability	OEMs are providing commercially off the shelf (COTS) products and the Contract for project implementation is between the Service Integrator and the Purchaser. OEM should not be held jointly and severally liable for the breach of the contract by SI as OEM has no control on delivery of the project.
3	Payment Terms	<p>We request that if payments for Services are linked to milestones, they are arranged in a manner which makes it commercially feasible for bidders in terms of cash flow operations. Clear acceptance conditions for each milestones along with a reasonable deemed acceptance should be provided. e.g. - when the solution/products/ services are put to operational use or when no response is provided by the Purchaser for over 30 days. Payments milestones for COTS Products (HW/SW) may be kept separate – e.g. - on Delivery/ Installation and not linked to the milestones of the overall Project.</p> <p>Exchange Rate Variation Clause should be included in RFPs to control the impact of currency fluctuations on project financials.</p>
4	Arbitration	As the purchaser is a party to the dispute, there is an apparent conflict of interest if Purchaser's official is appointed the arbitrator. Arbitrator should be appointed by mutual consent of both the parties.
5	Liability and Indemnities	Liability of the SI should be capped for all kinds of claims. As a typical project is split into a short implementation period and then much longer support services, SI's liability should also be accordingly limited to value of the Product/Services which are the subject of claim during implementation phase and one year value of support services during support phase of the project. Exclusion of indirect and consequential damages should be provided and indemnities should not be sought for breach of contract/ warranties as for these damages are already contemplated under the contract. IPR Indemnity should be court awarded damages for infringement of a patent/copyright by SI Products. All penalties and Liquidated damages under the Agreement should be capped in aggregate to 10% of the TCV.

6	Blacklisting	Blacklisting as a consequence should be restricted to fundamental ethical issues, namely fraud and bribing and not for breach of contract for which remedies of EMD / PGB forfeiture, LDs and damages exist under the contract. If a blacklisting is required the decision making should be transparent and after giving an opportunity to the bidder to be heard.
7	Scope Creep / Sweep Provisions	These clauses state that SI is to perform Services/supply products at its own cost, for successful execution of the Project, though not specifically stated in the contract. These are very onerous clauses which makes it impossible for a bidder to ascertain the commercial risk as well as submit a well-priced bid. It is always better for contracting parties to have an unambiguous scope.
8	Sharing of Source code/ Escrow	We request that such condition be done away with as no large OEM can handover / share its proprietary IP. The concern of continuation of services can be addressed in multiple other ways on a case to case basis looking at the solution and criticality of the same for Purchaser.
9	Termination	We request that (a) at least 30 days cure period is provided to cure the breach before termination, (b) SI should be paid for services and products properly rendered till the date of termination, (c) termination for convenience should be only after a reasonable notice period and on payment of adequate termination fees to compensate SI for the investments made by SI in the project and (d) SI should be provided a right to terminate/ suspend services for unjustified non – payment by Purchaser.
