



Proposed Approach for Regulations Under the *Building Ontario Businesses Initiative Act, 2022*

*Requirements where public sector entities must give preference to
“Ontario businesses” when conducting procurement processes.*

Submitted to: Treasury Board Secretariat

Submitted by: Ontario Bar Association

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Executive Summary

The Ontario Bar Association (“OBA”) appreciates the opportunity to provide comments to the government on the proposed approach for regulations under the *Building Ontario Businesses Initiative Act, 2022* (the “Act”). The following is a summary of our comments, which are more fully set out below:

- Definition of “Ontario business”: Location of employees, wages, value of goods and services produced, and a temporal connection to Ontario are reasonable determinants. Criteria requiring a physical presence, or nine to five business hours should be avoided as virtual entities that would otherwise qualify as Ontario businesses might be inadvertently excluded based on such requirements.
- Reduce as many ambiguities as possible through clear drafting to avoid disputes and delays, including providing guidance on who determines whether a bidder is an Ontario business, when that determination can be made, and liability protection for public sector entities in the event of a legal challenge.
- Ensure the *Act* and regulations do not inadvertently conflict with national and international trade agreement commitments to avoid widespread litigation in the broader public sector and retaliation from other jurisdictions.

Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.



This submission was prepared and reviewed by members of the OBA's Business Law, Charities & Not-for-Profit Law, Construction & Infrastructure Law, and International Law sections. Members of these sections include barristers and solicitors in public and private practice in large, medium, and small firms, and in-house counsel across every region in Ontario. These members have deep experience and expertise in dealing with matters related to trade, business law, and procurement (tendering and bidding).

Comments & Recommendations

1. Approach to Defining “Ontario Business” for the Purpose of the Act

Percentage of employees, wages and value of goods and services plus time

The three criteria¹ proposed for assessing a “permanent presence” in Ontario (considering the percentage of employees, payment of wages and value of goods and services produced by location) are reasonable and consistent with criteria used by other jurisdictions but could be strengthened with the addition of a temporal nexus to Ontario.

- For example, an extra-provincial business could incorporate in Ontario, obtain a business address, and employ one person in Ontario, therefore meeting the first two criteria. Adding a temporal requirement paired with a minimum employee threshold would go a long way towards resolving this potential issue.

Permanent presence vs. physical location

Requiring a “physical location” and “accessibility during normal business hours does not consider that some businesses operate virtually and could inadvertently exclude some

¹ The three criteria are:

1. Having over 50% of the full-time employees located in the jurisdiction.
2. Paying over 50% of the wages, salaries or fees to employees or contractors located in the jurisdiction.
3. Produces the majority of the value of a good or service in the jurisdiction.



Ontario businesses. Many Ontario businesses operate without a physical location and outside of the traditional nine-to-five window, but still meet the three criteria proposed for the permanent presence test.

Include contractors in calculating number of employees

Contractors should be included in calculating the number of “full-time employees” to capture the intentional spirit of the Ontario first policy. Consideration should be given to whether the location of the employee is tied to where the employee resides, or to the location of work done. It is quite common for Ontario businesses to employ individuals who reside in Quebec, for example, in regions such as Ottawa.

Fiscal vs Calendar Year

Guidance should be provided on the applicable timeframe to be used for assessing the application of any criteria. Do the parties look at the previous fiscal or calendar year(s)?

Business Form: Treatment of Charities, Non-Profits and Not-for-profits

For the sake of clarity, the definition of business forms should explicitly include nonprofit, not-for-profit and cooperative corporations, if that is the intention.

Similarly, consideration should be given to whether charities, including federally incorporated charities operating in Ontario, are excluded from the public sector entities required to comply with the *Act*. The proposed definitions would capture some registered charities that receive public funds. If the scheme is meant to capture charities, it should apply equally to federally incorporated charities that operate primarily or exclusively in Ontario.



2. Approach to Threshold Amounts for Triggering Preference Requirement

Include a Lower limit

Consideration should be given to providing a lower limit (i.e., under \$1,000) to prevent goods and services of limited value from being caught in the scheme. This is important to minimize the administrative burden on businesses and reduce red tape.

Joint Procurements

Thought should be given to how joint procurements would be handled if the entities fall into different threshold categories under the proposed regulations (for example, an MTO/Metrolinx project).

3. How Preference Should be Given

Awarding points preferable to excluding non-Ontario bidders

To ensure that public sector entities can get the best value for tax dollars while not risking an interruption of supply chain management, a system that awards points to bidders that qualify as an Ontario business would be less likely to cause potential disruptions to securing goods and services than by excluding non-Ontario bidders.

Consideration might also be given to whether the supplier has provided goods or services to the proponent in the past. There may be cases where the proponent and supplier have an existing working relationship where they have put considerable time and resources into ensuring efficiencies and quality standards are met.

4. Who Determines Whether it is an “Ontario Business”?

Public sector entities should have some degree of protection against potential claims by unsuccessful bidders challenging whether the successful bidder is in fact an Ontario business. Consideration should be given to whether it is sufficient for a public sector entity



to rely on a declaration by a bidder that it is an 'Ontario business', or if there will be an option for a third party to pre-determine whether a bidder qualifies as an Ontario bidder?²

5. Trade Law Considerations

There are serious concerns that the *Act* could lead to breaches of various trade agreement obligations.³ Trade obligations can only be altered through the notification and negotiation mechanism found in individual agreements. Consideration should be given to the potential impact of Ontario essentially obfuscating the terms of national or international trade agreements. Legally, trade agreements can only be amended by agreement of the parties. Each agreement has its own scope of application depending on the type of entity, the type of goods or services being procured, and the value which subjects the procurement to the agreements. Ensuring that these binding trade agreement commitments are respected would mitigate legal challenges across the broader public sector, which would be costly and time consuming.

The OBA would welcome the opportunity to provide additional input into draft language of the regulations.

² Using the points system rather than excluding non-Ontario businesses from bidding, could mitigate against the risk of legal disputes.

³ Trade agreements like the Canadian Free Trade Agreement, the Ontario-Quebec Trade and Cooperation Agreement, the Canada-EU Comprehensive Economic and Trade Agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership.