Bill 72, Buy Ontario Act, 2025

Submitted to: Ministry of Public and Business Service Delivery and Procurement

Submitted by: Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

Table of Contents

Introduction

The Ontario Bar Association ("**OBA**") appreciates the opportunity to comment on the *Buy Ontario Act (Public Sector Procurement), 2025*, as part of Bill 72. We note that this submission was prepared before the Bill was passed in an expedited fashion, bypassing the typical committee review stage. We urge the government to provide sufficient time for stakeholders and the public to provide meaningful feedback on important legislation such as this. We nonetheless provide the following comments for consideration in future amendments to the legislation, and for the regulations that will provide the particulars to fit into this legislative framework.

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, Construction & Infrastructure Law and Municipal 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, with expertise in procurement processes and the implications of domestic and international trade agreements.

Comments & Recommendations

General

We appreciate the underlying policy objectives and the broader economic and geopolitical pressures that have informed the development of *Bill 72, the Buy Ontario Act, 2025* (the "***Act***"). Strengthening Ontario's supply chains and enhancing the competitiveness, resilience, and growth of Ontario-based businesses are critical goals that we strongly support. The *Act* proposes an enabling framework that would permit preferential treatment for Ontario businesses within public procurement processes; however, many of the *Act*'s operational details are deferred to future directives, regulations, and policies. We urge the government to engage in meaningful, transparent, and comprehensive consultation as these instruments are developed to ensure that the *Act* can effectively advance its economic objectives, mitigate unintended consequences, and maintain Ontario's compliance with its obligations under domestic and international trade agreements.

Repealing the *Building Ontario Businesses Initiative Act, 2022*

The *Act* proposes to repeal and replace the *Building Ontario Businesses Initiative Act, 2022* ("***BOBIA***"). We anticipate that several core concepts and regulatory mechanisms under *BOBIA* will be carried forward into the new framework, including the definition of an "Ontario business" and the thresholds governing when local preference requirements apply. Ensuring continuity and clarity on these foundational elements will be critical for both procuring entities and suppliers as they transition to the new regime.

Under *BOBIA* Regulation 422/23, an Ontario business is defined in subsection 2(1):

> **2.** (1) A business that meets the following requirements is considered to be an Ontario business for the purposes of the Act:
>
> 1. The business is a supplier, manufacturer or distributor of any business structure that conducts its activities on a permanent basis in Ontario.
> 2. The business either,
>
> i. has its headquarters or main office in Ontario, or
>
> ii. has at least 250 full-time employees in Ontario at the time of the applicable procurement process.

One significant issue arises with the existing 250 full-time employee ("**FTE**") criterion used to determine whether a business qualifies as an Ontario business. This measure does not capture the reality of Ontario's construction and infrastructure sectors, in which large numbers of contractors and subcontractors may work on a daily basis in roles indistinguishable from full-time employees. Consideration should be given to incorporating FTE-equivalent calculations or similar mechanisms to better reflect the full economic footprint of businesses operating in Ontario. In addition, clarification is needed on whether the FTE count must relate specifically to the employees engaged in producing the good or service being procured, or whether maintaining a broader workforce in Ontario - regardless of its connection to the procurement - would be sufficient to meet the threshold.

BOBIA Regulation 422/23 also outlined the monetary thresholds for the application of its rules in section 4. For a public sector entity that is a government entity, the threshold applies to amounts under:

1. For a public sector entity that is a government entity,
    i. in respect of a procurement process for goods, $30,300, and
    ii. in respect of a procurement process for services, $121,200.
2. For a public sector entity that is a designated broader public sector organization,
    i. in respect of a procurement process for goods, $121,200, and
    ii. in respect of a procurement process for services, $121,200.

We understand that the limitation of the *Act* to lower-value procurements is influenced by Ontario's obligations under various domestic and international trade agreements. Many public-sector entities currently rely on *de minimis* rules to avoid unnecessary administrative burdens for very low-value procurements (for example, those under $1,000). Given the compliance obligations and potential penalties contemplated under the *Act*, it would be beneficial to codify an explicit *de minimis* threshold. This would provide increased predictability for procuring entities and suppliers alike. Additionally, where procurements involve a combination of goods and services, clarity on how value thresholds

will be assessed, whether separately or as a combined total, will be essential to avoid inconsistent application.

Finally, *BOBIA* contained an express exemption for procurements covered by domestic or international trade agreements requiring non-discriminatory treatment. We recommend that the *Act* include a similar provision to ensure legal certainty and to affirm Ontario's commitment to complying with its broader trade obligations. Including an explicit exemption in the statute itself, rather than relegating it to future regulations or directives, would provide welcome predictability for all stakeholders engaged in Ontario's procurement ecosystem.

Buy Ontario Act, 2025 (the "Act")

Scope of Application

The *Act* establishes the overarching framework for a new procurement preference regime, but leaves virtually all operational detail to future directives, regulations, and policies. Our comments below focus on the structure and implications of the framework as set out in the *Act*.

The scope of the *Act* and the future directives made under it is notably broad. The *Act* would apply to almost all public-sector entities, including ministries, most provincial agencies, boards, and commissions, as well as organizations such as the Independent Electricity System Operator, Ontario Power Generation, and a wide range of designated broader public-sector entities, including hospitals, school boards, and children's aid societies. The government's public communications have further indicated its intention to extend the regime to municipalities, and to contractors and subcontractors engaged in public-sector procurement.

Scope of Potential Directives

The scope of potential directives is equally broad. Directives may:

- Require preferencing Ontario/Canadian goods and services;

- Impose obligations to support or promote Ontario businesses, or restrict eligibility to participate in public sector procurements;
- Mandate the adoption of vendor performance standards or related practices;
- Establish reporting requirements and procedures; and
- Require public sector entities to implement specified compliance and enforcement measures

Section 9 of the *Act* further provides that directives may be *general or particular* in nature. They may apply to broad classes of entities or suppliers defined by certain attributes, or may name or exclude specific entities. This combination of sweeping authority and high granularity creates significant uncertainty. Although we anticipate that many rules will mirror elements of *BOBIA* and existing procurement frameworks, the structure of the *Act* allows for the possibility that different sectors, or even individual entities, could be subject to unique or divergent requirements, independent of any compliance-related rationale.

Need for Predictability and Consistency

In our view, directives issued under the *Act* should be general, consistent, and predictable. Procurement regimes function most effectively when businesses can rely on stable rules and clear expectations. Unpredictable or highly tailored directives risk undermining the very objectives the *Act* seeks to advance, including supporting investment, promoting Ontario-based business growth, and ensuring efficient, competitive procurement processes.

Consistency is also essential from the perspective of public-sector entities, which must implement these directives while managing operational, financial, and legal risk. The potential for a patchwork of entity-specific or sector-specific directives would complicate compliance, increase administrative costs, and hinder long-term procurement planning.

Importance of Transparency

We support the *Act*'s requirement that all directives be publicly posted on the Government of Ontario's website. Transparency is an essential safeguard in a regime that contemplates significant discretionary authority. However, transparency alone will not mitigate the risks associated with frequent, highly granular, or rapidly changing directives. To provide the certainty and stability needed by both procuring entities and suppliers, the directive-making process should be exercised judiciously, with clear rationales, consistent standards, and meaningful consultation.

Interaction with Non-Ontario Rules and Agreements

We reiterate the importance of ensuring that any rules developed under the *Act* align with Ontario's obligations under international, federal, and interprovincial agreements. To that end, we strongly recommend carrying forward *BOBIA*'s explicit provision addressing the primacy of trade agreements where conflicts arise. This statutory clarity is essential to prevent uncertainty for both procuring entities and suppliers.

Ontario remains bound by several trade and procurement frameworks including the Canadian Free Trade Agreement ("**CFTA**"), the Canadian-European Union Comprehensive Economic and Trade Agreement ("**CETA**"), and various World Trade Organization ("**WTO**") commitments, as well as federal laws and policies applicable to procurements involving federal funding. These instruments impose non-discrimination obligations and, in many cases, require open, fair, and transparent procurement processes. Any Ontario-specific local preference regime must therefore be carefully calibrated to avoid breaching these commitments.

Conflicts may be particularly acute where federal funding or cost-sharing arrangements are involved. For example, if a public-sector entity awards additional points or preferential scoring to Ontario businesses in accordance with a provincial directive, it may be unable to award a contract to the lowest-priced or highest-ranked compliant bidder as required under federal procurement rules. This could place procuring entities in an untenable

position where compliance with one regime necessitates non-compliance with another, even where the entity is attempting in good faith to satisfy all legal obligations.

To avoid such outcomes, the legislation should provide explicit and detailed guidance on how the *Act* interacts with these external regimes, and clarify circumstances in which provincial requirements are ousted or suspended. Specificity and clarity are essential to protect the integrity of the procurement system, reduce legal and financial risk for public-sector entities, and ensure that Ontario's economic objectives are pursued in a manner consistent with Canada's broader trade commitments.

Supply Chain Management Contractors

The *Act* requires any public-sector entity that engages a third-party supply chain management contractor to ensure that the contract obligates the supply chain manager to comply with all applicable requirements imposed under the *Act*. While this approach is consistent with modern procurement governance models, it raises significant operational challenges when considered alongside the broad powers contemplated in the legislation.

Many public-sector entities, particularly municipalities, participate in collaborative or joint procurement arrangements that leverage aggregated purchasing power to secure more favorable pricing and contract terms. These arrangements often depend on a single shared supply chain management contractor or cooperative procurement entity acting on behalf of multiple participants.

If future directives under the *Act* were to impose differing requirements on different municipalities or classes of public-sector entities, the practical effect could be to restrict the ability of municipalities to participate in joint or cooperative procurement initiatives. Supply chain management contractors would be required to apply distinct, and potentially conflicting, rules for each participating entity, undermining the efficiency and economies of scale that such collaborations are designed to achieve.

The likely consequences would include increased costs for goods and services, greater administrative burden, and reduced access to coordinated procurement solutions - outcomes that run counter to the government's stated objectives of strengthening Ontario's supply chains and improving procurement efficiency. To avoid these unintended impacts, directives should be designed to ensure coherence across similarly situated public-sector entities and should not impede municipalities or other organizations from engaging in collaborative procurement models that deliver demonstrable value.

Deemed Part of Agreements

Section 5 of the *Act* provides that every requirement established under the *Act* is deemed to be a term of any agreement or other funding arrangement between a public-sector entity and the Government of Ontario. While we recognize the policy intent, namely, ensuring uniform compliance across provincially funded activities, this provision raises concerns regarding contractual certainty and fairness.

To avoid retroactive alteration of negotiated rights and obligations, the deeming provision should apply only on a go-forward basis. Applying new statutory obligations to pre-existing contracts would undermine core principles of contract law, disrupt settled expectations of both public-sector entities and their contractual partners, and potentially expose entities to compliance risks they could not have anticipated or priced into their agreements at the time of negotiation.

A prospective-only application would better respect contractual stability, avoid unnecessary disputes, and allow public-sector entities and funding recipients to plan for and incorporate the requirements into future agreements in an orderly and transparent manner. Clear legislative language to this effect would reduce uncertainty and support the smooth implementation of the new procurement framework.

Failing to Comply and Withholding Funds

Section 6 of the Act grants the provincial government broad authority to withhold "any amount authorized by law to be paid" to an organization or entity that fails to comply with the *Act*'s requirements. As drafted, this could encompass any provincial funds, including those payable under unrelated funding agreements. The scope of this authority is unclear, including who would make a non-compliance determination, the criteria to be applied, and what process would precede such a decision.

For municipalities, the implications are particularly significant. Municipalities rely heavily on provincial transfers and have limited independent revenue sources. Withholding or clawing back funds could force them to raise funds locally to offset shortfalls, placing an undue burden on taxpayers.

Fiscal Year Cut-Off and Risk of Unfairness

Under Section 6(3), withheld funds will be paid only once the entity comes back into compliance. However, if non-compliance "continues" past the end of the fiscal year (March 31), the entity permanently loses its entitlement to the funds unless the Board withdraws its direction. This provision lacks any minimum period of non-compliance prior to the fiscal year-end.

This creates a foreseeable scenario where an entity notified of non-compliance on March 30 could permanently lose access to funding the following day, with no meaningful opportunity to remedy the issue. Such a result would be disproportionately punitive, undermine procedural fairness, and risk discouraging rather than promoting good-faith compliance.

Lack of Criteria, Decision-Making Transparency, and Recourse

The *Act* does not define what constitutes a "failure to comply," nor does it differentiate between (a) deliberate or reckless non-compliance and (b) good-faith efforts that fall short due to ambiguity or interpretation. In practice, procurement decisions often involve nuanced judgment calls, and disagreements over interpretation are inevitable. Without

clear criteria, entities acting in good faith could face severe penalties based on reasonable but disputed interpretations of future directives.

Similarly, the *Act* is silent on who makes a compliance determination, how that decision is communicated, and what procedural rights the affected entity has, such as notice, an opportunity to respond, and access to reasons. Limiting recourse to judicial review would be inefficient, costly, and inaccessible for many municipalities and public-sector organizations.

To ensure fairness, predictability, and proportional enforcement, the legislation should:

- Establish transparent criteria distinguishing non-compliance from minor or technical shortcomings made despite best efforts;
- Create a clear, accessible internal appeal or review mechanism;
- Require proportionality in determining the consequences of non-compliance; and
- Provide procedural safeguards, including notice and an opportunity to correct deficiencies before penalties are imposed.

Contractual Certainty and Liability Concerns

Significant uncertainty also arises regarding the consequences of non-compliance after a municipality or public-sector entity has already entered into a contract funded by the province. While it appears that the public-sector entity would be financially shielded from liability, the risks are shifted to the private party. For example, could suppliers be penalized for circumstances beyond their control or beyond what was foreseeable at the time of contracting?

Such uncertainty could deter businesses from participating in public-sector procurements, reduce competitive bidding, and increase prices—directly undermining the economic development objectives of the *Act*. Clear rules governing liability, risk allocation, and the treatment of existing contracts will be essential to maintain supplier confidence and ensure that the *Act* supports, rather than destabilizes, Ontario's procurement market.

Compliance Reviews

The *Act* authorizes the Minister to require a compliance review of any public-sector entity to assess adherence to the *Act* or to directives issued under it. Under section 7(4), entities must cooperate fully and provide access to their records and "any other information requested." While we understand the need for oversight, the breadth of this authority raises several concerns related to legal privilege, third-party confidentiality, procedural fairness, and cost.

Broad Authority to Appoint Reviewers

The *Act* permits the Minister to designate "a person" to conduct a compliance review but provides no guidance on qualifications, independence, accountability, or conflict-of-interest considerations. It is unclear whether reviewers would be public servants, contracted third-party auditors, industry experts, or other external actors. Given the potential consequences of a compliance determination, including funding implications, reputational risk, and possible public posting of findings, greater specificity and safeguards are required to ensure that reviews are conducted by qualified, impartial individuals subject to appropriate oversight.

Absence of Privilege Protections

The provision contains no exception for privileged information. Both solicitor-client privilege and settlement privilege are constitutionally protected rights that cannot be abrogated absent clear and explicit statutory language, and the Supreme Court of Canada has repeatedly affirmed their fundamental importance. The absence of a privilege carve-out could create uncertainty, discourage entities from seeking legal advice in procurement matters, and expose the *Act* to potential constitutional challenge. To avoid this, the *Act* should explicitly state that privileged information is excluded from disclosure obligations.

Risks to Third-Party Confidential Information

Beyond privileged information, compliance reviews may encompass records containing sensitive third-party information, including proprietary pricing strategies, confidential bids, commercially sensitive data, or information protected under municipal, provincial, or

federal access-to-information regimes. Public-sector entities cannot disclose such information without risking breach of confidentiality obligations owed to suppliers or service providers. Without clear protections and mechanisms for redaction or anonymization, entities may face irreconcilable conflicts between their obligations under the *Act* and their duties to safeguard third-party information.

Public Posting of Findings and Procedural Fairness

After a compliance review, the Minister may publicly post the findings. This amplifies the risks associated with disclosure of sensitive or confidential information but also raises broader administrative-law concerns. Public posting of adverse findings without guaranteed procedural safeguards such as notice of concerns, an opportunity to respond, access to evidence, and a mechanism for reconsideration would be inconsistent with well-established principles of procedural fairness. Entities must have the ability to challenge inaccuracies or contest conclusions before any findings are made public.

Uncertainty Regarding Financial Responsibility

The *Act* is silent on who bears the cost of a compliance review. If compliance with the *Act* is deemed to form part of existing funding agreements, entities may face unanticipated financial exposure, particularly where agreements do not contemplate such costs. For municipalities and other public-sector bodies with constrained budgets, this uncertainty could have significant operational and financial implications.

Liability Protections and Extinguishment of Causes of Action

The *Act* contains sweeping immunity provisions that extinguish a wide range of legal rights and remedies. Specifically, the *Act* purports to:

- Extinguish any cause of action arising from or relating to the *Act*, its regulations, directives, or related instruments;
- Preclude the recovery of costs, compensation, damages, or any form of remedy;
- Bar proceedings of any kind; and
- Eliminate remedies for expropriation or injurious affection.

These provisions represent a significant curtailment of private rights and remedies in connection with government procurement activities.

Asymmetry of Rights and Rule of Law Concerns

The *Act* explicitly provides that these extinguishments do not apply to proceedings brought by the Crown. This asymmetrical immunity raises serious rule of law concerns. One of the core constitutional principles underlying Canada's legal system is that the law applies equally to all persons, including the state. Legislation that shields the Crown from legal consequences while extinguishing the rights of private parties effectively places the government above the law in respect of its own procurement decisions.

Such asymmetry risks undermining public accountability, distorting the balance between governmental authority and private rights, and eroding the principle that state actions must remain subject to meaningful legal scrutiny. Where private entities are deprived of all recourse, while the Crown's right to bring proceedings remains intact, the resulting imbalance is antithetical to fundamental rule of law commitments. This concern is amplified in the context of procurement, where government decisions can significantly affect commercial interests, competitive markets, and public trust.

Interjurisdictional and Federal Court Implications

The application and enforceability of these immunity clauses in the broader Canadian legal landscape is also unclear. Many procurement-related disputes, particularly those involving trade agreements or federal funding, fall within the jurisdiction of the Federal Courts. It is uncertain how Federal Courts would interpret provincial statutory provisions purporting to extinguish causes of action, especially where federal law or international trade obligations may create parallel remedies or procedural rights.

In addition:

- Many aggrieved parties are likely to be extra-provincial or international entities with standing under federal or international trade agreements;

- Orders issued by the Federal Courts or international tribunals may require enforcement in Ontario, raising questions about whether the immunity provisions could impede or conflict with such enforcement; and
- Parties with assets located outside Ontario may face enforcement actions in other jurisdictions despite the Act's attempt to bar proceedings within Ontario.

These uncertainties introduce material legal and commercial risks for both suppliers and public-sector entities.

Interaction with Domestic and International Trade Agreements

Ontario's procurement obligations operate within a dense network of domestic and international trade frameworks. Provisions that extinguish rights or remedies could place entities in conflict with rights or obligations arising under the CFTA, CETA, WTO agreements, or federal procurement statutes and policies. As disputes under these regimes often contemplate access to domestic courts or tribunals, a provincial statutory bar on proceedings could interfere with Canada's international commitments and expose Ontario to reputational and legal risk.

BOBIA addressed this issue by including an explicit exemption where an international or domestic trade agreement conflicted with it. Incorporating a similar provision into this *Act* is essential to avoid conflicts between overlapping legal regimes and to maintain Ontario's compliance with binding national and international obligations.

Vendor Lists

Although the *Act* does not expressly provide for vendor lists, government announcements accompanying the Bill indicate an intention to develop lists of qualified Ontario and Canadian suppliers. Properly designed, such lists could offer meaningful support to procuring entities, particularly smaller municipalities and public-sector organizations with limited procurement capacity, by streamlining vendor identification and reducing administrative burdens.

To ensure the effectiveness and fairness of these lists, several principles should guide their development.

Clear and Accessible Criteria for Inclusion

The criteria for inclusion should be explicit, objective, and easily ascertainable. Vendors should not be subject to onerous administrative requirements or complex application processes, especially given the low-value procurement thresholds at which the *Act* may apply. Excessive administrative steps or documentation burdens could disproportionately disadvantage small and medium-sized enterprises, undermining the *Act*'s objective of promoting local business participation.

Minimal or No Cost to Vendors

Any fees associated with inclusion should be minimal, if not eliminated entirely. Many of the businesses that the Act aims to support—particularly small, local, and rural suppliers—may be deterred from participating if costs are significant relative to anticipated procurement opportunities.

Non-Exclusive Status of the Vendor List

It is essential that the legislation or subsequent directives make clear that inclusion on a vendor list is *not* a prerequisite to being recognized as an Ontario or Canadian business for the purposes of the *Act*. Non-inclusion must not create a presumption that a vendor is ineligible or that procurers should exclude them from consideration. Vendor lists should function as optional tools for procurement efficiency, not as gatekeeping mechanisms that inadvertently create barriers to entry.

Consistency with Transparency and Fair Procurement Principles

Finally, the development and maintenance of vendor lists should align with principles of transparency, fairness, and non-discrimination. This includes regular updates, accessible publication of criteria and processes, and mechanisms for vendors to challenge or correct errors affecting their status.