

1 **State of Arkansas**
2 **78th General Assembly**
3 **Regular Session, 1991**
4 **By: Senator Bradford**

A Bill

SENATE BILL

For An Act To Be Entitled

"THE MODEL STATE UNFAIR COMPETITION ACT."

10 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

11

12 SECTION 1. The Legislature hereby finds and declares that the growth of
13 private enterprise is essential to the health, welfare and prosperity of the
14 people of the State of Arkansas, and that the government and public
15 institutions of higher education compete with the private sector when those
16 institutions provide certain goods and services to the public. Recognizing
17 this problem, it is the intent of the Legislature and the purpose of this Act
18 to provide additional economic opportunities to private industry and to
19 regulate competition by government agencies and public institutions of higher
20 education. The Legislature intends that, with limited exceptions, if
21 government agencies and public institutions of higher education engage in
22 sales of goods or services at retail, such sales shall not be for less than
23 the costs that would be borne by persons making similar sales in the private
24 sector.

25 It is the further intent of the Legislature that issues and complaints
26 regarding competition between government, public institutions of higher
27 education, and nonprofit organizations and the private sector be addressed
28 through a Private Enterprise Review Commission, which Commission shall be
29 created in this Act.

30

31 SECTION 2. Definitions. As used in this Act:

32 (1) "Commercial activity" means performing services or providing goods
33 which can normally be obtained from private enterprise.

34 (2) "Commission" means the Private Enterprise Review Commission.

35 (3) "Institution of higher education" means a State-supported college,

1 university, or community college.

2 (4) "Invited guests" means persons who enter onto a campus of an
3 institution of higher education for an educational, research, or public
4 service activity and not primarily to purchase or receive goods and services
5 not related to the educational, research, or public service activity.

6 (5) "Private enterprise" means an individual, firm, partnership, joint
7 venture, corporation, association, or any other legal entity engaging in the
8 manufacturing, processing, sale, offering for sale, rental, leasing, delivery,
9 dispensing, distributing, or advertising of goods or services for profit.

10 (6) "Public service" means an activity normally and generally
11 associated with colleges and universities and other educational institutions
12 in this State, a purpose or significant result of which is not to engage in
13 competition with private enterprise.

14 (7) "Government agency" means a department, office, division,
15 authority, Commission, institution, board, or other agency of government, or
16 any other governmental unit existing in the State or any other creation of the
17 State, regardless of whether funds are appropriated to such agency.

18 (8) "Nonprofit organization" means an organization, other than a
19 government agency, which has been defined as nonprofit under state law except
20 for those nonprofit organizations which are licensed as nonprofit hospitals
21 pursuant to Acts 1961, No. 414.

22 (9) "Student" is a person seeking a degree or a certificate from an
23 institution of higher education.

24 (10) "Uniform accounting standards" means an accounting method which
25 allows government agencies and institutions of higher education to identify
26 the true and total cost of supplying goods and services in the same manner as
27 private enterprise would identify true and total costs, including, but not
28 limited to, the following:

29 (a) Labor expenses, including direct wage and salary costs, training
30 costs, overtime, and supervisory overhead;

31 (b) Total employee fringe benefits and other personnel expenses;

32 (c) Operating costs including vehicle maintenance and repair,
33 marketing, advertising and other sales expenses, office expenses, billing, and
34 insurance expenses;

35 (d) Real estate and equipment costs, debt service costs and a

1 proportionate amount of other agency overhead and capital expenses including
2 vehicle depreciation and depreciation of other fixed assets such as buildings
3 and equipment;

4 (e) Contract management costs;

5 (f) The imputed tax impact of the activity if such entity were required
6 to pay federal, state and local taxes; and

7 (g) Any other cost particular to the business or industry supplying the
8 goods or services.

9 (11) "Competitive impact statement" means a cost analysis using uniform
10 accounting standards accepted by private enterprise to determine the total
11 cost of the commercial activity. The cost analysis shall include a comparison
12 of the impact of the commercial activity on state and local tax revenues. The
13 private enterprise cost figures in the cost analysis shall be determined by
14 obtaining one (1) or more bids for performing or providing the commercial
15 activity.

16

17 SECTION 3. Government Competition with Private Enterprise Prohibited -
18 Exceptions.

19 (1) It is the general policy of the State of Arkansas that a government
20 agency shall not start or carry on any commercial activity to provide goods or
21 services for its own use, the use of other government agencies, or for public
22 use if such goods or services can be procured from private enterprise through
23 ordinary business channels.

24 (2) A government agency, unless expressly and specifically authorized
25 by law, shall not engage in any commercial activity including, but not limited
26 to, the manufacturing, processing, managing, sale, offering for sale, rental,
27 leasing, delivering, dispensing, distributing, or advertising, in whole or in
28 part, of any goods or services to or for other government agencies or the
29 public which are also offered by private enterprise.

30 (3) A government agency is authorized to perform or provide a
31 commercial activity when:

32 (a) The activity is specifically authorized by statute; or

33 (b) No private enterprise source is capable of providing the needed
34 goods or services. In any such case, the efforts made to solicit such sources
35 shall be documented to the Commission and made available to the public upon

1 request; or

2 (c) Use of a private enterprise source would cause unacceptable delay
3 or disruption of an essential program. In any such case, a written
4 explanation submitted to the Commission and approved by the agency head shall
5 show the specific impact on the agency program in terms of cost and
6 performance. Urgency alone shall not be an adequate reason for in-house
7 operation of a commercial activity. Temporary disruption resulting from
8 conversion to contract shall not be a sufficient reason for such operation of
9 a commercial activity. If such commercial activity has ever been performed by
10 contract, an explanation of how the present circumstances differ shall be
11 documented. These decisions and documents shall be made available to the
12 public upon request; or

13 (d) The activity is inherently related to the State's defense; or

14 (e) The agency can provide or is providing goods or services to
15 government agencies or institutions of higher education on a continuing basis
16 at a lower total cost than if such goods or services were obtained from
17 private enterprise as determined by cost comparisons as outlined in the
18 competitive impact statement relating to the specific good or service.

19 (4) If a government agency is authorized by law to engage in a
20 commercial activity, the government agency shall set a fee or charge a price
21 for that activity which shall include the true and total cost related to
22 engaging in the activity by such government agency, including, but not limited
23 to:

24 (a) The fair market value of the activity, and

25 (b) The direct and indirect costs incurred in engaging in the activity
26 determined by utilization of uniform accounting standards.

27 (5) If a government agency continues to engage in a commercial activity
28 or proposes to begin engaging in a commercial activity, the government agency
29 shall:

30 (a) Prepare a competitive impact statement to be submitted to the
31 Commission, and

32 (b) Prepare a detailed request for proposal which will be widely
33 disseminated within segments of private enterprise which normally engage in
34 the commercial activity in order to obtain firm bids or proposals for the
35 activity requested. A reasonable time frame approved by the Commission shall

1 be given to private enterprise to submit bids or proposals, including time to
2 obtain financial supply commitments. Bids received from the request for
3 proposal shall be used in the preparation of the competitive impact statement.

4 (6) Government agencies shall adopt and implement procedures to monitor
5 government agency compliance with this Act.

6 (7) Institutions of higher education shall not, unless specifically
7 authorized by statute:

8 (a) Engage in commercial activities for students, faculty, staff and
9 invited guests, or the general public that can be procured from private
10 enterprise through ordinary business channels, unless, as determined by the
11 Commission, the commercial activity:

12 (i) Necessitates the participation of students as a required part of an
13 educational program in order to obtain a degree or certificate; or

14 (ii) Is a recognized and integral part of a teaching, educational, or
15 research program leading to a degree or certificate; or

16 (iii) Consists of on-campus activities including:

17 (I) Food service; or

18 (II) Student housing; or

19 (III) Sponsoring cultural, and athletic events; or

20 (IV) Providing facilities for recreation to students, faculty and
21 staff; or

22 (V) Sales of course books and course related supplies, excluding
23 electronic equipment or devices and peripherals and software; or

24 (VI) Sale of a limited and reasonable quantity of personal items
25 bearing the institution's insignia, which shall be incidental to the sales of
26 textbooks and other items permitted in Item V, above.

27 (b) Enter competitive bidding for a commercial activity rendering any
28 goods or services unless, as determined by the Commission, the activity is
29 performed by students and is a recognized and integral part of a teaching,
30 educational, or research program leading to a degree or certificate from the
31 institution of higher education rendering the goods or services. Any such bid
32 shall fairly and fully include all direct and indirect costs utilizing uniform
33 accounting standards unless the funding source provides for or requires all
34 bidders to use a specific procedure or formula for allocating costs; or

35 (c) Engage in commercial activities for or through another government

1 agency including an intergovernmental agency agreement; or

2 (d) Provide for the disposal by sale of services, products, and by-
3 products which are part of research or instruction conducted by students and
4 faculty of the institution of higher education and leading to a student degree
5 or certificate unless the sale is an integral part of the particular research
6 project or instructional program or there is no other practical way of
7 disposing of the services, products, or by-products as determined by the
8 Commission, and if the services, products, or by-products are sold at their
9 market value utilizing uniform accounting standards.

10 (8) In determining whether the provision of a good or service is
11 directly related to teaching, educational or research programs leading to a
12 degree or certificate, the following criteria shall be considered:

13 (a) Whether the provision of the good or service is necessary for the
14 student to pursue a degree or certificate or for faculty or staff to engage in
15 research or teaching;

16 (b) Whether the good or service is a specialty good or service not
17 generally available to the public;

18 (c) Whether the price charged for the good or service reflects the
19 direct and indirect costs and overhead costs of providing such good or service
20 and the price in the private marketplace;

21 (d) Whether measures have been taken to ensure that the provision of
22 goods or services pursuant to this subsection is only for students, faculty or
23 staff and not the general public.

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25 SECTION 4. Nonprofit Competition with Private Enterprise Prohibited -
26 Exceptions.

27 (1) It is the general policy of the State of Arkansas that a nonprofit
28 organization as defined in Section 2(8) of this Act, shall not start or carry
29 on any commercial activity in competition with for-profit businesses in the
30 State unless the commercial activity of the nonprofit organization pays all
31 the taxes and fees that are applicable to a corresponding for-profit business.

32 (2) Such nonprofit organization is authorized to perform or provide a
33 commercial activity when:

34 (a) The activity is specifically authorized by statute; or

35 (b) The activity is not regularly carried on; or

1 (c) No private enterprise source is capable of providing the needed
2 goods or services and the Commission has determined that it is in the public
3 interest for the nonprofit to provide such goods or services. In any such
4 case, the efforts made to solicit such sources shall be documented to the
5 Commission and made available to the public upon request.

6 (3) If such nonprofit organization is authorized by law to engage in a
7 commercial activity, the nonprofit shall set a fee or charge a price for that
8 activity which shall include the true and total cost related to engaging in
9 the activity by such nonprofit organization, including, but not limited to:

10 (a) The fair market value of the activity, and

11 (b) The direct and indirect costs incurred in engaging in the activity
12 determined by utilization of uniform accounting standards.

13 (4) If a nonprofit organization as defined in Section 2(8) of this Act,
14 continues to engage in a commercial activity or proposes to begin engaging in
15 a commercial activity, the nonprofit organization shall:

16 (a) Prepare a competitive impact statement to be submitted to the
17 Commission, and

18 (b) Prepare a detailed request for proposal which will be widely
19 disseminated within segments of private enterprise which normally engage in
20 the commercial activity in order to obtain firm bids or proposals for the
21 activity requested. A reasonable time frame approved by the Commission shall
22 be given to private enterprise to submit bids or proposals, including time to
23 obtain financial supply commitments. Bids received from the request for
24 proposal shall be used in the preparation of the competitive impact statement.

25 (5) Such nonprofit organizations which engage in commercial activities
26 shall adopt and implement procedures to monitor their compliance with this
27 Act.

28

29 SECTION 5. Private Enterprise Review Commission - Members, Terms,
30 Duties.

31 (1) There is created the Private Enterprise Review Commission for the
32 purpose of reviewing and making determinations concerning state statutes,
33 state regulations, and practices of state agencies, institutions of higher
34 education or nonprofit organizations as defined in Section 2(8) of this Act,
35 relating to activities being or proposed to be engaged in by government

1 agencies, institutions of higher education or nonprofit organizations which
2 may be affected by this Act and to enforce the provisions of this Act against
3 violations.

4 (2) The Commission shall determine final uniform accounting standards
5 to be used for cost analysis in this Act in at least as strict a form as the
6 definition of uniform accounting standards in this Act.

7 (3) The Commission shall develop procedures to:

8 (a) Regulate competition by government agencies and ensure compliance
9 with this Act;

10 (b) Regulate competition by institutions of higher education and the
11 use of facilities of institutions of higher education by students, faculty,
12 staff, invited guests, and the general public and ensure compliance with this
13 Act; provided that the Commission shall develop, after consultation with
14 governing boards of institutions of higher education and recognized small
15 business organizations, guidelines for the provision of goods and services to
16 students, faculty, and staff of institutions of higher education and to the
17 invited guests of such students, faculty, and staff;

18 (c) Regulate competition by nonprofit organizations as defined in
19 Section 2(8) of this Act, and ensure compliance with this Act;

20 (d) Promptly hear and resolve complaints lodged under this section.

21 (4) The Commission shall report its activities, determinations, and any
22 proposed legislation to the Governor and members of the Legislature not later
23 than December first of each year.

24 (5) The Commission shall consist of nine (9) members including:

25 (a) Six (6) members from private enterprise who are owners or officers
26 of small businesses; the Governor, Speaker of the House and President of the
27 Senate shall each appoint two (2) members; and

28 (b) One (1) member who shall be a chief executive or administrative
29 officer of a government agency, who shall be appointed by the Governor; and

30 (c) One (1) member who shall be appointed from an institution of higher
31 education by the State Board of Higher Education; and

32 (d) One (1) member from the State Legislature who shall be appointed by
33 the Speaker of the House.

34 (e) The chairperson of the Commission shall be appointed by the
35 Governor from the members representing private enterprise.

1 (6) Terms of office for all members of the Commission shall be two (2)
2 years and members may be reappointed up to an additional four (4) terms. Each
3 member who is a state agency employee shall remain on the Commission until the
4 end of his term of office, but only so long as he remains a state agency
5 employee. A vacancy on the Commission shall be filled within sixty (60) days
6 of the date the vacancy occurred in the same manner as the original
7 appointment. Any member appointed to fill a vacancy occurring prior to the
8 expiration of the term for which his predecessor was appointed shall hold
9 office for the remainder of such term. Each member shall continue in office
10 until his successor is appointed and qualified.

11 (7) Five (5) members of the Commission shall constitute a quorum. No
12 action shall be taken by the Commission without the concurrence of at least
13 three (3) members.

14 (8) The Commission shall adopt, and may amend or rescind, such internal
15 management rules, subject to the Arkansas Administrative Procedure Act, as are
16 necessary to govern its proceedings. Members of the Commission shall serve
17 without compensation but shall receive the same reimbursement for actual
18 travel expenses and per diem for official Commission meetings as members of
19 the Legislature receive for legislative interim committees.

20 (9) Any person who believes that a government agency, institution of
21 higher education or nonprofit organization as defined in Section 2(8) of this
22 Act, has violated any provision of this Act may file a written complaint with
23 the Commission stating the grounds for such complaint. Upon receipt of such
24 complaint:

25 (a) The Commission shall immediately transmit a copy of such complaint
26 to the head of the government agency, institution of higher education or
27 nonprofit organization which is the subject of the alleged violation;

28 (b) The head of the government agency, institution of higher education
29 or nonprofit organization named in the complaint shall respond to the
30 Commission in writing within thirty (30) days after receipt of a complaint.
31 The government agency, institution of higher education or nonprofit
32 organization shall either admit or deny the allegations made in the complaint
33 and it shall indicate whether remedial action will be taken;

34 (c) Within thirty (30) days after receipt of the institution's
35 response, the Commission shall hold a public hearing on the complaint where

1 all parties are afforded an opportunity to present evidence unless the
2 remedial action agreed to be taken by the government agency, institution of
3 higher education or nonprofit organization is acceptable to the complainant
4 and the Commission. The Commission shall determine whether the government
5 agency, institution of higher education or nonprofit organization is
6 authorized to engage in the commercial activity or is in violation of the
7 provisions of this Act.

8 (i) If a government agency or institution of higher education is found
9 to be in violation of this Act, the Commission shall take the necessary steps
10 to terminate the commercial activity and require, if appropriate, the
11 government agency or institution of higher education to implement a contract
12 with the private sector for such activity;

13 (ii) If a nonprofit organization is found to be in violation of this
14 Act, such organization will be required to terminate the activity; in the case
15 where such organization continues to engage in the commercial activity, the
16 Commission shall take the necessary steps to seek the revocation of the tax
17 exempt status of such organization;

18 (iii) Notwithstanding the above, any nonprofit organization found to be
19 in violation of this Act shall be ineligible to participate in government
20 contracts.

21 (d) Within thirty (30) days after the public hearing, the Commission
22 shall issue a report of its findings to the complainant and the government
23 agency, institution of higher education or nonprofit organization.

24 (e) If the government agency or institution of higher education or
25 nonprofit organization's commercial activity is to be terminated, the action
26 shall take place within three (3) months of the Commission's report or under a
27 schedule set by the Commission.

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29 SECTION 6. Cease and Desist Orders.

30 If the government agency, institution of higher education or nonprofit
31 organization as defined in Section 2(8) of this Act, fails to comply with the
32 Commission's order, the Commission may file action in Circuit Court of Pulaski
33 County to restrain and enjoin the government agency, institution of higher
34 education or nonprofit organization from engaging in the activity.

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1 SECTION 7. Civil Right of Action.

2 A private enterprise that suffers economic loss as a result of a
3 government agency, institution of higher education or a nonprofit organization
4 as defined in Section 2(8) of this Act, violating this Act may bring a civil
5 action in the circuit court of the county where the private enterprise is
6 located for appropriate injunctive relief or damages, or both. Any damages
7 awarded in a cause of action brought pursuant to this Act shall be assessed
8 against the specific government agency, institution of higher education and
9 specifically assessed against its budget, or such nonprofit organization which
10 violated this Act. A private enterprise shall not have standing to seek
11 injunctive relief or damages or to challenge violations of this Act in the
12 courts of this State until the private enterprise has first made a complaint
13 to the Commission and has received the decision of the Commission.

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15 SECTION 8. State insurance pools and other insurance programs
16 administered by any agency of the State are not subject to the provisions of
17 this Act.

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19 SECTION 9. All provisions of this Act of a general and permanent nature
20 are amendatory to the Arkansas Code of 1987 Annotated and the Arkansas Code
21 Revision Commission shall incorporate the same in the Code.

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23 SECTION 10. If any provision of this Act or the application thereof to
24 any person or circumstance is held invalid, such invalidity shall not affect
25 other provisions or applications of the Act which can be given effect without
26 the invalid provision or application, and to this end the provisions of this
27 Act are declared to be severable.

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29 SECTION 11. All laws and parts of laws in conflict with this Act are
30 hereby repealed.

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32 SECTION 12. Effective Date.

33 This law shall become effective on August 1, 1991.

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