

Legislative Analysis



"GOVERNMENT COMPETITION AGAINST FREE ENTERPRISE" ACT

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House Bill 4453 (Substitute H-1)
Sponsor: Rep. Tom McMillin
Committee: Oversight, Reform, and Ethics

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A SUMMARY OF HOUSE BILL 4453 (PROPOSED SUBSTITUTE H-1)

House Bill 4453 (H-1) would create a new act to be known as the Government Competition against Free Enterprise Act. Generally speaking, a government agency would be prohibited from engaging in **commercial activity that involves the construction or rehabilitation of public works infrastructure** in competition against private enterprise. A description of the proposed new law follows.

Statement of legislative intent. The bill specifies that the legislature finds and declares all of the following:

- In the construction or rehabilitation of public works infrastructure, private enterprise is necessary to the health, welfare, and prosperity of this state.
- Government competes with private enterprise when it provides goods and services for the construction or rehabilitation of public works infrastructure beyond its government functions.
- This act is intended to protect economic opportunities for private enterprise against competition by government agencies and to enhance the efficient provision of goods and services for the construction or rehabilitation of public works infrastructure.

Commercial activity prohibited. The bill specifies that notwithstanding the provisions of any other act, rule, regulation, ordinance, or charter, a government agency would be prohibited from engaging in **commercial activity** in competition against private enterprise, including by intergovernmental or interagency agreement, and would be prohibited from funding, capitalizing, securing the indebtedness of, or leasing the obligations of, or subsidizing, any charitable or not-for-profit institution that would use the support to engage in commercial activity.

Under the bill, "**commercial activity**" would be defined to mean performing or providing or seeking to perform or provide or seeking to obtain any public funding to perform or provide goods or services for the construction or rehabilitation of public works infrastructure that can be obtained from private enterprise.

The phrase "**public works infrastructure**" is defined to mean roadways, streets, highways, bridges, sidewalks, non-motorized paths, parking lots, water supply and

distribution systems, tunnels, mass transportation facilities, sewers and sewage treatment facilities, wastewater treatment facilities, airports, railroads, reservoirs, dams, and any other improvements appurtenant thereto provided, the construction or rehabilitation of which is financed, in whole or in part, with public funds regardless of source.

Exceptions. The following functions or services would be exceptions under the act:

- Government functions;
- Necessary services (although the bill specifies that this would not preclude a government agency from utilizing private enterprise to provide necessary services);
- The development, management, and operation of state parks, historical monuments, and public hiking or equestrian trails;
- Essential services;
- Vital services;
- Goods, services, instruction, and other items provided to students and invited guests of universities, community college, or public school districts, (and, the bill specifies that this new law could not be used to privatize these functions for universities, community colleges, or public school districts);
- Routine or reactive maintenance of public works infrastructure traditionally performed by the government agency with its own forces and that did not constitute construction or rehabilitation of public works infrastructure.

No expansion of existing contracts. Under the bill, if commercial activity was being performed or provided by a government agency on the effective date of the bill in the event it was enacted into law, then that government agency could complete any existing individual contract or project, but it could not exceed, modify, expand, or extend the scope or duration of that contract or project. (However, the bill specifies that nothing in the proposed act would preclude a government agency from contracting with private enterprise to provide goods or services to the public.)

Injunctive relief in court; temporary; permanent; damages. The bill specifies that a cause of action could be initiated under the proposed new act, to enjoin a government agency from participating in commercial activity. A civil action for injunctive relief could request preliminary injunctive relief by alleging that a government agency was engaging, attempting to engage, or was about to engage in commercial activity. Upon receipt of a verified complaint showing the existence or imminent commencement of commercial activity, the court could issue a temporary restraining order. If a court issued such an order, it would also be required to order a preliminary hearing within 30 days from the date of the complaint.

The bill also requires that the court issue appropriate preliminary injunctive relief if, at the preliminary hearing, the plaintiff made a prima facie showing of both of the following: (a) the government agency was, or was planning to participate in commercial activity; and (b) that commercial activity resulted or would result in competition with private enterprise.

The plaintiff would *not* be required to show that the plaintiff had no adequate remedy at law, or that the plaintiff would suffer irreparable harm, or any other common law element applicable to obtaining temporary or preliminary injunctive relief.

Under the bill, if after a final hearing on the merits, the court found that a government agency was participating in commercial activity resulting in competition with private enterprise, then the court would be required to grant permanent injunctive relief, and also to issue orders as necessary to abate the government agency's commercial activity that was competing with private enterprise. The court could award actual damages including, but not limited to, costs, reasonable actual attorney fees, and all expenses and disbursements made by the plaintiff in bringing the action.

Standing. The bill specifies that a private enterprise in any way affected by the alleged government commercial activity, a trade union, a representative organization on behalf of a private enterprise, or any combination thereof, would have standing to bring a suit under the proposed act.

Other Definitions. The bill would define 10 terms, including "public works infrastructure," "commercial activity," "construction or rehabilitation of public works infrastructure," "essential services," "government agency," "government competition," "government functions," "necessary services," "private enterprise," and "vital services."

The term "*construction or rehabilitation of public works infrastructure*," is defined to include, but not be limited to, all new construction of new public works infrastructure, the reconstruction, in whole or in part, of existing public works infrastructure, the reconstruction to remediate, in whole or in part, components of any public works infrastructure, and pavement resurfacing.

"*Essential services*" is defined to mean those services that are essential for the public, including but not limited to water supply, sewers, garbage and trash removal, recycling, utilities, public transportation, and correctional facilities. Essential services do not include providing goods or services for the construction or rehabilitation of public works infrastructure.

"*Government agency*" or "*agency*" is defined to mean this state, a county, a city, a village, a township, or a public educational institution; a department, agency, commission, or subdivision of this state, a county, a city, a village, a township, or a public educational institution; or any entity formed and controlled by a government agency including, but not limited to, a construction manager engaged by an agency or entity. A government agency is not a private enterprise.

"*Government competition*" is defined to mean the provision of goods or services for the construction or rehabilitation of public works infrastructure by a government agency that are or can be offered by private enterprise.

"Government functions" is defined to mean those functions that are exclusively the prerogative of government, including, but not limited to, operation of the agency or department, fulfillment of the legal obligations of the agency, law enforcement, and the judicial system. Government functions do *not* include the providing of goods or services for the construction or rehabilitation of public works infrastructure that are traditionally, or are capable of, being contracted to private enterprise by competitive bid or other authorized method of procuring goods or services for the construction or rehabilitation of public works infrastructure from private enterprise.

"Necessary services" are defined to mean those services that are critical for human safety and health, including, but not limited to, fire departments, emergency services, and medical services. Necessary services do not include the providing of goods or services for the construction or rehabilitation of public works infrastructure.

"Private enterprise" is defined to mean an individual, firm, partnership, corporation, association, or any other legal entity engaging in the manufacturing, processing, sale, offering for sale, rental, leasing, delivery, dispensing, distributing, construction, or advertising of goods or services for profit in connection with the construction or rehabilitation of public works infrastructure.

"Vital services" is defined to mean those services that are normally available in a community, including, but not limited to, food stores, drugstores, child care, elder care, and telecommunications services. Vital services do not include providing goods or services for the construction or rehabilitation of public works.

FISCAL IMPACT:

Courts would face indeterminate costs due to the increased case load related to prosecuting claims against state and local governments. If the courts rule against the state or local governments, these governments would be liable for any court costs, attorney fees, or other expenses related to the case. Actual financial losses for state or local government would depend on the number of cases filed and the damages assessed.

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.