

2023 HOUSE INDUSTRY, BUSINESS AND LABOR

HB 1374

2023 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Room JW327C, State Capitol

HB 1374
01/23/2023

Relating to competition between the government and private industry; and to require a report to legislative management.

Chairman Louser called to order 9:00 AM

Members Present: Chairman Louser, Vice Chairman Ostlie, Representatives Boschee, Christy, Dakane, Johnson, Kasper, Koppelman, Ruby, Schauer, Thomas, Tveit, Wagner, Warrey.

Discussion Topics:

- Roughrider Industries
- BND
- Mill and Elevator
- Procurement not competition
- Strengthening government
- Secretary of State authority
- Fair market value
- WSI, private insurance
- In house
- Outsourcing

In favor:

Representative Nathan Toman, District 34 prime bill sponsor presenting a proposed amendment #17502

Opposed:

Sherry Neas, Director of Central Services of the ND Office of Management and Budget, #15333

John Schuh, Attorney, Public Service Commission #15138

Additional written testimony:

Dustin Gawrylow, ND Watchdog Network, #15245

Chairman Louser adjourned the hearing 9:35 AM

Diane Lillis, Committee Clerk

2023 HOUSE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee Room JW327C, State Capitol

HB 1374
01/30/2023

Relating to competition between the government and private industry; and to require a report to legislative management.

Chairman Louser called to order 3:28 PM

Members Present: Chairman Louser, Vice Chairman Ostlie, Representatives Boschee, Christy, Dakane, Johnson, Kasper, Koppelman, Ruby, Schauer, Thomas, Tveit, Wagner, Warrey.

Discussion Topics:

- Comparable costs

Representative Schauer moved a do not pass.
Representative Wagner seconded.

Roll Call Vote:

Representatives	Vote
Representative Scott Louser	Y
Representative Mitch Ostlie	Y
Representative Josh Boschee	Y
Representative Josh Christy	Y
Representative Hamida Dakane	Y
Representative Jorin Johnson	Y
Representative Jim Kasper	Y
Representative Ben Koppelman	AB
Representative Dan Ruby	Y
Representative Austen Schauer	Y
Representative Paul J. Thomas	Y
Representative Bill Tveit	Y
Representative Scott Wagner	Y
Representative Jonathan Warrey	y

Motion passed 13-0-1

Representative Schauer will carry the bill.

Chairman Louser adjourned the hearing 3:31 PM

Diane Lillis, Committee Clerk

REPORT OF STANDING COMMITTEE

HB 1374: Industry, Business and Labor Committee (Rep. Louser, Chairman)
recommends **DO NOT PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING).
HB 1374 was placed on the Eleventh order on the calendar.

TESTIMONY

HB 1374

House Bill 1374

Presented by: John M. Schuh
Public Service Commission

Before: House Industry, Business and Labor Committee
The Honorable Scott Louser, Chairman

Date: January 23, 2023

TESTIMONY

Mister Chairman and committee members, I am John Schuh. The Commission asked me to provide some agency comments regarding HB 1374.

HB 1374 creates a new section under chapter 49-02 which allows an individual directly affected by competition with a state agency or institution to present a case to the Public Service Commission. Then, if determined to be in competition with private enterprise, the Commission will direct the state institution to terminate the activity. The Commission has some conflict of laws concerns.

In its application, the Commission requests that a written decision not be limited to twenty days. Depending on the complexity of the issues and financials, the valuation of services and products may be limited by what is provided by the parties on record. This may result in a need, and resources for the Commission, to conduct an external investigation into cost of services to aid in its evaluation.

Another concern is that the legislature appears to delegate authority to the Commission to effectively overturn or negate legislated programs and appropriations from other departments or agencies. The Commission would also recommend that the committee consider having the Commission instead provide

a written report or findings to legislative management to provide a basis for future legislative action to correct the improper competition.

Mister Chairman, this concludes our testimony. I will be happy to answer any questions.

HB 1374 – Testimony by Dustin Gawrylow (Lobbyist #266) North Dakota Watchdog Network

Mr. Chairman and members of the committee,

I would like to thank Representative Toman for reintroducing this bill once again, I think this is the 4th time it has been put forward. (Previous: 2021 – HB 1169, 2019 – HB 1217, 2017 – HB 1162)

The concept of this bill is simple: to create an evaluation process for when government competes with private industry. It is based on ALEC model language.

It is a perennial bill that promptly gets ignored and tossed aside, or converted into an optional study, then not actually studied.

There is simply not the political will among the majority party to actually look at all the ways the state and local government – despite the fact the majority party likes to give lip service to the idea of getting government out of the way of business – but when it comes down to it, we all know this body is more interested in picking winners and losers than adhering to the free market philosophy that is so often espoused.

I urge a DO PASS recommendation, knowing full well that any law trying to get government out of way of private industry does not have a chance of passage.

Thank you for your time.

ALEC Government Services Competition Act

Summary

This model bill provides a general model for state government privatization efforts. States should adapt this model to meet their own particular needs and circumstances regarding privatization. It prohibits state agencies, institutions, or political subdivisions supported in whole or part by any state revenues, from engaging in any activity which is in competition with private enterprise unless the agency, institution, or political subdivision can demonstrate that there is an overriding or compelling public interest served by the state's provision of the service. It also sets standards for state agencies, authorized to engage in an activity in competition with private enterprise, to follow.

Model Legislation

{Title, enacting clause, etc}

Section 1.

This Act may be cited as the Government Services Competition Act.

Section 2. {Definitions.}

An Act relating to activities in competition with private enterprise.

(A) As used in this Act, an "activity in competition with private enterprise" means an activity which:

- (1) Is undertaken by a state agency, institution, or political subdivision that is supported in whole or in part from any state revenues; and
- (2) Can be performed by an existing private enterprise situated within the State.

Section 3. {Legislative Findings.}

Except as otherwise provided in this Act, and notwithstanding any other provisions of law, it shall be the policy that no state agency, institution, or political subdivision supported in whole or part by any state revenues shall engage in any activity which is in competition with private enterprise unless the agency, institution, or political subdivision can demonstrate that there is an overriding or compelling public interest served by the state's provision of the service. Examples of activities provided by the state which may carry an overriding or compelling public interest include certain aspects of the criminal justice system; activities and services of various kinds provided by educational institutions; programs of the state development finance authority; and health services such as those provided by state owned or operated hospitals.

Section 4. The commissioner of the "public protection and regulation agency" [insert appropriate state agency] shall determine, upon petition by any person directly affected by competition with a state agency, institution, or political

subdivision whether the agency, institution, or political subdivision is 'in competition with private enterprise.

Section 5. If, after a hearing at which all parties have been afforded an opportunity to present evidence, the commissioner finds that the agency, institution, or political subdivision is engaged in an activity in competition with private enterprise, he/she shall direct the agency, institution, or political subdivision to terminate the activity unless he/she also finds that:

(A) Cessation of the activity by the agency, institution, or political subdivision will create a bona fide emergency;

(B) The cost of the service from private enterprise will be at least 10 percent greater than the cost of the services provided by government;

(C) Private enterprise cannot adequately provide the needed service; or

(D) Cessation of the activity will cause irreparable harm or loss of substantial invested funds to the state.

Section 6. The commissioner shall submit a decision along with written findings within 20 days decision to authorize or terminate the activity of the agency or institution and shall make copies available to all interested parties.

Section 7. An appeal from an order of the commissioner may be taken to the circuit court where the petitioner does business. Such appeal shall not be de novo. The petitioner, if unsuccessful, shall pay the costs of the hearing and appeal incurred by the state, if any, including reasonable attorney's fees.

Section 8. Activities of a state agency, institution, or political subdivision which were undertaken prior to, and are in operation as of [insert date], and which are found under this Act to be in competition with private enterprise.

Section 6. The commissioner shall submit a decision along with written findings within 20 days decision to authorize or terminate the activity of the agency or institution and shall make copies available to all interested parties.

Section 7. An appeal from an order of the commissioner may be taken to the circuit court where the petitioner does business. Such appeal shall not be de nova. The petitioner, if unsuccessful, shall pay the costs of the hearing and appeal incurred by the state, if any, including reasonable attorney's fees.

Section 8. Activities of a state agency, institution, or political subdivision which were undertaken prior to, and are in operation as of [insert date], and which are found under this Act to be in competition with private enterprise and ordered terminated, may continue until the expiration date of any contract that would be adversely affected by the cessation of the activity.

Section 9. If a state agency, institution, or political subdivision of the state demonstrates an overriding or compelling public interest for the provision of any

activity in competition with private enterprise, it nevertheless shall be the policy of the state to contract with the private sector for the provision of that activity insofar as it is feasible and in the public interest.

Section 10. If a state agency, institution, or political subdivision is authorized to engage in an activity in competition with private enterprise, it shall be the policy of the state to set a fee or charge a price for that activity which shall include consideration of:

(A) The fair market value of the activity; and

(B) The actual costs incurred in engaging in the activity, including the costs and value of labor, real estate, equipment, overhead, and other related expenses.

Insofar as appropriate or deemed expedient in order to serve the public interest, fees or prices charged for public activities shall reflect the fair market value or the actual costs incurred.

Section 11. No later than [insert date) of each odd numbered year, the secretary shall submit a report on government competition with private enterprise to the legislature and the governor. The report shall include recommendations concerning whether the competitive government activities identified and reviewed by the secretary should be continued.

Section 12. {Severability clause.}

Section 13. {Repealer clause.}

Section 14. {Effective date.}

Reapproved by the ALEC Board of Directors on January 29, 2013



Testimony in Opposition of
House Bill No. 1374
**House Industry, Business,
and Labor Committee**
January 23, 2023

TESTIMONY OF

Sherry Neas, Director, Central Service Division

Good morning, Chairman Louser and members of the committee. My name is Sherry Neas, Central Services Division Director, and Chief Procurement Officer, with the Office of Management and Budget (OMB). OMB is opposed to HB 1374, as introduced.

Similar bills were introduced in 2017 (HB 1162), 2019 (HB 1217), and 2021 (HB 1169) which OMB also opposed.

The bill introduced this session does provide exceptions for the State Mill and Elevator, Bank of North Dakota, and Department of Correction and Rehabilitation.

The broad language in HB 1374 would allow anyone to petition that a government agency is competing with the private sector. This creates the potential for many petitions that could result in substantial workload for the Public Service Commission and interruption of state agency operations.

OMB is the administrative agency for state purchasing practices. State procurement laws facilitate a competitive process for vendors to compete for state contracts. Procurement laws also allow government agencies and correctional institutions to obtain needed goods and services directly from other government agencies and correctional institutions, this is known as using government sources of supply. There are several government agencies that have statutory authority to perform functions or provide goods and services that also exist in the private sector.

Government sources of supply may be established for efficiency, security or a specific mission of the agency. For example, OMB has statutory authority to operate a central mailroom, central supply, printing operations and surplus property operation. There are several other government agencies and correctional institutions that perform functions or provide goods and services also provided by private sector individuals and businesses. In some cases, government entities have the option to use the government source or conduct a procurement process to select a private sector provider.

This bill describes an administrative process whereby the Public Service Commission determines whether a government entity is in competition with the private sector and determines whether or not the government entity can continue the activity. OMB has concerns regarding how the administrative process described in this bill can override statutory authority

for government agencies and correctional institutions to provide the goods or services being petitioned.

OMB also has concerns with the section of the bill related to Public Service Commission authority establishing prices for other government entities. Page 2, lines 10-12 of the bill states, "If a state agency or institution is authorized to engage in an activity in competition with private enterprise, the commission shall set a fee for that activity to reflect the fair market value and the actual costs incurred."

Involving the Public Service Commission in establishing fees for government entities that provide goods and services would create a substantial workload increase for the Public Service Commission, and likely reduce the efficiencies of government programs.

Using OMB as an example, the laws that authorize OMB to operate a surplus property operation require OMB to transfer property at fair market value. OMB operates surplus property and has subject matter expertise in that area. Therefore, OMB would be the logical entity to establish rates for that program.

Existing law emphasizes opportunities for private sector entities to compete for government contracts, while also authorizing purchases directly from existing government agencies and correctional institutions.

In conclusion, OMB opposes the broad language of HB 1374 which could conflict with existing laws, disrupt existing government operations, and potentially result in substantial workload increase for the Public Service Commission and other government entities with existing authority for their operations.

OMB would welcome the opportunity to work with this committee and the bill sponsors on an amendment that addresses our concerns to exempt state agencies and institutions with existing authority from the process described in this bill.

Mr. Chairman and members of the committee, this concludes my testimony, and I would welcome any questions.

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Title.

Prepared by the Legislative Council staff for
Representative Toman
January 20, 2023

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1374

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact a new section to chapter 54-09 of the North Dakota Century Code, relating to competition between the government and private industry; and to provide for a legislative management report.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 54-09 of the North Dakota Century Code is created and enacted as follows:

Government - Private business - Competition - Report to legislative management.

1. Upon petition by an individual directly affected by competition with a state agency or institution, the secretary of state shall determine whether the agency or institution is in competition with private enterprise.
2. If the secretary of state determines a state agency or institution is engaged in competition with private enterprise after a hearing during which all impacted parties had an opportunity to present evidence, the secretary of state shall direct the state agency or institution to terminate the activity unless:
 - a. Cessation of the activity will create an emergency;
 - b. The cost of providing the service through private enterprise will cost at least ten percent more than the same service provided by a state agency or institution;
 - c. Private enterprise cannot adequately provide the service; or
 - d. Cessation of the activity will cause irreparable harm or loss of substantial invested funds.
3. The secretary of state shall submit a written decision to the parties within twenty days of the hearing.
4. A petitioner may file an appeal of a decision made by the secretary of state with the district court. If the appeal is unsuccessful, the petitioner shall pay the costs of the hearing and appeal incurred by the state including reasonable attorney's fees.
5. Any activity or service provided by a state agency or institution before the effective date of this Act which is found to be in competition with private enterprise may continue until the expiration of any contract that would be affected adversely by the cessation of the activity.

6. Unless a state agency or institution demonstrates a compelling public interest for an activity to be in competition with private enterprise, it must be the policy of the state to contract with private enterprise. If a state agency or institution is authorized to engage in an activity in competition with private enterprise, the secretary of state shall set a fee for that activity to reflect the fair market value and the actual costs incurred.
7. This section does not apply to the Bank of North Dakota, the state mill and elevator, or the department of corrections and rehabilitation.
8. The secretary of state shall report to the legislative management by March fifteenth of each even-numbered year on the status of petitions received under this section."

Renumber accordingly