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SENATE BILL 1139

43RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 1997

INTRODUCED BY

ROMAN M. MAES III

AN ACT

RELATING TO UNFAIR COMPETITION; ENACTING THE UNFAIR COMPETITION ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

Section 1. SHORT TITLE. -- This act may be cited as the "Unfair Competition Act".

Section 2. LEGISLATIVE FINDINGS AND PURPOSE. -- The legislature finds that the growth of private enterprise is essential to the health, welfare and prosperity of the people of New Mexico, and that government and educational institutions compete with the private sector when those institutions provide certain goods and services to the public. Recognizing this problem, it is the intent of the legislature and the purpose of the Unfair Competition Act to provide additional economic opportunities to private industry and to regulate competition by

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1 government agencies and educational institutions. The  
2 legislature intends that, with limited exceptions, if government  
3 agencies and educational institutions engage in sales of goods  
4 or services at retail, such sales shall not be for less than the  
5 costs that would be borne by persons making similar sales in the  
6 private sector. It is the further intent of the legislature to  
7 allow a remedy to those in the private sector adversely affected  
8 or disadvantaged by competition from government, educational  
9 institutions or nonprofit organizations.

10 Section 3. DEFINITIONS. -- As used in the Unfair Competition  
11 Act:

12 A. "commercial activity" means a government  
13 agency's, educational institutions's or nonprofit organization's  
14 performing services or providing goods, including manufacturing,  
15 processing, managing, selling or offering for sale, renting,  
16 leasing, delivering, dispensing, distributing or advertising, in  
17 whole or in part, goods or services to the public that are also  
18 offered by private enterprise;

19 B. "competitive impact statement" means a cost  
20 analysis using uniform accounting standards to determine the  
21 total cost of the commercial activity. The cost analysis shall  
22 include a comparison of the impact of the commercial activity on  
23 state and local tax revenues. The private enterprise cost  
24 figures in the cost analysis shall be determined by obtaining  
25 one or more bids for performing or providing the commercial

1 activity;

2 C. "educational institution" means a public post-  
3 secondary educational institution;

4 D. "government agency" means a branch, department,  
5 authority, board, commission, institution, board or other agency  
6 of the state or any of its political subdivisions;

7 E. "invited guest" means a person who enters onto a  
8 campus of an educational institution for an educational,  
9 research or public service activity and not primarily to  
10 purchase or receive goods and services not related to the  
11 educational, research or public service activity;

12 F. "nonprofit organization" means an organization  
13 that is incorporated under the provisions of the Nonprofit  
14 Corporation Act and that has been granted a tax exemption by the  
15 internal revenue service;

16 G. "person" means an individual, firm, corporation,  
17 partnership, joint venture or similar business;

18 H. "private enterprise" means a person engaging in  
19 the manufacturing, processing, sale, offering for sale, rental,  
20 leasing, delivery, dispensing, distributing or advertising of  
21 goods or services for profit;

22 I. "public service" means an activity normally and  
23 generally associated with educational institutions in this  
24 state, a purpose or significant result of which is not to engage  
25 in competition with private enterprise;

1 J. "student" means a person seeking a degree or a  
2 certificate from an educational institution; and

3 K. "uniform accounting standards" means an  
4 accounting method that allows government agencies and  
5 educational institutions to identify the true and total cost of  
6 supplying goods and services in the same manner as private  
7 enterprise would identify true and total costs, including the  
8 following:

9 (1) labor expenses, including direct wage and  
10 salary costs, training costs, overtime and supervisory overhead;

11 (2) total employee fringe benefits and other  
12 personnel expenses;

13 (3) operating costs, including vehicle  
14 maintenance and repair, marketing, advertising and other sales  
15 expenses, office expenses, billing and insurance expenses;

16 (4) real estate and equipment costs, debt  
17 service costs and a proportionate amount of other agency  
18 overhead and capital expenses, including vehicle depreciation  
19 and depreciation of other fixed assets such as buildings and  
20 equipment;

21 (5) contract management costs;

22 (6) the imputed tax impact of the activity if  
23 such entity were required to pay federal, state and local taxes;  
24 and

25 (7) any other cost particular to the business

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1 or industry supplying the goods or services.

2 Section 4. GOVERNMENT COMPETITION WITH PRIVATE ENTERPRISE  
3 PROHIBITED-- EXCEPTIONS. --

4 A. A government agency shall not start or expand any  
5 commercial activity for public use if the goods or services can  
6 be procured from private enterprise through ordinary business  
7 channels.

8 B. A government agency may perform or provide a  
9 commercial activity when:

10 (1) no private enterprise source is capable of  
11 providing the needed goods or services; provided the efforts  
12 made to solicit private enterprise sources are documented and  
13 made available to the public upon request;

14 (2) the activity is inherently related to the  
15 state's defense; or

16 (3) the agency can provide the commercial  
17 activity to government agencies or educational institutions on a  
18 continuing basis at a lower total cost than if the commercial  
19 activity were obtained from private enterprise as determined by  
20 cost comparisons outlined in the competitive impact statement  
21 relating to the specific commercial activity.

22 C. If a government agency is authorized by law to  
23 engage in a commercial activity, the government agency shall set  
24 a fee or charge a price for that commercial activity that  
25 includes the true and total cost related to engaging in the

1 commercial activity, including:

- 2 (1) the fair market value of the activity; and  
3 (2) the direct and indirect costs incurred in  
4 engaging in the commercial activity determined by use of uniform  
5 accounting standards.

6 D. If a government agency starts or expands a  
7 commercial activity, the government agency shall:

- 8 (1) prepare a competitive impact statement; and  
9 (2) prepare a detailed request for proposal  
10 that is widely disseminated within segments of the private  
11 enterprise that normally engage in the commercial activity to  
12 obtain firm bids or proposals for the commercial activity  
13 requested. A reasonable time frame approved by the state  
14 purchasing agent shall be given to private enterprise to submit  
15 bids or proposals, including time to obtain financial supply  
16 commitments. Bids received from the request for proposal shall  
17 be used in the preparation of the competitive impact statement.

18 E. The general services department shall adopt and  
19 implement regulations and procedures to implement the provisions  
20 of and monitor government agency compliance with the Unfair  
21 Competition Act.

22 F. Unless specifically authorized by law,  
23 educational institutions shall not:

- 24 (1) engage in commercial activities for  
25 students, faculty, staff, invited guests or the general public

1 that can be procured from private enterprise through ordinary  
2 business channels, unless the commercial activity:

3 (a) requires the participation of  
4 students as a part of an educational program to obtain a degree  
5 or certificate;

6 (b) is a recognized and integral part of  
7 a teaching, educational or research program leading to a degree  
8 or certificate; or

9 (c) consists of on-campus activities,  
10 including: 1) food service; 2) student housing; 3) sponsoring  
11 cultural and athletic events; 4) providing facilities for  
12 recreation to students, faculty and staff; 5) daycare services  
13 for children of faculty, staff and students; 6) sales of course  
14 books and course-related supplies, excluding electronic  
15 equipment or devices and peripherals and software; and 7) sale  
16 of a limited and reasonable quantity of personal items bearing  
17 the institution's insignia, which are incidental to the sales of  
18 textbooks and other items permitted in Item 6) of this  
19 subparagraph;

20 (2) submit competitive bidding for a commercial  
21 activity unless the commercial activity is performed by students  
22 and is a recognized and integral part of a teaching, education  
23 or research program leading to a degree or certificate from the  
24 educational institution. Such bid shall fairly and fully  
25 include all direct and indirect costs using uniform accounting

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1 standards, unless the funding source provides for or requires  
2 all bidders to use a specific procedure or formula for  
3 allocating costs;

4 (3) engage in commercial activities for or  
5 through another government agency, including an  
6 intergovernmental agency agreement; or

7 (4) dispose by sale of commercial activity and  
8 byproducts that are part of research or instruction conducted by  
9 students and faculty of the educational institution and leading  
10 to a student degree or certificate unless the sale is an  
11 integral part of the particular research project or  
12 instructional program or there is no other practical way of  
13 disposing of the commercial activity or byproduct and if the  
14 commercial activity or byproduct is sold at fair market value  
15 using uniform accounting standards.

16 G. In determining whether the provision of a  
17 commercial activity is directly related to teaching or  
18 educational or research programs leading to a degree or  
19 certificate, the following criteria shall be considered:

20 (1) whether the provision of the commercial  
21 activity is necessary for the student to pursue a degree or  
22 certificate or for faculty or staff to engage in research or  
23 teaching;

24 (2) whether the commercial activity is a  
25 specialty good or service not generally available to the public;

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1 (3) whether the price charged for the  
2 commercial activity reflects the direct and indirect costs and  
3 overhead costs of providing the commercial activity and the  
4 price in the private marketplace; and

5 (4) whether measures have been taken to ensure  
6 that the provision of the commercial activity is only for  
7 students, faculty or staff and not the general public.

8 Section 6. NONPROFIT COMPETITION WITH PRIVATE ENTERPRISE  
9 PROHIBITED-- EXCEPTIONS. --

10 A. A nonprofit organization shall not engage in a  
11 commercial activity in competition with for-profit business in  
12 the state unless the commercial activity of the nonprofit  
13 organization pays all the taxes and fees that are applicable to  
14 a corresponding for-profit business.

15 B. A nonprofit organization is authorized to perform  
16 or provide a commercial activity when:

17 (1) the activity is specifically authorized by  
18 statute;

19 (2) the activity is not regularly carried on;  
20 or

21 (3) no private enterprise source is capable of  
22 providing the commercial activity. In such case, the efforts  
23 made to solicit private enterprise sources shall be documented  
24 and made available to the public upon request.

25 C. If a nonprofit organization is authorized by law

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1 to engage in a commercial activity, the organization shall set a  
2 fee or charge a price for the commercial activity that includes  
3 the true and total cost related to engaging in the commercial  
4 activity by the nonprofit organization, including:

- 5 (1) the fair market value of the activity; and
- 6 (2) the direct and indirect cost incurred in  
7 engaging in the commercial activity determined by use of uniform  
8 accounting standards.

9 D. If a nonprofit organization proposes to begin  
10 engaging in a commercial activity, the nonprofit organization  
11 shall:

- 12 (1) prepare a competitive impact statement; and
- 13 (2) prepare a detailed request for proposal  
14 that is widely disseminated within segments of private  
15 enterprise that normally engage in the commercial activity in  
16 order to obtain firm bids or proposals for the commercial  
17 activity requested. A reasonable time shall be given to private  
18 enterprise to submit bids or proposals, including time to obtain  
19 financial supply commitments. Bids received from the request  
20 for proposal shall be used in the preparation of the competitive  
21 impact statement.

22 E. Nonprofit organizations that engage in commercial  
23 activities shall adopt and implement procedures to monitor their  
24 compliance with the Unfair Competition Act.

25 Section 7. INJUNCTION. -- Two or more private enterprises

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1 organized and operating under the laws of New Mexico may file an  
2 action in district court to restrain and enjoin a government  
3 agency or nonprofit organization from starting, expanding or  
4 engaging, as applicable, in a commercial activity that violates  
5 the provisions of the Unfair Competition Act.

6 Section 8. SEVERABILITY. -- If any part or application of  
7 the Unfair Competition Act is held invalid, the remainder or its  
8 application to other situations or persons shall not be  
9 affected.

10 Section 9. EFFECTIVE DATE. -- The effective date of the  
11 provisions of this act is July 1, 1997.