

**State of Arizona  
Office  
of the  
Auditor General**

**PERFORMANCE AUDIT**

**PRIVATE  
ENTERPRISE REVIEW  
BOARD**

**Report to the Arizona Legislature  
By Douglas R. Norton  
Auditor General  
July 1998  
Report No. 98-13**



DOUGLAS R. NORTON, CPA  
AUDITOR GENERAL

STATE OF ARIZONA  
OFFICE OF THE  
AUDITOR GENERAL

DEBRA K. DAVENPORT, CPA  
DEPUTY AUDITOR GENERAL

July 22, 1998

Members of the Arizona Legislature

The Honorable Jane Dee Hull, Governor

Mr. Hank Bried, Chair  
Private Enterprise Review Board

Transmitted herewith is a report of the Auditor General, A Performance Audit of the Private Enterprise Review Board. This report is in response to a May 27, 1998, resolution of the Joint Legislative Audit Committee. The performance audit was conducted as part of the Sunset review set forth in A.R.S. §§41-2951 through 41-2957.

The report addresses the Private Enterprise Review Board's viability and impact on state government services. PERB was established in 1983 to provide a mechanism by which an independent body could review state government functions that compete with private enterprise. PERB's ten volunteer members primarily review complaints about state agencies competing with private enterprise and solicit and evaluate written notices of interest from the private sector to perform functions that are currently performed by a state agency. This is the second audit the Auditor General has conducted of PERB in two years. In 1996, the Auditor General reported that PERB's impact was limited by the small number of cases it handled. We suggested that this may have been due to limited public exposure and lack of adequate procedures and staff. We recommended that the Legislature extend PERB's function for three to five years to allow the Board sufficient time to demonstrate its viability and impact on state government services.

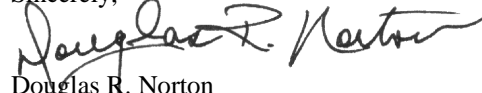
Despite efforts to address recommendations made in the Auditor General's 1996 report, the continued need for PERB remains questionable. Although PERB has made efforts to increase public awareness of its function, it has received and conducted hearings on only five cases within its purview in the last two years. Of those cases, PERB's activities appear to have positively impacted only one area of state government. Additionally, since the last Auditor General's report, other entities have been established in state government that could possibly perform the same functions as PERB.

As outlined in its response, the Board disagrees with all of the recommendations outlined in the findings. In particular, the Board does not accept the Auditor General's conclusion regarding the continued need for its function based on the criteria established in the report. Additionally, the Board does not believe additional procedures are needed to assist it in carrying out its functions. Finally, although the Board disagrees with the recommendation to develop a protocol to work with the competitive Government Program within the Governor's Office, it indicated that it would seek the program's cooperation to assist it in obtaining cost analyses from agencies.

My staff and I will be pleased to discuss or clarify items in the report.

This report will be released to the public on July 23, 1998.

Sincerely,

  
Douglas R. Norton  
Auditor General

Enclosure

# SUMMARY

The Office of the Auditor General has conducted a performance audit and Sunset review of the Private Enterprise Review Board, pursuant to a May 27, 1997, resolution of the Joint Legislative Audit Committee. The audit was conducted as part of the Sunset review set forth in Arizona Revised Statutes (A.R.S.) §§41-2951 through 41-2957.

The Legislature established the Private Enterprise Review Board (PERB) in 1983 to provide a mechanism by which an independent body could review state government functions that compete with private enterprise. As such, PERB performs four basic functions:

- First, PERB reviews complaints about state agencies competing with private enterprise in violation of statutes restricting competition.
- Second, PERB is empowered to solicit and evaluate written notices of interest, called petitions of interest, from the private sector to perform functions that are currently performed by a state agency.
- Third, PERB may evaluate and recommend changes to statutes that exempt certain agencies from the State's competition laws.
- Finally, PERB may also evaluate opportunities for the State to contract-out certain functions to private enterprise.

PERB's primary role in these areas is to hear testimony from both the private sector and state agency representatives and then report its findings and recommendations to the Legislature and the Governor.

PERB consists of ten volunteer members, primarily from the private sector, and four non-voting, advisory members from the Legislature. In addition to its volunteer members, PERB is supported by a part-time staff person from the Governor's Office for Excellence in Government (OEG). In return, the OEG receives a \$55,000 appropriation.

**Need for Private Enterprise  
Review Board Still Not  
Demonstrated  
(See pages 5 through 11)**

Although PERB has taken steps to address deficiencies noted in the 1996 Auditor General review of the Board (see Report No. 96-3), the need for PERB has still not been demon-

strated. The Legislature should consider sunseting PERB due to the small number of issues it continues to receive and its limited demonstrated impact.

At the time of the last audit, PERB was also handling few cases. The 1996 audit noted this was possibly due to the fact that PERB had experienced a period in which it had not met, and that it had insufficient staff support. Because at the time of the audit PERB had recently become much more active and because representatives from both state agencies and the business community indicated a need for a forum such as PERB, the 1996 audit recommended that PERB be given three to five years to demonstrate its viability and impact on state government. Following the audit, the Legislature continued PERB for two years.

Since the 1996 audit, PERB has taken action to increase public awareness of its function. However, despite its efforts PERB has received and conducted hearings on only five cases within its purview. Of those five cases considered, PERB's activities appear to have positively impacted only one area of state government. Specifically, a petition of interest from the private sector resulted in the Arizona Department of Transportation contracting-out for a service that the Department previously performed. PERB also addressed two complaints that were outside of its jurisdiction involving a community college and the Department of Economic Security.

If the Legislature chooses not to sunset PERB, changes are required to clarify the extent of its involvement in unfair competition complaints and petitions of interest. Although PERB's statutorily established role is to review complaints and petitions and report its findings and recommendations to the Legislature and Governor, PERB appears to prolong its involvement in certain cases. For example, in the petition of interest involving the Arizona Department of Transportation, PERB extended its involvement well beyond the completion of its investigation by continuing to monitor the case for several months. To ensure that PERB's involvement in a case does not exceed its statutory authority, PERB should better define when its role in a case ends.

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# INTRODUCTION AND BACKGROUND

The Office of the Auditor General has conducted a performance audit and Sunset review of the Private Enterprise Review Board (PERB), pursuant to a May 27, 1997, resolution of the Joint Legislative Audit Committee. This audit was conducted as part of the Sunset review set forth in Arizona Revised Statutes (A.R.S.) §§41-2951 through 41-2957.

## **PERB Established as a Forum to Consider Competitive Issues**

The Legislature created PERB in 1983 to provide a mechanism by which an independent body could review state government functions that compete with private enterprise. PERB was established as a board of voluntary members primarily from the private sector. Although only mandated to meet four times each year, PERB typically conducts monthly meetings. In addition, PERB members volunteer time to review materials, attend legislative hearings, and participate in other Board activities.

In its capacity as a review panel, PERB has the responsibility to consider:

- **Unfair competition complaints**—PERB is mandated to hear complaints about state agencies competing with the private sector in violation of the State’s competition laws and to evaluate if a violation has occurred. PERB may also hear unfair competition complaints against a university or community college but only after the appropriate governing board (either the Arizona Board of Regents or State Board of Directors for Community Colleges) has addressed the complaint and rendered a decision.
- **Petitions of interest**—PERB shall solicit and evaluate written notices of interest, called petitions of interest, from the private sector to perform functions that are currently performed by a state agency. The authority to solicit and evaluate petitions of interest ties PERB closely to the Governor’s Office for Excellence in Government’s (OEG) Competitive Government Program, which looks at areas of state government that could potentially be privatized. As part of this process, PERB can refer petitions of interest to the Competitive Government Program.
- **Competition exemptions**—PERB may evaluate and recommend changes to statutes that exempt certain agencies from the State’s competition laws. State agencies or activities that are exempt from competition laws include Arizona Correctional Industries, the Arizona Office of Tourism, the Department of Public Safety, and the Department of Transportation’s *Arizona Highways* magazine.

- **Opportunities to contract state functions**—PERB may also evaluate opportunities for the State to contract out certain functions to private enterprise.

PERB's primary role in these areas is to hear testimony from both the private sector and state agency representatives and then report its findings and recommendations to the Legislature and the Governor.

## **Organization and Staffing**

PERB is comprised of ten volunteer members who serve two-year terms.<sup>1</sup> As required by statute, six members are private sector representatives, one is a state agency representative, one is a representative of the community colleges, and one is a representative of the Board of Regents. Further, a new member was added through 1996 legislation to represent state employees covered by the merit system. In addition, the Board contains four non-voting, advisory members from the Legislature, including two from each house.

In addition to its volunteer members, PERB is supported by a part-time staff person. Since its inception, responsibility for staffing PERB has shifted from the Department of Administration to the Legislative Council to the Department of Commerce, and finally, to the OEG. Specifically, since July 1996, an OEG employee is dedicated half-time to PERB staffing duties such as receiving the private sector's complaints and petitions of interest, compiling and posting the Board's meeting agendas, and attending PERB meetings. In return, the OEG receives a \$55,000 appropriation.

## **Follow-up to 1996 Auditor General Report**

As part of the current audit, concerns identified in the Auditor General's 1996 performance audit of PERB (Report No. 96-3) were reviewed. The 1996 report recommended that the Legislature extend PERB's function for only three to five years to allow the Board some time to demonstrate its viability and impact on state government services. Specifically, the 1996 report found that PERB's effectiveness was hindered by limited public exposure and lack of adequate procedures and staff, and recommended that PERB adopt procedures to guide its review process and have sufficient staff available to assist it in establishing procedures, maintaining records, and increasing public awareness.

Although PERB has made several improvements based on the Auditor General's recommendations, the continued need for PERB's function is questionable due to the small num-

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<sup>1</sup> Of the ten members, four are appointed by the Governor, two each are appointed by the Speaker of the House and President of the Senate, and one each is appointed by the State Board of Directors for Community Colleges and the Arizona Board of Regents.



ber of cases it receives, its minimal impact on state government operations, and the fact that other entities can fulfill PERB's duties (see Finding I, pages 5 through 11).

## **Scope and Methodology**

This audit focused primarily on the need for PERB, addressing its viability and its impact on state government.

The methodologies used to conduct this audit included:

- Observing three PERB meetings and reviewing Board minutes dating back to March 1996;
- Interviewing seven PERB members and three of the four legislators serving as advisory members;
- Reviewing the seven cases PERB considered since May 1996;
- Reviewing other PERB records including its procedures and marketing efforts; and
- Interviewing members of the private sector who filed complaints or petitions of interest with PERB, along with state agency representatives required to respond to such issues.

This report presents one finding along with recommendations, addressing the need for PERB and the function it provides.

This audit was conducted in accordance with government auditing standards.

The Auditor General and staff express appreciation to the PERB chairman, Board members, and the staff serving PERB for their cooperation and assistance throughout the audit.

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# **FINDING I**

## **NEED FOR PRIVATE ENTERPRISE REVIEW BOARD STILL NOT DEMONSTRATED**

Despite efforts to address recommendations made in the Auditor General's 1996 report, it is not clear that PERB's functions are needed. At the time of the last audit, PERB had recently revitalized its role and it was determined that more time was needed to clearly demonstrate its viability and impact on state government services. However, in the two years since, there continue to be questions regarding the need for PERB due to the small number of issues brought before it and its limited demonstrated impact. Further, even if the function is still felt to be necessary, there are other entities that could possibly perform the function. Therefore, the Legislature should consider sunseting PERB. However, if continued, PERB should take steps to ensure its involvement in cases does not extend beyond its statutory authority.

### **1996 Audit Recommended Additional Time to Demonstrate Need for PERB**

The Auditor General's 1996 Sunset review focused primarily on PERB's ability to hear complaints regarding agencies' competition with private enterprise, and to evaluate opportunities to contract-out state functions. The report addressed the potential role PERB could play in providing a forum between business and state policymakers. At that time, the Auditor General reported that representatives from both the private sector and state agencies perceived a need for a forum where private business could bring competition complaints, since no mechanism existed within state government to perform such a function. PERB was also identified as serving as a source of public input into privatizing state functions. These perceptions were key factors in determining the continued need for PERB, since the amount of cases brought before PERB at that time (five cases in two years) did not demonstrate a clear need for such a forum. However, the 1996 audit also took into consideration that the low number of cases heard might be due to the fact that PERB had experienced a period of inactivity under former board members, and lacked adequate staff support. Recognizing that PERB had become much more active shortly before the 1996 audit, the report recommended that the Legislature consider extending PERB's function for a period of three to five years, thus allowing it sufficient time to demonstrate its viability and impact on state government services.

In the meantime, the Auditor General recommended, and PERB adopted, several changes to address some of the deficiencies identified in the prior audit. First, soon after release of the 1996 audit report, the Legislature amended PERB's statutes, transferring the responsibility for staffing PERB from the Department of Commerce to the Governor's Office for Excellence in Government (OEG). In addition, PERB's staff person helped develop administrative procedures for the receipt and handling of unfair competition complaints and petitions of interest. Further, PERB enhanced its communication efforts with the Governor and the Legislature by issuing reports following the closure of cases and through an annual status report. Finally, in an attempt to make the public aware of its existence and the services it can provide, PERB increased its marketing efforts by distributing pamphlets, conducting presentations for local Arizona Chambers of Commerce, and networking with other state agencies and private organizations.

## **Continued Need for PERB Questionable**

Despite PERB's diligent efforts to address recommendations made in the prior audit, several factors suggest that the Legislature should consider sunseting PERB. Similar to the 1996 report, in the last two years PERB has considered only five cases within its purview. Moreover, in only one of those cases could auditors identify any impact on state government services. Finally, since the last Auditor General's report, other entities have been established in state government that could likely perform the same functions as PERB.

***PERB still considers small number of issues***—Despite efforts to enhance its role and visibility, PERB continues to receive only a small number of cases. As noted earlier, PERB has made concerted efforts to increase its visibility within the business community in an attempt to generate more awareness and interest from private enterprise of competitive government issues. However, these additional efforts have not generated any more issues for PERB to consider than were reviewed during the last audit. Specifically, since the 1996 report, PERB has received and conducted hearings on only five cases that were within its purview, including two complaints of unfair competition, one publicly generated petition of interest, and two areas of state government PERB members felt could potentially be contracted to the private sector:

- A complaint filed in March 1996 against the Arizona Board of Appraisal argued that the Board of Appraisal competed unfairly with a professional organization in providing a free seminar to update Arizona appraisers on national appraisal standards. PERB conducted two hearings on this issue and had two of its members facilitate a meeting between the parties involved. PERB eventually concluded that the complaint was unfounded and recommended that the case be closed. In fact, PERB agreed with the Board of Appraisal's claim that the agency retains the right to offer similar courses in the future.

- Arizona Correctional Industries (ACI) was the subject of a September 1997 complaint. Although not an aggrieved party to a specific contract bid, one private cabinet-making company felt that, overall, ACI received unfair bidding advantages. For example, this private company argued that ACI fails to calculate certain costs into its bids that the private sector must, such as capital expenditures for equipment. After conducting three hearings, PERB recommended that the Governor and the Legislature revisit ACI's mission and statutes to ensure that ACI competes fairly with private sector business in its activities. However, this recommendation was vague and did not provide specific recommendations for how to address the issue.
- In May 1997, a private vegetation management company submitted a petition of interest contending that it could provide roadside vegetation control applications more efficiently and cost-effectively than the Arizona Department of Transportation. PERB forwarded the petition to the Department and, upon its receipt, the Department determined that it no longer wanted to provide such services. Consequently, the Department began efforts to procure requests for proposals to outsource Arizona's roadside vegetation control activities. Although the Department has issued several such requests, PERB continues to closely monitor the Department's activities.
- In August 1996, PERB evaluated a proposal by a conservative "think tank" to completely privatize ADOT's Motor Vehicle Division's issuance of automobile registrations and driver's licenses. Despite several hearings on this issue, PERB failed to develop any recommendations and also did not issue a report on its discussions. Instead, PERB members simply agreed to retain a continued interest in promoting enhanced dialogue and progress on the issue of privatizing certain Division functions.
- In July 1997, PERB, acting on its own initiative, asked the Department of Administration's Surplus Property Management Office to present an overview of Surplus Property's activities for consideration of possible privatization. PERB conducted two hearings on this issue, eventually concluding that privatization of Surplus Property Management's activities may not be in the State's best interest.

***Minimal impact demonstrated***—While the number of issues brought before PERB is one indicator of the need for such a forum, its ability to demonstrate an impact on state government services is perhaps an even more significant indicator of the need for the Board. Of the five previously mentioned cases, PERB's activities appear to have positively impacted only one area of state government. This case involved the private company's petition of interest contending it could provide roadside vegetation control applications more efficiently and effectively than the Arizona Department of Transportation. Although the company that originated the petition did not ultimately bid on the services due to geographic limitations, the Department has issued several requests for proposals to outsource Arizona's roadside vegetation control. In fact, the Department signed a contract with the Navajo Nation to provide vegetation control services to that region of the State. Department officials acknowl-

edged that PERB served as a catalyst for the Department and the Navajo Nation, reaching an agreement that the two groups were unable to attain in the past.

While the Arizona Department of Transportation petition of interest was the only case within its jurisdiction in which PERB's efforts resulted in positive change, PERB contends that it made positive impacts in two other cases. However, reviews of these two cases reveal that they were not within PERB's jurisdiction to hear. Specifically:

- A May 1996 complaint alleged that a program run by the Pima County Community College District was competing unfairly with a small business owner offering counseling and training services to other Tucson-area small businesses. Auditors believe this complaint was outside of PERB's purview for three reasons.
  - **First**, according to A.R.S. §41-2753(A)(1), community colleges are exempt from competition laws if the good or service provided fulfills the community college's public service mission. According a District official, the program in question helped the District fulfill its public service mission by providing services to small businesses that could not afford to purchase similar services elsewhere.
  - **Second**, the program is essentially a federal program operating under federal guidelines and funded primarily by federal monies from the Small Business Administration. In fact, of the approximately \$235,000 the program was operating with at the time of the complaint, only about \$16,800 came from legislative appropriations.
  - **Third**, PERB exceeded its legal authority in this complaint, since Arizona statute prohibits it from considering a complaint against a community college until the State Board of Directors for Community Colleges (SBDCC) addresses the complaint and renders a decision. Statutes instruct PERB to forward the complaints it receives against community colleges directly to the SBDCC. Although PERB received this complaint in May 1996, it did not forward it to the SBDCC until November 1996. In addition, before forwarding the complaint, PERB requested a response to the complaint from the District and held a fact-finding hearing involving both the complainant and District representatives. Ultimately, PERB discussed this case during six meetings. PERB contends it took these steps because the complainant had difficulty resolving the issue within the community college district. The case was eventually dismissed by the SBDCC in May 1997 when the complainant and the District reached an agreement amenable to both parties.
- The Department of Economic Security's Division of Developmental Disabilities was the topic of a December 1997 complaint. Several agencies that contract with the Division to provide services to developmentally disabled children and adults in Arizona contended that the Division was competing unfairly with their organizations because the Division also contracts with individuals to perform similar duties. This issue is outside PERB's

purview because the Division is not providing services itself, in competition with the private sector. Instead, the Division contracts with provider agencies and independent providers, both members of the private sector, to deliver services to its clients. While PERB members acknowledge that this complaint likely does not involve unfair competition, they contend that their efforts to bring the parties together has positively impacted government operations. Meanwhile, PERB continues to maintain an interest in the complaint by discussing the issue at PERB meetings and by directing the parties involved to address several issues and report on their progress.

***Other entities available***—Although the small number of issues brought before it raises a question about the need for PERB’s function, if the function is still thought to be needed, other entities could fill this role. Unlike the last audit, when PERB was the only entity in place to perform its functions, there are now two other entities in place that could possibly address the limited number of issues currently brought before PERB. Specifically, in July 1996, the Legislature created the Competitive Government Program within the Governor’s Office for Excellence in Government to examine areas of state government that could potentially be privatized. According to statute, the program is to identify and pursue opportunities for increasing the use of competition for the delivery of state services, while preventing unfair competition between state agencies and the private sector. Because this program also deals with competition and privatization issues, it could likely address such issues raised by the private sector. Also in July 1996, Arizona’s Office of the Ombudsman-Citizens’ Aide began operations with the purpose of “servicing citizens’ complaints by investigating the administrative acts of state agencies.” While the Ombudsman’s Office was not necessarily created to handle unfair competition complaints, it does review and process complaints in which state government potentially acted unfairly. In fact, the Ombudsman recently resolved one unfair competition complaint brought forth by a PERB member.

### **If Continued, Extent of Involvement with Cases Should Be Clarified**

If the Legislature wishes to retain a separate review panel and thus, chooses not to sunset PERB, changes are required to clarify the extent of PERB’s involvement in unfair competition complaints and petitions of interest. Although PERB members contend that its ability to consider cases more expeditiously is severely hampered by agencies’ inability to provide cost information, PERB’s prolonged involvement in certain cases still appears unwarranted. In addition to better defining its role in cases, PERB should work more closely with the Governor’s Competitive Government Program in an attempt to resolve the difficulties in obtaining cost information.

***PERB members indicate lack of cost information causes delays***—PERB members unanimously contend that a significant obstacle in preventing the Board from reviewing and deliberating on cases more quickly is that many of the state agencies that have appeared before

it cannot identify all the costs associated with the service or function in question. Without this information, PERB members feel they cannot adequately judge whether the agency is unfairly competing with the private sector. As a result, it is difficult for PERB to reach a conclusion in a timely manner and put forth meaningful recommendations. At the same time, given its lack of authority, PERB has no ability to compel state agencies to cooperate and provide the information PERB requests. This situation has long since frustrated PERB members, and, as a group, the Board has pursued efforts to assist agencies in devising a better cost accounting mechanism.

***Prolonged involvement in some cases***—While lack of cost information may make it difficult to determine if unfair competition exists in some cases, PERB’s extended involvement in certain cases appears to go beyond the need for such information. As was noted in the 1996 Auditor General report, PERB’s statutorily established role is to review unfair competition complaints, evaluate opportunities to contract-out state functions to the private sector, and issue a report to the Governor and the Legislature on its findings and recommendations. At the time of the last audit, it was recommended that PERB establish procedures to better ensure that its involvement in a case does not exceed its statutory authority. However, similar to the last audit, PERB continues to involve itself in some cases beyond its statutorily prescribed role. For example, in the petition of interest involving the Arizona Department of Transportation, PERB members acknowledged in July 1997 meeting minutes that the Department’s efforts preempted the need for PERB to pursue the matter further at that time. Despite the Department’s actions to outsource this activity, PERB has not terminated its involvement, as it has prolonged the issue over nine months, requiring the Department to discuss its privatization activities at four PERB meetings, and directing the Department to submit periodic status reports to document privatization progress. Similarly, PERB determined that it should maintain a continued interest in the issue involving contractors’ disputes over the Division of Developmental Disabilities’ services. While PERB acknowledged that this issue likely does not involve unfair competition, PERB continues to direct the parties involved to address several issues and report on their progress. During the audit, both private sector and state agency representatives, as well as some PERB members, expressed concern that PERB prolonged its involvement in some issues.

***Several areas need to be addressed***—PERB should not only work to better define when its role in a case ends, it should also consider developing a mechanism to address difficulties in obtaining information from agencies. First, as recommended in 1996, PERB should incorporate language into its procedures emphasizing the Board’s role in reviewing competition and privatization issues. Further, language should be added requiring PERB to report to the Governor and the Legislature once it has completed its deliberations regarding an issue’s eligibility and developed findings and recommendations.

Second, given its difficulty in obtaining sufficient information, PERB should develop a protocol to work with the Competitive Government Program within the Governor’s Office to motivate agencies to compile cost information. Currently, in statute, the Governor’s Office of Excellence in Government is required to “develop a costing model that accurately estimates



and accounts for the total cost of providing a state function and develop methods by which state in-house costs can be compared to the private sector.” Statute also authorizes the Competitive Government Program to require state agencies to develop an in-house total cost estimate concerning a target function to determine the potential for privatization. As these responsibilities are already established and PERB is connected with the OEG through its staffing, it appears that these entities could work in conjunction in an attempt to obtain the necessary information from the state agencies under review.

Finally, one Board member suggested that PERB may also want to consider preparing interim reports to the Governor and Legislature discussing its progress on cases. This might allow PERB to highlight for state policymakers the need for better cost accounting by agencies and compel action at a higher level on issues brought before PERB.

## **Recommendations**

1. The Legislature should consider sunsetting the Private Enterprise Review Board (PERB) as it has still not demonstrated a continued need for its services based on the low number of cases brought before it and its limited impact on state government services.
2. If the Legislature chooses not to sunset PERB, the Board should make several changes, including:
  - a. developing additional procedures to ensure that it adheres to its statutory mandate of receiving, investigating, and reporting on issues involving unfair competition complaints and petitions of interest, and
  - b. developing a protocol to work with the Competitive Government Program to motivate agencies that appear before PERB to compile cost information.

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# SUNSET FACTORS

In accordance with A.R.S. §41-2954, the Legislature should consider the following 12 factors in determining whether to continue or terminate the Private Enterprise Review Board.

**1. The objective and purpose in establishing the Private Enterprise Review Board.**

The Legislature created the Private Enterprise Review Board (PERB) in 1983 to provide a means for citizens to complain about unfair governmental competition with business, or issue proposals to privatize certain agencies' activities. Statutes mandate that PERB consider complaints about state agencies competing with the private sector in violation of the State's competition laws and to evaluate if a violation has occurred. Additionally, PERB may solicit and evaluate written notices of interest, called petitions of interest, from the private sector to perform functions that are currently performed by a state agency. Similarly, statutes authorize PERB to evaluate opportunities for the State to outsource certain functions to the private sector. Finally, PERB may evaluate statutes that exempt certain agencies from the State's competition laws and recommend changes to the Legislature. In all of its authorized activities, statutes require PERB to report its findings and recommendations to the Legislature and the Governor.

**2. The effectiveness with which the Board has met its objectives and purposes and the efficiency with which the agency has operated.**

For the most part, PERB has met the objectives and purposes for which it was established by holding hearings and evaluating the cases that come before it. However, its effectiveness is minimal due to the small number of issues brought before it by private businesses and limited demonstrated impact on state government services. Additionally, PERB appears to prolong its involvement in certain cases. While we question the need for PERB, if continued, PERB should take steps to clarify the extent of its involvement in competition and privatization issues. Additionally, PERB should work with the Competitive Government Program within the Governor's Office to motivate agencies that appear before PERB to compile cost information. (see Finding I, pages 5 through 11).

**3. The extent to which the Board has operated within the public interest.**

Although PERB is involved in a small number of competition issues, it operates in the interest of those individuals who have sought PERB's assistance in addressing their concerns. Specifically, PERB provides private enterprise a forum within state government to hear competition complaints and proposals for contracting-out government functions. Through this forum, PERB brings private sector and state agency representatives together to publicly discuss competition and privatization issues. PERB members contend that PERB's primary public benefit is its ability to mediate discussions between the private and public sector and facilitate solutions. Additionally, as noted in the 1996 Auditor General report, PERB members believe that they have saved the State from costly lawsuits by offering private businesses a forum for having their complaints addressed, short of taking legal action.

**4. The extent to which rules and regulations promulgated by the Board are consistent with legislative mandate.**

PERB has no statutory authority to promulgate rules.

**5. The extent to which the Board has encouraged input from the public before promulgating its rules and regulations and the extent to which it has informed the public as to its actions and their expected impact on the public.**

PERB meetings are open to the public. Our review indicates that PERB has corrected a meeting notification deficiency noted in the 1996 Auditor General report, by submitting the appropriate statement of where meeting notices would be posted with the Secretary of State. Currently, PERB holds its meetings in accordance with Open Meeting Law requirements.

**6. The extent to which the Board has been able to investigate and resolve complaints that are within its jurisdiction.**

PERB has statutory authority to investigate complaints regarding competition by state government, though it may only make recommendations to the Legislature and the Governor about their resolution. While PERB has had no difficulty in investigating complaints, it lacks guidelines that define when its role in a case ends. As a result, in some cases PERB has extended its involvement well beyond the completion of its investigation by continuing to monitor a case for several months. (see Finding I, pages 5 through 11).

- 7. The extent to which the Attorney General or any other applicable agency of state government has the authority to prosecute actions under enabling legislation.**

Though PERB has the authority to find that agencies are violating competition laws, it has no authority to take action against those agencies. Therefore, this factor does not apply.

- 8. The extent to which the Board has addressed deficiencies in the enabling statutes which prevent it from fulfilling its statutory mandate.**

Since the 1996 Auditor General's report, PERB's statutes were amended to shift staffing responsibility from the Department of Commerce to the Governor's Office for Excellence in Government (OEG). This change increased PERB's ability to fulfill its statutory mandate by ensuring that PERB has sufficient staff available to assist in establishing procedures, maintaining records, and increasing public awareness.

- 9. The extent to which changes are necessary in the laws of the Board to adequately comply with the factors listed in the Sunset Law.**

Our review did not identify any deficiencies in its enabling statutes that prevent PERB from fulfilling its statutory mandate. In response to a recommendation made in the 1996 Auditor General report, PERB has established procedures to transmit its recommendations only at the completion of its reviews rather than at the completion of every meeting (as is currently mandated by statute). While PERB operates in accordance with this recommendation, a corresponding change to its statutes was not made. Therefore, if PERB is continued, the Legislature may want to consider amending PERB's reporting requirements, as outlined in A.R.S. §41-2754, to allow the Board to report its recommendations only at the completion of its reviews.

- 10. The extent to which the termination of the Board would significantly harm the public health, safety, or welfare.**

Termination of PERB would not significantly harm the public's health, safety, or welfare. The 1996 Auditor General's report recommended extending PERB's function for three to five years to allow it to demonstrate its viability and impact on state government. However, despite efforts to address recommendations at that time, the continued need for PERB is questionable. Similar to the findings of the prior audit, PERB still considers a small number of cases and minimally impacts state government services. Moreover, despite specific efforts to increase public awareness of its existence, it does not appear PERB's level of activity will significantly increase in the

future. Therefore, the Legislature should consider sunseting PERB (see Finding I, pages 5 through 11).

- 11. The extent to which the level of regulation exercised by the Board is appropriate and whether less or more stringent levels of regulation would be appropriate.**

The factor does not apply as PERB has no regulatory authority.

- 12. The extent to which the Board has used private contractors in the performance of its duties and how effective use of private contractors could be accomplished.**

PERB does not use private contractors in the performance of its duties.

## Agency Response

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JANE DEE HULL  
GOVERNOR

HANK BRIED  
CHAIR

## **PRIVATE ENTERPRISE REVIEW BOARD**

**STAFFED BY THE OFFICE FOR EXCELLENCE IN GOVERNMENT**

1700 West Washington, Suite 300, Phoenix, Arizona 85007 • (602) 542-7546 • FAX: (602) 542-1220

The Private Enterprise Review Board (PERB) offers the following comments to the Auditor General's Audit Report of May 27, 1998. These comments shall address the points raised by the Auditor General, in sequence, starting with a summary.

### **SUMMARY**

As indicated in the summary, the PERB was created statutorily pursuant to ARS 41-2754 with the purpose of reviewing complaints of competition by the State in violation of statute ARS 41-2752, solicit and evaluate written petitions of interest from the private sector, review evaluate and recommend changes to statute exemptions, and review opportunities for the State to contract out certain functions to private enterprise. The auditors establish in their summary that the primary responsibility of PERB is to hear testimony and report their findings and recommendations to the Legislature and the Governor. The PERB Board perceives that they have met and/or exceeded the legislative intent of its enabling legislation.

The 1998 audit report repeatedly cites two factors for the sunset of the PERB board. The lack of the number of cases brought before PERB for review and the limited demonstrated impact on State government. These factors are not the only measure of the PERB's effectiveness and value.

The implication that PERB has not heard a sufficient number of cases to justify its continue operation is not supported by the audit or any statutory requirement. PERB's enabling legislation contains no reference to case volume, nor does the Auditor General's Office establish a minimum goal. What is apparent is that the PERB has maintained a constant agenda of cases for review.

As to the second factor, the PERB contends that it impacts not only the State government but the private sector as well. The audit report does not indicate the breadth of positive impacts of the PERB, only those which, in the auditor's opinion, are positive or can easily be quantified.

PERB is aware of its responsibility as a volunteer review panel to provide an avenue for the private sector to offer an unbiased, independent review of issues pertaining to the public/private business relationship. The PERB Board feels its function is of value and should be continued. While PERB does not agree with the majority of the audit report, we recognize the necessity of such a review and respectfully submit our rebuttal to the issues addressed herein.

## **INTRODUCTION AND BACKGROUND**

PERB was established to “provide a mechanism by which an independent body could review State government functions that compete with private enterprise.”(Auditor General’s report May 27, 1998) To accomplish this task, PERB reviews unfair competition complaints, petitions of interest, competition exemptions, and opportunities to contract out State functions.

The 1996 Auditor General’s Performance Report limited its focus to two of PERB’s responsibilities: 1)the hearing of complaints of unfair competition by the State and; 2)the ability to evaluate opportunities for the contracting out certain State functions. The report provided recommendations for improving PERB’s effectiveness. Specifically, developing procedures, improving staffing, and increasing public awareness. PERB has accepted and implemented these recommendations and made progress during the past two years.

Notwithstanding these conspicuous improvements, in 1998 the Auditor General recommends that the Legislative Council sunset the PERB based upon three non-statutory criteria: 1) the small number of cases received 2) the minimal impact on State government and 3) other entities can fulfill PERB’s duties.

## **FINDING I**

In Findings I (pages 5-11) of the 1998 audit report the Auditor General reviews the 1996 audit report which substantiates the need for the PERB based upon needs as identified by both public and private representatives. However, utilizing the three criteria mentioned above, the 1998 Auditor General’s Report then finds the need for PERB questionable.

The first criterion is the small number of cases reviewed by the PERB. PERB consists of ten volunteer members, four advisory members and one part-time staff person from the Governor’s Office for Excellence in Government (OEG). Although only required to meet four times a year, the PERB has dedicated their time to meet 2 hours monthly, for a total of approximately 240 hours of available working time. During this time the PERB must conduct all business, such as scheduling public hearings for any complaint of unfair competition, review petitions of interest, evaluate statutory exemptions, and opportunities for contracting out certain State functions. In order to accomplish these tasks, the PERB relies heavily on the cooperation of State Agencies and private sector

individuals. As the Auditors have previously indicated, during this same timeframe the PERB was also involved with implementing the 1996 audit recommendations.

The implication that PERB has not heard a sufficient number of cases to justify its continued operation is not supported by any statutory requirement. Comparing the number of cases heard per year without balancing this requirement against the time available for public testimony and the time commitment of the volunteer members does not adequately depict the efficiency of the PERB. Specifically, PERB does not view its main role as one of soliciting petitions of interest and complaints of unfair competition from the private sector, which are not viable opportunities, merely to justify its existence.

The second criterion is the minimal impact on State government. In the cases cited as being reviewed, the auditor's report has noted impacts on State government. The Board of Appraisal complaint and the Surplus Property Management Review justified the position of the State to provide these services. The ADOT complaint resulted in a change in how this agency obtains its services. But only one of these issues is credited in the report.

The audit report never indicated or provided the performance measure utilized to arrive at this limited impact conclusion. It is obvious that this measurement is not quantifiable as the report itself indicates the non-definitive term "appears". Nowhere in the report are avoided costs, relations with the private sector, and public awareness addressed or identified as positive results of the PERB's actions. These benefits are difficult to quantify, but it is apparent the auditors did not make an attempt to include them in their analysis.

In support of this conclusion, the auditors cite two complaints that it purports to be outside of the PERB's jurisdiction. PERB questions the auditor's jurisdictional opinions. The PERB has and intends to continue to review complaints until the jurisdictional issue can be ascertained.

PERB has remained active in its review capacity as long as necessary to evaluate the issue presented. PERB has continued its involvement in the cited ADOT complaint, in part due to the agency's failure to cooperate fully in the matter. Additionally, PERB will exercise its statutory authority, where appropriate to investigate other opportunities for contracting out certain functions. As issues evolve during the review process, so will PERB's involvement.

The last criterion stated in the audit report is the ability of other entities to fulfill the PERB's function. Specifically listed were the Competitive Government Program (CGP) within OEG and the Arizona Office of the Ombudsman – Citizen's Aide (Ombudsman).

The primary role of the PERB, as cited on page 2 of this report, is to hear testimony from both the private sector and State agency representatives and to report its findings and recommendations to the Governor and the Legislature. Neither of the entities cited as potential successors to the PERB have the capability or authority to fulfill the mission of a volunteer citizens review panel as contemplated by the enabling legislation.

The CGP was created to “emphasize the fiduciary responsibility to taxpayers by encouraging value in the provision of State services by identifying and pursuing opportunities for increasing the use of market forces in the delivery of State services, while preventing unfair competition between State agencies and the private sector” (ARS 41-2772). The CGP does not have the responsibility or the authority to hear public testimony and make recommendations to the Governor and the Legislature. Nor can issues from the universities or community colleges be referred for review. This program actually relies on the PERB as a review and co-evaluator of State functions that may be appropriate for inclusion in this process. As such, the program relies on the PERB to exercise its duties of review prior to referring a function to the CGP.

The Ombudsman is charged with the responsibility to investigate administrative acts of agencies. Its main focus is state agencies and administrative acts not competition with the private sector. According to the 1998 Legislative Report, the Ombudsman heard approximately 857 calls last year. The PERB was established to function as an independent review panel for the exemptions to competition with private enterprise and the mechanism by which petitions of interest and complaints of unfair competition can be processed. The Ombudsman currently has a caseload that would restrict the availability for review of any case brought through this venue. It also does not have the representation from the public sector that is unique to PERB. The PERB believes the intent and operational focus of the Ombudsman is not consistent with the mission of the PERB.

The audit report identifies several issues that should be addressed if the Legislature wishes to retain PERB. Only one of these issues has been correlated into an official recommendation. The audit report suggests a modification to PERB’s procedures that would emphasize its reviewing competition and privatization issues. This reprioritizes PERB’s functions as defined in the enabling legislation. By emphasizing competition and privatization issues the PERB would be effectively cutting its purview in half and dedicating itself to those functions that this report has outlined as being under utilized and reasons for sunset.

The report points out that the PERB has cited a difficulty in obtaining cost information from State agencies. The report suggests that PERB work with the CGP to motivate agencies to compile cost information. While the CGP has the authority to compel State agencies to develop in-house cost models, the program

deals with issues that have been identified by governmental agencies, not private enterprise, as potential functions for privatization. Not all of the issues reviewed by the PERB fall into this category. Having PERB supplant this review and evaluation process could negatively impact the CGP.

Finally, PERB accepts that its communication with both the Governor and the Legislature can be improved and it is acceptable to a suggestion of interim reporting.

## **RECOMMENDATIONS**

As to the official recommendations as outlined in the audit report the PERB takes the following positions.

Audit Recommendation 1) The Legislature should consider sunseting the Private Enterprise Review Board (PERB) as it has still not demonstrated a continued need for its services based on the low number of cases brought before it and its limited impact on state government services.

PERB Response 1) The finding of the Auditor General is not agreed to and the recommendation will not be implemented. PERB is meeting its legislative mandate and provides a useful service to the citizens of this State.

Audit Recommendation 2) If the Legislature chooses not to sunset PERB, the Board should make several changes, including:

- a) developing additional procedures to ensure that it adheres to its statutory mandate of receiving, investigating, and reporting on issues involving unfair competition complaints and petitions of interest, and
- b) developing a protocol to work with the Competitive Government Program to motivate agencies that appear before PERB to compile cost information.

PERB Response A) The finding of the Auditor General's recommendation A is not agreed to, and the recommendation will not be implemented. The PERB believes this recommendation impinges upon and restricts its statutory authority to investigate opportunities for contracting out certain State functions and the ability to review current competition exemptions.

PERB Response B) The findings of the Auditor General's recommendation B is not agreed to, but the recommendation will be implemented. The PERB will seek the cooperation of the Competitive Government Program to assist in the cost analysis.