

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current and previously issued FIRs are available on the NM Legislative Website (www.nmlegis.gov) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 02/18/17
LAST UPDATED _____ **HB** 431 _____

SPONSOR Little

SHORT TITLE Construction Industries Private Inspectors **SB** _____

ANALYST Amacher

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY17	FY18	FY19		
	\$256.8	\$513.7	Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY17	FY18	FY19	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		Unknown	Unknown	Unknown	Recurring	PSCOF and General Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates SB 352
 Conflicts with HB 362

SOURCES OF INFORMATION

LFC Files

Responses Received From

- General Services Department (GSD)
- Mortgage Finance Authority (MFA)
- New Mexico Municipal League (NMML)
- New Mexico Association of Counties (NMAC)
- New Mexico Corrections Department (NMCD)
- Office of the Attorney General (OAG)
- Public School Finance Authority (PSFA)
- Public Regulation Commission (PRC)
- Regulation and Licensing Department (RLD)

SUMMARY

Synopsis of Bill

House Bill 431 amends the Construction Industries Licensing Act allowing for companies to provide private inspectors for governments, contractors and homeowners. This bill requires the employment of certified building officials; limits employment of inspectors; provides new definitions; and expands inspection services and responsibilities for third-party inspection companies.

This bill becomes effective June 16, 2017.

FISCAL IMPLICATIONS

The Public School Finance Authority (PSFA) currently has an agreement in place that ensures projects funded through Public School Capital Outlay Council (PSCOC) are given priority inspection and review over other construction projects. PSFA noted that pursuant to the Public School Capital Outlay Act, it entered into a memorandum of understanding (MOU) with the division in 2007 with the intent to give Public School Capital Outlay Council funded projects priority over others.

PSFA further notes that in FY16, the PSCOC reimbursed the division \$277,988.20, based on an established rate per inspection of \$193.72. PSFA indicates the MOU may need to be modified or additional costs may be incurred by the PSFA as the cost of private inspections are not yet determined, if this bill is enacted. Per the MOU, as PSFA highlights, there is a plan review turnaround time of five business days. Building inspections are to occur within 48 hours of the request. It is unknown, as shown in the operating budget impact table, if the use of a private inspection company would have an impact on these times and require additional changes to the MOU.

The Regulation and Licensing Department (RLD) outlines three areas of possible fiscal impacts affecting property owners, the Construction Industries Division (CID) and the Manufactured Housing Division (MHD).

RLD provides the following as to increase in revenues:

There is a significant fiscal component due from property owners and potentially from contractors based on the allowance for the private inspection agencies to require additional fees and service charges. The current act allows for permit and inspection fees to be charged based on a fee structure approved in rule by the commission. The fee and service charges allowed by this bill are not limited and such that different private inspection agencies could charge different persons different fees and services charges for permits and inspections. The numbers in the revenue table above are estimates provided by RLD, representing increased revenues anticipated due to the increase in licensing fees from private inspectors. Allowing for additional fees could be considered a conflict with the bill's new "Purpose" provision to reduce costs.

As to operating budgets, RLD states:

1. If this bill is passed there could be a significant fiscal impact to CID/MHD based on the provision for the prosecution of code and license violations by CID/MHD; and,
2. The additional layer of licensing, maintenance and record keeping may involve additional costs for CID and other government entities to maintain and supply services sufficient to comply with all new procedures.

These impacts are not estimated, and are included in the operating budget impact table as affecting the general fund.

SIGNIFICANT ISSUES

The purpose of the Construction Industries Licensing Act (Act) is to promote the general welfare of all New Mexicans by ensuring protection of life and property by adopting and enforcing codes and standards for construction and related industries. The amendments proposed in House Bill 431 expands the purpose of the act to allow for private inspection companies and private inspectors to carry out certain responsibilities and actions in various construction industries. As proposed, third-party inspection contracts may be secured by local governments, homeowners, and contractors to address the multiple degrees of construction inspection required by law. This bill requires the employment of certified building officials; limits employment of inspectors; provides new definitions; and expands inspection services and responsibilities for third-party inspection companies.

Section 1 highlights the expanded purpose of the Act that includes greater inspection resources by allowing the Construction Industries Division (CID) to license private inspection companies to perform the work typically performed by the state and local governments. Licensed private inspection companies and licensed contractors will enforce building safety and ensure contractor compliance with laws, codes and standards. This may provide for a more efficient and cost-effective construction process statewide.

Section 2 shifts the definition from an “individual” to a “person” for the terms qualifying party, journeyman, apprentice, wages, and inspection agency. As proposed, a “certified building official” and “statewide inspector’s certificate” enables a government or private inspection company, so certified, to carry out and conduct inspections. This bill defines “private inspection company” to mean a private enterprise licensed by the division to apply for permits, conduct inspections of all work by the contractor or homeowner, ensuring compliance and report to the appropriate governmental jurisdiction. This definition also includes approval of plans and inspections of manufactured commercial units, modular home or pre-manufactured homes. Additional changes in Section 2 are congruent with the inclusion of private inspectors and private inspection companies with the appropriate certifications.

Section 3 makes clear that persons with a contractor’s license, or a certificate of competence, and are employed or contracted with CID (or governmental entity) must surrender their contractor's license to CID to be held in inactive status. Additionally, employees of CID are not allowed to work in any business activity that would be considered as contracting pursuant to the Act.

Section 4 adds to the duties of CID to include licensing private inspection companies. Notably, this bill removes the requirement to publish a list of contractors annually on the CID website and

instead requires a quarterly update. This quarterly update may be updated more frequently to reflect current licensing activity.

Section 5 of this bill uniquely expands the powers of CID from investigating code violations statewide to investigating and prosecuting code and license violations in any code jurisdiction statewide.

Section 6 provides conforming changes about “gas fitting” to include safety-related repair regarding the installation of appliances.

Section 7 permits CID to employ either state inspectors or contract with private inspection companies to carry out state inspections. Additional amendments ensure certification commonly known as a Certified Building Official or CBO. This section requires a government to publish any codes in their entirety it has adopted that are in excess of state codes. This bill allows for a contract between a private inspection company and a local jurisdiction that does not have a CBO.

Furthermore, Section 7 permits a government to contract with a third party inspection company for both the services of a CBO as well as inspection services. CID is required to publish on its website these agreements and all other contracts created between government entities and private inspection companies. Notably, this bill removes the geographic boundary by which a CBO may be employed. As proposed, a CBO may be employed in the same county, or an adjacent county, or within 100 miles of the government entity seeking services provided by a CBO. These agreements between a CBO and a government entity no longer require approval by CID. In the event a CBO terminates employment with a private inspection company, the company has 60 days to secure a replacement.

Section 8 outlines changes that are necessary to effectively implement the inclusion of state-certified inspectors employed by a private inspection company. For example, the private inspector may enter any building, during reasonable hours, to perform inspections and test any installations consistent with their jurisdiction and trade certification. Public utilities, rural electric cooperatives and utility departments must cooperate with the requests of such private inspectors. As proposed, certified building officials and inspectors employed by governments must not be employed by a private inspection company.

Section 9 permits both governmental entities and private inspection companies to adopt codes and requires that the governmental entity publish any codes which are in excess to state codes.

Section 10 permits the commission to establish rules addressing permit fees. A trade bureau may propose an increase for surety bonds from \$500 to \$1500. Additional amendments in this section address the forms, fees, permitting, and certifications between a private inspection company and a government. These changes allow a private inspection company to charge and keep additional fees for performing inspections. Changes in subsection G allow for a contract between a contractor and a private inspection company which allows then the private inspection company to pull permits on behalf of the contractor. This private inspection company inspects the work upon payment of the initial inspections fees and service charges. Uniquely, subsection H allows for the private inspection company to also approve the plans and codes, and declare that all additional inspection fees and service charges have been paid. Under the provisions of this bill, CID may allow for a change from one private inspection company to another at the request of a government, contractor or homeowner. Otherwise, once the first permit is issued the private

inspection company is uniquely tied to that specific project under development from beginning to end addressing all necessary general and trade specific inspections.

Section 11 represents new material of the Act that outlines the licensure for private inspection companies. Requirements include:

- evidence to the satisfaction of the director of CID that a private inspection company has employed a CBO;
- proof of responsibility as consistent with the Act, and familiarity with the rules of CID have been demonstrated;
- inclusion of the CBO's certificate;
- compliance with laws regarding the qualifications to conduct business in the state;
- sufficient location and contact information is provided;
- registration and submittal of current tax identification with the New Mexico Taxation and Revenue Department;
- compliance with any additional rules regarding the issuance of licenses; and
- proof of a minimum of four years sufficient practical experience, within the last ten years, of construction or inspection services.

Section 11 also limits the license fees by CID to be no higher than those charged to general contractors. Also, a COB shall not work for more than one private inspection company at the same time, unless the companies have at least thirty percent common ownership.

Section 12 allows for the commission to establish rules for proof of responsibility for private inspections companies.

PERFORMANCE IMPLICATIONS

The General Services Department suggests efficiencies may be gained in the construction process by having more inspectors available to do the required Construction Industries inspections.

PSFA notes that although this bill states one of its purposes is to improve efficiencies, specific periods and other mechanisms for measuring efficiency of service are not laid out.

ADMINISTRATIVE IMPLICATIONS

RLD notes that the added duties under Section 5 to CID to prosecute code and license violations are in conflict with duties of the Attorney General (Section 8-5-1 NMSA 1978). The Attorney General has the authority to prosecute and defend board and commission action with the discretion to allow other state entities to prosecute when given permission. The proposed bill provides authority for either the division or the commission to prosecute and therefore, bypasses the Attorney General's duties.

RLD highlights that Section 12 prevents the release of a bond if inspections were performed by a private inspection agency, as it requires the bond be released only if the final inspection is conducted by government. Additionally, it requires that the division certify any code violation for which it is requested that the bond be released.

CONFLICT, DUPLICATION

HB 431 conflicts with HB 362 the “Home Inspector Licensing Act”. HB 362 enacts the Home Inspector Licensing Act; outlines licensure for home inspection; and creates a new board with powers and duties as outlined. HB 362 requires all home inspection fees be deposited into a newly created “Home Inspector Fund” held at the state treasurer’s office to be administered by the board.

HB 431 duplicates SB 352.

TECHNICAL ISSUES

The OAG provides the following technical issues for consideration:

- HB 431 defines other government entities as “government”. It may be more appropriate to define other government entities as “government entities” or “government agencies”.
- 60-13-41(D), page 15 lines 5-7 and 60-13-44(F), page 22 lines 1-3, consider using slightly different language, with essentially the same content. It may be better to have the requirement relating to the publication of codes that are more stringent than the state codes.
- HB 431 broadens the definition of journeyman, apprentice, qualifying party and those who wages are paid to, from “individual” to “person”. The Act currently defines “inspector” as a person. Person is defined by the Act to include an individual, firm, partnership, corporation, association or other organization, or any combination thereof. It is unclear whether firms, partnerships, corporations, associations or other organizations may qualify as a journeyman, apprentice or entity to which “wages” are paid. Because organizations generally cannot become journeymen, apprentices or are owed “wages” the more accurate word to use would be “individual”. The same concern is raised with the definition of inspector as a person rather than an individual.
- 60-13-45(H) on page 26 lines 23-25 and page 27 lines 1-7, require private inspection companies to prepare a certificate of compliance on a form acceptable to the government, but does not indicate whether the form is to be submitted to the government entity or CID and does not indicate what time frame the certificate must be completed and submitted after completion of the inspection.

OTHER SUBSTANTIVE ISSUES

The Office of the Attorney General (OAG) seeks clarification regarding if the costs for inspections by private inspection companies and those charged by CID or other government entities will differ substantially. HB 431 allows private inspection companies to charge any amount for permit fees and inspections. Furthermore, private inspection companies are authorized to retain any money collected in excess of permit fees charged by CID and other Government entities.

There appears to be a way to circumvent oversight of state expenditures that are required by the

state procurement process. The OAG notes that in Section 10(F), private inspection companies are required to pay only the permit fees assessed by CID and other government entities. This bill allows private inspection companies to charge contractors and property owners additional undetermined amounts above the fees paid for the inspection. These additional monies may be retained by the private inspection companies. Therefore, private inspection companies may be paid for government contract work without passing through CID and other government entities that are subject to the state procurement process requiring review of all “expenditure of public funds.”

The OAG and RLD note it is unclear whether the decision to hire a private inspection company, CID or government entity to perform the inspection is made by the contractor or property owner.

HB 431 requires private inspection companies and their employees to surrender their contractor license or certificate when acting in the capacity of inspector of licensee work on behalf of CID and governmental entities. This bill does not prohibit private inspection companies from entering into contractual working relationships with licensees for contract inspection work or from obtaining permits on behalf of licensee. The OAG indicates this is of particular concern because the act prohibits contractors or property owners from changing inspection providers once the permit is obtained. These contracts may create conflicts of interest, as the OAG points out, because private inspection companies are not acting as objective third party inspectors on behalf of the state but more like agents of the licensee.

RLD expresses concern there are no defined disciplinary actions for violations and no clear delineation on who is responsible when there is a code or safety violation by private inspectors or private inspection companies. The division currently is allowed to investigate claims against incompetent work by inspectors, but not by private inspectors.

RLD suggests that the bond for private inspections companies should be significantly higher than indicated. Currently, a performance bond or liability insurance for commercial projects is between \$250 thousand and \$1 million dollars. The state or governmental entity should not be liable for construction that is inspected improperly considering the weak certification allowed for inspectors by the private inspection companies. RLD indicates a significant bond should be required of private inspection companies, which will provide incentive to know the codes and laws and provide competent inspections.

The primary purpose of the Construction Industries Licensing Act is to protect life and property and safety. RLD points out privatization of inspectors may undermine the protections envisioned by the legislature for residential and commercial building projects. The current process is for a licensed contractor to secure the permit and an independent state inspector or local jurisdiction with a CBO and certified inspectors to conduct the inspection. If the company is both securing the permits and conducting the inspections, as permitted in this bill, there is no guarantee that life and property safety is protected. There would be no truly independent inspection.

RLD comments that there is no liability coverage, or other insurance coverage, required in this bill which would protect the contractors, property owners or the government.

CID/MHD researched private inspection agencies in both Texas and Colorado to estimate the true costs to homeowners for using the services of private inspection agencies. RLD notes that it requires an average of 14 performed inspections per home.

RLD seeks clarification as to whether the procurement code requirements are affected considering the allowance for private contracting between contractors and the private inspection companies for state inspections.

The New Mexico Municipal League (NMML) comments that it is currently difficult at times for local governments to hire and retain Certified Building Officials to perform inspections in municipalities and counties. NMML suggests this legislation could ease that burden and allow local governments to utilize the services of private inspection companies to either replace or supplement local building officials.

NMML also notes that in many small communities across the state construction projects are delayed and additional costs are incurred due to the need to schedule inspections at various stages of construction. NMML comments that it is generally believed that by allowing contractors and/or local governments to utilize private inspection companies those delays will be significantly shortened and could lead to cost savings for the owner/users of the property. Both the NMML and the New Mexico Association of Counties support this legislation.

JMA/jle