

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](http://www.nmlegis.gov)) and may also be obtained from the LFC in Suite 101 of the State Capitol Building North.

## FISCAL IMPACT REPORT

SPONSOR Powdrell-Culbert/ Anderson ORIGINAL DATE 02/06/19 LAST UPDATED \_\_\_\_\_ HB 344

SHORT TITLE Failure to Pay Subcontractors as a Felony SB \_\_\_\_\_

ANALYST Torres

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY19	FY20	FY21	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>	Indeterminate but Significant				Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

- Public Defender Department (PDD)
- Administrative Office of the Courts (AOC)
- Administrative Office of the District Attorneys (AODA)
- New Mexico Attorney General (NMAG)
- Regulation and Licensing Department (RLD)

### SUMMARY

#### Synopsis of Bill

House Bill 344 amends Section 60-13-52 NMSA 1978, the Construction Industries Licensing Act, by making it unlawful for a contractor 1) to knowingly fail to compensate a validly licensed subcontractor for work performed pursuant to a contract, or 2) to fail to pay (*presumably a subcontractor, but possibly any other person depending upon the interpretation of the amendment*), as required by contract, for materials or supplies furnished for use in the construction, alteration or repair of a building or other improvement.

A contractor who violates this new subsection when the unpaid amount: (1) is not more than two thousand five hundred dollars (\$2,500), is guilty of a fourth degree felony; (2) is over two thousand five hundred dollars (\$2,500) but not more than twenty thousand dollars (\$20,000), is guilty of a third degree felony; or (3) is more than twenty thousand dollars (\$20,000), is guilty of a second degree felony.

## FISCAL IMPLICATIONS

HB 344 is likely to have significant fiscal implications on the Public Defender Department (PDD). What would ordinarily constitute a civil dispute between people doing business would be transformed into a criminal matter when a contractor loses the resources necessary to pay a subcontractor. Persons who are bankrupted and, therefore, knowingly fail to pay subcontractors, would likely qualify as PDD clients facing criminal penalties for inability to pay and would require representation.

There will be a minimal administrative cost for statewide update, distribution and documentation of statutory changes. Any additional fiscal impact on the Judicial Branch would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

Additionally, an increase in the number of jury trials and appeals is possible, given the creation of a criminal penalty for a matter that is usually civil in nature. In general, prosecutions brought pursuant to laws with increased/new criminal penalties can take up a considerable amount of judicial time and resources.

## SIGNIFICANT ISSUES

The bill criminalizes a contractor's non-payment that is typically addressed in magistrate and Metropolitan courts (if the amount in dispute is less than \$10,000.00) and district courts (any amount in dispute) by an aggrieved party filing a civil complaint for breach of contract. A contractor may then offer reasons in an attempt to defend or mitigate the non-payment or partial non-payment, such as incomplete or poorly-done work on behalf of a contractor, or inferior/defective materials sold by a supplier. Or it is possible that the contractor could admit to the breach of contract due to inability to pay and/or the contractor has filed for bankruptcy.

A contractor's non-payment or partial non-payment to a subcontractor or supplier may be legitimate or legally defensible in a civil case; however, under this bill, the same contractor could be convicted of a felony in a criminal case for the breach of contract despite having an otherwise valid defense to the civil complaint.

It should be noted that the bill's clauses "pursuant to a contract" and "as required by contract" could be interpreted as providing a legal defense for a contractor's non-payment to a subcontractor or supplier who themselves have not performed according to the contract (e.g. poor or incomplete work). The Administrative Office of the Courts notes that "such ambiguity may result in 1) inconsistent application of the statute throughout the State, and/or 2) increased court hearings and appeals."

Also of note, a contractor's fraudulent conduct of non-payment or partial non-payment to a subcontractor or supplier is unlawful pursuant to Section 30-16-6 NMSA 1978, which states "fraud consists of the intentional misappropriation or taking of anything of value that belongs to another by means of fraudulent conduct, practices or representations."

The Public Defender Department notes the following concerns:

The knowing failure to pay for services—not intentional or malicious but merely knowing—indicates the type of action where one would ordinarily recover any money lost through a civil action and should not implicate the resources of the criminal justice system, which requires prosecutors and defense attorneys funded by the state of New Mexico.

Penalizing persons for simply not being able to pay for services, especially at the rate of a second degree felony, will create “debtor’s prison” for those sentenced to incarceration for such a sin of omission. It is constitutionally suspect whether such crimes, lacking *mens rea* as to intent or malice, can result in people serving jail time for mere failure to pay.

Embezzlement and fraud statutes should already cover the enumerated behavior if it is undertaken criminally: that is, intentionally not paying or taking advantage of other people through contractual breach. Consequently, covering more individuals under the criminal code will not punish more intentional bad actors but would result in more prosecutions and more individuals facing jail time.

The Administrative Office of the District Attorneys states:

The criminal penalties set out in HB344 are harsh. A second degree felony carries a potential \$10,000 fine. If the defendant is an individual (as opposed to a corporation or a partnership, for example), a second degree felony is punishable by nine years in prison. It is likely that HB344 will be used as a threat by subcontractors and suppliers to obtain settlements of their contract disputes with contractors in civil actions.

The Regulation and Licensing Department adds:

Subsection E and F are not within the proper section of the Construction Industries Licensing Act (“CILA”) as 60-13-52 deals strictly with unlicensed contracting currently, and based on the difficulty in prosecuting these unlicensed matters it is critical that the courts be able to differentiate unlicensed crimes versus licensed crimes. The definition of “contractor” is included in CILA in 60-13-3. The proposed bill does not differentiate between unlicensed and licensed contractors in subsections E and F. Separating the crimes by statute will assist the courts in remaining diligent in the prosecution of unlicensed crimes while dealing with these new designated licensed crimes. There must be a separate statute for the crime of a licensed contractor in order for the courts to accurately understand the legislative intent and adequately punish the wrongdoer.

Subsection B punishes the journeyman for violating the journeyman ratio when in reality it is the contractor who violates the journeyman ratio. However, there is no punishment to the contractor for his action.

## **TECHNICAL ISSUES**

The AOC notes that:

It is not clear, based on the sentence structure of the bill, exactly WHO it is unlawful for a contractor “to fail to pay, as required by contract, for materials or supplies furnished for

use in the construction, alteration or repair of a building or other improvement”. The “who” could be interpreted as a subcontractor only, or it could be interpreted as any person or business supplying materials to the contractor. As already mentioned, ambiguity may result in 1) inconsistent application of the statute throughout the State, and/or 2) increased court hearings and appeals.

IT/al