Department of Legislative Services

Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Third Reader - Revised

Senate Bill 170 (Senator Feldman)
Finance Economic Matters

Energy Generation Projects – Required Labor Standards

This bill requires, on the approval of a Certificate of Public Convenience and Necessity (CPCN) or an exemption from the requirement to obtain a CPCN for certain proposed generating stations, that a developer meet requirements relating to (1) prevailing wage rates and (2) contractor/subcontractor certifications and records. The Maryland Department of Labor (MDL) must enforce compliance and adopt implementing regulations.

Fiscal Summary

State Effect: General fund expenditures for MDL increase by $96,200 in FY 2024; future years reflect annualization and the elimination of one-time costs. General fund revenues increase to the extent MDL recovers Public Information Act (PIA) request costs through fees.

(in dollars)	FY 2024	FY 2025	FY 2026	FY 2027	FY 2028
GF Revenue	-	-	-	-	-
GF Expenditure	$96,200	$116,300	$121,400	$126,700	$133,200
Net Effect	($96,200)	($116,300)	($121,400)	($126,700)	($133,200)

Note: () = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill does not directly affect local governmental operations or finances.

Small Business Effect: Meaningful.

Analysis

Bill Summary: The bill only applies to the construction of a "covered project," which means a generation station with a cumulative nameplate capacity of 2 megawatts or more for which the Public Service Commission (PSC) has approved a CPCN or an exemption from the requirement to obtain a CPCN. A covered project does not include an offshore wind project under § 7-704.1 of the Public Utilities Article. The bill applies only prospectively and may not be applied or interpreted to have any effect on or application to any covered project that received a CPCN before the bill's effective date.

On approval of a CPCN or CPCN exemption for a covered project, a developer must comply with requirements relating to prevailing wage rates and contractor/subcontractor certifications and records, as described below.

Prevailing Wage Rates

Generally, the developer of a covered project must ensure that workers are paid at least the prevailing wage rate determined under the State Finance and Procurement Article, as specified. The lone exception is if the covered project is subject to a project labor agreement that (1) binds all contractors and subcontractors on the project through the inclusion of specifications in all relevant solicitation provisions and contract documents; (2) allows all contractors and subcontractors to compete for contracts and subcontracts on the project without regard to whether they are otherwise parties to collective bargaining agreements; (3) establishes uniform terms and conditions of employment for all construction labor employed on the projects; (4) guarantees against strikes, lockouts, and similar job disruptions; (5) establishes mutually binding procedures for resolving labor disputes; and (6) includes any other provisions negotiated by the parties to promote successful delivery of the project.

Contractor/Subcontractor Certifications and Records

The developer of a covered project must ensure that each contractor and subcontractor involved in the construction of the project completes a certification that the contractor or subcontractor meets certain requirements. Specifically, the developer must ensure that each contractor and subcontractor:

- has the necessary resources to perform the relevant portion of the project, including the necessary technical, financial, and personnel resources;
- has all licenses, certifications, or credentials required under State or local law;
- participates in apprenticeship training (through a registered apprenticeship program) for each construction trade employed on the project;
- during the immediately preceding three years, (1) has not been debarred by any government agency; (2) has not defaulted on any project; (3) has not had any license, certification, or other credential relating to the business revoked or suspended;

and (4) has not been found in violation of any applicable law that resulted in the payment of a fine, back pay damages, or any other penalty of at least $10,000;

- will pay individuals employed on the project at least the applicable wage and fringe benefit rates for each individual's classification; and
- has not misclassified and will not misclassify employees as independent contractors.

The developer of a covered project must submit to MDL a certification of compliance with the requirements described above at least 30 days before beginning construction of the project (along with a copy of a project labor agreement, if applicable). If a certification contains false, misleading, or materially inaccurate information, the developer, contractor, or subcontractor that executed the certification must, after notice and opportunity to be heard, be subject to debarment from entering into a contract with a public body. A contractor or subcontractor is also subject to penalties established by MDL by regulation.

Each developer, contractor, and subcontractor that is not subject to a project labor agreement must maintain records relating to the wages and hours worked by each individual working on a covered project, as specified. The records must include a signed statement affirming, among other requirements, that the records are correct, that applicable wage and other requirements have been met, and that the developer, contractor, or subcontractor does not receive kickbacks from an employee or employee welfare fund.

The payroll for a covered project must be considered a public record subject to inspection and copying.

Other Requirements for the Maryland Department of Labor

MDL must distribute a list to all units, departments, and political subdivisions of the State providing the names of individuals or firms that MDL has found to have (1) failed to meet the bill's requirements; (2) been debarred by federal or State government; or (3) submitted false, misleading, or materially inaccurate information under the bill. The Secretary of Labor must also adopt regulations implementing the bill.

Current Law:

Wage and Labor Requirements for Utility Contractors

Chapter 38 of 2022 (The Climate Solutions Now Act) required an investor-owned electric company or gas and electric company to require a contractor or subcontractor that is working on specified projects to meet certain wage and labor requirements for federally funded electric infrastructure work. The requirements apply to a project that (1) involves the construction, reconstruction, installation, demolition, restoration, or alteration of any electric infrastructure of the company (and any related traffic control activities) and (2) is funded by federal funds to meet the State's policy goals for the electric distribution system, as specified. The wage and labor requirements only apply to the portion of a project supported by the federal funds.

Specifically, on the applicable projects, the company must (1) pay the area prevailing wage for each trade employed, including wages and fringe benefits; (2) offer health care and retirement benefits to the employees working on the project; (3) participate in an apprenticeship program registered with the State for each trade employed on the project; (4) establish and execute a plan for outreach, recruitment, and retention of State residents, as specified, to perform work on the project; (5) have been in compliance with federal and State wage and hour laws for the previous three years; (6) be subject to all State reporting and compliance requirements; and (7) maintain all appropriate licenses in good standing.

Chapter 12 of the 2021 special session required investor-owned gas and/or electric utilities to require contractors and subcontractors on specified *underground* projects to pay their employees at least the applicable prevailing wage rate.

Prevailing Wage – Generally

Contractors and subcontractors working on eligible public works projects in Maryland must pay their employees the prevailing wage rate. "Public works" are structures or works, including a bridge, building, ditch, road, alley, waterwork, or sewage disposal plant, that are constructed for public use or benefit or paid for entirely or in part by public money. "Public work" does not include, unless let to contract, a structure or work whose construction is performed by a public service company under order of PSC, regardless of public supervision or direction or payment wholly or partly from public money.

See **Appendix – Maryland's Prevailing Wage Law** for additional information, including a discussion of estimated project costs associated with paying the prevailing wage.

Certificate of Public Convenience and Necessity

See **Appendix – Certificate of Public Convenience and Necessity** for information about licensing the siting, construction, and operation of power plants and related facilities in the State.

Public Information Act

Maryland's PIA establishes that all persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees. Each governmental unit that maintains public records must identify a representative whom a member of the public may contact to request a public record.

Generally, a custodian of a public record must permit inspection of any public record at any reasonable time. A custodian must designate types of public records that are to be made available to any applicant immediately on request and maintain a current list of the types of public records that have been so designated. Each custodian must adopt reasonable rules or regulations that, consistent with PIA, govern timely production and inspection of a public record.

A custodian must deny inspection of a public record or any part of a public record if (1) the public record is privileged or confidential by law or (2) the inspection would be contrary to a State statute, a federal statute or regulation, the Maryland Rules, or an order of a court of record. PIA also requires denial of inspection for specified personal and confidential records and information, including, for example, personnel and student records, hospital records, specified medical and financial information, and shielded criminal and police records.

Unless otherwise specified, if a custodian believes that inspection of a part of a public record by an applicant would be contrary to the public interest, the custodian may deny inspection to the applicant of that part of the record. PIA specifies the types of records and information that are eligible for discretionary denials.

An official custodian may charge an applicant the actual cost of the search, preparation, and reproduction of any public record in a *standard* format, including the cost of media and mechanical processing. If an applicant requests a public record in a *customized* format, an official custodian may charge a reasonable fee for the search, preparation, and reproduction of the public record. PIA authorizes fee waivers under specified circumstances.

State Expenditures: MDL advises that it currently does not have the resources necessary to fulfill the bill's requirements to develop regulations, provide guidance, receive certifications, ensure compliance with PIA and the bill's record release requirements, and distribute information regarding noncompliant contractors/subcontractors to other governmental units. Accordingly, general fund expenditures for MDL increase by $96,158 in fiscal 2024, which accounts for the bill's October 1, 2023 effective date. This estimate reflects the cost of hiring one assistant Attorney General to assist in the promulgation of regulations and ensure compliance under the bill. It includes a salary, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Position	1.0
Salary and Fringe Benefits	$86,686
Operating Expenses	9,472
Total FY 2024 MDL Expenditures	**$96,158**

Future year expenditures reflect a full salary with annual increases and employee turnover as well as annual increases in ongoing operating expenses.

As MDL did not indicate any costs associated with enforcing prevailing wage rates under the bill, this estimate does not include any such costs. However, MDL expenditures may further increase if it is required to enforce prevailing wage requirements on a substantially higher number of construction projects. The number of projects subject to prevailing wage cannot be reliably estimated because it depends on the number that are covered by a project labor agreement.

The bill is not expected to affect the finances or operations of the Department of Natural Resources or PSC relating to the CPCN process.

The Maryland Department of Transportation advises that the bill may increase costs for certain solar projects in development and the resulting energy price; such costs, if any, are not reflected in this estimate.

State Revenues: General fund revenues increase to the extent that MDL seeks to recover any costs related to responding to PIA requests under the bill through fees charged in accordance with PIA. Any such impact, however, cannot be reliably estimated but is expected to be minimal.

Small Business Effect: Complying with the bill's wage and labor standards, recordkeeping, and certification requirements is likely to meaningfully impact small contractors and subcontractors working on covered projects, as well as small business renewable energy developers who may otherwise seek to construct a covered generating station.

Additional Comments: The Department of Legislative Services notes the following:

- the bill does not specify which test must be used for determining employee misclassification – different tests can sometimes yield different results;
- it is unclear how certified information from contractors and subcontractors would be verified as accurate, as there is no specific requirement on either the general contractor or MDL to do so. Additionally, some of the information – such as certain penalties for violation of any applicable law – would be administratively difficult to verify across multiple levels of government;

- MDL advises that payroll records have personal and confidential information that cannot be released under PIA; and
- the bill does not specifically state that it applies prospectively to covered projects that have received CPCN *exemptions* before the bill's effective date; the prospective language provision in the bill mentions only projects that received CPCNs.

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See SB 418 and HB 569 of 2022.

Designated Cross File: None.

Information Source(s): Maryland Department of Labor; Department of Natural Resources; Public Service Commission; Office of People's Counsel; Maryland Department of Transportation; Maryland Environmental Service; Department of Legislative Services

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Appendix – Maryland's Prevailing Wage Law

Contractors and subcontractors working on eligible public works projects in Maryland, including mechanical service contractors that are part of public works projects, must pay their employees the prevailing wage rate. "Public works" are structures or works, including a bridge, building, ditch, road, alley, waterwork, or sewage disposal plant, that are constructed for public use or benefit or paid for entirely or in part by public money.

Eligible public works projects are:

- those carried out by the State;
- any public work for which at least 25% of the money used for construction is State money; and
- specified projects in tax increment financing districts if the local governing body approves of the application of prevailing wages.

Any public works contract valued at less than $250,000 is not required to pay prevailing wages. The State prevailing wage rate also does not apply to (1) any part of a public works contract funded with federal funds for which the contractor must pay the prevailing wage rate determined by the federal government; (2) specified construction projects carried out by public service companies under order of the Public Service Commission; or (3) local House or Senate initiatives that receive State funds in the capital budget.

Prevailing wages are wages paid to at least 50% of workers in a given locality who perform the same or similar work on projects that resemble the proposed public works project. If fewer than 50% of workers in a job category earn the same wage, the prevailing wage is the rate paid to at least 40% of those workers. If fewer than 40% receive the same wage rate, the prevailing wage is calculated using a weighted average of local pay rates. The State Commissioner of Labor and Industry is responsible for determining prevailing wages for each public works project and job category based on annual surveys of contractors and subcontractors working on both public works and private construction projects.

The commissioner has the authority to enforce contractors' compliance with the prevailing wage law, including issuing a stop work order if the commissioner makes an initial determination that a contractor or subcontractor may have violated the prevailing wage requirements. Contractors found to have violated the prevailing wage law must pay restitution to the employees and liquidated damages to the public body in the amount of $20 a day for each laborer who is paid less than the prevailing wage or $250 per laborer per day if the employer knew or reasonably should have known of the obligation to pay the prevailing wage. If an employer fails to comply with an order by the commissioner to pay restitution, either the commissioner or an employee may sue the employer to recover the difference between the prevailing wage and paid wage. The court may order the employer to pay double or triple damages if it finds that the employer withheld wages or fringe benefits willfully and knowingly or with deliberate ignorance or reckless disregard for the law.

The Governor must include at least $385,000 in the budget each year for the Prevailing Wage Unit within the Maryland Department of Labor (MDL).

The University System of Maryland (USM), Morgan State University (MSU), St. Mary's College of Maryland, and the Maryland Stadium Authority (MSA) are all exempt from the prevailing wage law. However, USM, MSU, and MSA all voluntarily comply with prevailing wage requirements for contracts that exceed the $250,000 threshold.

History of the Prevailing Wage

The federal Davis-Bacon Act, originally enacted in 1931, requires contractors working on federal public works contracts valued at more than $2,000 to pay their employees the prevailing local wage for their labor class, as determined by the U.S. Secretary of Labor. The general intent of the law, and similar state and local laws, is to stabilize local wage rates by preventing unfair bidding practices and wage competition. Thirty-two states and the District of Columbia currently have prevailing wage laws; since 1979, nine states have repealed their prevailing wage laws.

Maryland adopted a prevailing wage law in 1945 (Chapter 999), but it only applied to road projects in Allegany, Garrett, and Washington counties. In 1969, the statute was amended to include State public works contracts of $500,000 or more. There have been periodic changes to the law and the definition of "prevailing wage." In 1983, the law was broadened to include public works projects in which the State funds 50% or more of the total project costs and 75% or more in the case of public schools. Chapter 208 of 2000 reduced the prevailing wage threshold for public schools from 75% to 50% of construction costs, thereby bringing school construction projects in line with prevailing wage requirements for other public works projects. Chapters 281 and 282 of 2014 further lowered the State funding threshold for school construction projects to 25% of total construction costs, thereby requiring the vast majority of public school construction projects in the State to pay the prevailing wage, subject to the $500,000 contract value threshold. Chapters 57 and 58 of 2021 lowered the State funding threshold for all public works projects (including school construction) to 25% of total construction costs and lowered the contract value threshold for payment of prevailing wages to $250,000; however, legislative bond initiatives that receive State funds in the capital budget are exempt from the requirement to pay prevailing wages.

The number of prevailing wage projects rose dramatically following the Great Recession and has remained high each year since. MDL advises that, during fiscal 2022, its prevailing wage unit monitored 921 projects, down slightly from 941 projects in fiscal 2021, but significantly higher than 496 in fiscal 2014. To accommodate the increase in projects, the number of prevailing wage investigators increased in fiscal 2016 from three to six; as of January 2023, there are five investigators in the unit.

Six Maryland jurisdictions – Allegany, Baltimore, Charles, Montgomery, and Prince George's counties and Baltimore City – have local prevailing wage laws requiring public works projects in the jurisdiction to pay prevailing wages.

Research on the Effects of Prevailing Wage on Contract Costs

The Department of Legislative Services (DLS) has reviewed research on the effect of prevailing wage laws on the cost of public works contracts and has found inconsistent and/or unreliable results. The primary challenge confronted by all prevailing wage researchers is identifying an appropriate "control group" consisting of projects of similar type, timing, and location that do not pay the prevailing wage. In most jurisdictions that require a prevailing wage, all projects of a specified type and size are subject to it, so there is no natural control group. Some researchers have compared project costs in states or localities before and after they adopted prevailing wage requirements, but their findings are clouded by the difference in time, during which construction costs changed and other factors were not consistent. Another deficiency in the research is that it almost always relies on project bid prices (*i.e.*, the anticipated cost prior to the beginning of construction) rather than actual final costs. As most construction projects experience change orders or cost overruns affecting their cost, reliance on bid prices negatively affects the validity of the findings. Therefore, research findings related to the effect of the prevailing wage on project costs are inconsistent and often inconclusive. A similar review of research conducted by MDL (at the time, the Department of Labor, Licensing, and Regulation) for the Task Force to Study the Applicability of the Maryland Prevailing Wage Law also concluded that "data limitations create difficulty for researchers on both sides of the issue."

Local school systems occasionally solicit side-by-side bids with and without prevailing wages to help them decide whether they want to accept the full State match (and, thus, be subject to the prevailing wage) or a lesser State match without being subject to the prevailing wage. Data provided to the Public School Construction Program by Anne Arundel, Carroll, Frederick, Howard, and Washington counties, from 2012 through 2015, shows that the cost differential between bids with and without prevailing wages for 266 individual bids submitted for 26 different school construction and renovation projects averaged 11.7%, with a range from 0% to 49%. As with other research data, these represent bid prices, not actual construction costs. An independent analysis of the Maryland side-by-side bid data concluded that factors other than prevailing wages, including bid timing and the level of competition for the bids, accounted for most of the differences between the prevailing wage and nonprevailing wage bids.

One area of the research in which there is a general consensus, and which is supported by the U.S. Bureau of Labor Statistics, is that labor costs represent between 20% and 30% of construction costs (with materials and site costs making up most of the rest). Therefore, a 10% gap between prevailing wages and market wages could theoretically increase total contract costs by about 2.5%, and a 20% gap in wages could increase total contract costs by about 6%. Given the empirical evidence that prevailing wages tend to be higher than nonprevailing wages and that labor costs are a significant portion of overall project costs, DLS believes that it is reasonable to expect that the prevailing wage requirement adds between 2% and 5% to the cost of a public works project. Given the inconsistency and inconclusiveness of the empirical research, however, actual effects may vary by project, with some projects exhibiting higher cost differences and others experiencing negligible differences.

Appendix – Certificate of Public Convenience and Necessity

General Overview

The Public Service Commission (PSC) is the lead agency for licensing the siting, construction, and operation of power plants and related facilities in the State through Certificates of Public Convenience and Necessity (CPCN). The CPCN process is comprehensive and involves several other State agencies, including the Department of Natural Resources (and its Power Plant Research Program), and the Maryland Department of the Environment. Subject to limited exemptions described below, a person may not begin construction in the State of a generating station, overhead transmission line, or qualified generator lead line unless a CPCN is first obtained from PSC. "Generating station" is not defined in statute; however, the PSC definition in regulation excludes a facility with up to 2 megawatts of capacity if it meets other specified requirements.

The CPCN process, detailed further below, involves the notification of specified stakeholders, the holding of public hearings, the consideration of recommendations by State and local government entities, and the consideration of the project's effects on various aspects of the State infrastructure, economy, and environment.

In December 2020, PSC initiated a rulemaking (RM 72) to revise regulations governing CPCNs for generating stations. Updated regulations became effective in September 2021. Among other changes, the regulations contain additional information requirements – to assist in project evaluation – and allow for electronic submission and distribution of application materials.

Notification Process

Upon receipt of a CPCN application, PSC – or the CPCN applicant, if required by PSC – must immediately provide notice to specified recipients, including the executive and governing body of affected local governments, affected members of the General Assembly, and other interested persons. When providing the notice, PSC must also forward the CPCN application to each appropriate unit of State and local government for review, evaluation, and comment and to each member of the General Assembly who requests a copy.

Public Hearing and Comment

PSC must provide an opportunity for public comment and hold a public hearing on a CPCN application in each county and municipality in which any portion of the construction of a generating station, overhead transmission line, or qualified generator lead line is proposed to be located. PSC must hold the hearing jointly with the governing body of the county or municipality and must provide weekly notice during the four weeks prior to the hearing, both in a newspaper and online, and must further coordinate with each local government to identify additional hearing notification options. PSC must ensure presentation and recommendations from each interested State unit and must allow representatives of each State unit to sit during the hearing of all parties. PSC must then allow each State unit 15 days after the conclusion of the hearing to modify the unit's initial recommendations.

Public Service Commission Considerations

PSC must take final action on a CPCN application only after due consideration of (1) recommendations of the governing body of each county or municipality in which any portion of the project is proposed to be located; (2) various aspects of the State infrastructure, economy, and environment; and (3) the effect of climate change on the project. For example, PSC must consider the effect of the project on the stability and reliability of the electric system and, when applicable, air and water pollution. There are additional considerations specifically for a generating station or an overhead transmission line. For example, PSC must consider the impact of a generating station on the quantity of annual and long-term statewide greenhouse gas emissions.

Generating Station Exemptions

There are three general conditions under which a person constructing a generating station may apply to PSC for an exemption from the CPCN requirement:

- the facility is designed to provide onsite generated electricity, the capacity is up to 70 megawatts, and the excess electricity can be sold only on the wholesale market pursuant to a specified agreement with the local electric company;
- at least 10% of the electricity generated is consumed onsite, the capacity is up to 25 megawatts, and the excess electricity is sold on the wholesale market pursuant to a specified agreement with the local electric company; or
- the facility is wind-powered and land-based, the capacity is up to 70 megawatts, and the facility is no closer than a PSC-determined distance from the Patuxent River Naval Air Station, among other requirements.

However, PSC must require a person who is exempted from the CPCN requirement to obtain approval from the commission before the person may construct a generating station as described above. The application must contain specified information that PSC requires, including proof of compliance with all applicable requirements of the independent system operator.