SB 337

Department of Legislative Services

Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 337 (Senator Gile, *et al.*)
Finance

Utility Contractors - Employment and Licensure - Requirements and Application

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This bill expands the applicability of specified wage and labor requirements for projects undertaken by an investor-owned electric company or gas and electric company to include *any project* that involves the construction, reconstruction, installation, demolition, restoration, or alteration of any electric infrastructure of the company, and any related traffic control activities. Under current law, such requirements apply only to a project funded by federal funds, and only to the portion of a project supported by the federal funds. The bill also alters project requirements to allow contractors to participate in federal apprenticeship programs and to require contractor compliance with local wage and hour laws.

Fiscal Summary

State Effect: Both the Maryland Department of Labor (MDL) and the Public Service Commission (PSC) advise that they can handle the bill's requirements with existing budgeted resources, as discussed below. The bill does not otherwise materially affect State finances or operations. The effect on electricity prices due to increased costs for utility projects is discussed below.

Local Effect: The bill is not anticipated to materially affect local government finances or operations. The effect on electricity prices due to increased costs for utility projects is discussed below.

Small Business Effect: Meaningful.

Analysis

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. These are the requirements with expanded applicability under the bill.

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

State Fiscal Effect: PSC recently decided a matter on the level and type of enforcement of prevailing wage rate requirements under Chapter 12. The resulting decision document provides an overview of the novel nature of the prevailing wage requirements, utility/union disagreement as to enforcement, and PSC's current stance that "addressing the prevailing wage requirements of [Public Utilities Article] § 5-305 through contractual terms between the utilities and their contractors and subcontractors is an appropriate mechanism." Under this method of enforcement for prevailing wage (*i.e.*, the *status quo*), PSC has no role in enforcing prevailing wage requirements and thus can handle the bill's requirements with existing budgeted resources.

MDL advises that the affected projects do not meet the 25% State-funded threshold in current law and thus are not subject to the prevailing wage law's reporting or enforcement requirements. Thus, the bill does not have a fiscal or operational impact on the department.

Small Business Effect: Complying with the bill's wage and labor standards is likely to meaningfully impact small contractors and subcontractors working on utility company projects. Prevailing wage rates tend to be higher than nonprevailing wage rates.

Additional Comments: The Department of Legislative Services (DLS) cannot provide an estimate of the total costs for investor-owned gas and electric utilities to comply with the bill. Ultimately, costs incurred under the bill that are determined to be just and reasonable by PSC may be recovered in future base rates, which are paid by all utility customers, including the State, local governments, and small businesses. Based on a review of empirical research – see the Appendix below – DLS believes the costs for the affected projects, going forward, may increase by 2% to 5%, with the potential for variances outside of that range. That does not mean that utility rates will likewise increase by 2% to 5%, because rates are also based on the sum total of undepreciated utility infrastructure ("rate base"), of which labor costs for construction are only one component. Still, there is likely upward pressure over time due to increased labor costs for utility construction projects.

Additional Information

Prior Introductions: Similar legislation has not been introduced within the last three years.

Designated Cross File: HB 61 (Delegate Charkoudian) - Economic Matters.

Information Source(s): Maryland Department of Labor; Public Service Commission; Department of Legislative Services

Fiscal Note History: First Reader - February 9, 2023
js/mcr

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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.