HB 169

Department of Legislative Services

Maryland General Assembly
2023 Session

FISCAL AND POLICY NOTE
Enrolled - Revised

House Bill 169 (Delegate Charkoudian)

Economic Matters Education, Energy, and the Environment

Public Utilities - Energy Efficiency and Conservation Programs - Energy Performance Targets and Low-Income Housing

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This bill requires the Department of Housing and Community Development (DHCD) to procure or provide energy efficiency and conservation (EE&C) programs and services for electricity customers for the 2024-2026 EmPOWER Maryland Program cycle, subject to specified requirements. The EE&C programs and services must be designed to achieve a target annual incremental gross energy savings, compared to 2016, of at least 0.53% in 2024, 0.72% in 2025, and 1.0% in 2026. The bill also (1) establishes the Green and Healthy Task Force, staffed by DHCD; (2) establishes several reporting and planning requirements for DHCD and the Public Service Commission (PSC), including that DHCD develop a plan to provide energy efficiency retrofits to all low-income households by 2031; and (3) requires the Maryland Department of Transportation (MDOT) and the Governor's Office of Small, Minority, and Women-Owned Businesses (GOSBA) to conduct a related disparity study by December 31, 2025. **The bill takes effect July 1, 2023.**

Fiscal Summary

State Effect: Special fund expenditures for DHCD increase significantly beginning in FY 2024 to meet the bill's enhanced energy savings requirements – DHCD estimates by $39.8 million in FY 2024, increasing to $214.2 million by FY 2028. Special fund revenues increase by an amount necessary to cover DHCD's annual programmatic costs. Special fund expenditures for the Maryland Energy Administration (MEA) may increase beginning in FY 2024. The effect on electricity rates is discussed separately below.

Local Effect: Local revenues and expenditures increase to the extent that they receive additional funding under the bill through expanded DHCD programs. The effect on electricity rates is discussed separately below.

Small Business Effect: Meaningful.

Analysis

Bill Summary:

Provision of EE&C Programs and Services and EmPOWER Maryland

Energy savings to meet the bill's threshold requirements must be calculated in a specified manner; the bill's target savings apply to all energy types subject to the EmPOWER energy savings goals. DHCD may, when calculating the annual incremental gross energy savings specified in the bill, include savings achieved through all funding sources to the extent consistent with federal law or regulations governing those funding sources. DHCD must adopt regulations for weatherization of leased or rented residences to achieve specified benefits and goals under the bill. In addition, DHCD may only approve contractors who follow specified labor practices, such as paying at least 150% of the State minimum wage, providing paid leave, and offering retirement benefits.

DHCD, MEA, and other State agencies must apply for all federal funding that may become available to implement the bill.

Plan and Reporting Requirements

The bill establishes the following plan development and reporting requirements for DHCD and PSC:

- By September 1, 2023, DCHD must submit a plan to PSC detailing proposals for achieving the electricity savings and demand reduction targets required by the bill for 2024. By September 1, 2024, and every three years thereafter, DHCD must submit a plan to PSC detailing proposals for achieving the electricity savings and demand reduction targets required by the bill for the three subsequent calendar years. The plan must include specified information, including anticipated costs, projected electricity savings, and a description of the proposed EE&C programs and services. PSC must review the plan to determine whether it is adequate for achieving the target, and DHCD must provide an update to PSC every six months on plan implementation and progress.

- PSC must work with DHCD to establish the procedures necessary to develop and implement a plan for achieving the electricity savings and demand reduction targets required by the bill, including securing cooperation from electric companies related to funding, communications, referrals, data sharing, and any other cooperation PSC determines is necessary.

- DHCD must coordinate with the Department of Budget and Management to identify additional funding sources to support a possible expansion of programs that support a whole-home approach by addressing health and safety upgrades, weatherization, energy efficiency, and other general maintenance for low-income housing. The coordination must include funding available through various State and federal programs, as specified. DHCD must coordinate with members of the Green and Healthy Task Force and identify other interested stakeholders to develop the plan. By December 31, 2023, DHCD must submit the plan to the Governor and the General Assembly.

- DHCD must report to PSC each year on (1) the amount of funding it receives and is projected to receive for energy efficiency and weatherization from the funding sources specified in the bill and (2) for the programs that contribute to energy efficiency and weatherization, the number of participants served and the amount of energy savings, reported in a specified manner. DHCD may satisfy this reporting requirement by including the information in its six-month status reports to PSC. A related annual reporting requirement is established for PSC using this information.

- DHCD must collaborate with members of the Green and Healthy Task Force to develop a plan, including a budget, a timeline, and potential funding sources, to provide energy efficiency retrofits to all low-income households by 2031. DHCD, in collaboration with the task force, must submit the plan to the General Assembly by December 1, 2023.

Green and Healthy Task Force

The Green and Healthy Task Force must:

- beginning July 1, 2023, meet quarterly for a period of three years;

- advance the alignment, branding, and coordination of resources to more effectively deliver green and healthy housing for low-income households in the State;

- examine the public and private resources needed to address the housing needs of low-income communities;

- develop policy and statutory recommendations to eliminate barriers to low-income households achieving healthy, energy-efficient, affordable, and low-emissions housing; and

- engage with interested parties and collaborate with other entities that can help advance the goals of the task force, including experts in the field of healthy, energy-efficient, and low-emissions housing.

By July 1, 2024, and each July 1 thereafter through 2027, the task force must report its findings and recommendations to the Secretary of Health, the Secretary of the Environment, PSC, the Governor, and the General Assembly.

Task force members may not receive compensation but are entitled to reimbursement for expenses.

Study of Measures to Assist Minority and Women-owned Businesses

The certification agency designated by the Board of Public Works under the State's minority business enterprise (MBE) law (*i.e.*, MDOT) and GOSBA, in consultation with DHCD, the Office of the Attorney General, and the General Assembly, must initiate a study regarding the energy efficiency and conservation services used by DHCD to evaluate whether the enactment of remedial measures to assist minority and women-owned businesses in the energy efficiency and conservation services industry and market would comply with the U.S. Supreme Court decision in *City of Richmond v. J. A. Croson Co., 488 U.S. 469*, and any subsequent federal or constitutional requirements.

By December 31, 2025, MDOT and GOSBA must submit the findings of the study to the Legislative Policy Committee so that the General Assembly may review the findings before the 2026 session.

Current Law:

EmPOWER Maryland Energy Efficiency Act

In 2008, the General Assembly passed the EmPOWER Maryland Energy Efficiency Act, which set target reductions of 15% in per capita electricity consumption and peak demand, respectively, by 2015 from a 2007 baseline. Legislation in 2017 extended the program through its 2018-2020 and 2021-2023 program cycles and established a new annual energy savings goal of 2.0% per year, based on each electric company's 2016 sales.

Chapter 38 of 2022 (the Climate Solutions Now Act) further increased the goal to 2.25% per year in 2025 and 2026 and to 2.5% annually thereafter. The Act also specified that the core objective of the reductions must include development and implementation of a portfolio of mutually reinforcing goals, including greenhouse gas emissions reduction, energy savings, net customer benefits, and reaching underserved customers. The Act included related administrative requirements in uncodified language.

DHCD participates in EmPOWER through two special fund programs: the Low Income Energy Efficiency Program (LIEEP) and the Multifamily Energy Efficiency and Housing Affordability (MEEHA) Program. LIEEP helps low-income households undertake energy conservation projects in their homes at no charge, while MEEHA promotes energy efficiency and affordability in the State's multifamily rental housing developments for low- and moderate-income households. Approved program costs are recovered by electric companies on customer bills.

Minority Business Enterprises

MDOT is designated in State regulations as the State's MBE certification agency. In 1989, the U.S. Supreme Court held in *City of Richmond v. J.A. Croson Co.* that state or local MBE programs using race-based classifications are subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. In addition, the ruling held that an MBE program must demonstrate clear evidence that the program is narrowly tailored to address actual disparities in the marketplace for the jurisdiction that operates the program.

See the **Appendix – Minority Business Enterprise Program** for additional information.

State Fiscal Effect: This analysis assumes that DHCD expands its existing EmPOWER programs in order to meet the bill's enhanced energy savings requirements. Further, as EmPOWER must continue beyond the current 2024-2026 planning cycle under current law, the bill's costs are assumed to be ongoing in nature. DHCD advises that the costs below account for other DHCD programs that can be reasonably expected to count their energy savings toward the bill's overall goals.

DHCD's estimate of the cost associated with significantly expanding its EmPOWER programs to meet the bill's energy savings requirements is approximately $39.8 million in fiscal 2024, increasing to $214.2 million by fiscal 2028. For fiscal 2024, the estimated cost is comprised mostly of contractual services for energy efficiency upgrades and related costs ($19.0 million), $16.5 million for grants, and $4.4 million in direct staff (45 in total) and other costs. In future fiscal years, DHCD estimates significantly higher contractual and grant costs as energy savings goals increase. By fiscal 2028, contractual services costs are estimated to be $111.8 million with grant costs of $96.7 million, while administrative and other expenditures remain relatively flat at $5.7 million.

The Department of Legislative Services cannot independently verify DHCD's costs at this time; ultimately, costs will depend on how DHCD chooses to implement the bill going forward, and the department could choose to do so in a more cost-efficient manner (DHCD's programs are an expensive component of EmPOWER on a per-unit basis). Regardless, costs are likely substantial – in the multiple tens of millions range. For context, spending on EmPOWER EE&C programs totaled $252.2 million in 2021, with DHCD spending $23.0 million of that amount.

DHCD's costs are assumed to be paid for by EmPOWER surcharge revenues. Accordingly, special fund revenues increase significantly – likely by tens of millions annually – from additional EmPOWER surcharge revenue to the extent necessary to cover additional costs. The amount and timing will depend on the amount and timing of approved cost collection by PSC. For context, utility revenue requirements for the EmPOWER EE&C programs totaled about $277.4 million in 2021.

To the extent that the State is able to apply for and obtain federal funding to support a possible expansion of programs that support a whole-home approach for energy efficiency and related upgrades, DHCD expenditures may further increase; however, that funding would be unavailable for other related uses and may be available in absence of the bill, so this estimate does not reflect any additional federal fund expenditures.

The effect on electricity rates is discussed in the Additional Comments section below.

Other Effects

This estimate assumes that DHCD can provide staff for the Green and Healthy Task Force and develop required plans with the additional staff and resources necessary to otherwise implement the bill. It further assumes that costs for other agencies related to the bill are generally minimal and/or absorbable within existing budgeted resources, with limited exceptions.

MEA must apply for federal funding that may become available to implement the bill and may have to hire additional staff to do so (assuming the agency would not have otherwise applied). Therefore, special fund expenditures for the Strategic Energy Investment Fund may increase to hire one additional staff beginning in fiscal 2024.

Assuming DHCD can provide certain industry information about its EmPOWER contractors, MDOT advises that it can conduct the required disparity study with existing resources. If not, Transportation Trust Fund expenditures increase by approximately $15,000 to $25,000 for data analysis in fiscal 2024 or 2025, prior to the disparity analysis being conducted at no further cost under existing contracts.

Local Fiscal Effect: Local weatherization agencies receive funds through LIEEP to assist in program implementation and local housing authorities receive funds through MEEHA. Both receive additional funds to expend on energy efficiency and conservation measures through those programs under the bill. The effect on electricity rates is discussed in the Additional Comments section below.

Small Business Effect: Small businesses engaged in weatherization and energy saving projects for DHCD benefit from a significant increase in program expenditures, although such businesses must comply with the specified labor practices, including paying 150% of the State minimum wage, providing paid leave, and offering retirement benefits. The effect on electricity rates is discussed in the Additional Comments section below.

Additional Comments: The EmPOWER surcharge is assessed on utility customers to pay for the program. Accordingly, all electricity customers – including the State, local governments, and small businesses – will ultimately pay for additional expenditures incurred by DHCD under the bill and funded through EmPOWER when those costs are recovered by electric companies through an increase in electricity rates. The timing and amount of rate recovery is unknown, although the bill represents a substantial increase in overall EmPOWER costs to be recovered. Of note, DHCD EmPOWER expenditures are typically funded by residential ratepayers.

Although the General Assembly passed similar legislation in the 2022 session (Senate Bill 524 and House Bill 108), the Governor vetoed the bills.

Additional Information

Prior Introductions: Similar legislation has been introduced within the last three years. See SB 524 and HB 108 of 2022; SB 462 and HB 379 of 2021; and SB 740 and HB 982 of 2020.

Designated Cross File: SB 144 (Senator Feldman) - Education, Energy, and the Environment.

Information Source(s): Department of Housing and Community Development; Maryland Energy Administration; Department of General Services; Public Service Commission; Department of Human Services; Maryland Department of Transportation; Department of Legislative Services

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Appendix – Minority Business Enterprise Program

The State's Minority Business Enterprise (MBE) program requires that a statewide goal for MBE contract participation be established biennially through the regulatory process under the Administrative Procedure Act. The biennial statewide MBE goal is established by the Special Secretary for the Governor's Office of Small, Minority, and Women Business Affairs (GOSBA), in consultation with the Secretary of Transportation and the Office of the Attorney General (OAG). In a year in which there is a delay in establishing the overall goal, the previous year's goal applies. The Special Secretary is also required to establish biennial guidelines for State procurement units to consider in deciding whether to establish subgoals for different minority groups recognized in statute. In a year in which there is a delay in issuing the guidelines, the previous year's guidelines apply. MDOT is the State's MBE certification agency.

In August 2013, GOSBA announced a new statewide goal of 29% MBE participation that applied to fiscal 2014 and 2015; as no new goal has been established, the 29% goal remains in effect for fiscal 2023. GOSBA issued subgoal guidelines in July 2011 and then updated them effective August 2020, as summarized in **Exhibit 1.** The guidelines state that subgoals may be used only when the overall MBE goal for a contract is greater than or equal to the sum of all recommended subgoals for the appropriate industry, plus two. MBE prime contractors may count their own work for up to 50% of a contract's MBE goal and up to 100% of any contract subgoal. Their full participation counts toward the State's 29% goal.

Exhibit 1
Subgoal Guidelines for Minority Business Enterprise Participation

	Construction	Architectural/ Engineering	Maintenance	Information Technology	Services	Supplies/ Equipment
African American	8%	7%	9%	10%	-	6%
Hispanic	-	-	3%	-	2%	2%
Asian	-	-	2%	-	3%	-
Women	11%	10%	-	10%	10%	8%
Total	**19%**	**17%**	**14%**	**20%**	**15%**	**16%**
Total +2	**21%**	**19%**	**16%**	**22%**	**17%**	**18%**

Source: Governor's Office of Small, Minority, and Women Business Affairs

There are no penalties for agencies that fail to reach the statewide target. However, Chapters 155 and 156 of 2022 require GOSBA to refer prime contractors that persistently fail to meet MBE participation goals on their contracts to OAG for debarment for up to three years.

History and Rationale of the Minority Business Enterprise Program

In 1989, the U.S. Supreme Court held in the *City of Richmond v. J.A. Croson Co.* that state or local MBE programs using race-based classifications are subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. In addition, the ruling held that an MBE program must demonstrate clear evidence that the program is narrowly tailored to address actual disparities in the marketplace for the jurisdiction that operates the program. As a result, prior to each reauthorization of the State's MBE program, the State conducts a disparity study to determine whether there is continued evidence that MBEs are underutilized in State contracting.

The disparity study completed in 2017 serves as the basis for the most recent reauthorization of the MBE program. It found continued and ongoing disparities in the overall annual wages, business earnings, and rates of business formation between nonminority males and minorities and women in Maryland. For instance, average annual wages for African Americans (both men and women) were 37% lower than for comparable nonminority males; average annual wages for nonminority women were 33% lower than for comparable nonminority males. It also found continued disparities in the use of MBEs by the State compared to their availability in the marketplace to perform work in designated categories of work. For instance, African American-owned construction businesses were paid 5.1% of State construction contract dollars, but they made up 10.3% of the construction sector in the relevant State marketplace. Nonminority women-owned construction businesses were paid 7.5% of State construction contract dollars but made up 13.7% of the construction sector. According to the analysis, these differences were large and statistically significant.

The MBE program is scheduled to terminate July 1, 2024; Chapter 117 of 2022, which reauthorized the program for the ninth time since its inception, required a new disparity study to be completed by September 2023 to inform the subsequent reauthorization process. **Exhibit 2** provides MBE participation rates for major Executive Branch agencies based on contract awards made during fiscal 2021, the most recent year for which data is available.

Exhibit 2
Minority Business Enterprise Participation Rates, by Agency
Fiscal 2021

Cabinet Agency	% Participation
Aging	0.1%
Agriculture	5.0%
Budget and Management	1.0%
Commerce	2.2%
Education	4.4%
Environment	33.4%
Executive Department	2.2%
General Services	15.3%
Health	3.6%
Higher Education Commission	0.7%
Housing and Community Development	22.6%
Human Services	NA
Information Technology	6.0%
Juvenile Services	12.6%
Labor	3.3%
Military	1.4%
Natural Resources	1.2%
Planning	1.2%
State Police	8.2%
Public Safety and Correctional Services	33.3%
Transportation – Aviation Administration	21.5%
Transportation – Motor Vehicle Administration	32.8%
Transportation – Office of the Secretary	28.20%
Transportation – Port Administration	17.8%
Transportation – State Highway Administration	24.5%
Transportation – Transit Administration	23.9%
Transportation – Transportation Authority	19.3%
Statewide Total[1]	**17.2%**

[1] Includes the University System of Maryland, Morgan State University, St. Mary's College of Maryland, and non-Cabinet agencies.

NA: Not Available/Did Not Report

Source: Governor's Office of Small, Minority, and Women Business Affairs

Requirements for Minority Business Enterprise Certification

An MBE is a legal entity, other than a joint venture, that is:

- organized to engage in commercial transactions;
- at least 51% owned and controlled by one or more individuals who are socially and economically disadvantaged; and
- managed by, and the daily business operations of which are controlled by, one or more of the socially and economically disadvantaged individuals who own it.

A socially and economically disadvantaged individual is defined as a citizen or legal U.S. resident who is African American, Native American, Asian, Hispanic, physically or mentally disabled, a woman, or otherwise found by the State's MBE certification agency to be socially and economically disadvantaged. An MBE owned by a woman who is also a member of an ethnic or racial minority group may be certified as being owned by both a woman and by a member of a racial or ethnic minority, but for the purpose of participating on a contract as an MBE, it can only be counted as one or the other.

A socially disadvantaged individual is someone who has been subject to racial or ethnic prejudice or cultural bias within American society because of his or her membership in a group and without regard to individual qualities. An economically disadvantaged individual is someone who is socially disadvantaged whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities compared with those who are not socially disadvantaged. An individual with a personal net worth in excess of $1.5 million, adjusted annually for inflation, is not considered economically disadvantaged. The inflation-adjusted limit for calendar 2023 is $1,995,008.