

By: Senator(s) Williams, Sparks

To: Business and Financial  
Institutions

COMMITTEE SUBSTITUTE  
FOR  
SENATE BILL NO. 2762

1 AN ACT TO ESTABLISH A MAXIMUM AMOUNT OF RETAINAGE AND  
2 ESTABLISH THE TIMING FOR RELEASE OF RETAINAGE WITH RESPECT TO THE  
3 PERFORMANCE OF CONTRACTS AND TO PROVIDE FOR THE PAYMENT OF  
4 INTEREST FOR IMPROPERLY HELD RETAINAGE; TO DEFINE CERTAIN TERMS  
5 FOR THE PURPOSES OF THIS ACT; TO PROVIDE TYPES OF CONTRACTS TO  
6 WHICH THE PROVISIONS OF THIS ACT DO NOT APPLY; TO AMEND SECTIONS  
7 31-5-15 AND 31-5-33, MISSISSIPPI CODE OF 1972, TO DEFINE THE TERM  
8 "RETAINAGE" FOR PURPOSES OF CERTAIN PUBLIC WORKS CONTRACTS; AND  
9 FOR RELATED PURPOSES.

10 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

11 **SECTION 1.** (1) For the purposes of this section, the  
12 following words and phrases shall have the meanings ascribed in  
13 this section unless the context clearly indicates otherwise:

14 (a) "Retainage" means that money, or other security as  
15 agreed to by the parties to a construction contract, earned by the  
16 contractor, subcontractor or lower tier sub-subcontractor or  
17 supplier, as the case may be, for work properly performed or  
18 materials suitably stored if payment for stored materials is  
19 provided for in the contract, which has been retained by the owner  
20 conditioned on final completion and acceptance of all work in



21 connection with a project or projects by the contractor,  
22 subcontractor or lower tier sub-subcontractor or supplier.

23 (b) "Final completion" shall mean the stage of the  
24 project at which all work has been completed in accordance with  
25 the contract requirements, including, but not limited to, the  
26 completion of punch list items, the submission of contractual  
27 close-out documents, equipment manuals, warranty documents or  
28 other like required deliverables.

29 (2) (a) A construction contract on any project in this  
30 state may provide for the owner's withholding of retainage from  
31 payments to its contractor for work performed by that contractor  
32 on a construction project. However, there may not be retained  
33 more than five percent (5%) of the estimated amount of work  
34 properly done and the value of materials stored on the site or  
35 suitably stored and insured off-site. After the contractor has  
36 completed fifty percent (50%) of the work in substantial  
37 compliance with the contract requirements and thereafter remains  
38 in substantial compliance with the contract requirements, no  
39 further retainage may be withheld. If an owner withholds an  
40 amount greater than that allowed by this paragraph (a), the owner  
41 shall be liable to the contractor for interest accruing on the  
42 excess amount withheld at the rate of one percent (1%) per month.

43 (b) A construction contract on any project in this  
44 state may provide for the contractor's withholding of retainage  
45 from payments to its subcontractors for work performed by the



46 subcontractors on a construction project. However, there may not  
47 be retained more than five percent (5%) of the estimated amount of  
48 work properly done and the value of materials stored on the site  
49 or suitably stored and insured off-site. After the subcontractor  
50 has completed fifty percent (50%) of the work in substantial  
51 compliance with the subcontract requirements and thereafter  
52 remains in substantial compliance with the subcontract  
53 requirements, no further retainage may be withheld. If a  
54 contractor withholds an amount greater than that allowed by this  
55 paragraph (b), the contractor shall be liable to the subcontractor  
56 for interest accruing on the excess amount withheld at the rate of  
57 one percent (1%) per month.

58 (c) A construction contract on any project in this  
59 state may provide for the subcontractor's withholding of retainage  
60 from payments to its sub-subcontractors or material suppliers for  
61 work performed by such sub-subcontractors or material suppliers on  
62 a construction project. However, there may not be retained more  
63 than five percent (5%) of the estimated amount of work properly  
64 done and the value of materials stored on the site or suitably  
65 stored and insured off-site. After the sub-subcontractor has  
66 completed fifty percent (50%) of the work in substantial  
67 compliance with the sub-subcontract requirements and thereafter  
68 remains in substantial compliance with the sub-subcontract  
69 requirements, no further retainage may be withheld. If a  
70 subcontractor withholds an amount greater than that allowed by



71 this paragraph (c), the subcontractor shall be liable to the  
72 sub-subcontractor or material supplier for interest accruing on  
73 the excess amount withheld at the rate of one percent (1%) per  
74 month.

75 (d) The five percent (5%) retainage described in  
76 paragraphs (a), (b) and (c) of this subsection shall apply to all  
77 items of work required to achieve final completion. Any amounts  
78 held above the five percent (5%) for items of work required to  
79 achieve final completion shall be subject to interest accruing on  
80 the excess amount at the rate of one percent (1%) per month.

81 (3) The owner shall release and pay retainage to the  
82 contractor for work completed on any construction contract no  
83 later than sixty (60) days after the final completion of the  
84 contractor's work provided all necessary certificates of occupancy  
85 have been issued. The contractor shall release and pay retainage  
86 to its subcontractors and subcontractors shall release and pay  
87 retainage to their sub-subcontractors for work completed pursuant  
88 to the requirements of Section 87-7-5, Mississippi Code of 1972.

89 (4) Nothing in this section limits or alters the paying  
90 party's right to withhold or not approve payment on grounds set  
91 forth in the party's contract, subcontract or sub-subcontract for  
92 work not properly performed or payment not earned; rather, this  
93 section is intended only to establish a maximum amount of  
94 retainage and provide for the payment of interest for improperly  
95 held retainage. Also, the paying party may condition payment on



96 the receipt of payment from the party with whom the paying party  
97 contracted and a full release of any lien of the contractor,  
98 subcontractor or sub-subcontractor, as the case may be, for the  
99 amount of work being paid.

100 (5) A party may not waive by contract or otherwise the right  
101 to receive interest, as provided for in this section.

102 (6) A contractor, subcontractor or sub-subcontractor may  
103 file a civil action solely against the party contractually  
104 obligated for the payment of the amount claimed to recover the  
105 amount due plus the interest accrued in accordance with this  
106 section. If the court finds in the civil action that the party  
107 contractually obligated for the payment of the amount claimed has  
108 not made payment in compliance with this section, the court shall  
109 award the interest specified in this section in addition to the  
110 amount due. In any such civil action, the party in whose favor a  
111 judgement is rendered shall be entitled to recover payment of  
112 reasonable attorneys' fees, court costs and reasonable expenses  
113 from the other party.

114 (7) This section does not apply to the following:

115 (a) Residential homebuilding.

116 (b) Improvements to real property intended for  
117 residential purposes which consist of sixteen (16) or fewer  
118 residential units.

119 (c) Contracts, subcontracts or sub-subcontracts in the  
120 amount of Ten Thousand Dollars (\$10,000.00) or less.



121 (d) Contracts awarded by the State of Mississippi, or  
122 any agency, unit or department of the State of Mississippi, or by  
123 any political subdivision thereof.

124 (8) This section does not amend or modify existing laws  
125 relating to mechanics and materialmen liens provided in Article  
126 21, Title 85, Chapter 7, Mississippi Code of 1972.

127 (9) The rights and obligations created in this section  
128 cannot be modified or waived by any oral or written contract or  
129 agreement.

130 (10) The provisions of this section shall become effective  
131 for and apply to all contracts, as described in this section,  
132 entered into on or after July 1, 2024.

133 **SECTION 2.** Section 31-5-15, Mississippi Code of 1972, is  
134 amended as follows:

135 31-5-15. Under any public contract heretofore or hereafter  
136 made or awarded by the State of Mississippi, or any agency or  
137 department of the State of Mississippi, or by any political  
138 subdivision thereof, the contractor may, with the written consent  
139 of his or its surety, from time to time, withdraw the whole or any  
140 portion of the amount retained from payments due the contractor  
141 pursuant to the terms of the contract by depositing with the State  
142 Treasurer of the State of Mississippi, or the treasurer or  
143 secretary of the political subdivision of the State of Mississippi  
144 holding funds belonging to the contractor, the following security,  
145 or any combination thereof in an amount equal to or in excess of



146 the amount so withdrawn, said securities to be accepted at the  
147 time of deposit at market value but not in excess of par value, to  
148 wit:

149 ( \* \* \*a) U.S. Treasury Bonds, U.S. Treasury Notes,  
150 U.S. Treasury Certificates of Indebtedness, or U.S. Treasury  
151 Bills, or

152 ( \* \* \*b) Bonds or notes of the State of Mississippi,  
153 or

154 ( \* \* \*c) Bonds of any political subdivision of the  
155 State of Mississippi, or

156 ( \* \* \*d) Certificates of deposit issued by commercial  
157 banks located in the State of Mississippi, provided that such  
158 certificate is negotiable or is accompanied by a power of attorney  
159 executed by the owner of the certificate in favor of the Treasurer  
160 of the State of Mississippi or of the treasurer or the secretary  
161 of the political subdivision involved, or

162 ( \* \* \*e) Certificates of deposit issued by savings and  
163 loan associations located in the State of Mississippi, the  
164 accounts of which are insured by the Federal Savings and Loan  
165 Insurance Corporation, or whose accounts are insured by a company  
166 approved by the State Board of Savings and Loan Associations,  
167 provided that such certificate is made payable with accrued  
168 interest on demand and is accompanied by a power of attorney  
169 executed by the owner of the certificate in favor of the Treasurer  
170 of the State of Mississippi or the treasurer or secretary of the



171 political subdivision involved, and provided that any such  
172 certificate from any of the savings and loan associations referred  
173 to in this subparagraph shall not be for an amount in excess of  
174 the maximum dollar amount of coverage of the Federal Savings and  
175 Loan Insurance Corporation.

176         The agency or department of the state shall notify the State  
177 Treasurer of the amount of deposit required and shall also notify  
178 the State Treasurer when to release the deposit. The political  
179 subdivision of the state shall notify its treasurer or secretary  
180 of the amount of deposit required and shall also notify him when  
181 to release the deposit.

182         The State Treasurer, or the secretary or treasurer of the  
183 political subdivision holding said security, shall, from time to  
184 time, collect all interest or income on the security so deposited  
185 and shall, by and with the written consent of contractor's surety,  
186 pay the same when and as collected to the contractor or  
187 contractors who deposited said obligations. If the deposit be in  
188 the form of coupon bonds, the coupons as they respectively become  
189 due shall be delivered to the contractor.

190         If in the event of an overpayment to a contractor the  
191 contracting authority is unable to obtain reimbursement for such  
192 overpayments from the contractor, the chief administrative officer  
193 of the contracting authority shall notify the contractor, its  
194 surety and the State Treasurer or other holder of the security, of  
195 the nature of the overpayment and of the failure to obtain





196 reimbursement. Upon such notification, the security holder shall  
197 retain the income on the deposited security until an amount equal  
198 to the overpayment is accumulated and paid to the contracting  
199 authority.

200 In the event the contractor shall default in the performance  
201 of the contract or any portion thereof, the securities deposited  
202 by him in lieu of retainage and all interest and coupons and  
203 income accruing on said securities after said default may be sold  
204 by the state or any agency or department thereof, or any political  
205 subdivision, and the proceeds of said sale used as if such  
206 proceeds represented the retainage provided for under the  
207 contract. For the purposes of this section, the term "retainage"  
208 means money, or other security as agreed to by the parties to a  
209 construction contract, earned by the contractor, subcontractor or  
210 lower-tier sub-subcontractor or supplier, as the case may be, for  
211 work properly performed or materials suitably stored if payment  
212 for stored materials is provided for in the contract, which has  
213 been retained by the owner conditioned on final completion, to  
214 include, but not be limited to, deliverable and nondeliverable  
215 requirements such as completion of contractual closeout, provision  
216 of equipment manuals, provision of warranty documents, completion  
217 of punch list and acceptance of all work in connection with a  
218 project by the contractor, subcontractor or lower-tier  
219 sub-subcontractor or supplier.



220           **SECTION 3.** Section 31-5-33, Mississippi Code of 1972, is  
221 amended as follows:

222           31-5-33. (1) In any contract for the construction, repair,  
223 alteration or demolition of any building, structure or facility  
224 awarded by the State of Mississippi, or any agency, unit or  
225 department of the State of Mississippi, or by any political  
226 subdivision thereof, which contract provides for progress payments  
227 in installments based upon an estimated percentage of completion  
228 with a percentage of the contract proceeds to be retained by the  
229 state agency, unit or department, or by the political subdivision  
230 or contractor pending completion of the contract, such retainage  
231 shall be five percent (5%), and the amount retained by the prime  
232 contractor from each payment due the subcontractor shall not  
233 exceed the percentage withheld by the state, or any agency, unit  
234 or department of the state, or by any political subdivision  
235 thereof, from the prime contractor. For the purposes of this  
236 section and Section 31-5-15, the term "retainage" means that  
237 money, or other security as agreed to by the parties to a  
238 construction contract, earned by the contractor, subcontractor or  
239 lower tier sub-subcontractor or supplier, as the case may be, for  
240 work properly performed or materials suitably stored if payment  
241 for stored materials is provided for in the contract, which has  
242 been retained by the owner conditioned on final completion and  
243 acceptance of all work in connection with a project or projects by



244 the contractor, subcontractor or lower tier sub-subcontractor or  
245 supplier.

246 On any contract as described herein, of which the total  
247 amount is Two Hundred Fifty Thousand Dollars (\$250,000.00) or  
248 greater, or on any contract with a subcontractor, regardless of  
249 amount, five percent (5%) shall be retained until the work is at  
250 least fifty percent (50%) complete, on schedule and satisfactory  
251 in the architect's and/or engineer's opinion, at which time fifty  
252 percent (50%) of the retainage held to date shall be returned to  
253 the prime contractor for distribution to the appropriate  
254 subcontractors and suppliers. Provided, however, that future  
255 retainage shall be withheld at the rate of two and one-half  
256 percent (2-1/2%).

257 (2) The provisions of this section shall not apply to  
258 contracts let by the Mississippi Transportation Commission for the  
259 construction, improvement or maintenance of roads and bridges.

260 **SECTION 4.** This act shall take effect and be in force from  
261 and after July 1, 2024.

