

By: Senator(s) Williams, Sparks

To: Business and Financial
Institutions

SENATE BILL NO. 2762

1 AN ACT TO CREATE A NEW SECTION TO ESTABLISH A MAXIMUM AMOUNT
 2 OF RETAINAGE AND ESTABLISH THE TIMING FOR RELEASE OF RETAINAGE
 3 WITH RESPECT TO THE PERFORMANCE OF CONTRACTS AND TO PROVIDE FOR
 4 THE PAYMENT OF INTEREST FOR IMPROPERLY HELD RETAINAGE; TO DEFINE
 5 CERTAIN TERMS FOR THE PURPOSES OF THIS ACT; TO PROVIDE TYPES OF
 6 CONTRACTS TO WHICH THE PROVISIONS OF THIS ACT DO NOT APPLY; TO
 7 AMEND SECTIONS 31-5-15 AND 31-5-33, MISSISSIPPI CODE OF 1972, TO
 8 DEFINE THE TERM "RETAINAGE" FOR PURPOSES OF CERTAIN PUBLIC WORKS
 9 CONTRACTS; AND 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 defined in subsections
76 2(a) through (c) of this section shall apply to all items of work
77 required to achieve final completion. Any amounts held above the
78 five percent (5%) for items of work required to achieve final
79 completion shall be subject to interest accruing on the excess
80 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 judgment is rendered shall be entitled to recover payment of
112 reasonable attorney's 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; or



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 close-out,
216 provision of equipment manuals, provision of warranty documents,
217 completion of punch list and acceptance of all work in connection
218 with a 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.

