

By: Senator(s) Williams, Sparks

To: Business and Financial
Institutions

SENATE BILL NO. 2762
(As Sent to Governor)

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 CERTAIN 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 which provides for progress payments in installments based
31 upon an estimated percentage of completion with a percentage of
32 the contract proceeds to be retained by the owner pending final
33 completion of the contract may provide for the owner's withholding
34 of retainage from payments to its contractor for work performed by
35 that contractor on a construction project. However, there may not
36 be retained more than five percent (5%) of the estimated amount of
37 work properly done and the value of materials stored on the site
38 or suitably stored and insured off-site. If an owner withholds an
39 amount greater than that allowed by this paragraph (a), the owner
40 shall be liable to the contractor for interest accruing on the
41 excess amount withheld at the rate of one percent (1%) per month.

42 (b) A construction contract on any project in this
43 state which provides for progress payments in installments based
44 upon an estimated percentage of completion with a percentage of
45 the contract proceeds to be retained by the contractor pending



46 final completion of the contract may provide for the contractor's
47 withholding of retainage from payments to its subcontractors for
48 work performed by the subcontractors on a construction project.
49 However, there may not be retained more than five percent (5%) of
50 the estimated amount of work properly done and the value of
51 materials stored on the site or suitably stored and insured
52 off-site. If a contractor withholds an amount greater than that
53 allowed by this paragraph (b), the contractor shall be liable to
54 the subcontractor for interest accruing on the excess amount
55 withheld at the rate of one percent (1%) per month.

56 (c) A construction contract on any project in this
57 state which provides for progress payments in installments based
58 upon an estimated percentage of completion with a percentage of
59 the contract proceeds to be retained by the subcontractor pending
60 final completion of the contract may provide for the
61 subcontractor's withholding of retainage from payments to its
62 sub-subcontractors or material suppliers for work performed by
63 such sub-subcontractors or material suppliers on a construction
64 project. However, there may not be retained more than five
65 percent (5%) of the estimated amount of work properly done and the
66 value of materials stored on the site or suitably stored and
67 insured off-site. If a subcontractor withholds an amount greater
68 than that allowed by this paragraph (c), the subcontractor shall
69 be liable to the sub-subcontractor or material supplier for



70 interest accruing on the excess amount withheld at the rate of one
71 percent (1%) per month.

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

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

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



95 subcontractor or sub-subcontractor, as the case may be, for the
96 amount of work being paid. For purposes of this subsection (4),
97 "the paying party" shall mean the party in direct contractual
98 privity with the party asserting that payment is due to it and,
99 accordingly, shall not include any financial institution or other
100 lender that is the source of the funds at issue.

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

103 (6) A contractor, subcontractor or sub-subcontractor may
104 file a civil action solely against the party contractually
105 obligated for the payment of the amount claimed to recover the
106 amount due plus the interest accrued in accordance with this
107 section. If the court finds in the civil action that the party
108 contractually obligated for the payment of the amount claimed has
109 not made payment in compliance with this section, the court shall
110 award the interest specified in this section in addition to the
111 amount due. In any such civil action, the party in whose favor a
112 judgement is rendered shall be entitled to recover payment of
113 reasonable attorneys' fees, court costs and reasonable expenses
114 from the other party. For purposes of this subsection (6), "the
115 party contractually obligated for the payment" shall mean the
116 party in direct contractual privity with the party asserting that
117 payment is due to it and, accordingly, shall not include any
118 financial institution or other lender that is the source of the
119 funds at issue.



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

121 (a) Residential homebuilding.

122 (b) Improvements to real property intended for
123 residential purposes which consist of sixteen (16) or fewer
124 residential units.

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

127 (d) Contracts awarded by the State of Mississippi, or
128 any agency, unit or department of the State of Mississippi, or by
129 any political subdivision thereof.

130 (8) This section does not amend or modify existing laws
131 relating to mechanics and materialmen liens provided in Article
132 21, Title 85, Chapter 7, Mississippi Code of 1972.

133 (9) The rights and obligations created in this section
134 cannot be modified or waived by any oral or written contract or
135 agreement.

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

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

141 31-5-15. Under any public contract heretofore or hereafter
142 made or awarded by the State of Mississippi, or any agency or
143 department of the State of Mississippi, or by any political
144 subdivision thereof, the contractor may, with the written consent



145 of his or its surety, from time to time, withdraw the whole or any
146 portion of the amount retained from payments due the contractor
147 pursuant to the terms of the contract by depositing with the State
148 Treasurer of the State of Mississippi, or the treasurer or
149 secretary of the political subdivision of the State of Mississippi
150 holding funds belonging to the contractor, the following security,
151 or any combination thereof in an amount equal to or in excess of
152 the amount so withdrawn, said securities to be accepted at the
153 time of deposit at market value but not in excess of par value, to
154 wit:

155 (* * *a) U.S. Treasury Bonds, U.S. Treasury Notes,
156 U.S. Treasury Certificates of Indebtedness, or U.S. Treasury
157 Bills, or

158 (* * *b) Bonds or notes of the State of Mississippi,
159 or

160 (* * *c) Bonds of any political subdivision of the
161 State of Mississippi, or

162 (* * *d) Certificates of deposit issued by commercial
163 banks located in the State of Mississippi, provided that such
164 certificate is negotiable or is accompanied by a power of attorney
165 executed by the owner of the certificate in favor of the Treasurer
166 of the State of Mississippi or of the treasurer or the secretary
167 of the political subdivision involved, or

168 (* * *e) Certificates of deposit issued by savings and
169 loan associations located in the State of Mississippi, the



170 accounts of which are insured by the Federal * * * Deposit
171 Insurance Corporation, or whose accounts are insured by a company
172 approved by the State Board of Savings and Loan Associations,
173 provided that such certificate is made payable with accrued
174 interest on demand and is accompanied by a power of attorney
175 executed by the owner of the certificate in favor of the Treasurer
176 of the State of Mississippi or the treasurer or secretary of the
177 political subdivision involved, and provided that any such
178 certificate from any of the savings and loan associations referred
179 to in this subparagraph shall not be for an amount in excess of
180 the maximum dollar amount of coverage of the Federal Savings and
181 Loan Insurance Corporation.

182 The agency or department of the state shall notify the State
183 Treasurer of the amount of deposit required and shall also notify
184 the State Treasurer when to release the deposit. The political
185 subdivision of the state shall notify its treasurer or secretary
186 of the amount of deposit required and shall also notify him when
187 to release the deposit.

188 The State Treasurer, or the secretary or treasurer of the
189 political subdivision holding said security, shall, from time to
190 time, collect all interest or income on the security so deposited
191 and shall, by and with the written consent of contractor's surety,
192 pay the same when and as collected to the contractor or
193 contractors who deposited said obligations. If the deposit be in



194 the form of coupon bonds, the coupons as they respectively become
195 due shall be delivered to the contractor.

196 If in the event of an overpayment to a contractor the
197 contracting authority is unable to obtain reimbursement for such
198 overpayments from the contractor, the chief administrative officer
199 of the contracting authority shall notify the contractor, its
200 surety and the State Treasurer or other holder of the security, of
201 the nature of the overpayment and of the failure to obtain
202 reimbursement. Upon such notification, the security holder shall
203 retain the income on the deposited security until an amount equal
204 to the overpayment is accumulated and paid to the contracting
205 authority.

206 In the event the contractor shall default in the performance
207 of the contract or any portion thereof, the securities deposited
208 by him in lieu of retainage and all interest and coupons and
209 income accruing on said securities after said default may be sold
210 by the state or any agency or department thereof, or any political
211 subdivision, and the proceeds of said sale used as if such
212 proceeds represented the retainage provided for under the
213 contract. For the purposes of this section, the term "retainage"
214 means money, or other security as agreed to by the parties to a
215 construction contract, earned by the contractor, subcontractor or
216 lower-tier sub-subcontractor or supplier, as the case may be, for
217 work properly performed or materials suitably stored if payment
218 for stored materials is provided for in the contract, which has



219 been retained by the owner conditioned on final completion, to
220 include, but not be limited to, deliverable and nondeliverable
221 requirements such as completion of contractual closeout, provision
222 of equipment manuals, provision of warranty documents, completion
223 of punch list and acceptance of all work in connection with a
224 project by the contractor, subcontractor or lower-tier
225 sub-subcontractor or supplier.

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

228 31-5-33. (1) In any contract for the construction, repair,
229 alteration or demolition of any building, structure or facility
230 awarded by the State of Mississippi, or any agency, unit or
231 department of the State of Mississippi, or by any political
232 subdivision thereof, which contract provides for progress payments
233 in installments based upon an estimated percentage of completion
234 with a percentage of the contract proceeds to be retained by the
235 state agency, unit or department, or by the political subdivision
236 or contractor pending completion of the contract, such retainage
237 shall be five percent (5%), and the amount retained by the prime
238 contractor from each payment due the subcontractor shall not
239 exceed the percentage withheld by the state, or any agency, unit
240 or department of the state, or by any political subdivision
241 thereof, from the prime contractor. For the purposes of this
242 section and Section 31-5-15, the term "retainage" means that
243 money, or other security as agreed to by the parties to a



244 construction contract, earned by the contractor, subcontractor or
245 lower-tier sub-subcontractor or supplier, as the case may be, for
246 work properly performed or materials suitably stored if payment
247 for stored materials is provided for in the contract, which has
248 been retained by the owner conditioned on final completion and
249 acceptance of all work in connection with a project or projects by
250 the contractor, subcontractor or lower-tier sub-subcontractor or
251 supplier.

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

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

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

