

House Amendments to Senate Bill No. 2762

TO THE SECRETARY OF THE SENATE:

THIS IS TO INFORM YOU THAT THE HOUSE HAS ADOPTED THE AMENDMENTS SET OUT BELOW:

AMENDMENT NO. 1

Amend by striking all after the enacting clause and inserting in lieu thereof the following:

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
37 of work properly done and the value of materials stored on the
38 site or suitably stored and insured off-site. If an owner
39 withholds an amount greater than that allowed by this paragraph
40 (a), the owner shall be liable to the contractor for interest
41 accruing on the excess amount withheld at the rate of one percent
42 (1%) per month.

43 (b) A construction contract on any project in this
44 state which provides for progress payments in installments based
45 upon an estimated percentage of completion with a percentage of
46 the contract proceeds to be retained by the contractor pending
47 final completion of the contract may provide for the contractor's
48 withholding of retainage from payments to its subcontractors for
49 work performed by the subcontractors on a construction project.
50 However, there may not be retained more than five percent (5%) of
51 the estimated amount of work properly done and the value of
52 materials stored on the site or suitably stored and insured

53 off-site. If a contractor withholds an amount greater than that
54 allowed by this paragraph (b), the contractor shall be liable to
55 the subcontractor for interest accruing on the excess amount
56 withheld at the rate of one percent (1%) per month.

57 (c) A construction contract on any project in this
58 state which provides for progress payments in installments based
59 upon an estimated percentage of completion with a percentage of
60 the contract proceeds to be retained by the subcontractor pending
61 final completion of the contract may provide for the
62 subcontractor's withholding of retainage from payments to its
63 sub-subcontractors or material suppliers for work performed by
64 such sub-subcontractors or material suppliers on a construction
65 project. However, there may not be retained more than five
66 percent (5%) of the estimated amount of work properly done and the
67 value of materials stored on the site or suitably stored and
68 insured off-site. If a subcontractor withholds an amount greater
69 than that allowed by this paragraph (c), the subcontractor shall
70 be liable to the sub-subcontractor or material supplier for
71 interest accruing on the excess amount withheld at the rate of one
72 percent (1%) per month.

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

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

87 (4) Nothing in this section limits or alters the paying
88 party's right to withhold or not approve payment on grounds set
89 forth in the party's contract, subcontract or sub-subcontract for
90 work not properly performed or payment not earned; rather, this
91 section is intended only to establish a maximum amount of
92 retainage and provide for the payment of interest for improperly
93 held retainage. Also, the paying party may condition payment on
94 the receipt of payment from the party with whom the paying party
95 contracted and a full release of any lien of the contractor,
96 subcontractor or sub-subcontractor, as the case may be, for the
97 amount of work being paid. For purposes of this subsection (4),
98 "the paying party" shall mean the party in direct contractual
99 privity with the party asserting that payment is due to it and,
100 accordingly, shall not include any financial institution or other
101 lender that is the source of the funds at issue.

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

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

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

122 (a) Residential homebuilding.

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

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

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

131 (8) This section does not amend or modify existing laws
132 relating to mechanics and materialmen liens provided in Article
133 21, Title 85, Chapter 7, Mississippi Code of 1972.

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

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

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

142 31-5-15. Under any public contract heretofore or hereafter
143 made or awarded by the State of Mississippi, or any agency or
144 department of the State of Mississippi, or by any political
145 subdivision thereof, the contractor may, with the written consent
146 of his or its surety, from time to time, withdraw the whole or any
147 portion of the amount retained from payments due the contractor
148 pursuant to the terms of the contract by depositing with the State
149 Treasurer of the State of Mississippi, or the treasurer or
150 secretary of the political subdivision of the State of Mississippi
151 holding funds belonging to the contractor, the following security,
152 or any combination thereof in an amount equal to or in excess of
153 the amount so withdrawn, said securities to be accepted at the

154 time of deposit at market value but not in excess of par value, to
155 wit:

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

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

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

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

169 (* * *e) Certificates of deposit issued by savings and
170 loan associations located in the State of Mississippi, the
171 accounts of which are insured by the Federal * * * Deposit
172 Insurance Corporation, or whose accounts are insured by a company
173 approved by the State Board of Savings and Loan Associations,
174 provided that such certificate is made payable with accrued
175 interest on demand and is accompanied by a power of attorney
176 executed by the owner of the certificate in favor of the Treasurer
177 of the State of Mississippi or the treasurer or secretary of the
178 political subdivision involved, and provided that any such
179 certificate from any of the savings and loan associations referred

180 to in this subparagraph shall not be for an amount in excess of
181 the maximum dollar amount of coverage of the Federal Savings and
182 Loan Insurance Corporation.

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

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

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

205 to the overpayment is accumulated and paid to the contracting
206 authority.

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

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

229 31-5-33. (1) In any contract for the construction, repair,
230 alteration or demolition of any building, structure or facility

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

253 On any contract as described herein, of which the total
254 amount is Two Hundred Fifty Thousand Dollars (\$250,000.00) or
255 greater, or on any contract with a subcontractor, regardless of
256 amount, five percent (5%) shall be retained until the work is at

257 least fifty percent (50%) complete, on schedule and satisfactory
258 in the architect's and/or engineer's opinion, at which time fifty
259 percent (50%) of the retainage held to date shall be returned to
260 the prime contractor for distribution to the appropriate
261 subcontractors and suppliers. Provided, however, that future
262 retainage shall be withheld at the rate of two and one-half
263 percent (2-1/2%).

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

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

**Further, amend by striking the title in its entirety and
inserting in lieu thereof the following:**

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.

HR31\SB2762PH.J

Andrew Ketchings
Clerk of the House of Representatives