

**Adopted
COMMITTEE AMENDMENT NO 1 PROPOSED TO**

Senate Bill No. 2762

BY: Committee

**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. After the
39 contractor has completed fifty percent (50%) of the work in
40 substantial compliance with the contract requirements and
41 thereafter remains in substantial compliance with the contract
42 requirements, no further retainage may be withheld. If an owner
43 withholds an amount greater than that allowed by this paragraph
44 (a), the owner shall be liable to the contractor for interest



45 accruing on the excess amount withheld at the rate of one percent
46 (1%) per month.

47 (b) A construction contract on any project in this
48 state which provides for progress payments in installments based
49 upon an estimated percentage of completion with a percentage of
50 the contract proceeds to be retained by the contractor pending
51 final completion of the contract may provide for the contractor's
52 withholding of retainage from payments to its subcontractors for
53 work performed by the subcontractors on a construction project.
54 However, there may not be retained more than five percent (5%) of
55 the estimated amount of work properly done and the value of
56 materials stored on the site or suitably stored and insured
57 off-site. After the subcontractor has completed fifty percent
58 (50%) of the work in substantial compliance with the subcontract
59 requirements and thereafter remains in substantial compliance with
60 the subcontract requirements, no further retainage may be
61 withheld. If a contractor withholds an amount greater than that
62 allowed by this paragraph (b), the contractor shall be liable to
63 the subcontractor for interest accruing on the excess amount
64 withheld at the rate of one percent (1%) per month.

65 (c) A construction contract on any project in this
66 state which provides for progress payments in installments based
67 upon an estimated percentage of completion with a percentage of
68 the contract proceeds to be retained by the subcontractor pending
69 final completion of the contract may provide for the



70 subcontractor's withholding of retainage from payments to its
71 sub-subcontractors or material suppliers for work performed by
72 such sub-subcontractors or material suppliers on a construction
73 project. However, there may not be retained more than five
74 percent (5%) of the estimated amount of work properly done and the
75 value of materials stored on the site or suitably stored and
76 insured off-site. After the sub-subcontractor has completed fifty
77 percent (50%) of the work in substantial compliance with the
78 sub-subcontract requirements and thereafter remains in substantial
79 compliance with the sub-subcontract requirements, no further
80 retainage may be withheld. If a subcontractor withholds an amount
81 greater than that allowed by this paragraph (c), the subcontractor
82 shall be liable to the sub-subcontractor or material supplier for
83 interest accruing on the excess amount withheld at the rate of one
84 percent (1%) per month.

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

91 (3) The owner shall release and pay retainage to the
92 contractor for work completed on any construction contract no
93 later than sixty (60) days after the final completion of the
94 contractor's work provided all necessary certificates of occupancy



95 have been issued. The contractor shall release and pay retainage
96 to its subcontractors and subcontractors shall release and pay
97 retainage to their sub-subcontractors for work completed pursuant
98 to the requirements of Section 87-7-5, Mississippi Code of 1972.

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

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

116 (6) A contractor, subcontractor or sub-subcontractor may
117 file a civil action solely against the party contractually
118 obligated for the payment of the amount claimed to recover the
119 amount due plus the interest accrued in accordance with this



120 section. If the court finds in the civil action that the party
121 contractually obligated for the payment of the amount claimed has
122 not made payment in compliance with this section, the court shall
123 award the interest specified in this section in addition to the
124 amount due. In any such civil action, the party in whose favor a
125 judgement is rendered shall be entitled to recover payment of
126 reasonable attorneys' fees, court costs and reasonable expenses
127 from the other party. For purposes of this subsection (6), "the
128 party contractually obligated for the payment" shall mean the
129 party in direct contractual privity with the party asserting that
130 payment is due to it and, accordingly, shall not include any
131 financial institution or other lender that is the source of the
132 funds at issue.

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

134 (a) Residential homebuilding.

135 (b) Improvements to real property intended for
136 residential purposes which consist of sixteen (16) or fewer
137 residential units.

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

140 (d) Contracts awarded by the State of Mississippi, or
141 any agency, unit or department of the State of Mississippi, or by
142 any political subdivision thereof.



143 (8) This section does not amend or modify existing laws
144 relating to mechanics and materialmen liens provided in Article
145 21, Title 85, Chapter 7, Mississippi Code of 1972.

146 (9) The rights and obligations created in this section
147 cannot be modified or waived by any oral or written contract or
148 agreement.

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

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

154 31-5-15. Under any public contract heretofore or hereafter
155 made or awarded by the State of Mississippi, or any agency or
156 department of the State of Mississippi, or by any political
157 subdivision thereof, the contractor may, with the written consent
158 of his or its surety, from time to time, withdraw the whole or any
159 portion of the amount retained from payments due the contractor
160 pursuant to the terms of the contract by depositing with the State
161 Treasurer of the State of Mississippi, or the treasurer or
162 secretary of the political subdivision of the State of Mississippi
163 holding funds belonging to the contractor, the following security,
164 or any combination thereof in an amount equal to or in excess of
165 the amount so withdrawn, said securities to be accepted at the
166 time of deposit at market value but not in excess of par value, to
167 wit:



168 (* * *a) U.S. Treasury Bonds, U.S. Treasury Notes,
169 U.S. Treasury Certificates of Indebtedness, or U.S. Treasury
170 Bills, or

171 (* * *b) Bonds or notes of the State of Mississippi,
172 or

173 (* * *c) Bonds of any political subdivision of the
174 State of Mississippi, or

175 (* * *d) Certificates of deposit issued by commercial
176 banks located in the State of Mississippi, provided that such
177 certificate is negotiable or is accompanied by a power of attorney
178 executed by the owner of the certificate in favor of the Treasurer
179 of the State of Mississippi or of the treasurer or the secretary
180 of the political subdivision involved, or

181 (* * *e) Certificates of deposit issued by savings and
182 loan associations located in the State of Mississippi, the
183 accounts of which are insured by the Federal * * * Deposit
184 Insurance Corporation, or whose accounts are insured by a company
185 approved by the State Board of Savings and Loan Associations,
186 provided that such certificate is made payable with accrued
187 interest on demand and is accompanied by a power of attorney
188 executed by the owner of the certificate in favor of the Treasurer
189 of the State of Mississippi or the treasurer or secretary of the
190 political subdivision involved, and provided that any such
191 certificate from any of the savings and loan associations referred
192 to in this subparagraph shall not be for an amount in excess of



193 the maximum dollar amount of coverage of the Federal Savings and
194 Loan Insurance Corporation.

195 The agency or department of the state shall notify the State
196 Treasurer of the amount of deposit required and shall also notify
197 the State Treasurer when to release the deposit. The political
198 subdivision of the state shall notify its treasurer or secretary
199 of the amount of deposit required and shall also notify him when
200 to release the deposit.

201 The State Treasurer, or the secretary or treasurer of the
202 political subdivision holding said security, shall, from time to
203 time, collect all interest or income on the security so deposited
204 and shall, by and with the written consent of contractor's surety,
205 pay the same when and as collected to the contractor or
206 contractors who deposited said obligations. If the deposit be in
207 the form of coupon bonds, the coupons as they respectively become
208 due shall be delivered to the contractor.

209 If in the event of an overpayment to a contractor the
210 contracting authority is unable to obtain reimbursement for such
211 overpayments from the contractor, the chief administrative officer
212 of the contracting authority shall notify the contractor, its
213 surety and the State Treasurer or other holder of the security, of
214 the nature of the overpayment and of the failure to obtain
215 reimbursement. Upon such notification, the security holder shall
216 retain the income on the deposited security until an amount equal



217 to the overpayment is accumulated and paid to the contracting
218 authority.

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

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



241 31-5-33. (1) In any contract for the construction, repair,
242 alteration or demolition of any building, structure or facility
243 awarded by the State of Mississippi, or any agency, unit or
244 department of the State of Mississippi, or by any political
245 subdivision thereof, which contract provides for progress payments
246 in installments based upon an estimated percentage of completion
247 with a percentage of the contract proceeds to be retained by the
248 state agency, unit or department, or by the political subdivision
249 or contractor pending completion of the contract, such retainage
250 shall be five percent (5%), and the amount retained by the prime
251 contractor from each payment due the subcontractor shall not
252 exceed the percentage withheld by the state, or any agency, unit
253 or department of the state, or by any political subdivision
254 thereof, from the prime contractor. For the purposes of this
255 section and Section 31-5-15, the term "retainage" means that
256 money, or other security as agreed to by the parties to a
257 construction contract, earned by the contractor, subcontractor or
258 lower tier sub-subcontractor or supplier, as the case may be, for
259 work properly performed or materials suitably stored if payment
260 for stored materials is provided for in the contract, which has
261 been retained by the owner conditioned on final completion and
262 acceptance of all work in connection with a project or projects by
263 the contractor, subcontractor or lower tier sub-subcontractor or
264 supplier.



265 On any contract as described herein, of which the total
266 amount is Two Hundred Fifty Thousand Dollars (\$250,000.00) or
267 greater, or on any contract with a subcontractor, regardless of
268 amount, five percent (5%) shall be retained until the work is at
269 least fifty percent (50%) complete, on schedule and satisfactory
270 in the architect's and/or engineer's opinion, at which time fifty
271 percent (50%) of the retainage held to date shall be returned to
272 the prime contractor for distribution to the appropriate
273 subcontractors and suppliers. Provided, however, that future
274 retainage shall be withheld at the rate of two and one-half
275 percent (2-1/2%).

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

279 **SECTION 4.** This act shall take effect and be in force from
280 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.

