

# Mississippi Passes New Retainage Law Governing Private Construction Jobs

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Construction contracts for private projects will soon be subject to a new retainage law in Mississippi. On April 19, 2024, Gov. Tate Reeves approved SB 2762 into law, and after July 1, 2024, most construction contracts on projects in Mississippi will comply with a set of retainage laws similar to those that have governed public projects for decades in the Magnolia State.

Specifically, this new law allows an owner, contractor, or subcontractor to retain contract proceeds from installment payments pending final completion. However, the retained funds cannot exceed 5% “of the estimated amount of work properly done and the value of materials stored on the site or suitably stored and insured off-site.”

The law punishes its violators through interest assessments. An owner, contractor, or subcontractor that withholds more than the 5% amount will be liable to the contractor, subcontractor, sub-subcontractor, or material supplier, as applicable, for interest accruing on the excess amount withheld at the rate of 1% per month. The law clarifies that the 5% retainage applies to all items of work required to meet final completion and that all amounts withheld above that amount are subject to the 1% per month interest penalty.

An owner must release all retainage to a contractor for completed work no later than 60 days after final completion of the work if all necessary certificates of occupancy have been issued. Contractors and subcontractors must release retained funds to lower tiered subcontractors and/or suppliers in accordance with Mississippi’s prompt payment statute, Miss. Code § 87-7-5.

The law defines the phrase “final completion” to mean “the stage of the project at which all work has been completed in accordance with the contract requirements, including, but not limited to, the completion of punch list items, the submission of contractual close-out documents, equipment manuals, warranty documents or other like required deliverables.”

The law also defines the term “retainage” to mean “money, or other security as agreed to by the parties to a construction contract, earned by the contractor, subcontractor or lower-tier sub-subcontractor or supplier, as the case may be, for work properly performed or materials suitably

stored if payment for stored materials is provided for in the contract, which has been retained by the owner conditioned on final completion and acceptance of all work in connection with a project or projects by the contractor, subcontractor or lower-tier sub-subcontractor or supplier.”

The law does not limit or alter a party’s right to withhold payments or not approve payment in accordance with the governing contract(s) for work not properly performed or for payment not earned. Similarly, this law expressly provides that pay-if-paid provisions can still be enforced and that lien releases can serve as conditions to payment.

A prevailing party in an action to enforce this law is entitled to recover attorneys’ fees, court costs, and expenses.

Contracts excluded from this new law are:

1. Residential homebuilding contracts;
2. Contracts for improvements to real property intended for residential purposes consisting of 16 or fewer residential units;
3. Contracts in the amount of \$10,000 or less; or
4. Public contracts (see Miss. Code Ann. § 31-5-33 for public project retainage law).

How and to what extent this new retainage law will impact Mississippi’s construction industry remains to be seen, although some possibilities come to mind:

- Owners and upper tiered contractors, because they can no longer withhold more than 5% of payments for additional security, may be more selective in choosing contractors, subcontractors, or suppliers.
- Careful contract drafting will become even more critical given the law’s express recognition of the payor’s right to withhold payments for inadequate work, payments not earned, pursuant to pay-if-paid provisions, and conditioned on the execution of lien releases.
- The new definition of “final completion” could impact how courts interpret construction contracts and industry statutes and regulations beyond just this new law, as this term was previously undefined (see, e.g., Miss. Code Ann. §§ 31-5-33 (public retainage law); 85-7-189 (timing of suits on performance bond claims); 65-9-11 (State Aid Engineer final inspection obligations)).
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