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Builders and contractors; revise license and penalty provisions, establish Home Improvement Guaranty Fund and revise board.				

MISSISSIPPI LEGISLATURE

2010 Regular Session

To: Judiciary B; Appropriations

By: Representative Broomfield

House Bill 955

AN ACT TO AMEND SECTION 73-59-1, MISSISSIPPI CODE OF 1972, TO DEFINE FUND; TO AMEND SECTION 73-59-3, MISSISSIPPI CODE OF 1972, TO REVISE LICENSING REQUIREMENTS AND FEES; TO AMEND SECTION 73-59-9, MISSISSIPPI CODE OF 1972, TO REVISE PENALTIES AND ENFORCEMENT PROVISIONS; TO AMEND SECTION 73-59-11, MISSISSIPPI CODE OF 1972, TO CREATE THE HOME IMPROVEMENT GUARANTY FUND AND PROVIDE FOR ITS ADMINISTRATION; TO AMEND SECTION 31-3-1, MISSISSIPPI CODE OF 1972, TO REVISE THE MONETARY THRESHOLD REGARDING PRIVATE PROJECTS; TO AMEND SECTION 31-3-3, MISSISSIPPI CODE OF 1972, TO REVISE THE MEMBERSHIP OF THE STATE BOARD OF CONTRACTORS; TO AMEND SECTION 97-23-103, MISSISSIPPI CODE OF 1972, TO REVISE DEFINITIONS REGARDING HOME CONSTRUCTION FRAUD; AND FOR RELATED PURPOSES.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

SECTION 1. Section 73-59-1, Mississippi Code of 1972, is amended as follows:

73-59-1. For the purposes of this chapter, the following words shall have the meanings ascribed herein:

(a) "Board" means the State Board of Contractors created in Section 31-3-3, Mississippi Code of 1972.

(b) "Fund" means the Home Improvement Guaranty Fund.

(c) "Residential builder" means any corporation, partnership or individual who constructs a building or structure for sale for use by another as a residence or who, for a fixed price, commission, fee,

wage or other compensation, undertakes or offers to undertake the construction, or superintending of the construction, of any building or structure which is not more than three (3) floors in height, to be used by another as a residence, when the cost of the undertaking exceeds Fifty Thousand Dollars (\$50,000.00).

(d) "Remodeler" means any corporation, partnership or individual who, for a fixed price, commission, fee, wage or other compensation, undertakes or offers to undertake the construction, or superintending of the construction, of improvements to an existing residence when the cost of the improvements exceeds Ten Thousand Dollars (\$10,000.00).

(e) "Residential construction" means any undertaking described in paragraph (b) of this section performed by a residential builder.

(f) "Residential improvement" means any undertaking described in paragraph (c) of this section performed by a remodeler.

SECTION 2. Section 73-59-3, Mississippi Code of 1972, is amended as follows:

73-59-3. (1) Except as otherwise provided in Section 73-59-15 or Section 33-1-39, persons who perform residential construction or residential improvement shall be licensed by the board annually, and, as a prerequisite to obtaining a license or renewal thereof, each shall submit to the board:

(a) Proof of workers' compensation insurance, if applicable;

(b) Proof of liability insurance;

(c) A federal employment identification number or social security number.

(2) Each licensee under this chapter shall appoint either the Secretary of State or the Executive Director of the State Board of Contractors as its registered agent for service of process.

(3) The board shall issue or renew a license to a residential builder or remodeler upon payment to the board of the license fee. The initial license fee shall be One Hundred Fifty Dollars (\$150.00), of which

One Hundred Dollars (\$100.00) shall be deposited into the fund. The license fee may thereafter be increased or decreased by the board and cannot exceed One Hundred Dollars (\$100.00) not including the initial deposit into the fund; however, the receipts from fees collected by the board shall be no greater than the amount required to pay all costs and expenses incurred by the board in enforcing the provisions of this chapter. Twenty-five Dollars (\$25.00) of the fee required by this section which is assessed to residential builders licensed under the provisions of Section 73-59-1 et seq. shall be deposited to the Construction Education Fund created pursuant to Section 31-3-14 and shall be distributed to the Mississippi Housing Institute. The remaining fees collected under this chapter shall be deposited into the special fund in the State Treasury known as the "State Board of Contractors Fund" created pursuant to Section 31-3-17 and shall be used for the administration and enforcement of this chapter and as provided in Section 31-3-14. Amounts in such fund shall not lapse into the State General Fund at the end of a fiscal year. Interest accrued to such fund shall remain in the fund. All expenditures from the special fund shall be by requisition to the Department of Finance and Administration, signed by the executive secretary of the board and countersigned by the chairman or vice chairman of the board.

(4) Except as provided in Section 33-1-39, the license shall expire on the last day of the twelfth month following its issuance or renewal and shall become invalid unless renewed. The board may notify by mail or e-mail every licensee under this chapter of the date of the expiration of his license and the amount of the fee required for renewal of the license for one (1) year. To receive notification by e-mail, a licensee must notify the board of his desire to receive notification by e-mail and provide an e-mail address. Such notice may be mailed or e-mailed within thirty (30) days prior to the expiration date of the license. The failure on the part of any licensee to renew his license annually in such twelfth month shall not deprive such licensee of the right of renewal, provided that renewal is effected within one hundred twenty (120) days after the expiration date of the license by payment of the license fee plus a penalty of ten percent (10%) of the license fee. A new license required to replace a revoked, lost, mutilated or destroyed license may be issued, subject to the rules of the board, for a charge of not more than Twenty-five Dollars (\$25.00).

(5) Any person who is not a resident of the State of Mississippi who desires to perform residential

construction or residential improvement shall be licensed to perform such construction or improvement as provided by this chapter.

SECTION 3. Section 73-59-9, Mississippi Code of 1972, is amended as follows:

73-59-9. (1) Any residential builder who undertakes or attempts to undertake the business of residential construction without having a valid license as required by this chapter, or who knowingly presents to the board, or files with the board, false information for the purpose of obtaining such license, shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not less than One Hundred Dollars (\$100.00) and not more than Twenty-five Thousand Dollars (\$25,000.00) or be imprisoned for not less than thirty (30) nor more than sixty (60) days in the county jail, or both.

(2) Any remodeler who undertakes or attempts to undertake the business of residential improvement without having a valid license as required by this chapter, or who knowingly presents to the board, or files with the board, false information for the purpose of obtaining such license, shall be deemed guilty of a misdemeanor and, upon conviction, shall be fined not less than One Hundred Dollars (\$100.00) and not more than Five Thousand Dollars (\$5,000.00) or be imprisoned for not less than thirty (30) nor more than sixty (60) days in the county jail, or both.

(3) A residential builder or remodeler who does not have the license provided by this chapter may not bring any action, either at law or in equity, to enforce any contract for residential building or remodeling or to enforce a sales contract.

(4) The district attorney of the county in which the residential builder or remodeler has undertaken or attempted to undertake the business of residential construction or improvement without having a valid license shall have the authority to prosecute such residential builder or remodeler and to enforce the penalties imposed by this section.

SECTION 4. Section 73-59-11, Mississippi Code of 1972, is amended as follows:

73-59-11. The board shall have the following additional duties for the purposes of this chapter:

(a) The board shall:

(i) Establish a Home Improvement Guaranty Fund; and

(ii) Keep the fund at a level of at least Two Hundred Fifty Thousand Dollars (\$250,000.00).

1. If the board finds that, because of pending claims, the amount of the fund may fall below Two Hundred Fifty Thousand Dollars (\$250,000.00), the board shall assess each contractor a fee of Fifty Dollars (\$50.00).

2. However, under this subsection the board may not assess a contractor more than One Hundred Fifty Dollars (\$150.00) in a calendar year.

3. If a contractor fails to pay an assessment within sixty (60) days after notice of the assessment, the contractor's license is suspended until the assessment is paid.

(iii) Claims against the fund:

1. Subject to this paragraph, an owner may recover compensation from the fund for an actual loss that results from an act or omission by a licensed contractor as found by the board or a court of competent jurisdiction.

2. For purposes of recovery from the fund, the act or omission of a licensed contractor includes the act or omission of a subcontractor, salesperson, or employee of the licensed contractor, whether or not an express agency relationship exists.

3. A claimant shall comply with a written agreement to submit a dispute to arbitration before seeking recovery from the fund.

4. The board may deny a claim if the board finds that the claimant unreasonably rejected good faith efforts by the contractor to resolve the claim.

5. The board may not award from the fund:

- a. More than Fifteen Thousand Dollars (\$15,000.00) to one (1) claimant for the acts or omissions of one (1) contractor;
- b. More than One Hundred Thousand Dollars (\$100,000.00) to all claimants for acts or omissions of one (1) contractor unless, after the board has paid out One Hundred Thousand Dollars (\$100,000.00) on account of acts or omissions of the contractor, the contractor reimburses One Hundred Thousand Dollars (\$100,000.00) to the fund;
- c. An amount for attorney's fees, consequential damages, court costs, interest, personal injury damages, or punitive damages; or
- d. An amount as a result of a default judgment in court.

6. Excluded claimants.

- a. A claim against the fund based on the act or omission of a particular contractor may not be made by:
 - A. A spouse or other immediate relative of the contractor;
 - B. An employee, officer, or partner of the contractor; or
 - C. An immediate relative of an employee, officer, or partner of the contractor.
- b. An owner may make a claim against the fund only if the owner:
 - A. Resides in the home as to which the claim is made; or
 - B. Does not own more than three (3) residences or dwelling places.

7. A claim shall be brought against the fund within three (3) years after the claimant

discovered or, by use of ordinary diligence, should have discovered the loss or damage.

(iv) Procedure for submitting claims.

1. To begin a proceeding to recover from the fund, a claimant shall submit to the board a claim, under oath, that states:

- a. The amount claimed based on the actual loss;
- b. The facts giving rise to the claim;
- c. Any other evidence that supports the claim; and
- d. Any other information that the board requires.

(v) Payments from the fund.

1. The board may order payment of a claim against the fund only if:

- a. The decision or order of the board is final and all rights of appeal are exhausted; or
- b. The claimant provides the board with a certified copy of a final judgment of a court of competent jurisdiction or a final award in arbitration, with all rights of appeal exhausted, in which the court or arbitrator expressly has found on the merits that the claimant is entitled to recover and has found the value of the actual loss.

2. Order of payment.

- a. Except as otherwise provided in this subsection, the board shall pay approved claims in the order submitted.
- b. If approved claims submitted to the board against a contractor exceed One Hundred Thousand Dollars (\$100,000.00) less the amount of unreimbursed claim payments previously made for

the contractor, the board may pay the approved claims proportionately so that each claimant receives the same percentage payment of the claims.

c. After the fund is reimbursed, the board shall pay unsatisfied approved claims.

3. If there is not enough money in the fund to pay an approved claim wholly or partly, the board shall pay the unpaid claim:

a. When enough money is deposited in the fund; and

b. In the order that each claim originally was filed with a court of competent jurisdiction or submitted to the board.

(b) Disposition of money collected; investments by State Treasurer.

(i) The board shall deposit all money collected to the credit of the fund with the State Treasurer for placement in a special account.

(ii) Investment earnings shall be credited to the fund.

(iii) The fund shall not be subject to fiscal year limitations.

(c) The board shall administer the fund in accordance with this section.

(d) To conduct thorough investigations of all applicants seeking a license or licensees seeking renewal of their licenses and of all complaints filed with the board concerning the performance of a residential builder.

(e) To obtain information concerning the responsibility of any applicant for a license or of a licensee. Such information may be obtained by investigation, by hearings, or by any other reasonable and lawful means. The board shall keep such information appropriately filed.

(f) To maintain a list of residential builders and remodelers to whom licenses are issued, refused,

revoked or suspended, which list shall be available to any interested person.

(g) To prepare annually a complete roster that shows all the names and places of business of the residential builders and remodelers licensed by the board during the preceding year and to forward a copy of the roster to each municipality and county in the state and to file the roster with the Secretary of State.

(h) To take disciplinary actions pursuant to the provisions of Section 73-59-13.

(i) To adopt rules and regulations governing disciplinary actions and the conduct of its hearings and to adopt such other rules and regulations as the board finds necessary for the proper administration of this chapter.

SECTION 5. Section 31-3-1, Mississippi Code of 1972, is amended as follows:

31-3-1. The following words, as used in this chapter, shall have the meanings specified below:

"Board": The State Board of Contractors created under this chapter.

"Contractor": Any person contracting or undertaking as prime contractor, subcontractor or sub-subcontractor of any tier to do any erection, building, construction, reconstruction, repair, maintenance or related work on any public or private project; however, "contractor" shall not include any owner of a dwelling or other structure to be constructed, altered, repaired or improved and not for sale, lease, public use or assembly, or any person duly permitted by the Mississippi State Oil and Gas Board, pursuant to Section 53-3-11, Mississippi Code of 1972, to conduct operations within the state, and acting pursuant to said permit. It is further provided that nothing herein shall apply to:

(a) Any contract or undertaking on a public project by a prime contractor, subcontractor or sub-subcontractor of any tier involving erection, building, construction, reconstruction, repair, maintenance or related work where such contract, subcontract or undertaking is less than Ten Thousand Dollars (\$10,000.00);

(b) Any contract or undertaking on a private project by a prime contractor, subcontractor or sub-subcontractor of any tier involving erection, building, construction, reconstruction, repair, maintenance or related work where such contract, subcontract or undertaking is less than One Hundred Thousand Dollars (\$100,000.00);

(c) Highway construction, highway bridges, overpasses and any other project incidental to the construction of highways which are designated as federal aid projects and in which federal funds are involved;

(d) A residential project to be occupied by fifty (50) or fewer families and not more than three (3) stories in height;

(e) A residential subdivision where the contractor is developing either single-family or multifamily lots;

(f) A new commercial construction project not exceeding seventy-five hundred (7500) square feet and not more than two (2) stories in height undertaken by an individual or entity licensed under the provisions of Section 73-59-1 et seq.;

(g) Erection of a microwave tower built for the purpose of telecommunication transmissions;

(h) Any contract or undertaking on a public project by a prime contractor, subcontractor or sub-subcontractor of any tier involving the construction, reconstruction, repair or maintenance of fire protection systems where such contract, subcontract or undertaking is less than Five Thousand Dollars (\$5,000.00);

(i) Any contract or undertaking on a private project by a prime contractor, subcontractor or sub-subcontractor of any tier involving the construction, reconstruction, repair or maintenance of fire protection systems where such contract, subcontract or undertaking is less than Ten Thousand Dollars (\$10,000.00);

(j) Any contract or undertaking on a private or public project by a prime contractor, subcontractor or sub-subcontractor of any tier involving the construction, reconstruction, repair or maintenance of technically specialized installations if performed by a Mississippi contractor who has been in the business of installing fire protection sprinkler systems on or before July 1, 2000; or

(k) Any contractor undertaking to build, construct, reconstruct, repair, demolish, perform maintenance on, or other related work, whether on the surface or subsurface, on oil or gas wells, pipelines, processing plants, or treatment facilities or other structures of facilities. Nothing herein shall be construed to limit the application or effect of Section 31-5-41.

"Certificate of responsibility": A certificate numbered and held by a contractor issued by the board under the provisions of this chapter after payment of the special privilege license tax therefor levied under this chapter.

"Person": Any person, firm, corporation, joint venture or partnership, association or other type of business entity.

"Private project": Any project for erection, building, construction, reconstruction, repair, maintenance or related work which is not funded in whole or in part with public funds.

"Public agency": Any board, commission, council or agency of the State of Mississippi or any district, county or municipality thereof, including school, hospital, airport and all other types of governing agencies created by or operating under the laws of this state.

"Public funds": Monies of public agencies, whether obtained from taxation, donation or otherwise; or monies being expended by public agencies for the purposes for which such public agencies exist.

"Public project": Any project for erection, building, construction, reconstruction, repair, maintenance or related work which is funded in whole or in part with public funds.

SECTION 6. Section 31-3-3, Mississippi Code of 1972, is amended as follows:

31-3-3. There is hereby created the State Board of Contractors of the State of Mississippi, which shall consist of twelve members who shall be appointed by the Governor with the advice and consent of the Senate. All appointments to the board after July 1, 1980, shall be made with the advice and consent of the Senate. Two (2) road contractors; two (2) building contractors; two (2) residential builders as defined in Section 73-59-1; one (1) plumbing or heating and air conditioning contractor; one (1) electrical contractor; * * * one (1) water and sewer contractor; and one (1) roofing contractor shall compose the board. From and after July 1, 2010, the Governor shall appoint two (2) additional members who shall be consumer representatives. Each member shall be an actual resident of the State of Mississippi and the first ten (10) must have been actually engaged in the contracting business for a period of not less than ten (10) years before appointment. The initial terms of the two (2) residential builders shall be for two (2) and four (4) years, respectively, beginning July 1, 1993. The initial terms of the two (2) consumer representatives shall be for two (2) and four (4) years respectively, beginning July 1, 2010.

Upon the expiration of the term of office of any member of the board, the Governor shall appoint a new member for a term of five (5) years, such new appointments being made so as to maintain on the board two (2) building contractors; two (2) road contractors; two (2) residential builders; one (1) plumbing or heating and air conditioning contractor; one (1) electrical contractor; * * * one (1) water and sewer contractor; and one (1) roofing contractor. The Governor shall fill any vacancy by appointment, such appointee to serve the balance of the term of the original appointee. The Governor may remove any member of the board for misconduct, incompetency or willful neglect of duty.

In the event the Governor fails to appoint a member of the board within twelve (12) months of the occurrence of the vacancy, such vacancy shall be filled by majority vote of the board, subject to advice and consent of the Senate and the requirements of this section.

SECTION 7. Section 97-23-103, Mississippi Code of 1972, is amended as follows:

97-23-103. (1) As used in this section, unless the context clearly requires otherwise:

(a) "Home construction" means the initial construction or repair, including fixing, replacing, altering, converting, modernizing, improving of or the making of an addition to any real property primarily designed or used as a residence.

(i) Home construction shall include the construction, installation, replacement or improvement of driveways, swimming pools, porches, kitchens, chimneys, chimney liners, garages, fences, fallout shelters, central air conditioning, central heating, boilers, furnaces, hot water heaters, electrical wiring, sewers, plumbing fixtures, storm doors, storm windows, awnings, carpets and other improvements to structures within the residence or upon the land adjacent thereto.

(ii) Home repair shall not include the sale of goods or materials by a merchant who does not directly or through a subsidiary perform any work or labor in connection with the installation or application of the goods or materials; the repair, installation, replacement or connection of any home appliance, including, but not limited to, disposals, refrigerators, ranges, garage door openers, television antennas, washing machines, telephones or other home appliances when the person replacing, installing, repairing or connecting such home appliance is an employee or agent of the merchant that sold the home appliance; or landscaping.

(b) "Person" means any individual, partnership, corporation, business, trust or other legal entity.

(c) "Residence" means a single or multiple family dwelling, including, but not limited to, a single family home, apartment building, condominium, duplex, townhouse or mobile home which is used or intended to be used by its occupants as their dwelling place.

(2) A person commits the offense of home construction fraud when he knowingly:

(a) Enters into an agreement or contract, written or oral, with a person for home construction, and he knowingly:

(i) Misrepresents a material fact relating to the terms of the contract or agreement or the preexisting or existing condition of any portion of the property involved, or creates or confirms another's

impression which is false and which he does not believe to be true, or promises performance which he does not intend to perform or knows will not be performed;

(ii) Uses or employs any deception, false pretense or false promises in order to induce, encourage or solicit such person to enter into any contract or agreement;

(iii) Misrepresents or conceals either his real name, the name of his business or his business address; or

(iv) Uses deception, coercion or force to obtain the victim's consent to modification of the terms of the original contract or agreement;

(b) Damages the property of a person with the intent to enter into an agreement or contract for home construction; or

(c) Misrepresents himself or another to be an employee or agent of any unit of the federal, state or municipal government or any other governmental unit, or an employee or agent of any public utility, with the intent to cause a person to enter into, with himself or another, any contract or agreement for home construction.

(3) Intent and knowledge shall be determined by an evaluation of all circumstances surrounding a transaction and the determination shall not be limited to the time of contract or agreement.

(4) Substantial performance shall not include work performed in a manner of little or no value or work that fails to comply with the appropriate municipal, county, state or federal regulations or codes.

(5) Violation of this section shall be punished as follows:

(a) A first conviction under this section shall be a misdemeanor when the amount of the fraud is less than Five Thousand Dollars (\$5,000.00) and shall be punished by a fine not to exceed One Thousand Dollars (\$1,000.00) or imprisonment in the county jail not to exceed six (6) months, or both.

(b) A second or subsequent conviction under this section shall be punished as follows:

(i) As a felony punishable by imprisonment in the custody of the Department of Corrections not to exceed two (2) years when the amount of the fraud is more than One Thousand Dollars (\$1,000.00) but less than Five Thousand Dollars (\$5,000.00).

(ii) As a misdemeanor punishable by imprisonment in the county jail for not more than six (6) months when the amount of the fraud is One Thousand Dollars (\$1,000.00) or less.

(c) A first or subsequent conviction under this section shall be a felony when the amount of the fraud is over Five Thousand Dollars (\$5,000.00) and shall be punished as follows:

(i) By imprisonment in the custody of the Department of Corrections not to exceed five (5) years or a fine not to exceed Ten Thousand Dollars (\$10,000.00) or both when the amount of the fraud is Five Thousand Dollars (\$5,000.00) or more, but less than Ten Thousand Dollars (\$10,000.00).

(ii) By imprisonment in the custody of the Department of Corrections not to exceed ten (10) years or a fine not to exceed Ten Thousand Dollars (\$10,000.00) when the amount of the fraud is Ten Thousand Dollars (\$10,000.00) or more.

(6) In addition to any other sentence it may impose, the court shall order that the defendant shall make restitution to the victim, either within a specified period of time or in specified installments. The order shall not be enforceable during the period of imprisonment unless the court expressly finds that the defendant has assets to pay the amounts ordered at the time of sentencing. Intentional refusal to obey the restitution order or a failure by a defendant to make a good faith effort to make such restitution may be considered a violation of the defendant's probation and may be cause for revocation of his probation or suspension of sentence.

SECTION 8. This act shall take effect and be in force from and after July 1, 2010.
