HOUSE BILL NO. 1606

AN ACT TO PROVIDE FOR PROGRESS PAYMENT SCHEDULES FOR CONTRACTORS AND SUBCONTRACTORS; TO DEFINE CERTAIN TERMS; TO PROVIDE FOR PROGRESS PAYMENT AGREEMENTS; TO PROVIDE FORMS FOR SUCH AGREEMENTS; TO PROVIDE FOR AGREEMENTS BETWEEN CONTRACTORS AND SUBCONTRACTORS; TO PROVIDE THAT CERTAIN PROVISIONS ARE AGAINST PUBLIC POLICY AND VOID; TO PROHIBIT DISPUTE RESOLUTION IN OTHER STATES; TO AMEND SECTIONS 87-7-3 AND 87-7-5, MISSISSIPPI CODE OF 1972, IN CONFORMITY TO THE PROVISIONS OF THIS ACT; AND FOR RELATED PURPOSES.

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

SECTION 1. The following words and phrases shall have the meanings exhibited herein, unless context clearly requires otherwise:

(a) "Construction contract" means a written or oral agreement relating to the construction, alteration, repair, maintenance, moving or demolition of any building, structure or improvement or relating to the excavation of or other development or improvement to land.

(b) "Contractor" means any person, firm, partnership, corporation, association or other organization, or a combination of any of them, that has a direct contract with an owner to perform work under a construction contract.

(c) "Owner" means any person, firm, partnership, corporation, association or other organization, or a combination of any of them, that causes a building, structure or improvement to be constructed, altered, repaired, maintained, moved or demolished or that causes land to be excavated or otherwise developed or improved, whether the interest or estate of the person is in fee, as vendee under a contract to purchase, as lessee or another interest or estate less than fee.
(d) “Subcontractor” means any person, firm, partnership, corporation, association or other organization, or a combination of any of them, that has a direct contract with a contractor or another subcontractor to perform a portion of the work under a construction contract.

SECTION 2. (1) By mutual agreement with a contractor, an owner may make progress payments on construction contracts of less than sixty (60) days. An owner shall make progress payments to a contractor on all other construction contracts. Progress payments shall be made on the basis of a duly certified and approved billing or estimate of the work performed and the materials supplied during the preceding thirty-day billing cycle, or such other billing cycle as stated in the construction contract. If billings or estimates are to be submitted in other than thirty-day billing cycles, the construction contract and each page of the plans, including bid plans and construction plans, shall specifically identify such other billing cycle in a clear and conspicuous manner as prescribed in subsection (2). Except as provided in subsection (3), the owner shall make progress payments to the contractor within seven (7) days after the date the billing or estimate is certified and approved pursuant to subsection (4).

(2) A construction contract may provide for a billing cycle other than a thirty-day billing cycle if the construction contract specifically sets forth such other billing cycle and either of the following applies:

(a) The following legend or substantially similar language setting forth the other billing cycle appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

NOTICE OF ALTERNATE BILLING CYCLE

This contract allows the owner to require the submission of billings or estimates in billing cycles other
than thirty-day billings or estimates for this contract shall be submitted as follows:

________________________________________________________
________________________________________________________
________________________________________________________

(b) The following legend or substantially similar language setting forth the other billing cycle appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

NOTICE OF ALTERNATE BILLING CYCLE

This contract allows the owner to require the submission of billings or estimates in billing cycles other than thirty (30) days. A written description of such other billing cycle applicable to the project is available from the owner or the owner's designated agent at (telephone number or address, or both), and the owner or its designated agent shall provide this written description on request.

(3) An owner may make progress payments later than seven (7) days after the date the billing or estimate is certified and approved if both:

(a) The construction contract in a clear and conspicuous manner specifically provides for a later payment defined by a specified number of days after certification and approval; and

(b) The following legend or substantially similar language setting forth the specified number of days appears in clear and conspicuous type on each page of the plans, including bid plans and construction plans:

NOTICE OF EXTENDED PAYMENT PROVISION

This contract allows the owner to make payment within ____ days after certification and approval of billings and estimates.
(4) A billing or estimate shall be deemed approved and certified fourteen (14) days after the owner receives the billing or estimate, unless before that time the owner or the owner’s agent prepares and issues a written statement detailing those items in the billing or estimate that are not approved and certified. An owner may decline to approve and certify a billing or estimate or portion of a billing or estimate for unsatisfactory job progress, defective construction work or materials not remedied, disputed work or materials, failure to comply with other material provisions of the construction contract, third-party claims filed or reasonable evidence that a claim will be filed, failure of the contractor or a subcontractor or to make timely payments for labor, equipment and materials, damage to the owner, reasonable evidence that the construction contract cannot be completed for the unpaid balance of the construction contract sum or a reasonable amount for retention. The owner is deemed to have received the billing or estimate when the billing or estimate is submitted to any person designated by the owner for the receipt of these submissions or for review or approval of the billing or estimate.

(5) An owner may withhold from a progress payment only an amount that is sufficient to pay the direct expenses the owner reasonably expects to incur to correct any items set forth in writing pursuant to subsection (4).

(6) An owner may extend the period within which the billing or estimate is certified and approved if both:

(a) The construction contract in a clear and conspicuous manner specifically provides for an extend time period within which a billing or estimate shall be certified and approved defined by a specified number of days after the owner has received the billing or estimate; and

(b) The following legend or substantially similar language, setting forth the specified number of days, appears in
clear and conspicuous type on each page of the plans, including bid plans and construction plans:

NOTICE OF CERTIFICATION AND APPROVAL PERIOD PROVISION

This contract allows the owner to certify and approve billings and estimates within ____ days after the billings and estimates are received from the contractor.

(7) After the effective date of a construction contract, an owner and contractor may change the number of specified days after certification and approval for the owner to make payment to the contractor or within which a billing or estimate must be certified and approved. Any contractor or subcontractor that does not provide written consent to the change will continue to be paid as previously agreed.

(8) When a contractor completes and an owner approves and certifies all work under a construction contract, the owner shall make payment in full on the construction contract within seven (7) days, when a contractor completes and an owner approves and certifies all work under a portion of a construction contract for which the contract states a separate price, the owner shall make payment in full on that portion of the construction contract within seven (7) days on projects that require a federal agency's final approval or certification, the owner shall make payment in full on the construction contract within seven (7) days of the federal agency's final approval or certification.

(9) Payment shall not be required pursuant to this section unless the contractor provides the owner with a billing or estimate for the work performed or the material supplied in accordance with the terms of the construction contract between the parties.

(10) A construction contract shall not alter the rights of any contractor, subcontractor or material supplier to receive
prompt and timely progress payments as provided under this article.

(11) If an owner or a third party designated by an owner as the person responsible for making progress payments on a construction contract does not make a timely payment pursuant to this section, the owner shall pay the contractor interest at the rate of one and one-half percent (1-1/2%) a month or fraction of a month on the unpaid balance, or at a higher rate as the parties to the construction contract agree.

(12) On the written request of a subcontractor, the owner shall notify the subcontractor within five (5) days after the issuance of a progress payment to the contractor. On the written request of a subcontractor, the owner shall notify the subcontractor within five (5) days after the owner makes the final payment to the contractor on the construction contract.

(13) In any action or arbitration brought to collect payments or interest pursuant to this section, the successful party shall be awarded costs and attorney fees in a reasonable amount.

(14) If the owner and contractor are a single entity, that entity shall pay its subcontractors or material suppliers within fourteen (14) days after the billing or estimate is certified and approved unless the deadlines for approval and certification or for payment have been modified pursuant to subsection (3) or (6).

SECTION 3. (1) A contractor may suspend performance under a construction contract or terminate a construction contract for failure by the owner to make timely payment of the amount certified and approved pursuant to Section 1 of this act. A contractor shall provide written notice to the owner at least seven (7) calendar days before the contractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the owner and contractor. A contractor shall not be deemed in breach of the
construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a contractor to suspend performance or terminate a construction contract under this subsection.

(2) A subcontractor may suspend performance under a construction contract or terminate a construction contract if the owner fails to make timely payment of amounts certified and approved pursuant to Section 1 of this act for the subcontractor’s work and the contractor fails to pay the subcontractor for the certified and approved work. A subcontractor shall provide written notice to the contractor and owner at least three (3) calendar days before the subcontractor’s intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the contractor and subcontractor. A subcontractor shall not be deemed in breach of a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a subcontractor to suspend performance or terminate a construction contract under this subsection.

(3) A subcontractor may suspend performance under a construction contract or terminate a construction contract if the owner makes timely payment of amounts certified and approved pursuant to Section 1 of this act for the subcontractor’s work but the contractor fails to pay the subcontractor for the certified and approved work. A subcontractor shall provide written notice to the contractor and owner at least seven (7) calendar days before the subcontractor’s intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the contractor and subcontractor. A subcontractor shall not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a subcontractor to suspend performance or terminate a construction contract under this subsection.
contract pursuant to this subsection. A construction contract shall not extend the time period for a subcontractor to suspend performance or terminate a construction contract under this subsection.

(4) A subcontractor may suspend performance under a construction contract or terminate a construction contract if the owner declines to approve and certify portions of the contractor's billing or estimate pursuant to Section 1 of this act for that subcontractor's work but the reasons for that failure by the owner to approve and certify are not the fault of or directly related to the subcontractor's work. A subcontractor shall provide written notice to the contractor and the owner at least seven (7) calendar days before the subcontractor's intended suspension or termination unless a shorter notice period is prescribed in the construction contract between the contractor and subcontractor. A subcontractor shall not be deemed in breach of a construction contract for suspending performance or terminating a construction contract pursuant to this subsection. A construction contract shall not extend the time period for a subcontractor to suspend performance or terminate a construction contract under this subsection.

(5) A contractor or subcontractor that suspends performance as provided in this section is not required to furnish further labor, materials or services until the contractor or subcontractor is paid the amount that was certified and approved, together with any costs incurred for mobilization resulting from the shutdown or start-up of a project.

(6) In any action or arbitration brought pursuant to this section, the successful party shall be awarded costs and attorney fees in a reasonable amount.

(7) Written notice required under this section shall be deemed to have been provided if either of the following occurs:
(a) The written notice is delivered in person to the individual or a member of the entity or to an officer of the corporation for which it was intended; or

(b) The written notice is delivered at or sent by any means that provides written, third-party verification of delivery to the last business address known to the party giving notice.

SECTION 4. The following are against this state's public policy and are void and unenforceable:

(a) A provision, covenant, clause or understanding in, collateral to or affecting a construction contract that makes the contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state.

(b) A provision, covenant, clause or understanding in, collateral to or affecting a construction contract stating that a party to the contract cannot suspend performance under the contract or terminate the contract if another party to the contract fails to make prompt payments under the contract pursuant to this act.

SECTION 5. A provision, covenant, clause or understanding in, collateral to or affecting a construction contract that makes the contract subject to the laws of another state or that requires any litigation, arbitration or other dispute resolution proceeding arising from the contract to be conducted in another state is against this state's public policy and is void and unenforceable.

SECTION 6. Section 87-7-3, Mississippi Code of 1972, is amended as follows:

87-7-3. Except as otherwise provided in Sections 1 through 4 of House Bill No. , 2002 Regular Session, all sums due prime contractors under all construction contracts, except public construction contracts, shall be paid as follows:

(a) Partial, progress or interim payments: All partial, progress or interim payments or monies owed contractors...
shall be paid when due and payable under the terms of the contract. If they are not paid within sixty (60) calendar days from the day they were due and payable, then they shall bear interest from the due date at the rate of one percent (1%) per month until fully paid.

(b) Final payments: The final payment of all monies owed contractors shall be due and payable:

(i) At the completion of the project or after the work has been substantially completed in accordance with the terms and provisions of the contract;

(ii) When the owner beneficially uses or occupies the project except in the case where the project involves renovation or alteration to an existing facility in which the owner maintains beneficial use or occupancy during the course of the project; or

(iii) When the project is certified as having been completed by the architect or engineer authorized to make such certification, whichever event shall first occur.

If the contractor is not paid in full within sixty (60) calendar days from the first occurrence of one (1) of the above-mentioned events, then the final payment shall bear interest from the date of such first occurrence at the rate of one percent (1%) per month until fully paid.

In no event shall the final payment due the contractor be made until the consent of the contractor's surety has been obtained in writing and delivered to the proper contracting authority.

SECTION 7. Section 87-7-5, Mississippi Code of 1972, is amended as follows:

87-7-5. Except as otherwise provided in Sections 1 through 4 of House Bill No. , 2002 Regular Session, when a prime contractor receives any payment from the owner under a construction contract, other than a public construction contract,
the prime contractor shall, upon receipt of that payment, pay each subcontractor and material supplier in proportion to the percentage of work completed by each such subcontractor and material supplier. If for any reason the prime contractor receives less than the full payment due from the owner, the prime contractor shall be obligated to disburse on a pro rata basis those funds received, with the prime contractor, subcontractors and material suppliers each receiving a prorated portion based on the amount due on the payment. If the prime contractor without reasonable cause fails to make any payment to his subcontractors and material suppliers within fifteen (15) days after the receipt of payment from the owner under the construction contract, the prime contractor shall pay to his subcontractors and material suppliers, in addition to the payment due them, a penalty in the amount of one-half of one percent (1/2 of 1%) per day of the delinquency, calculated from the expiration of the fifteen-day period until fully paid. The total penalty shall not exceed fifteen percent (15%) of the outstanding balance due. The provisions of this section shall not be applicable to contracts for the construction of single-family dwellings.

SECTION 8. This act shall take effect and be in force from and after July 1, 2002.