

By: Representative Fillingane

To: Judiciary B

HOUSE BILL NO. 1606

1 AN ACT TO PROVIDE FOR PROGRESS PAYMENT SCHEDULES FOR
 2 CONTRACTORS AND SUBCONTRACTORS; TO DEFINE CERTAIN TERMS; TO
 3 PROVIDE FOR PROGRESS PAYMENT AGREEMENTS; TO PROVIDE FORMS FOR SUCH
 4 AGREEMENTS; TO PROVIDE FOR AGREEMENTS BETWEEN CONTRACTORS AND
 5 SUBCONTRACTORS; TO PROVIDE THAT CERTAIN PROVISIONS ARE AGAINST
 6 PUBLIC POLICY AND VOID; TO PROHIBIT DISPUTE RESOLUTION IN OTHER
 7 STATES; TO AMEND SECTIONS 87-7-3 AND 87-7-5, MISSISSIPPI CODE OF
 8 1972, IN CONFORMITY TO THE PROVISIONS OF THIS ACT; AND FOR RELATED
 9 PURPOSES.

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

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

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

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

23 (c) "Owner" means any person, firm, partnership,
 24 corporation, association or other organization, or a combination
 25 of any of them, that causes a building, structure or improvement
 26 to be constructed, altered, repaired, maintained, moved or
 27 demolished or that causes land to be excavated or otherwise
 28 developed or improved, whether the interest or estate of the
 29 person is in fee, as vendee under a contract to purchase, as
 30 lessee or another interest or estate less than fee.



31 (d) "Subcontractor" means any person, firm,
32 partnership, corporation, association or other organization, or a
33 combination of any of them, that has a direct contract with a
34 contractor or another subcontractor to perform a portion of the
35 work under a construction contract.

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

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

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

60 **NOTICE OF ALTERNATE BILLING CYCLE**

61 This contract allows the owner to require the
62 submission of billings or estimates in billing cycles other



63 than thirty-day billings or estimates for this contract shall
64 be submitted as follows:

65 _____
66 _____
67 _____

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

72 **NOTICE OF ALTERNATE BILLING CYCLE**

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

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

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

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

92 **NOTICE OF EXTENDED PAYMENT PROVISION**

93 This contract allows the owner to make payment
94 within ____ days after certification and approval of
95 billings and estimates.



96 (4) A billing or estimate shall be deemed approved and
97 certified fourteen (14) days after the owner receives the billing
98 or estimate, unless before that time the owner or the owner's
99 agent prepares and issues a written statement detailing those
100 items in the billing or estimate that are not approved and
101 certified. An owner may decline to approve and certify a billing
102 or estimate or portion of a billing or estimate for unsatisfactory
103 job progress, defective construction work or materials not
104 remedied, disputed work or materials, failure to comply with other
105 material provisions of the construction contract, third-party
106 claims filed or reasonable evidence that a claim will be filed,
107 failure of the contractor or a subcontractor or to make timely
108 payments for labor, equipment and materials, damage to the owner,
109 reasonable evidence that the construction contract cannot be
110 completed for the unpaid balance of the construction contract sum
111 or a reasonable amount for retention. The owner is deemed to have
112 received the billing or estimate when the billing or estimate is
113 submitted to any person designated by the owner for the receipt of
114 these submissions or for review or approval of the billing or
115 estimate.

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

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

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

127 (b) The following legend or substantially similar
128 language, setting forth the specified number of days, appears in



129 clear and conspicuous type on each page of the plans, including
130 bid plans and construction plans:

131 **NOTICE OF CERTIFICATION AND**

132 **APPROVAL PERIOD PROVISION**

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

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

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

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

159 (10) A construction contract shall not alter the rights of
160 any contractor, subcontractor or material supplier to receive



161 prompt and timely progress payments as provided under this
162 article.

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

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

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

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

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



194 construction contract for suspending performance or terminating a
195 construction contract pursuant to this subsection. A construction
196 contract shall not extend the time period for a contractor to
197 suspend performance or terminate a construction contract under
198 this subsection.

199 (2) A subcontractor may suspend performance under a
200 construction contract or terminate a construction contract if the
201 owner fails to make timely payment of amounts certified and
202 approved pursuant to Section 1 of this act for the subcontractor's
203 work and the contractor fails to pay the subcontractor for the
204 certified and approved work. A subcontractor shall provide
205 written notice to the contractor and owner at least three (3)
206 calendar days before the subcontractor's intended suspension or
207 termination unless a shorter notice period is prescribed in the
208 construction contract between the contractor and subcontractor. A
209 subcontractor shall not be deemed in breach of a construction
210 contract for suspending performance or terminating a construction
211 contract pursuant to this subsection. A construction contract
212 shall not extend the time period for a subcontractor to suspend
213 performance or terminate a construction contract under this
214 subsection.

215 (3) A subcontractor may suspend performance under a
216 construction contract or terminate a construction contract if the
217 owner makes timely payment of amounts certified and approved
218 pursuant to Section 1 of this act for the subcontractor's work but
219 the contractor fails to pay the subcontractor for the certified
220 and approved work. A subcontractor shall provide written notice
221 to the contractor and owner at least seven (7) calendar days
222 before the subcontractor's intended suspension or termination
223 unless a shorter notice period is prescribed in the construction
224 contract between the contractor and subcontractor. A
225 subcontractor shall not be deemed in breach of a construction
226 contract for suspending performance or terminating a construction



227 contract pursuant to this subsection. A construction contract
228 shall not extend the time period for a subcontractor to suspend
229 performance or terminate a construction contract under this
230 subsection.

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

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

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

257 (7) Written notice required under this section shall be
258 deemed to have been provided if either of the following occurs:



259 (a) The written notice is delivered in person to the
260 individual or a member of the entity or to an officer of the
261 corporation for which it was intended; or

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

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

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

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

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

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

286 87-7-3. Except as otherwise provided in Sections 1 through 4
287 of House Bill No. _____, 2002 Regular Session, all sums due prime
288 contractors under all construction contracts, except public
289 construction contracts, shall be paid as follows:

290 (a) Partial, progress or interim payments: All
291 partial, progress or interim payments or monies owed contractors



292 shall be paid when due and payable under the terms of the
293 contract. If they are not paid within sixty (60) calendar days
294 from the day they were due and payable, then they shall bear
295 interest from the due date at the rate of one percent (1%) per
296 month until fully paid.

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

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

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

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

310 If the contractor is not paid in full within sixty (60)
311 calendar days from the first occurrence of one (1) of the
312 above-mentioned events, then the final payment shall bear interest
313 from the date of such first occurrence at the rate of one percent
314 (1%) per month until fully paid.

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

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

321 87-7-5. Except as otherwise provided in Sections 1 through 4
322 of House Bill No. _____, 2002 Regular Session, when a prime
323 contractor receives any payment from the owner under a
324 construction contract, other than a public construction contract,



325 the prime contractor shall, upon receipt of that payment, pay each
326 subcontractor and material supplier in proportion to the
327 percentage of work completed by each such subcontractor and
328 material supplier. If for any reason the prime contractor
329 receives less than the full payment due from the owner, the prime
330 contractor shall be obligated to disburse on a pro rata basis
331 those funds received, with the prime contractor, subcontractors
332 and material suppliers each receiving a prorated portion based on
333 the amount due on the payment. If the prime contractor without
334 reasonable cause fails to make any payment to his subcontractors
335 and material suppliers within fifteen (15) days after the receipt
336 of payment from the owner under the construction contract, the
337 prime contractor shall pay to his subcontractors and material
338 suppliers, in addition to the payment due them, a penalty in the
339 amount of one-half of one percent (1/2 of 1%) per day of the
340 delinquency, calculated from the expiration of the fifteen-day
341 period until fully paid. The total penalty shall not exceed
342 fifteen percent (15%) of the outstanding balance due. The
343 provisions of this section shall not be applicable to contracts
344 for the construction of single-family dwellings.

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

