

1-1 By: Chisum, et al. (Senate Sponsor - Averitt) H.B. No. 1146  
1-2 (In the Senate - Received from the House May 5, 2005;  
1-3 May 8, 2005, read first time and referred to Committee on Business  
1-4 and Commerce; May 23, 2005, reported adversely, with favorable  
1-5 Committee Substitute by the following vote: Yeas 6, Nays 0;  
1-6 May 23, 2005, sent to printer.)

1-7 COMMITTEE SUBSTITUTE FOR H.B. No. 1146 By: Averitt

1-8 A BILL TO BE ENTITLED  
1-9 AN ACT

1-10 relating to contingent payment clauses in certain construction  
1-11 contracts.

1-12 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-13 SECTION 1. Subchapter D, Chapter 35, Business & Commerce  
1-14 Code, is amended by adding Section 35.521 to read as follows:

1-15 Sec. 35.521. AGREEMENT FOR PAYMENT OF CONSTRUCTION  
1-16 SUBCONTRACTOR. (a) In this section:

1-17 (1) "Contingent payee" means a party to a contract  
1-18 with a contingent payment clause, other than an architect or  
1-19 engineer, whose receipt of payment is conditioned on the contingent  
1-20 payor's receipt of payment from another person.

1-21 (2) "Contingent payment clause" means a provision in a  
1-22 contract for construction management, or for the construction of  
1-23 improvements to real property or the furnishing of materials for  
1-24 the construction, that provides that the contingent payor's receipt  
1-25 of payment from another is a condition precedent to the obligation  
1-26 of the contingent payor to make payment to the contingent payee for  
1-27 work performed or materials furnished.

1-28 (3) "Contingent payor" means a party to a contract  
1-29 with a contingent payment clause that conditions payment by the  
1-30 party on the receipt of payment from another person.

1-31 (4) "Improvement" includes new construction,  
1-32 remodeling, or repair.

1-33 (5) "Obligor" means the person obligated to make  
1-34 payment to the contingent payor for an improvement.

1-35 (6) "Primary obligor" means the owner of the real  
1-36 property to be improved or repaired under the contract, or the  
1-37 contracting authority if the contract is for a public project. A  
1-38 primary obligor may be an obligor.

1-39 (b) A contingent payor or its surety may not enforce a  
1-40 contingent payment clause to the extent that the obligor's  
1-41 nonpayment to the contingent payor is the result of the contractual  
1-42 obligations of the contingent payor not being met, unless the  
1-43 nonpayment is the result of the contingent payee's failure to meet  
1-44 the contingent payee's contractual requirements.

1-45 (c) Except as provided by Subsection (f), a contingent payor  
1-46 or its surety may not enforce a contingent payment clause as to work  
1-47 performed or materials delivered after the contingent payor  
1-48 receives written notice from the contingent payee objecting to the  
1-49 further enforceability of the contingent payment clause as provided  
1-50 by this section and the notice becomes effective as provided by  
1-51 Subsection (d). The contingent payee may send written notice only  
1-52 after the 45th day after the date the contingent payee submits a  
1-53 written request for payment to the contingent payor that is in a  
1-54 form substantially in accordance with the contingent payee's  
1-55 contract requirements for the contents of a regular progress  
1-56 payment request or an invoice.

1-57 (d) For purposes of Subsection (c), the written notice  
1-58 becomes effective on the latest of:

1-59 (1) the 10th day after the date the contingent payor  
1-60 receives the notice;

1-61 (2) the eighth day after the date interest begins to  
1-62 accrue against the obligor under:

1-63 (A) Section 28.004, Property Code, under a

2-1 contract for a private project governed by Chapter 28, Property  
2-2 Code; or  
2-3 (B) 31 U.S.C. Section 3903(a)(6), under a  
2-4 contract for a public project governed by 40 U.S.C. Section 3131; or  
2-5 (3) the 11th day after the date interest begins to  
2-6 accrue against the obligor under Section 2251.025, Government Code,  
2-7 under a contract for a public project governed by Chapter 2251,  
2-8 Government Code.  
2-9 (e) A notice given by a contingent payee under Subsection  
2-10 (c) does not prevent enforcement of a contingent payment clause if:  
2-11 (1) the obligor has a dispute under Chapter 28,  
2-12 Property Code, Chapter 2251, Government Code, or 31 U.S.C. Chapter  
2-13 39 as a result of the contingent payee's failure to meet the  
2-14 contingent payee's contractual requirements; and  
2-15 (2) the contingent payor gives notice in writing to  
2-16 the contingent payee that the written notice given under Subsection  
2-17 (c) does not prevent enforcement of the contingent payment clause  
2-18 under this subsection and the contingent payee receives the notice  
2-19 under this subdivision not later than the later of:  
2-20 (A) the fifth day before the date the written  
2-21 notice from the contingent payee under Subsection (c) becomes  
2-22 effective under Subsection (d); or  
2-23 (B) the fifth day after the date the contingent  
2-24 payor receives the written notice from the contingent payee under  
2-25 Subsection (c).  
2-26 (f) A written notice given by a contingent payee under  
2-27 Subsection (c) does not prevent the enforcement of a contingent  
2-28 payment clause to the extent that the funds are not collectible as a  
2-29 result of a primary obligor's successful assertion of a defense of  
2-30 sovereign immunity, if the contingent payor has exhausted all of  
2-31 its rights and remedies under its contract with the primary obligor  
2-32 and under Chapter 2251, Government Code. This subsection does not:  
2-33 (1) create or validate a defense of sovereign  
2-34 immunity; or  
2-35 (2) extend to a primary obligor a defense or right that  
2-36 did not exist before the effective date of this section.  
2-37 (g) On receipt of payment by the contingent payee of the  
2-38 unpaid indebtedness giving rise to the written notice provided by  
2-39 the contingent payee under Subsection (c), the contingent payment  
2-40 clause is reinstated as to work performed or materials furnished  
2-41 after the receipt of the payment, subject to the provisions of this  
2-42 section.  
2-43 (h) A contingent payor or its surety may not enforce a  
2-44 contingent payment clause if, under Section 53.026, Property Code,  
2-45 the contingent payee is considered to be in direct contractual  
2-46 relationship with the obligor.  
2-47 (i) A contingent payment clause may not be used as a basis  
2-48 for invalidation of the enforceability or perfection of a  
2-49 mechanic's lien under Chapter 53, Property Code.  
2-50 (j) A contingent payor or its surety may not enforce a  
2-51 contingent payment clause if the enforcement would be  
2-52 unconscionable. The party asserting that a contingent payment  
2-53 clause is unconscionable has the burden of proving that the clause  
2-54 is unconscionable.  
2-55 (k) The enforcement of a contingent payment clause is not  
2-56 unconscionable if the contingent payor:  
2-57 (1) proves that the contingent payor has exercised  
2-58 diligence in ascertaining and communicating in writing to the  
2-59 contingent payee, before the contract in which the contingent  
2-60 payment clause has been asserted becomes enforceable against the  
2-61 contingent payee, the financial viability of the primary obligor  
2-62 and the existence of adequate financial arrangements to pay for the  
2-63 improvements; and  
2-64 (2) has done the following:  
2-65 (A) made reasonable efforts to collect the amount  
2-66 owed to the contingent payor; or  
2-67 (B) made or offered to make, at a reasonable  
2-68 time, an assignment by the contingent payor to the contingent payee  
2-69 of a cause of action against the obligor for the amounts owed to the

3-1 contingent payee by the contingent payor and offered reasonable  
 3-2 cooperation to the contingent payee's collection efforts, if the  
 3-3 assigned cause of action is not subject to defenses caused by the  
 3-4 contingent payor's action or failure to act.

3-5 (l) A cause of action brought on an assignment made under  
 3-6 Subsection (k)(2)(B) is enforceable by a contingent payee against  
 3-7 an obligor or a primary obligor.

3-8 (m) A contingent payor is considered to have exercised  
 3-9 diligence for purposes of Subsection (k)(1) under a contract for a  
 3-10 private project governed by Chapter 53, Property Code, if the  
 3-11 contingent payee receives in writing from the contingent payor:

3-12 (1) the name, address, and business telephone number  
 3-13 of the primary obligor;

3-14 (2) a description, legally sufficient for  
 3-15 identification, of the property on which the improvements are being  
 3-16 constructed;

3-17 (3) the name and address of the surety on any payment  
 3-18 bond provided under Subchapter I, Chapter 53, Property Code, to  
 3-19 which any notice of claim should be sent;

3-20 (4) a statement, furnished by the primary obligor and  
 3-21 supported by reasonable and credible evidence from all applicable  
 3-22 lenders, of the amount of the loan, a summary of the terms of the  
 3-23 loan, a statement of whether there is foreseeable default of the  
 3-24 primary obligor, and the name, address, and business telephone  
 3-25 number of the borrowers and lenders, if a loan has been obtained for  
 3-26 the construction of improvements; and

3-27 (5) a statement, furnished by the primary obligor and  
 3-28 supported by reasonable and credible evidence from all applicable  
 3-29 banks or other depository institutions, of the amount, source, and  
 3-30 location of funds available to pay the balance of the contract  
 3-31 amount if there is no loan or the loan is not sufficient to pay for  
 3-32 all of the construction of the improvements.

3-33 (n) A contingent payor is considered to have exercised  
 3-34 diligence for purposes of Subsection (k)(1) under a contract for a  
 3-35 public project governed by Chapter 2253, Government Code, if the  
 3-36 contingent payee receives in writing from the contingent payor:

3-37 (1) the name, address, and primary business telephone  
 3-38 number of the primary obligor;

3-39 (2) the name and address of the surety on the payment  
 3-40 bond provided to the primary obligor to which any notice of claim  
 3-41 should be sent; and

3-42 (3) a statement from the primary obligor that funds  
 3-43 are available and have been authorized for the full contract amount  
 3-44 for the construction of the improvements.

3-45 (o) A contingent payor is considered to have exercised  
 3-46 diligence for purposes of Subsection (k)(1) under a contract for a  
 3-47 public project governed by 40 U.S.C. Section 3131 if the contingent  
 3-48 payee receives in writing from the contingent payor:

3-49 (1) the name, address, and primary business telephone  
 3-50 number of the primary obligor;

3-51 (2) the name and address of the surety on the payment  
 3-52 bond provided to the primary obligor; and

3-53 (3) the name of the contracting officer, if known at  
 3-54 the time of the execution of the contract.

3-55 (p) A primary obligor shall furnish the information  
 3-56 described by Subsection (m) or (n), as applicable, to the  
 3-57 contingent payor not later than the 30th day after the date the  
 3-58 primary obligor receives a written request for the information. If  
 3-59 the primary obligor fails to provide the information under the  
 3-60 written request, the contingent payor, the contingent payee, and  
 3-61 their sureties are relieved of the obligation to initiate or  
 3-62 continue performance of the construction contracts of the  
 3-63 contingent payor and contingent payee.

3-64 (q) The assertion of a contingent payment clause is an  
 3-65 affirmative defense to a civil action for payment under a contract.

3-66 (r) This section does not affect a provision that affects  
 3-67 the timing of a payment in a contract for construction management or  
 3-68 for the construction of improvements to real property if the  
 3-69 payment is to be made within a reasonable period.

4-1 (s) A person may not waive this section by contract or other  
4-2 means. A purported waiver of this section is void.

4-3 (t) An obligor or a primary obligor may not prohibit a  
4-4 contingent payor from allocating risk by means of a contingent  
4-5 payment clause.

4-6 (u) This section does not apply to a contract that is solely  
4-7 for:

4-8 (1) design services;

4-9 (2) the construction or maintenance of a road,  
4-10 highway, street, bridge, utility, water supply project, water  
4-11 plant, wastewater plant, water and wastewater distribution or  
4-12 conveyance facility, wharves, docks, airport runways and taxiways,  
4-13 drainage project, or related types of projects associated with  
4-14 civil engineering construction.

4-15 (3) improvements to or the construction of a structure  
4-16 that is a:

4-17 (A) detached single-family residence;

4-18 (B) duplex;

4-19 (C) triplex; or

4-20 (D) quadruplex.

4-21 SECTION 2. Section 35.521, Business & Commerce Code, as  
4-22 added by this Act, applies only to a contingent payment clause under  
4-23 which payment is contingent on the receipt of payment under a  
4-24 contract or other agreement entered into on or after September 1,  
4-25 2005.

4-26 SECTION 3. This Act takes effect September 1, 2005.

4-27 \* \* \* \* \*