

Texas law requires non-public property owners to withhold 10% of the value of the work that is performed by a contractor and subcontractor under a construction contract until completion of the work. This 10% amount is called *retainage*. In situations where a lender is providing construction financing, typically a lender only funds a loan amount for 90% of the value of the work each month and does not fund the remaining 10% until the project is finished. When a loan default occurs, the 10% not funded by the lender does not get paid to the construction team.

Often, owners assume the 10% not funded by the bank to be retainage. It is not. If the owner of a construction project funds construction with a loan from a lender and the 10% retainage is not transferred to the owner each time the lender advances loan proceeds, then contractors and subcontractors and others entitled to the retainage often do not get paid if the lender forecloses on the construction loan.

Retainage should be recognized for what it is; a loan to the construction project by the construction team, and it should be protected in a similar fashion as the lender protects its construction loan. This can be accomplished by providing a priority to a lien for retainage that is equal to the priority of a lender's deed of trust for the construction loan. Under **HB 2668** and **SB 2073**, if the lender forecloses on a construction project, the properly perfected liens for retainage will not be wiped out, but rather will be on the same footing as the lender's deed of trust for the construction loan. The lender will continue to have protection under its deed of trust for the 90% of the construction cost it has provided. The lien for retained funds would not attach to the owner's property if, before withholding retained funds from the original contractor, the owner furnishes and files a bond.