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## Better “prompt” than never: court of appeal confirms when contractors must release retention to subcontractors under Public Contract Code Section 7107

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California’s “prompt payment” statutes provide for contractors and subcontractors to be paid for their work on a timely basis.<sup>1</sup> However, a recent California court of appeal decision, *Blois Construction, Inc. v. FCI/Fluor/Parsons*<sup>2</sup> (“*Blois*”) reveals that “prompt” may not always be as swift as subcontractors might hope.

### Case overview

In short, the *Blois* decision clarifies when subcontractors on public works projects are entitled to receive retention payments from the general contractor under Public Contract Code Section 7107 (“Section 7107”).<sup>3</sup>

Absent a good faith dispute,<sup>4</sup> Section 7107 requires public works general contractors to release retention payments to their subcontractors within seven days of receiving all or any portion of the retention proceeds from a project owner.<sup>5</sup>

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<sup>1</sup> California’s “prompt payment” statutes include laws from California’s Business and Professions Code, Public Contracts Code and Civil Code. See, e.g. Bus. & Prof. Code, § 7108.5; Pub. Contract Code; § 7107; Pub. Contract Code, § 7200; and Civ. Code §8812.

<sup>2</sup> *Blois Construction, Inc. v. FCI/Fluor/Parsons* (Cal. Ct. App., Mar. 23, 2016, No. B262310) 2016 WL 1158293.

<sup>3</sup> *Id.*

<sup>4</sup> See Nixon Peabody Alerts discussing the California appellate court split regarding what constitutes a good faith dispute under California’s prompt payment statutes: [You’ve got to know when to hold ‘em: what California public entities and public works contractors need to know about retention](#) and [You’ve really got to know when to hold ‘em: California Court of Appeal doubles down on its withholding of retention jurisprudence](#).

<sup>5</sup> Pub. Contract Code, § 7107(d) (“within seven days from the time that all or any portion of the retention proceeds are received by the original contractor, the original contractor shall pay each of its subcontractors from whom retention has been withheld, each subcontractor’s share of the retention received.”).

*Blois* defines “retention proceeds” to be retention *actually withheld from any payment*, and finds that the seven-day release provision of Section 7107 is tethered to each individual payment.<sup>6</sup> Consequently, a general contractor is required to release the retention withheld from each payment to its subcontractors within seven days.<sup>7</sup> However, if the project owner decides to withhold retention from some, but not all payments, Section 7107 only applies to those payments where retention is withheld.<sup>8</sup>

## The details

In *Blois*, the contract between the project owner, the Exposition Metro Line Construction Authority (“Expo”) and general contractor, a joint venture of Flatiron Construction, Fluor and Parsons (“FFP”), allowed Expo to withhold retention during the first half of the project, but at its election to make progress payments without withholding retention once the project was more than 50% complete.<sup>9</sup> Also pursuant to the Expo/FFP contract, Expo was not required to release retention withheld during the first half of the project until project completion.<sup>10</sup> FFP matched this retention scheme in paying its subcontractors and did not pay the subcontractors’ share of the retention withheld from the first half of the project until the project was completed.<sup>11</sup>

Plaintiff Blois Construction, Inc., a subcontractor on the project, sued FFP for the withheld retention and statutory penalties for late payment.<sup>12</sup> Blois argued that FFP’s obligation to release retention within seven days under Section 7107 took effect when Expo, the project owner, began making full progress payments without withholding retention.<sup>13</sup> According to Blois, as soon as Expo began paying retention it was *entitled to withhold*, Section 7107 obligated FFP to release all withheld retention to the subcontractor.<sup>14</sup>

The court of appeal disagreed with Blois, and found that “contractors are required to pay subcontractors the retentions owed them upon their receipt from the owner but not earlier.”<sup>15</sup>

Simply stated, Section 7107 only applies when retention has actually been withheld from a payment.<sup>16</sup> The owner’s decision to make full progress payments without withholding retention

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<sup>6</sup> *Blois Construction, Inc., supra*, 2016 WL 1158293 at \*3.

<sup>7</sup> *Id.* at 3-4.

<sup>8</sup> *Id.* at 3-4.

<sup>9</sup> *Id.* at 1-2.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at 3.

did not equate to a payment of retention, and therefore did not trigger Section 7107.<sup>17</sup> Because no retention payments were withheld from the progress payments made in full by Expo to FFP during the second half of the project, Section 7107 did not apply to those payments.<sup>18</sup> Consequently, the court found that Blois was not entitled to penalties for late payment.<sup>19</sup>

## **Key take-away**

General contractors and subcontractors should be aware that while California's prompt payment statutes are designed to guarantee "prompt" payment, this timeframe is inherently tied to when the owner releases retention to the direct contractor. As the *Blois* court has clarified, Section 7107 only applies to payments where retention has actually been withheld by a public works owner. Thus, absent a good faith dispute, a subcontractor can only expect prompt release of retention after the general contractor actually receives the retention from the owner on that individual payment.

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 3-4.

<sup>19</sup> *Id.*