

Milestone payments: Don't fall for them!

A contract that provides for Milestone Payments is one where payments are not scheduled by time but by a 'milestone'. This means that payments are due when a certain event or section of work is reached.

We all know the attraction of Milestone payments: all you have to do is get to that milestone quickly and 'you beauty!' you get your money quickly.

Typically we see contractors throwing extra staff and resources at the work with the aim of reaching each milestone extra fast and being able to bank the cash fast.

Only then does the brutal reality set in: no payments.

Why?

Because according to the client, you have not reached any milestone. And so it starts... the endless argument about whether the milestones were achieved or not. And while all this is going on your client has the benefit of the work being completed much sooner than it would have been under a normal payment arrangement.

The flipside of that coin is that you have incurred far greater labour and resource costs than you otherwise would have.

It's a deadly recipe and you need to avoid it like the plague. It's a trap. Here's what's wrong with them.

Easy to place obstacles in the way

Because the payment is not tied to time (i.e every month) it opens the way for the client to create problems that prevent payment. It is usually the case that milestone contracts provide that each milestone is deemed to have been reached when there are no defects, when all documentation is provided, all declarations are submitted, all timesheets are in, and on and on it goes.

This is deliberate. The more things they want, the more things they can allege you haven't provided. It is important to realise that it doesn't matter whether you've provided those things or not. To stall on payment, they need only allege that they haven't received them.

If you think that's a fantasy just think about the times when your client has denied receiving your invoices. That happens all the time. "*We never got your invoice*" is the cry every time. So long as they deny receipt, they do not pay.

Contrast this with a contract where payments are made monthly... the client cannot deny that another month has passed. It is much harder to deny payment in that situation. Even if there are defects, they must pay you the balance for the defect-free work.

Once there's a dispute you're stuck

Because your payment is tied to a milestone, there only needs to be a dispute about anything at all and the payment is held up. So long as your client can argue that the milestone is not reached, no payment need be made. They may argue about tiny details or that some particular Australian Standard is not met.

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The only way to resolve the situation is to fix the 'defect' or supply the paperwork. Either way it just slows you down.

Hard to define

Most contactors do not define the milestone in enough detail (or at all). This then opens the way for the client to define it to their advantage, when it comes to payment. In these cases the parties are bogged down arguing over what was meant by the milestone. For example if 'Milestone 1' was "excavate basement carpark" there could be a dispute over what that work exactly entails.

Contractors Debt Recovery recently handled a dispute between an excavator and developer. There were only two milestones (1 & 2) but no one had thought to document them on any plan or in writing. As a result the excavator removed over 10 000 tonnes of dirt only to be told that Milestone 1 had not been reached. At time of writing they were still arguing about it, despite a successful adjudication. Meanwhile the excavator has a bill of over \$260 000 that is unpaid.

Easy to terminate

Typically when the contractor has raised hell at not being paid the client will simply terminate the contract. The client now has a part of the work done in record time at no cost, and will simply appoint someone else to finish the work. Even if the second contractor gets paid in full, the client has saved the money on the first contactor's work.

If you MUST enter into a Milestone Contract then do the following:

Define each milestone

Because clients will try to redefine the milestone to their advantage it is critical that you define it at the outset. So take as many pages as you need to spell out exactly what is meant by each milestone. For example if the milestone is the "wiring to first floor" in a building, itemise each part of the work that comprises that floor and the electrical work required. If the milestone is "excavate basement" then itemise the plans and drawings, and have them marked up to show the areas that comprise the milestone. If possible get these signed off by the client.

Control Defect Allegations

The most common way clients hold up a milestone payment is by alleging defects. Make it a condition of your agreement that once you are satisfied that you have achieved a milestone, your client MUST conduct a site inspection with you to get sign-off that all is in order.

It is OK if your client points out defects. Get them on paper and have them addressed quickly. By committing them to paper it blocks the attempt at more defects later on.

Many clients will avoid this by saying they don't have time etc. Do NOT accept this. The best way to handle this is to include in your agreement the condition that if the client does not participate in the inspection, the work is deemed to be defect-free. With this in your agreement either way you are covered.

3. Be prepared to go to adjudication

If you are still getting stuffed around then take the matter to adjudication immediately. In that forum your client will have to show how the milestone was NOT met. Further, the ACT allows you to claim for work completed every month, regardless of a milestone payment contract.

When all is said and done it is best to avoid milestone payments. They are a mirage that invites you to work faster and at greater cost, but leaves you open to non payment.

In short milestones soon become millstones around your neck! Don't let it happen to you.