

# Fighting subcontracting

## *legal protections and negotiating strategies*

**A**s current debate around the flexibility or 'rigidity' of the South African labour market rages, companies continue to subcontract to lower labour costs and undermine labour standards. Subcontracting is very difficult to define and therefore very difficult to regulate. Desperate workers often accept a 'sub-contracted' job, just to be employed. However, subcontracted workers may not be protected by legislation and collective bargaining. This article explains subcontracting and explores options available to unions and subcontracted workers to limit exploitation.

### **SA and subcontracting**

South Africa does not have reliable figures for subcontracted workers. Evidence shows that subcontracting has been increasing in a number of sectors. Surveys show that employers intend to use more subcontracting.

NUM prioritised subcontracting in its negotiations with the Chamber of Mines this year. NUM says subcontractors are increasingly doing core mining work. In the building and construction industry, a bargaining council nearly collapsed because of an increase in subcontracting. The bigger construction companies say they cannot compete with the low wages paid by the small subcontractors. NUMSA also raised subcontracting as a core bargaining issue this year.

*Bridget Kenny and Andries Bezuidenhout explore how unions can limit exploitation of subcontracted workers.*

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### **Defining subcontracting**

Other terms used for subcontracting are contracting, outsourcing and 'partnering'. While there are different kinds of subcontracting, they all have one thing in common: subcontracting replaces an employment contract with a commercial contract.

In an *employment contract* a worker agrees to do certain work for an employer. The employer provides the materials, tools, premises etc to carry out the work, and pays the worker for the work. The employer tells the worker what to do and how to do it, and has to implement the relevant legislation governing the treatment of the worker.

In a *commercial contract* the company does not employ permanent (or even casual workers) directly. Instead, companies *pay someone else* to do a certain task. The company obtains goods or services from another company through a commercial contract. The assumption with commercial contracts is that the two firms are independent and

that each firm is on equal footing.

Companies may sometimes legitimately need to contract out specific services. For example, a company manufacturing screws may need to repair clogged drains. It would be very expensive if the company trained someone in-house to repair problems occurring every once in awhile. So the company subcontracts to another individual or company who specialises in plumbing. However, companies sometimes use this strategy to avoid paying the full costs of an employment contract. This article provides strategies to limit the use of subcontracting as a means of undercutting labour.

### Forms of subcontracting

The ILO categorises two forms of subcontracting, job contracting and labour-only contracting

In order to understand the two categories, one has to keep in mind the relationships between three different parties.

- the 'user company' is the firm that subcontracts out;
- the 'subcontractor' or 'contractor' provides the service or labour;
- the subcontracted workers actually do the work.

#### Job contracting

Under job contracting a user company contracts out the supply of goods or services to the subcontractor. The

subcontractor undertakes to carry out work at his or her own risk and with his or her own financial, material and human resources. He or she hires, supervises and pays the wages of the subcontracted workers. The user company pays the subcontractor for completing the service, and not on the basis of the number of people employed or the hours of work provided. An example of job contracting is the plumber discussed above. This is what is meant by a commercial contract.

South Africa's LRA calls this kind of subcontractor an 'independent contractor'.

#### Labour-only contracting

Labour-only contracting is done by a 'temporary employment service' or a 'labour broker' which supplies labour. It places subcontract workers on the user company's premises or somewhere else. In all its variations the user company does not directly employ the subcontract workers but it can control or supervise them. This is how labour-only contracting differs from an independent contractor. The subcontractor negotiates wages directly with the subcontracted workers. The power to hire and fire lies with the subcontractor, however, final decisions may in practice rest with the user company.

In some countries, labour-only subcontracting is illegal, but employers often then simply disguise it as job contracting. In South Africa, it is very

### The LRA on 'temporary employment services'

LRA, 1995, section 198:

'(4) The temporary employment service and the client are *jointly and severally liable* if the temporary employment service, in respect of any of its employees, contravenes:

(a) a collective agreement concluded in

a bargaining council that regulates terms and conditions of employment;

(b) a binding arbitration award that regulates terms and conditions of employment;

(c) the Basic Conditions of Employment Act; or

(d) a determination made in terms of the Wage Act'.



Falling tariffs are squeezing the clothing sector. This could increase outsourcing.

important to distinguish between 'independent contractors' and 'labour brokers' because labour legislation provides certain extra protection. Employees can expect joint responsibility of the user company and the contractor for ensuring wages and conditions (See box on p 40)

### The 'independent contractor'

The LRA excludes independent contractors from the definition of 'employee'. However, the LRA never clearly defines 'independent contractor'. The courts have drawn the distinction between people who *assist in* carrying out or conducting the business and those who *perform the work or services which have the effect of* providing such service. The latter are independent contractors. The courts have also focused on the questions of control and dependence.

The Department of Labour says that if

the following is true then the subcontracted worker is not an 'independent contractor':

The subcontracted worker.

- is supervised by the user company,
- does not act independently,
- does not own his or her own tools and equipment;
- works regular and set hours, and
- is paid a fixed wage.

All these criteria are used together, though often the courts give control/ supervision higher priority

### Labour broking

Labour brokers or 'temporary employment services' can be companies or workers. In South Africa, most labour brokers form closed corporations (CCs). Some labour brokers are very small companies, whose only function is to supply user companies with workers. Usually these workers are not very skilled. They are very vulnerable

**Forms of subcontracting**

Form of subcontracting	Sub-category	Description	Legal status
Independent contractor		Provides services through commercial contract to user company Controls and supervises own work or that of subcontracted workers, for example, plumber, electrician	Excluded from the definition of 'employee' in the LRA when acting as an individual (in relation to the user company) However, if employing workers, those workers still have rights of employment contract and fall under the LRA.
Labour broking (temporary employment service)	General labour broking	The labour broker only acts as a supplier of labour for a user company	The subcontracted workers may hold the user company and the labour broker 'jointly and severally liable' for their wages and conditions Remember, workers employed directly by labour brokers still have rights of employment contract with the labour broker under the LRA.
	Specialisation labour broking	The labour broker supplies skilled workers or workers specialising in a certain function, such as catering or working with computers The balance of control is held by the user company	Same as for general labour broking
	Gang subcontracting	The user company subcontracts to a team of workers The team leader acts as the intermediary instead of a company as with a labour broker.	Technically the same as for general labour broking Practically difficult to enforce because of informal arrangements

in the labour market and labour brokers can pick them up where they wait next to the road for work. This is the most exploitative form of labour broking and is called *general labour broking*

Some labour broking companies specialise in supplying companies with skilled workers or workers who specialise in a particular area, such as catering, cleaning, or working with computers This form of labour broking is called *specialisation labour broking*. Usually, because specialisation labour brokers have specific skills, they may look more like independent contractors. This is one of the ways in which user companies can evade responsibility for the subcontracted

workers. For instance, one labour broker promises to protect user companies from 'problems' including: disruptive union problems; unfair dismissal claims; protracted substantive negotiations; time-consuming, disciplinary/appeal hearings; stringent labour laws and costly retrenchment exercises.

User companies sometimes also subcontract to teams of workers who do not form formal companies. They take on contracts as gangs, and therefore we call it *gang subcontracting*. For instance, gangs operate a lot in the building industry. The leader is usually a builder who appoints four bricklayers. These bricklayers then appoint two helpers, who pass them the

bricks The builder pays the bricklayers, who pay the helpers This means that the construction companies do not employ the builders, the bricklayers, or the helpers They are all subcontracted according to commercial contracts, which are sometimes never formally concluded Evidence shows that employers from the mining and clothing and textile industries are aware that independent contractors are excluded from the scope of the LRA. They have therefore retrenched workers and subcontracted them back as individuals or gangs but called them independent contractors (see box on page 44).

Employers also use multiple forms of subcontracting in combination This complicates the contractual relationship even more. For instance, if one subcontractor subcontracts to another subcontractor, it becomes hard to determine who the real employer is This is called cascading subcontracting

### Impact on workers

Real independent contracting should not have a negative impact on workers or unions The workers of the independent contractor are employees as in any normal employment relationship Labour broking, on the other hand, often affects workers negatively. Labour broking may.

- lower wages and benefits;
- undermine health and safety standards;



*NUM prioritised subcontracting in its negotiations this year.*

- lead to de-unionisation;
- weaken the bargaining position of unionised workers

Subcontract workers usually receive lower wages than permanent workers There are various reasons for this. Generally, subcontract workers don't belong to unions who can bargain for higher wages Because there is only a commercial contract between companies and labour brokers, user companies can end this contract when subcontract workers demand higher wages Often subcontract workers do not receive benefits such as medical aid, pension and provident funds, and unemployment insurance.

Competition between labour brokers for contracts builds in a strong incentive for

labour brokers and gangs to keep the price of their services as low as possible. This means lowering labour costs.

Research in the mining and petrochemical industries found that subcontracted workers usually do more dangerous work than permanent workers. A researcher who studied the petrochemical industry told us: 'You can see who the subcontract workers are in some factories. They are the ones without protective clothing' Mineworkers told us that labour brokers often do not meet mining industry health and safety standards. Some send their workers into dangerous areas where NUM members refuse to work. When these workers are injured, they are fired, instead of receiving medical attention.

Labour brokers use different methods to prevent their workers from joining unions. One tactic is to move subcontract workers around constantly. Cleaning subcontractors, for instance, may move their cleaners around between different buildings. This makes it very difficult for unions to organise these workers. Another tactic is to close down when unions organise workers. This is very easy for general labour brokers who declare themselves bankrupt and re-open under a different name.

Solidarity between workers in gang subcontracting is undermined, because different gangs of workers compete against one another for contracts and gangs handle discipline internally.

Subcontract workers are kept separate from permanent workers. They sometimes have their own canteens. In Carletonville, subcontracted mineworkers live separately from other workers in a fenced off section of one hostel. Subcontracting also affects organised workers working directly for the user company. Often subcontracted workers are hired as strike breakers, but even where they work side by side with direct employees, the differences in status divide workers on the shopfloor.

Employers may also subcontract out whole departments in order to weaken the union by eliminating sections of a bargaining unit. This often takes the form of specialisation labour broking. For instance, when a manufacturing employer subcontracts cleaning to a contract firm, the workers who may have been part of the bargaining unit under the employer now fall within the cleaning sector.

Because of the threat that subcontracting poses to unions and workers, legislated protections are not enough. Unions should develop strategies to deal with subcontracting. Different

### **How employers use the status of 'independent contractor' to undermine labour standards**

The Confederation of Employers of Southern Africa (COFESA) claims to have converted 300 000 employees at 6 000 different companies into Independent contractors. They do this by changing each individual worker into a 'business'. This means that these workers are not protected by labour legislation anymore. It also means that they do not fall under bargaining council agreements. The Clothing Bargaining Council

took 22 clothing employers to court in an attempt to get them to register with the bargaining council. COFESA assisted these companies in their case. The Labour Court ruled on 15 June 1998 that it did not have jurisdiction over the case. The case is on appeal.

COFESA has 120 000 member companies nationally. It focuses mainly on companies with 200 or less workers.

strategies for coping with subcontracting will depend on the form of subcontracting and differences across industry.

### Negotiating models

Labour legislation and collective agreements can deal with subcontracting. Some forms of subcontracting, particularly general labour broking and gang subcontracting, occur in less well-organised sectors. If collective bargaining is not a viable strategy to combat subcontracting in the short-term, workers can explore the provisions in the LRA for joint and several liability.

Unions should also consider a range of collective bargaining provisions. The overall aim must be to:

- provide contract workers with the same conditions of employment and benefits as the user company's permanent workers,
- protect unions from loss of membership and downward pressure on conditions.

Specialisation labour broking carries the dangers of:

- subcontracting out part of a bargaining unit;
- resulting in loss of union membership,
- fragmenting the workforce,
- lowering wages and conditions of subcontracted workers,
- eliminating non-wage benefits for subcontracted workers;
- providing potential scab labour.

In bargaining around it, unions should begin with the principle that subcontracting impacts on their membership. Unions can negotiate that the company consult on or negotiate its decisions around subcontracting. Stronger yet is a sectoral-level bargaining council agreement which defines union decision-making capacity around subcontracting.

Collective bargaining options for union decision-making include:

- The duty to inform the union about subcontracting arrangements. The 1995 Chamber of Mines/NUM agreement includes such a provision.
- The duty to consult or negotiate around the use of subcontracted labour. This allows for greater intervention by the union by, for instance, providing for a joint committee to review all the employer's requests for contracting. Swedish legislation allows unions the right to veto the employers' decisions concerning use of a subcontracted workforce.
- Provisions specifying the choice of subcontractors, including criteria to meet labour and health and safety standards. For instance, NUMSA's engineering sector main agreement specifies that only subcontractors which are registered with the bargaining council and with the Department of Labour in terms of the Unemployment Insurance Act and the Compensation for Occupational Injuries and Diseases Act will be allowed to contract labour. Unions may insist that labour brokers used are accredited by a body such as a bargaining council.

### Threats to membership

Unions can deal with threats to membership and bargaining power by including:

- provisions to limit subcontracting to certain activities, such as non-core activities only;
- provisions ensuring that the user company only contract subcontractors whose employees are union members. This exists for the construction industry in Canada,
- provisions ensuring continued union membership for subcontracted workers outsourced from the user company. In some countries, unions have negotiated

### Case law

Case law showing conditions of subcontracted workers should not be less when outsourced:

In *Schutte and others v. Powerplus Performance (Pty) Ltd & Ano*, J2715/98, the labour court judge ruled that when part of a business was 'transferred' to another company the new company has to continue employing workers with their previous terms and conditions.

In this case the former employer, a vehicle rentals company, outsourced the maintenance and repair division to a new company. The court held that this was a transfer of business despite the fact that there was not a sale of business.

something like agency shop agreements where the user company contributes 1% of the wages paid to subcontracted workers on site, to the union;

- provisions clarifying the subcontracted workers' right to strike against the user company or in solidarity with the user company's direct employees.

### Undermining of conditions

To fight against fragmentation and undermining of conditions, unions can negotiate:

- provisions ensuring that the rate of pay for subcontracted workers is not less than regular employees (see box);
- provisions ensuring that subcontractors abide by union and company safety standards,
- provisions ensuring that non-wage labour costs for subcontracted workers are not less than for regular employees;
- requirements that contracts between subcontractors and the user company state the conditions of work of the subcontracted workers engaged;
- provisions for joint and several responsibility regarding wages and

working conditions by the subcontractor and the user company;

- that centralised bargaining cover subcontractors and user companies in the same industry

General labour brokers impact on unions in the same way as specialisation labour brokers, but they are more likely to be fly-by-nights, or unregistered companies which exploit subcontracted workers even more. In this case, workers and unions can use labour legislation to protect workers. If unions negotiate the above provisions and they are actively implemented, companies should be discouraged from using general labour brokers.

Another approach to deal with general labour broking is to prohibit labour-only subcontracting. Unions may want to campaign against such subcontracting because, in essence, the user company is contracting for jobs that should fall under direct employment.

Unions must actively organise subcontracted workers working for general labour brokers. Unions could consider using broad organising strategies that link bargaining councils and unions to community groups and/or advice centres. In the end, permanent workers benefit from bringing subcontracted workers into the ranks of the organised working class.

Gang subcontracting impacts on workers in the same way as general labour broking, only more severely because of the informal nature of the arrangement. Unions should campaign to prohibit gang subcontracting.

Finally, unions should negotiate to limit the possibility of cascading subcontracting. Labour brokers should not be allowed to subcontract further. ★

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