

BWI Position Paper

Labour clauses in Public Procurement

Labour clauses in Public Procurement will help local municipalities and other public clients to meet the Sustainable Development Goal No. 8 regarding Decent work.



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Introduction

At the Habitat III in October 2016 in Quito governments, municipalities, employer's associations, trade unions, Non-Profit Organizations, Civil Society Groups and other Stakeholders endorsed the New Urban Agenda which incorporates the 17 important Sustainable Development Goals (SDG) that were adopted the previous year.

This position paper advocates for local governments, municipalities and other public clients to utilize labour and social clauses in public procurement policies as a primary means to meet the SDG No. 8 "Promote sustained, inclusive and sustainable economic growth, full and productive employment, and decent work for all".

It should also be noted that in the New Urban Agenda, one of the "interlinked principles" to active the vision of the New Urban Agenda is to:

(b) Ensure sustainable and inclusive urban economies by leveraging the agglomeration benefits of well-planned urbanization, including high productivity, competitiveness and innovation, by promoting full and productive employment and decent work for all, by ensuring the creation of decent jobs and equal access for all to economic and productive resources and opportunities and by preventing land speculation, promoting secure land tenure and managing urban shrinking, where appropriate;

One of the mechanisms to fulfill this principle is to utilize labour and social clauses which are durable. Labour and social clauses are and can be effective in addressing protective gaps amongst workers, transition workers from an informal to a formal

Decent work

What is decent work?

According to Guy Ryder, the Director General of the ILO, **"Decent work is about Promoting jobs and enterprise, guaranteeing rights at work, extending social protection and promoting social dialogue as the four pillars of the ILO decent work agenda."**

economy, combat poverty and global inequality, promote skills training, and ensure health and safety in the work place, and they are here to stay.

With this background, the Building and Wood Workers' International (BWI) and its member organizations (326 affiliates in 132 countries) have and will continue to engage with local governments, municipalities, city councils, mayors, regional leaders, Habitat, the ILO and other stakeholders with the objectives of meeting the target of decent work through the usage of labour and social clauses in public procurement policy.

Labour clauses are not something new but unfortunately, in many public contracts, they are not fully applied and the provisions regarding wages and working conditions are often neglected. The BWI and its affiliates want to bring labour clauses back to life, make them vibrant and thereby an agent for change in relation to better working conditions for workers on public-funded projects. This will have a positive impact to not only the workers but the communities where they work and live. To do this effectively the BWI cannot do it alone. We need the support and partnership with municipal and regional governments and political decision makers.



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What is a labour clause, and what does it contain?

In the construction industry, a labour clause describes and pinpoints how one as a client want its main contractor and subcontractors to behave towards their workers. The labour clauses can make references to collective agreements, prevailing wage, social contributions, working conditions, vocational skills training, and the proportion of employing apprentices. This to inform the main contractor and subcontractors of what the client want from them in relation to its workers. The client can also stipulate that only workers formally hired can access the building site.

This is the easy part. Most people can likely write a meaningful labour clause. However, the more challenging and tricky part is the monitoring and the control measures put in place maybe leading to sanctions if the labour clauses are not met or has been violated.

Control measures must be present, visible, reliable and the contractor must feel that there is a high amount of certainty that there will be taken control measures. Control includes for example checking pay slips, social contributions, taxes, working hours, payments for food and lodging, random controls of

who is on the site and with what company do they work. Control and monitoring of the labour clauses is the essential element in making sure that labour clauses work, and the contractors must feel that these control measures is not merely superficial.

Control measures can be followed by sanctions. Sanctions can range from urging companies to “behave”, to a warning, or to something more severe such as a fine or cancellation of the contract. Sanctions as well as control measures must be described in the text of the labour clause and made clear to all contractors and subcontractors before signing any contracts.

History of Labour Clauses

(This part builds mainly upon: “Pay and other social clauses in European public procurement”, by Thorsten Schulten et. al. 2012.)

It seems though that many may have forgotten the roots of the long history of the existence of labour clauses in public procurement. Labour clauses were introduced in 1891 in England, with the “fair wage resolution” which obliged the contracting authorities to secure that workers under public contracts receive the “prevailing wage levels”.

A revision from 1909 made a reference, for the first time, not only to prevailing but also to collectively agreed wages. A similar development took place in France, and in 1899 a law was adopted according to which only those companies were allowed to get public orders which guaranteed their workers prevailing wages and working conditions. Moreover, many local and regional procurement regulations prescribed that contracting companies had to pay their workers certain minimum wages.

Hereafter legislation on labour clauses followed in Germany, Austria, the Netherlands, Italy, Switzerland and in Denmark with the so called “Polish Act” from 1908, which stipulated, that foreign





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workers should be treated equally with national workers. They could not get a lower wage or treated differently, just because they were foreigners.

In the U.S. we had the Davis-Bacon Act from 1931 and the Walsh-Healey Act from 1936 stipulating prevailing wage in public contracts. This all led to the discussions within the UN in the late 1940's which conclusion was expressed in ILO Convention 94. Guaranteeing same wage and working conditions for foreign workers as for national workers on public (government) projects.

One also must remember that ILO Convention 94 is not necessarily only a tool to protect workers from protective gaps and to ensure the collectively agreed or the prevailing wage and working conditions, but also acts as a tool to ensure that labour costs were being removed as an element of competition among bidders for public contracts. In other words, labour clauses also establish a level playing field for competition among companies competing for public contracts and for private contracts for that matter. This was very clear to the authors of ILO Convention 94, and was expressed explicitly in preliminary remarks to the Convention.

Later developments in labour clauses

Later, the World Bank and some of the World Bank institutions have engaged themselves having labour clauses in their standard bidding documents, when there is World Bank funded projects within the construction industry. This is the result of continuous lobbying by the BWI since late 1990s.

The UN Global Compact is another piece of evidence, that labour issues matter and should matter.

In addition, in 2011, the European Union (EU) came up with a long list of various issues that public clients could take on in the tendering process. It covers almost everything from decent work, wage and working conditions to promote employability for disabled. Likewise, the Procurement Directives from the EU opens for labour and social clauses in public

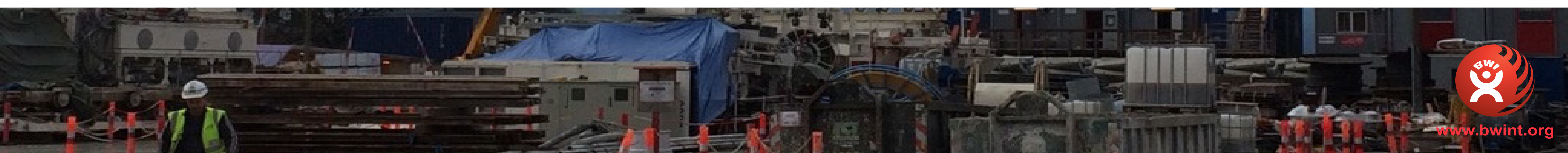
procurement. They do not set up limitations for its use. More so a survey made by the European Commission shows that 88 percent of the population in Europe believes that labour clauses and social clauses is a good way to introduce change and promote policy issues. Also, if it means that it will be costlier than were they not introduced. Here social clauses are in the forefront of the list among EU citizens. This can probably also be explained by many Europeans strong views on social dumping.

With a few exceptions, all EU-countries has legislation on public procurement that makes references to wage and working conditions. It can be very direct and concrete as in Belgium, where the “work under public contracts, has to follow law or collective agreement”. In the United Kingdom, where the law more loosely talks about “abnormally low offers” and “information on the compliance with the provisions relating to employment and working conditions.”

Municipalities, local and regional councils all over the world bring on labour clauses in public contracts. The number is increasing. This historic ‘tour de force’ is just to remind ourselves and others that labour clauses are not new. They are introduced for very good reasons and they have the objective, and sometimes the effect, that workers have decent wage and working conditions and companies have a level playing field to compete on. The arguments are as valid today, with millions of migrant workers, who are especially vulnerable to exploitation, as the argument for labour clauses was more than 125 years ago.

Cities take control of their own destiny

To meet the SDG's cities more and more cooperate, and learn for each other to be able to overcome the many challenges they face. In that respect the big cities often have much more in common with each other than with the rest of the country where the individual city happens to be placed! It shows in the cooperation in organizations as C40, Resilient Cities, UCLG and many others. The issues are plentiful, but the 17 SDG's are at the centerpiece of ongoing and future action.



Case Study 1: Denmark

Regarding decent work and labour clauses, other cities can look to Copenhagen and other Danish Cities for that matter, who for a number of years have used labour clauses in public procurement and in standard bidding documents. These cities are good examples for other cities to emulate the promotion of labour clause.

The following statement (December 20th 2016) is from the mayors of the 4 largest municipalities in Denmark. (Frank Jensen, Mayor of Copenhagen; Jacob Bundsgaard, Mayor of Aarhus; Anker Boye, Mayor of Odense and Thomas Kastrup-Larsen, Mayor of Aalborg):

“The mayors of the 4 largest Danish cities says in unity, that the introduction of labour clauses in municipal tendering in the construction industry has provided certainty for decent wage and working conditions on municipal building sites. Contractors, who do not have decent conditions, are now being sorted out in the tendering process or for subcontractors afterwards by the main contractor. The labour clauses has the desired preventive effect. Besides that, it has been easier for the Municipality as the client/customer to solve the problems and conflicts arising from inadequate wage and working conditions, at an early stage in the building process. The dialogue with the main contractor has improved, and there’s great understanding for the need for the Municipal demands regarding decent wage and working conditions. The same goes for the dialogue with the social partners.”

This provides quite strong evidence that labour clauses can promote decent work and thereby help achieve the SDG No. 8 to materialize.

The big client’s organizations in Denmark: “Bygherreforeningen” has just presented a labour clause under the heading: “Social responsibility in the construction sector”. This means that a lot of private clients, and not only public clients, are now engaging themselves in using labour clauses actively in their tendering. It is especially the big pension funds, but also other private developers and social housing societies who engage in this.

Some Danish contractors themselves have already taken the consequence and has introduced labour clauses towards their subcontractors. This goes for example for MT Højgaard, Hoffmann and Enemærke & Petersen.



Case Study 2: Labour Clauses in Cities hosting Mega Sports Events

New Delhi, India

In the past ten years, there has been a rapid development in New Delhi with a rising middle class. In New Delhi hosting the 2010 Commonwealth Games was an example of the growth of the city and progress it had made in terms of development, rehabilitation, environmental and workers' issues. Public works related to the improvement of stadium facilities; expansion of roads, flyovers, and metro in the national capital region; and upgrade of New Delhi International Airport were some of the key projects related to the Games.

More than 300,000 construction workers were engaged in these projects. To ensure decent work practices, the Central Government of India established a high-powered tripartite committee with trade union representation. Many of the agencies involved in the implementation of projects followed the standard contract clauses for domestic bidding that specifies adherence to applicable labour legislations. The Delhi the registration of construction workers employed at one of the commonwealth games worksites under the popular Construction Welfare Boards Act. This action regulates employment and welfare measures (including social security) of the construction workers.

Rio de Janeiro, Brazil

BWI's global sports campaign to ensure decent work in mega-sporting events had a very good base in Brazil as the country hosted the 2014 World Cup Tournament. Although the campaign resulted in massive recruitment of workers into trade unions and collective agreements with companies that saw increase in wages, better benefits, and improved working conditions including health and safety. However, despite this, it was quite evident that there as the preparations of the Games entered the final stretch, there was an increase in the number of accidents. Noting this, the BWI and its affiliates would use this in their campaign with local government officials of Rio de Janeiro as the city was to host the 2016 Summer Olympic Games.

However, the economic situations were completely different in the two Campaigns. While, during the preparation for World Cup, Brazil was facing a period of economic growth and political stability in a democratic system; during the preparation for the Summer Olympics the country had to deal with an economic crisis- that was especially strong in the construction sector, due to the big corruption scandal that stopped the works of Petrobras - and a political crisis that led to the impeachment of the elected president Ms. Dilma Rousseff.



continued from Case Study 2... The Campaign had its first International Conference of the Campaign in March 2015 when BWI had signed a Technical Cooperation Agreement with FUNDACENTRO, a research institute of the Ministry of Labor. As first output of the agreement, during this conference, a research on fatal accidents in the preparation of the World Cup and an Occupational Health and Safety Protocol were presented, that aims to promote coordinated actions between the employers, employees and government to guarantee the better working conditions in the Olympic works.

Since the launch of the Protocol, BWI and the trade unions have been pushing for the adoption of the Protocol for both: The Tripartite Regional Standing Committee on Conditions and Work Environment in the Construction Industry of Rio de Janeiro (CPR in Portuguese) and the Organizing Committee Rio 2016. Although the Campaign did not succeed in conquered adoption of the Protocol by the CPR, the plan of action toward this goal had as a result the involvement in the Campaign of not only the institution of the Ministry of Labor responsible for the auditing of the working conditions, the Regional Superintendent of Labor and Employment of Rio de Janeiro (SRTE), but also the two other trade unions that represent workers in the Olympic worksites - so the campaign impacted 100% of the workers in the Olympic works.

On the other hand, the Protocol was adopted partially as a policy of the Organizing Committee Rio 2016.

The case of Rio de Janeiro is a good case study of initiative to initiate agreements with host cities and national sporting agencies to ensure safety and health and decent work in the construction of projects related to mega-sporting events.

Case Study 3: South Korea

As we all know in the construction sector, local, regional, and national governments are the biggest clients of public projects. Noting this they have a tremendous influence in ensuring decent work through labour clauses in procurement policies and other relevant labour policies.

In South Korea, the workers in the construction industry face two major prevalent problems:

First is the high number of injuries and deaths due to accidents at the construction sites due to poor implementation of occupational health and safety standards. This is such an enormous problem that there on average is at least 2 deaths a day as a result of work related accidents in the construction sector.

The second problem, is the large number of delayed payment of wages to construction workers.

Noting these two problems, the local government of the Seoul Metropolitan City implemented a Seoul Payment Monitory System to ensure that workers working in construction projects funded by the Seoul Metropolitan local government do not face delayed payment of wages. The system monitors the payment from the city as a client to the main contractor to all relevant subcontractors and then

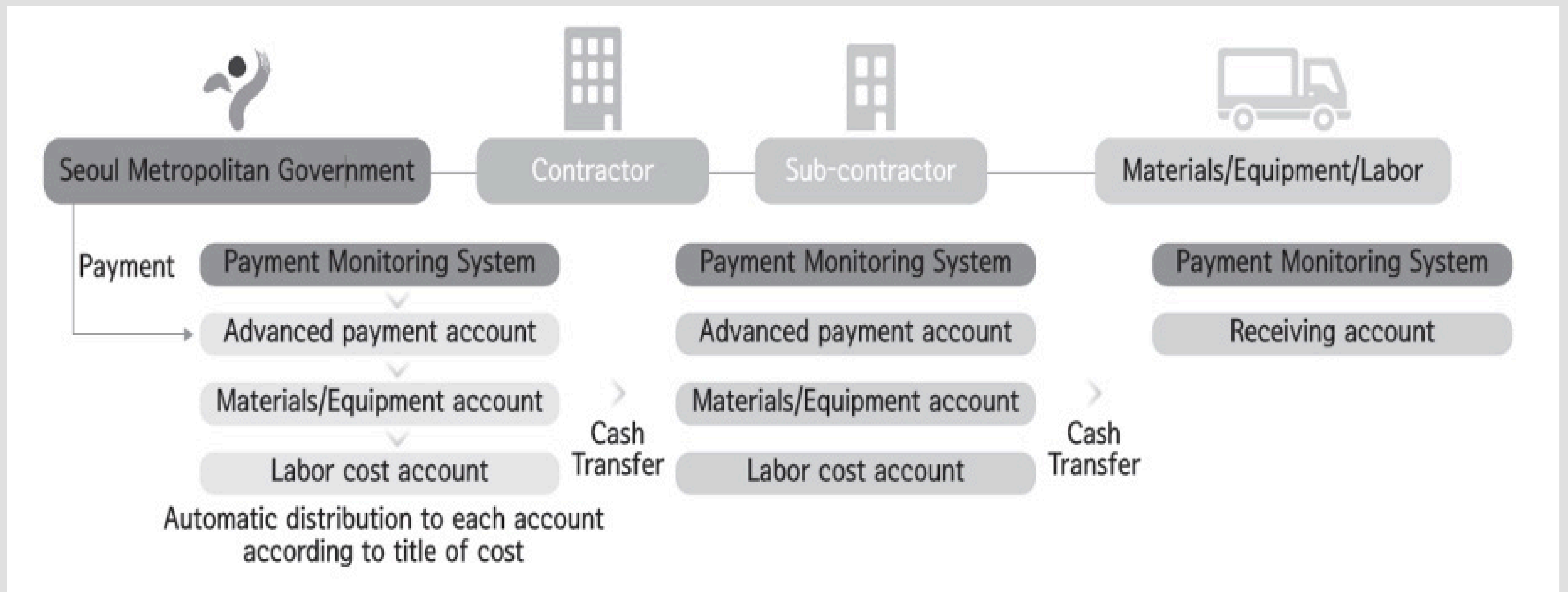


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continued from Case Study 3... and then finally to the construction/material/equipment/ worker.

According to the city, it was designed to level the playing field. The system links Seoul and financial institutions, sub-contractor claims are to be paid exactly as promised. Payment date and amount can be checked through the Seoul Payment Monitoring System.

The diagram below shows the mechanisms of the e-payment system:



Although the system has not completely eradicated delayed payment of wages, it has nevertheless reduced the number of cases. Since the program was implemented in late 2014, the application of the system on construction sites has increased as well as the value of the construction projects.

This is a system that was initiated by local government as a result of incredible pressures put by trade unions in South Korea in highlighting the consistent high number of cases of back wages to construction workers.

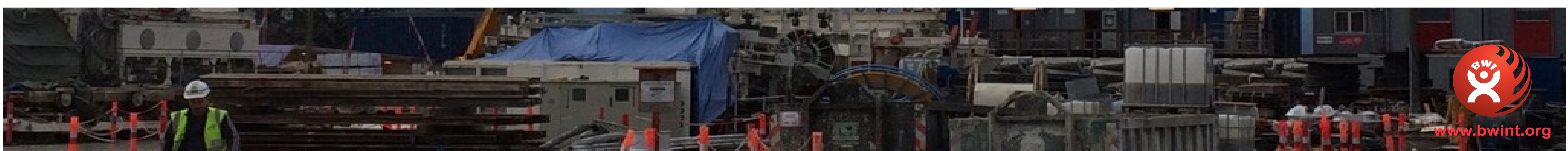
Sort out the “rotten apples”

The whole idea behind the labour clauses is preventive. We want the “good contractors” to get the contracts and all the tasks. And prevent the ‘rotten apples’, those who cannot behave decently in accordance to wage, working conditions, training and apprentices and health and safety on the building sites, those companies are not taken into consideration when you make the tendering and sign the contracts.

The BWI views labour clauses and their obligations as natural. We see it as right and fair that these clauses and obligations are put forward. They are no way obligations which are obsolete or cannot be met by contractors. Many companies can fulfill these obligations without any problems, without any delay. Those who can't we do not really need in the construction industry building for tax payers money!

Throughout the years labour clauses have been present, and been part of a system protecting workers, and giving workers equal rights. Let's keep it this way!

This paper was written by Gunde Odgaard, General Secretary of the Danish Building, Construction and Wood Workers Union (BAT) with contributions by BWI affiliates.



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