

August/September 2003
\$3.95

Indiana *Constructor*

A Publication of the Associated General Contractors of Indiana



CONSTRUCTION LABOR LAW

Military Leave:
Employers' Obligations to
Citizen-Soldiers

8

FEATURE

**Clarian People Mover
Rolling Along**

10

SAFETY LAW

**Heat Stress Can Be
Fatal, and Expensive**

14

FEATURE

**Gary Gets a
Ball Club**

16



By Robert P. Palmer
Executive Vice President, AGC/I

SOLD!...to the Lowest Bidder?

From business planning services to a taxidermy specimen of a North American Wood Duck, you can buy almost anything on eBay.

While auctions have been around for hundreds of years, eBay took the idea of a "silent auction" and combined it with the internet and created an auction for the masses. Anyone can sell virtually anything on eBay if someone is willing to buy it.

It did not take long for the government to get in on the act. The General Services Administration operates an auction website for surplus, seized and forfeited property. At gsaauctions.gov, you can bid on a former Coast Guard 25-foot patrol boat with both engines blown and hull damage or a 1982 Omega Crane with a leaky outrigger that hasn't run in eight years.

I suppose it was inevitable that someone would have the brilliant idea of combining competitive bidding for construction services with the internet. Throw out the idea of a single bid opening and allow bidders to post their bids on the website for all to see and at the appointed time, select the lowest bid...voila! Electric Reverse Auction Bidding (ERAB) is born. Expressed mathematically, eBay + competitive bid + bid peddling = ERAB.

In the previous paragraph, I describe this as a brilliant idea. It isn't. I was just being ironic for dramatic effect. It is a terrible idea, and on top of that, it is very shortsighted.

On its website, reverse auction and procurement software developer Silanta makes the following claim, "This product is aimed at the enterprise that wants to clear excess inventory, enrich the content of an existing web site, or eliminate the middleman, manufacturers who sell direct or who wish to automate their sales to distributors and liquidators seeking to obtain the best prices for products through dynamic pricing and the mass

reach of the Internet."

Notice the words "inventory," "manufacturers" and "distributors"? Those words are associated with commodities. Black's Law Dictionary says that the term commodity means tangible goods, such as products or merchandise, but not services. Construction is a service that combines professional services such as engineering and construction management with materials and labor. Paper clips and police cars are commodities. Construction isn't.

One factor that distinguishes construction from manufacturing is that plans and specifications for construction are not always sufficiently detailed to successfully complete the project. It is fairly straightforward for a purchasing agent to write a request for proposal (RFP) for paper clips or police cars that is detailed enough for manufacturers or distributors to submit a bid. In construction, incomplete bid documents result in numerous change orders. A successful low bid very well may cost the owner more after the change orders have been added.

As explained by Stanford University economics professors Patrick Bajari and Steven Tadelis in a paper co-authored with Robert McMillan, a Stanford graduate student, "[A] limitation of auctions is that they stifle coordination between the buyer and the contractor before the plans and specifications are finalized, since the only information that the buyer receives from sellers is their bid." Bajari, Tadelis and McMillan suggest that bidders will strategically read the plans to determine where the plans will fail. The contractor who finds the most design flaws and adjusts his price accordingly can win the bid and aggressively pursue extra compensation on the change orders that will be required to complete the job.

Reverse auctions are the Darwin Awards of the construction industry. A foolish contractor will be lured

Reverse auctions are the Darwin Awards of the construction industry.

¹ *Auctions versus Negotiations in Procurement: An Empirical Analysis*, by Patrick Bajari, PhD., Robert McMillan and Steven Tadelis, PhD. Available online on the AGC of Indiana home page www.agcin.org.

REEMPLOYMENT

Although USERRA does not explicitly cover an employer's obligation to grant leave, it does generally provide that employers must reemploy persons taking leave for military service, as long as they meet certain qualifications, namely: (1) that the employee provided notice of the need to take leave (subject to certain exceptions); (2) that the cumulative total of the instant military leave and all of the employee's other military leaves does not exceed five (5) years; (3) that the employee reports for reemployment or submits an application for reemployment in the manner and within the timeframes provided by the statute (more time is permitted for longer periods of military service); and (4) that the employee was not discharged from military service under less than honorable conditions.

If the returning serviceperson meets the above qualifications, the employer has an **obligation to reemploy** the person upon the completion of the employee's military service (subject only to certain limited exceptions, each of which the employer bears the burden of proving). The position in which the person must be reemployed is generally the position that the employee would have occupied, **but for** the military service. This required reemployment result is often referred to as the "escalator principle." That is, the employer must treat the person as if he or she had ridden the "promotion escalator" upward, and had never left employment at all. If the employee is not qualified to perform the duties of such a position (after reasonable efforts at qualification by the employer), USERRA provides for reemployment in a descending line of positions, based on the length of the employee's most recent leave for military service.

BENEFITS

As noted above, USERRA also requires that certain

These exceptions are: (1) if the employer's circumstances have so changed as to make reemployment unreasonable or impossible; (2) if reinstatement would impose an undue hardship on the employer; or (3) if the employee's employment was originally for a brief or non-recurrent period of time, such that there would be no reasonable expectation of employment for an indefinite or significant period. It is important to emphasize that proving an exception to the reemployment requirements is difficult, and would best be attempted only after consultation with legal counsel.

into lowering his bid below his cost. This can happen because the contractor does not have an accurate grasp of his true costs or because he feels the need to take work on the cheap for "cash flow". Regardless, if the contractor can't finish the work at the agreed upon price and is unsuccessful in salvaging the job by gouging the owner on change orders, it is the owner who ultimately loses because of the costs associated with the contractor's default.

Perhaps Mike Kennedy, general counsel for the Associated General Contractors of America, sums it up best when he

With the intensifying call for military service by citizen-soldiers, employers must be increasingly aware of, and ready to follow, the obligations imposed by USERRA.

benefits be maintained while the employee is on leave and/or provided upon the employee's return from leave. Generally, eligibility for benefits differs between seniority-based benefits and non-seniority benefits. Seniority-based benefits are any benefits that accrue as an employee accrues time with an employer. A returning veteran is entitled to receive seniority-based benefits as if he or she had not been absent from employment at all. Non-seniority benefits, on the other hand, are handled by treating the person as if he

or she had taken a standard leave of absence or furlough. Accordingly, the returning employee must only be provided with non-seniority benefits that persons with similar status, pay and seniority would have received if they took a leave of absence or furlough.

The statute addresses retirement benefits and health benefits specifically. Retirement benefits are generally not forfeited during a period of military service, and employees must be given time to "make up" contributions to retirement plans such as 401(k) plans. Health benefits during leave and upon return must

be provided similarly as under COBRA. See 38 U.S.C. § 4317.

CONCLUSION

Although calling employees to perform military service is not a new phenomenon, the requirements of USERRA may be novel to many employers, especially to smaller employers who have never dealt with requests for extended military leave or reemployment of returning veterans. With the intensifying call for military service by citizen-soldiers, employers must be increasingly aware of, and ready to follow, the obligations imposed by USERRA. ■

For more information regarding this article, please contact Mike Boldt at (317) 236-2100 or boldt@icemiller.com.

EXECUTIVE ISSUES *continued from page 5*

said, "Owners do not need the internet to organize and conduct auctions. If auctions were the best way for owners to select construction contractors, owners would have started doing it long ago."

Construction ain't peanuts. Owners should select contractors based upon past performance and reputation, and negotiate a contract with the contractor that fairly compensates the contractor for quality work.

For more information regarding this article, please contact Rob Palmer at (800) 899-8823 or rpalmer@agcin.org.