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."

Reverse auctions are the Darwin Awards of the construction industry.

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.

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

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EXECUTIVE ISSUES continued from page 5

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.