DRIVE YOUR OWN BARGAIN TO CONTROL LABOR COSTS

By bargaining independently, labor costs are strictly between you and the union

By Ira J. Smotherman, Jr., Esq.

Labor is the one area where contractors can best manage their costs—and therefore profitability—provided such control is retained rather than delegated to third-party bargaining representatives and labor unions which may not have any individual firms’ best interests in mind. Prudent contractors, then, should investigate and carefully weigh their options, including bargaining their next labor agreement independently.

First, a contractor should notify the local union and any multiemployer representatives that it intends to terminate the current labor agreement and negotiate a new one independently. This letter should be sent by certified mail, return receipt requested, in time to guarantee receipt 60 days before the current contract expires (as such longer notice period as the agreement may require). Failure to meet this deadline will automatically renew the existing agreement for another year.

To avoid charges of bad faith, a contractor should meet and bargain with the union as soon as possible after the “termination” letter is received. By this point a contractor should have a competent labor lawyer to review every step and action—form if the union ever sustained an unfair labor practice charge before the NLRB, the contractor must reinstate the old contract and make whole employees who struck or quit because of the alleged bad faith bargaining.

The Bargaining Process

The contractor’s first proposal should not be the bottom line, no matter how reasonable that may seem, but should include room for concessions or minor adjustments. Moreover, to make clear the proposal is a “new” and not “amended” agreement, the contractor should type up the first proposal as a complete contract. This guards against union claims that the existing contract “rolls over” for another year if it does not agree to the changes.

Nor should the first proposal raise too many issues over the changes or difference from the current agreement. This type of contract has been held by the NLRB as evidence a contractor intended to bargain to impasse. Where there is no solid basis, the contractor should never even make the proposal—or be prepared to concede it at an early date (indeed, even when there are good reasons, the contractor must be prepared to make concessions or else invite allegations of bargaining in bad faith).

Particularly at first, a contractor should write detailed reasons for each proposal, casting economic arguments not in terms of “survival” but in “meeting the competition.” The union has a legal right to request confidential business information if changes proposed are based upon an argument the contractor is suffering economically under the existing contract.

Each proposal and union counter-proposal should be made in writing, either at the time given or shortly thereafter. The contractor should have a witness present at bargaining sessions to take detailed notes. Minutes should be prepared of each meeting and signed by both parties, or at least exchanged with the union to put on it the burden of any objections.

Counter any outright, across-the-board rejection with a determination to discuss specific reactions to specific proposals—demanding always a complete, item-by-item written response. Indicate willingness to negotiate all specific parts of the proposal which constitute a significant change from the existing contract.

If negotiations bog down while expiration of the current agreement is imminent, the contractor should resist signing any “interim agreement” to allow more time for bargaining. Instead, the union should simply be in-
formed the existing contract will be observed until either a new agreement or an impasse is reached, and that it is hoped a new agreement can be concluded before the current agreement expires.

Reaching an Impasse

Should an impasse be reached and the existing contract has expired, the contractor has the right to implement its last offer to the union, including both items accepted and rejected. The contractor has no duty to comply with any provision of the existing contract —nor any provisions of the proposed contract which apply only to company/union relations such steward clauses, union security and check-off clauses. In other words, what must be implemented are strictly the terms of the proposal which related to wages, benefits and such employment conditions as overtime pay, vacation and reporting time.

If a contractor does reach a bargaining impasse and proceeds to implement its last proposal, it is advisable (but not required) to notify the union of this
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situation in writing. The timing of this notice may either be simultaneous with the effective date of the change, or could be in advance, depending upon which is psychologically better for retaining some employees. In any event, the announcement to the employees and the written notice to the union should probably be simultaneous.

Even if convinced further bargaining is futile, a contractor is obliged to resume negotiations upon union request—unless there is a “reasonable doubt” the union has majority support among bargaining unit employees.

Employee Relations

While bargaining is underway and before the existing agreement expires, unions may attempt to prove a contractor’s bad faith by sending people to apply for employment after “hearing” the company was going open shop—and since they weren’t union members, they wanted to be the first to apply for jobs that would become available. Such “applicants” should be told no positions are open and an exclusive hiring hall requirement is in effect.

During the last week before expiration of the existing contract, strive to avoid laying off employees and so avoid any appearance of discriminatory termination. Later if an impasse is reached and the contractor implements its last proposal, employees who fail to show for work should not be fired, laid off or replaced, but instead informed in writing that failure to report by a certain date carries an assumption the employee is on strike or has quit voluntarily.

Should a contractor anticipate a bargaining impasse, in the interests of retaining employees the contractor may legitimately explain to workers the terms of any final proposals the company may implement. However, care must be taken to avoid commenting on company or union proposals, which could be construed as an appeal for individuals to bargain directly with the contractor.

While a contractor can begin taking applications if a strike appears imminent, striking employees cannot be fired but only replaced. After replacements are hired, any striking employee who asks to return to work must be considered for any available positions.

All new employees hired during an impasse situation must be brought in under terms of the contractor’s last proposal. Also at this point, inquiring about a job applicant’s union affiliation or lack thereof constitutes an unfair labor practice—indeed, the union may attempt to trap the contractor by sending people to apply for jobs after a strike starts.

About the Author: Ira J. Smotherman, Jr., is a partner of Stokes, Shapiro, Fussell & Genberg, Atlanta, Ga. He advises contractors who choose to bargain independently to obtain specific legal advice from a competent labor lawyer, as the principles discussed in this article are necessarily general in nature and would not apply equally to every situation.