

Business Better (Season 2, Episode 5): The Infrastructure Investment and Jobs Act: Moving Authority Into Projects, A Public and Private Perspective

Speakers: John Smolen, Brent Heberlee and Sam Headon

Steve Burkhart:

Welcome to business better, a podcast designed to help businesses navigate the new normal. I'm your host, Steve Burkhart. After a long career at global consumer products company Bic, where I served as vice president of administration, general counsel and secretary. I'm now of council in the Litigation Department at Ballard Spahr, a law firm with clients across industries and throughout the country. Today's episode features a discussion on how to engage with the infrastructure and jobs act and moving authority into projects from a public and private perspective. Our experts will discuss opportunities presented by the new law and how those opportunities encourage even require a partnership between public and private leaders. Establishing those partnerships now can lead to efficient approvals and thorough distributions of resources. Participating in this discussion is John Smolen, partner in our Baltimore office and Brent Heberlee of council in our Washington D.C. office. John and Brent are joined by Sam Headon, director of project development at S&B USA Concessions. Now let's turn the episode over to John Smolen.

John Smolen:

Well, thanks for tuning into a podcast today. We're excited to be another voice in a chorus trying to figure out how to contend with the positive reception of the infrastructure bill that has now become the infrastructure law. In the interest of making what could be a cacophony of voice as an actual chorus, we have compiled a couple of lions in the space to give a new perspective, for that matter, a unique perspective to help move from what's in the bill, what's the bill about, what do we think about the bill to what are we going to do with this thing?

John Smolen:

I think it's appropriate to suggest that comes from the perspective of not only how the law and the politics around the law work, but how the politics and the interactions among the people who are benefiting from this, both on the public sector and the private sector work. Briefly, my name is John Smolen. I'm a partner at Ballard Spahr. You have clicked on a podcast with a Ballard Spahr logo, so you should expect to hear at least one of us. I'm in the P3 infrastructure group who represents public and private sector participants, including lenders into infrastructure projects. My position is moderator and the dumb guy on the podcast in favor of my two colleagues, which I'll let introduce themselves. With that, Brent Heberlee please.

Brent Heberlee:

Hello. Brent Heberlee. I'm of council in Ballard Spahr's government relations and public policy group. For lack of a better term, I'm a lobbyist in D.C. I've been working in the infrastructure space for quite some time dating back to 10 years on Capitol Hill, and more recently with Ballard Spahr representing both public and private clients in the infrastructure space. I've had the opportunity to experience many infrastructure weeks over the last decade and now we've actually succeeded in passing a bill and I'm spending a lot of time right now particularly with local governments around the country trying to help them make sense of this influx of federal funding. That's going to really be a game changer for a lot of communities.

John Smolen:

Thanks, Brett. With that, our other interlocutor today coming in from the private side turn puck is a colleague Sam Headon. Sam.

Sam Headon:

Thanks, John. Sam Headon. I'm director of project development with S&B USA Concessions, which is an infrastructure developer and contractor headquartered in Pittsburgh. I've got well over 15 years of U.S. infrastructure experience and more than I can remember globally and SBC specializes in developing financing, constructing and operating large scale infrastructure projects, particularly under P3 contracts. S&B has 30 years or more of P3 experience with large mega projects throughout the globe.

John Smolen:

For all you out there in cyberspace listening to us on your jog for this podcast today, the intent again, is to give you some unvarnished perspective from practitioners to Brent's word lobby, but also private sector investors to really as a practical matter move from what's in the bill to what's going to come out of the bill in terms of infrastructure changes, movements, challenges, opportunities, potentially obscure parts, potentially overemphasize parts, maybe even things that aren't going to be particularly well executed, or Baylor Fellow not withstanding the intents of the Congress. I think we are going to start with that point.

John Smolen:

I would open by asking Brent, your view and your practice. You've spent time working with obviously the federal government, but much of your work involves governments at different layers in the states and the mean supple and local layers. Here it is, a 1039 page bill signed into law with much pump and circumstance. If you're talking to these local folks and they are interested in participating in that, what do you see is their perspectives on this, their orientations, potentially, maybe even a little bit of here's how you get started and what we're supposed to do. Please, of course, emphasize all of the aspects of that you think our listeners will be interested in hearing.

Brent Heberlee:

Thanks, John. Yeah. The first thing I would say is certainly that state and local governments around the country are excited. I believe this infrastructure law is how it's been characterized. It's a pretty transformational opportunity for state and local governments to address a lot of infrastructure priorities that they've been unable to address for many years. As I think most people have heard, it's roughly a \$1 trillion infrastructure bill that includes about \$550 billion of new spending. By that we mean spending above the baseline of what the federal government would typically spend on a variety of infrastructure programs and in a given period of time. There is a lot of new money here. I think most of my conversations have been to our clients or local government clients in particular. You need to really get ready for this.

Brent Heberlee:

This is different than what you've experienced in the past. To their credit, I think the Biden administration recognize is that there are going to be some issues with implementing this new law in terms of really what I will call the human infrastructure element of governments really at all levels, the federal state and local governments. By that I mean, do these government and have the capacity to actually use this money in a way that's going to be meaningful to them? As we know, a lot of this money is going to be pushed out. It already has started to be pushed out to the states. In some cases, local governments through formula grants that are existing program, but there are a lot of new opportunities in the form of competitive grant funding opportunities that are going to be stood up by the Department of Transportation in particular, but also Department of Energy and several other federal agencies.

Brent Heberlee:

It's really incumbent upon state and local governments to have the right people in place that are knowledgeable about these programs that have the ability to assist their government apply for funding in a way that... Well, I should say, understanding how these new programs are going to operate, what the priorities are. It's important for these governments to have people in place. In some instances, that means you're going to have to spend some money locally and at the state level to get the right

people in place in order to access this additional money. That's a long way of saying I think state and local governments need to be prepared. Federal government is aware of this concern. They've actually provided a lot of what we'll call technical assistance along with the actual funding that's going to come out to do the construction work. Technical assistance is funding that other governments can use to prepare themselves to apply for grants and have the right people in place to administer these grants once they come in.

John Smolen:

Brent, it seems like that's good counsel, of course, is get ready to get ready. But at the same time, it seems as though the real impetus for the infrastructure move and president Biden's expenditure of political capital to get us some capital to build infrastructure itself really runs the risk of being in a regimented and linear way. We need to stand up organizations. We need to get people to know what they're doing. We need to apply for grants.

John Smolen:

It seems like that might be across purposes of the efforts to get infrastructure projects up and moving, which I think is part of perhaps Sam, some perspective you could bring as to ways that the private sector could interface with these folks facing this very long and uphill climb and access opportunity for a whole lot of money, maybe a guardian tyranny of all of the choice and opportunity renders this atrophy. It seems like that this is the precisely that the avenue through which a private sector and public sector partnership could really take place. Sam, I don't know if you had any thoughts on some of those standup type things that Brent was speaking to.

Sam Headon:

Yeah. I echo what Brent says about being excited. I do think the more you explore the detail and the ambition of this bill, it's impossible to be anything other than excited about the breadth and how wide it is. I echo his counsel that there's a huge amount of work to be done before we begin to unlock a lot of those funding mechanisms. A lot of that is going to be figured out on the run, because while there is initial guidance about preparedness and other things, it looks to me like there is going to be an enormous amount of review and interfacing in order to be eligible to access these funds across the board. One of the key directions of the bill itself was to open up the potential accesses of these funds itself.

Sam Headon:

The federal government has not only been ambitious in what it's making available, but also to who it is making it available. You've got a lot of new entities that will be also trying to access and unlock these funds. I think my sense is the groups that will be best able to access these funds are going to be able to merge the two competing influences in the bill itself. The first being that there are projects or at least there's commitment to funding of existing projects that are in existing pipelines, what we refer to as keeping the lights on with infrastructure and projects that are urgent and much needed. The more ambitious part of it is the scope that reaches resilience and energy efficiency and water and climate and other things.

Sam Headon:

I think the groups that will be best able to unlock this funding are the ones that are going to figure out ways to move merge the two. I think that's where the private sector can play a role. The bill itself creates some avenues. We see with asset recycling and some of the support around getting advisors in to assist with asset recycling and asset concession type advice. There're some opportunities there directly for the private sector to help the public sector understand how that might work as well as more generally, I think that there's just going to be a lot of work in terms of partnering between the private sector and the public sector to understand the eligibility requirements and to partner at an early stage in order to put forward projects that meet the criteria and that address the key policy concerns that the bill is designed to address.

John Smolen:

Yeah. There's the rub because I agree with you as we said at the head who sometimes spends time counseling the public sector and then sometimes counseling private sector folks. It seems like the one not so much missing thing, but wasn't supposed to be their thing can be more formal procurement type mechanisms and formalized opportunities for the private sector to bring through procurement laws that might need to change to Brent's earlier point the ways to pull these things together and speak more openly about the challenges that come with these policy favoring match up deals. I think Sam, in preparation for this, there was view of a project in Fargo, North Dakota, which in full disclosure, Ballard Spahr is not involved in, but it is a P3 project that seems to really grab at simultaneously the policy aspiration of an infrastructure bill and the direction for the country.

John Smolen:

But also when you unpack it, some of the challenges that come with that, be it transportation challenges to get to the site, be it human supply, be it supply chain issues, but maybe even fundamentally procurement pacing in the access that private sector had to suggest these things. Sam, if I may put you on the spot a bit, just to say, if Brent was the guy who picked up the phone who was representing city of X and you had some solutions, what might be your first couple things that you ask him to look into to try to advance his client's efforts to tap into this infrastructure money?

Sam Headon:

I'm very glad that you raised Fargo because I think it is a very important. It was and remains a landmark project not only for P3, but also generally in the market, I think around infrastructure. If I could briefly pause to explain that project, that is a partnership between the U.S. Army Corps Avenger. Well, first of all, it's procured by the Fargo Moorhead diversion authority, which is an intergovernment authority that was formed to deliver flood resilience infrastructure to the city's of Fargo Moorhead. It's a diversion channel. It is from a construction perspective, a partnership between the private sector that is delivering one part of the overall infrastructure and the U.S. Army Corps of Engineers, which is delivering the second part, but they're doing the project itself in partnership together.

Sam Headon:

The project benefits from interestingly enough with financing from the federal government directly to the procuring entity there as well. It is squarely in the sites of what this bill was designed from a policy perspective to be a catalyst for. I noticed actually even recently that the U.S. Army Corps Engineers has up to \$30 billion of additional financing that it will be able to access or directly control for projects like this. I think the best projects will be the ones that are able to present those types of urgent flood resilience, flood infrastructure projects, but with an organized client that has thought through those issues at an early stage and is best able to deliver that infrastructure thoughtfully and probably in partnership, not only with the federal government, but potentially with the private sector as well.

Sam Headon:

To the specific point that you asked John, I think most important piece of it will be to understand what's in the bill and what is the eligibility. Some of that is to be determined, but I think you are looking at projects. The ones that will be, I think, fast tracked are those that are most urgent that fit the key... What does once say? Focus areas of the bill. To that, we see surface transportation obviously being incredibly important, but also you're talking about water. You're talking about resilience, seaports, and this is really where the army core has been given a leg up here to really execute on its mandate. I think maybe not going for as much as you can, but being selective in pushing the most urgent projects that fit within those criteria and the better organizer you can be in an early stage so that you can be presenting that to the federal government, presenting that in a way that is compelling and that meets their grant criteria. I think that's probably the most important first step.

John Smolen:

Well, what's your response, Brent, when Sam comes knocking and saying, what's your priority projects? You should amend your procurement rules to let me talk to you so we can team up and make this happen. What do you think the average municipality is going to be able to wrestle with that?

Brent Heberlee:

Yeah. I think they will wrestle with it because I think their first inclination is they're going to be looking at their capital improvement plan and saying, okay, this is the list we're going to work off of. We're going to get all this new money and it's going to be business as usual. I do think there is a burden on the private sector partner to make a compelling case to that local government as to... There are parts of this infrastructure law where it does put a lot of additional money in legacy of portionment programs through FHWA, for example, but there's also a lot of very new programs that Sam alluded to.

Brent Heberlee:

In January this year, The White House released a menu of the 25 new competitive grant programs that are going to be coming out and when they're going to be coming out through DOT, and Department of Energy and other agencies. It really is understanding how these new programs work, what the priorities are, and also understanding... I think the Biden administration admits willingly is that they are looking to have the private sector be a partner in this whole process, because they want to leverage this federal funding as much as possible to get the most bang for the buck that they can. When the private sector is coming in and talking to mayors and city councils around the country, they need to be knowledgeable about the programs, obviously about the priorities, but then being able to explain if you're a local government, why you need to look beyond your just traditional list of projects and understanding that there are new alternative delivery mechanisms for doing projects that you might not have thought about or thought were feasible under the existing federal funding streams or state funding streams.

John Smolen:

That's a good springboard for some stuff that we talked about in anticipation of this is the, as you say, Brent, that here's our capital plan. We're going to dive a little deeper and use the extra money. Then the next thing you know it's a seven, eight, nine, 10 year plan, which doesn't comport with the five year policy. If Sam is advised to come in with his plan, he's going to come in with some things that are off the capital plan because there's message from the infrastructure bill is this tension between the policies for the conventional infrastructure. Keep the lights on, as you said, Sam, and the new stuff.

John Smolen:

It seems to me that a fertile ground for these alternative deliveries is going to be to catch the wave that at least I think I'm seeing in the market of invitation for some progressive technical use of that word progressive, design build progressive P3 approaches that become the vehicle through which folks in Sam's position could interface with your mayors and city councilman to bring this stuff up, which is an uncomfortable and an unusual space. Sam, I don't know if you have any thoughts about the pre-development approach as being helpful or harmful on this. I certainly have my opinion and I can chime in if I disagree with you, which might make it more interesting for the people on the runs right now.

Sam Headon:

No, I completely agree, John. Which maybe is not so good for the podcast, but we're in alignment. In truth, it does. It screams out for that attention, because the first thing you're going to get asked when these projects are being put forward is, what are they going to cost? The public sector is going to be working, I think, and has done generally a lot of work to be able to put those forward, but as Brent said, there's going to be a lot of updating and dusting off old plans and pulling out projects that otherwise many thought would never see the light of day and bring them forward. Those plans are going to have costings attached to them, which in many case are going to be outdated or at least in need of updating and in need of a sensible path forward with execution or delivery certainty and with management of the costs as those get presented for funding.

Sam Headon:

The more third party review and conformation of that you can present as part of your project, we'll wait and see. I'm sure that will be a benefit and an asset in terms of getting your project approval, potentially others. I definitely see as you say for a progressive approach, partnering at an early stage in order to bring in, additional expertise that can help you put forward a project in a compelling way with thoughtful advisors and with trusted partners who can help you to bring those projects forward, that's going to be a huge asset.

John Smolen:

It's wonderful to agree because I think that's some clarity on the purpose of this particular podcast was to bring various perspectives about how this is supposed to affect our infrastructure posture as a country. Having some unified perspective on that is probably a helpful message in and of itself. I think I'll see you one and raise you one on a thing I teed up to suggest that maybe one of the first things that government's facing and looking to navigate to get into this would be in their procurement laws or in their procurement policies to really take a hard look at the early stage on their receptiveness to unsolicited proposals. On the one hand with the progressive approach, there is the willingness on the part of the public sector to say I know that I don't know the price, but I also am willing to understand that they don't know the price, but let's think about this together and get to a place where we have a meaningful relationship within some bumpers to tackle this together.

John Smolen:

The converse of that is someone bringing that information to you and having a vehicle to do that. I could speculate on a number of ways where there's tension between some of the policy statements and the practical statements within the bill could turn into ideas that are really good ideas originating from the outside the government to be brought to the government. Now, that being said, both of those scenarios from my perspective need to tip their hat to the understanding that in not being able to pull the price together in a practical matter, there's an open book. Collaborative approach really needs to weigh on some of the things that come with this. There's a competition with all of this money out there for people trying to get access to it and spend it. Some knockoff effects are going to be some things we talked about before.

John Smolen:

Supply chain challenges, coupled with a lot of competition for those supplies themselves to advance state X or city wise infrastructure approach as well. I'm putting together a project in, let's say Indiana and someone in Illinois has another project. At some point, there's only so many people who can swing the hammers. That becomes an issue of sequencing those and timing those things out. I'm curious, Brent, if you have any thoughts on your experience with, or any advice that you could give to some of these public sector folks that you work with on how they should get ready for that part of getting ready for these infrastructure money accesses.

Brent Heberlee:

Yeah. These are conversations I'm having right now with a lot of our local government clients. One of the opportunities that they have that's already in front of them is they received a massive influx of capital from the American Rescue Plan. State and local governments around the country \$350 billion primarily to address COVID issues, but there was also an infrastructure component to that funding. I'm talking to them about being able to utilize some of those funds to actually prepare themselves for the influx of infrastructure funds that are coming from the bipartisan infrastructure law. Again, a lot of it's just education and making sure that they understand that they actually do have the resources, if they choose to use them in this way, to really prepare themselves for creating their own internal infrastructure, if you will, to be prepared for this influx of federal dollars and to really develop a plan to go about it in a smart way. That obviously includes talking to the private sector and having those conversations that Sam has been alluding to get ready for these new projects.

John Smolen:

Rounding the corner, I think the average 40 something who is listening to us on their jog is probably getting very tired at this point. Maybe what we probably ought to do is round the corner and say not everyone is going to be facing this infrastructure bill having to build from the ground up. There are several matured public sector entities. There are some agencies and some authorities that are set up specifically to try to move these things forward in time based upon already having an arsenal of advisors and programs and processes and protocols in place.

John Smolen:

Maybe Sam, you had some thoughts from the private sector side as a little bit of a signal to the public sector side and even those places in particular about some of the more obscure, but meaningful parts of this bill that you think can really turn things from, hey, let's talk about how we put this together to. We really can take advantage of this thing. We can take advantage of that thing. Just a couple off the top of my head TIFIA, PABs for broadband, the PABs allocations. I wonder if you had some thoughts about those things you'd like to share.

Sam Headon:

Yeah, we discussed it briefly. In listening as we all have probably to a lot of analysis of the bill and areas for opportunity, one little bit surprising reaction has been that there's just no major shift to P3 overall. There's been different views on that. I think in terms of bright shiny objects, there's not a whole section of this bill that deals with public private partnerships, but I do think there's some important incremental changes. John, you touched upon a couple of those. I think obviously the enhancement of PABs both moving from the \$15 billion to \$30 billion amount as well as extending some of the eligibility broadband. I think that's important. PABs just from an affordability perspective, it's always going to be a tool that will help to drive down the cost of projects.

Sam Headon:

I think TIFIA and WIFIA, we talked a little bit about the Army Corps of Engineers and it's increased store autonomy around using WIFIA. I think partnering with the army core will be extremely important given the backlog of projects that they're looking at and the fact that we know that they have... Fargo Moorhead was I believe second, and they've got two others in process, but I do think there's real core for optimism that there'll be more ability to deliver on that backlog of very important projects. S&B is involved with Fargo obviously, but we've certainly looked at some areas that we might be able to support there as well. With TIFIA specifically, at least one of the features I saw was the extension and to the loan 10 up to 80 years which I think could be a very significant change.

Sam Headon:

I know others have raised it as well, but in terms of just some of the nuts and bolts issues around securing TIFIA financing for P3 projects, that's one change that I think will be helpful moving forward. Outside of PABs and TIFIA, there's mega project funding of \$5 billion. There's info grants for major projects of regional significance. I think, as we said, there's going to be the dusting off of some large projects that were moth balled due to funding constraints that we will see come back. In addition, we looked at electric vehicle charging that there's potentially \$7.5 billion with an emphasis on P3s there. I do think there's real course for optimism for potential P3s and we're very excited to see what direction some of those changes might take the industry.

Brent Heberlee:

John, I just wanted to add to what Sam was saying, not about the types of projects, but actually the types of communities. One thing I should have mentioned earlier is there's a lot of money in this infrastructure law that is targeted to tribal communities around the country and to more rural communities around the country. I think it's important to remember that the opportunities don't just lie in the big cities that are experienced in dealing with big projects or projects in general. There are going to be a lot of new opportunities in smaller communities, tribal communities around the country where the feds have

targeted funding a lot of these new grant programs. Those are new opportunities for the private sector as well. I think that those should be looked at carefully.

John Smolen:

100%, Brandon. I'm glad you brought that up. The broadband thing is an example. That is a policy challenge to solve a geographic issue. In many ways, I think that that's going to be a load star for how it is that these folks that are in the more rural parts of our country can access an accelerated approach to delivery and access to these money. There's plenty of work for us to do. I will give my colleagues a moment to say their last thing, if there's something else they wanted to get out there, but we could talk about this for days. I think summing up our time today and potentially time for more conversations in the future is that there are paths in this. Shooting from the hip, I feel like its infrastructure bill, we got this. It's not as hard as it looks.

John Smolen:

I'm not sure what it is, but the byline on this really is about bringing folks together, opening eyes, realizing that the access to the funds and implementation of the policy really does bring forward most significantly from my perspective, an impetus to trust the relationship between the private sector deliverers and the private sector thinkers with the public sector owners of these projects. With that, I'll kick it to my colleagues if they have any last words and then we will let you finish your run and stretch.

Brent Heberlee:

I'll just say, well said, John. I agree with everything you said. I think really my message to the public sector folks is just get ready. You need to do a lot of preparation work. This money is not going to magically appear and results are not going to magically appear as well. You need to get prepared now as a government, as a local government, as a state government to manage this influx of funds appropriately.

Sam Headon:

Yeah. I agree with that, Brent. I would say at least from the public sector side, we've been discussing, but preaching a little bit of a combination of patients in terms of outcomes because this will be a process and we know that it's extraordinarily ambitious. There's a lot of work to be done in order to see results here. I think we're all confident those results will come. The question is, when and how quickly. The action needs to be taken now in order to ensure that we see those transformational changes that Brent talked about at the outset. I would say on top of that, the private sector, this is a challenge.

Sam Headon:

John, you did a good job I think of teeing it up. It's a challenge to the private sector. There are opportunities there. There are partnerships that can be formed here to support in the delivery of these projects and it's for the private sector to move forward. As we say, either through unsolicited or through working at an early stage either through a PDA process or something else and at risk in order to bring these projects to life. It's call to action not only to the public sector, but I think specifically to the private sector as well to understand these funding mechanisms and to make the most of them.

John Smolen:

Fantastic. Gentlemen, as always, it is a pleasure to interact with you. Now we get to share out there with the folks in podcast land doing their stretches and tying their shoes this intellectual interaction that makes my day so much better. Infrastructure, we got this thing. Look us up. Information about the speakers today will be available to you. We thank you for spending time listening to us today. Thanks guys.

Steve Burkhart:

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