

Season 2 | Episode 69

How the Infrastructure Bill and PRO Act Will Impact Contractors in America

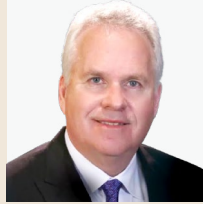
PAYCHEX
Business
Series

Coronavirus



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Full transcript

Gene Marks:

Hey everybody, and welcome to the Paychex Business Series podcast. My name is Gene Marks. Thank you for joining us today. I am speaking today, or I've spoken to actually already, Steve Sandherr, who is the CEO of the Associated General Contractors of America, representing tens of thousands of contractors, small businesses that do work in the construction industry. There are a lot of issues that are facing the construction industry and our conversation was so good, we didn't even get to some of the issues I wanted to talk about. We are talking about the Infrastructure Bill, not only where it stands, but how it will impact the construction industry. And number two is, we were talking about the PRO Act as well. The PRO Act could have sweeping changes to the power of unions and your ability to hire independent contractors. So very, very interesting stuff, particularly if you're in the construction industry, but for any business that is hiring outside contractors that might be effected by the Infrastructure Bill, you'll definitely want to listen. So stay tuned. We'll be right back with Steve in just a minute.

Gene Marks:

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Gene Marks:

Okay, I'm here with Steve Sandherr. Steve, thank you very much for joining me.

Steve Sandherr:

My pleasure, Gene. Thanks for the invitation.

Gene Marks:

So, Steve, you are the CEO of the Associated General Contractors of America. So let me ask you, tell me about the association.

Steve Sandherr:

Sure. Well, we're the nation's largest commercial construction trade association. We have 27,000 members all across the country. We have chapters in every state, the district of Columbia and Puerto Rico. Our members perform essentially everything but non-residential construction. However, they do perform multifamily construction, but generally it's roads, bridges, hospitals, schools, power plants, water treatment plants, sewer lines, et cetera.

Gene Marks:

Now, when you say contractors or construction companies, is the typical demographic of individuals or are they companies with employees? Mostly subcontractors?

Steve Sandherr:

Yeah, these are construction firms and it's everywhere from mom and pop all the way to the largest, the brand name, and in some cases publicly held companies that perform construction. And even though our name says general contractors, we represent specialty contractors and general contractors, and there are a lot of general contractors that at times are subcontractors to larger firms.

Gene Marks:

Yeah, I was just going to ask you that. Because you know, when I think of a general contractor, I think of somebody that's running a project or has a lot of subcontractors underneath them, but you're saying a lot of your members are actually drywall people or electricians—

Steve Sandherr:

—Electrical subs, plumbing subs, et cetera. Yeah.

Gene Marks:

Got it. All right. That's fine. And you've got independent associations in every single state and then obviously you're part of a national organization outside of Washington. So let's get into it. If you're listening to this podcast or watching us and you're in the construction industry in general, Steve is somebody who is living in this industry and dealing with the issues facing this industry. So let's first talk about infrastructure. Now, I warn you, for those of you that are listening, again, right now it's nearing the end of July. We still don't have an infrastructure bill as Steve and I are speaking. But Steve, we're kind of heading in that direction. I hope an infrastructure bill does happen. Don't you?

Steve Sandherr:

Oh, of course. And the answer as to whether it's going to happen is somewhat complicated. I'll give a lawyerly response. It all depends. And there are essentially three tracks here to look at. The first track is the president's infrastructure plan that he announced earlier this year, which we can essentially forget about. That's really off the table. Where the action is right now are in two other lanes. The first lane is the so-called "bipartisan infrastructure" framework, which they are, as we speak, finishing out the details. Evidently one of the last details is to what is going to be the investment level for mass transit. And then the third lane here is less sexy and less interesting to the press, because this is the normal sausage making that typically occurs in Congress, and there's evidence of bipartisan cooperation here.

Steve Sandherr:

And what I'm talking about is the basic nuts and bolts of what we call infrastructure. There's a highway and transit bill that the program expires on September 30th. And the House has taken one approach. They've passed a large basically partisan package. It warranted a handful of Republican votes, I think two. And then the Senate, two committees have reported out their service transportation infrastructure bill. In the Senate Environment and Public Works Committee, that was reported out unanimous, and so every Republican, every Democrat, voted to send this bill to the Senate.

Steve Sandherr:

And then there's a component of this, which requires Commerce Science and Transportation, another Senate committee. 11-14 Republicans voted for that version of the bill. This covers basically rail and transportation safety. And then two other committees, they get a shot at the bill. One is the Banking and Urban Affairs Committee, which deals with the title of mass transit. And then the Finance Committee determine how it's all paid for. So while the press is focused over here on this bipartisan infrastructure framework, on this hand, you have a lot of the normal legislation happening that's addressing infrastructure.

Gene Marks:

So really it sounds like there's two bills, right? There's the bipartisan infrastructure framework, and then you've got, I'd say the combined House Senate bill, however that turns out, that's [crosstalk 00:07:17] transportation bill. Is that a fair statement?

Steve Sandherr:

That's correct. And of course the bipartisan infrastructure framework has a broader approach to infrastructure than the narrow of what we would call highway transit.

Gene Marks:

Right now as we're speaking, the bipartisan framework was around, if I recall, around \$1.2 trillion.

Steve Sandherr:

Yes.

Gene Marks:

The highway transit bill, how does that compare in size? You don't have to give me exact numbers, but is it half the size? Is it, you know?

Steve Sandherr:

What passed out of the House and what's contemplated in the Senate is probably about half of it.

Gene Marks:

Right. So it's about half the size. And the highway transportation bill, again, however that plays between the House and the Senate bills, these would not be able to be passed via reconciliation I'm assuming. In other words, it would need 60 votes in the Senate.

Steve Sandherr:

That's correct. And that's why this bipartisan infrastructure framework is getting a lot of attention because it's about 22 senators equally divided between Republicans and Democrats that are writing this framework or have written most of this framework. And I would point out that a lot of the folks in that group are not on the committees of jurisdiction that deal with these issues. So while they're committed to finding a bipartisan solution, they may not be as knowledgeable or have the depth of knowledge that their colleagues that serve on the committees that have jurisdiction. So as a consequence, we're concerned about things getting into this bill that really aren't related and shouldn't be included in an infrastructure legislation.

Gene Marks:

Yeah. That's been an ongoing conversation as to how do you define infrastructure? Steve, so what happened? Let's take a positive angle. Say the bipartisan infrastructure framework turns into a bill and does get passed. How does that affect your members and how quickly does it affect your members?

Steve Sandherr:

Yeah. Well, I hesitate to give you a firm answer on this because we haven't seen any legislative texts. But from what has been leaked to us and from what we read about, there are robust funding levels and that should help contractors to have the ability to plan a little bit farther into the future. If you take a look at what's occurring in the normal legislative process that I've already discussed, I mentioned there's a September 30th deadline. If you're a highway contractor, and here we are at the end of July right now, you're basically a little bit over 60 days from the highway program expiring. People get a little anxious when that occurs, and typically Congress is able to provide for short-term extensions while they pass the legislation.

Steve Sandherr:

But in the environment that we're in right now, the political environment we're in right now, I wouldn't want to have to bet on that happening. And then I'd say the other note of collection is, so let's assume the Senate puts this package together, and let's assume it gets 60 votes in the Senate, and then it's sent over to the House. Well, Speaker Pelosi has already said that the House won't take the bill up, unless and until the Senate passes the larger three and a half trillion dollar so-called "human infrastructure" bill under budget reconciliation. So she'll basically be holding the bipartisan solution hostage until the partisan spending bill comes back over from the Senate.

Gene Marks:

Let's keep going down the road of assuming that again, let's assume all good things happen and there is some form of infrastructure bill that is passed. The money itself goes through the states, I'm assuming, right? That's how it flows.

Steve Sandherr:

Well, for most of these programs, that's correct, but there's going to be a lot of grant programs, particularly on the transit side. There's state-revolving loan funds that paid for water and sewer infrastructure.

Gene Marks:

Now to do business with your state, wherever you are, you need to get certified by your state to do it, to become an official state contractor as it is. And I guess the question I have for you is are you telling your members, if they're in this industry, should they be going the way of getting registered, certified with their state, making sure that they can get in line to do bidding, or does it make more sense for their members to really go to partner up and to go after companies that already are certified with the state and then your members would provide their subcontracted services?

Steve Sandherr:

Are you referring to state licensing requirements?

Gene Marks:

Not necessarily licensing, but you know, you have to be an approved state vendor, I'm assuming, if you're going to bid on state projects, correct?

Steve Sandherr:

Well, I mean the highway projects, highway and bridge projects, that are funded by the federal government, it's basically federal assistance to the states, and the states have a match of generally 20% to match the federal funds, and the states administer the program. I'm not aware of state requirements for contractors to adhere to, other than do they meet the bonding requirements, do they submit a responsible bid, et cetera, et cetera.

Gene Marks:

Let me rephrase the question then. If I'm a smaller contractor and I'm in Oregon or Washington state or Illinois, what do you propose that I do to go after this money?

Steve Sandherr:

Well, first of all, if you are a small emerging contractor, you might want to look and see whether you're eligible for disadvantaged business. Disadvantage is a minority contractor, women-owned contractor in some places, service-disabled veteran, categories like that, that make you attractive as a subcontractor to general contractors who have goals to meet under those requirements. And to the extent that you get that designation and market yourself as meeting the criteria, that provides you with a additional opportunity to pursue work.

Gene Marks:

Fair enough. All right, let's pivot a little bit to talk about something that's also near and dear to my heart, and that's the PRO Act. PRO Act passed the House a couple of months ago, and before we get into the description of what the PRO Act does, let me first ask you, Steve, is it your understanding that provisions of the PRO Act are included in this infrastructure bill?

Steve Sandherr:

There is an attempt to include them into the "human infrastructure" bill under budget reconciliation, because that will only require 50 Democratic votes. So to my knowledge right now, there will be no PRO Act language in the bipartisan infrastructure package. Now, having said that, even if there are attempts to add the PRO Act or provisions that are contemplated in the PRO Act in budget reconciliation, under the existing rules they would have to be narrowly drafted to meet the requirement under the so-called "Byrd Rule" that it's not a policy change, but it is a revenue issue that positively or negatively impacts the federal budget. So I'll give you an example of something that might be able to be included in the Infrastructure Bill, that's going to be considered on a budget reconciliation.

Steve Sandherr:

The PRO Act has increased penalties for employers that commit unfair labor practices. And it would go as far as to make officers and directors of a company personally liable for unfair labor practices that are committed by an employee. So that may be one aspect of the program where, because those penalties are financial penalties, it has an impact on the federal budget because the kind of [inaudible 00:16:52] will be collected by the National Labor Relations Board and sent to the U.S. Treasury. So that is something that has the potential to fall within the so-called "Byrd Rule" and could be included in budget loans. But the 35 other bad things in the PRO Act likely wouldn't be able to, because they're really policy changes without any ramifications towards the federal budget.

Gene Marks:

Let's talk about that. So for our viewers and for our listeners, guys, the PRO Act is really, to me, there's really two big parts of it. And then Steve, I'm going to let you pick up the ball from here. But the two parts really are changes in the ability of workers to form unions, and the second part is classifying workers as employees versus subcontractors, 1099 contractors. So the PRO Act addresses both of those things. So having said that, Steve, tell us what your understanding of the PRO Act is.

Steve Sandherr:

Okay, well, I would go a little bit broader than you, Gene, but you're a CPA, so you're taking a look at that independent contractor industry.

Gene Marks:

I am.

Steve Sandherr:

And you can predict the challenges that would happen there. The PRO Act, let's first talk about what it is. Protect the Right to Organize. So it's an innocuous title. And I think everyone in the business community should acknowledge and stipulate that under federal law, employees have a statutory right to be able to choose a union and have that union be their exclusive bargaining representative. But at the same time, they also have the right to choose not to belong to them and not to have a union. [inaudible 00:18:51]

Steve Sandherr:

And I think that's one of the challenges that you've highlighted here because the PRO Act would essentially take away employer's ability to communicate with employees about whether or not having a union at the workplace is a good idea for them. And secondly, it undermines employee free choice by undermining the secret ballot election. And I could go into the detail there, but for interest of time, if you want to ask a follow-up question, I'd be happy to respond to it, but let's leave it at that unless you want the detail.

Steve Sandherr:

And then the second part of it is it gives unions unprecedented economic weapons to use against the employers. And that would include the right to strike at any time and for any reason, and under current federal law, generally, a union can only go on strike in two instances.

Steve Sandherr:

The first is where the employer has committed an unfair labor practice. The second is where the parties have bargained to impasse and they can't reach an agreement, the union goes on strike to put economic pressure on the employer to acquiesce to the union's demands. Under the PRO Act though, if unions want to decide prior to bargaining that, "We're going to go on strike because we don't like your negotiator, and we want you to replace your negotiator, and we're going to go on strike until you get ready to negotiate it," they would have the ability to do it. If they want to put a lot of economic pressure on the employer, maybe they're opening a new store or something, and they go on strike on the day that that store is to open, just to put pressure on the employer. So they would have all these tools.

Steve Sandherr:

And the second issue with this newfound power is the removal of what's known as "secondary boycotts." And under current federal labor law, a union can use the economic weapons at their disposal only to put pressure on the primary employer, the employer that they have [inaudible 00:21:24]. And in the construction industry, I can illustrate this through an example. So let's assume you have a hospital and that hospital wants to build a new ward. And they contract with an open shop contractor who doesn't have union agreements. And the union finds out about that, and that disturbs them, they go to the hospital administrator, saying, "We think you've made a mistake. You really should fire the new general contractor." All right? So the hospital then says, "Well, this firm's done work for us before, they gave us the price. We like their work. We're gonna stay."

Steve Sandherr:

Well, under current law, the only thing union could do would be to put what's known as an "informational picket" out in front of the project that says that the contractor is unfair to workers because they don't utilize union wages and [inaudible 00:22:22]. That's the only thing they can do. They can't coerce anybody from showing up at the job site. They can't coerce anybody that works for the hospital to not go to work because of the choice of this contract.

Steve Sandherr:

Under the PRO Act, what they could do would be once they find out that the hospital—once they continue to use the non-union contractor, they can set a picket line up in front of the hospital. And they can contact the nurses' union, and say to the nurses' union, "They've hired a non-union contractor, we're protesting this. We want you to join our protest." Which means they're coercing the nurses' union employees not to go.

Steve Sandherr:

So then the hospital administrator basically has three choices. One, do they try to work through this strike where the nurses aren't showing up for work and compromise the care of their patients? Not likely to happen. Two, do they go to the open shop contractor and say, "Hey, I need you to sign a union agreement in order to get the unions to drop this picket line so my nurses will come back to work two?" Or three, do they fire the open shop contractor, hire a union contractor, and pay whatever damages for breach of contract that would be owed to that contractor because they were dismissed from the job?

Steve Sandherr:

So options two and three, aren't really all that great for the hospital administrator either. So basically the likelihood is that option two, putting a lot of pressure on the non-union company to sign the union labor agreement in order to continue to do the work. And that's what's known as "top down organizing," which is the best way that a union can get non-union employees in the construction industry to become union employees.

Gene Marks:

So I think it's safe to say that you're not a fan of the PRO Act as it pertains to your industry, which I think I understand. You know what the one thing, Steve, that you've mentioned very briefly and pushed it off a little bit about the whole worker classification thing, but the only reason why, and I realized the concerns from the union side, but you're the Association of General Contractors. So you've got a lot of members that are contracted out to do jobs.

Gene Marks:

And my understanding of the PRO Act, in addition to all the union issues that you talked about, is that the contractors themselves that are used by a company and are generating revenue for that company, like you're billing out a—you bring in a plumber to do the job, and he's a 1099, you pay him out whatever. You would potentially have to classify that person as an employee, which means that you would have employee-employer taxes, benefits. And not only is that a cost to the employer, but also a lot of these independent contractors, like a plumber, doesn't want to be an employee. Am I stating that right, and is that an issue for your organization?

Steve Sandherr:

Yeah, and I'll give you another example of where this pinches in a second, but first I want to, if I could, I'd like to just go back a second and address what you said about, it's pretty apparent I don't like the PRO Act.

Gene Marks:

And I'm just kidding around, I just realize that this is [inaudible 00:25:43].

Steve Sandherr:

Well, anybody in the business community, ought to wake up to the threat that what's in the PRO Act. And I think, unfortunately, there are a lot of people out there that think, "Well, you need 60 votes in the Senate to pass anything, and so this isn't going anywhere, even though it passed the House." Look, no one should be complacent about relying on 60 votes. We are like one or two votes away from losing the filibuster. And so anybody out there who is in business needs to contact the assemblies and let them know that they feel threatened by the PRO act. Now, to your question, in the construction industry, on many projects, general contractors will hire independent owner-operators of trucks. They deliver material, they hold waste, they bring supplies, et cetera, et cetera. Well, let's think about the independent owner operator of a truck.

Steve Sandherr:

That's somebody who saved up money. They've purchased the truck. They want to be in business for themselves, and the contractor pays them a set rate for their service. And it's the desire of that independent operator of the truck, likely, to save up enough money to buy another truck and hire an employee and grow their business. That's the way our system has worked for generations. And equally troubling about this, and to your point, under the independent contractor rules in the PRO Act, in most instances, that general contractor would have to have that independent owner-operator classified as an employee, which is not what the independent owner-operator wants.

Steve Sandherr:

And then further complicate things, a lot of these independent owner-operators are minority and women-owned businesses. And one of the reasons that the contractor is hiring them is to help meet their goals for minority and female participation in public works projects. So you basically have a broader negative impact here. You're undermining the ability of the owner-operator of the truck to remain a solo practitioner with the hope of growing their business, and you're also eliminating the ability of small minority and women-owned companies to be able to fully participate in the public works marketplace.

Gene Marks:

Steve Sandherr is the CEO of the Associated General Contractors of America. Steve, we didn't talk about safety and OSHA, we didn't talk about inflation, we didn't talk about labor disruption, and I wanted to get your thoughts on immigration, but we did talk about the Infrastructure Bill and the PRO Act, and those are two critical things facing the industry. So you'll be back. I do want to go over some of these issues again, because I think they're really important, but I want to thank you very much for joining us. Thank you.

Steve Sandherr:

Okay, thank you.

Gene Marks:

Everybody, if you want some more advice, tips, help in running your business, please visit us at paychex.com/worx. That's W-O-R-X. My name is Gene Marks. Thank you so much for joining us today, and we look forward to seeing you on a future episode. Take care.

Speaker 3:

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