2018 P3 HIGHER EDUCATION SUMMIT

P3 Sports and Multi-Purpose Venues on Campuses

More than 800 chief financial officers, business officers, senior administrators, chancellors, presidents, C-level executives, general counsels and other higher education officials attended the 2018 P3 Higher Education Summit in San Diego, Sept. 12. The conference provided forums, speakers and panels examining higher education infrastructure challenges faced nationwide—innovations in project delivery, procurement, asset management and technology—for the delivery of successful P3 initiatives.

Left to Right: Denis Braham, Dona Cornell, David Staas, Dan Shell

Panelists for the program "P3 Sports and Multi-Purpose Venues on Campuses," examined the opportunities for the development, financing and operation of Sports and Multi-Purpose Venues through public-private partnerships on University and College Campuses. The panel examined how P3 projects originate; the process from the Universities' perspective; challenges and risks; as well as what protections Universities look for from the private side. Panelists also discussed opportunities that the private sector brings to these facilities and legal challenges in balancing interests in P3 projects of this type.

Denis Braham, Co-Chair for the University Industry Group and Sports Business & Public Venues Industry Group at Winstead PC, moderated the exchange among the industry experts:
Dona Cornell, Vice Chancellor, VP for Legal Affairs and General Counsel, University of Houston
Dan Shell,President, Oak View Group/OVG Collegiate
David Staas, Shareholder, Sports Business & Public Venues Industry Group and University Industry Group, Winstead PC

SETTING THE STAGE

Privatization or the semi-privatization of multi-use public facilities is not a new topic. Beginning in the late seventies, the process migrated in the late eighties and nineties to the professional sports realm, operating as team-controlled, privatized facilities maximizing and monetizing revenue streams. Fast forward to this decade and it has moved into the collegiate arena. P3 has a broad definition depending what a school is looking for and what opportunities are available.

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THE UNIVERSITY PERSPECTIVE: THE DEVIL IS IN THE DETAILS.

BRAHAM: What matters, from an institution's perspective, when opportunities for P3 projects arise?

CORNELL: "The devil's in the details," that's the beginning and that's the end of my statement because really it is always about the details. At U of H we are about to reopen a newly renovated basketball arena. We are looking at different ways to figure out which private entities can help us manage it both from a facility standpoint as well as from a booking standpoint. What we look at from a University perspective, is how are we going to keep students in school? You always go back to the business purpose you must fulfill. In our case it's keeping students engaged and in school. Many will agree that successful athletics facilities help keep your students engaged. They're going to persevere, they're going to graduate, they're going to get jobs and integrating athletics with that has proven to be very successful for our students. And so, every time we look at these projects it's always back on student success and that's how I would sell it in every situation.

BRAHAM: Who are the stakeholders Universities are most concerned about? Are the P3 arena or stadium projects coming from the outside or germinated inside? What stakeholders do you have to make sure are comfortable?

CORNELL: Typically it starts inside looking at different models to finance the large capital projects. The stakeholders are students, faculty, staff, donors, and the community. The local political environment is also important. When you're a public entity, everybody is your constituent, as significant public dollars that go into funding public education. These stakeholders watch how you spend the money, and so I would say that your constituency is all of the above.

THE PRIVATE PERSPECTIVE: THE DEVIL IS STILL IN THE DETAILS.

BRAHAM: How can you find balance between the for-profit model of a private partner and an educational institution that may have a mission or priority other than financial gain?

SHELL: One reason P3 partnerships make sense is quite simple—specialization of craft. Taking advantage of each partner's strength helps avoid costly mistakes related to inexperience in a particular area. Then, it really gets down to what a University wants out of a potential partnership. Sometimes that is a financially driven goal, but often for a University it's not. It may be the desire to create a great building or venue for better student experience, and that's okay. Colleges may have different objectives. As a for-profit company our goal is to make sure the levels of income, such as from naming rights, founding partnerships, premium seats for athletic and non-athletic events, are there to make project financing viable. Private partners want to ensure those revenue opportunities are explored and harnessed. "The devil's in the details." What is important to the University? Can they look at a project and evaluate the positives and negatives of having a hundred nights of programming that are not University programming in this building? If they believe those positives outweigh the potential negatives, the economics and the deal structure starts to look a lot different. Priorities might be different from University to University, and the options for income streams are going to look different as well. It's important to ask the right questions on the front end and make sure you're interests are aligned.

THE LEGAL PERSPECTIVE

BRAHAM: What key concerns should counsel address when representing a University in such a project?

STAAS: The University is entering into a long-term relationship with a business partner, and establishing a legal framework that's going to last potentially for decades. So, it is imperative to build into that, a solid framework for the rights and responsibilities of the parties which will be important down the road. Who's putting equity in the deal? Is there equity? It there tax-exempt financing? How are you structuring the deal? Is it a ground lease to them? Do you involve a condominium structure? Who's responsible for construction or operating cost overruns? Who's going to bear those risks and, what happens if you have operating losses and that entity declares bankruptcy? Is someone else on the hook? Who ultimately has control? Is it the University? Are they approving key personnel of the manager? Do they have approval rights over annual budgets? Are there other approvals that the University wishes to retain? It is worth

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investing time at the outset to make sure that you put proper thought in place about how these roles and rights and responsibilities are allocated. This establishes a viable structure which will endure the test of time. Or, if it doesn't stand that test, provides exit ramps so that the parties can escape if/when that process ends.

FRONT-LOADED THINKING FOR LONG TERM SUCCESS

BRAHAM: The University's Athletic Director says, "There's an arms race going on in the conference. We need a brand new state-of-the-art facility to attract the student athletes we need. We want to issue an RFP and start building a new, world-class facility." What now?

CORNELL: Everybody is looking at different ways to create these kinds of entities that really do define a successful program. You absolutely have to pay attention to the details upfront; not after you've already issued an RFP. It's necessary to think about how long the relationship is going to last and how an exit will be negotiated. The individuals involved 15 years from now will not be the same, so your structure has to withstand the test of time. Will you be able to continue to operate those athletic facilities? Are you going maintain some control? The board, donors, students, faculty and staff and most importantly your president or chancellor are going to be asking – "If necessary, how are we going to get out of it?"

BRAHAM: Who should be involved in those first conversations, when evaluating a potential P3?

CORNELL: It is important to involve strong people on the finance side, both in-house and external counselors, be it legal, accounting, or independent consultants who can deliver sage advice about whether a deal makes sense. Even with the best intentions on both sides, everyone may not understand the totality of what they're agreeing to.

PRIVATE COMPANY INFORMATION AND PUBLIC TRANSPARENCY

BRAHAM: What challenges do Universities face regarding issues of confidentiality, as public entities, when engaging in an RFP process or soliciting proposals?

STAAS: It's important that all sides understand the environment, particularly with athletic facilities. In high visibility projects and when a public institution is involved, you can be sure someone is going to file a public information request. Does the private side understand that information they provide may be subject to disclosure? What steps have they taken to appropriately protect confidentiality? Having some degree of sophistication on both sides about the importance of transparency with public institutions (or even private institutions) can prevent potentially catastrophic missteps. On the University's side, there may be information they don't want possession of during negotiations. For protection they may say "At this stage, thank you very much, we're happy to have conversations about this but we don't want a pro forma from you right now." I think it is good that there is an expectation of transparency from Universities today. But how do you build a transparent process while appropriately protecting the need to engage in candid discussions to negotiate a transaction? Working through this process in a manner that balances the need for transparency, with the need to appropriately protect confidential materials, is important.

HARNESSING AND MAXIMIZING REVENUE STREAMS

BRAHAM: What role does branding play relating to the monetization of these facilities and how does that process differ from the private to the public side?

SHELL: Universities are all different, but they must have an understanding of the value of these facilities and how to capture that value in the form of income streams. Successful projects maximize the value by involving multiple divisions or segments - athletic department, campus, student life, procurement office, etc. Naming rights can serve as the high profile asset of a partnership but including and working with different campus stakeholders can create value for the brand, generating real dollars to flow into revenue streams to pay for the facility. Brands are asking for different things and campuses are going to start to look at this differently. For example, a University could increase value for a banking sponsor by including more than their name on a building. Adding benefits such as a recruiting program, or work program for students; a financial literacy program for students and alumni, ATMs on campus, etc. can foster a "customers-for-life"

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process as students and young alumni keep this bank top of mind. Marrying athletic assets to campus assets drives value, and it can diffuse the perception of being too corporate.

BRAHAM: In terms of the University brand, what concerns are there with monetizing revenue streams in a privately financed facility?

CORNELL: In this day and age everybody has seen brands take a dive in really short order based on the behavior of certain individuals. Just like we put morality clauses in coaches contracts, we put these good behavior, good citizen type clauses in endowment or naming agreements.

Consideration of the time frame of agreements is important as well. Look back at those 40 and 50 year-old agreements and see what they say. A cautionary example is an agreement written for a stadium 30 years ago, naming the field and the air above it. When renaming the newly constructed stadium, fulfilling the contractual agreement to name the "air" made the process difficult. Universities have to anticipate how the real world may change 40 years from now and plan for a strategic exit.

SHELL: Don't mortgage the future for immediate needs. Balancing the short-term needs and pressures of an athletic program with sound, sustainable financing for long-term success is a critical element for public entities. The urgency of need for a new facility can give way to poor decisions on monetization options.

STAAS: Anticipate change. Then build those factors into your agreements. Anticipating factors such as capital reserves for facility maintenance, changes in technology, relevance of venues and building standards, can help ensure a better position down the road. The industry technologies and standards of today may not even exist in 40 years.

SATISFYING THE STAKEHOLDERS

BRAHAM: Are there concerns about the operational controls you see from the University perspective?

STAAS: One important question to address with these minimum operating standards is this—If you're going to have an operator, how do you plan on holding them to the agreement. Part of it too depends upon the way that your agreement is structured. Is this just an operating agreement that's a shorter term agreement where you're bringing in an operator? Is this a ground lease agreement where they're doing their own thing? What is the nature of your agreement and how do you make sure that you include in your agreement performance measures that are going to provide the operation of the venue in the way that the University wants? And what one University may want may not be the same thing as a different University may want in terms of the expectations of the board of regents, the alumni and the athletic department. What's the horizon and what's the perspective of the athletic director, the donors? What are they looking for in the facility? And, if their name is on that facility what's their expectation for what it's going to be like?

BRAHAM: Where donors are concerned there are three dynamics we're seeing at work right now from a global economic perspective and a federal perspective. Current costs of construction are rising from tariff wars, and construction costs will likely continue to increase, putting a strain on the University system, especially if that system is financing the project. The risk of actual costs of the project increasing, in addition to the potential for cost overruns for unforeseen or unmanageable costs, is real. A 20 percent rise in steel cost, could toss a construction budget out the window. Escalating insurance rates are increasing pressure to cap financing costs in order to know where your risks are. Federal tax law is changing. The days where bona fide boosters of Universities, could step up and get a tax benefit from investing or buying suites or premium seats are numbered. It is all being reexamined within the context of these privatized public facilities. These things add some challenges, and at least for the short-term, create some urgency for those schools trying to get their projects done.

BRAHAM: Do you have a comment on that?

SHELL: The "arms race" among Universities for the biggest and best facilities has raised the overall bar. Looking at it from a financial standpoint, some collegiate projects are often better than many professional facilities. Some may sit empty for as much as 90 percent of the time—that is a large amount of revenue NOT funneling to the project. Financials are more and more important and schools are

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going to have to look at monetization of the facilities outside of their primary tenant which is their own team or their own events.

BRAHAM: Who are the critical stakeholders that should be involved when evaluating a project?

CORNELL: Complex transactions such as these are typically evaluated by the board of regents, but the CFO and certainly the president or chancellor will provide critical input. Some donors may get involved but not at a board or voting level. Ultimately it is the board that will make the final call, which they are not likely to do without the support of the CFO and the president or chancellor.

BRAHAM: What is the outlook for P3s in the University setting?

SHELL: There are going to be more P3 projects, but the RFP process is pivotal. “The devil is in the details,” so much on these deals that Universities should work to make RFPs less constraining, to allow some of those critical details to come out on the front end. Some Universities have harmed themselves with a less-than-nimble RFP process. These agreements can’t be put together with inflexible processes. Both parties need to get in a room and talk about the details, and if your process doesn’t allow that, it’s not going to end well. There are just too many elements to cover that can drastically affect the project’s viability.

CORNELL: Getting too prescriptive with an RFP can result in ending up with one bidder. From a University’s perspective, one bidder is a bad deal for any P3 project. More bidders mean people or entities willing to step forward and that competitive element keeps them honest.

QUESTIONS FROM THE AUDIENCE

QUESTION: Everyone speaks about the RFP, RFQ. Is there any benefit in just getting people in a room to talk about an idea that a University has to see what the reaction from the development community is before you start drafting RFQs?

BRAHAM: Yes. I’ll give you one from experience. This particular University, before the RFQ was issued, spent a year and a half working with an experienced consultant familiar with the space. They were able to analyze what they had versus what they wanted, then discuss the realities of what was out there and if it would work. They were able to then provide solid analysis to the president/chancellor before issuance of an RFP or an RFQ. So before the procurement folks were tasked to do their job, there were hundreds upon hundreds of hours of meetings to determine if this was really going to be feasible. So, I would say you’re exactly right, that it’s not just hey, we have an idea, let’s issue an RFP.

STAAS: It is also important to make sure that by the time you get to an RFP or RFQ, that you include commercially reasonable or viable standards so that you actually get bidders. Having these extended, advance conversations before it hits the street will help solicit the right people to participate.

BRAHAM: Also, you want qualified bidders proposing. The problem comes when you have unqualified bidders proposing and someone’s unhappy because they weren’t picked. The reason they weren’t picked is because they weren’t’ qualified to begin with which potentially leads to litigation, open debate in the media about that project and then the project is bogged down, costing time, money and potential community support. So the due diligence performed prior to issuing the RFP/RFQ is critical. But equally as important is the due diligence performed, once the proposals are received, as to whether a bid and bidder is realistic.