Sticking to the Fundamentals: Negotiating Revenue Generating Partnerships

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In Fall of 2019, the University of Texas at Austin broke ground on the Moody Center, a landmark first-class basketball arena and entertainment venue. Located in the "live music capital of the world," the project was an ideal opportunity for a P3 with the entertainment industry. The $338m project was the culmination of an 18-month negotiation with the Oak View Group, the California-based sports venue operating and management group.

Oak View Group agreed to finance, construct and operate the arena in exchange for the right to hold events at the venue when not in use by the university. In addition to getting a new basketball arena, the university will receive a healthy share of the project's revenues.

The Moody Center project is a tremendous success story that shows the potential for revenue-generating P3s in the higher education industry. At a time when public scrutiny of higher education spending is at an all-time high, colleges and universities across North America are increasingly looking for ways to fund projects and leverage campus assets to generate revenues. Whether it be a multi-purpose arena, a hotel and conference center, or a mixed-use campus edge project, these transactions have proven to be feasible; but they are not for the faint of heart.

And as is the case with college hoops, a university will have the greatest chance of success by sticking to the fundamentals.

> "Private returns should take into account the value created by the university"

Rely on your own advisors early and often

More often than not, a conversation about a revenue project concept will be initiated by a potential private sector development partner. These initial conversations can be valuable to universities as a way of exposing them to new possibilities. But ultimately, the university will need to come to its own

Rendering provided courtesy of The University of Texas at Austin and Gensler

independent determination regarding, not only the economic feasibility of a project, but the overall value proposition.

This can be achieved by retaining consultants and advisors with specialized knowledge of the industry (whether it be in hospitality, sports and entertainment venues, or another asset class) who have the university's interests solely in mind. Private partners are entitled to a fair return on their investment and risk, but private returns should also take into account the value created by the university, even in cases where the university is not necessarily cash up-front.

Reputation, brand recognition, promotional activities, exclusivity and possible tax savings, are just a few examples of valuable consideration for which the university should be fairly compensated.

Renegotiating the economic terms of the project can be painful for all involved, and can lead to the deterioration of the partnership. As an advisor to colleges and universities, we often enter a transaction after a private partner has already been selected, only to find that the underlying assumptions were wrong, and the revenue generating possibilities of the project were overstated or understated.

By engaging advisors and consultants early, a university is more likely to enter the transaction with the confidence that comes with knowing the strength of its bargaining position relative to its counterpart.

Set clear expectations and encourage competition

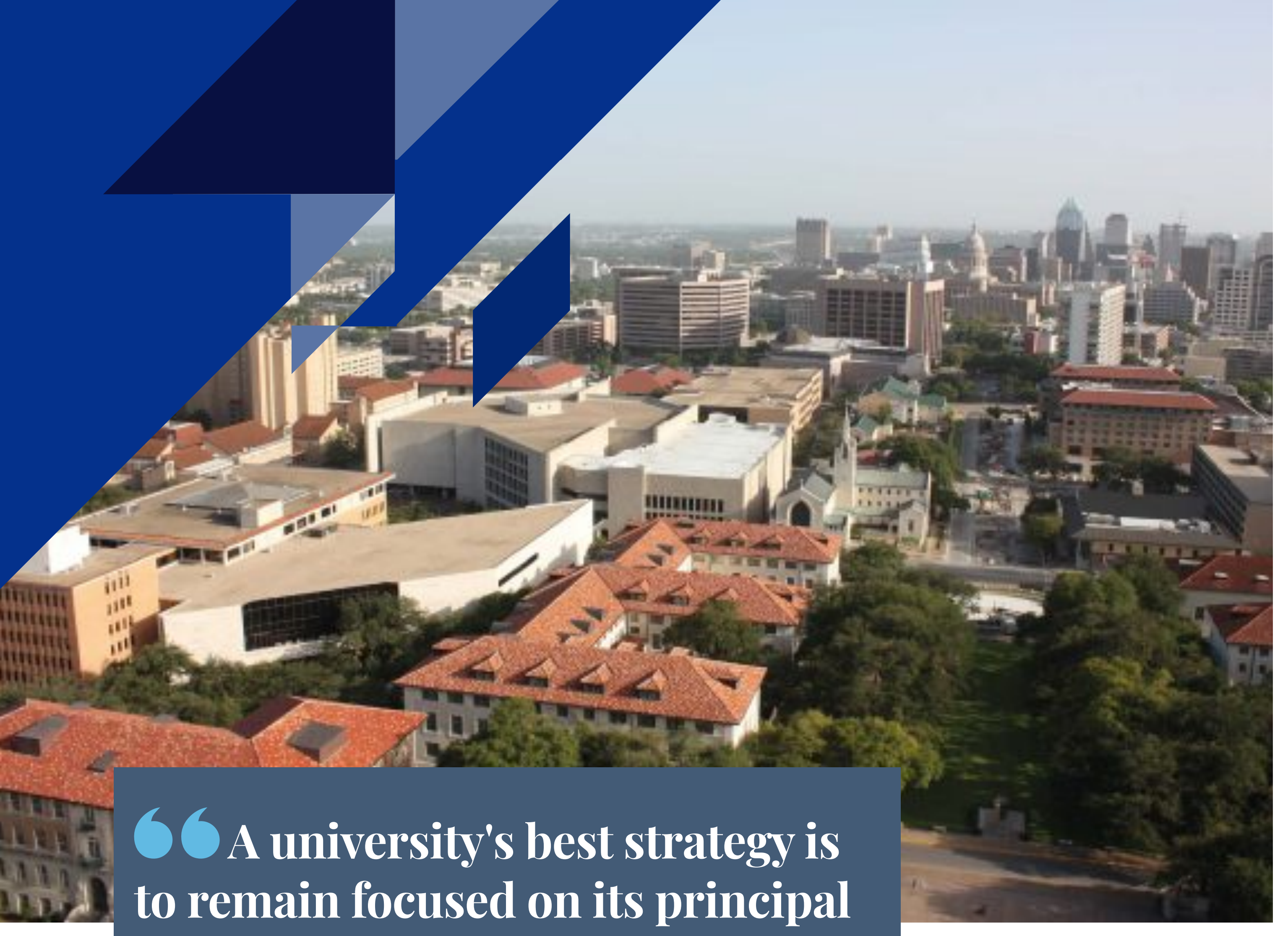
Universities will often have greater legal and institutional discretion when it comes to soliciting revenue-generating P3s because they are often formalized as real estate transactions. Universities often tend to use this freedom as an opportunity to accelerate delivery of the project. But while a traditional procurement process may not be required, taking the time to undergo a thoughtful and competitive solicitation process will pay tremendous dividends at the negotiating table.

> “A thorough solicitation sends an encouraging signal to potential bidders”

If a university has performed its own independent due diligence regarding the feasibility, cost, and revenue generating capabilities of a project, this work product can be utilized to produce a polished solicitation with solid assumptions and objective evaluation criteria.

A thorough solicitation sends an encouraging signal to potential bidders because it demonstrates the university's commitment to the project.

The solicitation process is also the university's best opportunity to set clear expectations regarding the scope of work, quality of design and construction, financing and revenue participation, and risk allocation. A good solicitation will also leave sufficient discretion for respondents to be creative, propose alternatives, and set themselves apart.



> A university's best strategy is to remain focused on its principal objectives

One variable that typically should not be left to the private sector is the general legal and contractual structure. Universities often tend to ask respondents to be creative in proposing a mutually beneficial contractual structure, whether it be a concession model, lease model, condominium regime, or something else. However, in the case of public institutions, the university has the best knowledge of its own legal constraints, and is therefore the best party to decide on an appropriate legal framework for respondents to consider.

Be Prepared for Compromise

Even when a university has taken every precaution to ensure a fair and successful negotiation, unforeseen circumstances will arise. Changes in the financial markets and unknown site conditions are the most common offenders. Whatever the new variables may be, it is likely that the parties will find themselves needing to renegotiate key terms.

There are a number of things a university can do to prepare for these unexpected challenges. First, if a university has performed its own thorough financial due diligence with the aid of knowledgeable advisors, the university is less likely to be taken advantage of by being asked to make concessions where the risk can and should be borne by the respondent.

Second, having a bench of other qualifying candidates available to step in when negotiations break down can be an incredible leverage point for a university.

Finally and perhaps most importantly, when circumstances change, a university's best strategy is to remain focused on its principal objectives for the project. If the university has been clear about these objectives from the beginning, they will serve as guideposts for the parties, making it easier to reach a fair compromise. In many cases, these renegotiations can lead to an enhancement of the university's positions relating to their objectives.

P3 has proven itself to be a viable model for delivering projects that would not otherwise be possible for university campuses. These projects can transform campuses and become a source of revenue. While at times these projects can be intimidating, universities have consistently shown the sophistication and commitment to meet the challenge of negotiating these complex transactions.

Your P3 Legal Advisors Are Here To Help.

With a long history of representing higher education clients, we understand your unique needs, especially when it comes to campus planning and development.

Winstead represents major colleges and universities with the planning, financing and structuring of a wide variety of P3 projects including:

- educational, medical and research facilities
- on-campus hotels and alumni centers
- arenas, stadiums and sports facilities
- utilities and infrastructure
- data centers
- private mixed-use developments

Whether you're focused on expanding your campus edge or replacing aging infrastructure, Winstead's sophisticated attorneys can assist with the unique challenges that arise in P3 transactions.

Our multi-disciplinary practice group works together to help our clients with all aspects of the P3 delivery process, including procurement, project finance, construction, real estate, operations, and intellectual property matters.

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