

Memorandum

To: JEE
From: DKI
Date: September 23, 2016
Re: Oppenheim Architecture Proposal

I have reviewed the Oppenheim Architecture proposal and based on the document alone, without knowing anything about the firm, would not proceed on the terms proposed.

Generally, Oppenheim Architecture is proposing that you pay \$100,000 in advance for an "initial concept design" of GSJ that is to be developed over a six week period. The program information appears to be somewhat detailed, but there is no statement as to total projected program area, structure sizes, etc. As discussed below, there should also be greater specificity in the deliverables so that you can ensure that you are receiving value for your design money. Payment ought to be tied to stages and your satisfaction with specific deliverables within each stage of the Initial Concept Design phase. For what it is worth, this seems like a substantial amount of money for a concept design, and because of the lack of specificity and the requirement of full payment of the design fee in advance, you will not be able to ensure that the fees will be limited to the initial \$100,000, especially in light of the usual give and take and multiple revisions ordinarily required during the course of design development.

Rough notes of my specific concerns with the proposal as written are set forth below:

1. Section 1.1 Commencement:

- Oppenheim is requiring you to provide them with a 3D topographical survey of the Island in CAD format. Do you have such a survey available? If not, are you going to have to commission one in order for Oppenheim to start the work?
- Oppenheim also requires a survey with existing buildings. Same question.
- Oppenheim requires you to provide engineering studies, but does not specify what engineering studies it requires. Again, what particular engineering studies will you need to provide, how much will it cost? Why is that not specified in this proposal? And why is that not something that Oppenheim should do if it is a necessary part of the initial concept design?
- Note that you will also have to provide location of the dirt trails and any aerial photographs you have. If Oppenheim is preparing the design, why doesn't the firm come out to the Island and use a drone and take whatever photographs it needs. This should be Oppenheim's responsibility since Oppenheim wants to use it for its design work.

- Oppenheim requires you to provide existing studies previously commissioned. Others' work should not influence Oppenheim's work. Nor should Oppenheim be relying on anyone else's work in producing its own. Oppenheim should do an independent job particularly when it is charging \$100,000 for the work.
- **Probably most important, Oppenheim is holding you responsible for providing "all local code, zoning and environmental related criteria."** Oppenheim also provides that Oppenheim is not responsible for any inaccuracy of information provided by you. Oppenheim is the professional Architecture firm; you are not. Oppenheim should be able to research local requirements and provide a design that conforms to those requirements. Oppenheim is not simply being asked to provide pretty pictures for \$100,000.
- In fact, as discussed below, Oppenheim's proposal requires that the pretty pictures of the Initial Concept Design – i.e., "professional renderings" must be commissioned from a third party at an estimated cost of \$4,000 each, payable in advance.

2. Section 1.2 "Design Process, Meetings and Approval":

The title of this Section of the proposal is a bit misleading as there is no discussion of either meetings with you or the approval process. The design process is discussed in general ways and even the deliverables, though more concrete, are still too vague to enable anyone to understand fully all of the documents you will have a right to expect from Oppenheim in competing the Initial Concept Design. Specific concerns are as follows:

- There is no reference to any site visits to the Island. Assuming that Oppenheim made an initial site visit, is that sufficient? Shouldn't Oppenheim spend some time there after beginning the conceptualization in order to refine it?
- There is no reference to specific meetings with you. There is a mention of a final presentation to you which will be assembled during weeks 5 and 6 after the design has been finalized. Should there not be a few meetings with you to present initial items so you have an opportunity to comment and refine the presented items and so that Oppenheim better understands your vision and program? How else will you or Oppenheim be able to gain any sense if you are both on the same page?
- What is stated is that in weeks 1-4 Oppenheim will develop the designs that comply with Client wishes and other special local zoning, conditions/considerations." Without site visits, meetings as discussed above, how does this occur?
- There is no specific mention of particular designers or the level of experience of the team that will be assigned to your project (i.e., principal of the firm, Senior Project Manager Project Manager/Team leader, Senior designer,

designer, etc.). Nor is there any mention of how many people will be assigned to your project? With multiple deliverables, the fewer people assigned to the project, the more likely completion of the project will take longer than 6 weeks. And if so, then it will cost more than the initial \$100,000 to complete the Initial Concept Design.

- Does Oppenheim have specific personnel with Caribbean or tropical locale experience? Did you seek Oppenheim out because of the work of a particular designer? If so, the proposal should specify that those people will be primarily responsible for completion of the design work and deliverables.
- There is a statement in this section that the initial program “will be used as a general guide with the understanding that **it may change slightly** during the process of this exercise.” Is Oppenheim suggesting that it has the right to change the initial program or is it merely acknowledging that you may change the program? What does slightly mean? Given that there is a provision in Section 1.4 of the proposal that “if program areas and complexity increases significantly, fees will be adjusted accordingly”, vague concepts such as “slight” changes and “significant” increase create room for Oppenheim to demand further fees before you get what you want. This is especially true because, as indicated below, the full Initial Concept Design fee is payable in advance before Oppenheim even commences work. If Oppenheim claims that your program changes are more than slight or significantly increase the program area or complexity, Oppenheim can simply not complete the work until you pay Oppenheim more money.

3. Section 1.3 Deliverables. The deliverables list in Section 1.3 provides some level of detail of what Oppenheim is required to deliver to you, but is still too vague for there to be a meeting of the minds on precisely what you are going to get and whether if you ask for more than you are given by Oppenheim, Oppenheim will seek to charge you more:

- “Overall Site Plan for the Island depicting general location of new program and structures” – Size, scale, level of detail, what about existing structures in relation to new structures? Changes and Revisions if Oppenheim does not get it right? Oppenheim provides that the Site plan will take into consideration things like sightlines/views, wind currents, natural light, privacy and accessibility. What about heat, water spray and exposure to corrosive elements for equipment, other natural conditions.
- “Diagrammatic floor plans, sections and elevations for new structures” – What level of detail? Scale? A minimum of how many of each per structure? Specific studies for specific structures? What about separate rooms within the structure? What about changes/revisions if Oppenheim doesn’t get it right? Shouldn’t similar considerations of sightlines/views, wind currents, natural light, etc., be taken into account for these deliverables as they are for the site plan. I keep thinking back to the door clearance heights at Zorro not having taken into consideration dust blow, for example.
- “Program Area calculations – Specifically what calculations?”

- “Inspirational images” - ?
- “Professional Renderings [by third party]” – why a third party? If Oppenheim can’t do renderings, why is it charging so much? You are being asked to pay \$4,000 per rendering, payable to Oppenheim in advance, for third party renderings. Nuts.
- Shouldn’t there be a 3D site plan including topographical features?
- What about a 3D model of the Island? So you can better visualize?

4. Section 1.4 Compensation

- \$100,000 seems high for what Oppenheim is providing and the reservations it makes for additional time beyond 6 weeks and significant increases in program area and complexity. It seems high in light of Oppenheim’s charging you for third party renderings costing \$4,000 each, where Oppenheim makes no mention of site visits or meetings, where there is a lack of specificity of deliverables, and no mention of revisions or changes to deliverables, and where there is no specificity of the number and skill level or experience of the designers to be used for the project.
- There is a provision in Section 1.4 that you will have to pay \$25,000 per week for any additional design services beyond the 6 week period outlined in the proposal. This language is very unclear. It is also crazy. What if it takes more than 6 weeks to complete the Initial Concept Design? What if the reason for that is Oppenheim understaffs the project? In addition, you should not be paying on a weekly basis for anything. To the extent that additional services are rendered there should be an agreement in advance of total cost of the additional services and a payment schedule agreed upon for the same. If there are some things that defy estimation for any reason then you can go with the hourly rate schedule that Oppenheim provides, but only if and when Oppenheim specifies to you in writing the work that is not included, and gets your advance written approval of payment for that work on an hourly basis. You should note that Oppenheim provided a rate schedule that seems pretty high (\$150 for designers, \$250 for sr. designers, \$300 for project manager/team leader, \$350 for senior project manager, and \$500 per principal) and that Oppenheim’s hourly rates increase by 10% per year.
- The fee should not be based on 6 weeks. It should be based on stages of completion of the Initial Concept Design phase and satisfactory deliverables at each stage. E.g., 1/3 in advance, 1/3 when design development finalized and Oppenheim delivers a final approved detailed written program with certain key drawings that you think are appropriate to ensure that Oppenheim has captured what you need for each building and 1/3 upon your satisfaction with the final Concept Design Deliverables.
- The 6 weeks is fine as a deadline, but should not determine the amount of the fee. At the very least there should be some holdback from the \$100,000 and penalty if the work is not completed within 6 weeks.

5. Reimbursable expenses:

- The proposal requires you to reimburse Oppenheim for “all travel related expenses” including, but not limited to, “lodging, business class flights, transfers and visas” - There should a “reasonable” requirement. Is business class necessary? To what transfers and visas is the proposal referring. The project is in the USVI and Oppenheim is located in Miami. If anyone from Oppenheim’s team requires a visa, that is Oppenheim’s issue, not yours. How many will be traveling and who? To avoid paying for an unnecessary entourage, there should be a requirement of written pre-approval of all travel and lodging. We should also consider a provision that travel and lodging will be handled by you, so that you can book it, ensure best pricing and if you use your credit card, get points.
- Third party professional renderings at an “estimated” \$4,000 per rendering are not included in the services provided by Oppenheim. Oppenheim will present proposals to you for approval and you must pay the full amount of the proposal **to Oppenheim** in advance. Apart from the point above that Oppenheim should provide you renderings at no additional charge, this suggests that this may be an area where Oppenheim is taking some kind of Vig on third party rendering charges.
- The proposal also provides that Engineering and other consultancy services are not part of the proposal, that Oppenheim won’t be responsible for any such Licensed or insured engineers or client consultants. The proposal provides a list of the types of engineers and consultants that **may be required**. Why is the list so broad? Shouldn’t Oppenheim know by now what, if any, engineers and consultants will be required for the initial concept design phase? Should any of this work be done in house and be included for the \$100,000?

6. Intellectual Property:

Oppenheim provides in its proposal that all intellectual property rights in the drawings, renderings, models, specifications, electronic files (including, but not limited to, CAD files, spreadsheets and databases) and other derivations that are part of the project belong to Oppenheim and are intended only for use with this project. It also provides that you are not allowed to use any of these materials on future phases of the project (i.e., beyond the Initial Concept Design phase) or on other projects, except if Oppenheim agrees and gets compensated for it. In addition, Oppenheim provides that if you desire to use any work product by Oppenheim without the further involvement of Oppenheim then you are required to pay Oppenheim a licensing fee of \$500,000.

This is absolutely insane. Oppenheim is charging you \$100,000 for the Initial Concept Design. Once you pay Oppenheim, you should own all the work and all intellectual property rights (other than moral rights which legally can't be assigned) in the work that Oppenheim provides. You should be able to use all that work as you deem appropriate without having to get permission or having to pay anything further to Oppenheim. If Oppenheim is concerned about liability for use of its work other than as intended then you can give Oppenheim a limited indemnity or hold harmless for any use of the work outside of its intended purpose.