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Considerations In Deciding To Include Arbitration Provisions In Your Construction Contracts, *NYREJ*

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When drafting and negotiating contracts with an architect, general contractor, construction manager, or even trade contractors, one important choice a developer or property owner faces is whether to litigate any potential disputes in a court of law, or to include a provision in the contract to compel arbitration instead. There are several important factors to consider in making the choice, chief among which are: (i) whether the draft construction contracts include "notice" clauses for extra work claims and time extension requests; (ii) the cost and time involved in arbitration versus those involved in litigation, and (iii) the qualifications of potential judges or arbitrators.

It is to the benefit of a developer or owner to make sure that a properly drafted construction contract contains provisions which make the providing of notice a condition precedent to any contractor's claims for extra costs incurred due to the contractor's performance of disputed work, or for an extension of time to complete the work. These notice provisions require the contractor to notify the developer of the performance of extra work or the need for the time extension within a few days after the occurrence of the extra work performed, or of the event causing the delay. Where such notice provisions exist, the contract should also provide that if a contractor fails to comply with the notice provisions, it will be deemed to have waived its claims. In many cases the contractor has a claim for extra work that would otherwise be valid, but because the contractor does not advise the owner of its claim until the work has already been performed, it will be unable to collect from the owner thereon.