

**WHAT TO DO IF YOU ARE ASKED TO SIGN A PERSONAL
GUARANTY**

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INTRODUCTION

A personal guaranty has the effect of making the person executing the guaranty individually liable for an underlying debt. Personal guarantees may take the form of a stand-alone agreement or a simple contract provision. In the construction industry, personal guarantees most commonly are requested in connection with agreements to establish credit with material suppliers. The person executing the guaranty is promising to satisfy all debts of the company opening the credit account in the event the company defaults on its payment obligations. It is not uncommon to see personal guarantees in run-of-the-mill construction contracts or even in lien and/or bond waiver forms. In these situations, the person executing the guaranty typically promises to satisfy all obligations and duties assumed by one of the parties to the underlying construction contract, including any indemnity and warranty obligations.

ATTEMPT TO NEGOTIATE THE REMOVAL OF THE PERSONAL GUARANTY

A personal guaranty is unacceptable and should be viewed as a “deal breaker” because of the substantial risk involved with the financial stability and future of the person executing the guaranty (who is referred to as the “guarantor”); the protection from individual liability afforded by incorporating is lost. A construction project that goes awry could easily result in threats to the guarantor and may end in a judgment against the guarantor with attempts to collect

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on the judgment through the seizure of the guarantor's assets and/or the garnishment of the guarantor's bank funds or wages. Consequently, the first thing to do when asked to sign a personal guaranty is to make every attempt to negotiate its removal from the agreement. Do this by asking if the other party to the agreement is willing to move forward without the personal guaranty. It will not be the first time the party proposing the guaranty has been asked this question.

WALK AWAY OR INCORPORATE PROTECTIONS

If the party proposing the guaranty is unwilling to compromise and remove the guaranty requirement, the roofing contractor should strongly consider walking away from the transaction. Given the substantial personal risk that comes with a personal guaranty, this will be the correct choice in most instances. The guarantor should only execute a personal guaranty after the guarantor has carefully weighed the likelihood of default on the underlying obligations against the possible financial consequences of the personal guaranty, consulted competent legal counsel and determined the rewards of the transaction greatly and substantially outweigh its risks.

If an individual makes the informed decision to execute the personal guaranty, then he/she should seek to incorporate certain protections intended to limit his/her liability in the event there is a default on the underlying contract. Examples of these protections would include terms in the personal guaranty that:

- place a monetary limit on the guaranty obligation;
- place a time limit on the guaranty obligation;

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- provide for written notice to the party defaulting on the underlying contract and a reasonable opportunity for that party to cure the default before the guarantor is required to satisfy the obligation;
- provide for written notice to the guarantor of any default on the underlying contract so the guarantor can see the obligation is satisfied by the defaulting party;
- provide that the other party must exhaust all its possible remedies against the defaulting party before it has the right to recover against the guarantor under the personal guaranty; and/or
- limit who may enforce the personal guaranty.

CONCLUSION

In most cases, a personal guaranty is a “deal breaker.” However, if required, such a guaranty should not be entered without giving thorough consideration to the possible financial consequences. If the roofing contractor chooses to move forward, the roofing contractor should negotiate terms that limit the personal liability emanating from the guaranty.

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