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## Feature Article

### "I just thought of something... Did anyone look at the contracts!"

Corporate acquisition due diligence projects and Sarbanes-Oxley audits are not complete without looking at all of the company's contracts.

**M&A.** Most software licenses and services contracts prohibit assignment without a party's consent. It's standard contract boilerplate.

Are the owners of a to-be-acquired business going to hold up the sale while they call around to all of their vendors and customers asking for their O.K.? Not if they can help it. Is a vendor going to drop the new company as a customer? Unlikely.

But if the vendor contract is a couple years old, and consultant rates have gone up 25% since, the vendor is going to take advantage and get out of the old pricing and any volume discounts along with it. If the consultants are responsible for core business functions and mission critical systems, the broken status of the contract can jeopardize the sale of the business itself, and the word "fraud" starts getting tossed around. Sales contracts get dicier still. Even with a right to assign spelled out, customers can ask for

numerous "assurances."

**SOX.** Sarbanes-Oxley has been discussed to death by lawyers and management consultants. But neither sales or procurement contracts, or contract management processes, seem to be part of the overall conversation about SOX audits.

Contracts are in essence non-automated financial controls. It was Enron, WorldCom and AOL reporting non-existent revenues based on reciprocal deals that led to Sarbanes-Oxley in the first place. The most expensive accounting reporting systems are worthless without contracts that obligate other parties to comply.

**Lost Profits.** M&A and Sarbanes Oxley audits are highly visible and immediate reasons for contract management. Then there is the small matter of lost revenue and unnecessary costs.

Sellers could be charging extra for services that are outside the scope of their statement of work, if only they knew what the statement of work said. Buyers wouldn't unnecessarily pay for licenses that duplicate unused ones. It doesn't take a Gartner Group survey to know that lack of contract management costs business somewhere in the

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## About James River



James River Consulting is a New England-based company specializing in the development, negotiation, and management of IT contracts. James River's services range from short-term staffing of contracts personnel, to sales contract process and policy implementation, to competitive bid announcement and management, to SaaS business consulting. James River's president, Eric Esperne, has over 15 years experience as an in-house legal counsel and director of contracts for both large and small IT companies.

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## Feature Article continued

hundreds of millions of dollars, or more, annually.

**Afterthought.** The single biggest reason company contracts get ignored in due diligence and audits is executive management never sees them. Often CEOs never actually look at anything more than the signature page. The physical contract ends up on in a folder on a sales person's lap top, or in some law or accounting firm file cabinet. Nobody worries about not seeing (and *ergo* not knowing) the terms until something bad happens.

**Tips.** Here is some practical and cost-saving advice for your business contracts:

- ◆ Designate a person in your company as the Contracts Officer. The CO is responsible for keeping final copies of all contracts in a single location and accessing them. Since many contracts these days are


online or part of an automated system, this person will need to be proactive.

- ◆ Make up an abstract of each contract's terms. The abstract should mention all safeguards in the contract against not getting what you paid for, or conversely not getting paid for changes and add-ons. These abstracts will come in handy when responding to investors and M&A inquiries.
- ◆ Write up your procedures for filing and monitoring contracts. These will help you avoid corporate memory loss due to turnover. They will also become part of your SOX audit.

If you would like to continue this discussion, James River will visit your offices for a free consultation and/or a PowerPoint presentation.

## Company News

James River published several articles in 2007. Here are two of them:

 **“Ways to quell the feud between legal and sales”**  
A Quarterly Publication of Lawyers Weekly, Inc. in the March, 2007, issue of New England In-House explores how to manage between the two departments when working on contracts.

**“Dodge traps when selling IT to large corporations”** in the May 4-10, 2007, issue of Mass High Tech describes what not to do when writing and negotiating an IT contract with a large corporate customer.



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# Newsletter

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