



## **Administrative Conference Recommendation 2022-1**

### **Contractors in Rulemaking**

**Adopted June 16, 2022**

Agencies rely on private contractors to perform many kinds of services in support of their rulemaking activities. These services can occur at any stage of the rulemaking process. Functions that agencies assign to contractors include conducting research undergirding a rule; preparing regulatory impact analyses; facilitating meetings with interested persons; and tabulating, categorizing, or summarizing public comments the agency receives. As with other agency functions, contracting out specific rulemaking functions may help increase staffing flexibility to ease workloads, lower administrative costs, provide topic-specific expertise or access to technology that agencies do not possess internally, and provide alternative perspectives on particular issues.<sup>1</sup>

Agencies' use of contractors, however, may also raise distinctive concerns in the rulemaking context.<sup>2</sup> Agencies must ensure that they comply with applicable legal obligations and must exercise their discretion in a way that avoids ethics violations, promotes efficiency, and ensures that agency officials exercise proper oversight of contractors.

Among the applicable legal obligations is the prohibition on contracting out “inherently governmental functions.”<sup>3</sup> Inherently governmental functions are those that are “so intimately

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<sup>1</sup> See Bridget C.E. Dooling & Rachel Augustine Potter, *Contractors in Rulemaking* (May 9, 2022) (report to the Admin. Conf. of the U.S.).

<sup>2</sup> Cf. Admin. Conf. of the U.S., Recommendation 85-2, *Agency Procedures for Performing Regulatory Analysis of Rules*, ¶ 6, 50 Fed. Reg. 28,364, 28,365 (July 12, 1985).

<sup>3</sup> See 48 C.F.R. § 7.503; Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, 76 Fed. Reg. 56,227 (Oct. 12, 2011) [hereinafter OFPP Policy Letter]; OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-76,



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related to the public interest as to require performance by Federal Government employees.”<sup>4</sup> They include “functions that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government . . . .”<sup>5</sup>

Whereas “determining” the content of a regulation is an inherently governmental function,<sup>6</sup> providing “[s]ervices that involve or relate to the development of regulations” is not.<sup>7</sup> Rather, the provision of such services is considered to be “closely associated with the performance of inherently governmental functions.”<sup>8</sup> When agencies allow contractors to perform functions closely associated with inherently governmental functions, they must exercise heightened caution.<sup>9</sup> They must, in particular, “give special consideration to Federal employee performance of [such] functions and, when such work is performed by contractors, provide greater attention and an enhanced degree of management oversight of the contractors’ activities to ensure that contractors’ duties do not expand to include performance of inherently government functions.”<sup>10</sup>

Agencies must also consider potential ethical issues when contracting out rulemaking functions. Because contractors are, with a few exceptions, generally not subject to the ethics laws governing federal employees, there are potential ethics-related risks against which agencies must

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PERFORMANCE OF COMMERCIAL ACTIVITIES (REVISED 2003). The prohibition is reflected in the Federal Activities Inventory Reform (FAIR) Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (1998) [hereinafter FAIR Act], and the National Defense Authorization Act (NDAA) for Fiscal Year 2009, Pub. L. No. 110-417, § 321, 122 Stat. 4356, 4411–12 (2008).

<sup>4</sup> OFPP Policy Letter, *supra* note 3, § 3, at 56,236; *accord* FAIR Act, *supra* note 3, § 5, at 2384.

<sup>5</sup> OFPP Policy Letter, *supra* note 3, § 3(a), at 56,236; *accord* FAIR Act, *supra* note 3, § 5(2)(B), at 2385.

<sup>6</sup> 48 C.F.R. § 7.503(c)(5); *accord* OFPP Policy Letter, *supra* note 3, app. A, ex. 7, at 56,240.

<sup>7</sup> 48 C.F.R. § 7.503(d)(4); *accord* OFPP Policy Letter, *supra* note 3, app. B, ex. 1(d), at 56,241.

<sup>8</sup> OFPP Policy Letter, *supra* note 3, app. B, at 56,241; *accord* 48 C.F.R. § 7.503(d).

<sup>9</sup> *See* OFPP Policy Letter, *supra* note 3, § 4(a)(2), at 56,236.

<sup>10</sup> *Id.*



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protect and which may not be addressed adequately under existing procurement regulations.<sup>11</sup> The risks of conflicts of interest (both organizational and personal) and misuse of confidential information may be especially salient when contractors support a policymaking function such as rulemaking.<sup>12</sup> Agencies can mitigate these risks by establishing and internally disseminating policies and procedures governing the use and management of contractors in rulemaking, which may include any requirement that the agency disclose its use of contractors.

In addition to legal and ethical issues, agencies must also consider the potential negative consequences of using contractors to perform rulemaking-related functions, including whether repeated reliance on contractors might compromise their ability to maintain necessary career staff with appropriate skills. Agencies may also wish to consider alternative methods to contracting when they need to expand internal capacity in connection with rulemaking, such as using executive branch rotations, fellowship programs, or federally funded research and development centers, or by assigning temporary employees under the Intergovernmental Personnel Act.<sup>13</sup>

This Recommendation provides guidance to agencies for when they are considering contracting out certain rulemaking-related functions. Recognizing that agencies' needs vary enormously, it addresses a range of legal, ethical, prudential, and practical considerations that agencies should take into account when using contractors.

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<sup>11</sup> See, e.g., 48 C.F.R. subparts 3.11 (Preventing Personal Conflicts of Interest for Contractor Employees Performing Acquisition Functions), 9.5 (Organizational and Consultant Conflicts of Interest).

<sup>12</sup> See Admin. Conf. of the U.S., Recommendation 2011-3, *Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information*, 76 Fed. Reg. 48,792 (Aug. 9, 2011).

<sup>13</sup> See 5 U.S.C. §§ 3371–75; see also 5 C.F.R. part 334.



## RECOMMENDATION

### Internal Management

1. Agencies that use contractors to perform rulemaking-related functions should adopt and publish written policies related to their use. These policies should cover matters such as:
  - a. The types of rulemaking functions considered to be inherently governmental functions or closely associated with inherently governmental functions;
  - b. Internal procedures to ensure that agency employees do not contract out inherently governmental functions and to ensure increased scrutiny when contracting out functions that are closely associated with inherently governmental functions;
  - c. Requirements for internal disclosure of the functions contractors undertake with regard to specific rulemakings;
  - d. Standards for when contractors should identify themselves as such in communications with the public in connection with rulemakings; and
  - e. Ethical rules applicable to contractors, including their employees.
2. To enhance their management of contractors, agencies should consider providing rulemaking-specific training for employees on agency policies and ethical restrictions applicable to contractors. Agencies should also consider designating an agency office or officer to answer questions about the use of contractors to perform rulemaking-related functions and be responsible for deciding whether a function is inherently governmental.
3. When agencies rely on contractors in a rulemaking, they should ensure that agency employees can identify contractors and are aware of contractors' assigned functions. Agencies should specifically focus on whether contractors should work in the same space as agency employees, how and to what extent they may participate in meetings with agency leadership or other meetings at which substantive policy is decided, and whether they should be provided with their own agency email addresses.
4. Agencies should consider ways to share information about contractors in rulemaking within and across agencies. This might include using existing contracting databases or



schedules to promote greater coordination and efficiency concerning existing contracts for rulemaking-related functions, as well as informal sharing of practices for managing contractors.

### **Ethics**

5. When selecting and managing contractors for rulemaking-related functions, agencies should evaluate whether any firm under consideration to serve as a contractor may have an actual or perceived organizational conflict of interest in connection with any assigned function. When a potential organizational conflict exists or arises, agencies should either select another contractor or put in place appropriate protections to ensure that the contractor's outside interests do not undermine its ability to perform its assigned functions in a way that does not create an actual or perceived conflict of interest.
6. When contracting out rulemaking-related functions for which there is a risk of a personal conflict of interest by an employee of the contractor, agencies should provide in the contract that the contractor will not assign functions to any employee who has an actual or perceived conflict of interest and, as appropriate, will train employees on recognizing and disclosing personal conflicts. The contract should also provide that, in the event that an employee performs a function despite the existence of a personal conflict of interest, the contractor will disclose the conflict to the agency and undertake appropriate remedial action.
7. When contracting out rulemaking-related functions for which there is a risk of misuse of confidential information, agencies should provide in the contract that the contractor will ensure that any employee handling such information has been appropriately trained on the necessary safeguards. The contract should also provide that the contractor will disclose any misuse of confidential information to the agency and undertake appropriate remedial actions.



### **Transparency**

8. When an agency uses a contractor to perform an activity closely associated with an inherently governmental function in a specific rulemaking, the agency should disclose the contractor's role in the rulemaking docket, the notice of proposed rulemaking, or the preamble to the final rule. Agencies should, unless legally precluded from doing so, also disclose the identity of the contractor.
9. Agencies should ensure that their contracts with contractors will allow the agencies to meet legal requirements for disclosure of information in connection with the rulemaking process and judicial review.

### **Intergovernmental Guidance**

10. The Office of Management and Budget should consider assessing whether current agency practices align with broader procurement best practices and whether to provide guidance on contractor-performed functions associated with rulemaking processes. Among other things, this guidance might provide specific examples of rulemaking-related functions that qualify as inherently governmental functions and should not be contracted out or that are closely associated with inherently governmental functions such that agencies should exercise heightened caution when contracting out those functions.