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.

Agencies’ use of contractors, however, may also raise distinctive concerns in the rulemaking context. Agencies must ensure that they comply with relevant legal obligations, including the prohibition on outsourcing “inherently governmental functions” (IGFs). They also face a need to exercise their discretion in a way that avoids ethics violations, promotes efficiency, and ensures that agency officials exercise proper oversight of contractors. With respect to the prohibition on contracting out IGFs, the Office of Management and Budget’s Circular A-76, *Performance of Commercial Activities*, and the Office of Federal Procurement Policy’s Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*,

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2. 48 C.F.R. § 7.503; see also OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003). Other relevant legal considerations may be presented under other sources of law.
provide examples of certain IGFs that should not be contracted out.\textsuperscript{3} Circular A-76 also describes activities that are “closely associated” with IGFs and for which agencies should exercise heightened caution when assigning such functions to contractors.\textsuperscript{4}

Although neither Circular A-76 nor Policy Letter 11-01 describes contracting functions related to rulemaking activities in any detail, they generally provide that contractor functions should be limited to those that support the agency’s policymaking activities and do not supplant the agency’s decision-making role. The risk of contracting out an IGF, or even an activity closely associated with an IGF, is heightened when a contractor is drafting the text or preamble of a rule, performing analyses, or presenting strategy options to be used by agency employees in the rulemaking context. As a practical matter, these concerns may also be greater when agencies enter into contracts that span multiple years and cover multiple rulemaking functions.

Agencies must consider potential ethical issues when contracting out rulemaking functions. Although contractors are, with a few exceptions, generally not subject to the ethics laws governing federal employees, there are nevertheless potential ethics-related risks against which agencies must protect and which may not be addressed adequately under existing procurement regulations.\textsuperscript{5} 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.\textsuperscript{6} Agencies can mitigate these concerns by


\textsuperscript{4} OFPP Policy Letter 11-01 defines “closely associated with IGF” in the context of policy and regulatory development as “support for policy development, such as drafting policy documents and regulations, performing analyses[ and] feasibility studies, and [developing] strategy options.” 76 Fed. Reg. at 56234.

\textsuperscript{5} 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).

establishing and internally disseminating policies and procedures governing the use and
management of contractors in rulemaking, including any required disclosure related to their use.

Agencies will need to consider the practical benefits and challenges of using contractors
to perform functions in furtherance of agency rulemaking. Those considerations might include
the effects of repeated reliance on agencies’ in-house capacities, in particular 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 by using executive branch rotations, fellowship programs, or federally
funded research and development centers, or by making arrangements for assigning temporary
employees under the Intergovernmental Personnel Act.7

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.

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 (IGFs) or closely associated with IGFs;
   b. Internal procedures to ensure that agency employees do not contract out IGFs and
      to ensure increased scrutiny when contracting out functions that are closely
      associated with IGFs;

7 5 U.S.C. §§ 3371-3375; see also 5 C.F.R. part 334.
c. Requirements for internal disclosure concerning 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.

2. To enhance their management of contractors, agencies should consider providing rulemaking-specific training for managers 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 an activity is an IGF.

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 rulemaking contracts, 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 a covered 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, provide employee training on recognizing and disclosing personal conflicts. The contract should also provide that, in the event that an employee improperly 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 breach of this obligation to the agency and undertake appropriate remedial actions.

Transparency

8. When an agency uses a contractor to perform an activity closely associated with an IGF in a specific rulemaking, the agency should consider disclosing the contractor’s role in the rulemaking docket, the notice of proposed rulemaking, or the preamble to the final rule, including, if legally permissible, identifying the contractor.

9. Agencies should ensure that their agreements 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 providing
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 IGFs and should not be contracted out or that are closely associated with IGFs such that agencies should exercise heightened caution when contracting out those functions.