



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Contractors in Rulemaking

Committee on Rulemaking

Proposed Recommendation for Committee | March 24, 2022

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24 3. Agencies must also take into account legal considerations that apply to the use of
25 contractors. When considering what functions to contract out, agencies must be cognizant
26 of what functions might constitute an inherently governmental function (IGF). The Office
27 of Management and Budget (OMB) has provided guidance in its Circular A-76 that
28 describes IGFs and which functions might be closely associated with IGFs.¹ Additionally,
29 OMB's Office of Federal Procurement Policy (OFPP) issued a final policy letter in 2011
30 providing clarification on what types of functions might venture into IGF territory.²
31 Generally, contractor functions should be limited to those that provide support for the
32 agency's rulemaking activities and do not supplant the agency's decision-making or
33 policy-making functions. Principles of administrative justice or good agency practice
34 might also mitigate against outsourcing certain functions, whether or not they qualify as
35 IGFs or are classified as being closely associated with IGFs.

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¹ OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003), available at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A76/a76_incl_tech_correction.pdf.

² OMB, Office of Federal Procurement Policy, Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227 (Oct. 12, 2011).

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Commented [A1]: It might be helpful to include discussion of the specifics given for regulation in table at page 56234.

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Deleted: (OFPP)



Inherently Governmental Functions

- 65 3. Agencies should adopt and disseminate policies to ensure that agency personnel do
66 not contract out inherently governmental functions (IGFs) and ensure increased
67 scrutiny when contracting out functions that are closely related to IGFs. In applying
68 policies from OMB to the rulemaking context, agencies should design their policies
69 to protect against the risk of contracting out activities involving discretion of the sort
70 likely to influence policy choices that they make.
- 71 4. OMB should consider assessing whether current agency practices align with broader
72 procurement best practices and providing guidance on contractor-performed functions
73 associated with rulemaking processes. Among other things, this guidance might
74 provide specific examples of rulemaking-related functions that qualify as IGFs and
75 should not be contracted out or that are sufficiently close to IGFs so that agencies
76 should exercise heightened caution when contracting out such functions.

Deleted: the Office of Management and Budget (OMB) and the Office of Federal Procurement Policy (OFPP)

Commented [KN2]: For Committee:
The preamble will address that this risk may be especially heightened when the contractor is drafting the regulatory text or preamble language, performing analyses or presenting strategy options to be used by agency personnel in the rulemaking context, or when agencies enter into contracts that span multiple years and cover multiple rulemaking functions, for example.

Commented [A3R2]: Steph Tatham (OMB): Some of these examples seem like “functions closely associated with IGFs” under current OMB guidance. It may be worth introducing that concept from the OFPP policy letter in the preamble.

Commented [A4]: Steph Tatham (OMB): Suggest that consider should qualify both clauses. Agencies are asked to do a lot in this draft recommendation so whether additional assessment is needed may depend on the uptake of those recommendations.

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Commented [KN5]: For Committee:
Should this recommendation identify specific examples of rulemaking-related functions that qualify as IGFs and should not be contracted out?

Commented [A6R5]: Steph Tatham (OMB): This would be helpful. Of the functions featured in Table 2 of the excellent report one seems likely to be over the line:

→ Help agency understand and reconcile reviewer feedback from other parts of the agency (e.g., legal counsel) and executive branch (e.g., other agencies, OMB, EOP, reviewers).

I'd be interested in the Committee's views on which, if any, of the other functions contractors have been found to perform should be performed by agency personnel because they are IGF in nature.