Contractors in Rulemaking

Committee on Rulemaking

Proposed Recommendation | June 16, 2022

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and additional amendments from the Council and Conference members (with sources shown in the margin).

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.²

Agencies’ use of contractors, however, may also raise distinctive concerns in the rulemaking context.³ Agencies must ensure that they comply with relevant applicable legal obligations, including the prohibition on outsourcing “inherently governmental functions.” (IGFs).³ They also must exercise their discretion in a way that avoids ethics

---

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

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*, provide examples of certain IGFs that should not be contracted out. Circular A-76 also describes activities functions that are “closely associated” with IGFs and for which agencies should exercise heightened caution when assigning such functions to contractors.  

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.

Among the applicable legal obligations is the prohibition on contracting out “inherently governmental functions.” Inherently governmental functions are those that are “so intimately related to the public interest as to require performance by Federal Government employees.” They include “functions that require either the exercise of discretion in applying Federal

5 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 56,234.
7 OFPP Policy Letter, *supra* note 6, § 3, at 56,236; *accord FAIR Act, supra* note 6, § 5, at 2384.
Government authority or the making of value judgments in making decisions for the Federal Government . . . .”

Whereas “determining” the content of a regulation is an inherently governmental function, providing “[s]ervices that involve or relate to the development of regulations” is not. Rather, the provision of such services is considered to be “closely associated with the performance of inherently governmental functions.” When agencies allow contractors to perform functions closely associated with inherently governmental functions, they must exercise heightened caution. 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 governmental functions.”

Agencies must also consider potential ethical issues when contracting out rulemaking functions. Although 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. 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. Agencies can mitigate these risks by

Commented [CA2]: Proposed Amendment from Council:

The Council proposes striking much of the language in lines 11-28 and replacing it with what appears in lines 29-44. The main reason for this amendment is to supply a definition of “inherently governmental function,” which is missing from the Committee’s Recommendation. The amendment also brings up the definition of “activities closely associated with inherently governmental functions” from the footnote (previously footnote 5) to the above-the-line text.

Commented [CMA3]: Proposed Amendment from Senior Fellow Alan Morrison #1:

“This makes it clearer that potential ethical issues arising from conflicts that the contractor might have must be considered, which is, I think, the problem at issue here.”
establishing and internally disseminating policies and procedures governing the use and management of contractors in rulemaking, which may include including any required disclosure related to their use that the agency disclose its use of contractors.

In addition to legal and ethical issues, agencies also need to consider the practical benefits and challenges of using contractors to perform rulemaking-related functions in furtherance of agency rulemaking, including whether. Those considerations might include the effects of repeated reliance on contractors might compromise 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 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.  

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, inherently governmental functions.

Commented [CMA4]: Proposed Amendment from Senior Fellow Alan Morrison #2:
“This paragraph is not about benefits at all, but about problems, and the opening sentence does not convey that.”

---

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 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, including their employees.

2. To enhance their management of contractors, agencies should consider providing rulemaking-specific training for managers and agency 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 an activity is an inherently governmental function.

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.

Commented [CMA5]: Comments from Public Member Jack Beermann & Senior Fellow Alan Morrison:
Not sure what is meant by this. Disclosure of what? Please clarify the subject of disclosure that is recommended.

Commented [CMA6]: Proposed Amendment from Senior Fellow Alan Morrison #3:
“Individual employees may have conflicts, even if the contractor does not.”
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, and the preamble to the

Commented [CMA7]: Comment from Public Member Jack Beermann: “I think we need a definition of ‘covered employee.’ It is not clear to me what that refers to.”

Commented [CMA8]: Proposed Amendment from Public Member Jack Beermann #1: “I found the word ‘improperly’ confusing. I think it would be better just to delete the word because I believe the remainder of the sentence covers the conflict of interest without it, and the word implies that perhaps there is something else wrong with the way the employee performed the function.”

Commented [CMA9]: Proposed Amendment from Public Member Jack Beermann #2: “I suggest changing ‘breach of this obligation’ to ‘misuse of confidential information’ because the only obligation mentioned is to put something in the contract and it is my understanding that the intent is to refer to misuse of confidential information.”
final rule. Agencies should, including if legally permissible unless legally precluded, also disclose the identity of the contractor.

9. Agencies should ensure that their agreements or 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 providing 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.

Commented [CMA10]: Proposed Amendment from Senior Fellow Alan Morrison #4:
"I would change ‘if legally permissible’ (which generally limits disclosure) to ‘unless legally precluded’ which generally favors disclosure.”

Commented [CMA11]: Proposed Amendment from Public Member Jack Beermann #3