Contractors in Rulemaking

Committee on Rulemaking

Proposed Recommendation for Committee | March 24, 2022

Note for Committee: The draft recommendation does not include a Preamble, which will be supplied prior to the next meeting. Here is a summary of the major points that staff anticipates will appear in the draft preamble.

1. Agencies rely on contractors to perform a wide variety of functions associated with rulemaking at various stages in the process. They include planning regulatory timelines and strategies, conducting research undergirding a rule, convening meetings of interested parties, monitoring and processing comments, and even drafting the initial text of a proposed rule.

2. Among the factors agencies consider in deciding whether to contract out specific rulemaking functions are the following:

   Reasons to use a contractor may include:
   - Increased staffing flexibility to ease workloads;
   - The ability for contractors to provide a particular service at a lower cost;
   - Topic-specific expertise that is not present among existing agency staff;
   - Access to technology that the agency does not possess internally; and
   - Contractors’ ability to provide an alternative perspective on a particular issue.

   Challenges presented by the use of contractors in rulemaking may include:
   - Management challenges associated with supervising a workforce that includes both federal employees and contractors;
   - A lack of familiarity with internal agency protocols among contractors; and

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A possible increased potential for ethics violations, especially in the domains of organizational and personal conflicts of interest and misuse of confidential information.

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

4. Although contractors are, with a few exceptions, not subject to the ethics laws governing federal employees, there are nevertheless potential ethics-related risks against which agencies must protect. The risks of conflicts of interest (both organizational and personal) and misuse of confidential information are especially salient when contractors support a policymaking function such as rulemaking (see ACUS Recommendation 2011-3, Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information).

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FAR 3.1106 provides model contract clauses to use in connection with contracts for services that are closely associated with inherently governmental functions and that involve potential personal conflicts of interest. This provision has only limited applicability to contracts for acquisition-related activities. The final Preamble will cite this FAR rule and note the extent of its applicability.

The FAR Council also proposed a rule titled Federal Acquisition Regulation; Organizational Conflicts of Interest (OCI), 76 Fed. Reg. 23236 (Apr. 26, 2011), in 2011 but withdrew it in 2021. This rule would have updated FAR 9.5, specifically by providing guidance for the detection and mitigation of actual and potential OCIs and by adding model contract clauses. The Preamble will also mention this proposed rule and what the scope of its coverage would have been.

**RECOMMENDATION**

**General Considerations Relating to Use of Contractors**

1. When considering whether to use a contractor to perform a function in furtherance of agency rulemaking, agencies should weigh the potential benefits and potential drawbacks of doing so. Before retaining a contractor to perform a specific rulemaking-related function, agencies should consider whether the contractor offers some comparative advantage that the agency does not otherwise possess. Possible reasons to hire a contractor include enhancing efficiency, acquiring access to knowledge or technology that the agency does not otherwise possess, and acquiring an alternative perspective on a particular problem.

2. In addition to considering contractors to perform a function in furtherance of agency rulemaking, agencies should also consider alternative methods to expand internal capacity. These might include:
   a. Considering whether existing processes for performing rulemaking-related functions can be made more efficient;
   b. Temporarily reallocating agency staff from another component to assist with a rulemaking;
   c. Offering employees overtime or compensatory time;
   d. Hiring more full-time staff;
   e. Hiring short-term employees;
   f. Using executive branch rotations, fellowship programs, or the Intergovernmental Personnel Act (IPA);
   g. Rehiring retired employees; or
   h. Using Federally Funded Research and Development Centers (FFRDCs).

**Inherently Governmental Functions**

3. Agencies should adopt and disseminate policies to ensure that agency personnel do not contract out inherently governmental functions (IGFs) and ensure increased
scrutiny when contracting out functions that are closely related to IGFs. In applying policies from the Office of Management and Budget (OMB) and the Office of Federal Procurement Policy (OFPP) to the rulemaking context, agencies should design their policies to protect against the risk of contracting out activities involving discretion of the sort likely to influence policy choices that they make.

4. The OFPP, OMB, and Office of Information and Regulatory Affairs should assess whether current agency practices align with broader procurement best practices and consider 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 sufficiently close to IGFs so that agencies should exercise heightened caution when contracting out such functions.

Ethics

5. When selecting contractors for rulemaking-related functions, agencies should consider whether any contractor may have an actual or perceived organizational conflict of interest in connection with any assigned task or function. If a potential organizational conflict exists, 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 functions for which there is a risk of a personal conflict of interest, agencies should consider including a clause in the contract providing that the contractor will not assign functions or tasks under the contract 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 clause 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.

Commented [KN4]: 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 [KN5]: For Committee: Should this recommendation identify specific examples of rulemaking-related functions that qualify as IGFs and should not be contracted out?
7. When contracting out rulemaking-related functions for which there is a risk of misuse of confidential information, agencies should consider including a clause in the contract providing that the contractor will ensure that any employee handling such information has been appropriately trained on the necessary safeguards. The clause should also provide that the contractor will disclose any breach of this obligation to the agency and undertake appropriate remedial actions.

**Internal Management**

8. Agencies should adopt and disseminate written policies relating to the use of contractors to perform rulemaking-related functions and covering matters such as:
   a. The types of rulemaking functions that should be reserved for federal employees;
   b. The extent of contributions in the rulemaking context that could be handled by contractors;
   c. Management controls, such as those in Paragraphs 9-11, the agency has adopted to ensure that agency personnel do not contract out IGFs and to ensure increased scrutiny when contracting out functions that are closely related to IGFs;
   d. Any other oversight policies related to contractors performing rulemaking-specific functions and steps the agency has adopted to ensure adequate internal disclosure concerning what functions contractors undertake;
   e. Ethical rules applicable to government contractors;
   f. Applicability of policies on ex parte communications to communications involving contractors;
   g. Considerations to help agency personnel determine the likely benefits or challenges of contracting out certain rulemaking-related functions; or
   h. Possible alternatives to contracting out certain rulemaking-related functions, including those listed in Paragraph 2.

9. To ensure effective management of contractors, agencies should consider adopting the following practices:
a. Providing rulemaking-specific training for managers on IGFs, activities closely associated with IGFs, and ethical restrictions applicable to contractors; and

b. Designating an agency office or officer who can answer questions about the use of contractors to perform rulemaking-related functions and is responsible for deciding whether an activity is an IGF.

10. When agencies contract out a rulemaking-related function, they should ensure that agency employees can identify contractors and are aware of contractors’ assigned duties. Agencies should also clarify to what extent contractors should be integrated into the workplace. For example, agencies may need to address whether contractors work in the same space as agency employees, participate in meetings with agency leadership or other meetings at which substantive policy is decided, and have agency email addresses.

11. 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 encourage greater coordination and efficiency about existing rulemaking contracts, as well as informal sharing of practices for managing contractors.

Transparency

12. Agencies should describe in an appropriate place on their websites the types of rulemaking-related functions they assign to contractors.

13. Agencies should adopt a policy that explains when they will note in a notice of proposed rulemaking or final rule that a contractor performed a rulemaking-related function and, if legally permissible, identify the contractor that performed it.

14. If an agency relies upon materials prepared by a contractor, those materials should be included in the public rulemaking docket with an indication of the contractor that prepared them. Although agencies must ensure that any contractor confidential business information (CBI) is protected when doing so, they should consider whether such restrictions allow them to achieve an appropriate level of transparency in connection with their rulemaking activities when deciding whether or not to use
contractors. Agencies should also ensure their agreements with contractors will allow for the disclosure of any information that may be needed on judicial review of an agency rule.

15. In instances in which a contractor undertaking a rulemaking-related function communicates with the public on behalf of the agency, the agency should consider whether to direct the contractor to identify its status as a non-federal employee in any such communications.