Contractors in Rulemaking

Committee on Rulemaking

Proposed Recommendation for Committee | April 12, 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 during the lifecycle of the rulemaking process. Among the functions that agencies often 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 the agency does 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 constraints, including the prohibition on outsourcing “inherently governmental functions” (IGFs). They should also exercise their discretion in a way that avoids ethics concerns, promotes efficiency, and ensures that agency officials exercise proper oversight of contractors. With respect to the prohibition on contracting out IGFs, agencies should follow 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, which provides examples of certain IGFs that should not be contracted out. Circular

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1 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), available at https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A76/a76_incl_tech_correction.pdf. Other relevant legal considerations may be presented by statutes such as the Federal Advisory Committee Act, 5 U.S.C. App. 2.
A-76 also describes activities that are “closely associated” with IGFs and for which agencies should exercise heightened caution when assigning such activities to contractors.

Although none of these documents describes contracting activities related to rulemaking activities in any detail, they generally provide that contractor functions should be limited to those that provide support for the agency’s policymaking activities and do not supplant the agency’s decision-making role. The risk of contracting out an IGF, or at least an activity closely associated with an IGF, may be especially heightened when a contractor is drafting the regulatory text or preamble language or performing analyses or presenting strategy options to be used by agency personnel in the rulemaking context. As a practical matter, such concerns may be heightened when agencies enter into contracts that span multiple years and cover multiple rulemaking functions.

Agencies must consider potential ethical issues when contracting out rulemaking activities. 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. 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. The establishment and dissemination of policies and procedures within the agency about the use, management, and disclosure requirements of contractors in rulemaking could be one way agencies might mitigate these concerns.

Agencies will need to consider the practical benefits and challenges of using a contractor to perform a function in furtherance of agency rulemaking and whether a contractor offers some comparative advantage that the agency does not otherwise possess. Agencies may 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,

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or Federally Funded Research and Development Centers, or by making arrangements under the Intergovernmental Personnel Act.

This Recommendation provides guidance to agencies when they are considering contracting out certain rulemaking activities. Recognizing that agencies’ needs vary enormously, it identifies a range of legal, ethical, prudential, and practical considerations that agencies should consider when using contractors. The recommended practices are intended to ensure that agencies achieve an appropriate level of transparency and accountability when contracting for rulemaking-related activities.

RECOMMENDATION

Internal Management

1. Agencies should adopt, disseminate internally, and consider publishing on their websites written policies relating to the use of contractors to perform rulemaking-related functions. These policies could cover matters such as:
   a. The types of rulemaking functions that the agency considers to be IGFs or closely associated with IGFs;
   b. Internal procedures to ensure that agency personnel do not contract out IGFs and to ensure increased scrutiny when contracting out functions that are closely associated with IGFs;
   c. Requirements for internal disclosure concerning what functions contractors undertake;
   d. Standards for when contractors should identify themselves as such in communications with the public in connection with a rulemaking; and
   e. Ethical rules applicable to government 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, and designating an agency office or officer who can answer

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questions about the use of contractors to perform rulemaking-related functions and
who is 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 duties.
Agencies may need to address whether contractors should work in the same space as
agency employees, participate in meetings with agency leadership or other meetings
at which substantive policy is decided, and use 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 encourage greater coordination and efficiency about existing rulemaking
contracts, as well as informal sharing of practices for managing contractors.

Ethics

5. When selecting contractors for rulemaking-related functions, agencies should
evaluate 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 include provisions 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.
7. When contracting out rulemaking-related functions for which there is a risk of misuse of confidential information, agencies should include provisions 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.

Transparency

8. When agencies use a contractor to perform a significant rulemaking-related function in a specific rulemaking, they should consider informing the public of the contractor’s role by making a notation in the rulemaking docket, notice of proposed rulemaking, or preamble to the final rule, including, if legally permitted, by identifying the specific contractor.

9. Agencies should ensure their agreements with contractors will allow them to meet legal requirements for disclosure of information in connection with the rulemaking process and judicial review.

Intergovernmental Guidance

10. OMB should consider assessing 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.