



Contractors in Rulemaking

Committee on Rulemaking

Proposed Recommendation for Committee | April 12, 2022

1 Agencies rely on private contractors to perform many kinds of services in support of their
2 rulemaking activities. These services can occur at any stage during the lifecycle of the
3 rulemaking process. Among the functions that agencies often assign to contractors include
4 conducting research undergirding a rule, preparing regulatory impact analyses, facilitating
5 meetings with interested persons, and tabulating, categorizing, or summarizing public comments
6 the agency receives. As with other agency functions, contracting out specific rulemaking
7 functions may help increase staffing flexibility to ease workloads, lower administrative costs,
8 provide topic-specific expertise or access to technology that the agency does not possess
9 internally, and provide alternative perspectives on particular issues.

10 Agencies' use of contractors, however, may also raise distinctive concerns in the
11 rulemaking context. Agencies must ensure that they comply with relevant legal constraints,
12 including the prohibition on outsourcing "inherently governmental functions" (IGFs).¹ They
13 should also exercise their discretion in a way that avoids ethics concerns, promotes efficiency,
14 and ensures that agency officials exercise proper oversight of contractors. With respect to the
15 prohibition on contracting out IGFs, agencies should follow the Office of Management and
16 Budget's Circular A-76, *Performance of Commercial Activities*, and the Office of Federal
17 Procurement Policy's Policy Letter 11-01, *Performance of Inherently Governmental and Critical*
18 *Functions*, which provides examples of certain IGFs that should not be contracted out.² Circular

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.

² OMB CIRCULAR A-76, *supra* note 1; Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions*, 76 Fed. Reg. 56227 (Oct. 12, 2011).



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19 A-76 also describes activities that are “closely associated” with IGFs and for which agencies
20 should exercise heightened caution when assigning such activities to contractors.

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

30 Agencies must consider potential ethical issues when contracting out rulemaking
31 activities. Although contractors are, with a few exceptions, generally not subject to the ethics
32 laws governing federal employees, there are nevertheless potential ethics-related risks against
33 which agencies must protect. The risks of conflicts of interest (both organizational and personal)
34 and misuse of confidential information may be especially salient when contractors support a
35 policymaking function such as rulemaking.³ The establishment and dissemination of policies and
36 procedures within the agency about the use, management, and disclosure requirements of
37 contractors in rulemaking could be one way agencies might mitigate these concerns.

38 Agencies will need to consider the practical benefits and challenges of using a contractor
39 to perform a function in furtherance of agency rulemaking and whether a contractor offers some
40 comparative advantage that the agency does not otherwise possess. Agencies may wish to
41 consider alternative methods to contracting when they need to expand internal capacity in
42 connection with rulemaking, such as by using executive branch rotations, fellowship programs,

³ See Admin. Conf. of the U.S., Recommendation 2011-3, *Compliance Standards for Government Contractor Employees – Personal Conflicts of Interest and Use of Certain Non-Public Information*, 76 Fed. Reg. 48792 (Aug. 9, 2011).



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

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

RECOMMENDATION

Internal Management

- 51 1. Agencies should adopt, disseminate internally, and consider publishing on their
52 websites written policies relating to the use of contractors to perform rulemaking-
53 related functions. These policies could cover matters such as:
- 54 a. The types of rulemaking functions that the agency considers to be IGFs or closely
55 associated with IGFs;
 - 56 b. Internal procedures to ensure that agency personnel do not contract out IGFs and
57 to ensure increased scrutiny when contracting out functions that are closely
58 associated with IGFs;
 - 59 c. Requirements for internal disclosure concerning what functions contractors
60 undertake;
 - 61 d. Standards for when contractors should identify themselves as such in
62 communications with the public in connection with a rulemaking; and
 - 63 e. Ethical rules applicable to government contractors.
- 64 2. To enhance their management of contractors, agencies should consider providing
65 rulemaking-specific training for managers on agency policies and ethical restrictions
66 applicable to contractors, and designating an agency office or officer who can answer

Commented [KN1]: For Committee Consideration: Does the Committee want to recommend that agencies should not contract out drafting of regulatory or preamble text? If so, relatedly, what is "drafting"?



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- 67 questions about the use of contractors to perform rulemaking-related functions and
68 who is responsible for deciding whether an activity is an IGF.
- 69 3. When agencies rely on contractors in a rulemaking, they should ensure that agency
70 employees can identify contractors and are aware of contractors' assigned duties.
71 Agencies may need to address whether contractors should work in the same space as
72 agency employees, participate in meetings with agency leadership or other meetings
73 at which substantive policy is decided, and use agency email addresses.
- 74 4. Agencies should consider ways to share information about contractors in rulemaking
75 within and across agencies. This might include using existing contracting databases or
76 schedules to encourage greater coordination and efficiency about existing rulemaking
77 contracts, as well as informal sharing of practices for managing contractors.

Ethics

- 78 5. When selecting contractors for rulemaking-related functions, agencies should
79 evaluate whether any contractor may have an actual or perceived organizational
80 conflict of interest in connection with any assigned task or function. If a potential
81 organizational conflict exists, agencies should either select another contractor or put
82 in place appropriate protections to ensure that the contractor's outside interests do not
83 undermine its ability to perform its assigned functions in a way that does not create an
84 actual or perceived conflict of interest.
- 85 6. When contracting out rulemaking functions for which there is a risk of a personal
86 conflict of interest, agencies should include provisions in the contract providing that
87 the contractor will not assign functions or tasks under the contract to any employee
88 who has an actual or perceived conflict of interest and, as appropriate, provide
89 employee training on recognizing and disclosing personal conflicts. The clause
90 should also provide that, in the event that an employee improperly performs a
91 function despite the existence of a personal conflict of interest, the contractor will
92 disclose the conflict to the agency and undertake appropriate remedial action.



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- 93 7. When contracting out rulemaking-related functions for which there is a risk of misuse
94 of confidential information, agencies should include provisions in the contract
95 providing that the contractor will ensure that any employee handling such information
96 has been appropriately trained on the necessary safeguards. The clause should also
97 provide that the contractor will disclose any breach of this obligation to the agency
98 and undertake appropriate remedial actions.

Transparency

- 99 8. When agencies use a contractor to perform a significant rulemaking-related function
100 in a specific rulemaking, they should consider informing the public of the contractor's
101 role by making a notation in the rulemaking docket, notice of proposed rulemaking,
102 or preamble to the final rule, including, if legally permitted, by identifying the
103 specific contractor.
- 104 9. Agencies should ensure their agreements with contractors will allow them to meet
105 legal requirements for disclosure of information in connection with the rulemaking
106 process and judicial review.

Intergovernmental Guidance

- 107 10. OMB should consider assessing whether current agency practices align with broader
108 procurement best practices and consider providing guidance on contractor-performed
109 functions associated with rulemaking processes. Among other things, this guidance
110 might provide specific examples of rulemaking-related functions that qualify as IGFs
111 and should not be contracted out or that are sufficiently close to IGFs so that agencies
112 should exercise heightened caution when contracting out such functions.