



Contractors in Rulemaking

Committee on Rulemaking

Proposed Recommendation for Committee | March 24, 2022

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

- 4 1. Agencies rely on contractors to perform a wide variety of functions associated with
5 rulemaking at various stages in the process. They include planning regulatory timelines
6 and strategies, conducting research undergirding a rule, convening meetings of interested
7 parties, monitoring and processing comments, and even drafting the initial text of a
8 proposed rule.
- 9 2. Among the factors agencies consider in deciding whether to contract out specific
10 rulemaking functions are the following:

11 Reasons to use a contractor may include:

- 12 • Increased staffing flexibility to ease workloads;
13 • The ability for contractors to provide a particular service at a lower cost;
14 • Topic-specific expertise that is not present among existing agency staff;
15 • Access to technology that the agency does not possess internally; and
16 • Contractors' ability to provide an alternative perspective on a particular issue.

17 Challenges presented by the use of contractors in rulemaking may include:

- 18 • Management challenges associated with supervising a workforce that includes
19 both federal employees and contractors;
20 • A lack of familiarity with internal agency protocols among contractors; and

Commented [KN1]: For Committee:
The Preamble will identify concerns that may be implicated
with the use of contractors in rulemaking.

Commented [KN2]: For Committee:
The Preamble will identify particular concerns regarding the
use of contractors in rulemaking.



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- 21 • A possible increased potential for ethics violations, especially in the domains of
22 organizational and personal conflicts of interest and misuse of confidential
23 information.
- 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 The Office
29 of Federal Procurement Policy (OFPP) issued a final policy letter in 2011 providing
30 clarification on what types of functions might venture into IGF territory.² Generally,
31 contractor functions should be limited to those that provide support for the agency’s
32 rulemaking activities and do not supplant the agency’s decision-making or policy-making
33 functions. Principles of administrative justice or good agency practice might also mitigate
34 against outsourcing certain functions, whether or not they qualify as IGFs or are
35 classified as being closely associated with IGFs.
- 36 4. Although contractors are, with a few exceptions, not subject to the ethics laws governing
37 federal employees, there are nevertheless potential ethics-related risks against which
38 agencies must protect. The risks of conflicts of interest (both organizational and personal)
39 and misuse of confidential information are especially salient when contractors support a
40 policymaking function such as rulemaking (see ACUS Recommendation 2011-3,
41 *Compliance Standards for Government Contractor Employees – Personal Conflicts of*
42 *Interest and Use of Certain Non-Public Information*³).

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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.

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 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).
³ 76 Fed. Reg. 48792 (Aug. 9, 2011).



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RECOMMENDATION

General Considerations Relating to Use of Contractors

- 43 1. When considering whether to use a contractor to perform a function in furtherance of
44 agency rulemaking, agencies should weigh the potential benefits and potential drawbacks
45 of doing so. Before retaining a contractor to perform a specific rulemaking-related
46 function, agencies should consider whether the contractor offers some comparative
47 advantage that the agency does not otherwise possess. Possible reasons to hire a
48 contractor include enhancing efficiency, acquiring access to knowledge or technology
49 that the agency does not otherwise possess, and acquiring an alternative perspective on a
50 particular problem.
- 51 2. In addition to considering contractors to perform a function in furtherance of agency
52 rulemaking, agencies should also consider alternative methods to expand internal
53 capacity. These might include:
- 54 a. Considering whether existing processes for performing rulemaking-related
55 functions can be made more efficient;
 - 56 b. Temporarily reallocating agency staff from another component to assist with a
57 rulemaking;
 - 58 c. Offering employees overtime or compensatory time;
 - 59 d. Hiring more full-time staff;
 - 60 e. Hiring short-term employees;
 - 61 f. Using executive branch rotations, fellowship programs, or the Intergovernmental
62 Personnel Act (IPA);
 - 63 g. Rehiring retired employees; or
 - 64 h. Using Federally Funded Research and Development Centers (FFRDCs).

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



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67 scrutiny when contracting out functions that are closely related to IGFs. In applying
68 policies from the Office of Management and Budget (OMB) and the Office of Federal
69 Procurement Policy (OFPP) to the rulemaking context, agencies should design their
70 policies to protect against the risk of contracting out activities involving discretion of
71 the sort likely to influence policy choices that they make. |

72 4. The OFPP, OMB, and Office of Information and Regulatory Affairs should assess
73 whether current agency practices align with broader procurement best practices and
74 consider providing guidance on contractor-performed functions associated with
75 rulemaking processes. Among other things, this guidance might provide specific
76 examples of rulemaking-related functions that qualify as IGFs and should not be
77 contracted out or that are sufficiently close to IGFs so that agencies should exercise
78 heightened caution when contracting out such functions.

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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?

Ethics

79 5. When selecting contractors for rulemaking-related functions, agencies should
80 consider whether any contractor may have an actual or perceived organizational
81 conflict of interest in connection with any assigned task or function. If a potential
82 organizational conflict exists, agencies should either select another contractor or put
83 in place appropriate protections to ensure that the contractor’s outside interests do not
84 undermine its ability to perform its assigned functions in a way that does not create an
85 actual or perceived conflict of interest.

86 6. When contracting out rulemaking functions for which there is a risk of a personal
87 conflict of interest, agencies should consider including a clause in the contract
88 providing that the contractor will not assign functions or tasks under the contract to
89 any employee who has an actual or perceived conflict of interest and, as appropriate,
90 provide employee training on recognizing and disclosing personal conflicts. The
91 clause should also provide that, in the event that an employee improperly performs a
92 function despite the existence of a personal conflict of interest, the contractor will
93 disclose the conflict to the agency and undertake appropriate remedial action.



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

Internal Management

- 100 8. Agencies should adopt and disseminate written policies relating to the use of
101 contractors to perform rulemaking-related functions and covering matters such as:
102 a. The types of rulemaking functions that should be reserved for federal employees;
103 b. The extent of contributions in the rulemaking context that could be handled by
104 contractors;
105 c. Management controls, such as those in Paragraphs 9-11, the agency has adopted
106 to ensure that agency personnel do not contract out IGFs and to ensure increased
107 scrutiny when contracting out functions that are closely related to IGFs;
108 d. Any other oversight policies related to contractors performing rulemaking-
109 specific functions and steps the agency has adopted to ensure adequate internal
110 disclosure concerning what functions contractors undertake;
111 e. Ethical rules applicable to government contractors;
112 f. Applicability of policies on ex parte communications to communications
113 involving contractors;
114 g. Considerations to help agency personnel determine the likely benefits or
115 challenges of contracting out certain rulemaking-related functions; or
116 h. Possible alternatives to contracting out certain rulemaking-related functions,
117 including those listed in Paragraph 2.
118 9. To ensure effective management of contractors, agencies should consider adopting
119 the following practices:



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- 120 a. Providing rulemaking-specific training for managers on IGFs, activities closely
121 associated with IGFs, and ethical restrictions applicable to contractors; and
122 b. Designating an agency office or officer who can answer questions about the use
123 of contractors to perform rulemaking-related functions and is responsible for
124 deciding whether an activity is an IGF.
- 125 10. When agencies contract out a rulemaking-related function, they should ensure that
126 agency employees can identify contractors and are aware of contractors' assigned
127 duties. Agencies should also clarify to what extent contractors should be integrated
128 into the workplace. For example, agencies may need to address whether contractors
129 work in the same space as agency employees, participate in meetings with agency
130 leadership or other meetings at which substantive policy is decided, and have agency
131 email addresses.
- 132 11. Agencies should consider ways to share information about contractors in rulemaking
133 within and across agencies. This might include using existing contracting databases or
134 schedules to encourage greater coordination and efficiency about existing rulemaking
135 contracts, as well as informal sharing of practices for managing contractors.

Transparency

- 136 12. Agencies should describe in an appropriate place on their websites the types of
137 rulemaking-related functions they assign to contractors.
- 138 13. Agencies should adopt a policy that explains when they will note in a notice of
139 proposed rulemaking or final rule that a contractor performed a rulemaking-related
140 function and, if legally permissible, identify the contractor that performed it.
- 141 14. If an agency relies upon materials prepared by a contractor, those materials should be
142 included in the public rulemaking docket with an indication of the contractor that
143 prepared them. Although agencies must ensure that any contractor confidential
144 business information (CBI) is protected when doing so, they should consider whether
145 such restrictions allow them to achieve an appropriate level of transparency in
146 connection with their rulemaking activities when deciding whether or not to use



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147 contractors. Agencies should also ensure their agreements with contractors will allow
148 for the disclosure of any information that may be needed on judicial review of an
149 agency rule.

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