



Office of the Inspector General
Commonwealth of Massachusetts

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**Advisory for Municipalities
and Other Public
Awarding Authorities Using
Energy Broker Services**

October 20, 2016

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Executive Summary

In addition to investigating allegations of fraud, waste and abuse at all levels of government, the Office of the Inspector General (“Office”) regularly reviews programs and practices in state and local agencies to identify systemic vulnerabilities and opportunities for improvement. In 2014, the Office initiated a review of the relationships between public awarding authorities (such as cities, towns and housing authorities) and the energy professionals (primarily energy brokers) those public awarding authorities pay to assist with the purchase of electricity and natural gas. The aim of this advisory is to offer guidance to public awarding authorities as they navigate this industry. The best practices described in this advisory can help prevent future waste and abuse in government spending on these kinds of energy services.

The Office focused on this area of public spending because of its heightened potential for waste and abuse. Specifically, contracts for “energy or energy related services” are exempt from M.G.L. c. 30B (“Chapter 30B”), meaning public awarding authorities are not legally required to employ an open and competitive procurement process when hiring these energy professionals. Additionally, public awarding authorities must purchase energy, while the energy market is increasingly complex and energy prices are on the rise. These factors combine to leave public awarding authorities particularly vulnerable to waste and abuse when spending money on professionals such as energy brokers.

In conducting this review, the Office collected and analyzed information from 15 public awarding authorities of varying sizes from across the Commonwealth relating to their purchase of electricity and natural gas, interviewed a number of energy brokers and consultants, and researched recent trends and issues affecting both the electric and natural gas markets in Massachusetts. The Office does not intend for the information provided by the public awarding authorities to be representative of the entire Commonwealth. Instead, the information offers insight into how public awarding authorities hire, use and compensate energy professionals such as energy brokers.

Some of the Office’s key findings are described below.

Public awarding authorities often fail to use an open and competitive procurement process when initially hiring or renewing their contracts with energy brokers.

Significantly, a public awarding authority’s contract with its energy broker typically spans the duration of any energy supply agreement the broker helps negotiate. Due in part to this arrangement, in many cases, the public awarding authorities contacted by the Office failed to conduct competitive procurements for energy broker services when their energy supply agreements were set to expire. Instead, the public awarding authorities gave the broker they had already been using permission to solicit new bids from energy suppliers on their behalf. Then, the public awarding authority executed a new supply agreement with one of the suppliers, thereby automatically extending the broker’s contract. It was not unusual to see this scenario play out several times in a row with the same broker.

There are hundreds of energy brokers with varying levels of expertise licensed to practice in Massachusetts.

The infrequency with which public awarding authorities used an open and competitive process in hiring energy professionals is especially troubling considering there are hundreds of electricity brokers and natural gas retail agents (which are essentially natural gas brokers) licensed in Massachusetts. Because it is relatively easy and inexpensive to become licensed, these brokers come from many different states and have varying levels of expertise and familiarity with the energy market in Massachusetts. With a competitive procurement, public awarding authorities will find brokers who best fulfill their needs.

Public awarding authorities often fail to monitor the amount they are paying to energy brokers because the energy broker's payment is embedded in the rate they are paying to the electricity or natural gas supplier.

In the Office's attempt to gather information relating to the amount public awarding authorities are spending on brokers and other energy professionals, an unanticipated issue emerged: many public awarding authorities are not maintaining adequate records of the payments they are making to these energy professionals. In fact, most of the public awarding authorities contacted by the Office had difficulty fully responding to the Office's request for this information in a timely manner. Because the energy suppliers are paying the brokers directly and the bills are not itemized, many public awarding authorities are not maintaining detailed records of these payments.

The majority of public awarding authorities are paying the same standard rate (based exclusively on energy usage) to energy brokers.

In its examination of contracts between public awarding authorities and brokers, the Office found nearly all public awarding authorities are paying the same standard usage-based rate for brokerage services: \$0.001 per kilowatt-hour ("kWh") for electricity and \$0.015 per therm for natural gas. This arrangement results in larger municipalities paying far more than smaller municipalities for essentially the same services since the payment is tied to usage and not the amount of work performed by the broker.

In consideration of these findings, the Office makes the following recommendations.

Prior to hiring an energy professional such as an energy broker, all public awarding authorities should conduct an assessment related to their energy needs and carry out an open and competitive procurement process in which they solicit responses from multiple energy professionals.

Before hiring an energy broker or other energy professional, a public awarding authority should conduct a needs assessment to gain a better idea of what specifically it is looking for in terms of energy supply and the amount it is willing to pay for professional energy services. Next, each public awarding authority should conduct an open and competitive process when considering hiring an energy professional. Finally, the public awarding authority should review all qualified responses and select the energy professional that best suits its needs.

Public awarding authorities should keep records of the payments they make to energy professionals and the work those energy professionals are performing.

In order to be able to conduct effective needs assessments and competitive processes in the future, public awarding authorities must keep better records of their use of energy brokers. To the extent possible, public awarding authorities should monitor the amount paid to any energy professional hired and compare it to the amount of work performed by that energy professional. This information would allow a public awarding authority to better assess whether they are getting good value when hiring an energy professional.

Public awarding authorities should not renew their contracts with energy brokers without first assessing the broker's performance and soliciting responses from other energy professionals.

Each time a public awarding authority chooses to sign a new supply agreement and automatically renew its contract with a broker, it misses an opportunity to carry out a competitive procurement process for broker services. Additionally, with better records of payments and services provided by its broker, a public awarding authority could better evaluate the broker's performance before simply extending the contract without conducting any kind of analysis of its value. Further, the Office encourages procurement professionals from different public awarding authorities to communicate with one another regarding energy services and to conduct reference checks any time they are considering hiring a broker or other energy professional.

Public awarding authorities should attempt to negotiate a lower usage-based rate, pay an hourly rate, or pay a one-time flat fee.

Finally, once a public awarding authority has selected a broker via competitive procurement process, the public awarding authority, particularly if it is a large municipality, should attempt to negotiate the rate it will pay the broker. The Office recommends paying a one-time flat fee or an hourly rate for brokerage services. If this is not possible, the public awarding authority should make an effort to negotiate the usage-based rate they are paying rather than simply accepting the industry standard rate offered by the broker. Other options would be to use a usage-based rate with a hard cap or arrange for the rate to decrease if certain usage thresholds are met. In short, there is no reason public awarding authorities must accept the standard rate offered by most brokers.

In conclusion, the use of a competitive procurement process typically yields the best rates and desired services for public awarding authorities. Thus, the Office recommends using such a process when hiring energy brokers or other energy professionals, even if Chapter 30B exempts those services. As past Office advisories have stated, with any procurement, the public awarding authority must fully understand the service or product it is purchasing, the cost of the purchase, and the implication of the purchase.

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Background

I. The Office of the Inspector General

Created in 1981, the Office of the Inspector General (“Office”) was the first state inspector general’s office in the country. The Legislature created the Office at the recommendation of the Special Commission on State and County Buildings, a legislative commission that spent two years probing corruption in the construction of public buildings in Massachusetts. The commission’s findings helped shape the Office’s broad statutory mandate, which is the prevention and detection of fraud, waste and abuse in the expenditure of public funds. In keeping with this mandate, the Office investigates allegations of fraud, waste and abuse at all levels of government; reviews programs and practices in state and local agencies to identify systemic vulnerabilities and opportunities for improvement; and provides assistance to the public and private sectors to help prevent fraud, waste and abuse in government spending.

II. Public Purchasing of Electricity and Natural Gas

When purchasing energy supply for public facilities it is common for public awarding authorities, such as municipalities, school districts, or housing authorities to employ an energy broker (“broker”) or another kind of energy professional to act as its agent and consultant in securing energy supply agreements (“supply agreement”) with energy suppliers (“supplier”). Traditionally, energy supply has taken the form of electricity and natural gas, but more recently, includes renewable energy sources.

The Office is issuing this advisory to offer guidance to public awarding authorities considering using energy professionals¹ to assist them with the purchase of electricity and natural gas for public facilities. The intent of this advisory is to recommend best practices to public awarding authorities that purchase electricity and natural gas. An additional goal of this advisory is to make public procurement officials aware of the many options available to them when deciding whether to hire a third party to assist them with the purchase of energy supply for public facilities. Finally, this advisory aims to bring attention to the many different payment models offered by brokers and other energy professionals operating in the energy industry today.

In order to gain a better understanding of the relationships between public awarding authorities and energy professionals in the Commonwealth, the Office collected information relating to the purchase of electricity and natural gas from 15 public awarding authorities,² interviewed a number of brokers and energy consultants, and researched trends and issues affecting the electric and natural gas markets in Massachusetts.

¹ The energy professionals discussed in this advisory do not include energy management services consultants. Energy management services consulting, a different discipline than energy brokering, is typically used by public awarding authorities looking to obtain energy management services under M.G.L. c. 25A, § 11I.

² The 15 public awarding authorities contacted consisted of eight towns, six cities, and one housing authority.

A. Massachusetts Procurement Law

Massachusetts General Laws chapter 30B (“Chapter 30B”) requires governmental bodies³ to follow a set of standardized procedures for “every contract for the procurement of supplies, services or real property and for disposing of supplies or real property[.]”⁴ There are, however, several exceptions, including, “energy contracts entered into by a city or town or group of cities or towns or political subdivisions of the [C]ommonwealth, for energy or energy related services[.]”⁵ Notably, in 2012, the Supreme Judicial Court ruled that contracts with brokers fall into the category of energy contracts “for energy or energy related services” under section 1(b)(33) of Chapter 30B.⁶

Although these contracts are exempt under Chapter 30B, the statute still requires public awarding authorities to “submit to the department of public utilities, the department of energy resources, and the office of the inspector general a copy of the [energy or energy-related] contract and a report of the process used to execute the contract[.]”⁷ If a public awarding authority used an energy professional’s services to assist with the negotiation of the supply agreement submitted, this “report of the process” often includes a description of the public awarding authority’s use of, and contractual relationship with, the energy professional they used, usually a broker. These agreements and the associated reports of the process prompted the Office to take a closer look at the relationships between public awarding authorities and the energy professionals they hire to assist with the purchasing of natural gas and electric supply for their public facilities.

In addition, since energy costs tend to make up a significant portion of most non-personnel municipal operating budgets, it is important to evaluate the options available to public awarding authorities trying to obtain the best deal when they are purchasing electricity and natural gas from suppliers. A competitive procurement process, when conducted properly, typically yields the best rates and desired services for public awarding authorities.

B. Regulation of the Electricity and Natural Gas Markets in Massachusetts

To understand the increasingly complex energy market, it is first necessary to identify some of the market’s key regulators and participants. The Massachusetts Executive Office of Energy and Environmental Affairs (“EEA”) is “the only state Cabinet-level office in the country that oversees both environmental and energy agencies.”⁸ One of the agencies it oversees is the

³ Chapter 30B defines a “Governmental body” as “a city, town, district, regional school district, county, or agency, board, commission, authority, department or instrumentality of a city, town, district, regional school district or county.” M.G.L. c. 30B, § 2. The public awarding authorities discussed throughout this advisory are all governmental bodies.

⁴ M.G.L. c. 30B, § 1(a).

⁵ M.G.L. c. 30B, § 1(b)(33).

⁶ See *Northeast Energy Partners, LLC v. Mahar Regional School Dist.*, 462 Mass. 687 (2012).

⁷ M.G.L. c. 30B, § 1(b)(33).

⁸ For more information about the Massachusetts Executive Office of Energy and Environmental Affairs, see <http://www.mass.gov/eea/welcomewelcome-matthew-a-beaton.html>.

Department of Public Utilities (“DPU”), which, among other duties, regulates both electricity and natural gas distribution in the Commonwealth.

1. Regulation of the Electricity Market⁹

This advisory primarily focuses on transactions involving three distinct entities operating within the electricity market: (1) competitive suppliers,¹⁰ (2) retail customers¹¹ and (3) electricity brokers.¹² Competitive suppliers purchase electricity and related services from wholesale electricity markets for resale to retail customers, including public awarding authorities. Electricity brokers are licensed to “facilitate[] or otherwise arrange[] for the purchase and sale of electricity and related services to [r]etail [c]ustomers.”¹³ Thus, electricity brokers serve as conduits between competitive suppliers and retail customers, but cannot sell electricity directly.¹⁴

In Massachusetts, competitive suppliers and electricity brokers must have a DPU license and registration to participate in the competitive electricity market. The cost for a license is \$100 and is renewable annually at a cost of \$100.¹⁵ The DPU application for brokers asks for basic historical information on a broker’s technical ability, customer service plan, and legal and regulatory issues. In terms of technical training requirements, new applicants for electricity broker licenses must provide evidence of their attendance at a competitive supplier/electricity broker training session conducted by one of the Massachusetts distribution companies. DPU does not require any testing or other certifications of brokers. There are currently 246 electricity brokers from almost 30 different states licensed in Massachusetts.¹⁶

⁹ For more information relating to the deregulated electricity industry in Massachusetts, see <http://www.mass.gov/eea/energy-utilities-clean-tech/electric-power/electric-market-info/frequently-asked-questions.html>.

¹⁰ DPU’s regulations define a “Competitive Supplier” as “an entity licensed by [DPU] to sell electricity and related services to Retail Customers, with [certain] exceptions[.]” 220 C.M.R. 11.02.

¹¹ DPU’s regulations define a “Retail Customer” as “a customer located in Massachusetts that purchases electricity for its own consumption and not for resale in whole or in part.” *Id.*

¹² DPU’s regulations define an “Electricity Broker” as “an entity, including but not limited to an Aggregator, that facilitates or otherwise arranges for the purchase and sale of electricity and related services to Retail Customers, but does not sell electricity. Public Aggregators shall not be considered Electricity Brokers.” *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ DPU’s electricity broker and competitive supplier license applications are available at: <http://www.mass.gov/eea/energy-utilities-clean-tech/electric-power/electric-market-info/electric-competitive-suppliers/license-applications.html>.

¹⁶ A complete list of electricity brokers licensed in Massachusetts is available at: <http://www.mass.gov/eea/energy-utilities-clean-tech/consumer-assistance/competitive-suppliers/> (last visited October 6, 2016).

2. Regulation of the Natural Gas Market

Like electricity brokers working in the electricity market, DPU requires retail agents of natural gas to apply for a license.¹⁷ Specifically, much like electricity brokers, gas retail agents are those who intend to “facilitat[e] or otherwise arrang[e] for the purchase and sale of natural gas to [r]etail [c]ustomers.”¹⁸ Thus, gas retail agents also serve as conduits between retail customers¹⁹ and suppliers.²⁰ This advisory treats gas retail agents as brokers.

As part of a gas retail agent’s license application, DPU requires “[d]ocumentation of technical ability to procure and deliver natural gas (such as previous gas resource experience in Massachusetts or as a shipper on interstate pipelines delivering to Massachusetts)[.]”²¹ As with electricity brokers, DPU does not require retail agents to pass a test to receive a license, but they must pay an initial \$100 fee and an annual renewal fee of \$100 to retain their license.²² There are currently over 149 licensed natural gas retail agents from more than 20 different states licensed in Massachusetts.²³

C. Factors Impacting Energy Prices

Certain factors specific to each individual retail energy customer, including public awarding authorities, are outside of a broker’s control and can have a significant impact on the rate a supplier is willing to offer that customer. One such factor, a customer’s load profile, is particularly significant. A customer’s load profile is a measure of how much energy that customer uses at any given time. A “flat” load profile is one in which the use of energy remains steady through the night and over the course of the year. Because suppliers value predictability, an energy supplier is more likely to offer a customer with a flat load profile a better rate than a customer who requires most of its energy at times of high demand, such as during normal working hours or in the hottest and coldest months of the year.²⁴ Other factors can have an

¹⁷ DPU’s gas retail agent and gas supplier applications are available at: <http://www.mass.gov/eea/energy-utilities-clean-tech/natural-gas-utility/competitive-supply-for-natural-gas/applications-natural-gas/>.

¹⁸ DPU’s regulations define a gas “Retail Agent” as “any entity facilitating or otherwise arranging for the purchase and sale of natural gas to Retail Customers and that is certified by [DPU] to obtain . . . the authorization from one or more Retail Customers to initiate Supplier Service provided by a Supplier.” 220 C.M.R. 14.02.

¹⁹ DPU’s regulations define a “Retail Customer” as “a customer located in Massachusetts that purchases natural gas for its own consumption and not for resale in whole or in part.” *Id.*

²⁰ DPU’s regulations define a natural gas “Supplier” as “an entity certified by [DPU] to sell natural gas, including the sale of capacity, commodity or balancing and peaking services to a Retail Customer, with the exception of: (a) a Default Service provider; and (b) a Retail Agent.” *Id.*

²¹ 220 C.M.R. 14.04(2)(b)(11).

²² DPU’s gas retail agent and gas supplier applications are available at: <http://www.mass.gov/eea/energy-utilities-clean-tech/natural-gas-utility/competitive-supply-for-natural-gas/applications-natural-gas/>.

²³ A complete list of retail agents licensed in Massachusetts is available at: <http://www.mass.gov/eea/energy-utilities-clean-tech/consumer-assistance/competitive-suppliers/> (last visited June 1, 2016).

²⁴ For more information, please refer to the US Energy Information Administration’s description of the factors that influence electricity prices (available at:

impact on a supplier's rate, including the customer's location, extreme weather, global economic conditions and fuel costs.²⁵ These and presumably many other factors are beyond the control of any energy professional hired to assist a public awarding authority with the purchase of electricity or natural gas for its public facilities.

III. Professional Energy Services Available to Public Awarding Authorities

At a time when energy costs are high and public awarding authorities must make difficult decisions in a complex energy market, turning to energy professionals for assistance with the purchasing of energy supply for public facilities has become commonplace. For public awarding authorities in Massachusetts considering their options, there are a number of different types of energy professionals with varying expertise and specializations.

Although there are several models available to public awarding authorities looking to purchase electricity and natural gas, all of the professional energy services discussed below help to facilitate the execution of supply agreements between public awarding authorities and suppliers in exchange for payment. The form of that payment – where it comes from and how it is calculated – varies significantly depending on the type of professional energy service chosen.

A. Energy Broker Model

1. Competitive Procurement Method

Public awarding authorities regularly work with brokers to purchase energy supply for public facilities. Often, the broker acts as the public awarding authority's agent in organizing some kind of competitive energy procurement process. A broker may first negotiate the non-price contract terms with all potential suppliers before soliciting bids. These terms include, among other things, material change²⁶ and solar carve-out provisions.²⁷ These early negotiations simplify the decision-making process for the public awarding authority when it comes time to select a particular supplier by allowing it to consider price exclusively (since the broker will have already negotiated the non-price terms of the contract with each supplier, ensuring they are roughly equivalent). The broker may then solicit bids for the cost of the energy, usually through a reverse auction. To solicit bids from suppliers, the broker gets permission to use the public awarding authority's load profile.

https://www.eia.gov/energyexplained/index.cfm?page=electricity_factors_affecting_prices) and natural gas prices (available at: <https://www.eia.gov/tools/faqs/faq.cfm?id=43&t=8>).

²⁵ *Id.*

²⁶ A material change provision requires a customer to pay a penalty to a supplier if their energy use differs significantly (by either using substantially more or less energy) over the course of the supply agreement from the amount of energy there were expected to use. This expected usage is often based on the customer's usage over the 12 months immediately preceding the supply agreement.

²⁷ A solar carve-out provision typically addresses a customer's participation in the Renewable Energy Certificates ("REC") market over the course of the supply agreement.

After soliciting bids, it is common for the broker to provide the public awarding authority with a memorandum comparing prices offered by suppliers. The broker then advises the public awarding authority which supplier it believes is offering the best deal. The public awarding authority always makes the final decision about which supplier to use and for how long.

2. Contract and Fee Structure

When a public awarding authority executes a supply agreement a broker has negotiated, it is usually committing to paying the broker for the duration of that supply agreement. This is because most public awarding authorities pay brokers a rate based exclusively on the amount of energy the public awarding authority uses for the duration of the supply agreement the broker helped negotiate rather than paying the broker a one-time flat fee or hourly rate for their services.

Thus, if a public awarding authority uses the services of the broker to extend its current supply agreement or negotiate a new one with a different supplier; this also extends its commitment to continue paying that broker.

However, certain energy consultants may offer procurement support to public awarding authorities for a lump-sum fee or at a billable hourly rate. In this kind of arrangement, the public awarding authority may pay for direct services rendered over the course of the supply agreement. Depending on the size of the lump-sum fee or hourly rate brokers receive, paying for services directly may save the public awarding authority money in the end.

3. Additional Services

In addition to facilitating the competitive procurement process and negotiating supply agreements, most brokers commit to being the exclusive agent of the public awarding authority for the duration of any supply agreement they negotiate. This means they agree to remain accessible and perform certain other services (which will be discussed in detail below) as needed over the course of the supply agreement.

B. Alternative Energy Professional-Assisted Purchasing Models

Importantly, a public awarding authority looking to hire a third party to assist with the procurement of electricity or natural gas has many options beyond the use of a broker charging a usage-based fee that accumulates over the course of a supply agreement. In fact, there are several kinds of organizations in the Commonwealth offering similar services. The sections below detail what the Office found to be the other most commonly used professional energy services by public awarding authorities in the Commonwealth when seeking assistance with the purchase of energy.

1. The Municipal Association Model

A municipal association (“association”) is a non-profit organization with a membership that consists of cities and towns in a certain geographic region. An association may charge

nominal membership dues to a municipality, oftentimes based on the municipality's size. In exchange for these membership dues, municipalities are then able to utilize certain services provided by the organization, including but not limited to, insurance plans, legislative support, and more recently, energy programs.

Specifically, the association's energy program may offer services related to energy purchasing.²⁸ In some cases, the association might develop a relationship with a specific supplier it has selected and then offer standard, pre-negotiated contracts with that supplier to its members. The association may select a particular supplier based on its reliability, beneficial contract terms, and a number of other factors. The supplier selected by the association is then likely to pay a fee to the association in exchange for its selection as the organization's recommended energy supplier for a set number of years. The dues-paying association members then have the exclusive right to use the pre-negotiated contract terms. In theory, this type of arrangement saves members time and attorneys' fees and allows the members to benefit from the association's expertise.

2. The Energy-Buying Consortium Model

In many ways, energy-buying consortiums ("consortium") are similar to municipal associations in that they rely on relationships with both their members and specific suppliers to operate effectively. However, they differ in terms of the law that governs their existence.²⁹ Consortiums collect nominal fees from their members, usually non-profit organizations and public awarding authorities, and in exchange, provide those members with access to the consortium's pre-negotiated contracts with their recommended suppliers. The supplier pays the consortium a fee in exchange for this endorsement, based in part on the number of members that ultimately wind up executing the pre-negotiated contracts.

One significant difference between a consortium and a municipal association, however, is that a consortium uses the diversity of the load profile of all its members to solicit favorable aggregated and individualized prices. Because some consortiums have hundreds of members, suppliers are likely to be far less concerned about minimum use requirements for individual members. Thus, in theory, suppliers are willing to offer lower rates to consortium members in exchange for the predictable, flat load profile a consortium's diverse client base provides.

As with municipal associations, consortiums tend to recommend a particular supplier to their members for a set number of years in exchange for a payment from that supplier. In some cases, consortiums encourage their members to lock in prices for longer terms, which may not result in the lowest price at any given time but eliminates price spikes by having stable prices over long periods.

²⁸ More information on municipal association energy programs is available at: <http://www.mma.org/what-customers-need-know-about-purchasing-electricity-0>.

²⁹ Specifically, M.G.L. c. 164, § 137 allows for group purchasing of electricity, natural gas, telecommunications services or similar products.

3. The Educational Collaborative Model

Educational collaboratives, like consortiums, allow a group of public awarding authorities to purchase energy together. However, educational collaboratives are public entities whose members utilize collective purchasing to procure the energy.³⁰ In many cases, educational collaboratives also provide the opportunity to engage in the collective bidding and purchasing of a number of goods and services other than energy, including “transportation, food service supplies or paper goods.”³¹

The 26 educational collaboratives in Massachusetts rely on specific enabling legislation to operate.³² Educational collaboratives have traditionally provided services to schools and school districts, but in recent years have broadened their membership to include municipalities, non-profit organizations, and even for-profit entities. Moreover, many collaboratives allow non-members to use their services for a fee.³³ Like an energy-buying consortium, an educational collaborative can rely on the diversity of its participants’ load profiles to obtain favorable prices.³⁴ Moreover, as with the organizations discussed above, an educational collaborative also negotiates contracts with favorable terms only made available to its participants.

Public awarding authorities typically pay an administrative fee to purchase energy through a collaborative. Much like the payment arrangement described in the broker model above in section III(A)(2), this fee is not fixed but is dependent on the public awarding authority’s energy usage.³⁵ However, what makes this arrangement somewhat different is that the collaborative uses its preferred broker, and then the broker and the collaborative split the fee.

³⁰ The following excerpt from the Inspector General’s Chapter 30B manual (at page 15) describes collective purchases (also known as collaborative purchases): “Chapter 30B and M.G.L. c. 7, § 22B, authorize two or more local jurisdictions to solicit bids for supplies or services as a group. This procurement method authorizes one local jurisdiction, called “the lead jurisdiction,” to procure supplies and services and award a contract for the benefit of a designated group. The lead jurisdiction undertakes the bid process in full compliance with Chapter 30B, and each participating local jurisdiction must accept sole responsibility for payment for any purchases that it elects to make under the contract and for compliance with all legal requirements governing administration of the contract.” The complete manual is available at: <http://www.mass.gov/ig/publications/manuals/>.

³¹ One such educational collaborative is South Coast Educational Collaborative. More information on this particular collaborative is available at: <http://www.scecoll.org/about.html>.

³² Specifically, the statute states that “[t]wo or more school committees of cities, towns and regional school districts and boards of trustees of charter schools may enter into a written agreement to provide shared programs and services, including instructional, administrative, facility, community or any other services; provided that a primary purpose of such programs and services shall be to complement the educational programs of member school committees and charter schools in a cost-effective manner.” M.G.L. c. 40, § 4E(b).

³³ One educational collaborative offering such services is the Lower Pioneer Valley Educational Collaborative. More information on this collaborative’s energy services is available at: http://www.lpvec.org/?page_id=3287.

³⁴ Participants include both members and non-members paying fees to use a collaborative’s services.

³⁵ Payments are based on number of kilowatt-hours (“kWh”) used for electricity and number of therms used for natural gas.

Unlike the typical non-negotiable broker fee, a collaborative may be willing to adjust its fee depending on the expected usage of the public awarding authority.³⁶

However, unlike energy-buying consortiums and municipal associations, educational collaboratives do not contract with or receive payment from a single preferred supplier that they then recommend to clients.

4. The Regional Council of Governments Model

A regional council of government (“council of governments”) is a division of the Commonwealth and is a governmental body that offers many programs and services.³⁷ A council of governments allows communities within a region to “pool [their] resources to meet challenges involving solid waste, water and wastewater systems, housing, crime, transportation, workforce training, services for elderly, economic development and other issues that cross jurisdictional boundaries.”³⁸

Membership in a council of governments is open to cities and towns, but the organization may not always reserve the use of the services exclusively for its members. Members pay dues, and in addition to having access to services provided by the organization, they help to govern the organization. Fees for services are separate from member dues, which allows non-members (typically other governmental bodies) the option of paying to use a council of governments’ services without becoming full members.

At least one such council of governments features a non-profit competitive electricity supplier as part of its organization.³⁹ In this scenario, the energy arm of the organization operates as a competitive supplier by purchasing large amounts of electricity on the wholesale market and reselling it to retail customers (typically public awarding authorities) using its service. In theory, electricity rates offered by council of governments-controlled competitive suppliers should remain modest because the supplier is a non-profit entity (unlike other suppliers, which are typically for-profit businesses).

³⁶ Larger clients expected to use more energy pay a lower fee (per kWh or therm) than the smaller clients expected to use less energy.

³⁷ M.G.L. c. 34B, § 20 is the enabling statute for regional councils of government. It reads, in pertinent part, “A regional council of government established pursuant to this section may administer and provide regional services to cities and towns and may delegate such authority to subregional groups of such cities and towns. Regional councils of government may enter into cooperative agreements with regional planning commissions or may merge with such commissions to provide regional services.” M.G.L. c. 34B, § 20(g).

³⁸ Notably, regional councils of government and regional planning agencies are slightly different kinds of entities. More information about Massachusetts Regional Planning Agencies is available at: <http://www.apa-ma.org/resources/massachusetts-regional-planning-agencies>.

³⁹ This entity is the Hampshire Council of Governments (“HCOG”). More information about HCOG is available at: <http://www.hampshirecog.org/>.

C. Comparison of the Different Types of Professional Energy Services Used by Public Awarding Authorities

The chart below, Figure 1, provides a brief summary of the differences between the kinds of services offered by the energy professionals described above in section III. Figure 1 highlights only some of the key aspects of the services offered by each type of energy professional or organization that assists public awarding authorities with the purchase of electricity or natural gas.

Figure 1. Comparison of Energy Professional-Assisted Purchasing Models

Type of Energy Professional	Public Entity or Instrumentality	Contracts with a Preferred Competitive Supplier	Payment Accumulates Based on Energy Usage	Operates as an Energy Supplier
Energy Broker	No	No	Yes	No
Municipal Association	No	Yes	No ⁴⁰	No
Energy-Buying Consortium	No	Yes	No ⁴¹	No
Educational Collaborative	Yes	No	Yes	No
Regional Council of Governments	Yes	Yes ⁴²	No	Yes ⁴³

IV. Analysis of Payments Made to Energy Professionals

The Office analyzed information relating to the purchase of electricity and natural gas from 15 public awarding authorities⁴⁴ of varying sizes from all across the Commonwealth, interviewed a number of brokers and energy consultants, and researched recent trends and issues

⁴⁰ A municipal association’s payment from the supplier may be dependent to some extent on anticipated member participation.

⁴¹ An energy-buying consortium’s payment from the supplier may also be dependent to some extent on member participation.

⁴² In the case of a regional council of governments, the preferred supplier is a non-profit entity that is part of the council of governments.

⁴³ As of the publishing of this report, HCOG is the only regional council of governments in Massachusetts that offers competitive energy supply services as part of its organization.

⁴⁴ As stated earlier, the 15 public awarding authorities contacted consisted of eight towns, six cities and one housing authority.

impacting both the electric and natural gas markets in Massachusetts. These public awarding authorities are not representative of the entire Commonwealth. Instead, they provide examples of how public awarding authorities use the available professional energy services.

The Office asked these public awarding authorities to submit specific information detailing how much they spent on energy professionals in Calendar Year 2013 (“CY2013”).⁴⁵ In response, the public awarding authorities contacted submitted a wide array of information. Whether due to poor record-keeping practices, changes in administration, or some combination of both, many of the public awarding authorities found it challenging to respond fully. As a result, some public awarding authorities were able to provide more thorough responses than others were.

Only a few public awarding authorities submitted documents explicitly stating the amount they paid to brokers in CY2013. That some public awarding authorities had this information available and others did not suggests that not all public awarding authorities are tracking the amount they are paying to brokers.⁴⁶

In most cases, each public awarding authority provided documentation of its energy usage for CY2013, electricity or natural gas supply contracts, and broker agreements. By looking at the amount of energy used during CY2013 and the price the awarding authority was paying for the energy, it was possible to estimate the amount that each public awarding authority paid for electricity and natural gas as well as to its energy broker.

A. Payments Public Awarding Authorities Made to Energy Brokers in CY2013 Based on Energy Usage

Many public awarding authorities contracted to use a broker model in which the broker’s payment was entirely dependent upon the public awarding authority’s energy use. This section utilizes information from those public awarding authorities who used the usage-based payment model to provide an estimate of just how much they were actually paying to brokers on an annual basis.

⁴⁵ Specifically, the Office requested the following from each of the 15 public awarding authorities for Calendar Year 2013 (“CY2013”): (1) all contracts with energy professionals; (2) all supply agreements that an energy professional negotiated on the public awarding authority’s behalf; (3) all invoices, statements, or other documents that reflect the amount of energy that the public awarding authority purchased pursuant to a supply agreement that an energy professional negotiated on the public awarding authority’s behalf; (4) any documents that show payments that a supplier made to an energy professional relating to the public awarding authority’s purchase of energy, including but not limited to, the amount and date of the payments; (5) any other documents that relate to payments that a supplier made to an energy professional relating to the public awarding authority’s purchase of energy; (6) all documents that reflect the energy professional’s work pursuant to the energy professional’s contract with the public awarding authority; and (7) all policies, procedures, guidelines, rules or other documents relating to the public awarding authority’s use of energy professionals.

⁴⁶ Nearly all of the public awarding authorities contacted required an extension, needed to submit some kind of supplemental response, or both.

1. Payments to Electricity Brokers

During CY2013, the public awarding authorities contacted by the Office who were using electricity brokers paid their brokers between \$6,000 and \$36,000 each, depending upon the amount of electricity they were using. Because these payments spanned only one calendar year, these public awarding authorities were likely paying something close to this amount each year for the duration of their supply agreements. The most common commission rate for electricity brokerage was \$0.001 per kilowatt-hour (“kWh”). However, there were some examples of public awarding authorities paying rates of \$0.00085 per kWh and \$0.0005 per kWh, depending on both the electricity broker and the type of account (*i.e.*, small meter usage accounts, large meter usage accounts, etc.).

Based on the information obtained from the public awarding authorities, Figure 2 estimates what a typical public awarding authority might spend in a year on electricity and how much of that payment is likely going directly to their electricity broker.⁴⁷ Because the public awarding authorities did not submit uniform data on their electricity use, Figure 2 is representative of the amount similarly sized public awarding authorities use annually.

As Figure 2 demonstrates, an electricity broker’s payment is dependent entirely upon the amount of electricity the public awarding authority uses. Therefore, the rate that a public awarding authority pays to its supplier for the electricity itself has no bearing on the amount that public awarding authority will then pay to its broker.

⁴⁷ The energy supply rates paid to the supplier for electricity and to the electricity broker in fees are not specific to any individual public awarding authority, but are instead representative of the rates seen in the information submitted to the Office. Likewise, the amount of electricity used is not specific to any individual public awarding authority but is instead representative of the amount used by public awarding authorities of varying sizes.

Figure 2. Estimated Annual Spending on Electricity and Electricity Brokerage Services

Population ⁴⁸	Estimated kWh Used (annual)	Electricity Contract Rate (per kWh)	Estimated Commission Rate Paid (per kWh)	Estimated Amount Paid to Supplier (annual)	Estimated Amount Paid to Broker (annual)
15,000 – 25,000	10,000,000	\$0.085	\$0.001	\$850,000.00	\$10,000.00
15,000 – 25,000	10,000,000	\$0.095	\$0.001	\$950,000.00	\$10,000.00
15,000 – 25,000	10,000,000	\$0.105	\$0.001	\$1,050,000.00	\$10,000.00
35,000 – 45,000	15,000,000	\$0.085	\$0.001	\$1,275,000.00	\$15,000.00
35,000 – 45,000	15,000,000	\$0.095	\$0.001	\$1,425,000.00	\$15,000.00
35,000 – 45,000	15,000,000	\$0.105	\$0.001	\$1,575,000.00	\$15,000.00
55,000 – 65,000	20,000,000	\$0.085	\$0.001	\$1,700,000.00	\$20,000.00
55,000 – 65,000	20,000,000	\$0.095	\$0.001	\$1,900,000.00	\$20,000.00
55,000 – 65,000	20,000,000	\$0.105	\$0.001	\$2,100,000.00	\$20,000.00
75,000 – 85,000	25,000,000	\$0.085	\$0.001	\$2,125,000.00	\$25,000.00
75,000 – 85,000	25,000,000	\$0.095	\$0.001	\$2,375,000.00	\$25,000.00
75,000 – 85,000	25,000,000	\$0.105	\$0.001	\$2,625,000.00	\$25,000.00
95,000 – 105,000	30,000,000	\$0.085	\$0.001	\$2,550,000.00	\$30,000.00
95,000 – 105,000	30,000,000	\$0.095	\$0.001	\$2,850,000.00	\$30,000.00
95,000 – 105,000	30,000,000	\$0.105	\$0.001	\$3,150,000.00	\$30,000.00

2. Payments to Natural Gas Brokers

The amount the public awarding authorities paid to natural gas brokers in CY2013 ranged from approximately \$2,500 to \$15,000, depending upon the amount of natural gas used. As with electricity, these figures represent the amount paid in a single year rather than the total amount paid over the course of the supply agreement. The most common commission rate for natural gas brokerage was \$0.015 per therm. However, depending upon the natural gas broker, certain public awarding authorities paid a commission rate of \$0.007 per therm.

Based on the information the public awarding authorities provided, Figure 3 demonstrates what a typical public awarding authority might spend in a year on natural gas and how much of that payment is for energy and how much is for the broker.⁴⁹

⁴⁸ The Office roughly based the figures included in this chart on the information submitted to the Office. The Office acknowledges that population does not have a direct correlation to a public awarding authority's electricity usage. The number of buildings (or accounts), hours of usage, and other factors all contribute to the total price paid for electricity. However, population was included to serve as a guide to provide an estimate of how much a public awarding authority of a certain population might spend on electricity annually.

Just as Figure 2 demonstrated with electricity brokers, Figure 3 illustrates that a natural gas broker’s payment is dependent entirely upon the amount of natural gas the public awarding authority uses. Therefore, the rate that a public awarding authority pays to its supplier for the natural gas itself has no bearing on the amount that public awarding authority will then pay to its broker.

Figure 3. Estimated Annual Spending on Natural Gas and Natural Gas Brokerage Services

Population ⁵⁰	Estimated therms Used	Natural Gas Contract Rate (per therm)	Estimated Commission Rate Paid (per therm)	Estimated Amount Paid to Supplier (annual)	Estimated Amount Paid to Broker (annual)
15,000 – 25,000	300,000	\$0.650	\$0.015	\$195,000.00	\$4,500.00
15,000 – 25,000	300,000	\$0.750	\$0.015	\$225,000.00	\$4,500.00
15,000 – 25,000	300,000	\$0.850	\$0.015	\$255,000.00	\$4,500.00
35,000 – 45,000	500,000	\$0.650	\$0.015	\$325,000.00	\$7,500.00
35,000 – 45,000	500,000	\$0.750	\$0.015	\$375,000.00	\$7,500.00
35,000 – 45,000	500,000	\$0.850	\$0.015	\$425,000.00	\$7,500.00
55,000 – 65,000	700,000	\$0.650	\$0.015	\$455,000.00	\$10,500.00
55,000 – 65,000	700,000	\$0.750	\$0.015	\$525,000.00	\$10,500.00
55,000 – 65,000	700,000	\$0.850	\$0.015	\$595,000.00	\$10,500.00
75,000 – 85,000	900,000	\$0.650	\$0.015	\$585,000.00	\$13,500.00
75,000 – 85,000	900,000	\$0.750	\$0.015	\$675,000.00	\$13,500.00
75,000 – 85,000	900,000	\$0.850	\$0.015	\$765,000.00	\$13,500.00
95,000 – 105,000	1,100,000	\$0.650	\$0.015	\$715,000.00	\$16,500.00
95,000 – 105,000	1,100,000	\$0.750	\$0.015	\$825,000.00	\$16,500.00
95,000 – 105,000	1,100,000	\$0.850	\$0.015	\$935,000.00	\$16,500.00

⁴⁹ Just as with Figure 2 above, Figure 3 includes energy supply rates paid to suppliers for natural gas as well as rates paid to natural gas brokers in fees, neither of which are specific to any individual public awarding authority, but are instead representative of the rates seen in the information submitted by the many public awarding authorities to the Office. And, as was the case with Figure 2, in Figure 3, the amount of natural gas used is not specific to any individual public awarding authority but is instead representative of the amount used by public awarding authorities of varying sizes.

⁵⁰ The Office roughly based the figures included in this chart on the information submitted to the Office. Importantly, the Office acknowledges that population does not have a direct correlation to a public awarding authority’s natural gas usage. However, population was included to serve as a guide to demonstrate the amount a public awarding authority of a certain population might spend on natural gas annually.

3. Additional Information Related to Payments to Energy Brokers

As the tables above demonstrate, if public awarding authorities pay brokers for assistance with both the purchase of electricity and natural gas, the total paid for the brokerage services can easily amount to tens of thousands of dollars per year. In fact, at least one public awarding authority contacted by the Office paid close to \$50,000 annually for energy brokerage services relating to the purchase of both electricity and natural gas.

Though the Office only used population as a rough indicator of a public awarding authority's typical energy usage, it was clear in the sample of public awarding authorities examined that those with the largest populations tended to use the most energy, and, as a result, pay the most in fees to energy brokers. Thus, the public awarding authorities using less energy often paid brokers far less for similar services.

4. Additional Energy Broker Services Paid for by Public Awarding Authorities

To gain a more complete understanding of how public awarding authorities and brokers worked with one another, the Office asked public awarding authorities to submit any emails with the brokers they worked with during CY2013. Though not all of the public awarding authorities contacted were able to comply with this request, several sent in emails for review. These emails revealed the frequency and manner in which brokers and public awarding authorities communicated with one another.

On the one hand, brokers were more likely to initiate the contact, particularly when they felt it was a good time for the public awarding authority to either extend its current supply agreement or execute a new agreement with a different supplier. In many cases, signing an extension is in a public awarding authority's best interest; however, it is also certainly in the best interest of the broker because it ensures the broker's continued payment for years into the future. If the public awarding authority responded with interest to the broker's proposition, then communications remained frequent until the public awarding authority executed an extension or new supply agreement. This back-and-forth usually consisted of the broker requesting a variety of information from the public awarding authority so the broker could negotiate directly with suppliers on behalf of the public awarding authority.

On the other hand, public awarding authorities were most likely to initiate contact with their brokers when there was a billing issue that they wanted the brokers to resolve. Often, the public awarding authority would explain the issue to its broker who would contact the supplier to resolve the issue.

Public awarding authorities also reached out to brokers to add new accounts or remove old ones when, for example, a new building had opened or an old building that had been open at the time the public awarding authority signed the supply agreement had closed. There were also instances of multiple suppliers billing a public awarding authority at the same time for the same service. This discrepancy occurred when a public awarding authority transitioned from one supplier to another. The broker resolved this issue by contacting the supplier responsible for the double billing.

Finally, brokers occasionally requested assistance from their clients. Specifically, brokers asked public awarding authorities to serve as references, to contact legislative committees regarding energy-related legislation, and to sign on to legal briefs to courts hearing energy-related cases.

Once brokers helped a public awarding authority through the process of purchasing energy supply, they provided other services such as preparing periodic projections and reports on energy market trends, monitoring pass-through charges and explaining changes in law that may affect public awarding authorities' purchase of energy supply. They also prepared statutorily required reports⁵¹ and answered other supply agreement-related questions. However, regardless of how often the public awarding authority contacted the broker or how many tasks the broker performed, the broker continued to receive payment directly from the supplier for the duration of the supply agreement.

When a broker is acting as a public awarding authority's agent, the broker should be performing ongoing tasks such as contacting the supplier on behalf of a public awarding authority to add or remove accounts, resolving billing issues, and disputing unforeseen charges, among other reasons. However, brokers appeared to provide the vast majority of these services sporadically over the course of several years, and some only upon the request of the public awarding authority. Thus, it was often incumbent upon the public awarding authority to request these services if it needed them.

These services sometimes resulted in the public awarding authority saving thousands of dollars. In one example, a broker resolved a dispute in a manner that not only saved the public awarding authority money it would have had to pay to the supplier, but also saved them money they likely would have spent on attorneys' fees had the broker not represented them in the dispute.

One thing is clear: some public awarding authorities are getting more services for their money than others are. Indeed, brokers provide many of these services on an as-needed basis, and a public awarding authority relying on a broker to provide dispute resolution services obviously has to find itself in a dispute with its supplier before it can reach out to a broker to resolve it. Thus, many of these services operate as a form of insurance for public awarding authorities – they may not always use them, but it is reassuring to know they have paid for them and are available if needed.

B. Payments to Other Professionals for Assistance with the Purchase of Energy

As described in section III(B) above, a number of public awarding authorities chose to purchase energy supply for their public facilities by using professional energy services other than the typical brokerage services in which payments accumulate based on the amount of energy used.

⁵¹ As mentioned above, Chapter 30B requires public awarding authorities to “submit to the department of public utilities, the department of energy resources, and the office of the inspector general a copy of the contract and a report of the process used to execute the contract[.]” M.G.L. c. 30B, §1(b)(33).

Some organizations, such as municipal associations, discussed in section III(B)(1), charge annual membership dues. For members, payment of these dues allows them access to all of the association's services and programs. Thus, members are not required to pay any additional fee to use the association's energy program so long as they pay their membership dues. A member's dues often depend upon its population.

Similarly, energy-buying consortiums, covered in section III(B)(2), charge an annual membership fee to public awarding authorities. An energy-buying consortium bases the fee upon the member's annual electricity or natural gas use. Fees range from as low as \$75 to as high as \$1,600 depending on annual use. The vast majority of public awarding authorities contacted paid fees of \$425, \$825, or \$1,600.⁵²

Compared to the broker fees, the municipal associations' and energy-buying consortiums' annual fees are relatively low. Of course, the suppliers they have selected to serve their members also pay these organizations. Thus, a supplier undoubtedly factors the payment to the organization into the price it offers to the organization's members.

Further, other regional organizations such as educational collaboratives, described in section III(B)(3), charge fees to public awarding authorities each time they want to be included in a group bid. These fees are nominal, sometimes as low as \$150 per bid. Public awarding authorities participating in each bid had the option to move forward with the price offered, or reject it and bid again at a later time or not at all. Notably, educational collaboratives may include a usage-based fee if a supply agreement is ultimately executed using their recommended broker.

Finally, like municipal associations and energy-buying consortiums, regional councils of government, discussed in section III(B)(4), also require their members to pay dues. However, members and non-members alike must pay fees to utilize certain services, including energy services. As explained above, regional councils of government and educational collaboratives differ from municipal associations and energy-buying consortiums because they are public entities. In addition, the for-profit supplier recommended by an education collaborative does not pay a fee to them, and a regional council of governments does not rely on a for-profit supplier at all.

⁵² These figures are based on current 2016 prices. In 2013, prices were slightly lower, but not significantly different.

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Findings

The Office found the following regarding the use of energy brokers and other energy professionals:

I. It has become the norm for public awarding authorities to enter into contracts with energy professionals in which they pay for assistance with the purchase of energy supply for their public facilities.

A. In recent years, hundreds of public awarding authorities in Massachusetts have relied on the expertise of energy brokers (“broker”) or other energy professionals to assist them with the purchase of energy supply for their public facilities.

Understandably, procurement officials within public awarding authorities normally do not have the time or expertise to track prices and recognize trends in the energy markets. Additionally, energy costs have come to make up a significant portion of most non-personnel municipal budgets. As a result, it has become common for public awarding authorities to hire energy professionals to guide them through the process of purchasing energy supply. The Office gathered information from 15 different public awarding authorities across the Commonwealth, all of which used some form of energy professional to help them purchase energy supply for their public facilities.

B. Many public awarding authorities fail to carry out a competitive procurement for hiring energy professionals, including brokers.

Despite the frequency with which public awarding authorities hire energy professionals, there was little evidence that the public awarding authorities contacted used a competitive procurement process to select their energy professionals. Public awarding authorities do not seem to be taking full advantage of the many different kinds of professional energy services and payment models in existence by considering all of the options available to them.

C. There is an abundance of energy professionals licensed in Massachusetts.

There are 395 brokers licensed in Massachusetts to assist public awarding authorities with the purchasing of energy supply and the negotiation of energy supply agreements (“supply agreement”). Of those, 246 are electricity brokers and 149 are natural gas retail agents. Though these brokers are licensed to work in Massachusetts, they come from almost 30 different states. Additionally, in order to be licensed, these brokers only need to have minimal experience and pay a modest \$100 fee each year. Further, they are not required to pass an exam in order to receive a license. Thus, among brokers, there is an extremely wide range of experience and familiarity with the Massachusetts energy industry.

II. A broker's payment is often linked to a public awarding authority's energy usage over the course of the supply agreement, leading to high payments and a failure on the part of public awarding authorities to closely track those payments.

A. The amount a broker is paid is commonly tied exclusively to a public awarding authority's energy usage, and thus, the more energy a public awarding authority uses over the course of a supply agreement, the more it pays its broker.

Typically, a public awarding authority bases the amount it pays exclusively on its energy usage over the course of the supply agreement negotiated by its broker. Therefore, the rate a public awarding authority pays to its energy supplier ("supplier") for the energy itself has no bearing on the amount it pays its broker for negotiating the supply agreement. Thus, two public awarding authorities using the same amount of energy but paying two different rates to their suppliers could still wind up paying the same amount to their brokers for the brokerage services associated with the negotiations of those supply agreements.

B. Larger municipalities tend to pay brokers far more for energy brokerage services than smaller municipalities receiving the same or similar services.

Because larger municipalities often pay brokers at the same usage-based rate (\$0.001 per kilowatt-hour for electricity and \$0.015 per therm for natural gas) as smaller municipalities but use far more energy, they tend to pay far more for brokerage services. When a public awarding authority bases the payment to its broker on usage alone, the larger the municipality is, the more it typically ends up paying its broker. Considering the amount spent on energy and the substantial broker fee at stake, larger public awarding authorities have significant bargaining power to negotiate lower usage-based rates with brokers; although, there is no indication that this has been the practice.

C. Public awarding authorities pay brokers for the duration of any supply agreement the broker helps negotiate, and brokers often encourage public awarding authorities to extend supply agreements several years into the future.

Under a usage-based payment model, public awarding authorities pay brokers for the duration of any supply agreement they have negotiated on behalf of a public awarding authority, even if the public awarding authority chooses to terminate its relationship with the broker partway through the supply agreement. It is in a broker's best financial interest to encourage public awarding authorities to extend supply agreements well into the future (sometimes as far as six years) regardless of whether that is in the public awarding authority's interest.

D. Most public awarding authorities did not maintain detailed, accurate records of payments made to brokers.

If a public awarding authority pays the broker a usage-based fee, typically the supplier embeds that fee in its rate. As a result, the supplier does not list the fee separately on the invoices public awarding authorities receive from suppliers. Thus, the public awarding authorities cannot immediately see what portion of each invoice is for the energy and what portion is paying the broker's usage-based fee. Moreover, the majority of public awarding authorities included in this review did not seem to independently track the amount they paid to brokers. Although a few of the public awarding authorities that provided information for this advisory maintained detailed records of these payments, the majority kept little or no record at all.

E. There is little or no accounting for the brokers' services once the public awarding authority executes the supply agreements.

Most brokers do not charge an hourly rate for their services, nor do they keep track of the hours they spend working on each public awarding authority's account. Public awarding authorities provided very little information describing what the brokers did after the public awarding authority executed the supply agreement. Similarly, none of these public awarding authorities provided documents that tracked how much time the brokers spent working on their account. Nor was there a single instance of a public awarding authority requesting this information from its broker.

III. Many public awarding authorities do not seem to take full advantage of the services that the brokers could provide after the execution of the supply agreement.

A. In addition to assisting public awarding authorities with the purchase of energy supply, most brokers offer on-going services for the duration of any supply agreement they help negotiate.

Many contracts with brokers require the brokers to serve as the public awarding authority's exclusive agent during the entire term of the supply agreement to which their payment is tied. As a public awarding authority's agent, a broker may provide a number of regular services over the course of a supply agreement, including but not limited to, tracking energy market trends, providing periodic reports, setting up new accounts, removing old accounts and resolving billing disputes. Many of these services, including dispute resolution services in particular, have the potential to save a public awarding authority significant time and money. However, based on the information reviewed, the primary service that brokers provide is the resolution of minor billing disputes. Some public awarding authorities may not understand or take advantage of the fact that a broker's contractual obligation to serve as their exclusive agent endures for the length of any supply agreement the broker has negotiated on their behalf.

B. Brokers appeared to be responsive to public awarding authorities' requests for assistance.

Based on the anecdotal evidence gathered by the Office, it appears that the brokers included in the review were responsive to requests for assistance and information, and that some public awarding authorities clearly requested assistance more frequently than others did. Notably, brokers appeared to be more likely to communicate directly with suppliers on behalf of public awarding authorities than the other types of energy professionals reviewed.

IV. Energy-buying consortiums and municipal associations tend to charge one-time, upfront fees rather than usage-based fees that accumulate over the course of the supply agreement; however, they often have contractual agreements with specific suppliers and agree to recommend those suppliers to their members.

A. Unlike brokers, energy-buying consortiums and municipal associations typically do not collect usage-based payments that continue to accumulate for the duration of each supply agreement they help negotiate on behalf of a public awarding authority.

Instead of including the type of usage-based fee brokers charge as a component of the supply agreement, energy-buying consortiums and municipal associations often charge their members one-time dues or fees (which may be based on expected usage) in exchange for the right to use their services and pre-negotiated supply agreements. Thus, a public awarding authority makes an upfront payment to an energy-buying consortium or municipal association, and the fee does not continue to accumulate over the course of the supply agreement as it would with a broker.

B. Energy-buying consortiums and municipal associations receive payments from both the members that use their services and the suppliers they recommend to those members.

Suppliers pay fees to energy-buying consortiums and municipal associations in exchange for recommending those suppliers to their members. However, it appears that energy-buying consortiums and municipal associations do not necessarily disclose those fees to their members. Thus, a public awarding authority may not know how much money an energy-buying consortium or municipal association is receiving from a supplier even though the payment is in part due to the public awarding authority's use of that supplier.

Recommendations

Based upon its review, the Office recommends the following:

I. All public awarding authorities should learn about their specific energy needs to help them determine what type of energy professional is best suited to help them in the purchase of energy supply.

When it comes to hiring a third party to assist with the purchase of energy supply, a public awarding authority has significant bargaining power and a variety of available options. Therefore, it should do its best to learn about its individual load profile and general trends in the energy market before committing to using a specific broker or consultant. Further, since not all energy professionals offer the same services or charge the same rate, all public awarding authorities should: (1) make a detailed assessment of their own energy budget and needs, (2) carry out an open and competitive process to evaluate the energy professionals offering their services, and (3) hire the energy professional that best suits their budget and needs based on the results of the process.

II. Public awarding authorities should use an open and competitive process for hiring any kind of energy professional.⁵³

There is no legal requirement that a public awarding authority use an M.G.L. c. 30B (“Chapter 30B”) procurement process for the hiring of energy professionals. However, using the competitive procedures of Chapter 30B, even for exempt contracts, is a best practice that allows a public awarding authority to obtain the best value through an open, fair process. Fair, robust competition for larger procurements saves money and promotes integrity and public confidence in government.

With nearly 400 brokers currently licensed in Massachusetts, there is no reason public awarding authorities should not take advantage of the number of available energy professionals by carrying out a competitive process each time they are considering hiring one. Failing to do so is a disservice to taxpayers, as it can leave a public awarding authority vulnerable, uninformed, and more likely to renew a contract with the same energy professional, regardless of price or past performance.

⁵³ As the Inspector General’s Chapter 30B manual (at page 16) explains: “To determine whether a cooperative purchasing agreement was procured using ‘full and open competition,’ ask whether the awarding authority took the following five steps: 1. Advertised a procurement solicitation in a relevant publication. 2. Used specific purchase descriptions in the solicitation. 3. Provided for renewed competition. 4. Used a clear rule for award or determination of best value in its solicitation. 5. Used an appropriate comparative evaluation process for choosing vendors.” The complete manual is available at: <http://www.mass.gov/ig/publications/manuals/>.

III. If a public awarding authority does not carry out a competitive procurement process, it should, at a minimum, perform due diligence prior to hiring an energy professional.

Considering the wide array of experience among licensed brokers, public awarding authorities should make an effort to research the background and work history of any broker or energy professional they may hire prior to committing to using their services. This includes contacting past clients, particularly other public clients, for references.

IV. Public awarding authorities should consult with legal and accounting professionals before executing an energy broker or supply agreement.

Because public awarding authorities pay brokers for the duration of each supply agreement they help negotiate, there is a financial incentive for brokers to encourage public awarding authorities to extend supply agreements. As a result, it is critical that a public awarding authority fully understand how any contracts that it is executing will work, what the public awarding authority is getting for its money, and how much it will cost over the entire term of the agreement. Although the broker takes on the responsibility of negotiating the terms of the supply agreement to ensure they are favorable to the public awarding authority, a public awarding authority should always consult with counsel before executing any supply agreement.

V. Public awarding authorities should be aware of and utilize all the services they are paying for in their contracts with brokers or other energy professionals.

The contracts that many public awarding authorities enter into with brokers and other energy professionals contain a number of services beyond assistance with the initial negotiation of a supply agreement, including adding and removing accounts and resolving billing disputes. To get the full value of the broker or energy professional contract, public awarding authorities should rely on their broker or energy professional to act as their agent in all communications with the supplier for the duration of the supply agreement. They should also rely on their broker's expertise to assess their current supply agreements, trends in the energy market, changes in the law, and any other energy-related issues.

VI. Public awarding authorities must evaluate an energy professional's performance before committing to a contract extension with that energy professional.

Unlike most contracts for services, the length of a public awarding authority's contract with a broker is tied directly to the length of another contract – the supply agreement between the public awarding authority and the supplier. This means an extension of a supply agreement often amounts to an automatic extension of the broker contract. Therefore, prior to extending a supply agreement, public awarding authorities must evaluate the performance of the broker they paid to negotiate the original supply agreement.

Public awarding authorities should develop objective criteria to assess the value of the work performed by the broker. If the public awarding authority is satisfied with the broker's

performance over the course of the supply agreement, then the public awarding authority could renew the contract with the broker. Ideally, the original contract with the broker would establish the criteria to evaluate a broker's performance. Even if satisfied, the public awarding authority should consider soliciting offers from other brokers or energy professionals prior to executing an extension.

VII. Public awarding authorities should carefully monitor the amount they pay brokers, and treat it as an expense separate from what they are paying for the energy supply itself.

Public awarding authorities should require their brokers to report regularly the amount the energy supplier paid them along with a breakdown of services they provided. All services performed should be itemized and reported. This disclosure will allow the public awarding authorities to assess whether they are getting good value. Without these reports, a public awarding authority cannot make informed decisions about its future needs for broker services. Most public awarding authorities in the sample could not provide this type of information. A public awarding authority should know the amount of money it is paying to all its vendors, regardless of the way the vendor is paid.

VIII. Public awarding authorities should attempt to negotiate either a flat-fee or an hourly rate with brokers.

Public awarding authorities, particularly larger ones using a great deal of energy, should make an effort to alter the manner in which they pay brokers so that it is not strictly dependent on the amount of energy they use. Specifically, public awarding authorities should avoid paying an energy usage-based fee to brokers. If this is not possible, the public awarding authority should, at the very least, attempt to negotiate a lower usage-based rate for the broker. Even though there is seemingly a standard rate that many public awarding authorities are accustomed to paying, that rate is still negotiable. Another option is to negotiate a cap on the amount a broker can make on any given supply agreement or arrange for the rate to decrease if certain usage thresholds are met.

IX. The Department of Public Utilities should amend its regulations to require suppliers to separate a broker's fee from the negotiated energy supply rate on all invoices sent to public awarding authorities.

The Department of Public Utilities ("DPU") regulates both energy suppliers and energy brokers. The DPU should require that energy suppliers provide public awarding authorities with detailed invoices that separate the amount paid to an energy broker from the overall rate charged for the energy. This would be a marked change, since suppliers currently do not include the broker's payment as a separate item on their invoices to public awarding authorities. The current practice of the supplier embedding the broker fee in the overall rate the public awarding authority pays the supplier is not sufficiently transparent. Suppliers separate out a number of fees and charges already, and therefore, separating this amount would not be unduly burdensome. A clearer presentation of this information would allow public awarding authorities to much more easily verify and track the amount of money it pays to the energy broker.

X. Public awarding authorities should keep a record of the interactions they have with brokers working on their account.

Public awarding authorities should keep their own records detailing all interactions with their brokers and the services that the brokers provided. They should then rely on these records to evaluate the services the broker has provided when considering whether to renew the broker's contract. This information would prove useful to a public awarding authority conducting a competitive procurement for broker services.

XI. Prior to executing a supply agreement with the assistance of an energy-buying consortium or municipal association, a public awarding authority should request that the organizations disclose the fee that their recommended supplier is paying them.

Before paying to become a member of an energy-buying consortium or municipal association, public awarding authorities should request information regarding the fee that energy suppliers are paying to them. Since these organizations are using public funds (the payments that public awarding authorities will make to suppliers) as leverage to secure payments from suppliers, this transparency is necessary to ensure public awarding authorities are spending public dollars in an appropriate and efficient manner.

Conclusion

The Office's review of the relationships between public awarding authorities and the energy professionals they employ has revealed that public awarding authorities can and should be doing more to protect themselves against waste and abuse.

First, though not required by Chapter 30B, public awarding authorities should be carrying out an open and competitive procurement process when hiring an energy professional to assist them with the purchase of energy supply for public facilities.

Second, public awarding authorities should attempt to negotiate the fee they pay any energy professional they choose to use. This could include attempting to negotiate a one-time fee, an hourly rate, or a reduced usage-based rate rather than simply accepting the standard usage-based rate offered by most brokers.

Third, public awarding authorities should keep detailed and accurate records of the amount they are paying brokers over the course of their relationship.

Fourth, public awarding authorities should be aware of all the services offered by the energy professionals they hire and utilize these services when needed.

Fifth, public awarding authorities should develop objective criteria to assess the value and effectiveness of any energy professional hired, so that they can then rely on this information when considering whether to extend their contracts with these professionals.

Indeed, it is often necessary and advisable for public awarding authorities to bring in energy professionals to assist in the process of purchasing energy supply. However, with energy prices rising and the energy market becoming increasingly complex, public awarding authorities have become particularly vulnerable when spending money on energy professionals such as energy brokers, and therefore need to do more to protect against waste and abuse.