



**GREGORY W. SULLIVAN**  
INSPECTOR GENERAL

*The Commonwealth of Massachusetts*  
*Office of the Inspector General*

May 18, 2010

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Dear Mr. Long:

On behalf of your client, the Ralph C. Mahar Regional School District (District), you inquired about the applicability of M.G.L. c.30B to an agreement between an energy broker and the District where the compensation for the broker's services was not paid by the District. Specifically, the District entered into a no-bid agreement with Northeast Energy Partners (NEP), a broker of energy services, who acted as an agent for the District's procurement of electricity ("agency contract"). This Office reviewed the agency contract and has determined that: (1) The contract was subject to M.G.L. c.30B; and (2) an automatic renewal provision in the agency contract violates M.G.L. c.30B, §12(c)(5).<sup>1</sup> It is this Office's opinion that the agency contract is therefore an invalid contract upon which payment may not be made under M.G.L. c.30B, §17(b).<sup>2</sup>

The agency contract, as amended, provides that NEP will act as "agent for [the District] for the procurement of energy supplies." NEP will, as the District's sole and exclusive agent, investigate sources of energy and enter into energy contracts on the District's behalf. Once NEP has signed an agreement with a supplier, the contract is sent to the District for acceptance or rejection. If NEP cannot provide a contract within a specified period, the agency contract automatically terminates. NEP receives no compensation from the District. NEP's compensation is "limited to commissions or other payments received from electricity suppliers in the event that it is successful in arranging

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<sup>1</sup> This opinion is advisory only, and it is not known as to whether a Superior Court Judge would agree

<sup>2</sup> In general, and outside a M.G.L. c.30B context, this office's best practice advice is for governmental bodies to always retain sole discretion in the exercise of options to renew or extend contracts for supplies and services.

electricity supply agreements on behalf of [the District].”

**(1) The contract was subject to M.G.L. c.30B**

M.G.L. c.30B, §2 defines "contract" as “all types of agreements for the procurement or disposal of supplies or services, regardless of what the parties may call the agreement.” Broker contracts, such as the agency contract at issue here, fall within this definition and, even though NEP would be paid by the District’s energy supply company and not the District, such agreements for services must be procured in compliance with M.G.L. c.30B.

The Electricity Restructuring Act (Chapter 164 of the Acts of 1997) exempted energy aggregation contracts, energy contracts, and energy-related services from the competitive procurement requirements of M.G.L. c.30B. The term “energy” is not defined in any applicable statute. However, it is this Office’s opinion that the services that NEP provided to the District are not the type of “energy-related services” that are exempt from M.G.L. c.30B. This office interprets energy-related services to be services that are ancillary to the delivery of energy, such as reactive power and voltage control, loss compensation, and load following. The services of a broker entail facilitating the sale of electricity to customers, rather than the delivery of electricity to them.

M.G.L. c.30B applies to a contract for services when there is an agreement between a governmental body and a vendor. To determine the applicable dollar thresholds you must determine the value of the contract to the vendor; that is, an estimate of how much the vendor will receive to perform the services. In this case, to determine which procurement method would have applied, you would estimate what NEP could have received from electricity suppliers to perform the services over the life of the automatically renewing contract.

The automatically renewing nature of the contract means that even nominal commissions or other payments to NEP by one or more suppliers of electricity to the District could exceed the \$5,000 threshold required for a M.G.L. c.30B quote process. If the value of the contract was \$5,000 or more and no quote or other M.G.L. c.30B process was conducted for the procurement, the agency contract would be invalid.

This office recommends that you check the payment terms between District’s electricity supplier and NEP, as the District may have unknowingly violated M.G.L. c.30B by not obtaining quotes or soliciting advertised competition for the agency contract if NEP received commissions or other payments from the electricity supplier that exceeded \$5,000, or if NEP could obtain commissions or payments that exceed \$5,000 over the unlimited term of the automatically renewing agency contract.

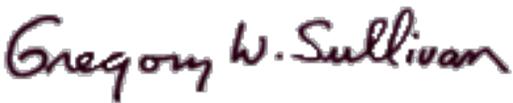
**(2) An automatic renewal provision in the agency contract violates M.G.L. c.30B**

The agency contract contains an automatic renewal provision that violates M.G.L. c.30B, §12(c)(5), which provides in part that where a contract contains an option for renewal, extension, or purchase, the governmental body shall retain sole discretion in exercising the option, and no exercise of an option shall be subject to agreement or acceptance by the vendor. The automatic renewal provision in the agency contract violated that provision of the law because it renewed without affirmative approval by the District. As such, NEP would lack signatory authority to bind the District on any electricity contract, even if the District had procured the services in full compliance

with M.G.L. c.30B.

As you serve as counsel for the Massachusetts Association of School Superintendents, this office seeks your assistance to inform school superintendents about the nature of such broker agreements. As you know, the Inspector General's Office offers a call-in hotline to answer procurement questions of this nature and would be glad to receive calls from your membership. Please feel free to contact me with any questions or concerns.

Sincerely,

A handwritten signature in dark ink that reads "Gregory W. Sullivan". The signature is written in a cursive, slightly slanted style.

Gregory W. Sullivan  
Inspector General

cc: Michael Baldassarre, Superintendent, Ralph C. Mahar Regional School District  
Joan Foster Evans, Senior Counsel, Department of Public Utilities  
Susan DiMare, CFO, Northeast Energy Partners, LLC