

SENATE No. 692

The Commonwealth of Massachusetts

PRESENTED BY:

Harriette L. Chandler

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act relative to the Worcester Housing Authority’s “Buy American Policy”.

PETITION OF:

NAME:

Harriette L. Chandler

DISTRICT/ADDRESS:

First Worcester

SENATE No. 692

By Ms. Chandler, a petition (accompanied by bill, Senate, No. 692) of Harriette L. Chandler for legislation relative to the Worcester Housing Authority's "Buy American Policy". Housing.

[SIMILAR MATTER FILED IN PREVIOUS SESSION
SEE SENATE, NO. 594 OF 2013-2014.]

The Commonwealth of Massachusetts

In the One Hundred and Eighty-Ninth General Court
(2015-2016)

An Act relative to the Worcester Housing Authority’s “Buy American Policy”.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

- 1 SECTION 1. The Worcester Housing Authority finds and declares that:
- 2 (1) the majority of funding received by the Worcester Housing Authority each year
- 3 comes directly from the federal and state governments;
- 4 (2) in an effort to produce the maximum benefit from these tax dollars, the Worcester
- 5 Housing Authority has crafted a "Buy American Policy". Fashioned after the American Recovery
- 6 and Reinvestment Act passed by Congress and signed into law by the President, this policy gives
- 7 a preference to goods and services produced in America; and
- 8 (3) By procuring goods and services made in America, the Worcester Housing Authority
- 9 finds that it is investing in the very businesses and citizens that produced these tax dollars in the
- 10 first place.

11 SECTION 2. Notwithstanding chapter 121B of the General Laws, or any other general or
12 special law to the contrary for the purposes of this act, the following terms, unless the context
13 appears otherwise, shall have the following meanings:-

14 “First preference”, the preference for any item manufactured in the United States.

15 “Foreign source”, any item from outside the United States.

16 “Item” or “Items procured” includes the procuring, purchasing, leasing or renting of: (1)
17 goods, supplies, equipment and materials; (2) construction, maintenance and consulting services;
18 (3) architectural and engineering services; (4) social services; and (5) other services.

19 “Manufactured good”, a good purchased for use by the housing authority or brought to
20 the construction site for incorporation into the building or work that has been processed into a
21 specific form and shape or combined with other raw material to create a material that has
22 different properties than the properties of the individual raw materials.

23 “Manufactured in the United States”, any manufactured item, produced or manufactured
24 in a facility located in the United States that has undergone substantial transformation in the
25 United States.

26 “Prime award recipient”, the vendor, supplier or contractor who is paid directly by the
27 housing authority and in whose name the purchase order, contract, bid or other agreement is
28 executed with the Worcester Housing Authority.

29 “Second preference”, the preference for any item manufactured by a foreign source.

30 “Sub-recipient”, the vendor, supplier or contractor who is paid by the prime award
31 recipient and who has contracted or otherwise agreed to provide the prime award recipient with
32 goods or services.

33 “Substantial transformation”, a new and different article, as a result of manufacturing
34 processes, having a distinct description, character or use, which is different from that originally
35 possessed by the good or material before being subject to the manufacturing process; provided,
36 however, that the mere finishing or modification of a partially or nearly complete foreign product
37 in the United States will not result in the substantial transformation of such product.

38 “United States”, any state in the different parts of the United States, the District of
39 Columbia and the several territories.

40 SECTION 3. Notwithstanding chapter 30B of the general laws, or any other general or
41 special law to the contrary, a purchase order, request for bid, proposal or quotation by the
42 Worcester Housing Authority, shall contain a qualification that items manufactured in the United
43 States shall receive first preference when evaluating a supplier’s submissions, except as noted in
44 section 4 of this Act. If a supplier’s submission contains items not manufactured in the United
45 States, the housing authority shall evaluate the submission by all other criteria stipulated in a
46 second preference category.

47 All first preference submissions to the housing authority shall be evaluated prior to
48 second preference submissions to determine if any of the first preference submissions satisfy the
49 needs of the housing authority and should be considered for award. If none of the first preference
50 submissions satisfy the needs of the housing authority, or if there are no first preference
51 submissions, then the submissions in the second preference category shall be evaluated and

52 considered for award. The purchase of any other items shall be in accordance with this Act;
53 provided, however, that items to be purchased from foreign sources shall be done by exception
54 pursuant to section 4 with the approval of the executive director of the housing authority.

55 SECTION 4. Notwithstanding any general or special law to the contrary, all items
56 purchased for use by the housing authority and 90 per cent of all materials expense associated
57 with any construction or modernization project undertaken by the Worcester Housing Authority
58 shall be items manufactured in the United States; provided, however, that the executive director
59 may, at the executive director's discretion permit items to be purchased from a foreign source
60 pursuant to the following:

61 (1) when the manufactured items are not produced in the United States in sufficient and
62 reasonably available quantities and of a satisfactory quality;

63 (2) when the item is not available in the time frame needed, as determined by the
64 executive director;

65 (3) when the inclusion of American made items will increase the cost of the item or
66 project by

67 more than 20 per cent; or

68 (4) when, after reasonable efforts, no supplier, distributor or provider of a American
69 made product or service submits a qualifying bid or offer.

70 Notwithstanding the provisions of this section, the executive director may deny any
71 award to a foreign source; provided, however, that the executive director substantiates such
72 denial in writing.

73 SECTION 5. Suppliers shall certify in writing that the items were manufactured in the
74 United States in accordance with the terms of this Act. Each non-compliance shall be addressed
75 individually depending on fact specific considerations; provided, however, that the Worcester
76 housing authority shall develop guidelines to ensure consistency.

77 SECTION 6. (a) The award recipient shall be responsible for documenting whether
78 substantial transformation has occurred in the United States. The Worcester Housing Authority
79 shall provide the award recipient with guidelines for the analysis of whether substantial
80 transformation has occurred. Such guidelines shall include, but not be limited to, consideration
81 of the following:

82 (1) whether all of the components of the manufactured good were manufactured in the
83 United States, and all of the components were assembled into the final product in the United
84 States;

85 (2) whether or not there was a change in character or use of the good in the United States;

86 (3) whether there was a change in the physical or chemical properties or characteristics
87 designed to alter the functionality of the good;

88 (4) whether the manufacturing or processing operation results in a change of a product,
89 with one use, into a product with a different use;

90 (5) whether the manufacturing or processing operation results in the narrowing of the
91 range of possible uses of a multi-use product; or

92 (6) whether or not the manufacturing or processing was performed in the United States,
93 including but not limited to assembly, complex and meaningful, taking into account the

94 following whether the process: (i) takes a substantial amount of time; (ii) is costly; (iii) requires a
95 particular high-level skill; (iv) requires a number of different operations; and whether substantial
96 value is added in the process.

97 (b) Substantial transformation shall be documented by a certificate of compliance form as
98 provided by the Worcester Housing Authority.

99 SECTION 7. (a) If a prime award recipient violates any provision of this act, an
100 enforcement action shall be taken against prime award recipient by the housing authority. If a
101 sub-recipient is in non-compliance, any notice or correspondence shall be sent to the prime
102 recipient, as the prime recipient is responsible for ensuring the compliance of its sub-recipients.
103 The award recipient shall report any incident of non-compliance to the chief procurement officer
104 of the housing authority. Non-compliance includes, but is not limited to: (1) an attempt by the
105 award recipient or sub-recipient to comply with the provisions of this act but did so in an
106 improper manner as determined by the chief procurement officer of the housing authority; (2) the
107 award recipient or sub-recipient has been misled by a contractor, vendor or manufacturer; or (3)
108 the award recipient or sub-recipient made no genuine attempt to comply with the provisions of
109 this act.

110 (b) The chief procurement officer of the housing authority may make a finding of
111 noncompliance without pursuing a remedy. Said officer shall document the determination using
112 guidelines set forth by the housing authority and determine which remedy provided for in this
113 section to pursue. The chief procurement officer may, after a determination of noncompliance
114 pursue the following remedies:

115 (1) If the award recipient contends that the item in question is not available from
116 domestic manufacturers, the chief procurement officer may advise the award recipient to submit
117 a non-availability waiver request. Alternatively, if the award recipient contends that the cost of
118 domestic items would increase the total project cost more than 20 per cent, the chief procurement
119 officer may advise the award recipient to submit an unreasonable cost waiver.

120 If the award recipient contends there is a compelling case for exceptions (2) or (4) in
121 section 4, then the chief procurement officer may direct the award recipient to submit their
122 justification for consideration; provided, that, if a waiver is awarded, the housing authority shall
123 notify the award recipient and publish the waiver. If the waiver is denied, the housing authority
124 shall notify all parties and work with the award recipient on how to proceed. While the waiver is
125 being processed, noncompliant items that have been purchased, but not installed, shall not be
126 installed.

127 (2) If noncompliant materials have been procured, but not installed into the project, those
128 items shall not be used. Where the award recipient was misinformed by a manufacturer or
129 distributor; and thus believed the goods were compliant, the housing authority shall attempt to
130 intervene and encourage the vendor, distributor or manufacturer to accept a return of the goods;
131 provided, however, that the award recipient shall be responsible for complying with the
132 provisions of this Act.

133 (3) If the noncompliant materials have been integrated into the project already, the chief
134 procurement officer may contact the award recipient in writing, and request that they be
135 removed.

136 (4) If removal of the noncompliant materials is: (i) impracticable; (ii) cause undue delay;
137 or (iii) otherwise detrimental to the interests of the housing authority, the chief procurement
138 officer, may allow the award recipient to retain the materials in the installation but require the
139 recipient to assume the cost of the noncompliant item. Alternatively, the chief procurement
140 officer may allow the award recipient to retain the materials in the installation and reduce the
141 award value by the cost of the noncompliant materials; provided, however, that the award shall
142 be reduced by the cost of the noncompliant goods only, not the cost of installation labor;
143 provided, further, that the cost of the noncompliant goods shall be determined and the chief
144 procurement officer shall work with the award recipient to determine the cost of the
145 noncompliant goods.

146 (5) The chief procurement officer may withhold further payments to the award recipient,
147 pending remedial action by the award recipient or sub-award recipient as determined by said
148 officer.

149 (6) The chief procurement officer may suspend the entire award, pending remedial action
150 by the award recipient or sub-award recipient.

151 (7) The chief procurement officer may terminate the entire award for serious or egregious
152 noncompliance and failure to remedy that compliance. If the award is terminated, the Worcester
153 housing authority shall allow full credit to the award recipient for the housing authority share of
154 non-cancellable obligations properly incurred by the award recipient prior to the effective date of
155 the termination.

156 (8) Future awards may be restricted or withheld from the award recipient if the
157 organization is selected for funding under future competitive opportunities or through non-

158 competitive means. The Worcester housing authority may consider the organization's past
159 performance record and may, at its discretion, impose controls or mitigation measures on any
160 resulting award or determine the organization's application to be ineligible for funding altogether
161 based on previous noncompliance with this act.

162 (9) The award-recipient may be debarred, which shall render the entity ineligible to
163 receive any Worcester housing authority contracts or subcontracts.

164 SECTION 8. Equipment used for construction or modernization projects by the
165 Worcester Housing Authority shall not be subject to this act; provided, however, that such
166 equipment is not incorporated into the project.

167 SECTION 9. Nothing in this act shall preclude the Worcester Housing Authority from
168 continuing to follow United States Housing and Urban Development department, statutes, rules
169 and regulations for applicable procurement procedures. For the procurement of goods and
170 services for other than the buy American policy, the housing authority shall continue to follow
171 all the Department of Housing and Community Development rules and regulations for
172 procurement procedures applicable.

173 SECTION 10. The Worcester housing authority shall prepare annually a report to the
174 General Court, including such documentation as it deems appropriate, to reflect the results of this
175 act.

176 SECTION 11. This act shall take effect upon its passage and shall expire 3 years
177 thereafter.