

# HOUSE . . . . . No. 3349

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## The Commonwealth of Massachusetts

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PRESENTED BY:

***John P. Fresolo***

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*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".

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PETITION OF:

NAME:	DISTRICT/ADDRESS:	DATE ADDED:
<i>John P. Fresolo</i>	<i>16th Worcester</i>	<i>1/17/2013</i>
<i>John J. Mahoney</i>	<i>13th Worcester</i>	<i>2/1/2013</i>
<i>James J. O'Day</i>	<i>14th Worcester</i>	<i>2/1/2013</i>
<i>John J. Binienda</i>	<i>17th Worcester</i>	<i>1/30/2013</i>
<i>Michael O. Moore</i>	<i>Second Worcester</i>	
<i>Harriette L. Chandler</i>	<i>First Worcester</i>	

# HOUSE . . . . . No. 3349

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By Mr. Fresolo of Worcester, a petition (accompanied by bill, House, No. 3349) of John P. Fresolo and others relative to the procurement policies of the housing authority of the city of Worcester. Housing.

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## The Commonwealth of Massachusetts

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In the Year Two Thousand Thirteen  
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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;

provided, however, that items to be purchased from foreign sources shall be done by exception pursuant to section 4 with the approval of the executive director of the housing authority.

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

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

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

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

more than 20 per cent; or

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

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

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

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

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

(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.

If the award recipient contends there is a compelling case for exceptions (2) or (4) in section 4,

then the chief procurement officer may direct the award recipient to submit their justification for consideration; provided, that, if a waiver is awarded, the housing authority shall notify the award recipient and publish the waiver. If the waiver is denied, the housing authority shall notify all parties and work with the award recipient on how to proceed. While the waiver is being processed, noncompliant items that have been purchased, but not installed, shall not be installed.

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

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

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

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

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

(7) The chief procurement officer may terminate the entire award for serious or egregious noncompliance and failure to remedy that compliance. If the award is terminated, the Worcester housing authority shall allow full credit to the award recipient for the housing authority share of

155 non-cancellable obligations properly incurred by the award recipient prior to the effective date of  
156 the termination.

157 (8) Future awards may be restricted or withheld from the award recipient if the  
158 organization is selected for funding under future competitive opportunities or through non-  
159 competitive means. The Worcester housing authority may consider the organization's past  
160 performance record and may, at its discretion, impose controls or mitigation measures on any  
161 resulting award or determine the organization's application to be ineligible for funding altogether  
162 based on previous noncompliance with this act.

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

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

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

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

177 SECTION 10. This act shall take effect upon its passage and shall expire 3 years  
178 thereafter.