UNITED STATES DEPARTMENT OF COMMERCE
Chief Financial Officer
Assistant Secretary for Administration
Washington, D.C. 20230

MAR 3 2009

PROCUREMENT MEMORANDUM 2009-04

ACTION

MEMORANDUM FOR: **SENIOR BUREAU PROCUREMENT OFFICIALS**
HEADS OF CONTRACTING OFFICES

FROM: Helen Hurcombe
Senior Procurement Executive and
Director for Acquisition Management

SUBJECT: Implementation of American Recovery and Reinvestment Act

Background

The American Recovery and Reinvestment Act (Recovery Act) of 2009 is designed to ensure easily identifiable results through transparent contract award and administration processes. The critical importance of the Recovery Act, and the funds it will make available to stimulate the economy, require heightened attention on acquisitions in order to:

- Mitigate schedule, cost and performance risk;
- Define contract requirements that deliver meaningful and measurable outcomes consistent with agency plans and the goals of the Recovery Act;
- Obtain maximum practicable competition;
- Maximize opportunities for small business to compete for contracts and to participate as subcontractors;
- Use supplies and services provided by nonprofit agencies employing people who are blind or severely disabled as provided in FAR Subpart 8.7;
- Expeditiously award contracts using available streamlining flexibilities;
- Apply sufficient and adequately trained workforce to responsibly plan, evaluate, award, and monitor contracts;
- Ensure an adequate number of qualified government personnel are available to perform inherently governmental functions during the acquisition life-cycle; and
- Provide appropriate oversight at critical decision points.

Acquisition professionals are accountable for responsible disposition of the funding provided by the Recovery Act. Specific processes and reporting requirements, in addition to those currently prescribed by Federal Acquisition Regulation (FAR), must be applied.

Purpose
The purpose of this guidance is to prescribe the requirements for Department of Commerce (DOC) Contracting Officers when planning, awarding and administering contractual actions involving funding provided through the Recovery Act.

Applicability
This guidance applies to all transactions that involve funding provided through the American Recovery and Reinvestment Act of 2009.

Required Actions

- **Acquisition Planning Considerations**
  Contracting Officers shall work closely with requirements officials to ensure that special emphasis is placed on the following considerations during acquisition planning.

  - **Contract Type Selection**
    The objective of contract type selection is to ensure reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance. Contracting Officers shall select contract types that support requirements for meaningful and measurable outcomes consistent with program plans for, and goals of, the Recovery Act.

    To the maximum extent possible, contracts funded under the Recovery Act shall be awarded as fixed-price contracts.

  - **Competition**
    Contracting Officers shall follow the same laws, principles, procedures, and practices in awarding non-competitive contracts with Recovery Act funds as they do with other funds.

    To the maximum extent practicable, contracts using Recovery Act funds shall be awarded using competitive procedures. These procedures include those identified under FAR Subparts 6.1, 6.2, and 16.505(b)(1) and Subsections 8.405-1 and 8.405-2. As appropriate, existing fixed-price contracts that were competitively awarded may be used to obligate funds expeditiously.

  - **Acquisition Objectives and Evaluation Criteria**
    Contracting Officers shall structure acquisitions to result in meaningful and measurable outcomes that are consistent with project plans and that promote the goals of the Recovery Act. The evaluation criteria for award should include those that bear on the measurement and likelihood of achieving these outcomes.

- **Acquisition Flexibilities**
  Contracting Officers are authorized acquisition flexibilities, as appropriate, to avoid unnecessary delays in awarding contracts with Recovery Act funds. Appendix A provides a list of authorized flexibilities. The Recovery Act does not independently trigger use of emergency procurement authorities in FAR Part 18. These authorities are triggered in limited, statutorily identified, circumstances, such as in support of a contingency operation or to facilitate the defense against or recovery from nuclear, biological, chemical, or radiological attack against the United States. Unless one of the circumstances identified in FAR 18.001 exists, the special emergency authorities shall not be used.

- **Interagency Agreements**
  In addition to the requirements of Office of Federal Procurement Policy (OFPP) memorandum entitled *Improving the Management and Use of Interagency* Acquisitions, dated June 6, 2008, when using assisted acquisitions for requirements using Recovery Act funding, interagency agreements must spell out the assignment of agency roles and responsibilities to fulfill the unique requirements of the Recovery Act. These include, but are not limited to, report development and submission, accurate and timely data reporting, and special posting requirements to agency web sites and Recovery.gov.

- **Small Business Participation**
  Contracting Officers shall provide maximum practicable opportunities for small businesses to compete for contracts and to participate as subcontractors. Authorized small business contracting programs may be used.

- **Davis-Bacon Act and Service Contract Act**
  The Davis-Bacon Act and Service Contract Act apply to contract actions using Recovery Act funds. Contracting Officers shall follow the same laws, principles, procedures, and practices in awarding contracts with Recovery Act funds as with other funds.

- **Javits-Wagner-O'Day Act – AbilityOne**
  To maximize participation of Americans who are blind or severely disabled, Contracting Officers must continue to purchase required goods and services on the Procurement List maintained by the Committee for Purchases From People Who Are Blind or Severely Disabled. Contracting Officers are encouraged to pursue additional opportunities to award contracts to AbilityOne sources as authorized by the Javits-Wagner-O'Day Act.

- **Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace**
  Contracting Officers shall comply with the requirements of FAR Part 23 when acquiring supplies and services using Recovery Act funds.

- **Contract Financing and Structuring Contract Deliverables**
  Contracting Officers should give special attention to structuring contract deliverables to promote the economic stimulus goals (including expenditure timeframes) of the Recovery Act. Ensuring consideration of contractor cash flow during acquisition planning will mitigate schedule and performance risks to the government and reduce costs to the contractor.

  Contract financing is not a normal practice in commercial item fixed-price contracting. However, tight credit markets may make it difficult for some contractors to secure the cash flow they need to fund their operations. Increased management and oversight must be provided if government financing is provided to ensure accountability.

  Alternatives to contract financing include structuring contract line items to allow invoicing and payments based on interim and partial deliverables, milestones, percent-of-completion, etc.

- **Pre-solicitation and Award Notices**
  The Recovery Act imposes unique transparency requirements that change the pre-solicitation and award notice process beyond standard practice. Contracting Officers shall follow the following processes for pre-solicitation and award notices that will involve the use of Recovery Act funds.

  - **New Notice**
    When creating a new notice on FedBizOpps (FBO), users are required to identify whether or not the notice is a Recovery Act action. There is a new field on the "Notice Details" form which prompts the user to select either the "yes" or "no" radio button. Appendix C provides a FBO Quick Reference Guide for Recovery Act actions.

  - **Amendment/Modification to Notice**
    If necessary, users can update existing notices on FBO to include Recovery Act designation by creating an amendment/modification to the base notice and editing the "Notice Details" form.

  - **Unique Requirements for Posting of Pre-solicitation Notices**
    Pre-solicitation notices must be posted on FBO in accordance with FAR Part 5 including applicable dollar thresholds. Under the Recovery Act, pre-solicitation notices are required for any order, meeting the

FAR Part 5 dollar thresholds, under a task or delivery order contract, including Governmentwide Acquisition Contracts (GWACs), multi-agency contracts, and General Services Administration (GSA) Federal Supply Schedule contracts. The pre-solicitation notices shall be posted in FBO for information purposes only (i.e., the requirement of FAR Subpart 5.203 do not apply). Contracting Officers should continue to also use their usual solicitation practice (e.g., e-Buy).

To facilitate transparency and ensure consistency in tracking notices for Recovery Act funds, Contracting Officers shall use the following special formatting requirements:

- All pre-solicitation notices must include the word "Recovery" as the first word in the *Title* field in FBO preceding the actual title.

- Pre-solicitation notices for delivery and task orders must also include the following statement in the *Description* field preceding the actual description:

"THIS NOTICE IS PROVIDED FOR INFORMATION PURPOSES ONLY. THIS OPPORTUNITY IS AVAILABLE ONLY TO CONTRACTORS UNDER [*contracting officer inserts program name. For example: GSA Schedule 03FAC, COMMITS, Navy's SEAPORT-E.]*

➢ **Unique Requirements for Announcing Contract Awards**
Contract award notices shall be posted at FBO in accordance with FAR Part 5, including all task and delivery orders. To facilitate transparency and ensure consistency in tracking award announcements for Recovery Act funds, Contracting Officers shall use the following special formatting requirement:

- All award announcements must include the word "Recovery" as the first word in the *Title* field in FBO preceding the actual title.

▪ **Responsibility Determinations**
Contracting Officers shall place special emphasis on responsibility determinations and pre-award surveys as required by FAR Part 9. Contracting Officers shall review the Excluded Parties List before determining that a prospective contractor is responsible in awarding contracts with Recovery Act funds. When an acquisition poses unique risks, Contracting Officers should use special responsibility standards to mitigate that risk. If sufficient information to make a determination of responsibility is not available, a pre-award survey should be requested unless the contract will be fixed-price at or below the simplified acquisition threshold or will involve the acquisition of commercial items.

- **Special Contract Requirements**
  The Recovery Act establishes several special contract requirements for contractor reporting, Buy American Act, and General Accountability Office and Office of Inspector General access to contractor records. FAR cases are currently in process that will accommodate these requirements.

  Pending implementation of these requirements in the FAR, the below model contract language shall be used in solicitations issued and contracts awarded with Recovery Act funds.

  - **Recovery Act Reporting**
    Recovery Act reports shall be identified as specific contract deliverables and the Contracting Officer shall ensure contract payments are contingent upon contractor meeting the reporting requirements.

    This reporting requirement applies to the prime non-Federal contractor of Federal funding, and subcontracts made by the prime contractor. It does not require each subsequent subcontractor to also report.

    Prescription: Insert the following in all solicitations and contracts funded in whole or in part with Recovery Act funds. Insert in any existing contract or order that will involve funding provided through the American Recovery and Reinvestment Act of 2009.

    Recovery Act – Reporting Requirements
    Not later than 10 days after the end of each calendar quarter, starting July 10, 2009, the contractor shall submit a report to the Contracting Officer that contains:
    (1) The total amount of recovery funds received from the agency;
    (2) The amount of recovery funds received that were expended or obligated to projects or activities. This reporting will also include unobligated allotment balances to facilitate reconciliations;
    (3) A detailed list of all projects or activities for which recovery funds were expended or obligated, including—
        a. The name of the project or activity;
        b. A description of the project or activity;
        c. An evaluation of the completion status of the project or activity;
        d. An estimate of the number of jobs created and the number of jobs retained by the project or activity; and
        e. For infrastructure investments made by State and local government, the purpose, total cost, and rationale of the agency for funding the infrastructure investment with funds

made available under the Recovery Act, and name of the person to contact at the agency if there are concerns with the infrastructure investment.

(4) Detailed information on any subcontracts awarded by the contractor to include the data elements required to comply with the Federal Funding Accountability and Transparency Act of 2006 (Public Law 109-282), allowing aggregate reporting on awards below $25,000 or to individuals, as prescribed by the Director of the Office of Management and Budget.

(5) Recovery Act funds can be used in conjunction with other funding as necessary to complete projects, however, tracking and reporting shall be separate to meet the reporting requirements of the Recovery Act.

(6) The contractor shall include this requirement in any subcontracts.

➢ **Inspector General Reviews**

Prescription: Insert the following in all solicitations and contracts funded in whole or in part with Recovery Act funds. Insert in any existing contract or order that will involve funding provided through the American Recovery and Reinvestment Act of 2009.

Access of Offices of Inspector General to Certain Records and Employees

(1) This contract is awarded with funds made available in the American Recovery and Reinvestment Act (Recovery Act). Any inspector general of a Federal department or executive agency shall review, as appropriate, any concerns raised by the public about specific investments using funds made available in the Recovery Act. Any findings of such reviews not related to an ongoing criminal proceeding shall be relayed immediately to the head of the department or agency concerned. In addition, the findings of such reviews, along with any audits conducted by any inspector general of funds made available in the Recovery Act, shall be posted on the inspector general's website and linked to the website established by section 1526 of the Recovery Act, except that portions of reports may be redacted to the extent the portions would disclose information that is protected from public disclosure under sections 522 and 522a of Title 5, United States Code.

(2) Any representative of an appropriate inspector general appointed under section 3 or 8G of the Inspector General Act of 1978 (5 U.S.C. App.), is authorized –

(a) to examine any records of the contractor , any of its subcontractors, or any State or local agency administering such contract, that pertain to, and involve transactions relating to, the contract, or subcontract; and

(b) to interview any officer or employee of the contractor or agency regarding such transaction.

➢ **Government Accountability Office Reviews**

Prescription: Insert the following in all solicitations and contracts funded in whole or in part with Recovery Act funds. Insert in any existing contract or order that will involve funding provided through the American Recovery and Reinvestment Act of 2009.

Access of Government Accountability Office
The Comptroller General and his representatives are authorized—
(a) to examine any records of the contractor or any of its subcontractors, or any State or local agency administering such contract, that directly pertain to, and involve transactions relating to, the contract or subcontract; and
(b) to interview any officer or employee of the contractor or any of its subcontractors, or of any State of local government agency administering the contract, regarding such transaction.

➢ **Use of American Iron, Steel, and Manufactured Goods**

Prescription: Insert the following in all solicitations and contracts for construction, alteration, maintenance, or repair of public building or public work which involve funding provided through the American Recovery and Reinvestment Act of 2009.

Use of American Iron, Steel, and Manufactured Goods
This contract is awarded with funds made available in the American Recovery and Reinvestment Act (Recovery Act). None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States.

▪ **Federal Procurement Data System (FPDS) Requirements**
When entering data in FPDS on any action (including modifications) funded by the Recovery Act, Contracting Officers shall enter the Treasury Account Symbol (TAS) in the *Description of Requirement* field. Contracting Officers shall coordinate with their budget/finance offices to identify the applicable TAS code.

The TAS code should be entered with TAS:: preceding the code and ::TAS following the code. The code itself should have spaces between the

segments, i.e., Agency code (2 characters) would be entered followed by a space then the Account code (4 characters) followed by a space and then the Subaccount code (3 characters), if applicable. The entry would appear as follows:

TAS::XX XXXX XXX::TAS

Standard data validation practices shall be used to assure the accuracy of contracting data, including data on contracts awarded under the Recovery Act. Bureau Procurement Officials shall conduct monthly data validation and verification of 100% of actions awarded with Recovery Act funds. Data validation and verification certifications shall be provided to the Senior Procurement Executive by the 5th of each month, beginning April 5, 2009.

- **Obligations Funded by both Recovery and Non-recovery Funds**
  For obligations that are funded by both recovery and non-recovery funds, Contracting Officers shall record each line of accounting in financial systems and contract writing systems separately.

- **Documentation**
  Contracting Officers shall place special emphasis on file documentation policies and procedures prescribed in FAR Part 4. Proper documentation shall be maintained for each contract award.

- **Oversight**
  Special attention should be given to maintaining strong internal controls over Recovery Act program funds. The high risk associated with the award and expenditure of Recovery Act program funds merit increased oversight. Therefore, Senior Bureau Procurement Officials shall provide for appropriate oversight of contracts to ensure outcomes that are consistent with and measurable against project plans and goals under the Recovery Act. Bureau Procurement Officials shall ensure the appointment of qualified Contracting Officers, Contracting Officer Representatives (CORs) and Program Managers with certification levels appropriate for the complexity of the Recovery Act projects.

  In addition, Bureau Procurement Officials shall actively monitor contracts to ensure that performance, cost, and schedule goals are being met, including:

  - Ensuring that incentive and award fees are effectively administered;
  - Implementing quality assurance procedures established for the contract;
  - Documenting timely inspection and acceptance of deliverables;

- Promptly using all available tools to identify and remedy deficiencies related to contractor performance, cost, and schedule (e.g., Quality Assurance Surveillance Plans, cure notices, show cause letters); and
- Completing timely contractor performance evaluations that accurately reflect the contractor's actual performance, supported by appropriate documentation.

- **Reporting Requirements**
  The Recovery Act imposes unique transparency requirements that require additional information collection and dissemination beyond standard practice.

  - **Contracts, Orders, and Modifications Exceeding $500,000**
    For each contract or order (or modification to an existing contract or order) over $500,000, Contracting Officers shall provide a summary of the contract or order (or modification to an existing contract or order), including a description of the required products and services, which will be made available publicly and linked to Recovery.gov.

  - **Actions that are not Fixed-price and Competitively Awarded**
    A summary of any contract or order (or modification to an existing contract or order), including a description of the required products and services, using Recovery Act funds shall be posted in a special section of the Recovery.gov web site unless the contract or order is both fixed-price and competitively awarded. This includes non-competitive set-asides under section 8(a) of the Small Business Act. Appendix B provides a summary of posting requirements.

  - **Actions under $25,000, Payments to Individuals, Administrative Funding, and Purchase Card Transactions**
    Current reporting under the Federal Funding Accountability and Transparency Act only requires information above $25,000 to be reported to USASpending.gov. The Recovery Act requires reporting on all funding, though it does allow for reporting of aggregates for amounts under $25,000.

    Beginning May 5, 2009, amounts under $25,000, payments to individuals, administrative funding, and other amounts not currently reported to USASpending.gov shall be entered into FPDS using a single vendor name from a list to be provided by the Office of Management and Budget (OMB) in future guidance.

    Purchase card transactions will be addressed by OMB in subsequent guidance as well. Pending issuance of OMB guidance, the purchase card **shall not** be used for actions involving Recovery Act funds.

If you have any questions, please contact Lori Donovan at ldonovan@doc.gov or (202) 482-1716.

cc: Acquisition Community
Acquisition Council

Appendix A – Acquisition Flexibilities

Generally Available Acquisition Flexibilities
A Quick Reference

Small Dollar Acquisitions under the Simplified Acquisition Threshold (SAT) ($3,000 to $100,000)

- Various flexibilities are provided in connection with publicizing – e.g., an oral solicitation may be efficient for actions up to $30,000 & other actions for which there is an exception to notice; response time may be less than 30 days provided a response time is reasonable (FAR 5.101, 5.202, 5.203, 13.106-1).

Acquisitions under the test program for commercial items ($100,000 to $5,500,000)

- Acquisition generally may be treated like a purchase under the SAT, with certain exceptions (see FAR Subpart 13.501)

Commercial Item Acquisitions (over $5,500,000)

- FAR Part 12 policies & procedures apply, including optional streamline procedures for evaluation and solicitation.
- Wait period after notice & before issuance of solicitation may be reduced (FAR 5.203(a)).
- Based on circumstances, the contracting officer may allow for fewer than 30 day response time for receipt of offers (FAR 12.205, 5.203(b)).

Non-commercial item acquisitions (over $100,000)

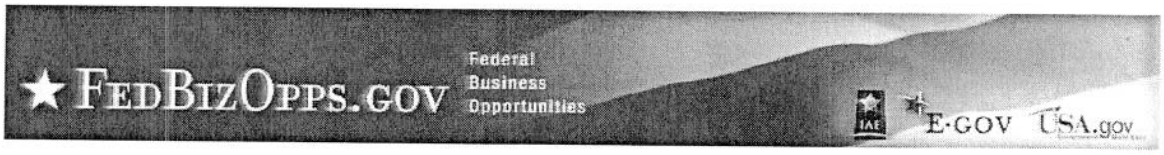
- Some acquisitions of non-commercial items may qualify to use FAR Part 12 (FAR 12.102(f) & (g)).
- Offerors may be allowed to give oral presentation. (FAR 15.102).

Appendix B – Posting on Special Section of Recovery.gov

Posting of Notice/Summary on Special Section

	Description of Contract Action	Posting on Special Section of Recovery.gov
(1)	A contract is competitively awarded and is fixed price	Not Required
(2)	A contract is awarded that is not fixed-price	Required
(3)	A contract is awarded without competition	Required
(4)	An order is issued under a new and existing single award IDIQ contract	Required if order is made under a contract described in (2) or (3)
(5)	An order is issued under a new or existing multiple award IDIQ contract	Required if one or both of the following conditions exist: I. the order is not fixed-price II. the order is awarded pursuant to an exception to the competition requirements applicable to the underlying vehicle (e.g., award is made pursuant to an exception to the fair opportunity process)
(6)	A modification is issued	Required if modification is made: I. to a contract described in (2) or (3) above; or II. to an order requiring posting as described in (4) or (5) above
(7)	A contract or order is awarded pursuant to a small business contracting authority (e.g., SBA's section 8(a) program)	Required if one or both of the following conditions exist: I. the contract or order is not fixed-price II. the contract or order was not awarded using competition (e.g., a non-competitive 8(a) award)

Appendix C



FBO Quick Reference Guide

Recovery and Reinvestment Act Actions

2/27/2009

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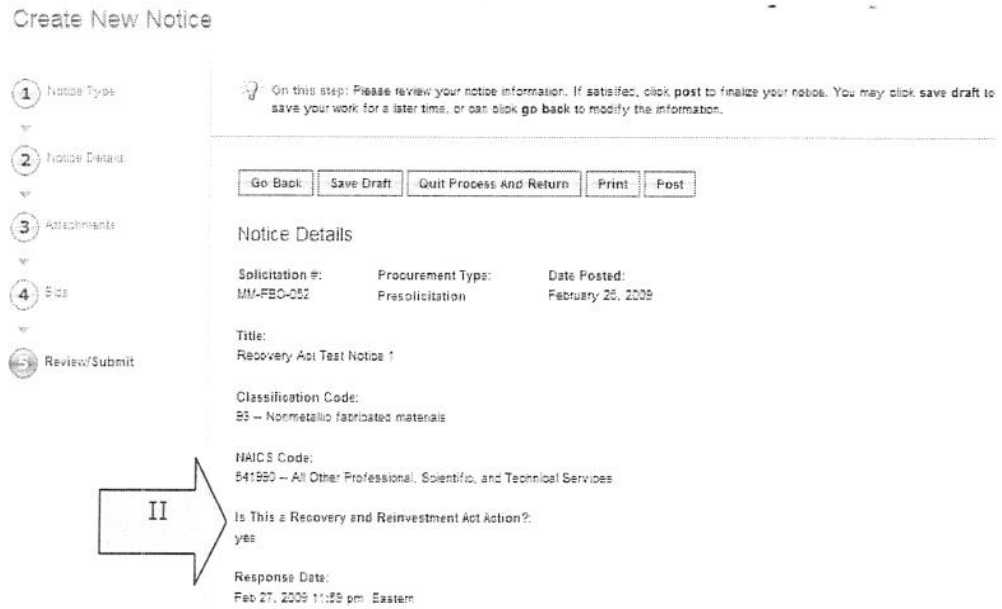
1 Recovery and Reinvestment Act Actions

1.1 New Notice

I. When creating a new notice, users will be required to identify whether or not the notice is a Recovery and Reinvestment Act action. There will be a new field on the "Notice Details" form (Step 2) located below the "NAICS Code" field which will prompt the user to select either the "yes" or "no" radio button.

II. The Recovery Act designation (yes or no) will be displayed on the "Notice Details" page during the "Review/Submit" step.



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1.2 Amendment / Modification

I. If necessary, users can update existing notices to include the Recovery and Reinvestment Act designation (yes or no) by creating an amendment/modification to the base notice and editing the notice details form.

II. When creating an amendment/modification to a base notice that already has the Recovery and Reinvestment Act designation, the system will pre-populate the field with the original selection (yes or no); however, users can change this setting if necessary.

1.3 Electronic Interface

I. The electronic interface will recognize if user submissions have "Recovery" as the first word in the title (<SUBJECT> tag within the template) for a notice. If so, the notice will automatically be flagged as a "Recovery and Reinvestment Act" action.

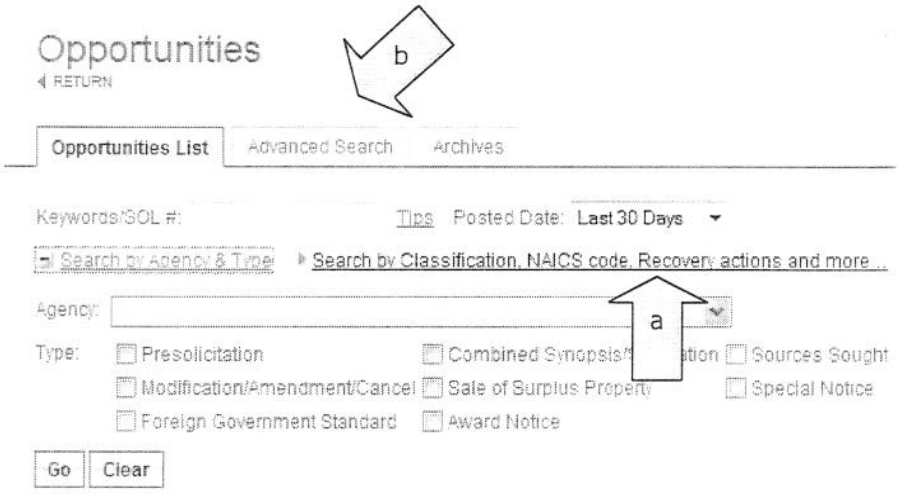
II. Note: "Recovery" **must** be the first word and spelled exactly; letter case will not affect the process.

1.4 Vendor Interface

I. A new search filter will be available for vendors to locate opportunities flagged as a Recovery and Reinvestment Act action by the buyer.

a. The new search filter is accessible within the "Opportunities List" tab by clicking on the "Search by Classification, NAICS code, Recovery actions and more..." link located below the "Keywords/SOL#" search field;

b. Vendor users can also access the new search filter by going directly to the "Advanced Search" tab.



c. The new search field is located at the bottom of the form below the "NAICS Code" search field.

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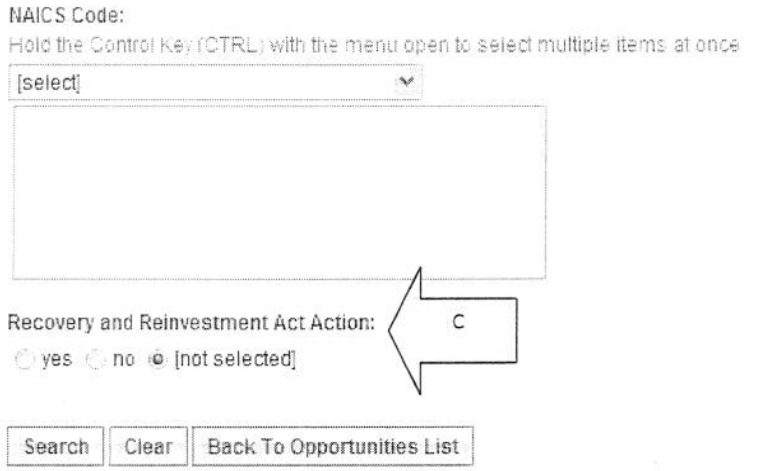
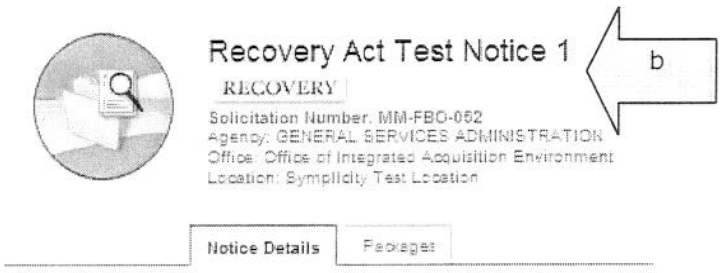


II. If the buyer activated the "Recovery and Reinvestment Act" flag for a notice, the system will display an icon in the following two places:
   a. Next to the notice title within the "Opportunities List" tab;

   b. Under the notice title found in the heading of a notice once the vendor opens the "Notice Details" tab.



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