Commercial Software Licensing

CHAPTER 14:

Ordering Off DoD ESI BPAs

Prepared by DoD ESI | September 2012

Chapter Overview

- Authorized users – Who can order?

    – All DoD components.

    – Ordering is de-centralized.

    – GSA.

    – Authorized contractors.

    – SmartBUY—all federal agencies.

- The Commercial-Off-The-Shelf (COTS) software ordering process.

- Impact of brand selection on the COTS ordering process.

- Considerations for single-product vs. multiple-product scenarios.

Chapter Overview (cont.)

- The Software Buyer's Checklist.

- Inventory, Enterprise Licenses (ELs) and ESI Agreements.

- Ordering Guide overview.

- COTS software license framework for BPA-based orders.

- Discussion Guide.

Authorized Users—Who Can Order?

DoD ESI Agreements are open for ordering by all DoD Components, including:
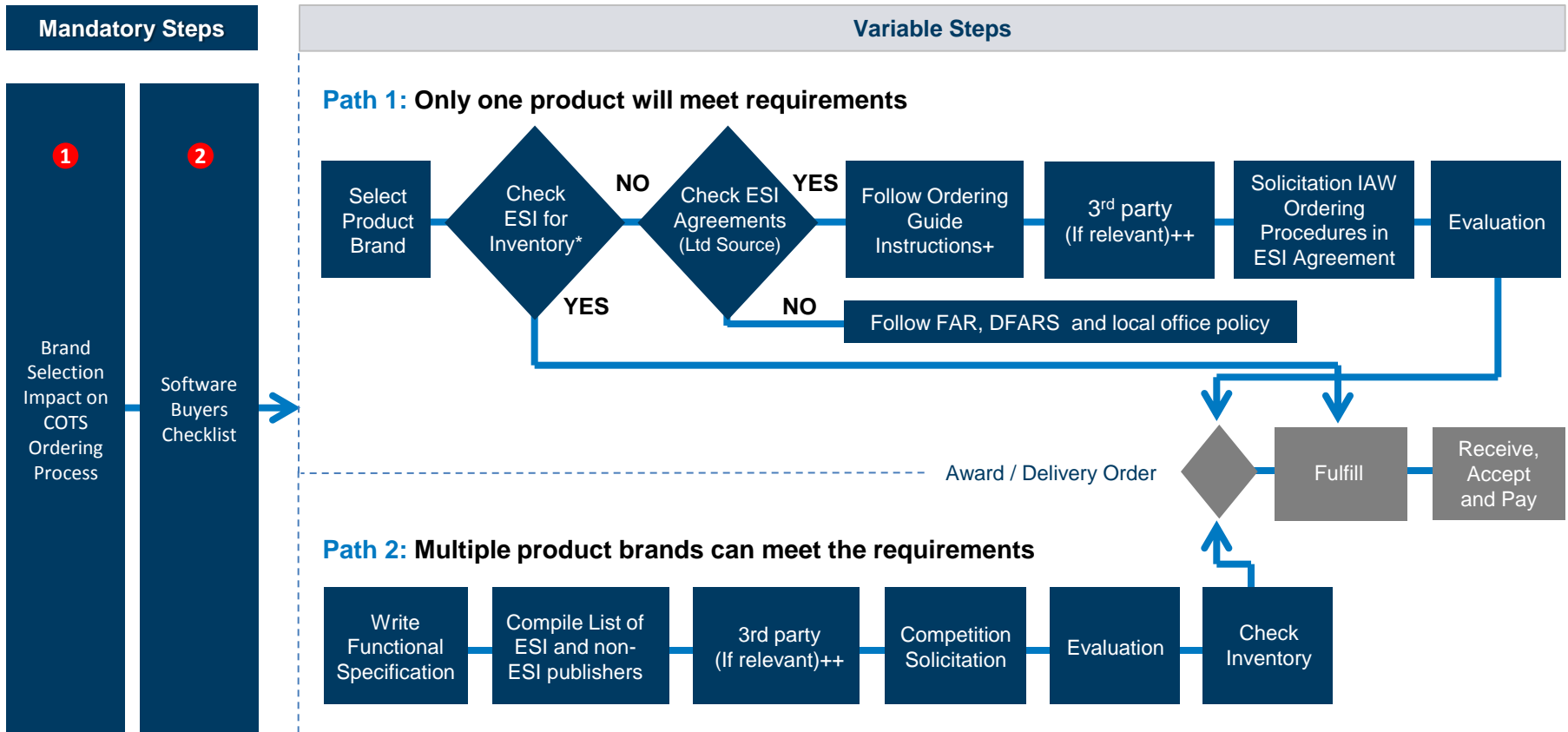
- Office of the Secretary of Defense (OSD).
- Military Departments.
- Chairman of the Joint Chiefs of Staff.
- Unified Combatant Commands.
- Inspector General of the Department of Defense (DoD IG).
- Defense Agencies.

- DoD Field Activities.
- U.S. Coast Guard.
- Intelligence Community.
- NATO *(if authorized under the specific BPA).*
- Foreign Military Sales (FMS) with a Letter of Authorization *(if authorized under specific BPA).*
- Authorized Defense Contractors.

- Ordering is decentralized, prepared by a Govt. Ordering Officer *(a duly warranted KO)*.

- GSA *(& others)* authorized to order under BPA on behalf of DoD *(meet DFARS 208.7400)*.

- Authorized government contractors may order as authorized by KO (FAR 51/DFARS 251).

- For ESI Agreements designated "SmartBUY", all federal government agencies may order.

COTS Software Ordering Process

Overview of a Typical Order Process—always refer to FAR and DFARS

Mandatory Steps

Variable Steps

1 **2**

Brand Selection Impact on COTS Ordering Process

Software Buyers Checklist

Path 1: Only one product will meet requirements

Select Product Brand → Check ESI for Inventory* — NO → Check ESI Agreements (Ltd Source) — YES → Follow Ordering Guide Instructions+ → 3rd party (If relevant)++ → Solicitation IAW Ordering Procedures in ESI Agreement → Evaluation

Check ESI for Inventory* — YES ↓

Check ESI Agreements (Ltd Source) — NO → Follow FAR, DFARS and local office policy

Award / Delivery Order ◆ → Fulfill → Receive, Accept and Pay

Path 2: Multiple product brands can meet the requirements

Write Functional Specification → Compile List of ESI and non-ESI publishers → 3rd party (If relevant)++ → Competition Solicitation → Evaluation → Check Inventory

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1 There are two basic paths that can be taken. See Brand Selection Impact on COTS Ordering Process.

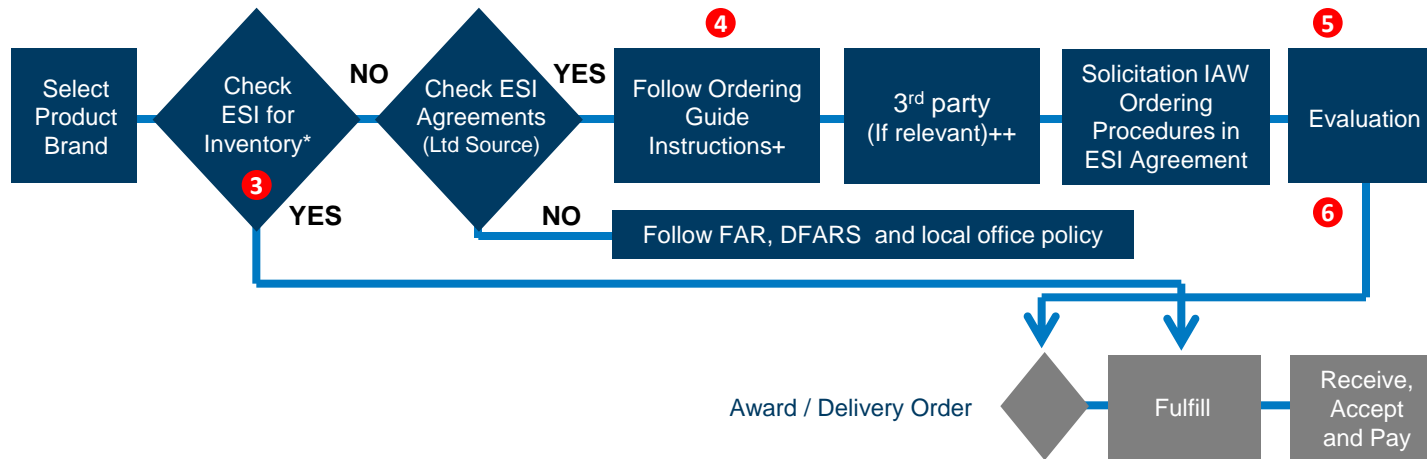**2** See Software Buyer's Checklist Slide.

End with Discussion Guide

COTS Software Ordering Process

Path 1: Only one product will meet requirements (overview)

❸ See Inventory and Enterprise Licenses.

❹ See Ordering Guide Overview.

❺ See COTS Software License Framework.

❻ See Software Buyer's Checklist.

*Refer to FAR 8.002 and DFARS 208.002 for order of precedence for use of Govt. supply sources.

+ Must also determine if a brand name or limited source justification is required.
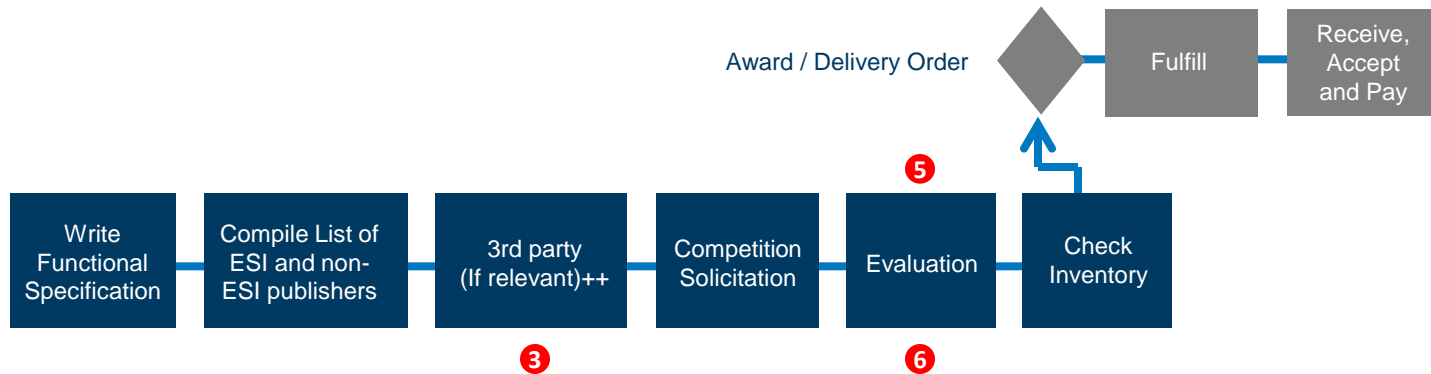
+ + If a 3rd party contractor is authorized to order on behalf of the government, the 3rd party would execute the remainder of this process beginning at this step.

End with Discussion Guide

COTS Software Ordering Process

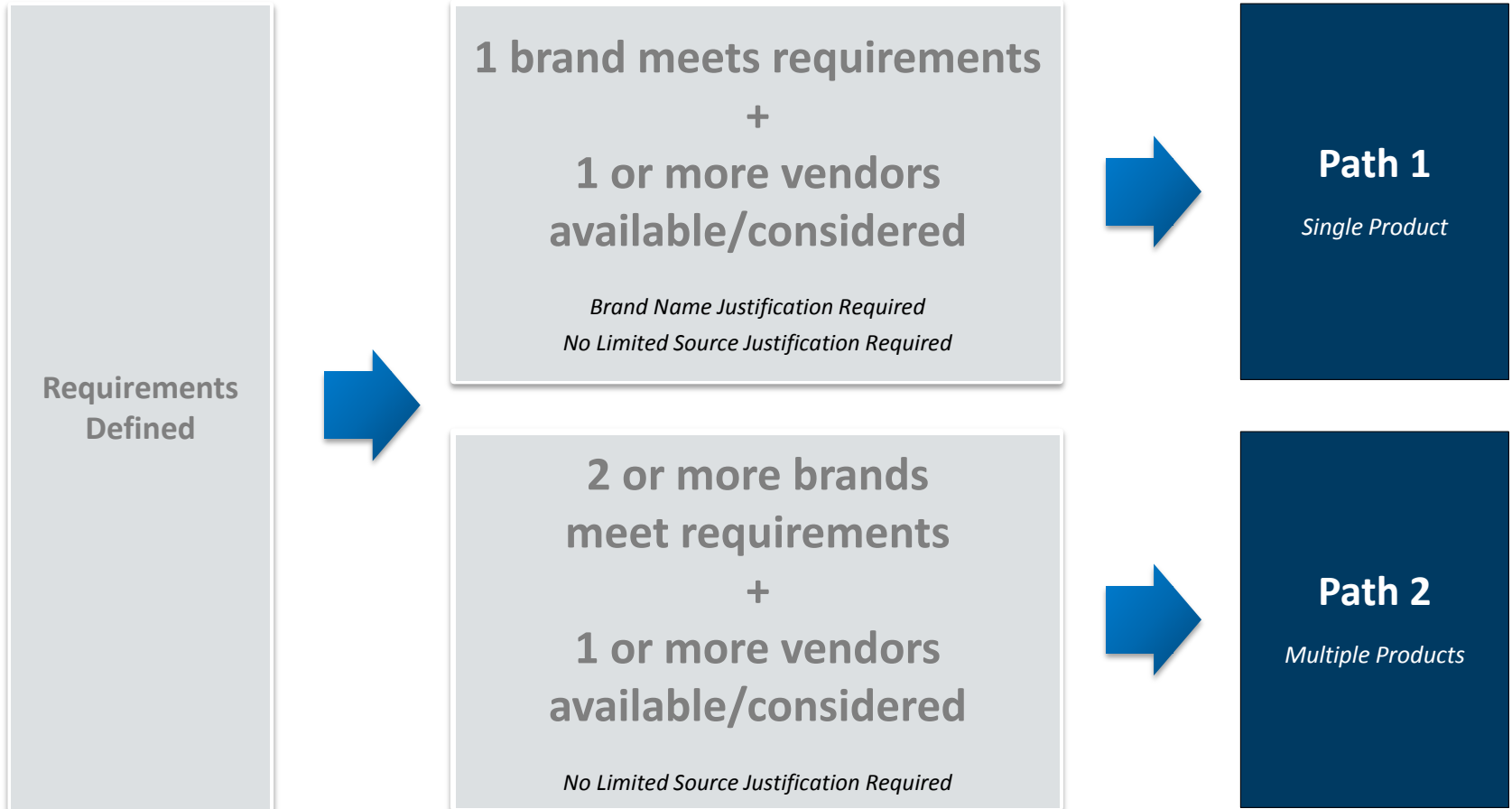**Path 2**: Multiple product brands can meet the requirements (overview)

Award / Delivery Order

Fulfill

Receive, Accept and Pay

Write Functional Specification → Compile List of ESI and non-ESI publishers → 3rd party (If relevant)++ ❸ → Competition Solicitation → Evaluation ❺ → Check Inventory ❻

❸ See Inventory and Enterprise Licenses.

❹ Not necessary to review Competition/Solicitation in Ordering Guide Overview.

❺ See COTS Software License Framework.

❻ See Software Buyer's Checklist.

End with Discussion Guide

Brand Selection Impact on COTS Order Process

Refer to Example of Brand Selection Impact (example)

Requirements Defined

1 brand meets requirements
+
1 or more vendors available/considered

Brand Name Justification Required
No Limited Source Justification Required

Path 1

Single Product

2 or more brands meet requirements
+
1 or more vendors available/considered

No Limited Source Justification Required

Path 2

Multiple Products

Considerations for Single vs. Multiple Products

Refer Back to Software Ordering Process [(overview)](#)

- If only one product *(brand)* will satisfy requirements, the requiring office must prepare a "Limited Source Justification" or "Justification and Approval."

- If multiple products *(brands)* will satisfy requirements, the requiring office must identify minimum functionality needed and basis for product selection.

- The BPA and Ordering Guide explain the ordering process:
  - Ordering office is still required to comply with FAR, DFARS and all local procurement regulations.
  - Need to know which regulations have been addressed in the BPA and which ones need to be addressed at the order level. *(e.g. "The Adobe BPAs were awarded non-competitively against GSA schedule. It is the responsibility of the Ordering Officer to ensure compliance with all fiscal laws prior to issuing an order under a BPA, and to ensure that the vendor selected represents the best value for the requirement being ordered.(see FAR 8.404)*

Software Buyer's Checklist

Refer Back to Software Ordering Process (overview) (single) (multiple)

- Software Buyer's Checklist is a comprehensive *(but not exhaustive)* list of items to consider before placing orders against ESI BPAs.

- The Checklist does not replace Procurement Office guidance. (Example)

- In summary, the Checklist covers the following topics:
  - Requirements determination.
  - Pricing.
  - Software maintenance.
  - License terms and conditions.
  - Regulations and policy guidance.

- Each subsection lists items to guide Software Buyers through key considerations. *(e.g. "Do market research" under Requirements Determination.)*

- Each item in Checklist also has rationale/guidance explaining how to execute.

Software Buyer's Checklist

☑ Checklist Item	Guidance / Rationale
☐ **Do Market Research**	Gather market information for the commercial software products or solutions that can satisfy your requirements.
☐ **Competitive or Sole Source**	Has your market research identified just one product or many that can meet your requirements?
☐ Technical Evaluation	If multiple products will satisfy the requirements, identify the minimum functionality needed and the basis for selection of the product.
☐ Brand Name Justification	If only one brand name product will satisfy the requirements, a Limited Source Justification or Justification and Approval document must be prepared to comprehensively explain the rationale.
☐ **Consider the Order of Precedence**	Once the COTS product solution has been determined, become familiar with the vehicles pertinent to COTS software acquisition and potential sources of existing inventory that can be leveraged.
	FAR 8.002 and DFARS 208.002 regulations specify an order of precedence for use of Government supply sources
☐ Government Supply Sources	The sources most pertinent to software acquisitions are listed below.
☐ Inventory	Check to see if "DoD Inventory Exists" at www.esi.mil.
☐ ESI/SmartBUY Agreements	Check if there is an ESI agreement for the required product. See DFARS 208.74 and DoDI 5000.2 Check if there is a DoD SmartBUY agreement for the required product. See DoD policy memo of December 22, 2005
☐ GSA Schedule	See www.gsa.gov and www.gsaadvantage.gov
☐ Other Existing Contracts	If the required product is on an existing contract, review the applicable ordering procedures specified in the contract.
☐ Open Market	

http://www.esi.mil/LandingZone.aspx?id=110&zid=3

Inventory, ELs & ESI License Agreements

Refer Back to Software Ordering Process (overview) (single) (multiple)

- As listed in Software Buyer's Checklist, FAR 8.002 and DFARS 208.002 regulations specify order of precedence for use of Govt. supply sources.

- Sources most pertinent to software acquisitions are:
  - Check to see if "DoD Inventory Exists" at the DoD ESI Web site. (Example Army CHESS)
  - Check if there is an ESI agreement for the required product.
    - *See DFARS 208.74 and DoDI 5000.2.*
  - Check if DoD SmartBUY agreement exists for the required product.
    - *See DoD policy memo of December 22, 2005.*
      (Found here: http://www.esi.mil/download.aspx?id=463)
    - *See www.gsa.gov and www.gsaadvantage.gov.*
  - If the required product is on an existing agreement, review the applicable ordering procedures specified in the agreement.

- ***Each user organization is responsible for maintaining audits of existing software inventory. Software inventory processes should be consistent across DoD components and accurate records should be mandatory.***

Ordering Guide Overview

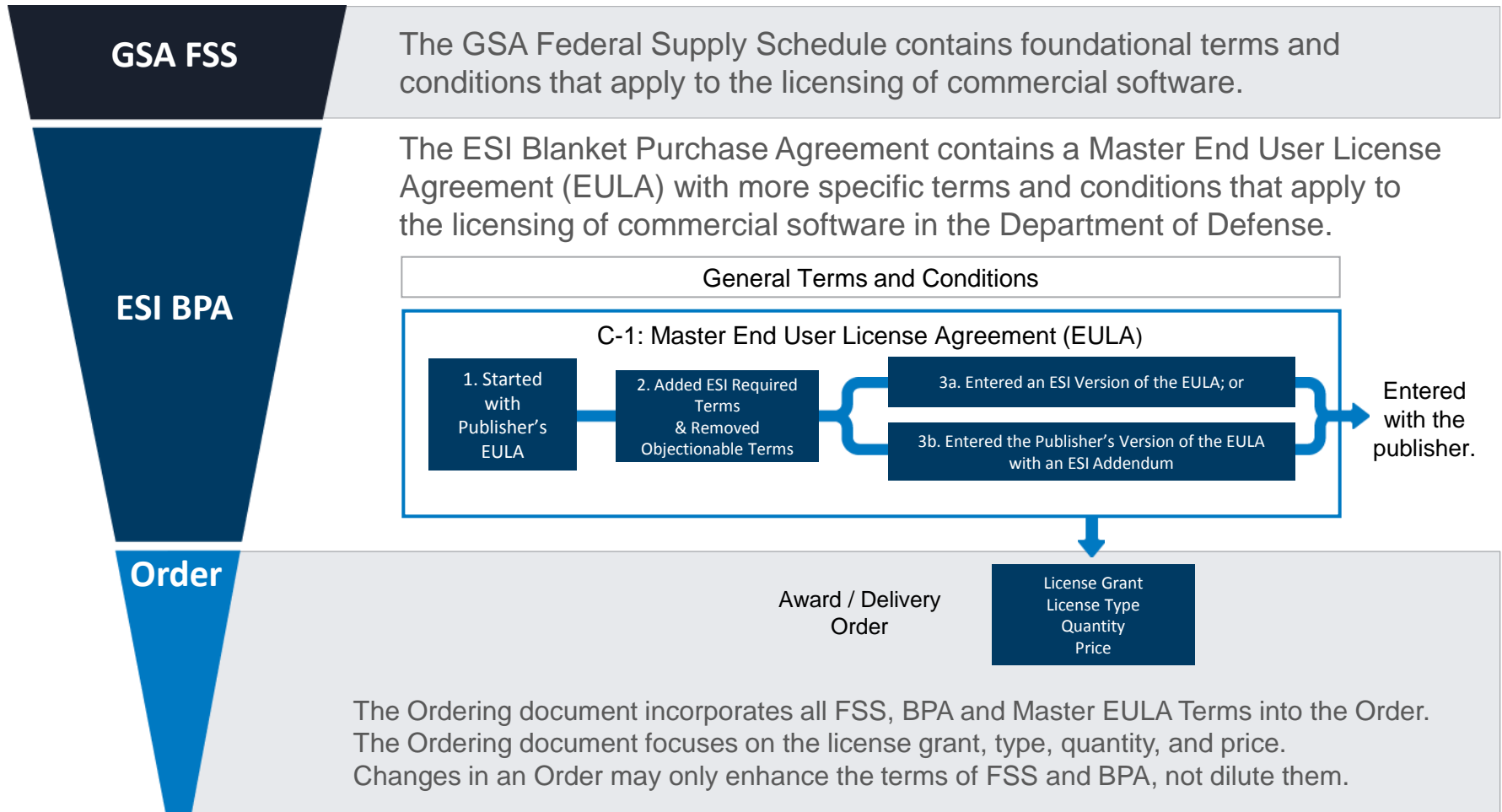Refer Back to Software Ordering Process (overview) (single) (multiple)

- In addition to Software Buyer's Checklist for general ordering processes, each BPA includes an Ordering Guide unique to that BPA.

- While some topics in Software Buyer's Checklist overlap with contents of the BPA Ordering Guide, items in the Ordering Guide are more specific to that BPA—and some items are not in the Checklist.

- Examples of Ordering Guide items unique to the BPA include:
  - Government points of contact (POCs).
  - Contractor/vendor information.
  - SPM information.
  - Summary of products on BPA.

- End users should read the complete BPA, including the Ordering Guide, as a preliminary step to conducting program market research--and to become familiar with the specific ordering process and requirements.

- Ordering officers should refer to the BPA Ordering Guide for specific instructions about how to place orders.

COTS Software License Framework

For BPA-based Orders [(overview)](#) [(single)](#) [(multiple)](#)

The following chart summarizes the three key components of the structure utilized by DoD ESI to execute an ESI COTS software license:

GSA FSS

The GSA Federal Supply Schedule contains foundational terms and conditions that apply to the licensing of commercial software.

ESI BPA

The ESI Blanket Purchase Agreement contains a Master End User License Agreement (EULA) with more specific terms and conditions that apply to the licensing of commercial software in the Department of Defense.

General Terms and Conditions

C-1: Master End User License Agreement (EULA)

1. Started with Publisher's EULA

2. Added ESI Required Terms & Removed Objectionable Terms

3a. Entered an ESI Version of the EULA; or

3b. Entered the Publisher's Version of the EULA with an ESI Addendum

Entered with the publisher.

Order

Award / Delivery Order

License Grant
License Type
Quantity
Price

The Ordering document incorporates all FSS, BPA and Master EULA Terms into the Order.
The Ordering document focuses on the license grant, type, quantity, and price.
Changes in an Order may only enhance the terms of FSS and BPA, not dilute them.

Discussion Guide

Name and discuss the entities authorized to order software under ESI BPAs.

Review and discuss the contents of the Software Buyer's Checklist.

Compare and contrast the COTS software ordering process when only one product can satisfy the user requirements vs. multiple brands.

Explain the difference between single-brand and multiple-brand sourcing and the impact of single-seller vs. multiple-seller scenarios in each case.

Discuss the value and challenges involved in maintaining and referring to software inventory records when placing new orders for software.

Explain how the BPA Ordering Guide is used and how it is different from the Software Buyer's Checklist.

Describe and discuss the relationships among GSA, BPA, and Order Ts & Cs.