TWELFTH PARLIAMENT |FOURTH SESSION
THE SENATE

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08/09/2020

Approved
8/9/2020

From: **Director, Committee Services**

Date': **8th September, 2020**

SUBJECT: APPROVAL FOR TABLING OF THE REPORT OF THE AD HOC COMMITTEE ON MANAGED EQUIPMENT SERVICES (MES)

The Adhoc Committee on Managed Equipment Services (MES) has finalized and unanimously adopted its report.

This is to forward the said report for processing and approval for Tabling. Given the huge volume of annexures that is proving impossible to attach on the report, we request that this be availed via flash disk to the Director, DLPS for uploading on devices for reference by Senators.

Njuguna S.N.

REPUBLIC OF KENYA



THE SENATE
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THE SENATE

TWELFTH PARLIAMENT— FOURTH SESSION

8/9/2020

REPORT OF THE INVESTIGATION OF THE MANAGED EQUIPMENT SERVICES

BY THE

AD-HOC COMMITTEE TO INVESTIGATE THE MANAGED EQUIPMENT SERVICES

PAPERS LAID
DATE 8/9/2020
TABLED BY Chairperson, Ad-hoc Committee on Managed Equipment Services
COMMITTEE
AT THE TABLE Hon. Mwollo

Clerk's Chambers,
First Floor,
Parliament Buildings,
NAIROBI.

8TH SEPTEMBER, 2020

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PREFACE

Mr. Speaker Sir,

Honourable Senators will recall that on 19th September, 2019, the Senate adopted a Motion and resolved to establish the *Ad-Hoc* Committee to Investigate the Managed Equipment Services (MES) Project. The Committee was mandated to investigate and establish the facts surrounding the leasing of specialized medical equipment in the then 119 beneficiary hospitals countrywide, including:

(1) Whether County Governments were involved in prioritizing the medical equipment in accordance with their needs;

(2) The details of the companies from which the equipment was leased;

(3) The viability and benefit of leasing versus outright purchase;

(4) The availability of adequate numbers of health human resource to provide specialized health services as envisaged in this project;

(5) The operation, training and maintenance facilities in place for the equipment;

(6) The terms and period of the lease of each piece of equipment, where the equipment was supplied, the lease amount, and who bears the cost of the residual value of the equipment at the end of the lease term;

(7) The schedule of equipment supplied to each hospital, and the cost thereof, including proof that the monies disbursed were utilized for the intended purpose; and

(8) The results of the exercise, considering that the terms of the contract end in 2022, when equipment has remained unused in some counties despite the county having paid annually for the installation, maintenance and utilization of the same since 2015.

The Motion as amended is attached as **annexure I.**

Mr. Speaker Sir,

The following Senators were appointed to serve in the Committee —

1. Sen. Dullo Fatuma Adan, CBS, M.P. — Member
2. Sen. Moses Wetang'ula, EGH, M.P. — Member
3. Sen. Mary Seneta, M.P. — Member
4. Sen. Paul Githiomi Mwangi, M.P. — Member
5. Sen. (Dr.) Christopher Langat, M.P. — Member
6. Sen. Stewart Madzayo, CBS, M.P. — Member

7. Sen. Judith Pareno, M.P. — Member
8. Sen. Millicent Omanga, M.P. — Member
9. Sen. Enoch Wambua, M.P. — Member

The Senate, in exercising its oversight function, established the *Ad-Hoc* Committee to investigate and establish the facts surrounding the leasing of the Medical Equipment in the said one hundred and nineteen (119) beneficiary hospitals countrywide.

Mr. Speaker Sir,

Following its establishment, the *Ad-Hoc* Committee held its first meeting on Wednesday 25th September, 2019. Pursuant to standing order 193 of the Senate Standing Orders, the Clerk of the Senate conducted the election for the positions of Chairperson and Vice-Chairperson. Senator Fatuma Dullo, MP and Senator Moses Wetang'ula, MP were elected to the positions of Chairperson and Vice-Chairperson of the Committee, respectively.

Mr. Speaker Sir,

Article 125 of the Constitution empowers both House of Parliament, and any of its committees, to summon any person to appear before it for the purpose of giving evidence or providing information. Article 125(2) of the Constitution further empowers a House of Parliament: to enforce attendance of witnesses and examine them on oath, affirmation or otherwise; to compel the production of documents; and to issue a commission or request to examine witnesses abroad. The Committee in fulfilling its mandate was therefore guided by the Constitution, the Parliamentary Powers and Privileges Act, 2017, the Public Finance Management Act, 2012, the Public Procurement and Asset Disposals Act, 2015 and the Senate Standing Orders, among others.

Mr. Speaker Sir,

The *Ad-hoc* Committee wishes to thank the Offices of the Speaker of the Senate and the Clerk of the Senate for the support extended to the *Ad-Hoc* Committee in the execution of its mandate. Special thanks go to the Senate Leadership including the Senate Majority Leader and the Senator Minority Leader for the support given to the Committee in fulfilling its mandate. The Committee is further grateful to all Senators who by several Senate Resolutions, extended the mandate of the Committee to enable the Committee finalise its work. The Committee is especially grateful for the support given during the Committee meetings, site visits and all public engagements. The Committee further extends its appreciation to the various institutions and members of the public

who either appeared before it or sent written memoranda to make their submissions. The *Ad-hoc* Committee also appreciates the media for the coverage of its proceedings during the course of investigations. Finally, the *Ad-hoc* Committee appreciates the support of the secretariat who assisted and facilitated the preparation of this Report.

Mr. Speaker.

It is now my pleasant duty and privilege, on behalf of the *Ad-Hoc* Committee, to present and commend to the Senate, pursuant to Standing Order 213, the Report of the *Ad-hoc* Committee to Investigate the Managed Equipment Services, for consideration by the Senate.

SIGNED ..... 

8TH SEPTEMBER, 2020

SEN. DULLO FATUMA ADAN, CBS, M.P.
CHAIRPERSON, *AD-HOC* COMMITTEE TO INVESTIGATE THE MANAGED EQUIPMENT SERVICES

LIST OF ABBREVIATIONS AND ACRONYMS

AG& DOJ	—	Office of the Attorney-General and Department of Justice
CARA	—	County Allocation of Revenue Act
CEC	—	County Executive Committee Member
COB	—	Office of Controller of Budget
COG	—	Council of Governors
CS	—	Cabinet Secretary
CSSD	—	Central Sterile Services Department
DCI	—	Directorate of Criminal Investigations
FDA	—	Funder Direct Agreement
FY	—	Financial Year
GCC	—	General Conditions of Contract
GOK	—	Government of Kenya
HCIT	—	Health Care Information Technology
HDU	—	High Dependency Unit
ICU	—	Intensive Care Unit
IKM	—	Iseme, Kamau and Maema Advocates
JOOTRH	—	Jaramogi Oginga Odinga Teaching and Referral Hospital
KEBS	—	Kenya Bureau Services
KEMSA	—	Kenya Medical Supplies Agency
KMTC	—	Kenya Medical Training College
LoS	—	Letter of Support
M&E	—	Monitoring and Evaluation
MES	—	Managed Equipment Services
MESIC	—	Managed Equipment Services Implementation Committee
MoH	—	Ministry of Health

MOU	—	Memorandum of Understanding
MTRH	—	Moi Teaching and Referral Hospital
OAG	—	Office of the Auditor-General
PPB	—	Pharmacy and Poisons Board
PPP	—	Public Private Partnership
PS	—	Principal Secretary
PSC	—	Public Sector Comparator
SST	—	Seven Seas Technologies

EXECUTIVE SUMMARY

Soon after the 2013 elections at the formative stages of devolution, the Ministry of Health sought to implement an ambitious programme to increase the range and quality of health services offered by public health institutions by equipping level 4 and 5 health facilities with modern and specialized diagnostic equipment through a Public private partnership (PPP) initiative. By a letter *Ref. MOH/DP/16/1/7/12* dated 20th September, 2013, the CS Health informed the forty seven (47) County Governors that the Ministry of Health was in consultation with the National Treasury and was negotiating with two (2) reputable multinational companies who had expressed interest to place or lease medical equipment in the health facilities as lessors.

On 22nd January, 2014, the Public Private Partnership Technical Sub-committee considered and approved a Ministry of Health concept paper titled "*Leasing of Equipment and Infrastructure Improvement in Public Health Facilities under Public Private Partnership*". According to the PPP Technical Sub- committee, the project was to be a build lease transfer where the private party finances and installs the equipment, private party leases completed facilities to the GoK/ MoH for 7 -10 years and facilities automatically reverent to the Government of Kenya at the end of the lease period. In this arrangement each county would be expected to pay Kshs thirty-one (31) million per annum.

However, despite the approval, on 9th June, 2014, the Ministry of Health invited sealed tenders from original equipment manufacturers. The advertisement provided in part that *The government has in the 2014 2015 financial year made budgetary provision to the ministry of health to be applied towards the enhancement of 94 county and sub County referral health facilities (otherwise known as level 4 and level 5 hospitals respectively) in all the 47 counties in Kenya...the Ministry of health now invites sealed tenders from original equipment manufacturers who can also undertake managed equipment service. This will involve supply, installation, testing, maintenance, repair, replacement and associated training for county and subcounty health facilities as indicated in the table below: Lot 1 Theatre Equipment; Lot 2 Theatre, CSSD Equipment, Lot 3 Laboratory Equipment (Category 1)* (clinical medicine, hematology, virology and immunology)*; Lot 4 Laboratory Equipment (Category 2)* (microbiology, clinical chemistry, histology)*; Lot 5 Renal Equipment; Lot 6 ICU Equipment; and Lot 7 Radiology Equipment.* The tender closed on 8th July

2014. It was again advertised on 11th July 2014 in the same terms and the bid closed on 8th August, 2014.

The Managed Equipment Service (MES) is a flexible and specialised partnership with a private sector service provider, to provide access to innovative medical technology and equipment. A MES manages all equipment concerns throughout the entire contract life time, including ownership, provision, purchase, installation and commissioning, user training and asset management, maintenance and ongoing replacement.

After these events, through a letter *Ref. No. MOH/MI/4/10/2/(49)* dated 22nd June, 2015, the Principal Secretary health wrote to the Principal Secretary National Treasury stating in part that *...based on the findings of the pre-feasibility study report, and to optimally benefit from the projects while also considering the time frame constraints, the Ministry opted to pursue and implement this project using Managements of Equipment and Services (MES) Scheme. The MES process is being implemented using alternative procurement mechanisms and is now at an advanced stage.*

The tenders were eventually awarded to: Shenzhen Mindray Bio-Medical Electronics Co. Ltd to deliver Lot 1; Esteem Industries Inc. to deliver Lot 2; M/S Sysmex Europe GMBH to deliver Lot 3; Bellco S.R.L Ltd to deliver Lot 5, Philips Medical Systems Nederland BV to deliver Lot 6; and GE East Africa Services Limited to deliver Lot 7.

Some of the challenges encountered during the implementation of the MES project include:

(a) value for money could not be guaranteed given the inefficiencies of the procurement processes, and the absence of minutes of Inspection and Acceptance Committee(s);

(b) lack of a project sustainability strategy beyond the seven-year contract period;

(c) lack of the requisite specialized personnel to run the equipment. This resulted in non-utilization of some of the equipment;

(d) lack of the requisite infrastructure to absorb the equipment in some counties. Affected counties incurred unexpected costs of developing the necessary infrastructure to accommodate the new equipment despite having neither planned nor budgeted for it. This resulted in delays in implementing the project;

(e) high operational costs particularly with regard to consumables and reagents;

(f) binding lease terms that required quarterly payments despite equipment not being functional in many facilities; and

(g) further, the MES contract was varied under unclear circumstances in the FY 2018/2019.

Due to the foregoing challenges and the complaints raised from various quarters in regard to the MES project, the Senate, pursuant to article 94 and 96 of the Constitution, and in exercise of its oversight mandate, resolved to establish the *Ad-Hoc* Committee to investigate and establish the facts surrounding the leasing of the medical equipment in one hundred and nineteen (119) beneficiary hospitals countrywide. The Ad-Hoc Committee was specifically mandated to establish-

(a) whether county governments were involved in prioritizing the medical equipment in accordance with their needs;
(b) the details of the companies from which the equipment was leased;
(c) the viability and benefit of leasing versus outright purchase;
(d) the availability of adequate numbers of health human resource to provide specialized health services as envisaged in this project;
(e) the operation, training and maintenance facilities in place for the equipment;
(f) the terms and period of the lease of each piece of equipment, where the equipment was supplied, the lease amount, and who bears the cost of the residual value of the equipment at the end of the lease term;
(g) the schedule of equipment supplied to each hospital, and the cost thereof, including proof that the monies disbursed were utilized for the intended purpose; and,
(h) the results of the exercise, considering that the terms of the contract end in 2022, when equipment has remained unused in some counties despite the county having paid annually for the installation, maintenance and utilization of the same since 2015; and submit a report to the House within forty-five (45) days.

In the course of the investigations of the Committee established inter alia that—

(a) that the Managed Equipment Services (MES) project was a public interest project that was intended to benefit the public by achieving the Constitutional right to the highest attainable standard of health outlined in Article 43(1)(a) of the Constitution. However, the persons involved in the conceptualization and the implementation of the project from start to finish carried out the project in an irregular and illegal manner that completely violated the very Constitution and the sacred principles that the project was originally conceived under.

(b) As a matter of fact, the Committee has established that the MES project was a criminal enterprise shrouded in opaque procurement processes and that the Ministry of Health relied on a faulty tool (public sector comparator) to justify a predetermined outcome in relation to the award of tenders that likely resulted in imprudent use of public finances contrary to Article 201 of the Constitution and section 197 of the Public Finance Management Act that forbids wasteful expenditure.

(c) that the MEs project is the only project where conditional grants meant for county governments and appropriated under the County Allocation of Revenue Acts are unconstitutionally paid directly to the Ministry of Health instead of being deposited in the respective County Revenue Funds contrary to Article 207 of the Constitution.

(d) that some of the equipment in the MES project was either overpriced, or substandard, or delivered late, or undelivered and thus the full positive effect of the MES project has not been felt by the people of Kenya.

(e) that despite the Ministry of Health carrying out a needs assessment, which confirmed that counties lacked adequate capacity to absorb the equipment, the Ministry of Health still went ahead to procure medical equipment for counties fully aware that the same equipment would not be optimally used. The Committee therefore concluded that the procurements were done so to advance adverse private commercial interests that were supply driven rather than need driven at the expense of the Kenyan public.

(f) despite the fact that the county governments were not fully involved in the conceptualisation and implementation of the MES project, the county governors were still duty bound to take every reasonable measures to ensure that the equipment was operationalised for the benefit of the people they represent. However, according to the evidence before the Committee, some county governors had in contravention of Article 73 of the Constitution violated public trust by abandoning the equipment to a state disuse by failing to either construct the necessary facilities, or to ensure the availability of the required quality or quantity of electrical power and water to ensure utililisation of the equipment.

(g) that officers of the Ministry of Health continuously undermined the role of the Attorney General as the principal legal adviser to the government by concealing material facts and disregarding the Attorney General's advise.

As a result of the foregoing, the Committee recommends as follows —

(1) that EACC and DCI investigate the circumstances surrounding the awarding and implementation of the MES Contracts;

(2) that all public officers found culpable of irregularities and illegalities committed in the furtherance of the adverse commercial interests which were at the expense of the people of the Kenya be prosecuted to the full extent of the law and be barred from holding public office;

(3) that all private entities and persons found culpable of participating in the irregular and illegal acts of the liable public officers adversely mentioned in this report be investigated by the relevant investigatory authorities;

(4) the Office of the Auditor-General to expeditiously undertake a comprehensive forensic audit of the Managed Equipment Service Project. In particular, the comprehensive forensic audit should address the following aspects of the MES project—

(a) the total cost incurred in the MES project from conceptualization to date, including any future financial costs that are pending in the project;

(b) the total amount of deductions made per county to date;

(c) establish under which vote in the Ministry of Health, funds for the MES project deducted from counties by the National Treasury are deposited;

(d) establish which parties in the MES project were paid, the amount they were paid and the reasons for payment;

(e) establish the roles played by the National Treasury; the Office of Controller of Budget; and the Ministry of Health in the payment processes of the MES Project and determine all irregularities and illegalities in relation to the payments;

(f) establish the whereabouts of the monies deducted from counties for purposes of payment for Lot 3 and Lot 4; the HCIT contract; and the ICU equipment for Meru Level 5 which is still lying in Netherlands.

CHAPTER ONE
INTRODUCTION

1.1 Establishment of the *Ad-Hoc* Committee

The Senate, in exercise of its oversight mandate resolved to establish the *Ad-Hoc* Committee to Investigate the Managed Equipment Services (MES) Project. The Committee was mandated to investigate and establish the facts surrounding the leasing of the Medical Equipment, in the then one hundred and nineteen (119) beneficiary hospitals country wide.

The Committee was specifically mandated to investigate and establish—

(1) whether county governments were involved in prioritizing the medical equipment in accordance with their needs;

(2) the details of the companies from which the equipment was leased;

(3) the viability and benefit of leasing versus outright purchase;

(4) the availability of adequate numbers of health human resource to provide specialized health services as envisaged in this project;

(5) the operation, training and maintenance facilities in place for the equipment;

(6) the terms and period of the lease of each piece of equipment, where the equipment was supplied, the lease amount, and who bears the cost of the residual value of the equipment at the end of the lease term;

(7) the schedule of equipment supplied to each hospital, and the cost thereof, including proof that the monies disbursed were utilized for the intended purpose; and,

(8) the results of the exercise, considering that the terms of the contract end in 2022, when equipment has remained unused in some counties despite the county having paid annually for the installation, maintenance and utilization of the same since 2015;

and submit a report to the House within forty-five (45) days.

1.2 Background to the Medical Equipment Services (MES) Project

The Ministry of Health in its submission to the *Ad Hoc* Committee, forwarded a concept paper titled "Leasing of Equipment and Infrastructure Improvement in Public Health Facilities under Public Private Partnership". According to the concept note, the Ministry of Health was to support and undertake a comprehensive development of health facility across the country. The project was aimed at equipping health facilities with modern and specialized diagnostic equipment. The concept note is attached as **annexure II**.

Soon after the 2013 elections that ushered in the devolved system of government and during the formative stages of devolution, the Ministry of Health, by a letter *Ref. MOH/DP/16/1/7/12* dated 20th September, 2013, informed the forty seven (47) County Governors of a proposal by the Ministry of Health (MoH) to train personnel, and equip Level 4 and 5 hospitals in the counties through a Public Private Partnership (PPP). According to the letter, the PPP initiative would involve the MoH, the National Treasury (NT) and two (2) reputable multinational companies. The letter is attached as **annexure III**.

By a letter *Ref. MOH/MI/4/10/2/(49)* dated 22nd June, 2015, from the Ministry of Health to the National Treasury, the Ministry of Health informed the National Treasury that the Ministry had opted to pursue the Equipment Lease and Health Infrastructure Development using the Management of Equipment and Services (MES) scheme. In that letter, the Ministry of Health stated that between 2012 and 2014, the Ministry had submitted to the National Treasury concept notes on Equipment Lease and Health Infrastructure Development targeting level 4 and 5 hospitals in each county as well as Oxygen Generation Plants in selected hospitals for implementation under Public Private Partnership (PPP) arrangements. The letter is attached as **annexure IV**.

Under the proposed PPP initiative, the multinational companies were to place/lease medical equipment in the county health facilities under an operating lease agreement. The National Government through the MoH was the Principal Agent, the two (2) multinational companies were the lessors, and county governments were the lessees with specific budgetary obligations.

In order to identify the needs of the counties under the MES model, the MoH conducted a preliminary needs assessment. From the preliminary needs' assessment, medical equipment under the MES project was prioritized and categorized under seven Lots as follows: (1) theatre; (2) theatre and Central Sterile Services Department (CSSD); (3) & (4) laboratory; (5) renal; (6) ICU; and, (7) radiology equipment. The Preliminary National Assessment Report is attached as **annexure V.**

It's important to note that the two (2) multinational companies, that is, Philips Medical Systems Nederland B.V and General Electric East Africa Ltd, successfully bid for the supply of ICU and radiology equipment, respectively, under the new MES procurement model. The combined contract value of the ICU and Radiology equipment (Lots 6 and 7) was USD 275,771,678.00 (or

Kshs. 27,852,939,500.00 at an exchange rate of Kshs. 101 to 1 USD). This was equivalent to at least sixty percent (60%) of the total contract value of the MES project.

1.2.1 Intergovernmental Arrangements Pertaining to the MES Project

Health service delivery is a devolved function under the Fourth Schedule to the Constitution. In order to implement the MES project, on diverse dates in 2015, the MoH executed Memoranda of Understanding (MOUs) with 46 out of the 47 County Governments. A number of counties stated that they executed the MOUs with the MoH under duress. For example, in the case of Kakamega County, the Kakamega Governor when he appeared before the *Ad Hoc* Committee stated that the National Government deployed provincial administration machinery to intimidate and blackmail the County Government into signing the MOU. Indeed, equipment under the project is reported to have been supplied, installed and commissioned even in the absence of an MOU, the most notable example being Bomet County.

The MOUs did not meet the requirements of a written intergovernmental agreements as required by Article 96, Article 187 of the Constitution, and sections 25 and 26 of the Intergovernmental Relations Act, 2012. The MOUs were standard across all the counties and did not take into account specific county needs.

1.2.2. Understanding the Managed Equipment Services Project

A Managed Equipment Services (MES) refer to flexible, long-term contractual arrangements that involve outsourcing the provision of specialized, modern medical technology and equipment to private sector service providers ("MES Providers"). MES projects typically provide procuring entities with access to up-to-date technology, modern health infrastructure, equipment and/or services over an agreed period. A key advantage of MES arrangements is that they provide an opportunity for long-term, sustainable budgeting by spreading costs over a period of time, and avoiding huge capital outlays.

In the Kenyan model, the MoH, through an international open tender advertised in July 2014, invited original equipment manufacturers to supply, install, train users, and provide maintenance, repair and replacement services for specialized equipment over a contract duration of seven (7) years, with the possibility of an extension for an additional three (3) years. Contracts under the

MES project were signed on 5th February, 2015 by the MoH and respective MES service providers.

The MES project was first provided for in the FY 2013/2014 budget estimates as an item on 'Feasibility Study'. In subsequent financial years, the project has been captured as 'Lease of Equipment' in the budget estimates of the MoH. In the initial three years of the MES project, that is, from the FY 2015/2016 to FY 2017/2018 counties paid Kshs. 95 million each under the scheme. Despite the fact that the MES contracts had been executed on fixed terms, the monies paid by counties was varied upwards to Kshs. 200 million in the FY 2018/2019. In the FY 2019/2020, it would be further varied to Kshs. 131 million. These monies were deducted directly from county allocations and paid to MES service providers by the MoH.

1.2.3. Objectives of the MES Project

The MES project was aimed at ensuring that every Kenyan citizen, regardless of location, had access to uninterrupted, quality, specialized health care services. The specific objectives/outcomes envisaged under the project included:

(1) attaining equitable, affordable and quality healthcare services of the highest attainable standard for citizens; and

(2) equipping Level 4 and Level 5 hospitals with specialized, modern and state of the art equipment, so as to ensure that all citizens, regardless of location, have access to uninterrupted, quality and specialized healthcare services.

1.2.4. Needs Assessment

The Ministry of Health supposedly undertook a nationwide needs assessment in March, 2014 to inform the MES project. The exercise which was conducted by the MoH without the involvement of county governments, assessed the readiness of counties to provide Level 4 and Level 5 services, particularly in the area of specialized healthcare targeting Non-Communicable Diseases (NCDs), such as cancer, renal, diagnostic, radiological and critical care services.

In line with the above, select county health facilities were assessed on the basis of available infrastructure, equipment and personnel. Following the assessment, equipment needs in the counties were prioritized and categorized under seven Lots of equipment as follows:

Table 1: prioritized equipment following needs assessment

LOT NO.	ITEM
1	Theatre equipment
2	Theater, CSSD equipment
3	Laboratory equipment (Category 1)
4	Laboratory equipment (Category 2)
5	Renal equipment
6	ICU equipment
7	Radiology equipment

1.2.5. Tendering Process

In July 2014, having abandoned its initial plan to equip Level 4 and 5 hospitals under a PPP financing arrangement, the MoH issued an international open tender *(Tender No. MoH/001/2014/2015)* for the supply, installation, testing, maintenance and replacement of medical equipment and associated training for county and sub-county health facilities on a long-term basis of between 7 to 10 years. Critically, the tender invited only original equipment manufacturers who could also undertake managed equipment services to bid. The equipment was to be delivered in seven (7) Lots as described in *table 1.*

1.2.6. Evaluation of Tenders

In order to ascertain value for money in the project, on 13th October, 2014, the MoH contracted a consortium of two local firms, PKF Kenya and Spa Infosuv East Africa Limited to offer financial advisory services, through a restricted tendering process at a contract sum of Kshs. 9,634,960. In three days, the consortium produced a Value for Money Assessment Report. This is the Report which the MoH relied on and decided to use the MES model and procurement through public procurement as opposed to the Public Private Partnership as initially conceptualised. Furthermore, a Public Sector Comparator (PSC) developed by the financial advisors formed the basis for awarding tenders under the MES project. All prices quoted by MES bidders and that were lower than the PSC were deemed responsive, and indicative of a positive value for money, while MES bidders who quoted prices that were higher than the PSC were considered unresponsive.

1.2.7. Award of Contracts

The Ministry of Health in February, 2015, proceeded to award tenders worth Kshs 38 Billion for the provision of specialized medical equipment under a managed equipment service. The tenders awarded comprised contractual agreements between the MoH and various MES service providers for the supply, installation, maintenance, replacement and disposal of various equipment, as well as training and reporting for the entire duration of the contract period of seven (7) years with a possibility of extension for a further three (3) year.

After the execution of the contracts, the Ministry of Health undertook a variation of the contracts in respect of equipment and services together with the number of hospitals to be covered. The execution of the deeds of variation under the MES project by the MoH was carried out in an opaque manner. Some of the issues raised in relation to the contracts included: lack of clarity on the supply of reagents and consumables for MES equipment, lack of information on the actual value and quantum of equipment received by counties, and lack of information on how variations under the MES project were arrived at.

1.2.8. MES Service Providers

The MES project tenders were awarded and Contracts executed as follows:

(a) Shenzhen Mindray Biomedical Electronics Co. (China) and subcontractor, Megascope Healthcare Limited (Kenya) for Lot 1;

(b) Esteem Industries Inc. (India) and subcontractor, Debra Limited (Kenya) for Lot 2;

(c) Bellco SRL(Italy) and subcontractor, Angelica Medical Supplies Ltd for Lot 5;

(d) Philips Medical Systems Nederland BV and sub-contractor, Philips East Africa Ltd for Lot 6; and

(e) GE East Africa Services Ltd for Lot 7.

The tender for Lot 3 was awarded to M/s Systemex Eorope *GMBH*, but according to the Ministry of Health, the company declined the offer. Lot 4 bids were all declared non-responsive.

1.2.9. Scope of Services

Under the contractual arrangements, MES contractors were expected to assume the risk and responsibility of procuring, installing, maintaining and replacing specialized equipment in

hospitals across the country. According to the MoH, services that were covered under the MES contracts included—

(a) Fitting out works to the rooms designated for equipment
(b) Replacement of old infrastructure, furnishings and fittings
(c) Supply of equipment
(d) Delivery and instalment of equipment
(e) Testing of equipment
(f) Commissioning of equipment
(g) Maintenance (both scheduled and reactive)
(h) Repairs and replacement of spare part
(i) Upgrading of equipment software
(j) Supply of consumable and reagents
(k) Insurance over the equipment
(l) Replacement of equipment upon expiry of its useful lifespan
(m) Decommissioning of equipment
(n) Training of staff using the equipment in the hospitals.

1.2.10 Financing

The original tender sum for the MES Project was USD 432,482,160 (Kshs 43,680,698,160/=) which was to be paid in quarterly instalments of USD 15,445,790 (Kshs 1,560,024,790/=).

In the FY 2015/2016, an amount of Kshs. 4.5 Billion was allocated through the County Allocation of Revenue Act, 2015 as a conditional grant from the Government of Kenya to the county governments for the leasing of specialized medical equipment. This translated to a sum of Kshs. 95,744,680.85 per county in the FY 2015/16. The monies were approved in the budget estimates of the National Government to facilitate technical assistance to county health facilities in line with the Fourth Schedule of the Constitution. In the subsequent two financial years, that is, FY 2016/2017 and FY 2017/2018, a similar amount of Kshs. 4.5 Billion was allocated as conditional grants to counties through the respective County Allocation of Revenue Acts.

However, in the FYs 2018/2019 and 2019/2020, and despite the contracts having been executed on fixed terms, this amount was varied to Kshs. 9.4 Billion and Kshs. 6.2 Billion respectively. Under these variations, county allocations to the project rose to Kshs. 200 million per county in

the FY 2018/2019 and then marginally dropped to Kshs. 131,914,894 per county in the FY 2019/2020.

It is important to note that disbursements related to the MES project were unusual in that despite being allocated as conditional grants to the counties in the various CARA, the disbursements were never deposited in the County Revenue Fund as required by Section 109(2) of the Public Finance Management Act, 2012. Section 109(2) provides —

> *"The County Treasury for each county government shall ensure that all money raised or received by or on behalf of the county government is paid into the County Revenue Fund, except money that:*
>
> *(a) is excluded from payment into that Fund because of a provision of this Act or another Act of Parliament, and is payable into another county public fund established for a specific purpose;*
>
> *(b) may, in accordance with other legislation, this Act or County legislation, be retained by the county government entity which received it for the purposes of defraying its expenses; or*
>
> *(c) is reasonably excluded by an Act of Parliament as provided in Article 207 of the Constitution."*

Despite this provision, a schedule of monies allocated to each county as conditional grant under the MES project was provided but the money was deducted at source and paid to MES contractors by the Ministry of Health without being deposited to the respective County Revenue Fund.

According to records obtaining from the Office of the Controller of Budget, out of a cumulative conditional allocation of Kshs. 29.1 Billion to county governments by the time of this inquiry, actual expenditure for the MES project as obtained from expenditure and budget reports from the MoH was Kshs. 25.9 Billion. The total share paid per county towards the implementation of the project from the FY 2015/2016 to FY 2019/2020 was Kshs 619,148,936.00.

1.2.11. Healthcare Information Technology Contract

The Healthcare Information Technology (HCIT) was originally part of the Lot 7 Contract for the supply of radiology equipment. Under Clause 23 (*information Technology*) of the contract, GE East Africa was to supply the procuring entity i.e. the Ministry of Health with all software, codes, tables and data required for the equipment to operate in accordance with the requirement set out in Schedule 9 (*Equipment*) and Schedule 10 (*Service Requirements*). The HCIT Option in the GE Contract was to be initiated by the Ministry of Health serving an HCIT Option Notice on the Contractor in line with clauses *23.16 and 23.17* of the contract. Clause 23.16 of the Contract placed on the Parties an obligation to confirm the status of the HICT Option.

The Ministry in its submission to the Committee stated that it opted not to exercise this option because by utilizing the HCIT option under Lot 7 Contract, would be an expensive venture and therefore it opted to issue a new tender to complete the HCIT solution. Subsequently, on 4th July, 2017, the MoH issued a national open tender No. *MOH/CRS/ONT/001/ 2017-2018* for the provision of Healthcare Information Technology (HCIT) solutions for the Managed Equipment Services Project.

According to the Kenya National e-Health Strategy Policy 2016-2030, the HCIT as envisaged, was intended to leverage on ICT as a means of promoting the full operationalisation of the MES Project. Specifically, the HCIT solution entailed the deployment of a Hospital Information System (HIS) and supporting ICT infrastructure across the ninety-eight (98) MES beneficiary hospitals, including two (2) hospitals per county and four (4) national referral hospitals. However, owing to the contractors' inability to secure a Government of Kenya Letter of Support, the HCIT project did not take off.

The MoH stated that the HCIT solution was intended to be the nerve centre and provide interconnectivity between Kenyatta National Hospital and beneficiary hospitals across the country. The HCIT solution was aimed at giving access to relevant users to manage a portfolio of patients and highlight problems as they arose both for an individual patient and within the population on a long-term basis and thereby facilitating access to specialists and grant real time support to county health facilities.

Following a successful bid, Seven Seas Technologies Group Ltd was awarded the tender for HCIT solutions on 21st August, 2017. A contract between the company and the MoH was subsequently executed on 2nd October, 2017. The contract was worth USD 47,569,731.00 (equivalent to Kshs. 4,943,417,903.68 at the then exchange rate of Kshs. 103.90 to the USD).

The Ministry of Health under unclear circumstances, terminated the HCIT contract on 19th November, 2019, a day after the *Ad-Hoc* Committee had met with the Contractor to inquire into issues arising from the projects.

1.3. Investigations by the *Ad- Hoc* Committee

In the process of the implementation of the MES project, various issues and concerns arose and these informed the establishment of the Ad Hoc Committee. The issues include:

(a) grossly exaggerated costs of equipment;
(b) usurpation of devolved functions by NG without due process;
(c) differential treatment of local firms in comparison to foreign firms;
(d) highly skewed contracts that exposed the government to huge liabilities;
(e) lack of involvement of County Governments in prioritizing their specific equipment needs;
(f) non-compliance with existing procurement laws by the MoH;
(g) irregular variations in the MES contracts;
(h) inadequate regulation of medical equipment;
(i) monopolization of the MES project by specific contractors and subcontractors;
(j) lack of requisite infrastructure to support the use of the equipment in some counties;
(k) lack of specialized health personnel to operate the equipment;
(l) under-utilization of installed equipment;
(m) inadequate consultation between the National and County Governments; and
(n) lack of adequate access to reagents and consumables among others.

In the conduct of this investigation, the *Ad-Hoc* Committee was guided by the Constitution and other relevant legislation. The particular provisions of the Constitution that were of interest to the Committee include Articles 189 which require cooperation between national and county governments; Article 201 on requirements of accountable, responsible and prudent use of public resources; Article 227(1) on use of competitive and cost effective system in the procurement of

goods and services; and Article 228(5) which prohibits the withdrawal of funds from unless authorized by law.

The Committee was further guided by the provisions of: Articles 6, 10, 35, 46 and 232 of the Constitution; the Public Procurement and Disposal Act of 2005, now repealed, and its Regulations of 2006; various County Allocation of Revenue Acts passed since 2015; the Public Finance Management Act, 2012; the Competition Act; the Pharmacy and Poisons Act; the Kenya Medical Supplies Authority Act; and, the Parliamentary Powers and Privileges Act, 2017.

CHAPTER TWO

SUBMISSIONS AND EVIDENCE MADE TO THE COMMITTEE

2.1 BACKGROUND

The Committee, in exercising its mandate, engaged with various stakeholders including state agencies, civil society organisations, MES consultants, MES contractors, other persons of interest and the public generally in order to establish the facts concerning the MES project, and the status of its implementation in the country. The Committee also visited eight (8) counties with a view to acquitting itself with the status of implementation of the project. The Counties visited include Mombasa, Kilifi, Kwale, Tana River, Isiolo, Meru, Uasin Gishu and Elgeyo Marakwet. The list and summary of stakeholders who appeared before the Committee and the visits conducted is attached as **Annexure V.**

The Committee conducted a comparative visit to the Netherlands as part of understanding how MES projects had been implemented there. During the visit, the Committee met with Members of the Senate Committee on Health, Sports and Welfare. During the visit, the Committee also conducted a site visit of the Philips Nederland B.V Headquarters in Eindhoven, Netherlands. The Minutes of the Session together with the documents and evidence presented during the meeting is attached as **annexure VI.**

2.2. STATE DEPARTMENTS AND AGENCIES

2.2.1. Office of the Auditor-General (OAG)

The Office of the Auditor General appeared before the Committee in two consultative meetings held on Tuesday, 8th October, 2019 and Thursday, 14th October, 2019. Key highlights of the presentation and written submissions are summarized below:

(i) Special Audit on the accounts of the MoH FY 2015/16

The Office of the Auditor-General (OAG) in their submission stated that in the FY 2015/2016, it issued a qualified opinion on the MoH accounts for the FY 2015/2016. Subsequently, the Public Accounts Committee of the National Assembly requested the OAG to conduct a special audit on the accounts of the MoH for the FY 2015/2016 with specific deliverables which included an audit

of the MES project. The special audit Report is attached as annexure **VIII**. The findings of the special audit by the OAG in relation to the MES project are elaborated below:

(ii) Legal Framework Governing the MES Project

According to the OAG, the MES project ought to have been guided by the Constitution, the County Allocation of Revenue Act (CARA), the then Public Procurement and Disposal Act, 2005, re-enacted as Public Procurement and Asset Disposal Act, 2015, and the Regulations made thereunder, and, the Kenya Health Policy, 2014. The OAG submitted that the Kenya Health Policy, 2014 initially conceptualized the MES Project as a Public-Private Partnership initiative. Public Private Partnerships (herein PPP) are governed by the Public Private Partnership Act, 2013. The MoH received approval to implement the project as a PPP in October, 2014.

The OAG stated that whereas MES Project had been conceptualised and approved as a PPP project, it is not clear how and when the project was subsequently converted and implemented as a public procurement process. Public procurement and disposal are governed by the Public Procurement and Disposal Act, 2005 (repealed and re-enacted as Public Procurement and Asset Disposal Act, 2015,) and regulated by the Public Procurement Regulatory Authority. They submitted that they did not find a written shift in policy to justify the change of financing arrangement from a PPP to a procurement process under a managed equipment services model.

(iii) Project Identification and Planning

The OAG informed the Committee that the project was triggered by a needs assessment exercise conducted by the MoH in June, 2014. The needs assessment exercise was conducted in select counties, and sought to establish what staffing, infrastructural and equipment challenges were hindering the delivery of quality healthcare services in the counties. However, in its Special Audit, the OAG established that county governments were not involved in the Needs Assessment exercise.

The OAG stated that the report of the needs assessment exercise resulted in the development of a Concept Paper by the MoH in 2014. The Concept Paper envisaged the project as a PPP based on a 'Build, Lease and Transfer' model and was in tandem with the Kenya Health Policy 2014. A subsequent report by the PPP Unit in October, 2014 indicated that the project had been approved for implementation as a PPP. However, the MoH later on proceeded to adopt a Managed Equipment Service (MES) model.

(iii) Financing

According to the OAG, in the FY 2015/2016, aa amount of Kshs. 4.5 Billion was allocated through the County Allocation of Revenue Act (CARA) as a conditional grant to county governments for the leasing of specialized medical equipment. This translated to a sum of Kshs. 95,744,680.85 per county. The monies were approved in the budget estimates of the National Government to facilitate technical assistance to county health facilities in line with Schedule 6 of the Constitution. The OAG informed the Committee that monies paid to contractors under the MES Project from FY 2015/2016 to FY 2017/2018 were as follows:

Table 2

FY	Payments Made (Kshs)
FY 2015/2016	Kshs. 4,568,544,208.00
FY 2016/2017	Kshs. 9,411,748,754.88
FY 2017/2018	Kshs. 4,902,409.40

(iv) Procurement of Financial and Legal Advisers

The OAG submitted to the Committee that the MOH procured financial consultants and legal transaction advisors to render consultancy advisory services in the project. The OAG informed the Committee that the financial and legal consultants for the project were procured by the MoH under questionable circumstances because PKF Kenya were engaged as financial consultants through a restricted tendering process at a contract sum of Kshs. 9,634,960.00, while M/S Iseme, Kamau and Maema Advocates were engaged as the legal transaction advisors through direct procurement at a contract sum of USD. 560,000.00 (Kshs 56,560,000/=).

The OAG stated that in both cases, the MOH cited urgency as the main reason for failing to procure these services through a competitive bidding process. The OAG however opined that since the project was a matter of national interest involving the allocation of Kshs. 4.5 Billion, the MoH ought to have used competitive bidding to procure the services of the consultants.

(v) Pricing

The OAG informed the Committee that PKF being MOH's financial consultants, conducted a Public Sector Comparator (PSC) aimed at guiding the Ministry's decision on whether to opt for outright purchase, or leasing of equipment. For purposes of ascertaining the best price that would

provide value for money for the government, the PSC compared how much the government would spend by direct purchase of equipment against amounts quoted by prospective MES contractors. All contractors who quoted amounts less than the Public Sector Comparator were considered responsive.

(vi) Procurement of MES Equipment

The OAG, on 11th July, 2014, stated that the MoH invited original equipment manufacturers to tender for the supply, installation, testing, maintenance and replacement of medical equipment, and associated training for county and sub-county referral hospitals. Tenders were opened and evaluated based on the Public Sector Comparator developed by PKF.

Table III: summary of the successful bidders

No.	Lot	Type of Equipment	No. of Bidders	Successful Bidder	Contract Sum in USD	Kshs Equivalent at an Exchange Rate of Kshs. 101 to the USD
1.	Lot 1	Theatre Equipment	8	Shenzhen Mindray Biomedical Electronics Co.	USD. 45,991,449.78	Kshs. 4,645,136,427,78
2.	Lot 2	CSSD and theatre Equipment	8	MS Esteem Industries Ltd	USD 88,027,973.00	Kshs. 8,890,825,273.00
3.	Lot 3	Laboratory Equipment, Category 1 (clinical medicine, hematology, virology and immunology)	5	M/S Sysmex Europe GMBH	USD 29,964,830.00	Kshs. 3,026,447,830.00

4.	Lot 4	Laboratory Equipment, Category 2 (microbiology, clinical chemistry, histology)	2	Non-Responsive	Contract yet to be awarded.	--
5.	Lot 5	Renal	2	Bellco SRL Ltd	USD 23,691,059.00	Kshs. 2,392,796,959.00
6.	Lot 6	ICU	1	Philips Medical Systems	USD 36,492,176.00	Kshs. 3,685,709,776.00
7.	Lot 7	Radiology	5	General Electric EA	USD 238,279,502.00	Kshs. 24,066,229,702.00

By the time the special audit was conducted, only four (4) of the Lot winners had received payment from the MoH as provided below-

Table iv: Payment to Bidders during special audit

Name of Contractor	**Equipment Supplied**	**Monies Received in the FY 2015/2016 in USD**	**Kshs Equivalent at an Exchange Rate of Kshs. 101 to 1 USD**
Shenzhen Mindray Biomedical Electronics Company Ltd	Theatre Equipment	USD 2,825,765.00	Kshs. 285,402,265.00
Esteem Industries	CSSD and Theatre	USD 7,607,601.00	Kshs. 768,367,701.00
Bellco Limited	Renal	USD 3,024,670.00	Kshs. 305,491,670.00
General Electric EA	Radiology	USD 6,960,000.00	Kshs. 702,960,000.00

The OAG observed that payments made to contractors were not supported by evidence of signed minutes of the Inspection and Acceptance Committee(s). This according to the OAG, violated Regulation 17 of the Public Procurement and Disposal Regulations, 2006, and Legal Notice No.

107 of 2013. However, the payments were supported by completion certificates confirming the quantity and quality of work done.

(vii) Challenges

The OAG identified the following as the main challenges facing the successful implementation of the MES project:

(a) value for money could not be guaranteed given the inefficiencies of the procurement processes, and the absence of minutes of Inspection and Acceptance Committee(s);

(b) lack of a project sustainability strategy beyond the seven-year contract period;

(c) lack of the requisite specialized personnel to run the equipment. This resulted in non-utilization of some of the equipment;

(d) lack of the requisite infrastructure to absorb the equipment in some counties. Affected counties incurred unexpected costs of developing the necessary infrastructure to accommodate the new equipment despite having neither planned nor budgeted for it. This resulted in delays in implementing the project;

(e) high operational costs particularly with regards to consumables and reagents;

(f) binding lease terms that required quarterly payments despite equipment not being functional in many facilities; and

(g) further, the MES contract was varied under unclear circumstances in the FY 2018/2019. Auditing on the same was ongoing at the time of the meeting.

2.2.2.1 Committee Observations

From the submissions of the OAG, the Committee made the following observations, findings and recommendations:

1. **The Shift of the MES Project from a Private Public Partnership to a Public Procurement:**

   (a) The MES Project was varied from a PPP initiative to a public procurement process under unclear circumstances. The OAG was unable to find any evidence of a written policy to justify the shift from a PPP model to a MES project under public procurement process. Whereas the project was initially conceptualised as a PPP initiative, it was finally undertaken as a public procurement under the Public Procurement and Asset Disposal Act.

(b) That despite the MOH receiving approval from the Public Private Partnership Committee to implement the project as a PPP in October, 2014, the MOH unilaterally changed the mode of implementing the project from a PPP to a public procurement through a letter dated 22nd June, 2015, *Ref. No. MOH/MI/4/10/2/(49)* to the National Treasury. There was no evidence or any Policy paper that was presented before the Committee to explain the sudden shift from a PPP to public procurement process.

(c) The Committee observes that the Report of the Technical Sub-committee dated 22nd January, 2014 states that when the project was initially conceptualized, it was intended to equip health facilities with modern and specialized diagnostic equipment, infrastructure development to facilitate the instalment of equipment in hospitals and train personnel in specialized care at a cost of Ksh. 43.5 Billion spread over ten years.

(d) However, with the change from PPP project to MES under public procurement, the change to MES under public procurement changed the cost to amount unknown to date without explanation. Indeed, under the original PPP project, counties would have paid Kshs 1.5 Billion per year for all the 47 counties which translates to Kshs 31 Million per year per county against a cost that picked at Kshs 200,000,000 per county per year in the FY 2018/2019 under the MES public procurement process and which restricted the project to the of supply equipment, most of which is basic equipment readily available in the market; and user training instead of training of personnel in specialized care.

Recommendations

1. Article 3 of the Constitution places an obligation on every person to respect, uphold and defend the constitution. Further, Article 10 of the Constitution provides that the national values and principles of governance in this Article bind all state Organs, State Officers, public officers and all persons whenever any of them applies or interprets the constitution, enacts, applies or interprets any law, or makes or implements public policy decisions. By overseeing the variation of the project from a PPP initiative to a MES project under the public procurement platform, the Ministry of Health contravened article 227 of the Constitution which provides that *when a state organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent,*

competitive and cost-effective; the Ministry also failed to follow the law as required under the Public Procurement and Asset Disposal Act;

2. If the project would have been implemented as a PPP, the monies charged to counties would have been approximately Kshs thirty-one million (31,000,000/=) per year per county. Further, the project would have provided for the leasing of the specialised equipment, infrastructural development and offer specialised training. In the circumstances, the project would have been cost effective;

3. Further, the change-over and ultimate implementation of the project as a MES project under the public procurement process contravened Article 201 (a) and (d) of the Constitution which provides that *there shall be openness and accountability, including public participation in financial matters*; and *that public money shall be used in a prudent and responsible way*;

From the above findings, the committee recommends that all state officers and public officers who presided over the conceptualisation, conversion and procurement of the MES project be investigated and if found culpable, they be barred from holding any state or public office.

2. Procurement of Financial and Legal Services Expert:

In respect to the procurement of financial and legal advisory services, the Committee observes that the Ministry of Health procured these services using direct procurement in direct contravention of Article 227 of the Constitution and the Public Procurement and Asset Disposal Act, 2015. The MoH procured financial and legal consultants for the MES project under questionable circumstances. For instance;

(a) PKF Kenya was procured through a restricted tendering process for financial consultancy services at a contract sum of Kshs. 9,634,960.00. The Committee established that the Value for Money assessment was supposed to last forty five (45) days and was to include included visiting the Counties. PKF took exactly three days to submit their finding because the Value for Money Report was submitted three days after signing the Contract. There was no evidence submitted to show that PKF visited counties as part of their research.

(b) M/s Iseme, Kamau and Maema (IKM) Advocates were identified by the MOH and engaged as the legal transaction advisors even before the Attorney General gave the clearance at a contract sum of USD 560,000.00 (kshs 56,560,000/=). as required by Section 17 of the Office of the Attorney General Act, 2015. Section 17(1) of the Office of the Attorney

General Act provides that; *No Ministry or Department shall engage the services of a consultant to render any legal services relating to the functions of the Attorney-General without the approval of the Attorney-General.*

(c) From a letter dated 16th May, 2014 written by IKM to the MOH, the Committee observes that the MOH retained the services of IKM on 12th May, 2014 before the approval of the Attorney General contrary to section 17(1) of the Office of the Attorney General Act, 2012 and the AG Circular Ref: *AG/1/2010* of 3rd May, 2010 that require all client ministries to consult and seek approval of the AG before retaining the services of private advocates.

(d) From the letters dated 2nd and 31st July, 2014, by Mr. James Macharia, the then CS health, to the AG, the Committee observes that the MOH should have invited quotations from external advocates pre-qualified by AG to determine which firm was best suited to provide the services at the best value possible. The Committee opines that the request by the Ministry of Health to the Attorney General was just but a decoy and used to ratify a decision that the Ministry of Health had already taken to determined which legal advisers it wanted to work with.

(e) Further, the Committee is not convinced that the project was so urgent as to preclude the need for competitive procurement for both legal and financial advisory services. Nonetheless, even if the project was as urgent as submitted by the MOH, the fact that the project was a matter of national interest involving an initial allocation of Kshs. 4.5 Billion, the MoH ought to have used competitive bidding to procure the services required.

In the circumstances, the Committee finds that—

(a) the reasons advanced by MoH for failing to use competitive bidding before retaining the services of both IKM, PKF and Infosluv SPA, were unsatisfactory and in contravention of section 74 of the Public Procurement and Disposal Act, 2005 (now re-enacted as the Public Procurement and Asset Disposal Act, 2015) which requires that direct procurement must not be used to stifle competition; and

(b) the MOH contravened article 227 (1) of the Constitution which requires that public entities use a system that is competitive and cost effective when it contracts for goods and services;

(e) the Ministry of Health contravened section 17 of the Office of the Attorney General Act which require that before a government agency procures consultancy for legal services, the Attorney General must be consulted and grant approval.

Recommendations

Having made the findings above, the Committee recommends as follows —

(a) that relevant Government agencies commence immediate investigations of the circumstances under which the consultants were procured and if found culpable, the officers who were involved in the procurement of the financial and legal services consultants be held liable for contravening Article 227 of the Constitution, the Public Procurement and Asset Disposal Act, 2015 and section 17 of the Office of the Attorney General Act, 2012; and

(b) Moving forward, all Government agencies must apply the Provisions of Section 17(1) of the Office of the Attorney General Act by seeking the approval of the Attorney General before enlisting the services of a legal consultant. The consultancy services must only be enlisted when it is determined that the respective Constitutional offices lacks the requisite technical capacity to undertake the assignment at hand. Similar approvals must be sort from the Office of the Auditor General in respect of financial services.

3. Involvement of County Governments in the conceptualization and implementation of the MES Project

The Committee notes that Health is a devolved function under the Fourth Schedule to the Constitution and accordingly, in order to ensure successful implementation of devolved function, consultation and cooperation as provided for in Articles 6 and 189 of the Constitution is vital. The Committee has established that County Governments were not involved at the conceptualization and designing of the MES project.

Further, MOH carried out a needs assessment to determine the needs of the counties in respect to their equipment needs, and whether the needs assessment carried out was effective without fully involving the counties.

The Committee makes the following findings;

(a) that health being a fully devolved function under the Fourth Schedule to the Constitution, and in keeping with Article 189 (1) of the Constitution which obligates the two levels of government to perform their functions and exercise their powers in a manner that respects the functional and institutional integrity of government at either level, county governments should be consulted when an action is likely to impact the ability of the county to perform its functions.

(b) that county government were not consulted during the carrying out of the needs assessment exercise in 2014 in contravention of Article 6 of the Constitution which requires that the two levels of government conduct their mutual relations on the basis of consultation and cooperation;

(c) the MOH undertook blanket allocation of equipment across the counties leading to duplication of equipment. For instance, despite having functional X-Ray and theatre equipment prior to devolution, Laikipia County was still supplied with new X-Ray and theatre equipment under the MES project;

(d) most counties lacked specialists to operate the equipment. For instance, in Hola District Hospital, although equipment for specialised surgery was delivered to the county, the county has been unable to use the varicose vein stripper set and urethroplasty set delivered since it has not employed the necessary sub-specialists;

(e) equipment supplied under the MES project was not tailored to suit specific county needs as would have been the case if a more consultative needs assessment process had been followed;

(f) The Committee also noted that there were wide inter- and intra-county disparities in the status of implementation of the MES project across the counties that were suggestive of the level of political goodwill, leadership and commitment to implement the MES project at county level. For example, during its visit to Isiolo County, the Committee found that there was a large disparity in the standard of implementation of the MES project between Isiolo County Referral Hospital and Garbatulla SDH.

(g) Whereas all the equipment in Isiolo County Referral Hospital was operational and in good working order, none of the equipment supplied to Garbatulla SDH was functional save for a CSSD machine.

(h) In Elgeyo Marakwet County, the Committee found that of the theatre and radiology equipment supplied to Chebiemit and Kamwosor Sub-County Hospitals, only the mobile X-Ray machine at Chebiemit SCH and the CSSD machine at Kamwosor SCH were reported functional.

(i) The Committee observes that in order to accommodate the equipment supplied under the MES project, County Governments were constrained to incur costly and unforeseen expenditure in infrastructural development and recruitment/training of specialized personnel. These costs had not been factored into county budgets or CIDPs. As such, counties were forced to reallocate funds from other votes to accommodate the project.

(j) The Committee further finds that had the MES Project been implemented in a stepwise and progressive manner that factored in the need to address these challenges, more impact would have been realized from the MES Project.

(k) The MoH procured specialized equipment for County Governments in the absence of an explicit written agreement between the two levels of Government as required by Article 187 of the Constitution, and Sections 25 and 26 of the Intergovernmental Relations Act. The Memoranda of Understanding (MOUs) that were executed between the MoH and the 47 County Governments did not equate to such an agreement as required by law.

(l) Furthermore, as demonstrated in the case of Bomet County, even where no MOU existed with a county government, the MoH had proceeded to supply and install equipment in its facilities under the MES project in disregard of the Constitution and the law.

(m) Counties did not receive uniform equipment under the project. Despite this, a standard rate of first Kshs. 95 Million, then Kshs. 200 million was allocated to all 47 counties. Furthermore, when the contract was varied to add 21 beneficiary hospitals to the MES project, the added costs were equally distributed to all the 47 counties as opposed to being charged on the specific counties that had benefited from the additional equipment.

(n) that the MOH ignored its own needs assessment report, as evidenced by the following:

(i) despite finding that the various equipment prioritized under the project were already available in at least 60% of county health facilities, the MoH went on to carry out a blanket allocation of equipment across the counties. This consequently led to cases of duplication of equipment. In Laikipia County for example, functional X-Ray and theatre equipment that had been procured by the National Government prior to devolution had to be removed to make way for new X-Ray and theatre equipment supplied under the MES project;

(ii) while some counties exceeded the infrastructural requirements necessary to absorb the equipment envisaged under the project, others had only 1% of the infrastructure required. For instance, in Elgeyo Marakwet County, the Committee found that theatre equipment had been installed in partially constructed theatre facilities at Iten County Referral Hospital. Despite this, the MoH went on to fast track the roll-out of the MES Project at a time when most counties did not have the infrastructure necessary to enable them absorb the equipment;

(iii) despite finding that more than ten (10) counties did not have even a single specialist, the MoH went on to fast track the roll-out of the MES Project. For instance, in Hola District Hospital, although equipment for specialised surgery was delivered to the county, the county has been unable to use the varicose vein stripper set and urethroplasty set delivered since it lacks the necessary sub-specialists;

(iv) various counties are yet to operationalize MES equipment owing to lack of adequate water or electricity, and/or ongoing construction works. For instance, theatre and radiology equipment under the MES project in Garbatulla SDH was non-functional owing to inadequate water and electricity and lack of requisite personnel.

From the foregoing, the Committee finds that the MOH ignored its report and delivered equipment to county facilities fully aware that the equipment would not be optimally. The delivery contravened Article 201 (e) of the Constitution that requires that *public money shall be used in a prudent and responsible way.*

Provision of additional equipment in the FY 2017/2018 under the expanded MES project was both suspicious and unjustifiable given the fact that MES equipment in various counties was non-functional owing to the lack of requisite personnel and infrastructure.

2.2.2.2 Committee Recommendations

The Committee recommends that—

(a) since there are equipment that were delivered and are still lying in disuse in a number of counties, the Ministry of Health as the agent of county governments in this transaction should negotiate for the extension of the service at no additional cost to the Government noting that the entire MES project money has been paid faithfully by the county governments;

(b) county Governors who have received equipment and have let the equipment to lie in disuse should be held accountable for having received and accepted equipment for which the county is paying annually and the benefit does not go to the public as envisaged in the project;

(c) moving forward, the Government and especially the Executive arm of the Government must remain faithful to the constitution and the law by ensuring that for all functions that are devolved or shared, the two levels of government are involved from inception, conceptualization and implementation of any such project; and

(d) the MES project being on its fifth year, the Office of the Auditor General should undertake an urgent audit of the entire project including how the funds so far paid by Counties have been used, the state of the equipment and the extent to which the project has met its objectives, and recommend to the Senate on the best way forward. This audit should be undertaken immediately and report back to the Senate within 6 months from the date of this Resolution.

4. Whether counties realized value for money in respect to the pricing of MES equipment and consumables

As to whether the country realised value for money in relation to the pricing and supply of the MES equipment and consumables, the Committee observes as follows—

(a) that under a managed equipment service arrangement, it is a reasonable expectation that recurrent costs such as the supply of consumables and reagents will be covered at no additional cost to the client. Therefore, the Committee finds that the restriction on the supply of consumables and reagents to starter kits that were only to last three (3)

months under the MES project was severely skewed against the government and therefore the taxpayers;

(b) In addition, the Committee finds that the fact that Philips was not required to provide for consumables under its MES contract was severely skewed against the government and therefore the taxpayers;

(c) In contrast to the submissions by Dr. Muraguri, the Committee observes that Shenzhen Mindray, Bellco and Esteem were required under their respective contracts to supply consumables and durables in respect of the equipment that the contractors supplied. In this respect therefore the Committee finds that the contractors have continuously failed to comply with the provisions of the contract.

(d) Infact, from the letter dated 22nd November, 2017, *Ref. No. MOH/FIN/1/A.VOL.I(229)* from the then PS, Health, Mr. Julius Korir, CBS, the MoH to the National Treasury, the Committee observes that MoH recognised that the burden of procuring reagents and consumables was not being legitimately borne by counties. Due to the foregoing the Committee finds that Dr. Muraguri intentionally misled the Committee by stating that all the contractors were only supposed to supply starter kits for the consumables in contravention of section 27 (3) (g) of the Parliamentary Powers and Privileges Act, 2017 which makes it an offence to wilfully make a statement or furnish a committee of Parliament with information which is false or misleading;

(e) The Committee further noted that the letter 2nd November, 2017, *Ref. No. MOH/FIN/1/A.VOL.I(229)* also provides an indication of the significant and additional burden imposed on counties for the running and operation of MES equipment. The letter is attached as **annexure X.**

In respect to the sourcing and the costing of the MES Equipment consumables and whether the sourcing and costing was justifiable and legal, the Committee observations as follows —

(a) that equipment supplied under the MES project is locked to the specific reagents and consumables that are supplied by the contractor. Accordingly, one Ms. Matu misled the Committee by claiming that the equipment delivered under Lot 5 is not locked to specific

reagents and consumables. Misleading a Committee of Parliament is an offence under section 27 (3) (g) of the Parliamentary Powers and Privileges Act, 2017;

(b) that the MES contracts created a monopoly for the supply of consumables and reagents related to the MES equipment. Therefore, the Committee finds that the contracts contravened section 21 (1) and (3) of the Competition Act that prohibits agreements whose effect is to prevent, distort, or lessen competition in trade in any goods or services in Kenya for instance by participating in collusive tenders, directly or indirectly fixes purchase or selling prices or any other trade conditions;

(c) that KEMSA, after consulting the contractors, had used direct procurement to procure reagents and consumables for Renal (Lot 5) and Radiology (Lot 7) equipment from Angelica Medical Supplies Limited which the manufacturers had informed, it was their local agent. The Committee further observes that KEMSA did not submit any evidence to establish that it had sought to determine whether the reagents and consumables could be procured from any other supplier before carrying out direct procurement. The Committee therefore finds that KEMSA failed to comply with section 74 of the PPDA which requires that *a procuring entity use direct procurement if there is only one person who can supply the goods, works or service being procured; and there is no reasonable alternative or substitute for the goods, works or services;*

(d) that KEMSA's decision to undertake direct procurement, resulted in deliberately monopolising the market for reagents and consumables in favour of Angelica Medical Supplies Limited. This contravenes section 74 of the PPDA which provides that *a procuring entity may use direct procurement ...as long as the purpose is not to avoid competition.*

(e) Further that contrary to Resolution 5 of the Communique dated 22nd October, 2013 issued by the Cabinet Secretary for Health and Senior Ministry Officials with Chief Executive Members for Health and Finance, and County Directors of Health, the MES project did end up creating a monopoly by select sub-contractors. For example, Angelica Medical Supplies Limited, which was identified as a subcontractor for Bellco SRL (Lot 5, Renal Equipment), became the sole supplier of consumables and reagents for renal and radiological equipment supplied under the MES Project;

(f) In addition, the Committee also noted that the Director/CEO of Angelica Medical Supplies Ltd, Ms. Matu had participated in the MES tender and contract of Lot 5 equipment in questionable circumstances;

(g) that KEMSA did not get the best price for the consumables and reagents for Lot 5 and Lot 7 as alleged because KEMSA did not try to establish whether the reagents and consumables could be sourced at more competitive rates from other suppliers. The Committee therefore finds that KEMSA contravened Article 227 (1) of the Constitution which requires that public entities use a system that is competitive and cost effective when it contracts for goods and services;

(h) From the county visits the Committee undertook, the Committee observed that counties were buying the consumables relating to Renal equipment (Lot 5) and Radiology equipment (Lot 7) from Angelica Medical Supplies Ltd who was the only supplier at the time. However, from 2019, counties had started purchasing the consumables from KEMSA. Curiously, KEMSA was buying the consumables from Angelica Medical Supplies Ltd.

(i) The Committee established that while the KEMSA did negotiate the prices, this did not translate into any tangible cost-savings by counties. Indeed, in the case of renal consumables (e.g. haemodialysis blood lines, bicarbonate cartridge powder and acid concentrate) KEMSA supplied to counties at prices higher than Angelica Medical Supplies Limited. In the case of radiology products, despite having negotiated significantly marked down prices with Angelica Medical Supplies Limited, the average cost saving accrued to counties was negligible at 1.67%

(j) That the enactment of the Health Laws (Amendment) Act, 2019, contradicted the provisions of the Health Act and granted KEMSA an absolute monopoly in the supply of drugs to public health facilities countrywide by making it mandatory for both national and county health facilities to obtain drugs and medical supplies from KEMSA and penalising anyone who does not. Section 4 of the KEMSA Act as amended by the Health Laws (Amendment) Act, 2019 provides *a person responsible for the procurement and distribution of drugs and medical supplies in a national or county public health facility and who contravenes provisions of this section, commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years, or to both.*

(k) that as a result of the statutory monopoly, County Governments are obligated by law to source all their health products and supplies from KEMSA despite the fact that KEMSA is only able to provide a fill rate of 50-60%. In this regard, the Committee finds that the statutory monopoly adversely affects the ability of county governments to meet their obligations under the Fourth Schedule of the Constitution in respect to delivery of health services in the county health facilities'.

(l) The Committee further observes that the statutory monopoly created for KEMSA adversely affects competition in the procurement and supply of health products and technologies.

Committee Recommendations

1. **The Kenya Medical Supplies Authority Act be amended to remove the monopoly granted to Kenya Medical Supplies Authority in the supply of medical products and technologies. Government agencies and especially county governments must be given latitude to procure competitively as envisaged in Article 227(1) of the Constitution;**
2. **That the relevant investigative agencies investigate the circumstances under which a contractual monopoly for the supply of consumables and reagents was created for MES Project contractors and subcontractors, take necessary action on the named persons; and report back to the Senate within six months from the date of the adoption of this Report.**

2.2.2. Office of the Controller of Budget

The Office of the Controller of Budget (COB) appeared before the Committee on 15th October, 2019. Led by the Ag. Controller of Budget, Mr. Steve Masha, COB made submissions as summarised below -

(a) Mandate of the Office of the Controller of Budget

The Office of the Controller of Budget (herein COB) is an Independent Office established under Article 228 of the Constitution. It oversees the implementation of budgets of both the National and County Governments and further authorizes the withdrawal from public funds on the basis of Articles 206(2) and 228(4) of the Constitution.

(b) Legal Basis for the Authorization of Withdrawal of Funds towards the MES Project

The Controller of Budget (COB) informed the Committee that in authorizing the withdrawal of funds towards the medical equipment leasing scheme, the COB was guided by the following-

(a) the Memoranda of Understanding signed between the National Government and each County Government;

(b) the National Government Appropriations Act; and

(c) the various County Allocation of Revenue Acts (CARA).

(c) Budget Allocations and Expenditure on the MES Project

The COB submitted before the Committee that the total conditional allocations for leasing of medical equipment to County Governments stood at Kshs 29.1 Billion. This amount had been provided for in the Second Schedule of successive County Allocation of Revenue Acts since FY 2015/16. The annual allocations to the MES project were provided as summarized in the table below-

Table IV: Conditional allocations for MES between FY 2015/2016 – FY 2019/2020

Financial Year	National Government Budget	Allocations to County Governments as per CARA Total (Kshs.)	Share per County Government (Kshs.)
2015/2016	4,500,000,000	4,500,000,000	95,744,680
2016/2017	9,600,000,000	4,500,000,000	95,744,681
2017/2018	5,000,000,000	4,500,000,000	95,744,681
2018/2019	9,400,000,000	9,400,000,000	200,000,000
2019/2020	6,205,000,000	6,200,000,000	131,914,894
Total	**34,705,000,000**	**29,100,000,000**	**619,148,936**

Source: *MoH Budget & CARA Allocations as submitted to the Committee by the Office of the Controller of Budget.*

Actual expenditure for the MES Project as obtained from the expenditure and budget reports from the MoH at the time of the meeting was Kshs. 25.9 Billion as summarized below-

Table V: Actual expenditure for MES project for FY 2015 TO FY 2019/2020

Financial Year	Annual Budget (Kshs. Billion)	Total Expenditure (Kshs. Billion)
2015/2016	4.5	2.5
2016/2017	9.6	9.6
2017/2018	5.0	5.0
2018/2019	9.4	8.8
2019/2020	6.2	-
Total	**34.7**	**25.9**

Source: *MoH expenditure reports as submitted to the Committee by the Office of the Controller of Budget.*

The written submissions from the Office of the Controller of Budget is herein attached as Annexure **XI.**

Committee Observations

From the submissions of the Office of the Controller of Budget, the Committee observed as follows—

(a) Whether the MOUs executed between county governments and the MOH were agreements within the terms of Article 187 of the Constitution; and
(b) Whether the withdrawals authorised by the controller of budget were lawful;

(a) Were the MOUs executed between county governments and MOH were agreements in terms of Article 187 of the Constitution

In respect to whether the MOUs executed by county governments and MOH were agreements in terms of Article 187 of the Constitution, the Committee observed that—

1. county governments and the MOH executed MOUs between February and August 2015. The MOUs sought to obligate county governments *inter alia to* -

   (a) support, cooperate with and not wilfully impede the contractors in the performance of their obligations under the MES contracts;

   (b) supply the contractors at the county's cost cold water mains services, electricity to the quality and quantity as may be requested by the MOH or the contractors;

   (c) to cooperate at its own cost with the MOH and the contractor;

   (d) to indemnify the MOH against direct losses suffered by the MOH;

(e) to grant access to the hospitals to the contractors for purposes of the project;

(f) to prevent theft and damage to the equipment;

(g) at the request of the MOH, to verify any reports produced by the contractor in respect to their performance under the project;

(h) make available such number of staff as may be notified by the MOH to be trained by the contractor; and

(i) at the request of the MOH, participate in testing and commissioning of the equipment.

2. the MOUs did not make any reference to pertinent issues such as: the conditional grant, the specific county needs being addressed, the amounts being expended by the National Government on behalf of the county, details of which hospitals would benefit from the project and/or the specific equipment that each facility would receive. In this respect the Committee finds that the MOUs were generic across the 47 Counties;

3. the MOUs sought to have the county governments carry out some of the obligations that were apportioned to the MOH under the MES contracts. Some of the obligations include providing cold water mains services and electricity to the quality and quantity requested by the contractors.

4. according to Article 187 of the Constitution, *a function may only be transferred if the function would be more effectively performed or exercised by the receiving government*. This provision of the law implies an obligation that the two levels of government must consult before transferring functions in order to determine which level of government is better placed to effectively perform or exercise the function that is sought to be transferred. Therefore, according to the law, the MOH was required to seek the opinion of counties regarding their ability to effectively carry out the functions that the MOUs sought to transfer.

From the submissions made before the Committee, the Committee finds as follows—

(a) that consultation was not carried out as required by Article 187 this is because according to submissions by the Council of County Governors, the Governors were only informed of the MES project and then coerced to sign the MOUs which would amount to a contravention of the above mentioned implied constitutional requirement to consult;

(b) that from the submissions of the MOH and in particular *MoH 2* which sets out the functionality status of equipment, the fact that some counties lacked and continue to lack the capacity to provide for water and electricity as required under the MES

contracts, is a further indication that the implied obligation to consult in order to determine which level of government would perform the function more effectively was never adhered to;

(c) that section 26 (3) of the Intergovernmental Relation Act, an intergovernmental agreement that seeks to transfer functions between the two levels of government must be signed by an authorized person. A review of the MOUs submitted by the MOH to the Committee shows that whereas some MOUs were signed by county governors on behalf of their respective counties, others were signed by the county secretary as was the case in Embu and Siaya county while others were signed by the County executive members of health as was the case in Turkana county.

(d) In this regard the committee observes that Article 1 of the Constitution vests all sovereign power to the people who may exercise it through their democratically elected representatives at either the national or county level. In addition, the Committee observes that Article 179 (4) of the Constitution provides that *the county governor and the deputy county governor are the chief executive and deputy chief executive of the county, respectively*. Further, Article 179 (1) of the Constitution as read together with section 34 of the County Government Act provides that *the executive authority of the county is vested in, and exercised by a county executive committee*.

(e) that the county governor is the one mandated and authorised to exercise sovereign power on behalf of the people of the county. The Committee therefore finds that transfer of functions which is an exercise of sovereign authority should be undertaken by the Governor and as such the instrument that seeks to transfer functions must be executed by the Governor.

(f) that as a further protection of sovereign power of the people, section 26 (5) of the Intergovernmental Relations Act, 2012 requires that *the county assembly be notified of the decision to transfer a county government power, function or competency*. To compound the importance of providing the information of transfer of functions, Section 26 (3) of the Intergovernmental Relations Act, 2012 provides that the intergovernmental agreement shall be published in the Kenya Gazette and the county Gazette in respect of the county to which it relates, at least fourteen days before the effective date of the transfer or delegation. Finally, recognizing the amount of public interest issues relating to a transfer of function, section 29 of the Intergovernmental Relations Act provides *a framework for public participation in the transfer or delegation of powers, functions or competencies by either level of government.*

(g) that the MOUs were not submitted to the county assemblies neither were they subjected to public participation or published in the Kenya *Gazette* nor the respective county

gazettes. It is for the above stated reasons that the Committee finds that the MOUs that were executed with MoH and the forty-six (46) County Governments does not qualify as an agreement envisaged under Article 187 of the Constitution.

(h) that the MOUs for Embu, Siaya and Turkana counties were not properly executed since the officers who signed them lacked the authority to do so under the Constitution and the law.

(i) that in respect to Bomet county, the Committee finds that at the time of the supply, installation and delivery of the equipment, an MOU had not been executed between the National government and the Bomet county government and as such the National government contravened the Constitution and the law by usurping the functions of the county government of Bomet. (county Government was determined

Committee Recommendation

1. **The Committee recommends that any engagement between the two levels of Government must conform to the Constitution. The National and County Governments must strictly comply with Articles 6 and 189 of the constitution which provides that the two levels of Government are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.**

2. **State officers and public officers must observe the fidelity of the Constitution and the law and in particular Article 10 (1) provides that national values and principles of governance in Article 10 bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions. To this end Article 10(2)(c) identifies as one of the national values and principles.**

3. **A person to whom an authority or decision-making power has been delegated to from a higher source, cannot, in turn, delegate again to another, unless the original delegation explicitly authorise it. The MoUs that were entered into between the Ministry of Health and the County Governors ought to have been executed by the respective county Governors. By delegating that power to the respective CECs, the county governors abdicated their constitutional responsibility. County Governors must be true to the constitution and are obligated by Article 3 of the Constitution to respect, uphold and defend the constitution.**

(b)Were the withdrawals authorised by the Controller of Budget lawful?

As to whether the withdrawals made on the authority of the controller of budget were lawful, the committee observes that—

(a) in the FY 2015/2016, an amount of Kshs. 4.5 Billion was allocated through the County Allocation of Revenue Act, 2015 (CARA) as a conditional grant by the National Government to the county governments for the leasing of specialized medical equipment. The monies were however not deposited in the County Revenue Fund. Instead the monies were withheld at source and approved in the budget estimates of the National Government to facilitate technical assistance to county health facilities in line with the Fourth Schedule to the Constitution. In the FY 2016/2017 and FY 2017/2018, a similar amount of Kshs. 4.5 Billion was allocated as conditional grants to the counties through the annual County Allocation of Revenue Acts. However, in the FYs 2018/2019 and 2019/2020, allocations were varied upwards to Kshs. 9.4 Billion and Kshs. 6.2 Billion respectively. Failure to process the monies through the county treasury contravened Section 109 (2) of the Public Finance Management Act, 2012, which requires that *all money raised or received by or on behalf of the county government be paid into the County Revenue Fund;*

(b) the MES contracts were fixed term contracts with fixed quarterly payments. However, in the FYs 2018/2019 and 2019/2020, the amount allocated to leasing of specialized medical equipment was varied from Kshs. 4.5 Billion to Kshs. 9.4 Billion and then drop to Kshs. 6.2 Billion. Under these variations, county allocations to the project rose to Kshs. 200 million in the FY 2018/2019 and then marginally dropped to Kshs. 131,914,894 in the FY 2019/2020. In this regard, the Committee finds that COB as an oversight body mandated to oversee the implementation of budgets of both the National and County Governments and further mandated to authorize the withdrawal from public funds on the basis of Articles 206(2) and 228(4) of the Constitution, failed to ensure prudent and efficient use of public funds as required under section 5 of the Controller of Budget Act, 2016 by authorising the withdrawal of funds and further by failing to raise questions regarding the glaring anomalies in the variations.

(c) in addition, the COB demonstrated double standards in favour of the National Government by failing to apply the same high approval thresholds that it applies to approvals for spending by county governments as compared to the standard applied to approvals for spending by MoH. It is for this reason that the Committee finds that this failure resulted in suspicious and unjustifiable expenditure by the MoH in relation to the MES project as illustrated by the following examples:

(i) the COB approved payments towards the MoH's contractual obligations to MES service providers in the absence of the necessary minutes by Inspection and Acceptance Committees.

(ii) the COB continued to approve the disbursement of monies towards the MES project despite the fact that equipment remained non-functional in various counties due to the lack of requisite personnel and infrastructure.

(iii) despite the counties not receiving the same equipment in regard to quantum, the COB authorised blanket withdrawals from each county in contravention of the principle that public money should be used prudently.

From the foregoing, the Committee finds that the COB failed to ensure prudent and efficient use of public finances in contravention of Article 201 of the Constitution and section 5 of the Controller of Budget Act, 2016 while authorising withdrawals.

Committee Recommendations

(1) the Controller of Budget should be held accountable for violating Article 201 of the Constitution and section 5 of the Controller of Budget Act, 2016;

(2) the relevant investigating agencies to investigate the office of the Controller of Budget for approving withdrawals; and

(3) the Office of the Controller of Budget should apply and uphold the Constitution and in particular, the principles of public finance as espoused under Article 201 of the Constitution.

2.2.3. Council of Governors

The Committee received submissions from the Council of Governors (COG) on 9th October, 2019. Led by the Chairperson, Gov. Wycliffe Oparanya, EGH, COG made submissions as summarised below —

(a) Conceptualization of the Project

According to the COG, the conceptualization and design of the MES project was not conducted in accordance with the provisions of Article 187 of the Constitution. Furthermore, its implementation did not respect the functional and institutional integrity of counties as required by Article 189(1) of the Constitution.

(b) Needs Assessment

According to the COG, the MoH conducted a needs assessment exercise in March, 2014 which prioritised theatre, CSSD, laboratory, renal, ICU and radiology equipment. According to the COG, neither the COG nor the County Governments were involved in the need's assessment exercise.

(c) Memoranda of Understanding (MOU)

The COG stated that County Governments had executed MOUs with the MoH under duress. The COG state that the National Government utilized provincial administration machinery to exert public pressure on County Governors, and to blackmail county governments to sign the MOUs. For example, in the case of Kakamega County, Gov. Oparanya stated that chiefs were used to address public *barazas* in which the County Government was condemned for perpetuating the suffering of its citizens by refusing to accept MOUs equipment. He further stated that in some counties like Bomet, MES equipment was delivered and installed even before the MOUs had been signed.

With regard to the terms of the MOU, COG reported that the MOUs did not make provision for counties to exchange the equipment for what was more relevant to their needs. Further to this, COG stated that the same MOUs forbade counties from transferring duplicate equipment from a primary beneficiary hospital to another county health facility whose needs it may have better served. As such, counties lacked the flexibility necessary to adapt the MES equipment to better suit their needs.

(d) Contractual Agreement and Variations

According to the COG, County Governments did not receive full disclosure on the MES contracts that were executed between the MoH and the MES Contractors. As such, the COG was unable to explain the basis upon which monies were being charged to counties under the conditional grant for MES equipment.

The COG further submitted that the MoH did not disclose to counties how the additional equipment received under the expanded MES project had resulted in a variation of the annual costs of the project from Kshs. 95 million to Kshs. 200 million per county. In addition, while the additional equipment had benefited only 21 hospitals, the costs had been spread out across the 47 Counties.

(e) Duplication of Equipment

The COG submitted that owing to the lack of consultation, in certain instances, equipment received under the MES project duplicated equipment that was already in the counties. For example, in Laikipia County, functional X-Ray and theatre equipment that had been procured by the National

Government prior to devolution was removed to pave way for a new X-Ray and theatre equipment supplied under the MES project.

(f) Financing Procedures

According to the COG, disbursements related to the MES project were unusual in that they did not enter the County Revenue Fund. Rather, the MoH prepared a schedule of monies to be received by each county and deducted it at source without the money ever being processed through the County treasury.

(g) Schedule of Equipment

The COG stated that the MoH did not share the original list of equipment that each county was supposed to receive under the MES project. Consequently, counties were unable to determine whether they actually received what was due to them.

(h) Delivery, Installment and Commissioning of MES Equipment

According to the COG, equipment supplied under the MES project continued to be installed and commissioned at the time of the inquiry as indicated in the case of Chuka County Referral Hospital below-

Table VI: Schedule of equipment supplied TO Chuka Referral Hospital under MES Project

No.	Health Facility	Type of Equipment	Date Started	Date Completed
1.	Chuka County Referral Hospital	Theatre Equipment	30.7.2015	29.6.2016
		CSSD and Surgical Sets	30.7.2015	29.6.2016
		Renal Equipment	30.7.2015	29.6.2016
		Imaging and Radiology: a) X-Ray b) Dental X-Ray c) Ultrasound d) Mammography	30.7.2015	29.6.2016

(i) Functionality Status of MES Equipment

The COG testified that most of the equipment supplied under the MES project was functional at the time of this inquiry. However, there were still some equipment that still remained non-functional at the time of the meeting. For example, two theatre machines in Iten County Referral Hospital, digital X-Ray machine in Marsabit Referral Hospital, and anaesthetic and infant radiation machines in Emuhaya Sub-County Hospital.

The COG further reported that where the MES equipment was functional and in use, a positive impact in health service delivery had been realised.

(j) Specialized Personnel

According to the COG, lack of requisite specialized personnel was a key challenge hindering the successful implementation of the MES project. For instance, for purposes of operating the radiology equipment that it had received under the MES project, Homa Bay County reported that it had trained a Radiologist for a period of five years at a total cost of Kshs. 5 million. However, according to the CEC, Health, Homabay County, when the officer graduated, he declined to return to the county to provide his newly acquired specialist services.

(k) Staff Training

According to the COG, various county staff received the user-training for MES equipment during their installation. The COG however reported that refresher courses had not been provided, and specialist training under the project had been minimal and confined to the training of ICU and renal nurses.

(l) Consumables and Reagents

According to the COG, except for starter kits, counties were compelled to purchase reagents and consumables for renal, radiology and theatre equipment under the MES project. The COG further reported that MES equipment was locked to specific reagents and consumables which were expensive and not readily available in the market.

The COG also stated that the cost of reagents and consumables for MES equipment was exorbitant compared to reagents and consumables for corresponding equipment in the counties. For example,

the cost of digital films for MES X-Ray machines was at least five times that of normal X-Ray films.

(m) Cost

According to the COG, the cost of the equipment received under the MES project was highly exaggerated in comparison to prevailing market rates. Had counties been allowed to procure the equipment on their own, similar equipment would have been procured at a fraction of the cost.

The COG further reported that counties had incurred costly and unforeseen expenditure in infrastructural development, recruitment/training of specialized personnel and high operational costs (e.g. due to increased electricity and water needs) in order to accommodate the equipment supplied under the MES project.

Copies of the written submission and annexures received from the Council of Governors are herein attached **as Annexure VIII.**

Committee Observations from Meeting with the Council of Governors

The Committee made the following observations based on the submissions by the Council of Governors, and other evidence before it:

1. Where MES equipment had been installed and was functional, a positive impact in the delivery of health services had been realized. Positive examples of counties where the MES project had been well implemented and was having a demonstrable impact on health service delivery included Coast General Hospital in Mombasa County and Moi Teaching and Referral Hospital (MTRH) in Uasin Gishu County.

2. That the impact of the MES project was most demonstrable in facilities that already had capacity, and the requisite personnel and infrastructure to begin with. These included national referral facilities, and the former Provincial General Hospitals (now referred to as Level 5 hospitals). Poor implementation of the project was most pronounced in remote, marginalized counties that had been forced to adapt themselves to the equipment. For example, in Elgeyo Marakwet County, Iten County Referral Hospital was yet to operationalize its theatre equipment.

3. The conceptualization and design of the MES project was not conducted in accordance with constitutional provisions on intergovernmental cooperation as envisaged in Article 6 of the Constitution. Further, its implementation did not respect the functional and institutional integrity of counties as required by Article 189(1) of the Constitution. This was underlined by the fact that, in implementing the MES Project, the National Government through the MoH had exceeded its policy role by implementing roles and functions that were constitutionally under the domain of County Governments.

4. In contravention of Article 6 of the Constitution which requires the two levels of Government to conduct their mutual relations on the basis of consultation and cooperation, County Governments were not involved in the needs assessment exercise that led to the prioritization of equipment under the MES Project. Consequently, the equipment supplied under the project was not tailored to suit the unique and specific needs of each county.

5. The luck of consultation meant that, in various instances, equipment supplied under the MES project duplicated equipment already in use at county level. For example, Turkana County received an additional CT scan machine to one that the County Government had already procured. In other instances, counties received equipment that they had no capacity to absorb owing to the lack of requisite personnel, and/or infrastructure e.g. Endebess Hospital in Trans Nzoia County and garbatula in Isiolo county. In Tana River County, theatre equipment installed in Garsen Health Centre was yet to be operationalised owing to ongoing construction works and lack of three-phase electricity.

6. The MOU executed with the MoH denied Counties the flexibility necessary to adapt the MES project to suit their needs: For example, under the MOU, Counties could not exchange the equipment they received for what was more relevant to their needs. In addition, the same MOUs forbade Counties from transferring duplicate equipment from primary beneficiary hospitals to other county health facilities whose needs it may have better served. For example, theatre equipment assigned to Ziwa County Referral Hospital in Uasin Gishu County was unilaterally

reallocated to Moi Teaching and Referral Hospital (MTRH) by the MoH despite there being a viable alternative health facility in the County.

7. The MoH procured equipment for County Governments in the absence of an explicit written agreement between the two levels of government as required by Article 187 of the Constitution and Sections 25 and 26 of the Intergovernmental Relations Act.

8. The Memoranda of Understanding (MOUs) that were executed with MoH and the forty-six (46) County Governments did not equate to such an agreement as required by procurement/ contract law. Not only were they generic across the forty-six (46) Counties, they also did not make reference to pertinent issues to be expected under such an agreement. For example, the specific county needs being addressed, the amounts being expended by the National Government on behalf of the county, details of beneficiary hospitals and/or the specific equipment that each facility would receive.

9. The Committee takes a dim view of the quality of governance in the counties and is particularly disturbed that the county governors allegedly succumbed to pressure that resulted in the contravention of the Constitution, in particular the principles of governance, the principles of public finance, and the principles of intergovernmental relations. The Committee however commends the former Governor of Bomet County, Honourable Isaac Ruto for staying resolute and protecting the Constitution and the principles of devolved government by refusing to execute the MOUs that contravened the Constitution.

10. The MOH's response to Governor Ruto's stance served to demonstrate the unconscionable and ultimately unconstitutional and illegal conduct of the MOH when it forcefully supplied equipment to Bomet County despite the fact that a cooperation agreement between the MOH and the County of Bomet was not in place.

11. Counties did not receive uniform quantity of equipment under the MES project. Despite this, a blanket budgetary allocation of first Kshs. 95 Million, then Kshs.

200 million was applied across the forty-seven (47) Counties. Furthermore, when the contract was varied to add twenty-one (21) beneficiary hospitals to the MES project, the added costs were charged to all forty-seven (47) counties as opposed to the specific counties that had benefited from the additional equipment.

12. The committee further observed that whereas counties were not involved at the inception, conceptualisation, procurement and ultimately the contracting stages, there were some consultation during the implementation phase. Indeed, for the counties that accepted the equipment and took a keen interest to implement, positive change has been noted. Mombasa is one such example.

13. Disbursements related to the MES project were unusual in that they did not enter the County Revenue Fund as required by Section 109 (2) of the Public Finance Management Act which requires all money raised or received by or on behalf of the county government to be paid into the County Revenue Fund.

14. Key factors hindering the effective implementation of the MES project were the lack of requisite specialized personnel and infrastructure across various counties. This had resulted in MES equipment remaining non-functional in various county health facilities and denied attendant benefit to the population.

15. To accommodate the equipment supplied under the MES project, county governments were constrained to incur costly and unforeseen expenditure in infrastructural development and recruitment/training of specialized personnel. At the initiation of the project, these costs had not been factored into county budgets or CIDPs as required by law. For example, while Meru county has been paying for the equipment for the last five years, theatre equipment destined for Meru county is still lying in Netherlands.

16. Further, the monies necessary for the procurement of reagents and consumables were not factored into the conditional grants. As such, sourcing reagents and consumables had imposed a significant additional cost to counties for the running and operation of MES equipment.

17. The cost of the equipment received under the MES project was highly exaggerated in comparison to prevailing market rates. Had counties been allowed to procure the equipment on their own, similar equipment may have been procured at a fraction of the cost.

18. The Committee further observed that as much as counties were not involved in the inception, conceptualisation and contracting stages of the MES project, county governors perpetuated the illegalities by the Ministry of Health when the Governors accepted to sign the MoUs which did not meet the basic legal standards stipulated in Article 187 of the constitution and sections 25 and 26 of the Intergovernmental Relations Act.

19. The Committee further noted that the Council of Governors had engaged in litigation to oppose the actions of the National Government by filing Nairobi High Court Constitutional. Petition No 99 of 2015. When the High Court delivered in favour of the National Government, the COG filed an appeal at the Court of Appeal through Nairobi CoA Civ. Appeal No 101 of 2016.

20. The committee further observes that in some counties e.g. Uasin Gishu the equipment was delivered to MTRH which is a National referral Hospital and yet the county referral Hospital (Ziwa) has no equipment despite paying for the equipment;

21. The Committee further observes that County Governments never put any mechanism in place to isolate the revenue coming from MES equipment. Further, no assessment has been undertaken to determine how much counties collect from the services rendered under the MES equipment. There should be a proper revenue stream for MES equipment and determine how the income is expended.

Committee Recommendations

In view of the above observations, the Committee recommends as follows –

1. **that county governors as state officers and public officers have a fiduciary responsibility to exercise the sovereign power donated to them by the people of the county pursuant to Article 1 of the Constitution. Therefore, they exercise due**

diligence and fidelity to the Constitution when signing and executing binding agreements and exercising their office's power pursuant to Article 179(4) of the Constitution;

2. **Governors and the Executive should raise these matters in the Summit and stop the National Government from clawing back on devolution; resist the temptation from being emasculated by the National Executive to claw back on devolution;**
3. **that county governors should exercise the executive authority donated to them under Article 189 by being diligent in carrying out their functions and ensuring prudent use of public resources;**
4. **That County Governors having committed their counties by signing the MoUs and accepting the deductions from their respective county funds, the Governors must take responsibility and own the MES project and the equipment delivered and ensure that the equipment that are not in use, are put into use with immediate effect in order to benefit the public;**
5. **that county governments should ensure that they have in place a strict retention policy to prevent the loss of county officers who have been trained using county resources. Furthermore, in the event such officers trained with county resources fail to adhere to the retention policy, the Committee recommends that the county treasury institute civil proceedings against such errant officers. Thus, Homa Bay county treasury should recover the costs of specialized training from the radiologist that failed to adhere to the bond signed with the county as provided for under section 203 (1) (the Public Finance Management Act and the Public Finance Management (County Government Regulations, 2015).**

2.2.4. Ministry of Health (MoH)

The Committee received submissions from the MoH in four hearings. The Ministry delegation was led by the Cabinet Secretary, Mrs. Sicily Kariuki, EGH. The main highlights of the Ministry's submissions and evidence are provided below-

2.2.4.1 Goals and Objectives of the MES Project

According to the MoH, the MES project was aimed at accelerating progress towards attaining the health sector goal of equitable, affordable and quality health care at the highest attainable standard. The specific objectives/outcomes envisaged under the project included:

(i) attaining equitable, affordable and quality healthcare services of the highest attainable standard for citizens; and,

(ii) equipping Level 4 and Level 5 hospitals with specialized, modern and state of the art equipment so as to ensure that all citizens regardless of location, have access to uninterrupted, quality, specialized health care services.

2.2.4.2 Process of Conceptualization, Initiation and Implementation of the MES Project

The MES project was conceived as a strategic decision by the MoH to improve medical equipment in public health facilities based on the Medium-Term Plan II (2013-2017) and the 2013-2014 Health Performance Report. The 2013-2014 Health Performance Report had noted that medical equipment in public health facilities was more than 20 years old and was characterized by frequent breakdowns. The report further noted that public health facilities lacked modern equipment such as dialysis machines, radiology equipment etc.

Further, the initiation of the project had been informed by concerns raised by various stakeholders on the status of health service provision in the country. For example, in June 2013, the Senate, through a motion moved by Sen. (Dr.) Wilfred Machage, adopted a resolution that urged the National Government to establish a Level 5 and Level 4 hospital in each of the 47 counties.

In September, 2013, the MoH wrote to County Governors informing them of an intention to equip Level 4 and 5 hospitals under a public private partnership financing structure, and requesting for their support and cooperation. This communication was followed by a meeting with County Executive Committee Members of Health and Finance, and County Directors of Health in October 2013, where a resolution to fully support the equipping of public health facilities was signed.

2.2.4.3 Needs Assessment

According to the MoH, a Needs Assessment conducted between February and March, 2014 established that forty one (41) Counties did not have HDU equipment; thirty one (31) Counties did

not have ICU equipment; twenty nine (29) Counties did not have equipment for maternity theatre; twenty eight (28) Counties did not have equipment for casualty services; and seven (7) Counties did not have equipment for CSSD.

Based on the findings of the needs assesment, the MoH developed a list of priority equipment and categorized them according to Lots including theatre, renal, radiology, laboratory and ICU equipment.

2.2.4.4 Procurement

The MoH further submitted that a Value for Money analysis undertaken by PKF Kenya subsequently informed the MoH's decision to opt for a Managed Equipment Service model rather than outright purchase. On 6th May, 2015, the MoH signed contracts with successful bidders as follows-

No.	Name of Company	Contract Amount (USD)	Kshs. Equivalent at a Conversion Rate of Kshs. 101 to the USD
1.	Shenzhen Mindray Bio-Medical Electronic Co. Ltd	$45,991,449.78	Kshs. 4,645,169.78
2.	Esteem Industries Inc	$88,027,973.00	Kshs. 8,890,825,273.00
3.	BellCo SRL	$23,691,059.00	Kshs. 2,392,796,959.00
4.	Philips EA Ltd	$36,492,176.00	Kshs. 3,685,709,776.00
5.	General electric (EA) Services Ltd	$238,279,499.00	Kshs. 24,066,229,399.00

No contracts were awarded for Laboratory Equipment under Lots 3 & 4. An award was recommended for Sysmex Ltd under Lot 3, but the company declined the offer. In the case of Lot 4, none of the bidders was found to be responsive. As such, no payments had been effected for Lots 3 and 4.

Clearance for the other MES contracts by the Office of the Attorney General, as well as issuance of Letters of Support from the government was done on 10th July, 2015.

2.2.4.5 Leasing vs Outright Purchase

According to the MoH the MES leasing model involved an all-inclusive service for the supply, installation, commissioning, maintenance and replacement of the equipment.

Monies paid to the providers were spread over several financial years: Had the MoH opted for outright purchase, payment for the equipment would have been required in a single payment.

2.2.4.6 Cost of MES Equipment

According to the MOH, the cost of the equipment under the MES model factored in the following components:

(a) Product price
(b) Installation costs
(c) Civil and fitting out works
(e) 7-year life cycle training
(f) 7-year maintenance costs
(g) Equipment replacement
(g) Present value of cash outflows
(h) Consumables and start up kits
(i) Insurance costs
(j) Taxation
(k) Profit

As such, the Cabinet Secretary alleged that the seemingly high cost of leasing the equipment was justifiable in light of all the costing components. A breakdown of the specialised equipment supplied to each county as well as its value as submitted by the MoH is provided under annexure **IX**.

2.2.4.7 Schedule of Equipment Received

Counties received various equipment under the MES project including specialized theatre, renal, ICU and radiology equipment. A schedule of the equipment received by each county is provided under annexure **IX**.

2.2.4.8 Delivery, Installation and Commissioning of MES Equipment

According to the MOH, counties received equipment under the MES project on diverse dates from November, 2015. See *annexure **IX**, document marked 'MoH8'* for the dates of installation and commissioning of the MES equipment as submitted by the Ministry.

2.2.4.9 Functionality Status of MES Equipment

The MoH further submitted that MES equipment was not in use in various facilities for reasons varying from lack of requisite personnel, insufficient power and inadequate water (*see annexure IX document marked 'MoH9'*). A summary of hospitals with MES equipment installed but not offering service was provided as follows:

(1) Theatre equipment in nine (9) facilities was yet to be operationalized owing to lack of requisite personnel, lack of theatre facilities and/or lack of electricity as follows: Garsen Health Centre (Tana River), Eldas Hospital (Wajir), Chebiemit SCH (Elgeyo Marakwet), Kamwosor SCH (Elgeyo Marakwet), Endebess SCH (Trans Nzoia), Emuhaya SCH (Vihiga County), Baragoi SCH (Samburu), Kacheliba SCH (West Pokot), Kigumo SCH (Muranga), Mwala SCH (Machakos), and Suguta Marmar Hospital (Samburu).

(2) Renal equipment was operational in all but two facilities as follows:

(a) Meru Teaching and Referral Hospital: Renal equipment was yet to operationalized owing to ongoing construction works.

(b) Kapenguria District Hospital: Equipment was yet to be operationalized owing to lack of connection to a sewer line and insufficient power.

(3) All ICU equipment under the MES project was installed and functioning except in Meru Teaching and Referral Hospital where necessary construction works were ongoing.

(4) In the case of radiology equipment, Digital General X-Ray machines were installed and ready for service in sixteen (16) hospitals including Bondo, Chebiemit, Garbatulla, Garsen, Gucha, Kacheliba, Kapenguria, Kehancha, Keroka, Likoni, Makindu, Mwingi, Ndanai, Nyambene, Tharaka, and Endebess Hospitals.

2.2.4.10 Total Costs Incurred

Payments for the MES project were made on a quarterly basis. A summary of the payments made to the contractors from the FY 2015/2016 to date is provided below:

Contractor	FY 2015/16 (Kshs)	FY 2016/17 (Kshs)	FY 2017/18 (Kshs)	FY 2018/19 (Kshs)	Variations (Kshs)	Total (Kshs)

Mindray Medical	613,933,427.20	837,426,265.05	523,481,003.70	839,368,980.10	193,137,595.10	3,007,347,271.15
Esteem Industries	768,156,046.29	1,931,060,549.15	1,001,946,967.30	1,607,359,354.45	473,116,838.25	5,781,639,755.44
Bellco SRL	443,681,441.75	514,882,996.95	356,778,520.75	345.333,190.25	117,817,292.85	1,778,493,437.55
Philips Medical Systems	--	881,391,698.05	365,641,068.15	694,648,162.40	118,159,826.30	2,059,840,754.90
GE East Africa Ltd	1,774,597,964.50	5,321,355,235.15	2,660,295,535.00	4,386,089,500.80	--	14,142,338,236.45
Annual Total	**3,600,368,879.74**	**9,486,116,744.35**	**4,908,143,094.90**	**7,872,799,188.00**	**902,231,552.50**	**26,769,659,459.49**

2.2.4.11 Variation of Contract

The MOH informed the Committee that variations were made to the MES contracts resulting in an increase in payments by each county from Kshs. 95 million to Kshs. 200 million in the FY 2018/2019. The reasons behind the increase in variations were provided as follows:

(h) Expansion of MES to 21 additional hospitals at a value of Kshs. 3,700,808,413.00 for five years. This had translated to an annual payment of Kshs. 740,161,682.60;

(i) Procurement of HCIT at a contract value of Kshs. 4,756,773,074.00 for five years translating to an annual payment of Kshs. 970,381,692.00;

(j) Procurement of Laboratory Equipment at a cost of Kshs. 1.1 Billion; and

(k) Service Level Monitoring and Administration at a cost of Kshs. 298,548,722.00 with service level monitoring was being conducted by PKF Consulting at a cost of Kshs. 98,548,722.00.

In total, the additional costs had resulted in an increase in county allocations in CARA from Kshs. 95 million in FY 2016/17 to Kshs. 200M in FY 2018/19 per county. A summary of the FY 2018/19 MES Budget is provided as follows:

No.	Item	Annual Amount (Kshs)
1.	Initial Contract Annual Payment for 98 hospitals	6,301,882,830.00
2.	HCIT Contract	970,381,692.00
3.	Annual Payment due to expansion of 21 additional hospitals	740,161,682.60
4.	Procurement of Laboratory Equipment	1,089,025,073.00
5.	PKF, M&E, Mid-Term Review and Administration	298,548,722.90

Grand Total: 9,400,000,000.00

However, of these monies, no payments were made for the procurement of HCIT as the project had stalled. Further, the envisaged procurement of laboratory equipment was yet to be done.

2.2.4.12 Allocations in CARA to date

According to the MOH, the national government had extended conditional grants to counties for the MES project from FY 2015/16 to date. CARA Allocations to date totaled Kshs. 22,900,000,000 as follows:

Kshs. 3(95,744,681) + Kshs. 200,000,000.00 = Kshs. 487,234,043/county

Total allocations in CARA across the 47 counties amounted to:

Kshs. 47 counties X 487,234,043.00 = Kshs. 22,900,000.00

2.2.4.13 Fate of Leasing Equipment at the Lapse of the Leasing Period

The MoH stated that the contracts under clause 18.7 provided for three options at the lapse of the seven-year contractual period:

(i) Extension of the current contractor for a further period of three years;

(ii) Retention of the equipment in the hospitals where they were installed at the cost of $1; or

(iii) Decommissioning and disposing of the equipment at the contractors' cost.

2.2.4.14 Training

Training under the MES project was offered during the initial phase of the project following installation and commissioning of the equipment. Subsequently, contractors had conducted refresher training.

2.2.4.15 Monitoring and Evaluation

The Ministry informed the committee that it had put in place elaborate monitoring and evaluation processes that allowed for guaranteed performance of MES equipment. MES providers were contractually obligated to ensure equipment uptime of at least 95%. They were further obligated to submit periodic reports including: monthly and quarterly status reports; quarterly and annual programmed planned maintenance schedules; and, annual programmed planned maintenance reports. Further, the Ministry had put in place a MES Implementation Committee (MESIC).

In addition, contractors were contractually obligated to have performance monitoring systems whose minimum requirements included: a 24-hour help-desk facility; a robust system capable of receiving and handling complaints; a tamper-proof system to measure and report uptime; documentation; and, an auditable trail for recording complaints about equipment at facility level.

Further, in order to facilitate communication between the Ministry and the MES implementing hospitals, the Ministry had opened an email account (MoH.mescommunication@gmail.com) for the reporting of any challenges and/or difficulties relating to the equipment.

2.2.4.16 Schedule of the 21 beneficiary hospitals of the expanded MES Project

The decision to expand the MES project was informed by the need to achieve improved accessibility to specialized healthcare services in remote areas and the need to increase capacity in high volume hospitals. It was also done in response to requests by counties. Below is a summary of the 21 beneficiary hospitals of the expanded MES Project as submitted by the MoH:

No.	County	Health Facility
	Tharaka Nithi	Magutuni
	Murang'a	Kigumo
	Marsabit	Moyale

	Siaya	Yala
	Nakuru	Molo
	Kericho	Londiani
	Machakos	Mwala
	Meru	Kanyakini
	Tana River	Bura
0	Mandera	Takaba
2	Lamu	Mpeketoni
3	Kiambu	Gatundu
4	Bungoma	Naitiri
5	Wajir	Eldas
6	Kisii	Nyamache
7	Mombasa	Port Ritz
8	Taita Taveta	Wesu
9	Samburu	Suguta Marmar
0	Elgeyo Marakwet	Kamworor
1	Nyeri	Othaya

2.2.4.17 Impact of MES

The MES project had a significant impact on health service delivery as summarized in the table below:

No.	MES Equipment	Impact on Health Service Delivery

1.	Theatre and CSSD Equipment	- Improved access to specialized and emergency care. For example, in one quarter (Jul-Sep 2019) a total of 28,902 surgeries were carried out in MES hospitals. - Reduced patient waiting times - Reduced patient referrals - Improved clinical outcomes - Cost-savings for patients owing to lower user fees - Improved quality of life owing to improved health care - Increased hospital efficiency - Improved motivation amongst health personnel.
2.	Renal Equipment	- Expansion of renal dialysis services from five public hospitals previously, to 54 health facilities - Installation of 305 additional dialysis machines - 1,265 dialysis patients have been attended to with 198,256 dialysis sessions. - Increase in revenue collection by hospitals of Kshs. 1,883,432,000 from the Kshs. 9500 NHIF refund. - Decongestion of the five major public hospitals that were offering dialysis previously i.e Kenyatta National Hospital, Moi Teaching and Referral Hospital, Coast General Hospital, Nakuru PGH and Jaramogi Oginga Odinga Teaching and Referral Hospital - Improved staff capacity

3.	ICU	- Under the MES project, 14 hospitals have been fitted with six (6) ICU beds and three (3) HDU beds. This has resulted in: (a) Improved accessibility to critical care. For example, 1036 patients received ICU care between July and September, 2019. (b) Improved clinical outcomes (c) Improved staff capacity
4.	Radiology	- Improved access to affordable, quality radiological services: (a) 726,982 digital x-ray examinations have been conducted (b) 251,285 ultrasound examinations (c) 9,618 digital dental x-ray exams (d) 6,148 digital mammography examinations for the screening of breast cancer - Increased revenue collections in hospitals - Upgrading of facilities with modern radiology facilities - Improved diagnosis and image analysis

2.2.4.18 Interventions that the Ministry had undertaken to Address Challenges with the MES Project

In order to address emerging challenges in relation to the MES project, the Ministry had undertaken several key interventions including:

(a) Employment of Cuban doctors to support the delivery of theatre, ICU and renal services;

(b) Employment of 24 renal nurses to support the delivery of dialysis services;

(c) Capacitating KMTC to provide expanded training opportunities in critical care, radiography, renal care, biomedical engineering and theatre services; and

(d) Continuous engagement with county governments and enabling ministries to provide for power upgrades.

Copies of the written submissions and annexures received from the MoH are herein attached as Annexure **IX.**

2.2.4.19 Committee meetings with former officials and persons of interest within the Ministry of Health

2.2.4.19.1 Meeting with Mr. James Macharia, CS, Transport, Infrastructure, Housing and Urban Development; and, former CS, Health (2013 - 2015), and Dr. Nicholas Muraguri, PS, Lands, and former PS, Health (2015 - 2017)

(i) Background

Mr. James Macharia, CS, Transport, Infrastructure, Housing and Urban Development was the Cabinet Secretary for Health between 2013 and 2015. It was during his tenure that the MoH first proposed to procure specialized medical equipment for county health facilities through a PPP under a 'Build Lease and Transfer' (BLT) leasing model. The project would subsequently be implemented through a managed equipment service (MES) procurement model.

His tenure as Cabinet Secretary for Health also included the period during which: the MoH conducted the Needs Assessment exercise; MES bids were advertised and tendered for; MES contracts were awarded; financial advisory services were rendered by PKF Kenya and Spa Infosuv; MOUs were executed between the MoH and County Governments; and, the supply, installation and commissioning of MES equipment was initiated across the 47 counties.

During this period (2013-2015), Dr. Nicholas Muraguri, PS, Lands, and former PS Health (2015-2017) served as the Director of Medical Services. He subsequently rose to serve as the PS, Health from 2015 to 2017. During his tenure as PS, Health, Dr. Muraguri signed the contract for Lot 7 (Radiology Equipment) with General Electric East Africa Ltd on 31st March, 2016.

(ii) Submissions by Mr. James Macharia, CS, Transport, Infrastructure, Housing and Urban Development; and, former CS, Health (2013 - 2015), and Dr. Nicholas Muraguri, PS, Lands, and former PS, Health (2015 - 2017)

The Committee held two hearings with CS, James Macharia, and PS (Dr.) Nicholas Muraguri on 6th and 11th March, 2020. The following are key highlights of the submissions received by the Committee during these meetings:

(iii)Senate Resolution

According to Mr. James Macharia, the genesis of the MES project was a resolution by the Senate requiring the National Government through the MoH to establish a Level 5 and Level 4 hospital in each of the 47 counties. This came about following a motion moved by Sen. (Dr.) Wilfred Machage in June 2013 *(Annexure IX, document marked as 'MoH4')*. Subsequent to the Senate resolution, in October 2013 the MoH held a meeting with CEC Members of Health and Finance, and County Directors of Health at Multimedia University where a resolution to equip public health facilities was proposed and passed.

(iv) 2013-2014 Health Performance Report

According to Mr. Macharia, the need to supply specialised equipment was further informed by a 2013-2014 Health Performance Report had noted that most medical equipment in public health facilities was more than 20 years old and characterized by frequent breakdowns. The report had further noted that public health facilities lacked modern equipment such as dialysis machines, radiology equipment etc (*see Annexure IX, document marked 'MoH13')*.

(v) Needs Assessment

According to Dr. Muraguri, two assessments were conducted in relation to the MES project as follows:

a. Kenya Service Availability and Readiness Assessment Mapping (SARAM)

The Kenya Service Availability and Readiness Assessment Mapping (SARAM) was conducted in 2013. It entailed a joint assessment exercise by the MoH, the World Health Organisation (WHO) and other development partners whereby all health facilities across the country were assessed for

their level of service availability and readiness to provide basic services against a standard service package.

b. *Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in Proposed Level 4 and 5 Health Facilities*

Prior to rolling out the project, the MoH conducted a Needs Assessment aimed at establishing the personnel, equipment and infrastructural needs of Level 4 and 5 hospitals. According to Dr. Muraguri, the assessment targeted two hospitals in each county, typically former provincial general hospitals or former district hospitals. A report was subsequently prepared in March, 2014 whereby it was found that 41 counties lacked HDU equipment; 39 counties lacked ICU facilities; 29 counties did not have equipment for a maternity theatre; 28 counties did not have equipment for Casualty services; and, 7 counties lacked CSSD equipment. According to Dr. Muraguri, based on the findings of the Needs Assessment Report, the MoH developed a list of priority equipment which were subsequently categorised into seven Lots. He further noted that, following the needs assessment, the MoH made a strategic decision to distribute equipment under the MES Project uniformly across all counties for purposes of providing a standardized package of care.

(vi) Conceptualization of the MES Project

According to submissions made by Mr. James Macharia, the decision to opt for the MES Model over direct purchase or leasing was driven by the need to avoid huge financial outlays that would have arisen from traditional procurement methods, and the need to ensure uninterrupted service delivery. Further, according to Mr. Macharia, the MES Project was conceptualized to enable the Government to acquire an all-inclusive service for uninterrupted provision of theatre, CSSD, dialysis, ICU and Radiology services in 98 selected hospitals countrywide. The aforementioned services were identified following an assessment of the 98 beneficiary hospitals. The hospitals comprised two (2) hospitals per county.

(vii) MES Model vs Outright Purchase and Equipment Leasing

According to Mr. Macharia, when conceptualising the MES project, the MoH had ruled out procurement by outright purchase based on lack of capital and trained personnel. Likewise, he stated that while the MoH had considered financing and leasing options, owing to lack of capacity at county hospitals, leasing options were ruled out in favor of transferring risk to private entities

through a MES model. Leasing of equipment is dependent on volume of work which varies across different hospitals. As such, leasing for hospitals with low work volumes would have been expensive. Further, under a leasing arrangement, only basic repairs would be provided, there would be no replacement of obsolete equipment, fitting out works would not be included and there would be no uptime guarantees.

(viii) Value for Money

According to Mr. Macharia, the MoH engaged PKF Kenya and SPA Infosuv with a view towards determining value for money in the MES model of procurement *vis a vis* direct purchase. According to Mr. James Macharia, it was on the basis of the value for money assessment report by PKF Kenya that the MoH opted for the MES model of procurement rather than direct purchase. Further, he stated that in order to facilitate the value for money assessment, the MoH supplied PKF Kenya with the bids that it had received from prospective MES service providers. He further noted that the MoH precipitated the submission of the Value for Money Assessment Report by PKF Kenya as it needed to urgently establish value for money of the MES model over the traditional procurement method of direct purchase.

(ix) Involvement of the Office of the Attorney General

According to Mr. James Macharia, the Office of the Attorney General was duly involved in the MES Project as evidenced by a letter dated 10th June, 2015, and signed by the Former Attorney General, Prof. Githu Muigai, in which he, amongst others, cleared the MES Contracts for execution having stated that his office '*had independently reviewed the MES Contracts...and ascertain(ed) the validity of the contracts*'. The letter further confirmed that the obligations of the Government expressed in the transaction documents constituted legal, valid and binding obligations *(Annexure IX document marked 'MoH17')*.

(x) Level of Involvement of Counties in the MES Project

According to Mr. James Macharia, following the resolution by the Senate requiring the National Government through the MoH to establish Level 4 and 5 hospitals in each county, on 22nd October, 2013, the MoH held a meeting with County Executive Committee (CEC) Members of Health and Finance at Multimedia University to take them through details of the proposed project. Following the meeting, a Joint Communique was signed by himself as the CS, Health, the Principal Secretary and one representative each of the CECs of Health and Finance. Subsequently, on 22nd

January, 2014, the MoH held a meeting with County Governors at the Great Rift Valley Lodge, Naivasha, whereby the latter were taken through the details of the MES project.

With regard to the implementation of the MES project, according to Dr. Muraguri, counties were involved during the needs assessment by giving them an opportunity to select two facilities for assessment, as well as by being incorporated into the assessment teams. He further identified the specific county officials who were involved in the assessment exercise as CEC Members for Health, County Directors of Health and Medical Superintendents.

(xi) Level of Preparedness of Counties

According to both Mr. James Macharia and Dr. Nicholas Muraguri, the level of preparedness of counties to absorb the MES equipment varied based on the readiness of each respective counties to absorb the equipment, and the level of commitment by each county to commit the resources required to operate the equipment.

(i) Execution of Memoranda of Understanding

Mr. James Macharia denied claims that County Governors had signed MOUs for MES equipment under duress. However, in response to queries raised by Senators regarding the fact that MES equipment was delivered to Bomet County despite the lack of an MOU, he responded that the MoH delivered the equipment regardless because, "*..if a patient refuses to take medicine, there are ways of giving the patient medicine by force for the interest of the patient*".

(xii) Basis for Charges Levied Against Counties

With regards to the basis upon which monies were charged as 'conditional grants' to each county, according to Dr. Muraguri, that determination was made at the National Treasury without reference to the MoH.

(xiii) Provision of Water and Electricity for the Running of MES Equipment

According to Dr. Muraguri, while the provision of water and electricity was contained as an obligation of the MoH under the MES Contracts, these obligations were subsequently transferred to the County Governments under the MOUs.

(xiv) 2.23.15 Consumables and Reagents

According to Dr. Muraguri, the provision for consumables and reagents was excluded from the MES Contracts owing to difficulties in ascertaining how many patients would seek particular MES services at beneficiary hospitals.

(xv) Role of GE East Africa Services Ltd and Philips Medical Systems Nederlands B.V.

Mr. James Macharia admitted to the involvement of GE East Africa Services and Philips Medical Systems Nederland B.V. at the initiation of the project, but denied that there was any connection between their proposed involvement under a PPP model, and their eventual engagement as MES Contractors.

(xvi) Queries on the Procurement of MES Consultants

According to their submissions, the decision to procure the legal and financial transaction advisors by direct procurement and restricted tendering respectively was a collective decision of various offices and government agencies. They further submitted that in engaging the legal and financial transaction advisory services, the MoH had adhered to Part IV – General Procurement Rules, Section 3 which states that *'A procuring entity may use restricted tendering or direct procurement...if, ...the procuring entity – (a) obtains the written approval of its tender committee; and, (b) records in writing the reasons for using the alternative procurement procedure.'*

With regard to the procurement of financial transaction advisory services, they submitted that PKF Kenya was selected following the issuance of a Request for Proposals (RFP) from the MoH to five firms including PricewaterhouseCoopers Ltd, Ernst & Young, KPMG Kenya, Deloitte Kenya and PKF Kenya.

In relation to the procurement of legal transaction advisory services by IKM Advocates, they submitted that IKM Advocates were selected from a panel of advocates maintained by the Office of the Attorney General for use by State Departments. And further, that on 9th December, 2014, following a series of consultations and correspondences, the Attorney General had approved a Service Level Agreement between the MoH and IKM Advocates.

(xvii) Criteria Used to Define 'Original Equipment Manufacturer' as per the terms of the Tender

According to their submission, the decision to limit the MES project to original equipment manufacturers was informed by the need to avoid the interference of middle men. They further submitted that as per the terms of the tender, original equipment manufacturers (OEM) were defined as companies that made '*equipment either directly or through outsourcing of the manufacturing of their designed equipment and are sold usually under OEMs own name*'. Further, during the tender evaluation process, OEMs were confirmed using a valid and certified copy of a Manufacturer's Certificate, and a valid and certified proof of incorporation or registration.

(xviii) HCIT Project

According to their submissions, the HCIT project was intended as a critical component of the MES project. As envisaged, the use of HCIT would have facilitated the MoH to measure the level of productivity of the MES Project by supporting the monitoring of equipment and personnel. Further, it would have allowed for the optimization of MES equipment by supporting diagnostics, particularly in radiology, whereby images would be referred to a central server where the requisite expertise was available.

(xix) Costing of MES Equipment

Both Mr. James Macharia and Dr. Nicholas Muraguri disowned the cost figures for MES equipment that were submitted to the Committee by the MoH (*Annexure IX, document marked 'MoH7'*). They further tabled a price list from Philips tabulating the cost of equipment supplied under Lot 6, which amongst others, indicated the price of a stethoscope at KShs. 4500.00 compared to USD 12,400.00 (equivalent to KShs. 1,252,400.00 at KShs. 101 to the USD) in the MoH schedule.

2.2.4.19.1.1 Committee Observations

The Committee made the following observations:

1. Mr. James Macharia, CS, Transport, Infrastructure, Housing and Urban Development was the Cabinet Secretary (CS) for Health between 2013 and 2015. It was during his tenure that the MoH first proposed to obtain specialized medical equipment for county health facilities through a PPP initiative under a 'Build Lease and Transfer' (BLT) leasing model. His

tenure as Cabinet Secretary for Health also included the period during which: the PPP initiative was irregularly varied to a procurement process using the MES model; the MoH conducted the Needs Assessment exercise; the MoH engaged IKM Advocates as the legal transaction advisors for the MES project; financial advisory services were rendered by PKF Kenya and Spa Infosuv; MES bids were advertised and tendered for; MES contracts were awarded and executed; MOUs were executed between the MoH and County Governments; the process of procuring GoK Letters of Support to the MES Contractors was initiated; and, the supply, installation and commissioning of MES equipment was initiated across the 47 counties.

2. During this period (2013-2015), Dr. Nicholas Muraguri, PS, Lands, and former PS Health (2015-2017) served as the Director of Medical Services (DMS). He subsequently rose to serve as the PS, Health between 2015 and 2017. Further to being involved in the MES activities described under (1) above, first as the DMS, and then subsequently as the PS, Health, Dr. Muraguri executed the MES contract for Lot 7 (Radiology Equipment) with GE on 31st March, 2016 on behalf of the MoH *(see copy of Lot 7 contract attached as 'Annexure XXII').*

With specific regard to the processes which CS, James Macharia, and Dr. Muraguri presided over in relation to the MES Project, the Committee observed:

i) Conceptualisation and Initiation of the MES Project

a) The conceptualization and design of the MES project was not conducted in accordance with the constitutional provisions on intergovernmental cooperation envisaged in Article 6(2) of the Constitution which states that "*the governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.*". Further, its implementation did not respect the functional and institutional integrity of counties as required by Article 189(1)(a) of the Constitution which obligates the Government at either level to, "*perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level...*". Indeed, in implementing the MES Project, the National

Government through the MoH exceeded its policy role by implementing roles and functions that were constitutionally under the domain of County Governments.

b) Health is a devolved function under the Fourth Schedule to the Constitution. However, in contravention of Article 6 of the Constitution which requires the two levels of Government to conduct their mutual relations on the basis of consultation and cooperation, County Governments reported not having received full disclosure on the contracts executed on their behalf by the MoH and the contracted companies. Further, Counties were not optimally involved in the needs assessment exercise that led to the prioritization of equipment under the MES Project. Consequently, the equipment supplied under the project was not tailored to suit the unique and specific needs of each county.

c) The MoH flouted the procurement law by first of all identifying who they intended to deal with as evidenced by the following:

d) In a letter to County Governors dated 20th September, 2013, Mr. James Macharia, then CS, Health, stated an intention by the MoH to train personnel, and equip Level 4 and 5 hospitals in the counties through a Public Private Partnership (PPP) initiative involving two multinational companies (*Annexure IX, document marked 'MoH1'*).

e) The two multinational companies, GE and Philips, were further referenced in the Concept Paper developed by the MoH on '*Leasing of Equipment and Infrastructure Improvement in Public Health Facilities under Public Private Partnership,*' as key initiators in the project (*see Annexure IX document marked as 'MoH1'*).

Based on the foregoing, the Committee observes that by first identifying who it was going to work with, the MoH precluded the possibility of competitive sourcing of goods and services under the project. To note, the two companies were awarded contracts to supply equipment under Lots 6 and 7 respectively.

At a combined contract value of USD 275,771,678.00 (equivalent to Kshs. 27,852,939,500.00 at an exchange rate of Kshs. 101 to 1 USD), this was equivalent to at least 60% of the total contract value at the time.

ii) Feasibility Study

f) In relation to the above, the Committee notes that according to the MoH budget estimates for the FY 2014/15, the MoH was allocated a budget of KShs. 1.2 Billion towards feasibility studies presumably for the MES project under Vote 1081. However, despite resources being availed by Parliament for this exercise, there was no evidence that the MoH undertook the feasibility study as had been budgeted for. Further, it was unclear from the submissions made how the needs assessment exercise by the MoH was funded.

iii) Variation from a PPP Initiative to a MES Procurement Model

g) As per submissions made by the National Treasury, and as per the Concept Note submitted by the MoH, the cost of the entire project as a PPP initiative (including infrastructural development) would have Kshs. 43.5 Billion over a 10-year period. According to the Concept Paper, this would have translated to an annual sum of Kshs. 4.35 Billion spread out over a ten-year period as follows:

- MoH budgetary allocation: Kshs. 1 Billion/year;
- Payment by counties and revenues from services rendered: Kshs. 1.5 Billion/year; and,
- Budgetary support from the NT: Kshs. 2 Billion/year.

However, under the MES arrangement, the equipment was ultimately supplied to counties at an annual cost that peaked at Kshs. 9.5 Billion, in the FY 2019/2020.

h) In a letter dated 22nd June, 2015, the MoH terminated its engagement with the National Treasury (NT) for equipment lease and health infrastructural development under a PPP. The letter further indicated that the MoH had opted to pursue the proposed project using a Managed Equipment Services (MES) scheme (*Annexure IX).* According to the National Treasury (NT), no justification or explanation was provided by the MoH for the termination of the PPP initiative. Further, the NT submitted that the termination of the PPP initiative coincided with the point at which processes had been initiated to conduct a feasibility study. The Committee further notes that in its Special Audit of the MoH Accounts for the FY 2015/2016, the OAG queried the manner in which the project was varied from a PPP initiative to a public procurement process (*Annexure IX).*

iv) Needs Assessment

i) In implementing the MES Project, the MoH appears to have ignored its own findings and recommendations as contained in the *'2014 Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in the proposed Level 4 and 5 Facilities in the Counties' (see Annexure. IX)*. The report notes that the *"provision of specialized health services is still very weak due to inadequate specialized human resources."* It goes further to note that the *"delivery of comprehensive services requires availability of at least one specialist in all categories …"*. Data provided in the report indicated the following availability of various specialized cadres in 2014: Physicians (18%); Obstetricians/Gynaecologists (14%); Orthopedic Surgeons (9%); Radiologists (32%); Paediatricians (21%); General Surgeons (22%); Anaesthesiologists (11%); ICU Nurses (2%); Burns Nurses (3%); Theatre Nurses (15%); and Renal Nurses (VV%).

The report further noted that more than ten (10) counties did not have even one specialist. However, despite finding that counties lacked the requisite specialised personnel, the MoH went on to fast track the roll-out of the MES Project. To note, lack of specialized personnel to operate the MES equipment has since been identified as one of the key challenges hindering the successful implementation of the MES Project.

j) On availability of equipment, the same report *(Annexure IX)* indicated that the availability of various equipment varied from 60-90% in the counties. For example:

- General X-Ray Machines: 54% availability
- Anesthetic machines: 65%
- Autoclaves: 86%
- Cesarean Section Sets: 86%
- Operating Theatre Lamps: 62% etc

However, despite finding that the various equipment prioritized under the project were already available in at least 60% of county health facilities, the MoH went on to supply a blanket allocation of MES equipment across the counties. This had

consequently led to cases of duplication of equipment. For example, Laikipia County reported that functional X-Ray and theatre equipment that had been procured by the National Government prior to devolution was removed to pave way for the new X-Ray and theatre equipment supplied under the MES project. In Nyamira County, renal equipment was installed and commissioned by the MoH despite the fact that the County had already procured functioning renal dialysis machines that were adequate for its needs.

k) Further, the needs assessment report *(Annexure IX)* indicated that the infrastructure available for specialised diagnostic radiological services ranged from 1-109% across the counties. The import of which was that, from the onset, there already existed wide infrastructural disparities between the counties: While some counties exceeded the infrastructural requirements necessary to absorb the equipment envisaged under the project at 109%, others had only 1% of the infrastructure required. However, despite finding that most counties lacked the requisite infrastructure for specialised equipment, the MoH went ahead to fast track the roll-out of the MES Project. Consequently, five years down the line, various counties were yet to operationalize MES equipment owing to lack of adequate water or electricity, and/or ongoing construction works. For example, in the MoH Report on the functionality status of MES equipment *(see Annexure IX)*, the MoH noted that while General Digital X-Ray machines were already installed and ready for service in 16 counties, they were yet to be utilised owing to lack of phase three electricity.

l) The net effect of ignoring its own findings in the needs assessment report was that, approximately five years after the roll-out of the project, MES equipment remained non-functional in several health facilities across the 47 counties owing to the lack of the requisite specialized personnel, infrastructure, water and/or electricity.

m) The Committee further observes that the Needs Assessment report *(Annexure IX)* contained recommendations to the effect that the MoH would: (i) share its findings with the county governments; (ii) jointly with the county governments prioritize the list of critical equipment to be procured; and, (iii) together with the county governments, draw a comprehensive procurement plan for high-end equipment. However, contrary to these recommendations, the Committee did not find evidence

to suggest that the MoH shared the needs assessment report with the counties, or that county governments were involved in prioritizing their needs. As a result, most of the equipment supplied to the counties under the MES project did not correspond to their actual needs.

n) With regard to the Kenya Services Availability and Readiness Assessment (SARAM) Report referenced by both Mr. Macharia and Dr. Muraguri as part evidence of having conducted a needs assessment prior to rolling out the MES Project, the Committee observed that the SARAM report was focused on basic health services and not the provision of specialised equipment which underpinned the MES project. Further, the report did not make any reference to the MES project, and was funded by the World Health Organisation (WHO) and DFiD amongst others.

v) Consultation and Cooperation with County Governments

o) As part evidence of having consulted counties on the MES project, Mr. Macharia and Dr. Muraguri submitted a Communique of a consultative meeting held between the MoH, CECs for Health and Finance, and County Directors of Health on 22nd October, 2013 *(see Annexure IX)*. Part of the Resolutions captured from the meeting read as follows:

- *Resolution 3: We (counties) need to prioritize the facilities to be considered under the current initiative, including the type of equipment to be used.*
- *Resolution 5: That measures will be taken to ensure that existing legislation in procurement and Public Private Partnership are used to avoid the problem of monopolizing the initiative.*
- *Resolution 8: Regular meetings will be held to review the development of the initiative. "*

However, contrary to the resolutions of this meeting, and as evidenced by submissions of the COG and OAG, counties were not subsequently involved in prioritizing the equipment that was supplied to them under the MES project. Indeed, counties reported having been excluded from the Needs Assessment exercise conducted by the MoH altogether. Further to this, and in contravention of the meeting's own resolutions, no evidence was provided to suggest that the MoH had

continued to hold regular meetings with the Forum to review the development of the initiative.

vii) Memoranda of Understanding

p) On diverse dates between February and August 201, the MoH and County Governments executed MOUs for purposes of facilitating the implementation of the MES Project.

q) Health is a devolved function under the Fourth Schedule of the Constitution. Article 187 (1) of the Constitutions states that *"a function or power of government at one level may be transferred to a government at the other level by agreement between the governments if—*

(a) the function or power would be more effectively performed or exercised by the receiving government; and

(b) the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.

r) Section 25 of the Intergovernmental Relations Act, 2012 provides that, *"A government transferring or delegating a power, function or competency under this Part shall:*

a) ensure the assignment is to the level of government best placed to exercise or perform the power, function or competency in accordance with Article 187 of the Constitution;

b) ensure that adequate resources are provided to carry out the power, function, or competency;

c) ensure that the transfer is in accordance with the procedures set out under this Act or prescribed by regulations made under this Act; and

d)) ensure a transfer or delegation under this section does not transfer constitutional responsibility assigned to that level of government."

Section 26 of the Intergovernmental Relations Act, 2012 (IGRA, 2012) further provides *"that a transfer or delegation of powers, functions or competencies under*

this Part shall be by a written agreement. It further provides that the Agreement shall set out the resourcing framework for the delivery of the function, the capacity of the receiving entity to exercise or perform the function, the method of resolving disputes, the terms and conditions for the exercise of the function." The IGRA, 2012 further requires *"..that the agreement be signed by an authorized person and published in the Kenya Gazette and the county Gazette at least fourteen days before the effective date of the transfer or delegation.*

s) Contrary to the aforementioned provisions of Article 187 of the Constitution and section 26 of the IGRA 2012, the MoH procured specialized equipment for County Governments in the absence of an explicit written agreement between the two levels of Government. The Memoranda of Understanding (MOUs) that were executed between the MoH and the 46 County Governments did not equate to such an agreement as required by law. In deed, according to Black Laws dictionary, an MOU is merely a letter of intent *"..detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement."*

t) In some counties, MOUs were signed by non-authorised persons contrary to section 26 (3) of the IGRA 2012 which mandates only authorised persons to sign intergovernmental agreements for the transfer functions between the two levels of government: The County Governor is the officer authorised to exercise sovereign power on behalf of the people of a county as provided for under Article 179 (4) of the Constitution which defines county governors as the chief executive officers of the counties; and, section 24 of the County Government Act (CGA) which vests the executive authority of a county on the county executive committee. However, in the case of Embu and Siaya counties, the MOUs were signed by the County Secretaries. In Turkana County, the MOU was signed by the CEC Health.

u) The MOUs that were executed under the MES project did not comply with section 26 (5) of the IGA 2012 which provides for county assemblies to be notified of a decision to transfer a county government power, function or competency.

v) Further, the MOUs did not comply with section 26 (3) of the IGA 2012 which provides that the *"..intergovernmental agreement shall be published in the Kenya*

Gazette and the county Gazette in respect of the county to which it relates, at least fourteen days before the effective date of the transfer or delegation."

w) Further, the Committee observed that not only were the MOUs generic across the forty-six (46) Counties, but they also did not make reference to pertinent issues to be expected under such an agreement e.g. the specific county needs being addressed, the amounts being expended by the National Government on behalf of the county, details of beneficiary hospitals and/or the specific equipment that each facility would receive.

x) The legal validity of the MOUs was further brought to question by the fact that even where no MOU existed with a county government, as demonstrated in the case of Bomet County, the MoH proceeded to supply and install equipment under the MES project in total disregard of the Constitution and the law.

y) Further on the legal validity of the MES Contracts, the Committee observes that Clause 5.4 of the MES contracts obligated the MoH to *"..supply at its cost: (a) cold water mains services, and (b) electricity to the quantity and quality set under the contract."*. However, under the MOUs executed by the MoH and the county governments, these obligations and their attendant costs were irregularly transferred to county governments. For example, according to the MOU signed by Machakos County, the county had an obligation under item 2.3 to "*...supply to the contractors at the county's cost, cold water mains services and electricity to the quantity and quality as may be requested by the ministry or contractors, throughout the contract period.*"

z) Further, County Governments reported having signed the MOUs under duress: According to submissions made by the COG, the National Government deployed provincial administration machinery to intimidate and exert public pressure on Governors to sign the MoUs. In the case of Kakamega County for example, Chiefs reportedly mobilized public *barazas* to condemn the County Government for declining to accept the equipment thereby causing needless deaths and suffering of county residents.

aa) The MOUs further denied Counties the flexibility necessary to adapt the MES project to suit their unique needs: For example, under the MOUs, Counties could

not exchange the equipment they received for what was more relevant to their needs. In addition, the same MOUs forbade Counties from transferring duplicate equipment from primary beneficiary hospitals to other county health facilities whose needs they may have better served. For example, theatre equipment assigned to Ziwa County Referral Hospital in Uasin Gishu County was unilaterally reallocated to Moi Teaching and Referral Hospital (MTRH) by the MoH despite there being a viable alternative health facility in the County.

vii) Non-Adherence to Mandatory Tender Requirements

bb) Section 64 of the PPDA 2005 (now repealed) stated that *" a tender is responsive if it conforms to all the mandatory requirements in the tender documents."*

cc) The MES invitation to tender was restricted to original equipment manufacturers (OEMs) of medical equipment and specifically stated "*The Ministry of Health now invites sealed tenders from original equipment manufacturers who can also undertake managed equipment services."* However, contrary to the tender documents, despite not qualifying as an OEM, GE was awarded the tender to supply Lot 7 (Radiology) equipment *vide* an award letter *(Ref: MOH/PS/1/1/VOL VI(118))* dated 21st November 2014 *(see Annexure XII)*. The award letter was signed by Dr. Nicholas Muraguri, the then DMS, on behalf of the PS, Health. The Contract was subsequently executed on 31st March 2016. Signatories to the contract included Dr Nicholas Muraguri, PS, Health and Mr. Felix Okwenda for GE East Africa Ltd.

dd) To this effect, the Committee observed that GE lacked the authorization to tender and subsequently execute the Lot 7 contract as all MES Contracts were specifically reserved for OEMs. As such, the MoH illegally awarded the Lot 7 MES contract and violated section 64 of the PPDA 2005 (now repealed), which stated that *" a tender is responsive if it conforms to all the mandatory requirements in the tender documents."*

viii) Sub-Optimal Involvement of the Office of the Attorney General in the MES Project

ee) Circular Ref. No. AG/1/2010 titled "Government Legal Advisory Services," dated 3rd May, 2010, mandated the involvement of the Office of the Attorney General (OAG & DOJ) in the negotiation and drafting of government contracts (*see Annexure XIV*). In addition, the AGs' Circular of the 1st March, 2018 required Ministries, Departments and other Government Agencies to submit contracts and agreements to the OAG & DOJ for review prior to signature. However, contrary to the provisions of the AGs' circulars referred to above, according to the OAG & DOJ, the extent of its involvement in the MES project was minimal in so far as it related to the negotiations and initial review of the contracts.

ff) As the legal transaction advisors to the MoH, IKM Advocates played the key role in advising on the procurement structure of the MES Project, and in the drafting, negotiating, amending and finalizing of the MES Contracts for execution.

gg) Contrary to the provisions of AGs' circular dated 3rd May, 2010 (Ref.AG/1/2010) which obligated all client ministries to consult and seek approval of the AG before retaining the services of private advocates, the MoH irregularly engaged the services of IKM Advocates prior to the approval of the AG as partly evidenced by the following:

- *Vide* a letter dated 16th May, 2014, IKM Advocates referenced a meeting with the MoH held on 12th May, 2014 in which they were requested by the MoH to advise it on its proposed procurement of the Project (*see Annexure XXI*);

- *Vide* a letter dated 2nd July, 2014, then CS, Health, Mr. James Macharia, wrote to the then AG, Prof. Githu Muigai, EGH, SC, seeking to engage the services of IKM Advocates through direct procurement (*see Annexure XXI*);
  - *Vide* a letter dated 23rd July, 2014, then AG, Prof. Githu Muigai wrote back to the then CS, Health, Mr. James Macharia advising the MoH on the legal requirements for direct procurement in accordance with section 74 of the PPDA Act 2005 (now repealed) and Regulation 62 of the Public Procurement and Disposal Regulations, 2006 (*see Annexure XXI*);
- On July, 2014, the MoH floated a tender (Tender No. MoH/2014/2015) for the supply, installation, testing, maintenance and replacement of medical equipment and associated training for county and sub-county health facilities through a managed equipment service (MES) arrangement. As submitted by IKM Advocates, the tender documents included a draft contract prepared by themselves;
  - *Vide* an unsigned letter dated 31st July, 2014, then CS Health wrote back to the then Attorney General justifying the decision by the MoH to engage IKM Advocates through direct procurement (*see Annexure XXI*); and
  - *Vide* a letter dated 18th August, 2014, Prof. Githu Muigai, the then Attorney General, advised the MoH to enter into a service level agreement with IKM Advocates and submit the same to his office for approval(*see Annexure XXI*);

These suggest that the MoHs' involvement of the OAG & DOJ and eventual execution of the Service Level Agreement with IKM Advocates were exercised as mere formalities rather than as integral aspects of the legal process.

ix) Engagement of IKM Advocates as the Legal Transaction Advisors

hh) In a special audit of the MoH for the FY 2015/2016, the Office of the Auditor-General (OAG) raised audit queries regarding the questionable circumstances under which the MoH procured its legal and financial consultants for the MES Project: In the case of IKM Advocates, the OAG noted that the firm was engaged as the legal transaction advisors through direct procurement at a contract sum of

USD. 560,000.00 (equivalent to KSHs. 56,560,000.00 at KShs. 101 to the USD). Noting that the MoH had cited urgency as the reason for failing to procure the transaction advisors through a competitive bidding process, the OAG nevertheless observed that the reasons provided by the MoH for failing to use competitive bidding were unsatisfactory owing to the scale of the project, and level of public interest.

ii) Under the then applicable law, PPDA 2005 (now repealed), direct procurement was provided for under section 74 "*...as long as the purpose is not to avoid competition*". Section 74(2) & (3) of the PPDA 2005 (now repealed) outlined the following preconditions for direct procurement by a procuring entity:

> *(2) A procuring entity may use direct procurement if the following are satisfied—*
>
> *(a) there is only one person who can supply the goods, works or services being procured; and*
>
> *(b) there is no reasonable alternative or substitute for the goods, works or services.*
>
> *(3) A procuring entity may use direct procurement if the following are satisfied—*
>
> *(a) there is an urgent need for the goods, works or services being procured;*
>
> *(b) because of the urgency the other available methods of procurement are impractical; and*
>
> *(c) the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.*

The Committee notes that in response to a request by the MoH to directly procure the services of IKM Advocates dated 2nd July, 2014 (*see Annexure XXI*), *vide* a letter dated 23rd July, 2014, the then Attorney General advised the MoH in accordance with section 74 of the PPDA Act 2005 (now repealed) and Regulation 62 of the Public Procurement and Disposal Regulations, 2006. In this respect, the

Committee observed that the MoH failed to satisfy the legal requirements set out in section 74 of the PPDA Act 2005 (now repealed) as it did not demonstrate that IKM Advocates were the only persons capable of providing legal transaction advisory services under the MES Project, nor did it demonstrate that there lacked reasonable alternatives.

Further, in contravention of section 74 (3) of the PPDA 2005 (now repealed), the Committee observes that whilst there may have been a need for specialised and modern equipment, given that most counties lacked the requisite personnel and infrastructure to begin with, procurement of the equipment was not as urgent as postured by the then CS, Health, Mr. James Macharia, in his letter dated 2nd July, 2014, as to render competitive procurement methods for legal advisory services impractical (*see Annexure XXI).* Moreover, the Committee observes that the response by the AG dated 18th August, 2014 did not exempt the MoH from procuring legal transaction advisors through competitive means (*see Annexure XXI).* Based on the foregoing, the Committee concurs with the position of the OAG& DOJ that the MoH unprocedurally single-sourced legal transaction advisory services from IKM Advocates under the MES Project.

jj) According to submissions made by IKM Advocates, their terms of reference as the legal transaction advisors to the MoH included providing a legal opinion on the optimal procurement structure for the MES Project: Accordingly, *vide* the letter dated 16th May, 2014 ,IKM Advocates noted that the MoH had requested it to advise on: (i) whether to procure under the Public Private Partnership Act, 2013 (PPP Act, 2013) or the Public Procurement and Disposal Act, 2005 (PPDA, 2005); and, (ii) the optimal procurement process for the process, having regard to the existing legal framework.

The letter further noted that the MoH had indicated a preference towards procurement of medical equipment using the following processes:

- outright purchase, which would have been used for specific equipment identified by the MoH, and which the MoH proposed be purchased by the respective county governments;

- placement, which would have been used for Lots that typically required reagents and which were smaller and less capital intensive. Here, the MoH proposed that it would be the procuring entity; and,
- leasing, which would have been used for Lots that were more capital intensive and for which the MoH would be the procuring entity.

The Committee observes that at the point of being requested for this legal opinion, IKMs' engagement with the MoH was yet to be formalised either via approval of the AG, or via the execution of a service level agreement. The Committee further notes that in its legal opinion, IKM Advocates advised the MoH that the PPP Act would not be applicable to the proposed project, and that the project ought to be procured under the PPDA 2005. This legal opinion had a consequential impact on the overall project as demonstrated by the fact that one month later, on 9th June, 2014, the MoH published an invitation to tender for the supply, installation, testing and replacement of medical equipment under a managed equipment service arrangement *(see Annexure XXI)*. Further, in the letter dated 22nd June, 2015 the MoH proceeded to terminate its engagement with the National Treasury (NT) for equipment lease and health infrastructural development under a PPP.

kk) The MoH paid IKM Advocates KShs. 48,881,063.90 (excluding tax), being the cumulative cost for services rendered. Contrary to the law, according to submissions by IKM Advocates, the payment included the cost of services rendered during its 'informal' engagement with the MoH between May 2014 and 16th January, 2015 when their service level agreement was executed. Services rendered during this 'informal' engagement period were highly consequential and included issuing a legal opinion that presumably informed the decision by the MoH to vary the legal framework of the project from a PPP to a procurement model, and drafting the draft contracts that were attached to the MES tender documents.

ll) *Vide* a letter dated 27th February, 2015, then CS, Health, Hon. James Macharia sought the approval of the AG to extend the mandate of IKM Advocates. The letter further sought the AGs' approval for the MoH to accept funding in the form of a 'donation' from GE East Africa, a contractor in the MES Project, for the further

engagement of IKM Advocates in the additional scope of services. *Vide* his letter dated 23rd April, 2015, the then Attorney General, Prof. Githu Muigai, EGH, SC granted his approval subject to the conclusion of a fresh service level agreement to be approved by his office. The AG further granted approval for the 'donation' by GE on the understanding that it was to be made *gratis*, without any expectations of preferential treatment in the MES Project. To note, contrary to the express directive of the AG, the Committee did not find evidence to suggest that the MoH and IKM subsequently executed a new SLA for the additional scope services.

mm) There had been a pre-existing client-advocate relationship between GE and IKM Advocates from 2010 at the time of its engagement as legal transaction advisors to the MES Project. However, neither the firm, nor the MoH declared this conflict of interest to the OAG & DOJ. To note, GE was the biggest beneficiary in the MES project having been awarded at least 52% of the total MES.

x) Execution of the MES Contracts

nn) According to submissions by the OAG & DOJ, the signing event of the MES Contracts on 6th February, 2015 was supposed to serve ceremonial purposes as the contract negotiations were still at their nascent stages at the time. According to the OAG & DOJ, the five (5) MES Contracts that were signed on 6th February, 2015 were supposed to have wording to the effect that the same were *'mere expression of the intention to contract'* and be subject to further negotiations between the parties. Further, according to submissions by Prof. Githu, the MES Contracts that were executed on 6th February, 2015 were only to be signed as pre-contracts and not the final MES Contracts, as they were still subject to further negotiations and review. However, in total disregard of the advice given by the OAG & DOJ, the MoH subsequently referred to 6th February, 2015 as the Commercial Close Date, and all further reviews of the MES Contracts after 6th February, 2015 were considered as amendments and restatements.

xi) Execution of Additional Contracts Ancillary to the MES Contracts

oo) According to the OAG & DOJ, the MoH and MES Contractors executed additional contracts ancillary to the MES Contracts (as amended and restated), including, *inter*

alia, Funders Direct Agreements, Subcontracting Agreements; Parent Company Guarantees; and Novation Agreements without their being reviewed and/or approved by the OAG & DOJ. Indeed, the OAG & DOJ testified that its office only came to learn of the additional contracts *post facto* when binding obligations had already been created to third parties *(see Annexure XXI)*

pp) The import of the additional agreements was that they were designed to circumvent the Public Procurement and Disposal Act whereby international contractors tendered for the MES Project but subsequently transferred the performance of the ensuing contract obligations to local companies that may not otherwise have qualified for the contracts.

qq) Further, according to the OAG & DOJ, the ancillary agreements altered the MES Contracts (as amended and restated) and placed binding obligations on the GoK that were highly skewed in favour of the Contractors, and which exposed the GoK to huge financial and legal liabilities. For example, the Amended and Restated Contracts for Philips and GE referenced Funders and Assignment agreements which superseded their respective contracts, were independent of the contracts document and placed an obligation on the GoK to pay their funders for the equipment whether or not the contract subsisted, or whether or not the contractor met the other maintenance, repair and support elements of the contracts.

xi) Issuance of GoK Letters of Support

rr) The issuance of the GoK Letters of Support (GoK LoS) was not applicable in the MES Project as the issuance of GoK LoS is not provided for under the Public Procurement and Disposal Act, 2005, but rather the PPP Act. Further, owing to the fact that the project was being financed by the exchequer and, that the MoH was not borrowing any monies to finance the project, the relationship and duty of care of the procuring entity (MoH) ought to have only been to the Contractors and not third parties (lenders) as was implied by the issuance of GoK LoS. If at all, any GoK LoS issued to the MES Contractors ought to have been drafted as general letters of acknowledgement of policy support that expressly omitted financial guarantees by the GoK.

ss) The OAG & DOJ severally expressed its principled reservations against the issuance of GoK LoS for the MES Project. In response to the reservations expressed by the OAG & DOJ with regard to the issuance of GoK LoS, both Mr. Macharia and Dr. Muraguri are on record as having defended their issuance as evidenced by the following:

- *Vide* a letter to the OAG & DOJ dated 11th June, 2015 and signed by Dr. Nicholas Muraguri on behalf of the CS, Health, the MoH notes that '*...All of the MES Contractors are relying on external financing for this project.... One of the key requirements for the banks and the MES Contractors is that this Project be supported by the Government of Kenya. This reduces the risk for the MES Contractors....*".
- *Vide* a letter to the OAG & DOJ dated 6th July, 2015 and signed by the then CS, Health, Mr. James Macharia, he states that '*...You have indicated that...such a letter would only apply to transactions pending preparation of formal contracts. This is not however the position and it is in fact standard practice for lenders to take letters of comfort..and for such letters to be a condition precedent to an executed contract to come into effect.*

Ultimately, following a protracted process involving the MoH and NT on one hand, and the OAG & DOJ on the other, GoK LoS were issued to the five original MES Contractors (i.e. Shenzen, Esteem, Bellco, Philips and GE). In the case of Philips and GE, the GoK LoS issued constructively amounted to sovereign guarantees in violation of the constitutional provisions that vest that authority in Parliament alone.

xii) Engagement of PKF Kenya and SPA Infosuv as the Financial Transaction Advisors to the MES Project

tt) The MoH irregularly procured financial advisory services for the MES Project from PKF Kenya Ltd and Spa Infosuv through a restricted tendering process at a contract sum of Kshs. 9,634,960.00. The Office of the Auditor-General (OAG) raised a query regarding the decision by the MoH to opt for restricted tendering, noting that the reasons advanced by MoH for failing to use competitive bidding were

unsatisfactory and in contravention of section 73 of the Public Procurement and Disposal Act, 2005.

uu) The OAG further noted that the financial advisory services provided by PKF Kenya had guided the decision by MoH to opt for the MES model rather than outright purchase of equipment . This position was in accordance with the testimonies given by the MoH, Mr. Macharia and Dr. Muraguri, who all testified that the Value for Money (VfM) assessment conducted by PKF Kenya had informed the decision by the MoH to opt for a MES procurement model rather than outright purchase .This position was however contradicted by PKF Kenya who denied any role or involvement in the decision by the MoH to undertake MES as a model for procuring the equipment. In relation to the above, the Committee observed that by the time MoH engaged PKF Kenya, the MoH had not only already decided to use the MES procurement model, but MES bids for the equipment had already been advertised, received and evaluated up to the technical stage.

vv) PKF Kenya submitted a Value for Money (VfM) Assessment Report by PKF Kenya on 17th October, 2014, a record three (3) days after the signing of its contract on 13th October, 2014, and against a stipulated contract period of 44 days. To wit, the submission of the VfM Assessment report even pre-dated the firms' Inception Report which detailed the specific steps it had intended to take in value assessment for purposes of helping the MoH '*decide on best pricing*'. According to the testimony of Mr. Macharia, the precipitated VfM Assessment report was necessitated by urgency on the part of the MoH to demonstrate value for money using the MES model.

ww) Further to the above, the Committee observed that PKF Kenya developed a Public Sector Comparator (PSC) that was aimed at ascertaining value for money for the government by comparing how much the government would have spent through direct purchase of equipment *vis a vis* through a MES model. To note, according to PKF Kenya, the PSC was developed based on common equipment used in Kenya, with the base costs being derived from an '*average of different prices obtained from at least three manufacturers*. According to submissions made

by the OAG, all contractors who quoted amounts less than the PSC were considered responsive, while all contractors who quoted more were considered unresponsive.

xiii) Value for Money

xx) However, the Committee observed that far from providing value for money, the cost of the equipment supplied under the MES Project was grossly exaggerated as demonstrated by a schedule submitted to the Committee by the MoH on the value of equipment received by each county. Some examples included:

Equipment	**No.**	**Value (USD) as submitted by the Ministry)**	**MES Unit Cost in USD**	**MES Unit Cost in Kshs (converted at Kshs.101 to 1 USD)**	**Average Market Price Based on Committee's Investigations (Kshs)**
Instrument Trolley	2	5,345.00	2,672.50	269,922.50	15,000.00
Linen Trolley	2	6,072.00	3,036.00	306,636.00	25,000.00
Patient Stretchers	3	64,475.00	21,491.00	2,170,591.00	30,000.00
Resuscitation Patient Trolley	1	16,037.00	16,037.00	1,619,737.00	50,000.00
Stitching Removal Set	4	15,796.00	3,949.00	398,849.00	5,000.00
Drip Stand	15	187,857.75	12,523.85	1,264,873.50	5,000.00
Spot Light	3	42,164.00	14,054.67	1,419,514.60	800.00
Stethoscope	2	24,976.14	12,488.07	1,261,295.07	12,000.00
Microwave Oven	1	12,805.81	12,805.81	1,293,386.81	20,000.00
Washing Basin	12	154,804.16	12,900.35	1,302,935.35	800.00
Baby Cot	2	28,662.70	14,331.35	1,447,466.35	25,000.00
Electric Kettle	1	12,598.27	12,598.27	1,272,425.27	15,000.00

From the table above, the Committee observed that under the MES Project, common basic equipment was supplied at several times the normal market price: For example, a stitching removal set which typically comprises a suture tray, a pair

of scissors and a pair of tongs, was supplied to counties at the unconscionable cost of Kshs. 398,849.00, more than 80 times the average cost of similar equipment in the market. Simple instrument trolleys were supplied at Kshs. 269,922.50 which was 18 times the average cost of similar equipment in the market. Spot lights were supplied at Kshs. 1,419,514.60 each, a price at least 1,774 times the average market price. Washing basins were priced at Kshs. 1,302,935.00 which is at least 1,667 times the normal market price etc.

yy) Even the cost of the specialized equipment supplied under the project was grossly exaggerated: According to 'Medical Price', an online medical equipment search engine and marketplace (https://www.medicalpriceonline.com/), the average market price of the specific C-Arm X-Ray Imaging machine that was supplied by GE was USD 88,656.00 (or Kshs. 8,954,256.00 at an exchange rate of Kshs. 101 to the dollar). However, the value of the equipment as provided by the MoH was USD. 403,190.00 (equivalent to Kshs. 40,722,190.00 at an exchange rate of Kshs. 101 to the dollar) - at least five times the average market value as obtained from the online source. In addition, according to the site, the average market price for the specific ultrasound machine that was supplied by GE was USD. 29,301.00 (equivalent to Kshs. 2,959,401.00 at an exchange rate of Kshs. 101 to the USD) - at least eight times less than the indicated price by MoH of USD 233,572.42 00 (equivalent to Kshs. 23,590,772.00 at an exchange rate of Kshs. 101 to the USD).

zz) Further to the above, independent investigations by counties had similarly revealed evidence to suggest that the value of equipment supplied to counties under the project was grossly exaggerated: For instance, Kitui County conducted an Internal Inventory and Market Survey on the MES equipment supplied to the county and found that its total value amounted to Kshs. 331,542,230.00, at least 2.5 times less than the estimates provided by the MoH which indicated that equipment supplied to Kitui County was worth USD 8,032,770.00 (equivalent to Kshs. 811,309,770.00 at a conversion rate of Kshs. 101 to 1 USD).Further, during its visit to Uasin Gishu County, the Committee established that the County Government had undertaken a local market survey to establish the total value of all MES equipment that had been

allocated to the county. Results of the market survey had revealed that the total value MES equipment allocated to the county was Kshs. 84,952,000.00 as follows:

- Ziwa County Referral Hospital: Kshs. 54,176,000.00 (including theatre equipment which was subsequently reallocated to MTRH).
- Burnt Forest Sub County Hospital: Kshs. 30,776,000.00.

See Annex 13 for a detailed breakdown of the county's market survey results.

aaa) In relation to the above, of the items supplied to counties under leasing terms in the MES Project, at least 90% comprised basic, common clinical equipment such as instrument trolleys and basic surgical sets as opposed to actual specialized equipment. This in itself represents an unconscionable use of public resources given the fact that basic equipment ought to have been procured through outright purchase rather than a managed equipment services model. The legal opinion by IKM Advocates dated 16th May, 2020 demonstrates that the MoH had initially contemplated allowing counties to directly procure the basic equipment component under the project. However, under circumstances that remain unclear to date, the MoH subsequently opted to procure all the equipment under the costlier MES model..

bbb) To note, during his submissions, Dr. Muraguri, disowned the cost figures of ICU equipment submitted to the Committee by the MoH. For instance, questioned on whether the MoH had supplied two adult cardiac stethoscopes at the cost of USD 24,876.14 (equivalent to Kshs. 2,512,490.14 at a conversion rate of Kshs. 101 to the USD) as per documentation received from MoH, the Dr. Muraguri clarified that the stethoscopes were supplied at a cost of Kshs. 4,500.00 per unit - at least 575 times less than the value item cost supplied to the Committee by the MoH (*See Annex 20 for an extract of the Hansard proceedings of the Committee's meeting with Directors of Philips Company Ltd).*

ccc) Further to the above, the Committee observes that according to submissions made by the MoH, the value of equipment received by each county ranged from USD. 7,971,365.00 to USD. 11,392,388.00 .However, despite the fact that the equipment received was neither standard in value nor quantum, the MoH applied a blanket standard rate of first, Kshs. 95 Million (FY 2015/2016 to FY 2017/2018),

then Kshs. 200 Million (FY 2018/2019) and subsequently, Kshs. 131 million (FY 2019/2020) across all 47 counties.

xiv) County vs National Funds?

ddd) Contrary to submissions made by Mr. Macharia and Dr. Muraguri, and in accordance with position of the NT, the Committee observed that the monies allocated under the MES Project belonged to counties, and not the MoH as demonstrated by the following:

- monies under the MES conditional grant had been consistently captured in successive County Allocation of Revenue Acts (CARA) since 2015/2016;
- County Governments had been obligated to appropriate monies for the MES project as part of their budgets through the County Assemblies;
- the monies allocated for the MES Project were for activities being undertaken by counties; and,
- counties were the key consumer of MES services.

eee) In relation to the above, the Committee observed that while successive CARA had consistently borne the budget item 'Conditional Grant- Leasing of Medical Equipment' since FY 2015/2016, disbursements related to the MES project were unusual in that they did not enter the County Revenue Fund as required by Section 109 (2) of the Public Finance Management Act which requires all money raised or received by or on behalf of the county government to be paid into the County Revenue Fund.

2.2.4.19.2 Meeting with Dr. Cleopa Mailu, Current Ambassador and Permanent Representative to the UN, Geneva; former CS, Health (Nov 2015 - Jan 2018);

(i) Background

Dr. Cleopa Mailu, Current Ambassador and Permanent Representative to the UN, Geneva, was the Cabinet Secretary for Health between November 2015 and January 2018. It is during his tenure that: the Lot 7 contract with GE was signed (31st March, 2016); variations of the MES contracts for Lot 1, 2, 5 and 6 were executed; GoK Letters of Support for the five original MES Contractors

were issued; tendering for the HCIT Project was conducted; and the contract between the MoH and Seven Seas Technologies Ltd executed; and, monies levied against counties for the implementation of the MES Project were varied from Kshs. 95M to Kshs. 200M.

The Principal Secretaries responsible for Health during this period included Dr. Nicholas Muraguri (2016 - 2017), and Mr. Julius Korir, CBS, PS, State Department of Youth (2017-2018).

(ii) Submissions by Ambassador (Dr.) Cleopha Mailu, Current Ambassador and Permanent Representative to the UN, Geneva; former CS, Health (Nov 2015 - Jan 2018);

The Committee held a hearing with Ambassador (Dr.) Cleopa Mailu on Thursday, 23rd July, 2020. The following are key highlights of the submissions received by the Committee during these meetings:

(iii)Lack of Documentation and Support from the MoH

In his submissions, Amb. Dr. Cleopha Mailu stated that he had sought assistance from the MoH for records and documents relating to the queries raised to him by the Committee but had received no support or assistance. He further submitted that he had written several letters to the MoH to no avail, and that he had formally communicated the same to the Senate through the Office of the Clerk *(Annexure XXV)*.

(iv) MES Contracts and Issuance of GoK Letters of Support

According to Amb. (Dr) Mailu, the MES Contracts and/or ancillary documents were not availed to him during his tenure as CS, Health as they were considered 'secret' documents. He further testified that any correspondence signed by him in reference to the MES Contracts, GoK Letters of Support, novations, subcontracts etc, were drafted for him by the PS serving at the time whom he believed to have followed due diligence. He further submitted that he could not vouch for the contents of the GoK LoS as he had never seen them.

(v) Variation of the MES Contracts

According to Amb. Dr. Mailu, the MES contracts were varied following requests for additional MES equipment from the counties. As to the extent of his role, he testified that he had forwarded the requests as received to the PS as it was the latter's responsibility to handle the variations within the law. Once county requests came and were forwarded to the PS, he did not thereafter get information regarding the implementation of the variations. Further to the above, he testified that: the variations of the MES Contracts having been a procurement process, his office had not been involved in the matter; he had not been made aware by the Accounting Officer (PS) of the escalation of costs levied against counties from KShs. 95 million to KShs. 200 million per year as a result of the variations; and, he had not been made aware of any variations for non-performing MES contracts.

(vi) The HCIT Contract

According to Amb. Dr. Mailu, the MoH had initially conceptualised the HCIT Project as a component under the GE contract for radiological equipment. However, these plans were subsequently dropped owing to the prohibitive cost quoted by GE at KShs. 11.4 Billion. Thereafter, the MoH had floated a tender for HCIT solutions which was won by Seven Seas Technologies Ltd (SST) at a contract sum of KShs. 4.9 Billion. According to his testimony, by contracting SST rather than GE, the GoK accrued a saving of approximately KShs. 6.8 Billion. Further, he testified that had the HCIT project been successfully implemented, it would have optimised the use of MES equipment by interconnecting the various MES beneficiary hospitals, and alleviating human resource capacity challenges.

(vii) Regulation of MES Equipment

Dr. Mailu strongly denied claims by KEBS that he had acted to preclude its involvement in regulating products falling under the mandate of the PPB *vide* a letter dated 16th August, 2016 (*see Annex XVII*). Rather, he submitted that the letter was intended to provide guidance and clarity on which regulatory body under the MoH was mandated to regulate health products following attempts by various health regulatory bodies to wrest control from the PPB e.g. Nursing Council

of Kenya, National Quality Control Laboratory, Kenya Medical Laboratory and Technologists Board etc.

(viii) Functionality of MES Equipment

According to Dr. Mailu, key challenges affecting the functionality of MES equipment in counties included inadequate water supply, old and/or inadequate infrastructure and lack of sufficient electricity.

(ix) Challenges

Dr. Mailu submitted that he had faced various challenges during his tenure as CS, Health. In particular, he stated that a poor working relationship with his first PS, Dr. Nicholas Muraguri had constrained his ability to function effectively owing to disputes over their respective mandates and deliberate efforts by the PS to impede his involvement in the activities of the MoH.

(x) Committee Observations from meeting with Dr. Cleopa Mailu

The Committee made the following observations:

1. Dr. Cleopa Mailu, Current Ambassador and Permanent Representative to the UN, Geneva, was the Cabinet Secretary for Health between November 2015 and January 2018. It was during his tenure that the Lot 7 contract with GE was signed (31st March, 2016); variations of the MES contracts for Lot 1, 2, 5 and 6 were executed; GoK Letters of Support for the five original MES Contractors were issued; tendering for the HCIT Project was conducted, and the contract between the MoH and Seven Seas Technologies Ltd executed; and, monies levied against counties for the implementation of the MES Project were varied from Kshs. 95M to Kshs. 200M. The Principal Secretaries responsible for Health during this period included Dr. Nicholas Muraguri (2016 - 2017), and Mr. Julius Korir, CBS, PS, State Department of Youth (2017-2018).
2. Unlike his other counterparts, Dr. Mailu reportedly failed to get any documentation or support from the MoH, and was therefore unable to access important information in relation to this inquiry.

3. The Committee further observed that according to the testimony of Dr. Mailu, despite having occupied the office at the apex of the MoH, during his tenure as CS, Health, he was denied access to critical documents relating to the MES Project, including the MES Contracts and GoK Letters of Support on the basis that they were 'secret'.
4. However, contrary to his allegations that he was denied access to critical documentation relating to the MES project, the Committee observed that in a letter dated 22nd January, 2016 and addressed to the then AG, Prof. Githu Muigai and the then CS, NT, Dr. Mailu made extensive reference to the MES Contracts, GoK Letters of Support, novations, assignments, subcontracts etc (*see Annexure XXI)*. The Committee further takes note that Dr. Mailu assumed personal responsibility for the contents of the said letter *vide* a letter dated 30th July, 2020 and addressed to the Clerk of the Senate *(see Annex XXVI).*
5. The Committee further observes that according to the testimony of Dr. Mailu, he faced various challenges during his tenure as CS, Health owing to a poor working relationship with his PS, Dr. Nicholas Muraguri, arising from disputes over their respective mandates, and alleged efforts by the PS to impede his work at the MoH.
6. Further to the above, with specific regard to the processes over which Dr. Mailu presided during his tenure as CS, Health in relation to the MES Project, the Committee observed as follows:

i) Non-Adherence to Mandatory Tender Requirements

a) Section 64 of the PPDA 2005 (now repealed) stated that *" a tender is responsive if it conforms to all the mandatory requirements in the tender documents."*

b) The MoH invitation to tender for the MES project (Tender No. MOH/2014/2015) was restricted to original equipment manufacturers (OEMs) and specifically stated that, "*The Ministry of Health now invites sealed tenders from original equipment manufacturers who can also undertake managed equipment services..."(see Annexure XXI*

c) However, contrary to the mandatory requirements stipulated in the tender document, despite not qualifying as an OEM, GE was awarded the tender to supply Lot 7 (Radiology) equipment *vide* an award letter *(Ref: MOH/PS/1/1/VOL VI(118))* dated 21st November 2014 (*see Annexure XXII).* The award letter was signed by Dr. Nicholas Muraguri, the then DMS, on behalf of the PS, Health. The Contract

was subsequently executed on 31st March 2016. Signatories to the contract included Dr Nicholas Muraguri, PS, Health and Mr. Felix Okwenda for GE East Africa Ltd.

d) Based on the foregoing, the Committee observed that GE lacked the authorization to tender and subsequently execute the Lot 7 contract as MES As such, the MoH awarded and executed the Lot 7 MES contract contrary to the law.

ii) Variation of the MES Contracts

e) The terms of the MES contracts did not provide for any extension of the project term arising from delay events such as variation of the contract or contractual breaches. Despite this, on diverse dates, the MoH initiated variations in the MES contracts for Lot 1 (Theatre), Lot 2 (Theatre and CSSD), Lot 5 (Renal) and Lot 6 (ICU) equipment.

f) The import of the contractual provisions on delay events were that, despite MES equipment under the variation of contracts being handed over to the counties as late as August 2018, most of the contracts were still set to lapse in June 2022. This implied that additional facilities under the variation of contracts were set to benefit from the MES equipment for a lesser time period than original MES facilities despite the costs levied being the same.

g) Further, contrary to the provisions of Regulation 9 of the Public Procurement and Disposal Regulations, 2006 which requires user departments to initiate requests in variations of contracts, the Committee found little evidence to suggest that counties had initiated requests for additional equipment under the MES Project as the designated user departments.

h) In relation to the variation of contract for Lot 1 equipment under the MES Contract with Shenzen Mindray, the Committee found that:

- The Ministry of Health (MoH) and Shenzen Mindray executed a variation of contract contract on 22nd November 2017. The contract was signed by Mr. Julius Korir for the Ministry of Health. It increased the cost of the original contract from USD 45,991.449.78 (Kshs. 4,645,136,427.78) to

USD 53,645,886.84 or Kshs. 5,418,234,570.84 at a conversion rate of KShs. 101 to the USD *(see Annex XXIII)*.

- The MoH initiated a request for a variation of the contract *vide* a letter dated 4th October, 2017 *(see Annex XXIII);*
- At the time of initiating the request, owing to delays by the Contractor, Lot 1 equipment was yet to be delivered to 17 county health facilities as follows: Nyamira, Ndanai, Hola, Garsen, Mandera, Marsabit, Kacheliba, Naitiri, Kamwosor, Mpeketoni, Takaba, Port Reitz, Manga, Suguta Marmar, Wesu, Bura and Eldas hospitals;
- As per the aforementioned letter dated 4th October, 2017, the MoH proposed that additional Lot 1 equipment be delivered to seventeen (17) high-volume facilities as follows: eight (8) new county health facilities, and nine (9) previous beneficiary facilities. However, contrary to the contents of this letter, the Further Amendment and Restatement Deed submitted by MoH listed not seventeen, but fifteen (15) beneficiary facilities *(see Annex XXIII)*;
- In addition, with regards to the beneficiary hospitals, there were inconsistencies in the information contained in the variation deed submitted by the Contractor *(see Annex XXIII)*, the aforementioned letter by MoH dated 4th October, 2019 *(see Annex XXIII)*, and the Further Amendment and Restatement Deed submitted by MoH *(see Annex XXIII)*. For example, while the MoH letter dated 4th October, 2017, identified Nyamira, Ndanai, Hola, Garsen, Mandera and Marsabit Hospitals as the selected facilities to receive additional equipment under the variation, according to documentation received from the Contractor, the beneficiary facilities were Garissa, Kakamega, Nyeri, Kisii, JOORTH, Nakuru, Embu, Thika and Coast PGH. No documentary evidence was provided to support these substitutions. In view of the above inconsistencies, the Committee observed that it was impossible to establish for a fact which county health facilities actually benefited under the variation of contract for Lot 1;
- Further, the Committee noted that while the new beneficiary hospitals under the expanded MES project had received similar equipment in terms of

quantum, it was significantly less than what the original MES beneficiary hospitals had received under this Lot: Under the variation, beneficiary hospitals received only one anesthetic machine, one operating theatre lamp and one operating theatre table as opposed to two of each for facilities that had benefited under the original contract; and,

- Further, as for original beneficiary facilities that received additional Lot 1 equipment under the expanded project, the quantum in equipment supplied varied from hospital to hospital. For example, while Garissa PGH and Embu PGH received one anesthetic machine each, Kakamega, Nyeri, Kisii, JOORTH, Nakuru, Thika and Coast hospitals received two. Given that the variation had resulted in a 16% increase in the cost of the contract, that is, Kshs. 773,098,143.06, being the difference between the original contract cost of Kshs. 4,645,136,427.78 and the varied contract cost of Kshs. 5,418,234,570.84) for only seventeen (17) hospitals; the Committee found that the variations in quantum of equipment supplied under the two contracts were suspicious.
- To note, at the time of initiating the variation of contract for Lot 1, according to the *'MES Service Level Monitoring Report, January 2019'* by PKF Kenya, MoH had fallen behind in its payments to the contractor. Indeed, according to the report, as per 20th March, 2017, the MoH owed the contractor USD 366,527.46 or KShs.37,019,273.46 (using a conversion rate of 101) in late penalty charges.

i) In relation to the variation of contract for Lot 2 equipment under the MES Contract with Esteem Industries, the Committee found that:

- The MoH and Esteem Industries Inc (India) executed a variation contract for Lot 2 on 16th October, 2017. That contract was signed by Mr. Julius Korir for the Ministry of Health. It increased the cost of the contract from USD 88,027,973.32 or Kshs. 8,890,825,305.32 to the USD to USD 103,615,896.07 or Kshs. 10,465,205,503.07 at a conversion rate of KShs. 101 to the USD.
- To note, at the time of initiating the variation of contract for Lot 2, according to the *'MES Service Level Monitoring Report, January 2019,'* by PKF Kenya,

the MoH had fallen behind in its payment to the contractor: As at 30th October, 2017 the MoH owed the contractor USD 1,420,427 or KShs.143,463,127 (using a conversion rate of 101).

j) In relation to the variation of contract for Lot 5 equipment under the MES Contract with Bellco SRL, the Committee found that:

- The MoH and Bellco SRL executed a variation contract for Lot 5 on 22nd November, 2017. That contract was signed by Mr. Julius Korir for the Ministry of Health. It increased the cost of the contract from USD 23,691,059 or Kshs. 2,392,796,959 to USD 28,692,951 or Kshs. 2,897,988,051 (conversion rate of 101).
- Under the variation, capacity of renal equipment was doubled at nine (9) original beneficiary hospitals, and installation and commissioning of Lot 5 equipment was implemented in five (5) additional hospitals. However, despite the fact that the variation of the contract benefitted only fourteen hospitals as indicated above, the costs of the variation were spread equally across all 47 counties.

k) In relation to the variation of contract for Lot 6 equipment, the Committee found that the MoH executed a variation contract with Philips on 20th November 2017. That contract was signed by Mr. Julius Korir for the MoH. It resulted in an additional cost of the contract from USD 36,492,176 (equivalent to Kshs 3,685,709,776 at KShs. 101 to the USD) to USD 45,256,008 (equivalent to Kshs. 4,570,856,808 at a conversion rate of KSHs. 101 to the USD). The variation targeted three hospitals including Narok and Meru Level 5 Hospitals. However, the costs of the variation were spread equally across all 47 counties.

ii) Basis for Monies Charged against Counties after the Variation of Contracts

l) With regards to the variation of the costs effected against counties from Kshs. 95 million at the start of the program to Kshs. 200 million in the FY 2018/2019 and then Kshs. 131 million in the subsequent financial year, the Ministry submitted the following justifications:

- Expansion of the MES Project to include an additional 21 hospitals at a contract sum of KEs. 3,700,808,413.00;
- Procurement of HCIT Solutions at a contract value of Kshs. 4,756,773,074.00;
- Procurement of Laboratory Equipment at an estimated cost of Kshs. 1.1 Billion;
- Service Level Monitoring and Administration at a cost of Kshs. 98,548,722.00

Of these reasons, the Committee observes that the HCIT Solutions contract stalled and no payments had been effected by the time of this inquiry. Further, Laboratory Equipment was never procured under the MES project owing to irresponsive bids by potential suppliers.

m) According to submissions by the MoH, the value of equipment received by each county varied from USD. 7,971,365.00 to USD. 11,392,388.00 *(see Annexure XII)*. However, despite the fact that the equipment received was neither standard in value nor quantum, the MoH applied a blanket standard rate of first, Kshs. 95 Million (FY 2015/2016 to FY 2017/2018), then Kshs. 200 Million (FY 2018/2019) and subsequently, Kshs. 131 million (FY 2019/2020 across all 47 counties. Furthermore, when the contract was varied to add twenty-one (21) beneficiary hospitals to the MES project, the added costs were spread across all forty-seven (47) counties as opposed to the few specific counties that had benefited from the additional equipment.

2.2.4.19.3 Meeting with Prof. Fred Segor: Former PS, Health (2013-2014)

(i) Background

Prof. Fred Segor was the Principal Secretary for Health between 2014 and 2015. It was during his tenure that the MES Project was initially conceptualised, and the Needs Assessment conducted.

During this period (2013-2015), Mr. James Macharia, CS, Transport, Infrastructure, Housing and Urban Development and Dr. Nicholas Muraguri, PS, Lands, served as the Cabinet Secretary for Health, and Director of Medical Services respectively.

(ii) Submissions by Prof. Fred Segor: Former PS, Health (2013-2014)

The Committee held a hearing with Prof. Fred Segor on Thursday, 23rd July, 2020. The following are key highlights of the submissions received by the Committee during these meetings.

(iii) Tenure of Office as PS, Health

Prof. Fred Segor, PS, State Department of Wildlife, submitted that he served as PS, Health from 27th June, 2013 to 18th August, 2014, when he handed over office to Dr. Khadijah Kassachoon.

(iv) Conceptualisation of the MES Project

According to Prof. Segor, the MoH made a strategic decision to prioritise the provision of medical equipment in accordance with key policy documents in the health sector as follows:

1. Medium Term Plan II (MTP) (2013-2017)
2. Health Sector Strategic and Investment Plan (KHSSP) (2013-2017)
3. 2013-2014 Health Performance Report

According to Prof. Segor, the conceptualisation and initiation of the MES Project was further buttressed by the adoption of a Senate resolution that the National Government establish a Level 4 and 5 hospital in each of the 47 counties in a motion sponsored by Sen. Wilfred Machage in June, 2013. Following the adoption of the motion, in a letter dated 26th August, 2013, the CS, Health communicated the Senate resolution and requested County Governors to facilitate an assessment of their county facilities.

(v) County Involvement

According to Prof. Segor, on 22nd October, 2013, the CS, Health met with CEC Members of Health and Finance and County Directors of Health at Multimedia University, Nairobi where a resolution to fully support the proposal to equip public health facilities with modern equipment was signed.

(vi) Needs Assessment

According to Prof. Fred Segor, between February and March 2014, the MoH supported by County Governments assessed infrastructure, equipment and personnel in facilities selected by county governments. The findings of the needs assessment exercise showed that:

a) 41 counties did not have equipment for HDU
b) 39 counties did not have equipment for ICU
c) 29 counties did not have equipment for maternity theatre
d) 28 counties did not have equipment for Casualty services
e) 7 counties did not have equipment for CSSD.

These findings were further buttressed by the 2013 Kenya Service Availability and Readiness Assessment Mapping (SARAM) Report.

(vii) Shift from a Private Public Partnership (PPP) Model to a Managed Equipment Services (MES) Model

According to Prof. Fred Segor, the shift from the initially proposed PPP to a MES model was informed by a panel of experts at the MoH comprising technical and legal officers in which the decision to shift from leasing under a PPP model to procurement under the MES Model was recommended based on the following:

a) Limited repairs and lack of replacement in a leasing model;
b) Lack of replacement of equipment where technology becomes obsolete, or after end-of equipment life cycle;
c) Leasing of equipment being dependent on volume of work - hospitals with low volume of work would have been more expensive to maintain under a lease method;
d) Lack of fitting out works; and
e) Lack of uptime guarantee.

(viii) Engagement of the MoH with the MES Contractors prior to its roll-out

He concluded his submissions by noting that the MoH had not engaged any of the contractors prior to conceptualising the MES Project.

Written Submissions and Hansard Reports of the proceedings of the Committees' hearings with Principal Secretary Prof. Fred Segor are attached herein under Annexure 'XXVII'.

(ix) Committee Observations from meeting with Prof. Fred Segor

The Committee made the following observations:

1. Prof. Fred Segor was the Principal Secretary for Health from 27th June, 2013 to 18th August, 2014. It was during his tenure that the MES Project was initially conceptualised as a PPP, the Needs Assessment conducted and IKM Advocates were informally engaged as legal transaction advisors to the MES project. During this period (2013-2015), Mr. James Macharia, CS, Transport, Infrastructure, Housing and Urban Development and Dr. Nicholas Muraguri, PS, Lands, served as the Cabinet Secretary for Health, and Director of Medical Services respectively.

2. With regard to the specific processes in the MES Project over which Prof. Fred Segor presided over as the Accounting Officer, the Committee observed the following:

i) Conceptualisation and Initiation of the MES Project

a) The conceptualization and design of the MES project was not conducted in accordance with the constitutional provisions on intergovernmental cooperation envisaged in Article 6(2) of the Constitution which states that "*the governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation.*". Further, its implementation did not respect the functional and institutional integrity of counties as required by Article 189(1)(a) of the Constitution which obligates the Government at either level to, "*perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level...*". Indeed, in implementing the MES Project, the National Government through the MoH exceeded its policy role by implementing roles and functions that were constitutionally under the domain of County Governments.

b) Health is a devolved function under the Fourth Schedule to the Constitution. However, in contravention of Article 6 of the Constitution which requires the two levels of Government to conduct their mutual relations on the basis of consultation and cooperation, County Governments reported not having been involved in the needs assessment exercise that led to the prioritization of equipment under the MES Project. Consequently, the equipment supplied under the project was not tailored to suit the unique and specific needs of each county.

c) Contrary to the submissions made by Prof. Segor, evidence before the Committee indicated that the MoH flouted the procurement law by first of all identifying who they intended to deal with as evidenced by the following:

1. In a letter to County Governors dated 20th September, 2013, Mr. James Macharia, then CS, Health, stated an intention by the MoH to train personnel, and equip Level 4 and 5 hospitals in the counties through a Public Private Partnership (PPP) initiative involving two multinational companies (*Annexure 'XXVII'*).
2. The two multinational companies, GE and Philips, were further referenced in the Concept Paper developed by the MoH on '*Leasing of Equipment and Infrastructure Improvement in Public Health Facilities under Public Private Partnership,' (Annexure 'XXVII')* as key initiators in the project (*Annexure 'XXVII'*).

Based on the foregoing, the Committee observes that by first identifying who it was going to work with, the MoH precluded the possibility of competitive sourcing of goods and services under the project. To note, the two companies were awarded contracts to supply equipment under Lots 6 and 7 respectively. At a combined contract value of USD 275,771,678.00 (equivalent to Kshs. 27,852,939,500.00 at an exchange rate of Kshs. 101 to 1 USD), this was equivalent to at least 60% of the total contract value at the time.

ii) Feasibility Study

d) In relation to the above, the Committee notes that according to the MoH budget estimates for the FY 2014/15, the MoH was allocated a budget of KShs. 1.2 Billion towards feasibility studies presumably for the MES project under Vote 1081.

However, despite resources being availed by Parliament for this exercise, there was no evidence that the MoH undertook the feasibility study as had been budgeted for. Further, it was unclear from the submissions made how the needs assessment exercise by the MoH was funded.

iii) Variation from a PPP Initiative to a MES Procurement Model

e) As per submissions made by the National Treasury, and as per the Concept Note submitted by the MoH, the cost of the entire project as a PPP initiative (including infrastructural development) would have KSHs. 43.5 Billion over a 10-year period. According to the Concept Paper, this would have translated to an annual sum of Kshs. 4.35 Billion spread out over a ten-year period as follows:

- MoH budgetary allocation: Kshs. 1 Billion/year;
- Payment by counties and revenues from services rendered: Kshs. 1.5 Billion/year; and,
- Budgetary support from the NT: Kshs. 2 Billion/year.

However, under the MES arrangement, the equipment was ultimately supplied to counties at an annual cost that peaked at Kshs. 9.5 Billion in the FY 2019/2020.

f) According to submissions made by IKM Advocates, their terms of reference as the legal transaction advisors to the MoH included providing a legal opinion on the optimal procurement structure for the MES Project: Accordingly, *vide* the letter dated 16th May, 2014, IKM Advocates noted that the MoH had requested it to advise on: (i) whether to procure under the Public Private Partnership Act, 2013 (PPP Act, 2013) or the Public Procurement and Disposal Act, 2005 (PPDA, 2005); and, (ii) the optimal procurement process for the process, having regard to the existing legal framework.

The letter further noted that the MoH had indicated a preference towards procurement of medical equipment using the following processes:

- outright purchase, which would have been used for specific equipment identified by the MoH, and which the MoH proposed be purchased by the respective county governments;

- placement, which would have been used for Lots that typically required reagents and which were smaller and less capital intensive. Here, the MoH proposed that it would be the procuring entity; and,
- leasing, which would have been used for Lots that were more capital intensive and for which the MoH would be the procuring entity.

The Committee observes that at the point of being requested for this legal opinion, IKMs' engagement with the MoH was yet to be formalised either via approval of the AG, or via the execution of a service level agreement. The Committee further notes that in its legal opinion, IKM Advocates advised the MoH that the PPP Act would not be applicable to the proposed project, and that the project ought to be procured under the PPDA 2005. This legal opinion had a consequential impact on the overall project as demonstrated by the fact that one month later, on 9th June, 2014, the MoH published an invitation to tender for the supply, installation, testing and replacement of medical equipment under a managed equipment service arrangement

g) The MoH subsequently formally terminated its engagement with the National Treasury (NT) for equipment lease and health infrastructural development under a PPP in a letter dated 22nd June, 2015,. The letter further indicated that the MoH had opted to pursue the proposed project using a Managed Equipment Services (MES) scheme. According to the National Treasury (NT), no justification or explanation was provided by the MoH for the termination of the PPP initiative. Further, the NT submitted that the termination of the PPP initiative coincided with the point at which processes had been initiated to conduct a feasibility study. The Committee further notes that in its Special Audit of the MoH Accounts for the FY 2015/2016, the OAG queried the manner in which the project was varied from a PPP initiative to a public procurement process

iv) Needs Assessment

h) In implementing the MES Project, the MoH appears to have ignored its own findings and recommendations as contained in the *'2014 Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in the proposed Level 4 and 5 Facilities in the Counties' (see Annexure*

V). The report notes that the *"provision of specialized health services is still very weak due to inadequate specialized human resources."* It goes further to note that the *"delivery of comprehensive services requires availability of at least one specialist in all categories …"*. Data provided in the report indicated the following availability of various specialized cadres in 2014: Physicians (18%); Obstetricians/Gynaecologists (14%); Orthopedic Surgeons (9%); Radiologists (32%); Paediatricians (21%); General Surgeons (22%); Anaesthesiologists (11%); ICU Nurses (2%); Burns Nurses (3%); Theatre Nurses (15%); and Renal Nurses (VV%).

The report further noted that more than ten (10) counties did not have a single specialist. However, despite finding that counties lacked the requisite specialised personnel, the MoH went on to fast track the roll-out of the MES Project. To note, lack of specialized personnel to operate the MES equipment has since been identified as one of the key challenges hindering the successful implementation of the MES Project.

i) On availability of equipment, the same report *(Annexure V)* indicated that the availability of various equipment varied from 60-90% in the counties. For example:
   - General X-Ray Machines: 54% availability
   - Anesthetic machines; 65%
   - Autoclaves: 86%
   - Cesarean Section Sets: 86%
   - Operating Theatre Lamps: 62% etc

   However, despite finding that the various equipment prioritized under the project were already available in at least 60% of county health facilities, the MoH went on to supply a blanket allocation of MES equipment across the counties. This had consequently led to cases of duplication of equipment. For example, Laikipia County reported that functional X-Ray and theatre equipment that had been procured by the National Government prior to devolution was removed to pave way for the new X-Ray and theatre equipment supplied under the MES project. In Nyamira County, renal equipment was installed and commissioned by the MoH

despite the fact that the County had already procured functioning renal dialysis machines that were adequate for its needs.

j) Further, the needs assessment report *(Annexure V)* indicated that the infrastructure available for specialised diagnostic radiological services ranged from 1-109% across the counties. The import of which was that, from the onset, there already existed wide infrastructural disparities between the counties: While some counties exceeded the infrastructural requirements necessary to absorb the equipment envisaged under the project at 109%, others had only 1% of the infrastructure required. However, despite finding that most counties lacked the requisite infrastructure for specialised equipment, the MoH went ahead to fast track the roll-out of the MES Project. Consequently, five years down the line, various counties were yet to operationalize MES equipment owing to lack of adequate water or electricity, and/or ongoing construction works. For example, in the MoH Report on the functionality status of MES equipment *(Annexure XII)*, the MoH noted that while General Digital X-Ray machines were already installed and ready for service in 16 counties, they were yet to be utilised owing to lack of phase three electricity.

k) The net effect of ignoring its own findings in the needs assessment report was that, approximately five years after the roll-out of the project, MES equipment remained non-functional in several health facilities across the 47 counties owing to the lack of the requisite specialized personnel, infrastructure, water and/or electricity.

l) The Committee further observes that the Needs Assessment report *(Annexure XII)*, contained recommendations to the effect that the MoH would: (i) share its findings with the county governments; (ii) jointly with the county governments prioritize the list of critical equipment to be procured; and, (iii) together with the county governments, draw a comprehensive procurement plan for high-end equipment. However, contrary to these recommendations, the Committee did not find evidence to suggest that the MoH shared the needs assessment report with the counties, or that county governments were involved in prioritizing their needs. As a result, most of the equipment supplied to the counties under the MES project did not correspond to their actual needs.

m) With regard to the Kenya Services Availability and Readiness Assessment (SARAM) Report referenced by Prof. Segor as part evidence of having conducted a needs assessment prior to rolling out the MES Project, the Committee observed that the SARAM report was focused on basic health services and not the provision of specialised equipment which underpinned the MES project. Further, the report did not make any reference to the MES project, and was funded by the World Health Organisation (WHO) and DFiD amongst others.

v) Consultation and Cooperation with County Governments

n) As part evidence of having consulted counties on the MES project, Mr. Macharia and Dr. Muraguri submitted a Communique of a consultative meeting held between the MoH, CECs for Health and Finance, and County Directors of Health on 22nd October, 2013 *(Annexure XII)*. Part of the Resolutions captured from the meeting read as follows:

- *Resolution 3: We (counties) need to prioritize the facilities to be considered under the current initiative, including the type of equipment to be used.*
- *Resolution 5: That measures will be taken to ensure that existing legislation in procurement and Public Private Partnership are used to avoid the problem of monopolizing the initiative.*
- *Resolution 8: Regular meetings will be held to review the development of the initiative. "*

However, contrary to the resolutions of this meeting, and as evidenced by submissions of the COG and OAG, counties were not subsequently involved in prioritizing the equipment that was supplied to them under the MES project. Indeed, counties reported having been excluded from the Needs Assessment exercise conducted by the MoH altogether. Further to this, and in contravention of the meeting's own resolutions, no evidence was provided to suggest that the MoH had continued to hold regular meetings with the Forum to review the development of the initiative.

vi) Engagement of IKM Advocates as the Legal Transaction Advisors

o) Contrary to the provisions of AGs' circular dated 3rd May, 2010 (Ref.AG/1/2010) which obligated all client ministries to consult and seek approval of the AG before retaining the services of private advocates, the MoH irregularly engaged the services of IKM Advocates prior to the approval of the AG as partly evidenced by the following:

- *Vide* a letter dated 16th May, 2014, IKM Advocates referenced a meeting with the MoH held on 12th May, 2014 in which they were requested by the MoH to advise it on its proposed procurement of the Project (*Annexure XXI);*
- *Vide* a letter dated 2nd July, 2014, then CS, Health, Mr. James Macharia, wrote to the then AG, Prof. Githu Muigai, EGH, SC, seeking to engage the services of IKM Advocates through direct procurement (*see Annexure XXI);*
- *Vide* a letter dated 23rd July, 2014, then AG, Prof. Githu Muigai wrote back to the then CS, Health, Mr. James Macharia advising the MoH on the legal requirements for direct procurement in accordance with section 74 of the PPDA Act 2005 (now repealed) and Regulation 62 of the Public Procurement and Disposal Regulations, 2006 (*Annexure XXI);*
- On July, 2014, the MoH floated a tender (Tender No. MoH/2014/2015) for the supply, installation, testing, maintenance and replacement of medical equipment and associated training for county and sub-county health facilities through a managed equipment service (MES) arrangement. As submitted by IKM Advocates, the tender documents included a draft contract prepared by themselves;
- *Vide* an unsigned letter dated 31st July, 2014, then CS Health wrote back to the then Attorney General justifying the decision by the MoH to engage IKM Advocates through direct procurement; and,
- *Vide* a letter dated 18th August, 2014, Prof. Githu Muigai, the then Attorney General, advised the MoH to enter into a service level agreement with IKM Advocates and submit the same to his office for approval .

p) Services rendered by IKM during the 'informal' engagement period that Prof. Segor presided over as Accounting Officer were highly consequential and included issuing a legal opinion that presumably informed the decision by the MoH to vary the legal framework of the project from a PPP to a procurement model; and, drafting the draft contracts that were attached to the MES tender documents. To note, at the time, IKMs' engagement with the MoH was yet to be formalised either via approval of the AG, or via the execution of a service level agreement.

q) In a special audit of the MoH for the FY 2015/2016, the Office of the Auditor-General (OAG) raised audit queries regarding the questionable circumstances under which the MoH procured its legal and financial consultants for the MES Project: In the case of IKM Advocates, the OAG noted that the firm was engaged as the legal transaction advisors through direct procurement at a contract sum of USD. 560,000.00 (equivalent to KSHs. 56,560,000.00 at KShs. 101 to the USD). Noting that the MoH had cited urgency as the reason for failing to procure the transaction advisors through a competitive bidding process, the OAG nevertheless observed that the reasons provided by the MoH for failing to use competitive bidding were unsatisfactory owing to the scale of the project, and level of public interest.

r) Under the then applicable law, PPDA 2005 (now repealed), direct procurement was provided for under section 74 "*...as long as the purpose is not to avoid competition*". Section 74(2) & (3) of the PPDA 2005 (now repealed) outlined the following preconditions for direct procurement by a procuring entity:

> *(2) A procuring entity may use direct procurement if the following are satisfied—*
>
> > *(a) there is only one person who can supply the goods, works or services being procured; and*
> >
> > *(b) there is no reasonable alternative or substitute for the goods, works or services.*
>
> *(3) A procuring entity may use direct procurement if the following are satisfied—*

(a) there is an urgent need for the goods, works or services being procured;

(b) because of the urgency the other available methods of procurement are impractical; and

(c) the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.

The Committee notes that in response to a request by the MoH to directly procure the services of IKM Advocates dated 2nd July, 2014 (*see Annex bb)*, *vide* a letter dated 23rd July, 2014, the then Attorney General advised the MoH in accordance with section 74 of the PPDA Act 2005 (now repealed) and Regulation 62 of the Public Procurement and Disposal Regulations, 2006. In this respect, the Committee observed that the MoH failed to satisfy the legal requirements set out in section 74 of the PPDA Act 2005 (now repealed) as it did not demonstrate that IKM Advocates were the only persons capable of providing legal transaction advisory services under the MES Project, nor did it demonstrate that there lacked reasonable alternatives.

Further, in contravention of section 74 (3) of the PPDA 2005 (now repealed), the Committee observes that whilst there may have been a need for specialised and modern equipment, given that most counties lacked the requisite personnel and infrastructure to begin with, procurement of the equipment was not as urgent as postured by the then CS, Health, Mr. James Macharia, in his letter dated 2nd July, 2014, as to render competitive procurement methods for legal advisory services impractical . Moreover, the Committee observes that the response by the AG dated 18th August, 2014 did not exempt the MoH from procuring legal transaction advisors through competitive means. Based on the foregoing, the Committee concurs with the position of the OAG that the MoH unprocedurally single-sourced legal transaction advisory services from IKM Advocates under the MES Project.

2.2.4.19.4 Meeting with Dr. Khadijah Kassachoon: PS, Labour; Former PS, Health (2014 - 2015)

(i) Background

Dr. Khadija Kasachoon was the Principal Secretary for Health between 2014 and 2015. It is during her tenure that: MES contracts were awarded and executed; financial advisory services were rendered by PKF Kenya and Spa Infosuv; legal advisory services were rendered by IKM & Co. Advocates; MOUs were executed between the MoH and County Governments; and, the supply, installation and commissioning of MES equipment was initiated across the 47 counties.

During this period (2013-2015), Mr. James Macharia, CS, Transport, Infrastructure, Housing and Urban Development and Dr. Nicholas Muraguri, PS, Lands, served as the Cabinet Secretary for Health, and Director of Medical Services respectively.

Submissions by Dr. Khadijah Kassachoon, Former PS, Health (2014)

The Committee held two hearings with Dr Khadijah Kassachoon, on 23rd and 27th July, 2020.:

(ii) Needs Assessment

According to Dr. Khadijjah, the needs assessment entailed lowinhe fol processes:

a) the National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in Proposed Level 4 and 5 Health Facilities;
b) The Kenya Service Availability and Readiness Assessment Mapping (SARAM), a national census that involved all health facilities in the country;
c) The 2013-2014 Health Performance Report which indicated that most medical equipment in public health facilities was more than 20 years old and characterized by frequent breakdowns. The report had further noted that public health facilities lacked modern equipment such as dialysis machines, radiology equipment etc (*see Annexure XII).*

(iii) Senate Resolution

According to Dr. Khadijah, the need for the project was further buttressed when the Senate, through a motion moved by Sen. (Dr.) Wilfred Machage in June 2013 adopted a resolution requiring the National Government to establish a Level 5 and Level 4 hospital in each of the 47

counties. Subsequent to the Senate resolution, the then CS, Health wrote to County Governors to communicate the resolution of the Senate and to request for the facilitation of an assessment of the health capacity in their respective counties.

(iv) Outcome of the Needs Assessment

According to Dr. Khadijjah, between February and March, 2014, the MoH conducted a Needs Assessment aimed at establishing the personnel, equipment and infrastructural needs of Level 4 and 5 hospitals. The assessment found that 41 counties lacked HDU equipment; 39 counties lacked ICU facilities; 29 counties did not have equipment for a maternity theatre; 28 counties did not have equipment for Casualty services; and, 7 counties lacked CSSD equipment.

(v) County Involvement

According to Dr. Khadijah, in October 2013 the MoH held a meeting with CEC Members of Health and Finance, and County Directors of Health where a resolution to equip public health facilities was proposed and duly passed.

With regard to the implementation of the MES project, according to Dr. Khadijah, counties were involved during the needs assessment by giving them an opportunity to select two facilities for assessment, as well as by being incorporated into the assessment teams. She further denied claims that counties had been compelled to sign MOUs under the MES Project.

(vi) Queries on the Procurement of MES Transaction Advisors

Dr. Khadijah denied any knowledge regarding the engagement of any legal and/or financial MES transaction advisors (that is, PKF Kenya/SPA Infosuv and IKM Advocates) during her tenure in office. She further submitted that the DMS i.e. Dr. Nicholas Murguri, headed a technical team that was responsible for steering the MES Project.

(vii) Execution of the MES Contracts

According to Dr. Khadijah, the MES Contracts that were signed on 6th February, 2015 were cleared by the office of the AG. However, at the time of signing, negotiations on the MES contracts had yet to be finalised.

(viii) Cost of MES Equipment

According to submissions made by Dr. Khadijah, the cost of the MES equipment varied from county to county as some counties had ICU and dialysis facilities while others did not. She further submitted that the Government was not paying for the equipment *per se*, but rather that the MES service providers were billing the National Government for services rendered using MES equipment based on the number of patients who accessed their services.

(ix) Committee Observations

The Committee made the following observations:

1. Dr. Khadijah Kassachoon was the Principal Secretary (PS) for Health between 2014 and 2015. It was during her tenure that the MES contracts were awarded and executed; MOUs were executed between the MoH and County Governments; the process of procuring GoK Letters of Support to the MES Contractors was initiated; and, the supply, installation and commissioning of MES equipment was rolled out across the 47 counties. With regards to the specific processes in the MES Project over which Dr. Khadijah presided over as the Accounting Officer, the Committee observed the following:

    i) Needs Assessment

    a) In implementing the MES Project, the MoH appears to have ignored its own findings and recommendations as contained in the *'2014 Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in the proposed Level 4 and 5 Facilities in the Counties'* The report notes that the *"provision of specialized health services is still very weak due to inadequate specialized human resources."* It goes further to note that the *"delivery of comprehensive services requires availability of at least one specialist in all categories* ...". Data provided in the report

indicated the following availability of various specialized cadres in 2014: Physicians (18%); Obstetricians/Gynaecologists (14%); Orthopedic Surgeons (9%); Radiologists (32%); Paediatricians (21%); General Surgeons (22%); Anaesthesiologists (11%); ICU Nurses (2%); Burns Nurses (3%); Theatre Nurses (15%); and Renal Nurses (VV%).

The report further noted that more than ten (10) counties did not have even one specialist. However, despite finding that counties lacked the requisite specialised personnel, the MoH went on to fast track the roll-out of the MES Project. To note, lack of specialized personnel to operate the MES equipment has since been identified as one of the key challenges hindering the successful implementation of the MES Project.

b) On availability of equipment, the same report indicated that the availability of various equipment varied from 60-90% in the counties. For example:
   - General X-Ray Machines: 54% availability
   - Anesthetic machines: 65%
   - Autoclaves: 86%
   - Cesarean Section Sets: 86%
   - Operating Theatre Lamps: 62% etc

However, despite finding that the various equipment prioritized under the project were already available in at least 60% of county health facilities, the MoH went on to supply a blanket allocation of MES equipment across the counties. This had consequently led to cases of duplication of equipment. For example, Laikipia County reported that functional X-Ray and theatre equipment that had been procured by the National Government prior to devolution was removed to pave way for the new X-Ray and theatre equipment supplied under the MES project. In Nyamira County, renal equipment was installed and commissioned by the MoH despite the fact that the County had already procured functioning renal dialysis machines that were adequate for its needs.

c) Further, the needs assessment report indicated that the infrastructure available for specialised diagnostic radiological services ranged from 1-109% across the counties. The import of which was that, from the onset, there already existed wide infrastructural disparities between the counties: While some counties exceeded the infrastructural requirements necessary to absorb the equipment envisaged under the project at 109%, others had only 1% of the infrastructure required. However, despite finding that most counties lacked the requisite infrastructure for specialised equipment, the MoH went ahead to fast track the roll-out of the MES Project. Consequently, five years down the line, various counties were yet to operationalize MES equipment owing to lack of adequate water or electricity, and/or ongoing construction works. For example, in the MoH Report on the functionality status of MES equipment , the MoH noted that while General Digital X-Ray machines were already installed and ready for service in 16 counties, they were yet to be utilised owing to lack of phase three electricity.

d) The net effect of ignoring its own findings in the needs assessment report was that, approximately five years after the roll-out of the project, MES equipment remained non-functional in several health facilities across the 47 counties owing to the lack of the requisite specialized personnel, infrastructure, water and/or electricity.

e) The Committee further observes that the Needs Assessment report contained recommendations to the effect that the MoH would: (i) share its findings with the county governments; (ii) jointly with the county governments prioritize the list of critical equipment to be procured; and, (iii) together with the county governments, draw a comprehensive procurement plan for high-end equipment. However, contrary to these recommendations, the Committee did not find evidence to suggest that the MoH shared the needs assessment report with the counties, or that county governments were involved in prioritizing their needs. As a result, most of the equipment

supplied to the counties under the MES project did not correspond to their actual needs.

f) With regard to the Kenya Services Availability and Readiness Assessment (SARAM) Report referenced by Prof. Segor as part evidence of having conducted a needs assessment prior to rolling out the MES Project, the Committee observed that the SARAM report was focused on basic health services and not the provision of specialised equipment which underpinned the MES project. Further, the report did not make any reference to the MES project, and funded by the World Health Organisation (WHO) and DFiD amongst others.

ii) Memoranda of Understanding

g) On diverse dates between February and August 201, the MoH and County Governments executed MOUs for purposes of facilitating the implementation of the MES Project.

a) Health is a devolved function under the Fourth Schedule of the Constitution. Article 187 (1) of the Constitutions states that *"a function or power of government at one level may be transferred to a government at the other level by agreement between the governments if—*

(a) the function or power would be more effectively performed or exercised by the receiving government; and,

(b) the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised.

b) Section 25 of the Intergovernmental Relations Act, 2012 provides that, *"A government transferring or delegating a power, function or competency under this Part shall:*

a) ensure the assignment is to the level of government best placed to exercise or perform the power, function or competency in accordance with Article 187 of the Constitution;

b) ensure that adequate resources are provided to carry out the power, function, or competency;

c) ensure that the transfer is in accordance with the procedures set out under this Act or prescribed by regulations made under this Act;

and

d) ensure a transfer or delegation under this section does not transfer constitutional responsibility assigned to that level of government."

c) Section 26 of the Intergovernmental Relations Act, 2012 (IGRA, 2012) further provides *"that a transfer or delegation of powers, functions or competencies under this Part shall be by a written agreement. It further provides that the Agreement shall set out the resourcing framework for the delivery of the function, the capacity of the receiving entity to exercise or perform the function, the method of resolving disputes, the terms and conditions for the exercise of the function."* The IGRA, 2012 further requires *"..that the agreement be signed by an authorized person and published in the Kenya Gazette and the county Gazette at least fourteen days before the effective date of the transfer or delegation.*

d) Contrary to the aforementioned provisions of Article 187 of the Constitution and section 26 of the IGRA 2012, the MoH procured specialized equipment for County Governments in the absence of an explicit written agreement between the two levels of Government. The Memoranda of Understanding (MOUs) that were executed between the MoH and the 46 County Governments did not equate to such an agreement as required by law. In deed, according to Black Laws dictionary, an MOU is merely a letter of intent *"..detailing the preliminary understanding of parties who plan to enter into a contract or some other agreement."*

e) In some counties, MOUs were signed by non-authorised persons contrary to section 26 (3) of the IGRA 2012 which mandates only authorised persons to sign intergovernmental agreements for the transfer functions between the two levels of government: The County Governor is the officer authorised to

exercise sovereign power on behalf of the people of a county as provided for under Article 179 (4) of the Constitution which defines county governors as the chief executive officers of the counties; and, section 24 of the County Government Act (CGA) which vests the executive authority of a county on the county executive committee. However, in the case of Embu and Siaya counties, the MOUs were signed by the County Secretaries. Further, in Turkana County, the MOU was signed by the CEC Health.

f) The MOUs that were executed under the MES project did not comply with section 26 (5) of the IGA 2012 which provides for county assemblies to be notified of a decision to transfer a county government power, function or competency.

g) Further, the MOUs did not comply with section 26 (3) of the IGA 2012 which provides that the "*..intergovernmental agreement shall be published in the Kenya Gazette and the county Gazette in respect of the county to which it relates, at least fourteen days before the effective date of the transfer or delegation.*"

h) Further, the Committee observed that not only were the MOUs generic across the forty-six (46) Counties, but they also did not make reference to pertinent issues to be expected under such an agreement e.g. the specific county needs being addressed, the amounts being expended by the National Government on behalf of the county, details of beneficiary hospitals and/or the specific equipment that each facility would receive.

i) The legal validity of the MOUs was further brought to question by the fact that even where no MOU existed with a county government, as demonstrated in the case of Bomet County, the MoH proceeded to supply and install equipment under the MES project in total disregard of the Constitution and the law.

j) Further on the legal validity of the MES Contracts, the Committee observes that Clause 5.4 of the MES contracts obligated the MoH to *"..supply at its cost: (a) cold water mains services, and (b) electricity to the quantity and quality set under the contract."*. However, under the MOUs executed by the

MoH and the county governments, these obligations and their attendant costs were irregularly transferred to county governments. For example, according to the MOU signed by Machakos County, the county had an obligation under item 2.3 to "*...supply to the contractors at the county's cost, cold water mains services and electricity to the quantity and quality as may be requested by the ministry or contractors, throughout the contract period.*"

k) Further, County Governments reported having signed the MOUs under duress: According to submissions made by the COG, the National Government deployed provincial administration machinery to intimidate and exert public pressure on Governors to sign the MoUs. In the case of Kakamega County for example, Chiefs reportedly mobilized public *barazas* to condemn the County Government for declining to accept the equipment thereby causing needless deaths and suffering of county residents.

l) The MOUs further denied Counties the flexibility necessary to adapt the MES project to suit their unique needs: For example, under the MOUs, Counties could not exchange the equipment they received for what was more relevant to their needs. In addition, the same MOUs forbade Counties from transferring duplicate equipment from primary beneficiary hospitals to other county health facilities whose needs they may have better served. For example, theatre equipment assigned to Ziwa County Referral Hospital in Uasin Gishu County was unilaterally reallocated to Moi Teaching and Referral Hospital (MTRH) by the MoH despite there being a viable alternative health facility in the County.

iii) Lack of County Involvement

m) The roll-out and implementation of the MES project assumed a highly centralized approach that was incognizant of the distinct and unique needs of each of the 47 county governments. In contravention of Article 6 of the Constitution which requires the two levels of government to conduct their mutual relations on the basis of consultation and cooperation, counties

reported not having received full disclosure on the contracts executed on their behalf by the MoH and the contracted companies.

iv)Execution of the MES Contracts

n) According to submissions made by Dr. Khadijah, the MES Contracts that were signed on 6th February, 2015 were still subject to further negotiations and were supposed to be concluded after the ceremonial signing event. This corroborated submissions made by the OAG & DOJ, that the signing event of the MES Contracts on 6th February, 2015 was supposed to serve ceremonial purposes as the contract negotiations were still at their nascent stages at the time. According to the OAG & DOJ, the five (5) MES Contracts that were signed on 6th February, 2015 were supposed to have wording to the effect that the same were '*mere expression of the intention to contract'* and be subject to further negotiations between the parties.

o) It further corroborated submissions made by the Former Attorney General, Prof. Githu who testified that the MES Contracts that were executed on 6th February, 2015 were initially supposed to be signed as pre-contracts and not the final MES Contracts as they were still subject to further negotiations and review. However, in total disregard of the advice given by the OAG & DOJ, the MoH subsequently referred to 6th February, 2015 as the Commercial Close Date, and all further reviews of the MES Contracts after 6th February, 2015 were considered as amendments and restatements.

v) Execution of Additional Contracts Ancillary to the MES Contracts

p) According to the OAG & DOJ, the MoH and MES Contractors executed additional contracts ancillary to the MES Contracts (as amended and restated), including, *inter alia,* Funders Direct Agreements, Subcontracting Agreements; Parent Company Guarantees; and Novation Agreements without their being reviewed and/or approved by the OAG & DOJ. Indeed, the OAG & DOJ testified that its office only came to learn of the additional contracts *post facto* when binding obligations had already been created to third parties *(see Annexure XIV).*

q) The import of the additional agreements was that they were designed to circumvent the Public Procurement and Disposal Act whereby international contractors tendered for the MES Project but subsequently transferred the performance of the ensuing contract obligations to local companies that may not otherwise have qualified for the contracts.

r) Further, according to the OAG & DOJ, the ancillary agreements altered the MES Contracts (as amended and restated) and placed binding obligations on the GoK that were highly skewed in favour of the Contractors, and which exposed the GoK to huge financial and legal liabilities. For example, the Amended and Restated Contracts for Philips and GE referenced Funders and Assignment agreements which superseded their respective contracts, were independent of the contracts document and placed an obligation on the GoK to pay their funders for the equipment whether or not the contract subsisted, or whether or not the contractor met the other maintenance, repair and support elements of the contracts.

vi) Issuance of GoK Letters of Support

s) The issuance of the GoK Letters of Support (GoK LoS) was not applicable in the MES Project as the issuance of GoK LoS is not provided for under the Public Procurement and Disposal Act, 2005, but rather the PPP Act. Further, owing to the fact that the project was being financed by the exchequer and, that the MoH was not borrowing any monies to finance the project, the relationship and duty of care of the procuring entity (MoH) ought to have only been to the Contractors and not third parties (lenders) as was implied by the issuance of GoK LoS. If at all, any GoK LoS issued to the MES Contractors ought to have been drafted as general letters of acknowledgement of policy support that expressly omitted financial guarantees by the GoK.

vii) Value for Money

t) The cost of the equipment supplied under the MES Project was grossly exaggerated as demonstrated by a schedule submitted to the Committee by

the MoH on the value of equipment received by each county. Some examples included:

Equipment	No.	Value (USD) as submitted by the Ministry)	MES Unit Cost in USD	MES Unit Cost in Kshs (converted at Kshs.101 to 1 USD)	Average Market Price Based on Committee's Investigations (Kshs)
Instrument Trolley	2	5,345.00	2,672.50	269,922.50	15,000.00
Linen Trolley	2	6,072.00	3,036.00	306,636.00	25,000.00
Patient Stretchers	3	64,475.00	21,491.00	2,170,591.00	30,000.00
Resuscitation Patient Trolley	1	16,037.00	16,037.00	1,619,737.00	50,000.00
Stitching Removal Set	4	15,796.00	3,949.00	398,849.00	5,000.00
Drip Stand	15	187,857.75	12,523.85	1,264,873.50	5,000.00
Spot Light	3	42,164.00	14,054.67	1,419,514.60	800.00
Stethoscope	2	24,976.14	12,488.07	1,261,295.07	12,000.00
Microwave Oven	1	12,805.81	12,805.81	1,293,386.81	20,000.00
Washing Basin	12	154,804.16	12,900.35	1,302,935.35	800.00
Baby Cot	2	28,662.70	14,331.35	1,447,466.35	25,000.00
Electric Kettle	1	12,598.27	12,598.27	1,272,425.27	15,000.00

From the table above, the Committee observed that under the MES , common basic equipment was supplied at several times the normal market price: For example, a stitching removal set which typically comprises a suture tray, a pair of scissors and a pair of tongs, was supplied to counties at the unconscionable cost of Kshs. 398,849.00, more than 80 times the average cost of similar equipment in the market. Simple instrument trolleys were supplied at Kshs. 269,922.50 which was 18 times the average cost of similar equipment in the market. Spot lights were supplied at Kshs.

1,419,514.60 each, a price at least 1,774 times the average market price. Washing basins were priced at Kshs. 1,302,935.00 which is at least 1,667 times the normal market price etc.

u) Even the cost of the specialized equipment supplied under the project was grossly exaggerated: According to 'Medical Price', an online medical equipment search engine and marketplace (https://www.medicalpriceonline.com/), the average market price of the specific C-Arm X-Ray Imaging machine that was supplied by GE was USD 88,656.00 (or Kshs. 8,954,256.00 at an exchange rate of Kshs. 101 to the dollar). However, the value of the equipment as provided by the MoH was USD. 403,190.00 (equivalent to Kshs. 40,722,190.00 at an exchange rate of Kshs. 101 to the dollar) - at least five times the average market value as obtained from the online source. In addition, according to the site, the average market price for the specific ultrasound machine that was supplied by GE was USD: 29,301.00 (equivalent to Kshs. 2,959,401.00 at an exchange rate of Kshs. 101 to the USD) - at least eight times less than the indicated price by MoH of USD 233,572.42 00 (equivalent to Kshs. 23,590,772.00 at an exchange rate of Kshs. 101 to the USD).

v) Further to the above, independent investigations by counties had similarly revealed evidence to suggest that the value of equipment supplied to counties under the project was grossly exaggerated: For instance, Kitui County conducted an Internal Inventory and Market Survey on the MES equipment supplied to the county and found that its total value amounted to Kshs. 331,542,230.00, at least 2.5 times less than the estimates provided by the MoH which indicated that equipment supplied to Kitui County was worth USD 8,032,770.00 (equivalent to Kshs. 811,309,770.00 at a conversion rate of Kshs. 101 to 1 USD)*(see Annexure XII)*. Further, during its visit to Uasin Gishu County, the Committee established that the County Government had undertaken a local market survey to establish the total value of all MES equipment that had been allocated to the county. Results

of the market survey had revealed that the total value MES equipment allocated to the county was Kshs. 84,952,000.00 as follows:

- Ziwa County Referral Hospital: Kshs. 54,176,000.00 (including theatre equipment which was subsequently reallocated to MTRH).
- Burnt Forest Sub County Hospital: Kshs. 30,776,000.00.

See Annex 13 for a detailed breakdown of the county's market survey results.

w) In relation to the above, at least 90% comprised basic, common clinical equipment such as instrument trolleys and basic surgical sets as opposed to actual specialized equipment. This in itself represents an unconscionable use of public resources given the fact that basic equipment ought to have been procured through outright purchase rather than a managed equipment services model. The legal opinion by IKM Advocates dated 16th May, 2020 *(see Annex XXI)* demonstrates that the MoH had initially contemplated allowing counties to directly procure the basic equipment component under the project. However, under circumstances that remain unclear to date, the MoH subsequently opted to procure all the equipment under the costlier MES model. *See Annex XII for a detailed breakdown of the basic equipment supplied under the project, versus the actual specialized equipment.*

x) Further to the above, the Committee observes that according to submissions made by the MoH, the value of equipment received by each county ranged from USD. 7,971,365.00 to USD. 11,392,388.00 . However, despite the fact that the equipment received was neither standard in value nor quantum, the MoH charged a blanket standard rate across the 47 counties of Kshs. 95 Million FY 2015/2016.

Committee Observations

The Committee made the following observations:

1. The MES Project was initially conceptualized as a Public Private Partnership (PPP). However, the legal framework upon which it was ultimately undertaken was the Public Procurement and Disposal Act 2005, and the Public Procurement and Disposal Act (Regulations) of 2006;

2. Where successfully implemented, the MES project had realized a positive impact on health service delivery through improved access to specialised and emergency care. For example, in the third quarter of 2019 alone, 28,902 surgeries were conducted in beneficiary hospitals. Further, the provision of renal dialysis services had been expanded from 5 public hospitals previously, to 54. During this period, 1,265 dialysis patients had been attended to with 198,256 dialysis sessions. Accessibility to critical care had also improved under the project with 1036 patients receiving ICU care in the third quarter of 2019.

3. The impact of the MES project was most demonstrable in facilities that had already had the requisite personnel and infrastructural capacity to begin with. These included national referral facilities, and the former Provincial General Hospitals (now referred to as Level 5 hospitals). Poor implementation of the project was most pronounced in remote, marginalised counties that had been forced to adapt themselves to the equipment. For example, in Elgeyo Marakwet County, Iten County Referral Hospital was yet to operationalise its theatre equipment five years down the line owing to ongoing theatre construction works.

4. A special audit conducted by the Office of the Auditor General (OAG) revealed that the MoH violated Section 17 of the Public Procurement Regulations (2006) and the provisions of Legal Notice No. 107 of 2013, as evidenced by payment vouchers amounting to Kshs. 2,082,282,652.00 made in respect to Shenzhen Mindray Biomedical Electronic Co, Esteem Industries, Bellco Ltd and General Electric East Africa Services in the absence of signed minutes by an Inspection and Acceptance Committee. The payments were however supported by completion certificates signed by Mr. Morang'a Morekwa who was identified as the Chairperson of the MES Implementation Committee in the MoH.

5. In a letter dated 20th September, 2013 (*see Annexure 1*), barely six months after the General Elections that had been held on 4th March of the same year, and at a time when the nascent County Governments were still operating under the Transition Authority (now defunct), the then Cabinet Secretary, Mr. James Macharia wrote to all 47 Governors informing them of the

MoH's intention to equip county health facilities. The letter states that the Ministry, *"through the Public Private Initiative is in the process of negotiating with two multinational companies...."* Under the arrangement envisaged in this letter, the Project was to be implemented as a PPP under an operating lease agreement with the National Government identified as the Principal Agent, the two multinational companies as lessors, and county governments as lessees with budgetary obligations.

6. In the Committee's meeting with the MoH dated 22nd October, 2019, the two multinational companies were identified as Philips East Africa Ltd and General Electric East Africa Ltd. The two companies would ultimately proceed to be awarded contracts to supply equipment under Lots 6 and 7 respectively, under the managed equipment service arrangement. The combined contract value of the ICU and Radiology equipment (Lots 6 and 7 respectively) was USD 275,771,678.00 (or Kshs. 27,852,939,500.00 at an exchange rate of Kshs. 101 to 1 USD). This was equivalent to at least 60% of the total contract value at the time.
7. According to the Concept Paper developed by the MoH on *'Leasing of Equipment and Infrastructure Improvement in Public Health Facilities under Public Private Partnership,'* preliminary assessments undertaken by the MoH indicated that it would cost Kshs. 43.5 Billion to equip counties with leased equipment, including developing the necessary infrastructure to support the installation of such equipment. This would translate to an annual sum of Kshs. 4.35 Billion over a ten-year period. It was anticipated that this cost would be met as follows:
   (a) MoH budgetary allocation: Kshs. 1 Billion/year;
   (b) Payment by counties and revenues from services rendered: Kshs. 1.5 Billion/year. Council; and
   (c) Budgetary support from the National Treasury: Kshs. 2 Billion/year.

   However, under the MES arrangement, the equipment was ultimately supplied to counties at an annual cost that peaked at Kshs. 9.5 Billion in the FY 2019/2020.
8. As part evidence of having consulted counties on the MES project, the MoH submitted a Communique of a consultative meeting held between the Cabinet Secretary for Health and Senior Ministry Officials with Chief Executive Members for Health and Finance, and County Directors of Health dated 22nd October, 2013. Part of the Resolutions captured from the meeting read as follows:

"(a) Resolution 3: We (counties) need to prioritize the facilities to be considered under the current initiative, including the type of equipment to be used.

(b) Resolution 5: That measures will be taken to ensure that existing legislation in procurement and Public Private Partnership are used to avoid the problem of monopolizing the initiative.

(c) Resolution 8: Regular meetings will be held to review the development of the initiative. "

However, contrary to the resolutions of this meeting, and as evidenced by submissions received by the Committee from the Council of Governors and the Office of the Attorney General, counties were not involved in prioritizing the equipment that was supplied to them under this project. Indeed, counties reported having been excluded from the Needs Assessment exercise conducted by the MoH Further to this, and in contravention of the meeting's own resolutions, the MoH did not provide evidence to suggest that it had continued to hold regular meetings with the Forum to review the development of the initiative.

9. In addition, contrary to the law and to Resolution 5 of the aforementioned meeting, the MES project did end up being monopolized by select sub-contractors. For example, Angelica Enterprises Ltd, which was identified as a subcontractor for Esteem Industries (Lot 5, Renal Equipment), became the sole supplier of consumables and reagents for renal and radiological equipment supplied under the MES Project. To note, all MES equipment was locked to specific consumables and reagents supplied by what was essentially, a single-sourced supplier.

10. In implementing the MES Project, the MoH appears to have ignored its own findings and recommendations as contained in the *'2014 Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in the proposed Level 4 and 5 Facilities in the Counties'*. The report notes that the *"provision of specialized health services is still very weak due to inadequate specialized human resources."* It goes further to note that the *"delivery of comprehensive services requires availability of at least one specialist in all categories …"*. Data provided in the report indicated the following availability of various specialized cadres in 2014:

(a) Physicians: 18%
(b) Obstetricians/Gynecologists: 14%
(c) Orthopedic Surgeons: 9%
(d) Radiologists: 32%
(d)Pediatricians: 21%
(e)General Surgeons: 22%
(f) Anesthesiologists: 11%
(h) ICU Nurses: 2%
(i) Burns Nurses: 3%
(j) Theatre Nurses: 15%
(k) Renal Nurses: 21%

The Report further noted that more than ten (10) counties did not have a single specialist. However, the MoH went on to fast track the roll-out of the MES Project despite their own assessment report demonstrating that counties lacked the requisite specialized personnel. To note, lack of specialized personnel to operate the equipment has since been identified as one of the key challenges hindering the successful implementation of the MES Project.

11. On availability of equipment, the same report *(Annexure XII)* notes that the availability of various equipment varies from 60-90% in the counties. For example:

(a) General X-Ray Machines: 54% availability
(b) Anesthetic machines: 65%
(c) Autoclaves: 86%
(d) Cesarean Section Sets: 86%
(e) Operating Theatre Lamps: 62% etc

However, despite finding that the various equipment prioritized under the project were already available in at least 60% of county health facilities, the MoH went on to carry out a blanket allocation and delivery of equipment across the counties. This had consequently led to cases of duplication of equipment. In Laikipia County for example, functional X-Ray and theatre equipment that had been procured by the National Government prior to devolution had to be removed to make way for new X-Ray and theatre equipment supplied under the MES project even when the same was functional. In Nyamira County, renal equipment was installed and commissioned by the MoH despite the fact that the County had already procured functioning renal dialysis machines that were adequate for its needs.

Further, the aforementioned Report *(Annexure XII)* noted that the infrastructure available for specialised diagnostic radiological services ranged from 1-109% across the counties. The import

of which was that from the onset, there already existed wide infrastructural disparities between the counties. By the MoHs own assessment, while some counties exceeded the infrastructural requirements necessary to absorb the equipment envisaged under the project, others had only 1% of the infrastructure required.

Despite this, the MoH went on to fast track the roll-out of the MES Project at a time when most counties did not have the infrastructure necessary to enable them absorb the equipment. As a result, five years down the line, various counties are yet to operationalize MES equipment owing to lack of adequate water or electricity, and/or ongoing construction works. In the MoH Report on the functionality status of MES equipment, the MoH notes that while General Digital X-Ray machines are already installed and ready for service in 16 counties, they are yet to be utilised owing to lack of phase three electricity.

The net effect of ignoring its own findings in the needs assessment report is that to date, MES equipment has remained non-functional in several health facilities across the 47 counties owing to the lack of the requisite specialized personnel, infrastructure, water and electricity. Had the MES Project been implemented in a stepwise and progressive manner that factored in the need to address these challenges first, more impact would have been realized from the MES Project.

The Needs Assessment report further recommends that the MoH:

(a) Shares its findings with the county governments;

(b) Jointly with the county governments prioritize the list of critical equipment to be procured; and

(c) Together with the county governments, draw a comprehensive procurement plan for high-end equipment.

However, contrary to these recommendations, as per evidence submitted to the Committee, the MoH did not share the needs assessment report with counties. Further, county governments were not involved in prioritizing their needs. As a result, some of the equipment supplied to the counties under the MES project did not correspond to their actual needs. This was demonstrated by the fact that in certain cases, equipment received under the project duplicated equipment that the county government already had in its possession.

In some instances, counties were unable to put the equipment to use because they lacked the capacity to absorb it. For example, during a county visit to Isiolo, the Committee found most theatre equipment supplied under Lot 2 still in cartons in the theatre store. The Committee found the same when it visited Iten (Elgeyo Marakwet) and Ziwa (Uasin Gishu) County Referral Hospitals where all specialised surgical instruments supplied under Lot 2 were found in storage and still packed in their original packaging.

The MoH procured financial advisory services for the MES Project from PKF Kenya Ltd through a restricted tendering process at a contract sum of Kshs. 9,634,960.00. The reason provided by the MoH for procuring these services through a restricted tendering process was time constraints. However, given the fact that the project was a major project with huge financial implications and a high level of public interest, the MoH ought to have procured the financial advisory services through a competitive process.

The Report by PKF Kenya refers to a Public Price Comparator that was used by the MoH as a basis for evaluating the responsiveness of bidders. The Public Price Comparator was based on common equipment used in Kenya. The base costs were derived from an '*average of different prices obtained from at least three manufacturers*. However, costing for the equipment was done by Lot without providing a breakdown of each individual component under each Lot. In the absence of a costing to indicate how prices for each Lot were ultimately arrived at, the Committee found that the decision by the MoH to cost the contracts by Lot rather than by individual equipment component provided an opportunity to disguise the actual value of equipment and to inflate costs.

The cost of the equipment supplied under the MES Project was grossly exaggerated as demonstrated by a schedule submitted to the Committee by the Cabinet Secretary on the value of equipment received by each county. Some examples include:

Equipment	Units	Value (USD) as submitted by the Ministry)	MES Unit Cost in USD	MES Unit Cost in Kshs (converted at Kshs.101 to 1 USD)	Average Market Price Based on Committee's Investigations (Kshs)

Instrument Trolley	2	5,345	2,672.50	269,922.50	15,000.00
Linen Trolley	2	6,072	3,036.00	306,636.00	25,000.00
Patient Stretchers	3	64,475	21,491.00	2,170,591.00	30,000.00
Resuscitation Patient Trolley	1	16,037	16,037.00	1,619,737.00	50,000.00
Stitching Removal Set	4	15,796	3,949.00	398,849.00	5,000.00
Drip Stand	15	187,857.75	12,523.85	1,264,873.50	5,000.00
Spot Light	3	42,164	14,054.67	1,419,514.6	800.00
Stethoscope	2	24,976.14	12,488.07	1,261,295.07	12,000.00
Microwave Oven	1	12,805.81	12,805.81	1,293,386.81	20,000.00
Washing Basin	12	154,804.16	12,900.35	1,302,935.35	800.00
Baby Cot	2	28,662.70	14,331.35	1,447,466.35	25,000.00
Electric Kettle	1	12,598.27	12,598.27	1,272,425.27	15,000.00

See Annex 1 for an average breakdown of the market prices for select equipment supplied under the MES Project.

From the table above, common basic equipment was supplied, on lease, at several times the normal market price. For example, a stitching removal set which typically comprises a suture tray, a pair of scissors and a pair of tongs, was supplied to counties at the unconscionable cost of Kshs. 398,849.00. That is more than 80 times the average cost of similar equipment in the market. Simple instrument trolleys were supplied at Kshs. 269,922.50 which is 18 times the average cost etc. Spot lights were supplied at Kshs. 1,419,514.60 each, a price at least 1,774 times the average market price. Washing basins were priced at Kshs. 1,302,935, which is at least 1,667 times the normal market price etc.

When pressed by the Committee to declare her stand on the costs of MES equipment as submitted by the MoH, Mrs. Sicily Kariuki, the then CS, Health defended the pricing of the equipment noting that they were reasonable for a managed equipment services.

Even the cost of the specialized equipment supplied under the project was heavily exaggerated: According to 'Medical Price', an online medical equipment search engine and marketplace (https://www.medicalpriceonline.com/) the average market price for GE equipment is USD 26,353.00. A simple online search on the site by the Committee revealed that the cost of equipment supplied under Lot 7 had been grossly exaggerated: For example, according to the site, the average market price of the C-Arm X-Ray Imaging machine was USD 88,656.00 (or Kshs. 8,954,256.00 at an exchange rate of Kshs. 101 to the dollar) However, the indicated value of equipment as provided by the MoH was USD. 403,190.00 (or Kshs. 40,722,190.00 at an exchange rate of Kshs. 101 to the dollar) - at least five times the average market value as obtained from the online source. In addition, according to the site, the average market price for the specific Ultrasound machine that was supplied by GE East Africa Ltd was USD. 29,301.00 (or Kshs. 2,959,401.00 at an exchange rate of Kshs. 101 to the USD). This was at least eight times less than the indicated price of USD 233,572.42 00 (or Kshs. 23,590,772.00 at an exchange rate of Kshs. 101 to the dollar) as received from the MoH.

Independent investigations by counties had similarly revealed evidence to suggest that the value of equipment supplied to counties under the project was grossly exaggerated. For instance, Kitui County conducted an Internal Inventory and Market Survey on the MES equipment supplied to the county and found that it had a total value of Kshs. 331,542,230.00. This was 2.5 times less than the estimates provided by the MoH which indicated that equipment supplied to Kitui County was USD 8,032,770.00 (or Kshs. 811,309,770.00 at a conversion rate of Kshs. 101 to 1 USD). The Countys' concerns on the excessive costs of equipment received under the MES project was captured in a letter to the Cabinet Secretary dated 2nd May, 2018. In addition to the above, counties reported having procured similar equipment to that supplied under the MES project at a fraction of the cost.

In relation to the above, at least 90% comprised basic, common clinical equipment such as instrument trolleys and basic surgical sets as opposed to actual specialized equipment. This in itself represents an unconscionable use of public resources given the fact that basic equipment need not have been procured under a leasing arrangement to begin with. This fact was iterated in the Concept Paper prepared by the MoH, and from numerous statements made by the MoH itself on the MES project: the original intention was to supply specialised rather than basic equipment.

See Annex 19 for a detailed breakdown of the basic equipment supplied under the project, versus the actual specialized equipment.

In their submission, representatives of Philips East Africa Ltd, disowned the cost figures of ICU equipment submitted to the Committee by Ms. Sicily Kariuki, the then CS, Health. For instance, questioned whether they had supplied two adult cardiac stethoscopes at the cost of USD 24,876.14 (equals Kshs. 2,512,490.14 million at a conversion rate of Kshs. 101 to the USD) as indicated in the documentation received from MoH, the Director clarified that it had actually supplied the stethoscopes at a cost of Kshs. 4,500.00 per unit. This was at least 575 times less than the value item cost supplied to the Committee by the MoH.

Further to this, according to submissions received from the MoH, the value of equipment received by each county varied from USD. 7,971,365.00 to USD. 11,392,388.00. However, despite the fact that the equipment received was neither standard in value nor quantum, the MoH applied a blanket standard rate of first, Kshs. 95 Million (FY 2015/2016 to FY 2017/2018), then Kshs. 200 Million (FY 2018/2019) and subsequently, Kshs. 131 million (FY 2019/2020 across all 47 counties. This was suggestive of a reverse subsidy of more established counties by poorer, less resourced ones with lower capacity to accommodate the equipment.

Further, in the absence of evidence of national disbursement schedules indicating specific allocations to the four (4) national referral health facilities that benefited under the MES Project, the Committee established that conditional grants to counties were used to underwrite equipment supplied to national referral hospitals under the MES Project.

Further, save for 3-month starter kits, the MoH budgetary allocations for the MES project had not factored in recurrent expenditure such as the supply of reagents and consumables. This had resulted in additional expenditure to counties.

Equipment supplied under the MES Project continued to be delivered counties at the time of this investigation. However, this Committee found that payments to MES contractors were effected regardless of the actual dates when the equipment were delivered, installed and commissioned in county health facilities. To note, owing to the fact that the MoH assumes full liability for delayed

events under the terms of the MES contracts, even equipment that will never have been used at the end of the contractual period will have to be fully paid for.

On the functionality status of the equipment, according to documentation received from the MoH, MES equipment was yet to be operational in several county health facilities by the time of this inquiry. For example, theatre equipment was non-functional in ten (10) counties including Tana River, Wajir, Elgeyo Marakwet, Trans Nzoia, West Pokot, Vihiga, Muranga, Samburu and Machakos owing to a variety of reasons including lack of requisite personnel and infrastructure. Additionally, Digital General X-Ray services were still unavailable in 16 county health facilities owing to the lack of three-phase electricity. Affected counties included Siaya, Elgeyo Marakwet, Isiolo, Tana River, Kisii, West Pokot, Migori, Nyamira, Mombasa, Makueni, Kitui, Bomet, Meru, Tharaka Nithi and Trans Nzoia. Regardless, payments were still being effected for the equipment installed in the affected counties.

With regard to the variation of the costs effected against counties from Kshs. 95 million at the start of the program to Kshs. 200 million in the FY 2018/2019 and then Kshs. 131 million in the FY 2019/2020, the MoH submitted the following justifications:

(a) Expansion of the MES Project to include an additional 21 hospitals at a contract sum of KEs. 3,700,808,413.00.
(b) Procurement of HCIT Solutions at a contract value of Kshs. 4,756,773,074.00
(c) Procurement of Laboratory Equipment at an estimated cost of Kshs. 1.1 Billion
(d) Service Level Monitoring and Administration at a cost of Kshs. 98,548,722.00

It's important to note that, the HCIT Solutions contract had already been terminated and no payments had been made to the contractor. Further, Laboratory Equipment was never procured owing to irresponsive bids by potential suppliers. As such, basing the variations on these two components was itself unjustifiable.

Further, the MoH had unjustifiably opted to spread the cost of equipping twenty-one (21) additional hospitals under the expanded MES project to all forty-seven (47) counties at a cost of Kshs. 3,700,808,413.00. Owing to the fact that the MoH had justified the expansion of the MES Project by citing requests from counties, the additional costs ought to have been applied exclusively to the actual twenty-one (21) counties that had applied and benefited from the expanded project.

The Committee also found that a minimum number of equipment supplied under the MES Project had actually been upgraded and replaced by the time of this inquiry. What equipment had actually been replaced mostly consisted of common basic equipment such as trolleys and stretchers. To note, part of the justification provided by the MoH for opting for the added expense of a managed equipment service was the added advantage of access to equipment upgrades and replacements. However, in this respect, the benefit that had accrued to Kenya had been minimal.

Counties are obliged by law to factor all their expenditure into County Integrated Development Plans (CIDPs), and annual plans and budgets. Further, the Constitution obligates the involvement of people through public participation during the budget-making process. In addition, in line with their budget-making role, County Assemblies must be involved too. However, there is no evidence to suggest that public participation was conducted contrary to constitutional provisions, or that County Assemblies were involved in the conceptualization and implementation of the MES Project.

On the question of cost-effectiveness, investment in primary health care approaches by the MoH would have been preferable to the costly MES project given the fact that more impact would have been realised at a fraction of the cost.

Overall Committee Recommendations on the Ministry of Health Submissions

From the above observations, the Committee makes the following recommendations –

1. **The Ministry of Health oversaw the conversion of the MES Project from a PPP to a public procurement process. This conversion was not in the public interest because under a PPP, the total cost of the project including infrastructural support was Ksh 4.3 billion over a period of 10 years. This translated to roughly Ksh thirty-one (31) million per county per year. After the conversion, counties have been paying Ksh 95 million per county per year in the FY2014/15 to FY 2017/18; Kshs 200 million in the FY 2018/2019 and Ksh 131,914, 893 for the FYs 2019/2020 and 2020/21 for a project that runs for 7 years.**

2. **In its inquisitorial capacity, the *Ad-Hoc* committee finds that various and several public officers and public institutions acted or omitted to act in the inception and**

execution of the MES project that caused the government to spend inordinated and unjustifiable public resources on the project. Consequently, the Committee recommebds a thorugh investigation by the Ethics and Anti Corruption Commission and the Directorate of Criminal Investigation and to report their findings and action taken to the Senate within six (6) months. Consequently, upon investigations—

(a) any person found culpable be prosecuted in accordance with the law;

(b) Where it is established that the Government has suffered financial loss, the Nationa Treasury to commence recovery proceedings against the culpable officers for the loss suffred; and

(c) The culpable offciersbearing the greatest responsibility be barred from holding public office.

(4) The entire procurement process of the MES project is shrouded in secrecy. Article 201 of the Constitution holds that there shall be openness and transparency in public finance. County governments were not involved in the conceptualization, negotiation and award of the contracts under the MES project and yet the county governments are paying for the equipment and services in the MES project. The committee thus urge the EACC to commence investigations into the process of procurement and award of contracts under the MES project with a view to taking action against the officers found culpable;

(5) The EACC and other investigatory and prosecution agencies are also urged to investigate the process of procuring the legal and financial consultants, IKM Advocates, PKF Kenya and Spa-InfoSuv who advised the MoH in the entire conceptualization and implementation process. In particular, the EACC is requested to investigate the circumstances under which the PKF was awarded a contract to undertake a Value-for-money assessment and was paid Ksh 9 million for completing the work and submitting its findings in an unrealistic period of 3 days;

(6) EACC is urged to move expeditiously and investigate the circumstances surrounding the procurement of the services of IKM Advocates as legal consultants in view of the

fact that IKM was already acting as legal counsel for GE East Africa, the contractors for Lot 7 equipment;

(7) Further, the EACC is urged to investigate the circumstances under which contractors to the MES project made donations that went towards legal fees to IKM Advocates and to report its findings to the Senate within 60 days; investigate how contractors raise money to IKM advocates who were advocates of MOH in the transaction and against whom was the money billed? Was Billed against the Counties;

(8) The EACC is urged to investigate the circumstances under which the HCIT Contract was awarded and subsequently terminated by the Ministry of Health;

(9) The EACC is further urged to investigate the circumstances under which the county governments were charged additional expenditure in the County Allocation of Revenue Acts for the FY 2018/19 and FY 2019/20 in relation to the expansion of the MES project despite the fact that laboratory equipment was not procured and the contract for the HCIT project was terminated; and

(10) Where it is established that the Government suffered loss as a result of the acts of financial misconduct arising from incurring of wasteful expenditure and the imprudent committal on behalf of the government, the National Treasury is urged to institute recovery proceedings against culpable officers pursuant to section 202 of the Public Finance Management Act.

2.5. Kenya Medical Supplies Authority (KEMSA)

The Committee received submissions from KEMSA in two hearings held on Friday, 18th October, 2019 and 30th October, 2019 respectively. Led by its CEO, Dr. John Manjari, KEMSA made its submissions to the Committee as follows-

2.5.1. Mandate

KEMSA's legal mandate is governed by the KEMSA Act 2013, which mandates the Authority to procure, warehouse and distribute medical commodities to public health facilities countrywide.

2.5.2. Reagents and Consumables Supplied under the MES Project

According to KEMSA, in relation to the MES project, the authority had stocked and or supplied X-Ray digital films and renal consumables to counties based on county orders for the products as captured by the KEMSA Logistics Management Information System. A summary of MES-related

consumables and reagents that had been issued to counties at the time of this inquiry was provided as summarised below:

No.	Product Name	Qty of Facility Requests	Qty of County Proformas	Qty Issued to Facilities
A. Renal Consumables				
1.	Dialyzers Universal High Flux Surface Area 1.9m2	2,342	1,150	--
2.	Dialyzers Universal High Flux Surface Area 2.0m2	3,012	2,000	1,100
3.	Hemodialysis Blood Lines (Universal) with drainage bag, percutor arterial and venous lines with a filter, transducer, compatible with Formula 2000 plus dialysis machine	3,372	1,800	400
4.	Bicarbonate Cartridge Powder for Hemodialysis 750g compatible with Formula 2000 plus Dialysis Machine	5,764	4,092	290
5.	Acid Concentrate (Lympha)	19,662	9,755	8,665
B. Radiology Consumables				
6.	Dryview DVE Laser Imaging Film 20 * 25 cm (8*10 inch)	3,476	1,313	838
7.	Dryview DVE Laser Imaging Film 25 * 30 cm (10*12 inch)	2,259	1,201	755
8.	Dryview DVE Laser Imaging Film 28 * 35 cm (11*14 inch)	555	144	78
9.	Dryview DVE Laser Imaging Film 35 * 43 cm (14*17 inch)	516	232	181
10.	Dryview DVM Laser Imaging Film 20 * 25 cm (8*10 inch)	503	82	51

2.5.3. Regulatory Status of the Reagents and Consumables supplied by KEMSA

According to KEMSA, all the renal consumables indicated in the table above had been listed by the Pharmacy and Poisons Board (PPB), while the radiology products had been certified by the Radiation Protection Board.

2.5.4. Procurement Process

According to KEMSA, following demand for renal and radiology consumables for MES equipment by counties, KEMSA initiated a procurement process of the products from the original equipment manufacturers. However, according to KEMSA, upon inviting the manufacturers to submit bids for the consumables, the manufacturers of MES equipment directed KEMSA to their local agent, Angelica Medical Supplies Limited, for the supply of both renal and radiology products. Consequently, based on the advisory of the manufacturers, the KEMSA engaged Angelica Medical Supplies Ltd. through a direct procurement process. Subsequently, the authority executed contracts with Angelica for the supply of MES consumables on diverse dates as follows:

(a) Contract with Angelica for the supply of dialysers: 12th July, 2019;

(b) Contract with Angelica for the supply of acid concentrate: 22nd November, 2018; and,

(c) Contract with Angelica for the supply of dryview digital films: 19th November, 2018.

2.5.5. Pricing

According to KEMSA, pricing for consumables and reagents for MES equipment was arrived at following a negotiation process. Prior to the Authority's engagement, counties were procuring the reagents and consumables directly from Angelica Medical Supplies Ltd or from MEDS. According to KEMSA, following the entry of the authority, the prices of the reagents and consumables were successfully negotiated downwards by 20%.

No.	Item Description	Unit	Angelica Prices to Counties (KShs)	Angelica Prices to KEMSA (KShs.)	KEMSA Prices to Counties (KShs)	Price Mark-Up (KShs)	Cost-Saving to Counties (KShs)
A. Renal Consumables							

1.	Dialyzers Universal High Flux Surface Area 1.9m2	piece	1700	1400	1600	200	100
2.	Dialyzers Universal High Flux Surface Area 2.0m2	piece	1700	1400	1600	1700	1400
3.	Hemodialysis Blood Lines (Universal) with drainage bag, percutor arterial and venous lines with a filter, transducer, compatible with Formula 2000 plus dialysis machine	piece	700	650	750	1700	1400
4.	Bicarbonate Cartridge Powder for Hemodialysis 750g compatible with Formula 2000 plus Dialysis Machine	piece	700	650	750	700	650
5.	Acid Concentrate (Lympha)	3.8 litre bag	900	800	950	700	650
	B. Radiology (Dryview Digital Films)						
1.	Dryview DVE Laser Imaging Film 20 * 25 cm (8*10 inch)	125 sheets/ box	16,617	12,185	15,800	3615	817
2.	Dryview DVE Laser Imaging Film 25 * 30 cm (10*12 inch)	125 sheets/ box	21,719	18,164	21,500	2886	219
3.	Dryview DVE Laser Imaging Film 28 * 35 cm (11*14 inch)	125 sheets/ box	29,414	23,500	28,900	5400	514
4.	Dryview DVE Laser Imaging Film 35 * 43 cm (14*17 inch)	125 sheets/ box	42,603	32,470	42,000	9530	603
5.	Dryview DVM Laser Imaging Film 20 * 25 cm (8*10 inch)	125 sheets/ box	19,250	16,700	19,200	2500	50

The written submissions and evidence presented by KEMSA is attached herein under Annex XV.

Committee Observations

The Committee made the following observations —

1. The enactment of the Health Laws (Amendment) Act 2019, granted KEMSA a near absolute monopoly in the supply of drugs to public health facilities countrywide. The law, which amended Section 4 of the KEMSA Act, states as follows:

> *"a national or county public health facility shall, in the procurement and distribution of drugs and medical supplies, obtain all such drugs and medical supplies from the Authority... A person responsible for the procurement and distribution of drugs and medical supplies in a national or county public health facility and who contravenes provisions of this section, commits an offence and is liable on conviction to a fine not exceeding two million shillings or to imprisonment for a term not exceeding five years, or to both."*

As a result, County Governments are obligated by law to source all their health products and supplies from KEMSA. This has had serious implications in fostering a fair and competitive environment for the procurement and supply of health products.

2. All the reagents and consumables supplied by KEMSA in relation to the MES project were single sourced from a single local agent i.e Angelica Medical Supplies Limited. According to KEMSA, Angelica Medical Supplies Ltd was invited to supply the renal and radiology reagents and consumables through a direct tendering process on the advice of the original manufacturers. However, there was evidence of conflict of interest arising from the appointment of Angelica Medical Supplies Ltd as the sole supplier of renal consumables and reagents under the MES project as demonstrated by the following:

   (a) Bellco SRL (Italy) executed a power of attorney in favour of Ms. Mary Wanja Matu, Director/CEO, Angelica Medical Supplies Ltd, on 18th February, 2015. The power of attorney empowered Ms. Matu to execute, deliver, approve and amend the MES contract, the service agreement, and all other agreements as may have been required under Kenyan law in respect of Lot 5.

   (b) Legally, the authority donated to Ms. Matu by the power of attorney could only have come to force after its execution, not before. However, this inquiry found that despite the power of attorney not being in force at time, Ms. Matu bid for the Lot 5 MES tender, and signed the tender documents on behalf of Bellco SRL.

(c) Further, Ms. executed the Lot 5 MES Contract on behalf of Bellco SRL on 6th February, 2015 - at least twelve days before the execution of the power of attorney that granted her the authority to act on the contractors' behalf.

The questionable circumstances under which Ms. Matu, Director/CEO, Angelica Medical Supplies Ltd, participated in the Lot 5 MES tender and contract, as well as the subsequent single-sourcing of Angelica by KEMSA for the supply of MES-related reagents and consumables imply that the market for reagents and consumables was deliberately monopolised in favour of Angelica. It is therefore questionable whether the reagents and consumables supplied by KEMSA under the MES project were actually sourced at the most competitive rates.

3. According to KEMSA, direct procurement of the MES consumables was necessitated by the fact that the renal and radiology equipment supplied under the MES project were locked to the specific reagents and consumables. This however controverted submissions made by Ms. Matu on behalf of Bellco at a hearing held on 31st December, 2019, during which she testified that all the equipment supplied under Lot 5 operated under an open system. This implies that KEMSA was at liberty to source for viable alternatives from the market.

4. Under Schedule 10, Clause 5 of the MES contracts, MES Contractors were obligated to supply, maintain and replace all maintenance and operational durables in respect of the equipment, and, all maintenance and operational consumables. This implies that, according to the terms of the contract, counties ought to have been receiving reagents and consumables in respect to the MES equipment supplied. Specifically, for Lot 5, having executed the contract on behalf of Bellco, it is reasonable to expect that Ms. Matu, CEO, Angelica, was aware of this obligation. However, according to submissions made by the MoH, the COG, KEMSA and the MES contractors, counties were only issued with starter kits.

5. According to the testimony of KEMSA, following their entry, prices for consumables supplied by Angelica were successfully negotiated downwards by 20%. However, the Committee found that while the authority did negotiate the prices, this did not translate into any tangible cost-savings by counties. Indeed, in the case of renal consumables (e.g. hemodialysis blood lines, bicarbonate cartridge powder and acid concentrate) KEMSA

supplied to counties at prices higher than Angelica. In the case of radiology products, despite having negotiated significantly marked down prices with Angelica, the average cost saving accrued to counties was negligible at 1.67% as demonstrated in the tables below:

No.	Item Description	Angelica Prices to Counties (KShs) (a)	Angelica Prices to KEMSA (KShs.) (b)	KEMSA Prices to Counties (KShs) (c)	KEMSA Price Mark-Up (KShs) (c-b=d)	Cost Savings to Counties	Cost Savings to Counties in %
	A. Renal Consumables						
1.	Dialyzers Universal High Flux Surface Area 1.9m2	1700	1400	1600	200	100	5.9%
2.	Dialyzers Universal High Flux Surface Area 2.0m2	1700	1400	1600	200	100	5.9%
3.	Hemodialysis Blood Lines (Universal) with drainage bag, percutor arterial and venous lines with a filter, transducer, compatible with Formula 2000plus dialysis machine	700	650	750	100	-50	-7.1%
4.	Bicarbonate Cartridge Powder for Hemodialysis 750g compatible with Formula 2000plus Dialysis Machine	700	650	750	100	-50	-7.1%
5.	Acid Concentrate (Lympha)	900	800	950	150	-50	-5.5%

						Average Cost-Saving to Counties	*- 1.58%*
B. Radiology Consumables							
No.	**Item Description** ***(Unit: 125 sheets/box)***	**Angelica Prices to Counties (KShs) (a)**	**Angelica Prices to KEMSA (KShs.) (b)**	**KEMSA Prices to Counties (KShs) (c)**	**KEMSA Price Mark-Up (KShs) (c-b=d)**	**Cost Savings to Counties**	**Cost Savings to Counties in %**
1.	Dryview DVE Laser Imaging Film 20 * 25 cm (8*10 inch)	16,617	12,185	15,800	3615	817	4%
2.	Dryview DVE Laser Imaging Film 25 * 30 cm (10*12 inch)	21,719	18,164	21,500	2886	219	1%
3.	Dryview DVE Laser Imaging Film 28 * 35 cm (11*14 inch)	29,414	23,500	28,900	5400	514	1.7%
4.	Dryview DVE Laser Imaging Film 35 * 43 cm (14*17 inch)	42,603	32,470	42,000	9530	603	1.4%
5.	Dryview DVM Laser Imaging Film 20 * 25 cm (8*10 inch)	19,250	16,700	19,200	2500	50	0.25%
						Average Cost-Saving to Counties	*1.67%*

6. The supply of reagents and consumables for MES equipment remains a key sustainability issue and concern to counties. According to COG, the cost of digital films for MES radiology equipment was at least five times that of normal X-Ray films. Under a managed equipment services arrangement, it is a reasonable expectation that recurrent costs such as the supply of consumables and reagents will be covered at no additional cost to the client. Despite contractual provisions to this effect, counties have been constrained to meet the

cost of reagents and consumables for MES equipment having only received 3 months' starter kits for the various equipment at the initiation of the project.

7. In a letter to the National Treasury (NT) dated 2nd November, 2017, and signed by the then PS, Health, Mr. Julius Korir, CBS, the MoH sought KShs. 500,000,000.00 for the supply of consumables for MES equipment. This implies that the MoH recognised that the burden of procuring reagents and consumables was not being legitimately borne by counties. Further, it provides an indication of the significant and additional burden imposed on counties for the running and operation of MES equipment.

Committee Recommendations

The Committee makes the following recommendations –

1. **that the KEMSA Act be amended to remove the monopoly granted to KEMSA in the supply of medical products and technologies; and**
2. **that the EACC investigates the circumstances under which a contractual monopoly was created for the supply of consumables and reagents for Lot 5 and Lot 7 for the benefit of Angelica Supplies Limited.**

2.6. Pharmacy and Poisons Board (PPB)

The Committee received submissions from the Pharmacy and Poisons Board led by in two hearings held on Friday, 18th and 30th October, 2019 respectively. Led the CEO, Dr. Fred Siyoi, PPB made its submissions to the Committee as follows-

According to PPB, prior to the enactment of the Pharmacy and Poisons Act, 2010, the PPB had no mandate over the registration of medical devices. Following the enactment of the Act, the Board developed guidelines for the listing and registration of medical products and supplies.

2.6.1. Mandate of the Pharmacy and Poisons Board

The Pharmacy and Poisons Board (herein PPB) is the Drug Regulatory Authority established under the Pharmacy and Poisons Act, Chapter 244 of the Laws of Kenya. The Board regulates the practice of Pharmacy and the manufacture and trade in drugs and poisons. It implements regulatory measures to achieve the highest standards of safety, efficacy and quality for all drugs, chemical substances and medical devices, locally manufactured, imported, exported, distributed, sold, or

used, to ensure the protection of the consumer as envisaged by the laws regulating drugs in force in Kenya.

According to PPB, prior to the enactment of the Pharmacy and Poisons Act, 2010, the PPB had no mandate over the registration of medical devices. Following the enactment of the Act, the Board developed guidelines for the listing and registration of medical products and supplies.

2.6.2. Regulation of Medical Equipment

According to PPB, its role in the regulation of medical devices involved granting Market Authorization through listing or registration based on the risk classification of the medical device. The Board further indicated that as a prerequisite for market authorisation, medical devices were required to be in compliance with applicable legislation including Pre-Export Verification (PVoC) of shipments.

2.6.3. Listing of Equipment, Reagents and Consumables by the PPB

According to PPB, for purposes of providing market authorization for MES equipment, the Board relied on an online listing process. The procedure for listing of medical equipment, reagents and consumables was provided as summarized below:

(a) The applicant uploads relevant information and documentation on the Boards online system.

(b) The uploaded information is vetted by an Evaluator with the relevant qualifications.

(c) The applicant is issued with a listing certificate or requested to provide additional information.

2.6.4. Registration of Equipment, Reagents and Consumables by the PPB

The Pharmacy and Poisons Board submitted that the registration of medical equipment and supplies constituted a more rigorous process which involved vetting, inspection and laboratory testing and validation. However, the Board submitted that no equipment, reagents or consumables supplied under the MES project had been subjected to the rigours of registration owing to the lack of capacity and a regulatory framework.

2.6.5. Role of the PPB in the MES Project

According to PPB, the MoH did not involve the Board at any stage of the implementation and roll-out of the MES project.

2.6.6. Challenges

PPB identified the following specific challenges with implementing the registration of medical devices: lack of a regulatory framework; inadequate funding; lack of requisite expertise; and, lack of proper infrastructure to support the necessary tests.

The written submissions and evidence presented by PPB is attached herein under Annex XVI.

Committee Observations

The Committee made the following observations-

1. Despite the MES project having been a serious undertaking by the MOH, the Pharmacy and Poisons Board (PPB) was not involved at any point of its implementation.
2. In accordance with Legal Notice 78 of 15th July 2005, the regulation of the items supplied under the MES Project ought to have been covered by the Kenya Bureau of Standards (KEBS).
3. The equipment, reagents and consumables supplied under the MES project were merely listed by the PPB. No independent vetting, inspection or quality control testing was carried out by the Board to guarantee their safety, efficacy or quality. This was in contradiction of Section 9(3) of the KEMSA Act which requires all drugs and supplies to be registered by the PPB.
4. The PPB attributed its lack of independent vetting, inspection or quality control testing of MES equipment to the lack of a regulatory framework and lack of requisite capacity.

Committee Recommendations

The Committee recommends that—

1. **Ministry of Health to re-examine the legal framework that the Board operates to ensure they effectively discharge their mandate to protect Kenyans.**
2. **EACC investigates the circumstances under which the Pharmacy and Poisons Board failed to carry out its statutory obligations to ensure the safety of medical products imported under the MES project.**
3. **EACC investigate the role of PPB in the licensing and registration of drugs in Kenya.**
4. **Operationalize the Regulatory Body provided for in the Health Act with a view to streamlining the registration of drugs.**

2.7. Kenya Bureau of Standards

The Committee received submissions from the Kenya Bureau of Standards in a hearing held on Tuesday, 3rd December, 2019. Led by its Managing Director, Lt. Rtd. Benard Njiraini, MD, KEBS made the following submissions-

2.7.1. Mandate of the Kenya Bureau of Standards

Kenya Bureau of Standards (herein KEBS) is a statutory body established by the Standards Act, Cap 496. The functions of the Kenya Bureau of Standards include—

(a) Promote standardization in industry and commerce;

(b) Make arrangements or provide facilities for the examination and testing of commodities and any material or substance from which or with which and the manner in which they may be manufactured, produced, processed or treated;

(c) Control, in accordance with the provisions of the Act, the use of standardization marks and distinctive marks;

(d) Prepare, frame, modify or amend specifications and codes of practice;

(e) Encourage or undertake educational work in connexion with standardization;

(f) Assist the government or any local authority or other local body and any other person in the preparation and framing of any specifications or codes of practice;

(g) Provide for co-operation with the government or the representatives of any industry or with any local authority or other public body or any other person, with a view to securing the adoption and practical application of standards;

(h) Provide the testing at the request of the Cabinet Secretary and on behalf of the government of locally manufactured and imported commodities with a view to

determining whether such commodities comply with the provisions of this Act or any other law dealing with standards of quality or description.

Further by Legal Notice 78 of 15th July, 2005 and Legal Notice 127 of 19th June, 2018, KEBS is mandated to undertake quality inspection of imports.

2.7.2. Regulatory Status of all Equipment, Devices and Accessories supplied under the MES Project

The Kenya Bureau of Standards (KEBS) submitted that MES equipment was imported into the country in 2015. At the time, inspection of imported goods by KEBS was regulated by Legal Notice 78 of 15th July 2005, which require KEBS to publish a list of goods which shall be subjected to verification of conformity to Kenyan standards. Pursuant to this provision, in January 2012, KEBS published a list detailing the goods that were to be subjected to verification of conformity. According to KEBS, the criteria that it used precluded any items regulated by other government agencies. As such, MES equipment were excluded from verification of conformity to standards on the basis that they were regulated by agencies of the MoH.

2.7.3. Regulatory Status of the Reagents and Consumables for Equipment supplied under the MES Project

KEBS informed the Committee that MES reagents and consumables were similarly excluded from verification of conformity on the basis of their being regulated by agencies of the MoH.

2.7.4. Inspection and Verification of MES Equipment

KEBS further submitted before the Committee that it did not inspect any of the equipment, devices, appliances, reagents and consumables supplied under the MES project as regulation of the items was already covered by agencies in the MoH. However, during port clearance, the Bureau verified that the equipment had the requisite import permits.

2.7.5. Status of Registration and Compliance of MES Service Providers

KEBS informed the Committee that it did not confirm whether MES service providers were duly registered and in compliance with all the relevant rules and regulations as the Standards Act did not provide for registration of suppliers. Further, according to KEBS stated that in 2016, the MoH

issued a letter consolidating the regulatory responsibilities of its agencies under the Pharmacy and Poisons Board (PPB).

2.7.6. Memorandum of Understanding with Pharmacy and Poisons Board (PPB)

The Kenya Bureau of Standards further stated that in 2017, the Bureau and PPB entered into a Memorandum of Understanding (MoU) by which all imported devices and technologies, food supplements, medical cosmetic, herbal and other allied healthcare borderline products falling under the mandate of PPB were required to be subjected to verification for conformity by the KEBS. The public was advised accordingly through an advertisement placed in the local dailies. **The written submissions and evidence presented by KEBS is attached as annexure XVII.**

Committee Observations

The Committee made the following observations —

1. That by a letter dated 16th August, 2016 and signed by the then CS, Health, Dr. Cleopa Mailu, the MoH irregularly excluded KEBS from regulating products falling under the mandate of the PPB. According to KEBS, partly in compliance with this letter, KEBS did not conduct Pre-Export Verification of Conformity (PVoC) of standard for MES equipment. The Committee however finds KEBS negligent in the circumstances because a letter from the Ministry of Health cannot oust the statutory mandate of a government body.

2. Under Section 4 of the Standards Act and Legal Notice No. 78 of 15th July, 2005, the Kenya Bureau of Standards is mandated to undertake quality inspection of imports. Accordingly, the Committee noted that KEBS issued MES contractors with certificates of conformity on diverse dates between 2015 and 2018 for various equipment. These findings controverted submissions made by KEBS whereby KEBS maintained that MES equipment was excluded from verification of conformity to standards as they fell under the regulated mandate of PPB.

3. The committee that the relevant regulatory agencies having abdicating their responsibility, no independent vetting, inspection or quality control testing for MES equipment was carried out by either KEBS or PPB to guarantee the safety, efficacy or quality of MES equipment. These agencies abdication of duty risked the life of the

public by compromising the quality of medical equipment being impoprted in the country.

Recommendations

The Committee recommends that—

(a) EACC and DCI to investigate the circumstances under which KEBS –

(i) failed to carry out its statutory duty of verifying the equipment, reagents and consumable imported into the country under the MES project in order to ensure the standards and safety of medical products imported under MES;

(ii) MES contractors received import certificates on various dates;

(b) The Standards Act be reviewed with a view to enhancing the standards and safety of the public.

2.8. Ministry of National Treasury & Planning

The Committee received submissions from the Ministry of National Treasury and Planning (National Treasury) in two hearings held on 27th November, 2019 and 30th July, 2020. Led by the Cabinet Secretary, Hon. Ukur Yattani, the National Treasury made the following submissions -

2.8.1. Shift of the MES Project from a Public Private Partnership (PPP) Model

According to the National Treasury (NT) MoH initiated the MES Project under a PPP model in 2013. The aim of the project was to increase access to specialized health services, and improve health infrastructure across the counties. The indicative cost of the project at the time was estimated at Kshs. 43.5 Billion over a 10-year period. Discussions between the MoH and the Ministry of National Treasury and Planning eventually led to the establishment of a Joint Committee between the MoH and the PPP Unit. However, according to NT, at the point of initiating the process to conduct a feasibility study, without any justification or explanation, the MoH pulled out of the PPP model *vide* a letter dated 22nd June, 2015. With the letter, the

Ministry of National Treasury and Planning formal engagement with the MES project was terminated.

2.8.2. Funding of the MES Project

According to the NT, the MES project was funded as a conditional grant to counties from the shareable revenue of the National Government through the MoH. On the basis of the fact that monies allocated for the MES Project were for activities being undertaken by counties, and that counties were the consumer of those services an assumption could be made that the monies allocated under the MES Project belonged to the counties.

2.8.3. Government Letter of Support

According to the NT, the MoH wrote to the NT on 16th March, 2016 requesting for the issuance of GoK Letters of Support (LoS) to MES contractors as follows:

1. Shenzhen Mindray Bio-medical Electronic Co. Ltd (Shenzhen);
2. Esteem Industries Inc (Esteem);
3. Bellco S.R.L (Bellco);
4. Philips Medical Systems Nederland B.V (Philips); and,
5. GE East Africa Services Ltd (GE).

According to the NT, with specific regard to Philips and GE, the MoH presented to the NT draft GoK LoS based on agreements that it had executed with the two contractors. Upon review, the NT established that the financial obligations to the GoK under the two requirements required a direct fiscal commitment by GoK that was dependent upon a clear budget allocation to support the project. Having reviewed the draft GoK LoS to the two contractors as presented by the MoH, on 27th May, 2015, NT wrote to MoH requesting for the following documentation:

(a) a letter from the Attorney General (AG) clearing the MES contracts;
(b) a letter from the AG clearing the GoK Los; and,
(c) a letter from the AG clearing the GoK LoS to Security Trustees.

According to the National Treasury 9NT), on 15th July, 2015, MoH wrote to the NT with an attachment letter from the AG in which he cleared the requested documents subject to various amendments.

However, on 24th July, 2015, the MoH wrote to request a meeting of the MoH, Office of the Attorney General and the NT to deliberate on concerns raised by Philips and GE with regards to the GoK LoS that had been approved by the AG.

On 4th September, 2015, the NT wrote to the AG (and copied the MoH) raising various concerns about the draft GoK LoS including that the proposed GoK LoS: did not reference the contract amounts; did not contain names of the signatories to the LoS; were not accompanied with copies of the contracts; and, did not include a matrix of the financial implications of the contracts. Accordingly, on 4th September, 2015, the MoH wrote back to the NT providing the above information.

On 2nd November, 2015, the NT wrote to the AG requesting for clearance of the GoK LoS having taken into consideration the agreed amendments.

On 9th November, 2015, the office of the AG responded to the NT with further amendments. Subsequently, on 26th February, 2016, the office of the AG wrote to the NT giving final clearance for the GoK LoS to the two contractors. Accordingly, on 8th March, 2016, the CS, NT appended his signature on the two GoK LoS for Philips and GE for onward transmission to the CS, Health. However, the MoH did not share with the NT copies of the final executed GoK LoS.

2.8.4. Variation of Contract

According to the NT, the variation of contracts by the MoH by more than 100% were an irregularity. By law, the contract variation ceiling is set at 25%. As such, the variations in the MES project ought to have been subjected to a new contractual process.

2.8.5. Basis upon which Monies were Charged against each County in the MES Project

According to the NT, the NT disbursed funds as a block to the MoH for the implementation of the MES project. It was therefore not in a position to isolate the MES resources plaid to

suppliers, or to provide the basis upon which monies were charged against each County under the MES project.

2.8.6. Prudent Use of Public Resources

According to the NT, its role in enforcing prudent financial expenditure in state departments and agencies such as the MoH was limited. In relation to the MES project, there were existing structures and mechanisms within the MoH to ensure the prudent use of public resources. This included internal audit, finance and procurement officers. In addition to these internal structures and mechanisms, other institutions of Government domiciled within the MoH ought to have checked if the proper systems and procedures were being followed in the execution of the project. Nevertheless, the NT observed that there was a need to grant NT discretionary powers to stop the disbursement of funds in questionable circumstances such as was the case when the payments towards the MES project were varied by more than 100%.

Committee Observations

The Committee made the following observations-

1. On 22nd June, 2015 the MoH unprocedurally and irregularly terminated its relationship with the NT for equipment lease and health infrastructural development under a PPP. According to the NT, no justification or explanation was provided by the MoH for the termination of the PPP initiative. Further, the NT submitted that the termination coincided with a point at which processes had been initiated to conduct a feasibility study under the PPP model. The Committee further notes that in its Special Audit of the MoH Accounts for the FY 2015/2016, the OAG queried the manner in which the project was varied from a PPP to a public procurement process.
2. According to the MoH budget estimates for the FY 2014/15, the MoH was allocated a budget of KShs. 1.2 Billion towards feasibility studies for the MES project under Vote 1081. However, despite resources being availed by Parliament for this exercise, there is no evidence that the MoH undertook the feasibility study as had been budgeted for.
3. The County Allocation of Revenue Act had consistently borne the budget item 'Conditional Grant- Leasing of Medical Equipment' since FY 2015/16. Under the so-called Conditional Grant to counties, the MoH received a total of Kshs. 95 Million (FY 2015/2016 to FY 2017/2018), then Kshs. 200 Million (FY 2018/2019) and subsequently, Kshs. 131

million (FY 2019/2020) from each of the 47 counties for purposes of paying for the equipment under the MES Project. However, contrary to the provisions of section 109 of Public Finance Management Act, the conditional grants related to the MES project did not enter the County Revenue Fund but were rather deducted at source and paid to private suppliers by the NT.

4. Contrary to submissions made by the MoH, and in accordance with position of the NT, the Committee observes that the monies allocated under the MES Project belonged to counties, and not the MoH as demonstrated by the following:
    (a) monies under the MES conditional grant had been consistently captured in successive CARA since 2015/2016;
    (b) County Governments had been obligated to appropriate monies for the MES project as part of their budgets through the County Assemblies;
    (c) the monies allocated for the MES Project are for activities being undertaken by counties; and,
    (d) counties are the key consumer of MES services.
5. According to submissions by the MoH, the value of equipment received by each county varied from USD. 7,971,365.00 to USD. 11,392,388.00. However, despite the fact that the equipment received was neither standard in value nor quantum, the MoH applied a blanket standard rate of first, Kshs. 95 Million (FY 2015/2016 to FY 2017/2018), then Kshs. 200 Million (FY 2018/2019) and subsequently, Kshs. 131 million (FY 2019/2020 across all 47 counties. Furthermore, when the contract was varied to add twenty-one (21) beneficiary hospitals to the MES project, the added costs were spread across all forty-seven (47) counties as opposed to the few specific counties that had benefited from the additional equipment.
6. According to the OAG & DOJ, the Amended and Restated Contracts for Philips and GE referenced Funders and Assignment agreements which ultimately vested the rights over the equipment component of their projects to their funders. Further, the OAG & DOJ noted that the agreements superseded the MES contracts, were independent of the contract document and placed an obligation on the GoK to pay for the equipment whether or not the contract subsisted, or whether or not the contractor met the other maintenance, repair and support elements of the contracts. Further, the OAG & DOJ noted that the agreements

had created a distinct financing framework that formed the basis for the insistence by Philips Medical Systems Nederland B.V. and GE East Africa Services Ltd that their GoK LoS adopt a specific wording and format.

7. The issuance of the GoK Letters of Support LoS) was not applicable in the MES Project to begin with as the issuance of GoK LoS are not provided for under the Public Procurement and Disposal Act, 2005, but rather the PPP Act. Further, owing to the fact that the project was being financed by the exchequer and, that the MoH was not borrowing any monies to finance the project, the relationship and duty of care of the procuring entity (MoH) ought to have only been to the Contractors and not third parties (lenders) as was implied by the issuance of GoK LoS.
8. If at all, any GoK Letters of Support (GoK LoS) issued to the MES Contractors ought to have been drafted as general letters of acknowledgement of policy support that expressly omitted financial guarantees by the GoK. However, in the case of GE and Philips, the MoH and NT issued GoK LoS which constructively amounted to sovereign guarantees in violation of the constitutional provisions that vest that authority in Parliament alone.
9. In various correspondence to the MoH and the NT, the OAG & DOJ raised specific concerns regarding the GoK LoS for GE and Philips to the effect that their wording and format amounted to offering financial guarantees. However, despite repeated concerns raised by the OAG & DOJ and various advisories on the same, after a protracted process involving the MoH and NT on one hand, and the OAG & DOJ on the other, on 26th February, 2016, the AG provided clearance for the issuance of GoK LoS in a format agreeable to GE and Philips in reliance on the NT taking policy responsibility for the matter.
10. Despite the fact that the NT is the official custodian of GoK LoS, according to submissions by the NT, the MoH unprocedurally failed to avail it the final executed GoK LoS for any of the MES Contractors.
11. In implementing the MES project, the MoH failed to exercise prudent use of public resources as demonstrated by the following-
    a) Installation of MES equipment in counties that had no capacity to absorb it: For instance, five years after the project was initiated, radiological equipment in

Endebess Hospital in Trans Nzoia County was yet to be installed owing to the lack of the necessary infrastructure.

b) MES contracts were varied by more than 100% whereas, existing public finance management and procurement laws and regulations require any variations beyond 25% to be subjected to a new contract altogether.

12. The NT failed to exercise due diligence and enforce prudent financial expenditure by the MoH in the execution of the MES project. This is demonstrated by the fact that funds towards the project continued to be disbursed despite illegal variations in the contract, inequitable distribution of MES equipment across the counties, lack of, or delayed functionality of MES equipment across the counties and general public outcry.

Committee Recommendations

The Committee recommends that the National Treasury should take responsibility and observe strictly Article 201 of the Constitution as read together with section 12 of the Public Finance Management Act, 2012 for failing to do due diligence when a variation occurs. The amounts deducted from county governments rose from kshs 95 Million to 200 million in one go. This should have raised the red flag and require the National Treasury to investigate the basis for the variations before releasing funds to the Ministry of Health.

2.9 The Office of the Attorney General and Department of Justice (OAG & DOJ)

The Committee held its second hearing with the Office of the Attorney General and Department of Justice (OAG & DOJ) led by the Attorney General, Mr. P. Kihara Kariuki and the Solicitor General, Mr. Kenneth Ogeto, CBS, on 11th March, 2020. The following are key highlights of their oral and written submissions to the Committee:

2.9.1 Engagement of the OAG & DOJ in the Review of the Draft MES Contracts

According to the OAG & DOJ, it first became seized of the MES Project on 30th January, 2015 following a request from the MoH for the secondment of a senior legal counsel to support the MoH technical and legal teams to finalise the MES contracts. Prior to this, the MoH had engaged a private law firm, IKM Advocates (in conjunction with DLA Piper) as legal consultants to assist

the MoH prepare the MES tender documents, and to negotiate, review and finalize the MES contracts.

2.9.2 'Ceremonial' Execution of the MES Contracts

According to the OAG & DOJ, at a contract negotiation meeting shortly thereafter, the MoH reported that there was going to be a ceremonial signing event for the MES contracts on Friday, 6th February, 2015. At the time, the MES contracts were still at their nascent stages of negotiation: As such, the OAG & DOJ advised the MoH to sign the contracts as 'mere expressions of intention to contract'.

According to the OAG & DOJ, it was on this basis that, in a letter dated 5th February, 2015, the then Attorney General, Prof. Githu Muigai issued an advisory confirming the power and authority of the MoH and the Principal Secretary to sign the MES Contracts on behalf of the Government of Kenya. Further, in an additional advisory letter by the then AG dated 5th February, 2015, the MoH was advised that there were *'various outstanding issues with respect to the said Contracts and that the parties had undertaken to continue with negotiations in a bid to agree on the final texts of the said Contracts after the ceremonial signature'*.

However, according to the OAG & DOJ, in subsequent correspondence relating to the MES Contracts, the MoH repeatedly referred to the contracts that were executed on 6th February, 2015 as the final MES contracts. Further, in various correspondence to the OAG & DOJ, the MoH also referred to 6th February, 2015 as the Commercial Close Date. Reviews of the MES contracts executed after this date were referred to as amendments and restatements.

2.9.3 Non-Disclosure of the Final Executed MES Contracts by the MoH

According to the OAG & DOJ, its repeated requests for copies of the final executed MES contracts were ignored by the MoH. Indeed, it was not until 4th March, 2020 that the MoH submitted copies of the final executed MES Contracts to the OAG & DOJ in response to a request by the latter in relation to this inquiry.

2.21.3 Engagement of IKM Associates (in conjunction with DLA Piper) by the MoH

According to the OAG & DOJ, prior to its involvement, the MoH had engaged a private law firm, IKM Associates (in conjunction with DLA Piper) as legal consultants to assist the MoH prepare the MES tender documents, and to negotiate, review and finalize the MES contracts.

In a letter dated 27t[h] February, 2015, the MoH wrote to the OAG & DOJ requesting for approval to extend its engagement with IKM Associates for purposes of additional scope negotiations, and finalization of the MES Contracts. To note, contrary to the terms under which the then AG, Prof. Githu Muigai had approved the ceremonial signing of the MES contracts, the letter from the MoH indicated that '*IKM's engagement expired upon execution of the final MES Contracts on the 6th February, 2015*'.

Additionally, the MoH sought approval to accept funding in the form of a 'donation' from GE for the extended engagement of IKM Associates. In a letter dated 23rd April, 2015, the OAG & DOJ granted approval to the MoH to engage IKM Associates under a new contract as requested on the understanding that the 'donation' by GE East Africa Ltd was to be made 'gratis' without any expectation of preferential treatment in the MES Project.

2.9.4 Amended and Restated MES Contracts

According to submissions made by the OAG & DOJ, based on information received from IKM Associates, the lead advisor on behalf of the MoH for the MES Contracts, negotiations on the MES Contracts were concluded, and the final versions of the Amended and Restated Contracts signed on or about 31[st] April, 2015.

On 3[rd] June, 2015, in response to a letter of request from the MoH dated 5[th] May, 2015, the then AG, Prof. Githu Muigai issued an advisory to each of the MES Contractors (i.e. M/s GE East Africa Ltd, M/s Philips Medical Systems, M/s Esteem Industries, M/s Bellco SRL and M/s Shenzen Mindray Bio-Medical Electronic co. Ltd) reaffirming, *inter-alia*, the power and authority of the MoH and the Principal Secretary to enter into the Amended and Restated MES Contracts behalf of the Government of Kenya.

2.21.5 Clearance for the Issuance of Government of Kenya Letters of Support (GoK LoS)

According to the OAG & DOJ, in reliance on submissions made by the MoH, IKM Associates and National Treasury, in a letter dated 10[th] July, 2015, the OAG & DOJ provided clearance for the

issuance of the Government of Kenya Letters of Support (GoK LoS) to the MES Contractors and Security Trustees. The chronology of events leading to the clearance of the GoK LoS to the MES Contractors by the OAG & DOJ was provided as summarised in the table below:

Date of Letter	Request/Response Made	Justification/Rationale/Direction Provided
11th June, 2015	The MoH writes to the OAJ & DOJ requesting for clearance for the issuance of Letters of Support executed by the MoH and the National Treasury to MES Contractors.	- Reliance by the MES Contractors on external financing from commercial banks. - Issuance of GoK LoS as a key requirement by the banks and MES Contractors for purposes of reducing risk to the MES Contractors.
12th June, 2015	IKM Advocates writes to the OAG & DOJ requesting for the Attorney-General to clear the MES Contracts, and provide an enforceability opinion in relation to the GE MES Contract *...as a matter of urgency.*	- Request for the clearance of the MES Contracts justified by the need to enable financial close.
19th June, 2015	In response to the request made by the MoH dated 11th June, 2015, the Attorney-General writes back to the then CS, Health Mr. James Macharia expressing grave reservations about providing clearance for the issuance of GoK LoS, key highlights of which included: - Doubt as to the utility of the Letters of Support in so far as they related to the executed MES Contracts. - Concern that the wording of the draft GoK LoS amounted to offering guarantees. - Concern regarding differences in scope in the draft Letters of Support for Philips and GE *vis a vis* the other MES Contractors. - A request to the National Treasury to expressly state whether the GoK Letters of Support were intended to give a binding undertaking regarding the availability of the budgetary funding, as well as the assumption of liability to make good all necessary payments were the MoH to be in default. - A request for written confirmation in respect of, *inter alia,* legal compliance of all antecedent procurement processes, legal risks identified against the GoK and mitigation measures taken, and disclosure of all legal encumbrances that may affect the performance of the MES Contracts.	
6th July, 2015	In response to the response made by the OAG & DOJ dated 19th June, 2015, the then CS, Health Mr. James Macharia writes back highlighting: - That it was standard practice for lenders to take Letters of Comfort as part of their security package and for such Letters of Comfort to be conditions precedent to an executed contract. - That without the GoK Letters of Support, none of the MES Contracts would become effective thereby jeopardizing the entire MES Project. - That the MES Contracts were in compliance with the provisions of the Public Procurement and Disposal Act 2005 and the Public Procurement and Disposal Regulations 2006. - That all antecedent processes of procurement including tender	

	advertisement, evaluation, due diligence, award and entry into MES Contracts had been complied with. - That the MoH had entered into Intergovernmental Agreements with 37 County Governments and was further set to conclude similar agreements with the remaining 10 County Governments. - That in order to mitigate risks to the GoK, the MoH had: set out appropriate invoicing procedures; established a Project Implementation Team and a Joint Liaison Committee; and, executed Intergovernmental Agreements imposing obligations on the counties to provide access to facilities, utilities and personnel.
10th July, 2015	The OAG & DOJ issues an advisory to the MES Contractors confirming the power and authority of the MoH and the Principal Secretary to enter into the MES Contracts and other Ancillary Documents for and on behalf of the Government of Kenya.
10th July, 2015	In a further letter to the then CS, Health Mr. James Macharia, indicating reliance on an advisory by IKM Advocates, the OAG & DOJ confirms the validity of the MES Contracts, and further confirms that the obligations of the Government expressed in the Transaction Documents constitute legal, valid and binding obligations. Further, in reliance on an advisory by IKM Associates, the OAG & DOJ provides clearance for the issuance of GoK Letters of Support to the MES Contractors and Security Trustees. The OAG & DOJ further suggests amendments to the draft GoK Letters of Support to ensure that they are in accordance with the Public Finance Management Act, and that they do not impose financial guarantee obligations.

To note, according to submissions made by the OAG & DOJ, the MoH did not subsequently avail to the Office of the Attorney General, copies of the Letters of Support that were issued to the MES Contractors. Further, the OAG & DOJ was neither provided with copies of the tender and other procurement documents, nor copies of the Intergovernmental Agreements executed between the National and County Governments.

2.9.6 Review of the GoK Letters of Support

However, subsequent to the OAG & DOJ authorising the issuance of the Letters of Support *vide* its letter to the MoH dated 10th July, 2015, on 24th July, 2015, the MoH wrote back to the OAG & DOJ stating that Philips Medical Systems Nederland B.V. and GE East Africa Services Ltd had raised concerns with their authorised GoK Letters of Support. The letter from the MoH therefore requested a meeting between the MoH, National Treasury (NT), OAG & DOJ and IKM Advocates to deliberate on the concerns raised by the two contractors.

On 7th August, 2015, presumably upon having successfully held the consultative meeting as requested by the MoH, the OAG & DOJ wrote to the NT requesting concurrence with its amendments and final revised version of the Letters of Support for onward transmission to the lenders.

Vide a letter dated the 4th September, 2015, the NT wrote to the MoH with a copy to the OAG & DOJ suggesting further amendments to the draft GoK Letters of Support and requesting the MoH to furnish the NT with further details including due diligence reports, a summary of the financial implications of the contracts, risk allocation between the parties or remedies for breach of performance.

By a letter dated 2nd November, 2015, the NT wrote to the OAG & DOJ seeking further advice on the amended draft GoK Letters of Support and more particularly, those to be issued to Philips and GE which had wording to the effect that the '*GoK wants to transfer, novate or assign the MES Contracts to third parties.*'

By a letter dated 6th November, 2015, having taken note of the concerns raised by the NT, the OAG & DOJ highlighted its initial opinion with respect to the purpose and intention of GoK Letters of Support as per its advisory to the MoH dated 19th June, 2015 (please see above). The OAG & DOJ further suggested amendments to the Letters of Support to make them '*general letters of acknowledgement of policy support by GOK and to expressly omit any financial guarantees by GoK as the financing arrangements of the individual projects should remain within the purview of the individual contractors and their lenders*'. Further, while acknowledging that the financiers for GE and Philips had their preferences over the format and content of the Letters of Support, the letter recommended that all Letters of Support follow the same standard format for all MES Contractors.

The OAG & DOJ further suggested amendments to the GoK Letters of Support to the effect that any transfer, novation or assignment of the MES Contracts to third parties was to occur only with the written approval of the MoH, the NT and the OAG & DOJ as a mandatory requirement.

By a letter dated 18th November, 2015, the MoH wrote to the OAG & DOJ indicating that the NT had issued the GoK Letters of Support (date unspecified). The letter further sought an opinion by

the OAG & DOJ for the contract affecting GE. To this request, the MoH attached a draft opinion in a format agreeable to the lenders of GE.

To note, according to the OAG & DOJ, the MoH did not subsequently submit copies of the GoK Letters of Support referred to in the letter by the MoH dated 18th November, 2015.

2.9.7 Matters Arising with Regards to the Letters of Support for GE East Africa Services Ltd and Philips Medical Systems Nederland B.V.

By a letter dated 14th December, 2015, the MoH wrote to the OAG & DOJ indicating that GE and Philips had raised further areas of concern with regards to their executed Letters of Support in relation to specific clauses as follows: 'Undertaking and Commitment by the Government of Kenya', 'Dispute Resolution', 'Binding Agreement' and 'Parties to the LOS'. The MoH therefore called for a consultative meeting between all the parties involved, including the National Tresury and the OAG & DOJ.

According to the OAG & DOJ, a consultative meeting between all the parties involved was subsequently held on 15th December, 2015 in which it was agreed, *inter alia,* that a uniform GoK Letter of Support would be issued to Philips and GE and that only minimal changes would be accepted.

By a letter addressed to Dr. Cleopha Mailu dated 22nd December, 2020, the then Attorney General, Prof. Githu Muigai raised key concerns regarding repeated requests by Philips and GE that their GoK Letters of Support must adopt a particular form and wording. Noting that the suggestions for amendments to the GoK Letters of Support were being pushed to obtain a financial guarantee from the GoK over parallel financial arrangements between the Contractors and their lenders, the AG raised the following key issues:

(a) The Amended and Restated Contracts for Philips Medical Systems Nederland B.V. and GE East Africa Services Ltd ultimately vested the rights over the equipment component of the projects to their funders who were to be paid quarterly payments for the equipment supply independently of the service contract terms.

(b) The Funders and Assignment Agreements for Philips Medical Systems Nederland B.V. and GE East Africa Services Ltd superseded the contract, were independent of the contract

document and placed an obligation on the GoK to pay for the equipment whether or not the contract subsisted, or whether or not the contractor met the other maintenance, repair and support elements of the contracts. The letter further noted that it was '*on the basis of this distinct financing framework that the Funders demand Letters of Support from the National Treasury and Legal Opinion from the Attorney General, which elements are considered conditions precedent for the coming into effect of the contract*'.

The OAG & DOJ therefore reiterated its earlier opinion that the Letters of Support and Funders Agreements were not required for the following reasons:

(a) The MES Project was a budgeted item procured for within the framework of the Public Procurement and Disposal Act.

(b) Being a procured service, the relationship and duty of care of the procuring entity was solely owed to the contractor and not to other ancillary arrangements.

(c) As per practice, GoK Letters of Support were typically issued to cover contingent liabilities and operate as financial guarantees to assure financiers of distinct government agencies that intend to borrow for particular projects.

Based on the foregoing, the OAG & DOJ noted that the intent of securing the GoK Letters of Support was rendered nugatory by the fact that the MoH was not a distinct government agency within the context of the MES Project and was not borrowing monies to finance the project. Further, that it ought to have satisfied itself with its budgetary provision prior to initiating procurement.

In response, by a letter dated 22nd January, 2016, the MoH explained that the requirement for GoK Letters of Support as a condition precedent had been agreed upon all along and that failure to issue the same would amount to the GoK reneging and acting in bad faith.

By a letter dated 27th January, 2016, the OAG & DOJ reiterated its advisory of 22nd December, 2015 with respect to the necessity for issuance of Letters of Support and the Legal Opinion of the Attorney General. The OAG & DOJ however conceded that it would stand guided by the National Treasury on the matter.

By a letter dated 4th February, 2016, the NT wrote to the OAG & DOJ stating that it had gone through the draft GoK Letters of Support and discussed with the MoH. The NT further indicated that it had recognised the lenders of the suppliers in the revised Letters of Support and that the executed Letters of Support would be copied to the lenders.

In response to the letter from the NT, *vide* a letter dated 8th February, 2016, the OAG & DOJ reiterated its opinion of 22nd December, 2015 and 27th January, 2016. It nonetheless took note of the resolution by the NT and MoH to recognise the lenders of the suppliers in the GoK Letters of Support to be issued. Noting that the NT had taken a policy decision to issue the same, the OAG & DOJ advised that they may proceed to issue the same as amended.

By *a* letter dated 19th February, 2016, the NT once again wrote to the OAG & DOJ to the effect that upon further discussion with the MoH, it had resolved that the GoK Letters of Support will take note of the assignees of the funders in respect of the MES Contracts as informed by the tripartite Funders Direct Agreement between the MoH, the contractors and the funders. The NT further stated that the revised GoK Letters of Support would not be copied to the suppliers. The NT further requested the OAG & DOJ to review the revised GoK Letters of Support and advice on whether taking note of the assignees jeopardized the GoK's position.

In response, by a letter dated 26th February, 2016 the OAG & DOJ noted that bearing in mind the existence of an already executed Funders Direct Agreement, the GoK was already obligated as part of its mandate to provide the MoH with all the requisite funding to meet its obligations. As such, taking note of the assignees and funders in the Letters of Support was unlikely to jeopardise the GoK position any further than had already been committed. The OAG & DOJ further reviewed the revised Letters of Support and suggested further amendments to be incorporated to all the Letters of Support to be issued to the Contractors (including Philips and GE).

By a letter dated 15th April, 2016, the OAG & DOJ wrote to the NT and MoH requesting to be furnished with copies of the duly executed Letters of Support for GE and Philips. However, according to the OAG & DOJ, no such copies were submitted to their office as requested. As such, they were not in a position to comment on the terms and conditions of the said letters.

2.9.8 Letters of Support for Seven Seas Technologies (SST)

According to the OAG & DOJ, its office did not receive any further correspondence on the MES project until 14th December, 2017 when the NT wrote to the AG to request clearance for a GoK Letter of Support in favour of Seven Seas Technologies Ltd (SST). To note, the letter indicated that the proposed GoK Letter of Support was similar to the ones issued to GE and Philips except in respect to particulars relating to dispute resolution.

In its response by a letter dated 16th January, 2018, the OAG & DOJ requested the NT to liaise with the MoH and furnish them with information with respect to the procurement of SST for the HCIT Contract, as well as their role in the MES Contract. The OAG & DOJ further called for '*caution against the issuance of Letters of Support without a clear legal and administrative framework to guide their issuance*' and iterated an earlier position to withhold any clearance of issuance of GoK Letters of Support pending the publication of a clear Policy on Issuance of Government Support Measures.

According to submissions made by the OAG & DOJ, a review of the draft GoK Letter of Support for SST revealed that it was similar in form and substance to initial draft Letters of Support under the MES Project in respect of which the OAG & DOJ had expressed strong reservations.

2.9.9 Additional Issues Arising from the MES Contracts

According to the OAG & DOJ, during a consultative meeting held on 15th December, 2015, it had come to its attention that there were additional contracts ancillary to the MES Contracts (as amended and restated) that had been signed including, *inter alia,* Funders Direct Agreements, Subcontracting Agreements, Parent Company Guarantees and Novation Agreements. According to the OAG & DOJ, the import of the ancillary agreements was that they altered the MES Contracts (as amended and restated).

According to the OAG & DOJ, the ancillary agreements were neither reviewed nor approved by the OAG & DOJ prior to their execution. Further, the OAG & DOJ observed that the changes effected in the Amended and Restated MES contracts by the ancillary documents had driven the insistence by Philips and GE that their GoK Letters of Support assume a certain format.

Further, the OAG & DOJ noted that the additional agreements were mainly with local companies. This had led the OAG & DOJ to conclude that the additional agreements were designed to circumvent the Public Procurement and Disposal Act whereby international contractors tendered for the MES Project with an intention to transfer the performance of the ensuing contract obligations to local companies that may otherwise not have qualified for the contracts. For example, upon reviewing the Shenzen Mindray Agreements in totality, the OAG & DOJ drew the following overall picture:

1. The MoH (Procuring Entity) awarded the contract to Shenzen Mindray (Contractor) to supply equipment and undertake installation, maintenance and repairs.
2. Shenzhen Mindray (Contractor) subsequently sub-contracted the equipment supply component to MR Investments who further sub-contracted the installation, maintenance and repairs to Megascope Healthcare Ltd (maintenance subcontractor).
3. Shenzhen Mindray (Contractor) thereafter, in conjunction with MR Investments (equipment subcontractor) entered into supply of equipment contracts with three China-based supply firms (eijing Beilin, Heibei Pukang and Beijing Julongsanyou).
4. Shenzen Mindray (Contractor) then novated its rights and obligations under the contract to Mindray Medical Kenya (Nomine Contractor) upon which the latter company took up all responsibilities under the contract and released Shenzen Mindray from all its obligations.
5. Shenzhen Mindray then executed a Parent Company Guarantee agreement whereby it guaranteed Mindray Medical Kenya's execution of the contract.

Based on the foregoing, the OAG & DOJ advised the MoH to '*review the MES Project and related Contracts in their entirety and assure themselves as to the sanctity, integrity and propriety of the novation/assignment/transfer agreements proposed and to conduct due diligence on the beneficiary assignees/transferees*'.

Further, the OAG & DOJ noted that the Funders Direct Agreements for GE and Philips established a distinct financing framework outside of the contract which must be fulfilled notwithstanding the accompanying contract terms. The OAG & DOJ observed that this was risky as non-performance and/or termination of the contract would nonetheless expose the GoK to loss for payment of equipment that was no longer being serviced.

Further, the OAG & DOJ noted that whereas subcontracting arrangements are anticipated in any contracting agreement, the intertwining of the MoH as the procuring entity in the sub-contracting arrangements was unprecedented.

As per the submissions made by the OAG & DOJ, the ancillary documents i.e the subcontracting agreements, guarantees, parent company guarantees and novation agreements were not formally submitted to the OAG & DOJ for review and approval prior to their execution.

2.9.10 Meeting with Prof. Githu Muigai, EGH, SC, Former Attorney General (2011 - 2018)

The Committee held a hearing with Prof. Githu Muigai, EGH, SC, Former Attorney General (2011-2018) on Wednesday, 22nd July, 2020. Key highlights of his submissions are provided below:

2.9.11 Role of the Office of the Attorney General in supporting Government Departments and Agencies

According to Prof. Githu, during his tenure as Attorney-General (AG), he set up a Government advisory department for the express purpose of advising Government agencies and departments on commercial, financial and technical agreements. However, this department was under-staffed.

2.22.2 Loopholes in Government Procurement Processes

Prof. Githu identified the lack of involvement of the OAG & DOJ in the tendering processes by government departments and agencies as a key loophole in Government procurement processes: According to Prof. Githu, as draft contracts were typically included in tendering documents, by the time the OAG & DOJ was being involved, in 80% of the cases, government departments and agencies had already executed legal commitments. He went further to describe the two key phases in the tendering process as follows:

(a) *Phase 1:* A government department or agency advertises a tender, interested bidders bid for the tender and are shortlisted following which the tender is awarded and a letter of offer made. This phase of the tendering process includes the approval of draft contract documents as part of the tender documents.

(b) *Phase 2:* The second phase of the tendering process requires the National Treasury to approve and provide input on financing. It is at this point that the OAG & DOJ receives the contract and the financing contract for comment.

2.22.3 Provision of Legal Advisory Services in Relation to the MES Project

According to Prof. Githu, in early 2015, he received, and duly approved a request from the MoH to second a senior legal officer to assist in procurement processes related to the MES Project. This was in addition to a legal officer who had already been seconded to the MoH.

Further to the above, he testified that in accordance with guidelines issued by his office on contracting external legal counsel, the MoH requested for his approval to hire IKM Advocates/DLA Piper on the strength of work that they had done in medical infrastructure projects. According to Prof. Githu, by the time the request was made to him, the MoH had already engaged the services of the firm.

He further submitted that at the time of approving the engagement of IKM Advocates by the MoH, he was not aware of any audit queries raised by the Office of the Auditor General (OAG) regarding how the MoH had procured their services.

2.22.4 Approval of the Extended Mandate of IKM Advocates

Prof. Githu further denied having had any knowledge of an existing client-advocate relationship between GE and IKM Advocates at the time of approving a request by the MoH for the extension of IKM's mandate through a donation from GE. According to Prof. Githu, at the time of approving the extended mandate of IKM Advocates, the contracting period of the MES Project had come to an end. As such, the expected role of IKM Advocates during the extension period had been merely to 'mop up' any outstanding issues.

He further submitted that while he had granted approval for the extended mandate of IKM Advocates, his office was not made aware that the 'donation' by GE for the extended mandate was actually raised by way of a *harambee* involving the other MES providers. He further denied any knowledge regarding how IKM Advocates was paid through this 'donation'.

2.22.5 'Ceremonial' Execution of the MES Contracts

According to Prof. Githu, he had advised the MoH that there were several outstanding issues relating to the MES Contracts prior to their execution. Accordingly, for purposes of the ceremonial signing of the MES contracts, he submitted that he had advised the MoH to sign the MES Contracts as pre-contracts. He further submitted that he had advised the MoH to forward the MES Contracts to his office for final review once they were negotiated and concluded by the parties. However, according to Prof. Githu, he left office without ever having seen the final executed MES contracts.

2.22.6- Clearance of the MES Contracts

In his submissions, Prof. Githu denied having cleared the MES Contracts for execution: Rather, he stated that his letters of 5th February, 2015 and 3rd June, 2015 respectively were merely a legal opinion identifying who could legitimately and legally execute the MES contracts on behalf of the Government of Kenya.

2.22.7 Additional Contracts Ancillary to the MES Contracts

According to Prof. Githu, his office challenged the manner in which the execution of the additional contracts ancillary to the MES Contracts such as novation agreements, subcontractors' agreements etc, were conducted by the MoH.

2.22.8 Issuance of Enforceability Opinions in relation to the MES Contracts

Prof. Githu submitted that he had declined to sign any enforceability opinion for any of the MES Contractors under the MES Project.

2.22.9 Clearance for the Issuance of Government Letters of Support in relation to the MES Project

According to Prof. Githu, following the execution of the MES Contracts, challenges arose in the execution of the financing contracts as a result of a protracted push and pull between the State Law Office on one hand, and the MoH and National Treasury on the other. He further submitted that in various correspondence between his office, the MoH and the National Treasury, he had reiterated the position that the MES Contracts did not require GoK Letters of Comfort. He was however compelled to provide clearance for the issuance of the letters of support following veiled threats by the MoH that he risked collapsing the entire MES Project. Prior to providing the clearance

however, he requested the National Treasury to assume responsibility for the issuance of the GoK Letters of Support as a policy decision that it had undertaken.

Further, according to Prof. Githu, the draft GoK Letters of Support that his office provided clearance for on 10th July, 2015 were in accordance with the Public Finance Management Act, 2012, and did not impose any financial guarantee obligations. However, this version of GoK Letters of Support as approved by his office were subsequently contested by GE and Philips following which there was a protracted negotiation process regarding the wording and format that their GoK Letters of Support should assume.

2.22.10 Intergovernmental Cooperation between the two levels of Government

According to Prof. Githu, based on the fact that health was a devolved function, officers from the OAG & DOJ who had been seconded to the MoH raised issues regarding the need for the MoH to enter into formal intergovernmental agreements with county governments. He submitted that the MoH subsequently assured his office that it was in the process of negotiating and concluding agreements with county governments. However, he submitted that he never subsequently saw the agreements. Further, he stated that his role in the matter of the intergovernmental agreements was purely advisory as he had no mandate to supervise its execution.

2.22.11 Issues and Challenges

Prof. Githu identified inadequate manpower as a key limitation facing the delivery of legal support services to government departments and agencies by the OAG & DOJ. He further noted that upon secondment of staff from the OAG & DOJ to government ministries, the Attorney General lost any supervisory role over the staff as they automatically fell under the chain of command at the ministry to which they were seconded;

2.22.12 Level of Involvement of the Office of the Attorney-General and Department of Justice in the MES Project

With regards to procurement of major projects by government departments and agencies, Prof. Githu stated that it was necessary to incorporate the involvement of the National Treasury and the OAG & DOJ from the outset in order to avoid situations where the Attorney General was dealing with contracts which had been compromised at tender stage. Further, he recommended that all procurement processes must be fully funded and fully supervised legally from the outset.

Committee Observations

The Committee made the following observations:

1. Circular Ref. No. AG/1/2010 titled "Government Legal Advisory Services" dated the 3rd May, 2010 mandates the involvement of the Office of the Attorney General in the negotiation and drafting of government contracts. In addition, the AGs' Circular of the 1st March, 2018 requires Ministries, Departments and other Government Agencies to submit contracts and agreements to the Office of the Attorney General for review prior to signature. However, contrary to the provisions of the AGs' circulars referred to above, according to the OAG & DOJ, the extent of its involvement in the MES project was minimal in as far as it related to the negotiations and initial review of the contracts. Further, as the legal transaction advisors to the MoH, IKM Advocates played the key role in advising on the procurement structure of the MES Project, and in the drafting, negotiating, amending and finalizing of the MES Contracts for execution. As per the testimony of the OAG & DOJ, even where it was involved, it was largely by way of reliance on advisories by IKM Advocates.
2. However, contrary to assertions by the OAG & DOJ that their involvement in the MES contracts was minimal, the Committee observes that in a letter dated 10th July, 2015, the then AG, Prof. Githu Muigai expressly cleared the MES contracts. Further, in addition to indicating his reliance on an advisory from IKM Advocates for providing this clearance, his letter stated that, *"in addition, my office has independently reviewed the MES contracts and we hereby ascertain the validity of the contracts and further confirm that the obligations of the Government expressed in the Transaction Documents constitute legal, valid and binding obligations."*
3. Contrary to the provisions of the AGs' circular dated 3rd May, 2010 (Ref.AG/1/2010) which required all client ministries to consult and seek approval of the AG before retaining the services of private advocates, the MoH irregularly engaged the services of IKM Advocates prior to the approval of the AG as demonstrated by the following:

(a) By a letter dated 16th May, 2014, IKM Advocates referenced a meeting with the MoH held on 12th May, 2014 in which they were requested by the MoH to advise it on its proposed procurement of the Project;

(b) by a letter dated 2nd July, 2014, then CS, Health, Mr. James Macharia, wrote to the then AG, Prof. Githu Muigai, EGH, SC, seeking to engage the services of IKM Advocates through direct procurement;

(c) By a letter dated 23rd July, 2014, then AG, Prof. Githu Muigai wrote back to the then CS, Health, Mr. James Macharia advising the MoH on the legal requirements for direct procurement in accordance with section 74 of the PPDA Act 2005 (now repealed) and Regulation 62 of the Public Procurement and Disposal Regulations, 2006;

(d) On July, 2014, the MoH floated a tender (Tender No. MoH/2014/2015) for the supply, installation, testing, maintenance and replacement of medical equipment and associated training for county and sub-county health facilities through a managed equipment service (MES) arrangement. As submitted by IKM Advocates, the tender documents included a draft contract prepared by themselves;

(e) *By* an unsigned letter dated 31st July, 2014, then CS Health wrote back to the then Attorney General justifying the decision by the MoH to engage IKM Advocates through direct procurement; and,

(f) *By* a letter dated 18th August, 2014, Prof. Githu Muigai, the then Attorney General, advised the MoH to enter into a service level agreement with IKM Advocates and submit the same to his office for approval.

These suggest that the MoHs' involvement of the OAG & DOJ and eventual execution of the Service Level Agreement with IKM Advocates were exercised as mere formalities rather than as integral aspects of the legal process.

4. In a special audit on the accounts of the MoH for the FY 2015/2016, the Office of the Auditor-General (OAG) raised queries regarding the questionable circumstances under which the MoH procured its legal and financial consultants for the MES Project. In the case of IKM Advocates, the OAG noted that they were engaged as the legal transaction advisors through direct procurement at a contract sum of USD. 560,000.00 (or Kshs.

56,560,000.00 at Kshs. 101 to the USD). Noting that the MoH had cited urgency as the reason for failing to procure the transaction advisors through a competitive bidding process, the OAG nevertheless noted that the reasons provided by the MoH for failing to use competitive bidding were unsatisfactory owing to the scale of the project, and the level of public interest.

5. Under the then applicable law, PPDA 2005 (now repealed), direct procurement was provided for under section 74 "*...as long as the purpose is not to avoid competition*". Section 74(2) & (3) of the PPDA 2005 (now repealed) outlined the following preconditions for direct procurement by a procuring entity as follows:

> *(2) A procuring entity may use direct procurement if the following are satisfied—*
>
> *(a) there is only one person who can supply the goods, works or services being procured; and*
>
> *(b) there is no reasonable alternative or substitute for the goods, works or services.*
>
> *(3) A procuring entity may use direct procurement if the following are satisfied—*
>
> *(a) there is an urgent need for the goods, works or services being procured;*
>
> *(b) because of the urgency the other available methods of procurement are impractical; and*
>
> *(c) the circumstances that gave rise to the urgency were not foreseeable and were not the result of dilatory conduct on the part of the procuring entity.*

The Committee notes that in response to a request by the MoH to directly procure the services of IKM Advocates dated 2nd July, 2014, *vide* a letter dated 23rd July, 2014, the then Attorney General advised the MoH in accordance with section 74 of the PPDA Act 2005 (now repealed) and Regulation 62 of the Public Procurement and Disposal Regulations, 2006. In this respect, the Committee observes that the MoH failed to demonstrate that IKM Advocates were the only persons capable of providing legal transaction advisory services under the MES Project. The MoH further failed to demonstrate that there lacked reasonable alternatives.

In addition, in contravention of section 74 (3) of the PPDA 2005 (now repealed), the Committee observes that whilst there may have been a need for specialised and modern equipment, given that most counties lacked the requisite personnel and infrastructure to begin with, the procurement of the equipment was not so urgent as as to render competitive procurement methods for legal advisory services impractical. Moreover, the Committee observes that the response by the AG dated 18th August, 2014 did not exempt the MoH from procuring legal transaction advisors through competitive means. Based on the foregoing, the Committee concurs with the position of the OAG that the MoH unprocedurally single-sourced legal transaction advisory services from IKM Advocates under the MES Project.

6. By a letter dated 27th February, 2015, then CS, Health, Hon. James Macharia sought the approval of the AG to extend the mandate of IKM Advocates. The letter further sought the AGs' approval for the MoH to accept funding in the form of a 'donation' from GE East Africa, a contractor in the MES Project, for the further engagement of IKM Advocates in the additional scope of services. By his letter dated 23rd April, 2015, the then Attorney General, Prof. Githu Muigai, EGH, SC granted his approval subject to the conclusion of a fresh service level agreement to be approved by his office. The AG further granted approval for the 'donation' by GE on the understanding that it was to be made *gratis*, without any expectations of preferential treatment in the MES Project. To note, contrary to the express directive of the AG, the Committee did not find evidence to suggest that the MoH and IKM subsequently executed a new SLA for the additional scope services.
7. Further, the Committee finds that the AG was deliberately misled on the issue of the 'donation' by GE: Whilst the AG granted approval for GE to fund the extended mandate of IKM Advocates through a 'donation' in actuality, IKM Advocates received a total of USD 945,000.00 (equivalent to KShs. 95,445,000 at an exchange rate of KShs. 101 to the USD) from the five original MES service providers as follows:
    (a) Shenzhen Mindray Biomedical Electronics Company: USD 75,000.00 (equivalent to KShs. 7,575,000 at an exchange rate of KShs. 101 to the USD);
    (b) Esteem Industries: USD 50,000.00 (equivalent to KShs. 5,050,000 at an exchange rate of KShs. 101 to the USD);

(c) Bellco SRL: USD. 50,000.00 (equivalent to KShs. 5,050,000 at an exchange rate of KShs. 101 to the USD);

(d) Philips Medical Systems Nederland B.V: USD. 170,000.00 (equivalent to KShs. 17,170,000 at an exchange rate of KShs. 101 to the USD); and,

(e) GE East Africa Services Ltd: USD. 600,000.00 (equivalent to KShs. 60,600,000 at an exchange rate of KShs. 101 to the USD.

The Committee observes that contrary to the terms under which the 'donation' by GE was approved for additional scope services, IKM Advocates acted unethically by accepting the 'donation' from parties that they were supposed to be acting against. Further to this, the Committee observed that the amount collected by IKM Advocates from the five contractors was almost double the KShs. 48,881,063.90 it had received from the MoH on whose behalf it was supposed to have been acting.

8. To note, there had been a pre-existing client-advocate relationship between GE and IKM Advocates from 2010 at the time of its engagement as legal transaction advisors to the MES Project. However, neither the firm, nor the MoH declared this conflict of interest to the OAG & DOJ. To note, GE was the biggest beneficiary in the MES project having been awarded at least 52% of the total MES.

9. A conflict of interest between the two entities was subsequently demonstrated by the fact that IKM Advocates subsequently went on to draft Government Letters of Support for GE East Africa Services Ltd (and Philips Medical Systems Nederland B.V.) that were manifestly different from the other MES contractors. Contrary to the conditions set by the Attorney General that IKM Advocates should owe its duty of care to the MoH and not GE, it is evident that IKM Advocates singled out (and Philips) for special treatment as evidenced by the following:

(a) By a letter dated 12th June, 2015 in, IKM Advocates wrote to the OAG & DOJ requesting to be provided with an enforceability opinion in relation to the GE contract as a matter of urgency. No reference was made to any of the other MES Contractors with regards to the issuance of an enforceability opinion;

(b) By a letter dated 18th November, 2015, the MoH wrote to the OAG & DOJ indicating that the NT had issued the GoK Letters of Support (LoS) (date unspecified). The letter further sought an opinion by the OAG & DOJ for the

contract affecting GE. To this request, the MoH attached a draft opinion in a format agreeable to the lenders of GE East Africa Services Ltd;

(c) Documented concerns raised by the OAG & DOJ that the Amended and Restated Contracts for Philips and GE ultimately vested the rights over the equipment component of their projects to their funders;

(d) Documented concerns raised by the OAG & DOJ that the Funders and Assignment Agreements for Philips and GE superseded the contract, were independent of the contract document and placed an obligation on the GoK to pay for the equipment whether or not the contract subsisted, or whether or not the contractor met the other maintenance, repair and support elements of the contracts;

(e) Documented concerns raised by the OAG & DOJ that changes effected in the Amended and Restated MES contracts by ancillary documents had driven the insistence by Philips and GE that their GoK LoS assume a certain format;

(f) Apparent delays in the financial close of the MES Contracts arising from repeated requests by Philips and GE that their GoK LoS adopt a particular format and wording;

(g) Consequently, differences in scope in the GoK LoS issued to Philips and GE *vis a vis* the other MES Contractors. This despite repeated concerns raised by the OAG & DOJ that the wording and format envisaged in the Letters of Support to the two contractors amounted to offering financial guarantees.

From the documentation received from the OAG & DOJ, it is apparent that issues affecting GE and Philips dominated the contract negotiation process. Despite several repeated concerns raised by the OAG & DOJ on the draft GoK LoS and advisories on the same, GoK LoS in a format agreeable to the two contractors were ultimately issued. To note, *vide* a letter dated 15th April, 2016, the OAG & DOJ wrote to the NT and MoH requesting to be furnished with copies of the duly executed GoK LoS for GE and Philips. However, according to submissions made by the OAG & DOJ, no such copies were submitted to the OAG & DOJ as requested.

10. According to submissions by the OAG & DOJ, the signing of the MES Contracts on 6th February, 2015 was supposed to serve ceremonial purposes as the contract negotiations

were still at their nascent stages at the time. As per the OAG & DOJ's advice, the five (5) MES Contracts that were signed on that day were supposed to serve as a '*mere expression of the intention to contract*' and be subject to further negotiations between the parties .

11. The OAG & DOJ appears to have been under pressure to expedite the MES Contracts as evidenced by the following: (1) On 5th February, 2015, as the Attorney General then, Prof. Githu Muigai wrote to the then Cabinet Secretary, Hon. James Macharia stating that, "*...there are still a number of outstanding issues relating to this contract...the parties have undertaken to conclude the negotiations after the scheduled signing on the 6th of February...*"; (2) Notwithstanding the reservations expressed by the Attorney General on the outstanding issues relating to the project, on the same day, that is, 5th February, 2015, he contemporaneously authorised the execution of the MES Contracts; and, (3) the following day, 6th February, 2015, the contracts were signed at State House.

12. According to submissions by the OAG & DOJ, the signing event of the MES Contracts on 6th February, 2015 was supposed to serve ceremonial purposes as the contract negotiations were still at their nascent stages at the time. According to the OAG & DOJ, the five (5) MES Contracts that were signed on 6th February, 2015 were supposed to have wording to the effect that the same were '*mere expression of the intention to contract*' and be subject to further negotiations between the parties. Further, according to submissions by Prof. Githu, the MES Contracts that were executed on 6th February, 2015 were only to be signed as pre-contracts and not the final MES Contracts, as they were still subject to further negotiations and review. This position was however controverted by IKM Advocates who maintained that negotiations for the commercial close contracts had already been finalised at the time. IKM Advocates further alleged that they had not been made aware of any objections raised by the OAG & DOJ in respect of the contracts at the time. To note, in subsequent correspondences to the OAG & DOJ following the 'ceremonial' execution of the MES Contracts, the MoH repeatedly referred to the contracts that were executed on 6th February, 2015 as the final MES contracts. Further, in various subsequent correspondence to the OAG & DOJ, the MoH also referred to 6th February, 2015 as the Commercial Close Date. Subsequent reviews of the MES contracts executed after this date were considered as amendments and restatements

13. Additionally, according to the OAG & DOJ, the MoH subsequently failed to comply with the directive of the Attorney General to send back the MES contracts for review as contained in his letter dated 5th February, 2015. However, the Committee noted that there was limited utility in the Attorney General requesting the MoH to forward the MES Contracts after they had already been *'negotiated and concluded by the parties'*.

14. The OAG & DOJ issued advisories clearing the MoH to execute the MES Contracts under questionable circumstances:

    (a) In a letter dated 5th February, 2015, the then Attorney General, Prof. Githu Muigai, EGH, SC, issued an advisory confirming the power and authority of the MoH and the Principal Secretary to execute MES Contracts on behalf of the Government of Kenya, despite having noted in a separate letter to the MoH (also dated 5th February, 2015) that the contracts were still at a nascent stage of negotiations and that there were a number *'of outstanding issues relating to these contracts.'*

    (b) Further, despite the MoH flagrantly ignoring explicit advice by the OAG & DOJ to sign the nascent MES Contracts as *'mere expression of the intention to contract'* during the ceremonial signing event held at State House on 6th February, 2015; and despite having stated that copies of the executed MES Contracts were never availed to his office, contrary to his own directives, on 3rd June, 2015, as the then Attorney General, Prof. Githu wrote a further letter to the MoH confirming *inter alia* the authority of the Principal Secretary, MoH to execute the amended and restated MES Contracts without (presumably) even having gone through and/or approved them;

To note, according to submissions made by the OAG & DOJ, its office relied on advisories by IKM Advocates to confirm the validity of the MES Contracts. However, in a letter to the then CS, Health, Mr. James Macharia, dated 10th July, 2015, with regards to the clearance of the MES Contracts, the then Attorney General, Prof. Githu Muigai, EGH, SC states that "*..IKM has confirmed to this office vide letter dated 12th June, 2015...that the MES Contracts are in a form that reflects their instructions from the Ministry of Health..... In addition, my office has independently reviewed the MES Contracts and we hereby ascertain the validity of the Contracts and further confirm that the obligations of the*

Governments expressed in the Transaction Documents constitute legal, valid and binding obligations...".

15. In a letter from IKM Advocates dated 12th June, 2015 over and above a request that the Attorney General '*clear the MES Contracts*', IKM Advocates requested for the issuance of an enforceability opinion from the Attorney General in respect to the GE Contract. Subsequently, in a letter addressed to the then Attorney General, Prof. Githu Muigai, dated 6th July, 2015, the then CS, Health, Mr. James Macharia requested the AG to '*issue the enforceability opinion requested by GE's lenders to prevent the MES contracts (and consequently the MES Project) from collapse on account of the Ministry's failure to fulfill its conditions precedent'*. In his submissions, Prof. Githu confirmed to the Committee that he declined to sign an enforceability opinion for any of the MES Contractors. Further, according to the OAG & DOJ, its office advised the MoH to engage with the Contractor(s) to review and waive the issuance of the Legal Opinion of the Attorney General as a condition precedent altogether. As no reference was made to any of the other MES Contractors with regards to the issuance of an enforceability opinion, it may be surmised that the MoH and IKM Advocates pursued this matter in the exclusive interests of the GE MES Contract.

16. In a letter dated 3rd June, 2015, Prof. Githu, the then Attorney-General, confirmed the authority of the Principal Secretary, MoH, to execute such further documents as were necessary or desirable to complete the MES contracts. It was presumably based on this clearance that the MoH subsequently executed additional contracts ancillary to the MES Contracts; issued GoK LoS to the MES Contractors, which in the case of GE and Philips amounted to sovereign guarantees; and, varied the MES Contracts at great cost to the taxpayer.

17. According to the OAG & DOJ, the MoH and MES Contractors executed additional contracts ancillary to the MES Contracts (as amended and restated), including, *inter alia,* Funders Direct Agreements, Subcontracting Agreements; Parent Company Guarantees; and Novation Agreements without their being reviewed and/or approved by the OAG & DOJ. The import of the additional agreements was that they were designed to circumvent the Public Procurement and Disposal Act whereby international contractors tendered for

the MES Project but subsequently transferred the performance of the ensuing contract obligations to local companies that may otherwise not have qualified for the contracts. Further, according to the OAG & DOJ, the ancillary agreements altered the MES Contracts (as amended and restated) and placed binding obligations on the GoK that were highly skewed in favour of the Contractors, and which exposed the GoK to huge financial and legal liabilities.

18. According to submissions made by Prof. Githu, as then Attorney General, his office challenged the manner in which the MoH executed the additional contracts ancillary to the MES Contracts. Further, according to the testimony of both the OAG & DOJ and Prof. Githu, the AGs' office was not involved in the conclusion of any of the additional contracts ancillary to the MES Contracts. Indeed, the OAG & DOJ submitted that its office only came to learn of the additional contracts *post facto when* binding obligations had already been created to third parties

19. According to submissions made by the OAG & DOJ, the Amended and Restated Contracts for Philips and GE referenced Funders and Assignment agreements which ultimately vested the rights over the equipment component of their projects to their funders. Further, the OAG & DOJ raised serious concerns with regards to the agreements, most notably that they:

    (a) superseded the contracts, were independent of the contract document and placed an obligation on the GoK to pay for the equipment whether or not the contract subsisted, or whether or not the contractor met the other maintenance, repair and support elements of the contracts.

    (b) had created a distinct financing framework that formed the basis for the insistence by Philips Medical Systems Nederland B.V. and GE East Africa Services Ltd that their Letters of Support assume a certain wording and format.

20. The issuance of the GoK Letters of Support LoS) was not applicable in the MES Project as the issuance of GoK LoS are not provided for under the Public Procurement and Disposal Act, 2005, but rather the PPP Act. Further, owing to the fact that the project was being financed by the exchequer and, that the MoH was not borrowing any monies to finance the project, the relationship and duty of care of the procuring entity (MoH) ought

to have only been to the Contractors and not third parties (lenders) as was implied by the issuance of GoK LoS. If at all, any GoK Letters of Support (GoK LoS) issued to the MES Contractors ought to have been drafted as general letters of acknowledgement of policy support that expressly omitted financial guarantees by the GoK. However, the MoH and NT issued GoK LoS to Philips and GE, which constructively amounted to sovereign guarantees in violation of the constitutional provisions that vest that authority in Parliament alone.

21. As adduced from evidence before the Committee, the OAG & DOJ severally expressed its principled reservations against the issuance of GoK LoS for the MES Project. Ultimately however, following a protracted process on 10th July, 2015, the OAG & DOJ provided clearance for the issuance of the Letters of Support to the MES Contractors and Security Trustees in reliance on submissions made by the MoH, IKM Associates and National Treasury.

22. In response to the reservations expressed by the OAG & DOJ with regard to the issuance of GoK LoS, the MoH, through consecutive Cabinet Secretaries of Health, strenuously defended the issuance Government Letters of Support as evidenced by the following:

    a) *Vide* a letter to the OAG & DOJ dated 11th June, 2015 and signed by Dr. Nicholas Muraguri on behalf of the CS, Health, the MoH notes that '*...All of the MES Contractors are relying on external financing for this project.... One of the key requirements for the banks and the MES Contractors is that this Project be supported by the Government of Kenya. This reduces the risk for the MES Contractors....*".

    b) *Vide* a letter to the OAG & DOJ dated 6th July, 2015 and signed by the then CS, Health, Mr. James Macharia, he states that '*...You have indicated that...such a letter would only apply to transactions pending preparation of formal contracts. This is not however the position and it is in fact standard practice for lenders to take letters of comfort.and for such letters to be a condition precedent to an executed contract to come into effect.*

    c) *Vide* a letter dated 22nd January, 2016 and signed by the then CS, Health, Dr. Cleopa Mailu, the CS noted that the MoH had executed Supplemental Deeds extending the Financial Close Longstop Date for the GE and Philips MES Contracts

from 30h November, 2015 to 29th February, 2016 so as to give the GoK sufficient time to meet its Conditions Precedent under the MES Contracts. The letter further stated, "*...We have considered the MES Contracts (which were approved by the Attorney General) very carefully and are satisfied that they are well drafted, balanced and favorable to the GoK.... The requirement for the GoK Letter of Support as a Condition Precedent has been there from inception.... any attempt not to issue the Letter of Support will be seen as reneging and in bad faith on the part of the GoK, with disastrous consequences...*".

23. To note, according to submissions made by the OAG & DOJ, the MES Contracts were still in the nascent stages of negotiation when they were prematurely executed on 6th February, 2015 against its advice and guidance: Given the OAG & DOJ's principled reservations on the matter, it is debatable whether the issuance of GoK LoS (and the Funders Direct Agreements) as conditions precedent were actually contained in the initial drafts of the MES Contracts as averred by the MoH, or whether they were added in the subsequent Amended and Restated MES Contracts. The position that the issuance of GoK LoS were not contained as conditions precedent in the original tender and contract documents is supported by submissions by IKM Advocates which indicate that the issuance of GoK LoS was requested by the successful MES bidders during contract negotiations.

24. To note, in various correspondence to the MoH and the NT, the OAG & DOJ raised specific concerns regarding the GoK LoS for GE and Philips to the effect that their wording and format amounted to offering financial guarantees. Differences in the scope of GoK LoS issued to Philips and GE *vis a vis* the other MES Contractors were however defended by the then CS, Health, Mr. James Macharia in a letter to the OAG & DOJ dated 6th July, 2015 in which he attributed the differences to the funding structure adopted by GE and Philips, and noted that the GoK LoS for the two Contractors '*were tailored to suit the individual requirement of their lenders and are a requirement of their credit approvals for the financing of these MES Contracts*'.

25. With regard to the HCIT Project, the draft GoK LoS was similar in scope to the ones issued to Philips and GE as evidenced by a letter dated 14th December, 2017, in which the then CS, NT, Mr. Henry Rotich, requested the then AG, Prof. Githu Muigai to provide clearance for the issuance of a GoK LoS in favour of Seven Seas Technologies Ltd. In it, he states

that the proposed Letter of Support (to SST) '..*is similar to the ones issued to GE East Africa Ltd and Philips Medical Systems Nederland B.V. in respect of Medical Equipment Services (MES) leasing by the Ministry of Health except for the dispute resolution*"

26. According to submissions made to the Committee, the OAG & DOJ was neither involved in the procurement process, nor in the vetting or reviewing of the ensuing Contract executed between the MoH and SST on 2nd October, 2017. In deed, according to the OAG & DOJ, the HCIT Contract with SST was first brought to its attention *vide* the letter from the NT dated 14th December, 2017 (kindly see above) in which the NT requested the OAG & DOJ to clear the issuance of a Letter of Support in favour of Seven Seas Technologies Ltd (SST) for the provision of HCIT Solutions for the MES Project.
27. At the time the request for clearance of a GoK LoS to be issued to SST came, the OAG & DOJ had adopted a position to withhold clearance for the issuance of GoK LoS pending the publication of a clear policy on the Issuance of all Government Support Measures. According to the OAG & DOJ, the withholding of this clearance was not exclusive to SST but had also affected various other projects in the energy and road sector.
28. According to evidence before the Committee, the HCIT Contract under the MES Project ultimately collapsed owing to the failure of the GoK to issue a GoK LoS as a condition precedent to the Contract. To note, as with Philips and GE before it, SST had executed a Funders Direct Agreement (FDA) between itself, MoH and KCB on 7th May, 2018.
29. The import of the FDA is that it obligated the MoH to *"...procure the provision of an original copy of the Government Support Letter duly executed by the National Treasury, Kenya as provided under Schedule 2(GOK Support Letter) of the MES Contract."*. Further, as per Schedule 2 of the HCIT Contract, as a condition precedent, the MoH as the 'Procuring Entity' was obligated to provide an original copy of a GoK LoS as one of the completion documents to the contract.
30. The Committee observes that except in the case of the HCIT Project, almost every legal opinion given to the MoH by the Office of the Attorney General in relation to the MES project was either disregarded or forcefully modified to satisfy a predetermined outcome.
31. Further, from the evidence adduced, it is apparent that there was a deliberate attempt by the MoH to minimise the role of the OAG & DOJ in the negotiation, review and finalisation of the MES Contracts in favour of IKM Advocates: This is evidenced by the following:

a) Its minimal involvement in the initial review of the MES Contracts;

b) Its lack of involvement in the conclusion of additional contracts ancillary to the MES Contracts such as the Funders Direct Agreements, Sub-Contracts and Novation Agreements;

c) Its lack of possession, to date, of the duly executed Letters of Support despite repeated requests to the MoH for the same; and,

d) Its lack of possession of the duly executed MES Contracts until 4th March, 2020 when the MoH forwarded them in response to a request relating to this inquiry.

The minimized role of the OAG & DOJ is further evidenced by a letter addressed to the then CS, National Treasury, Mr. Henry Rotich, EGH, dated February 26, 2019, from the then Attorney-General, Prof. Githu Muigai, EGH, SC which notes that '..*the National Treasury and Ministry of Health have held further consultations and come up with proposals for the GoK Letter of Support.... This undesirable situation that has occasioned delay in the implementation of this project has been occasioned by piecemeal information on the status of each agreement, and the non-disclosure of material information covering the entire spectrum of the project*...

32. As a direct result of the minimized involvement of the OAG & DOJ, the MES Contracts were highly skewed in favour of the MES Contractors, and contained terms that exposed the Government to huge financial and legal liabilities. In order to avoid similar exposure to the Government in the future, it is imperative that measures be taken to strengthen the role of the OAG & DOJ in negotiating, drafting and vetting Government contracts in line with section 5 of the Office of the Attorney General Act, 2012.

33. Further, the Committee notes that the OAG & DOJ was not involved in the procurement process of the MES project as its involvement only commenced after the tenders had been won. As such, by the time the OAG & DOJ was being involved, it was dealing with draft contracts that had already been compromised at the tendering stage. Accordingly, the Committee notes that there is a need to amend the Public Procurement and Asset Disposal Act, 2015 with a view towards mandating the involvement of the OAG & DOJ in procurement processes relating to major contracts by government agencies and departments

Committee Recommendations

Having made the findings above, the Committee recommends as follows —

1. **Moving forward, all Government agencies must apply the Provisions of section 17(1) of the Office of the Attorney General Act by seeking the approval of the Attorney General before enlisting the services of a legal consultant. The consultancy services must only be enlisted when it is determined that the respective Constitutional offices lacks the requisite technical capacity to undertake the assignment at hand. Similar approvals must be sort from the Office of the Auditor General in respect of financial services.**

2. **The advice of the AG to state agency in relation to negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies is binding and not a matter of debate to arrive at some findings. Public officers that are found to have defied OAG&DOJ advice should be subjected to disciplinary proceedings.**

3. **that relevant Government agencies commence immediate investigations of the circumstances under which the legal consultants were procured and if found culpable, the officers who were involved in the procurement of the financial and legal services consultants be held liable for contravening Article 227 of the Constitution, the Public Procurement and Asset Disposal Act, 2015 and section 17 of the Office of the Attorney General Act, 2012; and**

4. **That section 134 (2) of the Public Procurement and Asset Disposal Act (2015) be amended to reduce the threshold for the involvement of the OAG & DOJ in clearing contracts from the current Kshs. 5 Billion to Kshs. 1 Billion**

CIVIL SOCIETY ORGANIZATIONS

2.9. KELIN

The Committee received submissions from KELIN in a consultative meeting held on Friday, 18th October, 2019. Led by its Deputy Director, Ms. Saoya Tabitha, the Committee received submissions from KELIN as provided below-

1. The MES project as implemented violated Articles 3, 10 and 35 of the Constitution of Kenya, and provisions of the Intergovernmental Relations Act and the Public Finance Management Act.
2. KELIN began following the MES project following an adverse report by the Office of the Auditor General in 2015. Between 2016 and 2018, the organization sent several letters to the COG and the MoH seeking further information on the MES Project. However, the organization was yet to receive any official communication from either the MoH or the COG on the MES project.
3. In April 2019, the organization commissioned its own investigation to look into the MES project. Key areas of interest in its investigation included: the parties behind the leasing of the equipment; and the evidence or lack thereof of public participation in the initiation and execution of the MES project.
4. The findings of this investigation revealed that County Governments had not been involved in prioritizing their medical equipment needs. This fact had been backed by a letter addressed to the EACC by the then Chairperson of the COG requesting the agency to investigate the MES project (see Annex 11).
5. Further, the investigation revealed that various counties were yet to benefit from the MES equipment supplied to them either due to lack of space, human resource personnel and insufficient electricity supply.

2.10 Transparency International Kenya

The Committee received submissions from Transparency International (TI) in a consultative meeting held on Friday, 18th October, 2019. In its submissions, TI noted that in collaboration with other stakeholders, several requests had been made to the MOH for information on the MES project to no avail. Specific observations by the organization in relation to the project were provided as follows-

(a) MES Contracts were done in secrecy, without any public participation and outside the involvement of the County Governments.

(b) Despite being a matter of great national interest, details on the MES project had not been made public.

(c) The project had failed to meet the core health needs of the Kenyan population thus raising questions of value for money.

(d) MES equipment had been installed despite the fact that counties did not have the capacity to absorb the equipment. This led to low utilization of the equipment.

(e) The project was commerce-driven and appeared to be of more benefit to the contractors than to the Kenyan public.

Based on the foregoing, the organization proposed the following remedial actions-

(a) That, the MoH publishes the MES contracts, concept paper, needs assessment, and any other documents related to the project.

(b) That the MoH publishes the list of hospitals that received the equipment, as well as the criteria used to identify the beneficiaries.

(c) That the MoH makes public the capacity needs report for each facility.

(d) That the MoH makes public an impact assessment report on the MES project.

(e) That the OAG develops a report on the value for money with regard to the MES project.

(f) That the Public Procurement Regulatory Authority investigate the MES project to establish whether the right procedures were followed in its implementation.

Committee Observations

The Committee made the following observations:

1. The Committee appreciates the role played by civil society in holding the Government to account in the use of public resources.
2. The MoH failed to undertake public participation in the MES project contrary to the provisions of the Constitution and the law.
3. The MoH and COG violated Article 35 of the Constitution on the Right to Information by failing to respond to several requests for information by civil society organisations. This conduct by the MoH was a continuation of their indifference and arrogant disposition in the handling of a matter of such great public interest.

Committee Recommendations

The committee recommends that —

(1) All public officers and public agencies at both levels of government should treat the National values and principles of governance set out in Article 10 of the Constitution as binding obligations in the execution of public policies; and

(2) The Chief Executive Officer of all [public entities at National and county level should adhere to the provisions of section 8 of the Access to Information Act, 2016 and perform their duties as information access officers for the purposes of transparency and accountability.

(Written submissions from KELIN are attached and marked as ANNEXURE **XXVII**)

CHAPTER THREE
MES TRANSACTION ADVISORS/CONSULTANTS

Background

The MoH procured financial and legal consultants to provide transaction advisory services for the MES project as follows:

1. *Financial Consultants:* PKF Kenya was procured through a restricted tendering process for financial consultancy services at a contract sum of Kshs. 9,634,960.00.
2. *Legal Consultants:* M/s Iseme, Kamau and Maema Advocates were engaged as the legal transaction advisors through direct procurement at a contract sum of USD 560,000.00 (or Kshs. 56,560,000.00 at Kshs. 101 to the USD).

3.1 PKF Kenya

The Committee held two hearings with PKF Kenya on 27th November, 2019 and Friday, 14th February, 2020. Led by the Managing Director, Mr. James David Kabeberi made submissions as follows:

3.1.1. Conceptualization of the MES Project

In his submission, Mr. Kabeberi stated that the MoH initially conceptualized the MES project as a PPP aimed at equipping Level 4 and 5 hospitals with specialized, modern and state of the art equipment through a 'Build Lease Transfer'(BLT) financing and delivery model. Subsequent to this, the MoH invited interested parties to tender for the supply of these equipment through a MES model.

According to PKF, the scope of financial advisory services that it provided to the MoH did not include advising the MoH to opt for MES as a mode of procurement. In relation to the same, PKF stated that the decision t-o opt for a MES model had already been taken by the MoH as evidenced by the fact that bids for the MES project had already been advertised, tendered for, and evaluated upto the technical stage by the time they were engaged.

3.1.2 Tendering Process and Selection of PKF Kenya as Financial Advisors of the MES Project

According to PKF Kenya, on 2nd September, 2014, the MoH issued a Request for Proposals (RFP) to five firms as follows:

i. PKF Kenya
ii. PricewaterhouseCoopers Ltd

iii. Ernst & Young
iv. KPMG Kenya
v. Deloitte Kenya

PKF Kenya submitted its bid on the due date of 8th September 2014 and was subsequently awarded the tender as a consortium with Spa Infosuv East Africa Ltd on 13th October, 2014.

3.1.3 Award of Contract and Payment for Services Rendered

The MoH and the consortium of PKF Kenya and SPA Infosuv East Africa Ltd executed the contract to provide financial advisory services for the MES project on 13th October, 2014. According to PKF, out of a total contract sum of Kshs. 9,634,960.00, it had received a total sum of Kshs. 8,370,014.00 for financial advisory services rendered under the MES Project. As the lead consultants under the contract, PKF provided financial analysis expertise while Spa Infosuv advised on procurement processes and procedures.

3.1.4. Public Sector Comparator

PKF Kenya undertook a value for money assessment aimed at establishing the maximum acceptable price for each MES Lot as defined by a public sector comparator (PSC) – defined as the cost of outright purchase by traditional procurement processes. According to PKF, MES prices lower than the PSC (outright purchase) were deemed indicative of a positive value for money in the procurement of any specific lot.

3.1.5 Market Price Survey

According to PKF Kenya, while the firm had made reference to market prices in determining the PSC by Lot, it had not engaged in market surveillance for individual items of equipment within the Lots.

3.1.6 Role in Evaluation of Tenders

According to PKF, it was not engaged in the evaluation of the MES tenders. Further, PKF stated that the MoH had not granted them access to the MES bids. Rather, the firm's role had been confined to designing tools to be used in the evaluation of the financial proposals as provided below:

(a) Project risk assessment tool;
(b) Project direct and indirect costs assessment tool (value for money);
(c) Financial assessment model.

3.1.7 MES Project Service Level Monitoring

In September 2016, the MoH issued a RFP inviting firms to tender for Service Level Monitoring of the MES Project through a restricted tender. PKF Kenya successfully bid for the tender and was consequently contracted to provide service level monitoring for a period of two years on 1st February, 2017. The aim of the service level monitoring assignment was to assist the MoH in ensuring that the MES project was implemented to the required standards, and in accordance with the performance parameters of the agreements with the service providers.

According to PKF, the assignment involved monitoring at least ninety-eight (98) MES beneficiary hospitals, and submitting quarterly and other ad-hoc reports. A final Quarterly MES Service Level Monitoring report dated 20th March, 2019 raised key issues in relation the MES Project as follows:

1. Failure by the MoH to recover performance deductions from MES service providers amounting to USD 408,126.00 (Kshs 42,220.726/=) contrary to the provisions of the contract;
2. Delays in the implementation, installation, and commissioning of MES equipment in several health facilities;
3. Lack of MES project services in at least twenty seven (27) hospitals owing to the lack of personnel, electricity and/or water.
4. Inconsistencies between the payment schedules and stipulated end dates of MES contracts;
5. Delayed submissions of the financial models for the year 2018/2019 by MES contractors;
6. Penalties amounting to USD 4,183,290 (Kshs 422,512,290/=) levied against the MoH by contractors owing to late payment; and,
7. Pending installation and commissioning of theater equipment in six hospitals owing to delays in completion of renovation or construction works of theatre facilities etc.

Copies of the written submissions and evidence presented by PKF Kenya are attached herein under:

(a) Annex 20 - Written submissions dated 26th November, 2020.
(b) Annex 20 (b) - Written submissions dated 12th February, 2020.

3.2 SPA INFOSUV EAST AFRICA LTD

The Committee held a hearing with representatives of SPA InfoSuv East Africa Ltd led by its CEO, Mr. Joseph Ogachi, on Tuesday, 3rd March, 2020. During the hearing, SPA Infosuv testified as follows:

(a) PKF Kenya and Spa Infosuv were selected as a consortium to provide financial advisory services to the MES Project following a competitive bidding process in which four other firms participated as follows: PricewaterhouseCoopers Ltd, Ernst and Young, KPMG Kenya and Deloitte Kenya.

(b) The contract for the provision of financial advisory services for the MES Project provided for Mr. David Kabeberi, CEO, PKF Kenya, to act as the authorized representative under Clause 1.6 on the Special Conditions of the Contract.

(c) The contract was valued at Kshs.9,634,960 of which Kshs.598,032 was withheld for payment of VAT. The balance of Kshs. 8,370,014 was shared between both firms, with Spa Infosuv ultimately receiving Kshs. 4,817,480.

(d) On the specific roles played by both firms, PKF Kenya provided financial expertise, while Spa Infosuv provided procurement advisory services.

(e) The Public Sector Comparator (PSC) in the MES Project provided an estimate of the cost that the Government would have paid if it had opted to deliver the services itself, rather than transferring the risk to private suppliers.

(f) The PKF Kenya and Spa Infosuv consortium did not conduct a market price index surveillance and as such, did not make recommendations to the MoH on prices for individual items of equipment contained within each Lot.

(g) Further, the scope of advisory services provided did not include advising the MoH to opt for MES as a mode of procurement. The decision to opt for a MES model had already been taken by the MoH as evidenced by the fact that bids for the MES project had already been advertised, tendered for, and evaluated upto the technical stage by the time they were engaged.

(h) According to SPA Infosuv, neither PKF Kenya nor Spa Infosuv were involved in the evaluation or selection of the successful bidders. They also did not participate in negotiation meetings for contract variations, or have access to any of the bids. Rather, their role was confined to designing tools as follows: (i) project risk assessment tool; (ii) value for money assessment; and, (iii) financial assessment model.

Copies of the written submissions and evidence presented by Spa Infosuv East Africa Ltd are attached herein.

Committee Observations

The Committee made the following observations:

i) Restricted Tendering

1. The MoH irregularly procured financial advisory services for the MES Project from PKF Kenya Ltd and Spa Infosuv through a restricted tendering process at a contract sum of Kshs. 9,634,960.00.
2. The Committee noted that the OAG testified that the decision by MoH to use restricted tendering rather than a more competitive process was unjustifiable owing to the huge financial implications, and the high level of public interest in the MES project.

ii) Non-Adherence to Mandatory Tender Requirements

3. Clause 2.3 of the tender document required the successful bidder to familiarize themselves with local conditions prior to submitting financial advisory services. However, the contractor was unable to demonstrate to the Committee that the company had complied with this requirement.

iii) Alleged Role of PKF in the decision by MoH to opt for the MES Procurement Model

4. The Committee took note that the OAG had testified that the financial advisory services provided by PKF Kenya had guided the decision by MoH to opt for the MES model rather than outright purchase of equipment.
5. The Committee further took note that the OAG position was corroborated by the MoH who testified that the Value for Money (VfM) assessment conducted by PKF had informed the MoH decision to opt for a MES procurement model rather than outright purchase *(see Annex 9)*.
6. The MoH position was however controverted by PKF who denied having any role in the decision by the MoH to undertake MES as a model for procuring the equipment.
7. The Committee observed that by the time PKF/Spa InfoSuv were engaged, the MoH had already decided to opt for the MES procurement model as evidenced by the fact that MES bids had already been advertised, received and evaluated up to the technical stage by the time PKF/Spa InfoSuv were engaged.

iv) Value for Money

8. PKF Kenya and Spa Infosuv developed the Public Sector Comparator (PSC) (direct purchase price) that formed the basis for the awarding of tenders under the MES Project.
9. According to the OAG, all MES bids that quoted below the PSC were considered responsive, while MES bids that quoted above the PSC were considered unresponsive.

10. The PSC, ideally a tool for ensuring value for money, was manipulated to justify the vastly inflated cost figures for MES equipment as demonstrated by the following material facts:

(a) The Value for Money (VfM) Assessment Report containing the PSC was submitted on 17th October, 2014, an incredible three (3) days after the signing of the contract on 13th October, 2014. The stipulated contract period was 44 days.

(b) The Value for Money Assessment report pre-dated an Inception Report which was submitted on 21st October, 2014, three days after the submission of the Value for Money Report.

(c) The Value for Money and Inception Reports by PKF detailed specific steps by which PKF/Infosuv conducted a market analysis on the individual prices of equipment in each Lot. However, in their testimony, both PKF and SPA InfoSuv maintained that costing for MES equipment was arrived at by Lot without providing a breakdown of how the cost in each Lot was actually arrived at.

(d) In the absence of a costing by individual equipment to indicate how prices for each Lot were ultimately arrived at, an opportunity was created to grossly inflate costs and disguise the actual price of equipment.

(e) In relation to the above, the Committee notes that PKF Kenya submitted two written submissions signed by the CEO, Mr. Alpesh Vadher, which differed significantly on material facts relating to the process of costing:

- Whereas PKF admitted to having conducted a market price surveillance index to arrive at the PSC in its first submission dated 26th November, 2019, and even attached a report to this effect in its second submission dated 12th February, 2020, it denied the very existence of such a report.
- Further, in its first submission dated 26th November, 2019, PKF described how the PSC for individual equipment was arrived at. However, in its second submission dated 12th February, 2020, its denied the existence of PSC's for individual items (including instrument trolleys) altogether.

From the foregoing, the Committee observed that PKF Kenya gave falsified information aimed at misleading the Committee

11. The decision by MoH and PKF/Spa Infosuv to price MES equipment by Lot rather than individual items of equipment served to disguise the actual price of the equipment, and to provide an avenue for fraudulent manipulation of the MES project.

v) Service Level Monitoring Findings by PKF Kenya

12. In relation to the findings of PKF Kenya in the MES Project Service Level Monitoring reports, the Committee found that, in contravention of Article 201 of the Constitution, the MoH failed to ensure the prudent use of public resources as demonstrated by:
    a) Its alleged failure to recover performance deductions from MES service providers amounting to USD 408,126 contrary to the provisions of the contracts;
    b) Inconsistencies between payment schedules and the stipulated end dates of the various MES contracts;
    c) Delayed submissions of financial models for the FY 2018/2019 by MES service providers;
    d) Penalties amounting to USD 4,183,290 levied against the MoH by MES service providers owing to late payments;- in Kshs.
    e) Delayed implementation, installation and commissioning of MES equipment in several health facilities; and,
    f) Non-functional MES project services in at least twenty-seven hospitals owing to the lack of personnel, and/or electricity, and/or water.

Committee Recommendations

The Committee recommends that —

1. The EACC and other investigatory agencies expeditiously commence investigations into the conduct of PKF Kenya and SPA-InfoSuv and the circumstances in which both parties were awarded a contract by the Ministry of Health through direct procurement. In particular, the EACC is requested to investigate the circumstances under which the PKF was awarded a contract to undertake a Value-for-money assessment and was paid Ksh 9 million for completing the work and submitting its findings in an unrealistic period of 3 days;;

2. The Institute of Certified Public Accountants of Kenya conduct disciplinary proceedings against PKF Kenya under the Accountants Act for their unethical and unprofessional conduct.

3.3 M/S ISEME, KAMAU AND MAEMA ADVOCATES

Background

The Committee held a hearing with IKM Advocates on Monday, 27th July, 2020. Led by their Counsel Hon. Paul Muite, SC, and Managing Partner, Mr. James Kamau, IKM Advocates submitted as follows:

3.3.1 Procurement of IKM Advocates by the MoH as the Legal Transaction Advisors to the MES Project

According to IKM Advocates, the MoH appointed their firm for the provision of legal transaction advisory services from a panel of prequalified law firms with the approval of the Office of the Attorney General and Department of Justice (OAG & DOJ). As per their testimony, their services were lawfully single-sourced under section 32 of the Public Procurement and Disposal Act, 2005 (now repealed) which was the applicable law at the time.

3.3.2. Execution of the Service Level Agreement with the MoH

IKM Advocates admitted to having had 'informal' engagements with the MoH in respect of the MES Project prior to the execution of their service level agreement or approval of the AG. According to IKM, these engagements were aimed at understanding the MES project and the services that they were required to provide.

3.3.3. Terms of Reference/Scope of Services

According to IKM Advocates, their initial scope of work entailed the following:

(a) advising on the optimal procurement structure for the MES Project;

(b) drafting, negotiating, amending and finalizing the MES Contract including all related schedules;

(c) drafting, negotiating, amending and finalizing the intergovernmental agreement to be concluded between MoH and each County government, including all related schedules;

(d) drafting, negotiating, amending and finalizing all legal agreements and documents related to the MES Project;

(e) assisting MoH in compiling, drafting and reviewing the tender documents submitted by MoH to potential bidders including the invitation to tender and the instructions to bidders;

(f) assisting MoH in responding to clarification questions relating to the tender;

(g) assisting MoH in the tender evaluation process including by drafting evaluation criteria, advising on the legal aspects related to the tender evaluation process, advising and assisting the tender evaluation committee and drafting the evaluation report. Note: We did not participate in the tender evaluation process or award;

(h) attending meetings with MoH, its employees and/or any third party advisors in relation to the project;

(i) managing the legal work stream including producing and running issues lists and managing the process until close of negotiations;

(j) assisting MoH to manage the process of advising unsuccessful bidders and debriefing of such unsuccessful bidders;

(k) producing and delivering to MoH soft copies (cd-rom format) of the project agreements and applicable documentation.

3.3.4. Role of IKM Advocates in the Procurement Processes in the MES Project According to IKM Advocates, their role in the procurement processes in the MES Project was confined to drafting the template MES Contract which was attached to the tender documents.

The firm submitted that the MoH conducted the entire tendering process, and that they were not in any way involved in the identification, evaluation or selection of the MES bidders. Further, IKM Advocates submitted that they had not had any contact with any of the successful bidders prior to the tenders being awarded.

3.3.5. Role of IKM Advocates in the Execution of the MES Contracts

According to IKM Advocates, the final commercial close MES contracts were signed during a contract-signing ceremony at State House on 6th February 2015 with the approval of the OAG & DOJ. According to their testimony, they were not made aware of any objections raised by the OAG & DOJ in respect of the contracts.

3.3.6. Total Payments Received from the MoH

According to IKM Advocates, they received a total of KShs. 48,881,063.90 (excluding taxes) from the MoH. The cost was cumulative and included payment for services rendered to the MoH during their informal engagements.

3.3.7. Extension of Mandate

On 23rd April, 2015, the OAG & DOJ granted approval for the extension of the mandate of IKM Advocates for additional scope services as follows:

a) providing guidance to the contractors on preparation of their technical schedules and collating and contractualization of the same upon receipt and approval by MoH;
b) review of and negotiating further mark-ups and comments to the MES Contracts submitted by the contractors so as to arrive at Financial Close MES Contracts;
c) review of contractor term sheets and financial solutions and negotiation on the same and finalization as part of the Financial Close MES Contracts;
d) supporting MoH in its coordination with various work streams including technical, financial and insurance advisors;
e) supporting MoH on the Government Letter of Support including drafting template and negotiating same with the contractors, MoH, National Treasury, Office of the Attorney General;
f) preparing legal opinions on issues arising;
g) conducting workshops and training for the relevant MoH officials and affected government stakeholders; and,
h) all other legal services incidental to the above.

3.3.8. Payments Rendered for the Extended Mandate of IKM Advocates

IKM Advocates testified that their extended mandate was funded as a 'donation' by the five MES contractors on a pro-rata basis, as follows:

a) Shenzen Mindray Biomedical Electronics Co (China): USD 75,000.00 (equivalent to KShs. 7,575,000.00 at KShs. 101 to the USD);
b) Esteem Industries Inc. (India): USD 50,000.00 (equivalent to KShs. 5,050,000.00 at KSHs. 101 to the USD);
c) Bellco SRL(Italy): USD 50,000.00 (equivalent to KShs. 5,050,000.00 at KSHs. 101 to the USD);
d) Philips Medical Systems Nederland BV USD 170,000.00 (equivalent to KShs. 17,170,000.00 at KSHs. 101 to the USD);

e) GE East Africa Services Ltd USD 600,000.00 (equivalent to KShs. 60,600,000.00 at KSHs. 101 to the USD);

3.3.9. Role of IKM Advocates in the Execution of the Funders Direct Agreements (FDA)

According to IKM Advocates, in collaboration with DLA Piper, they drafted the initial template of the Funders' Direct Agreement (FDA) with input from MoH and the Office of the Attorney General. The final forms of the FDAs were arrived at following negotiations with the lenders of GE and Philips who were separately legally represented, and finalized by IKM/DLA with input from MoH and the OAG & DOJ.

3.3.10. Role of IKM Advocates in the Execution of the Subcontractors Agreements

According to IKM Advocates, the initial drafts of the Subcontractors' Agreements were drafted by the respective contractors and reviewed by IKM/DLA Piper in liaison with MoH and the OAG & DOJ.

3.3.11. Role of IKM Advocates in the Execution of the Parent Company Guarantees

According to IKM Advocates, in collaboration with DLA Piper, they drafted the initial form of the Parent Company Guarantee with input from MoH and the OAG & DOJ. However, the final forms of the Parent Company Guarantees were arrived at following negotiations with the contractors and their respective legal advisors (with input from their lenders and their advisors), and finalized by IKM/DLA Piper with input from MoH and the OAG & DOJ.

3.3.12. Role of IKM Advocates in the Execution of the Novation Agreements

According to IKM Advocates, they issued a legal opinion to MoH on the legality of the novation agreements. They however denied being involved in the finalization and execution of any novation/assignment/transfer agreements.

3.3.13. Conditions Precedent to the MES Contracts

a) Funders Direct Agreements (FDAs)

According to IKM Advocates, the execution of Funders Direct Agreements (FDAs) was a condition precedent in respect of the MES Contracts executed by GE and Philips.

b) Government of Kenya Letter of Support (GoK LoS)

According to IKM Advocates, the issuance of GoK LoS were not contained as conditions precedent in the original tender documents. However, during contract negotiations, the successful MES bidders requested for the issuance of GoK LoS on the grounds that they were required by their lenders as a precondition for funding. The MoH, NT and OAG & DOJ subsequently consented to this request and issued GoK LoS to all the MES contractors.

c) Legal Opinion of the Attorney-General

According to IKM Advocates, a Legal Opinion by the Attorney General was not a condition precedent in the original tender documents. However, during contract negotiations, the successful MES bidders requested for the issuance of legal opinions on the grounds that they were required by their lenders as a precondition for funding. The MoH and OAG & DOJ subsequently consented to this request and issued GoK LoS to all the MES contractors.

3.3.14. Issuance of Government of Kenya Letters of Support to the MES Contractors

With regard to its role in the issuance of GoK LoS to the MES Contractors, IKM Advocates submitted that they had provided the template that formed the basis for discussions between the MoH, NT and the OAG & DOJ.

IKM Advocates further attributed differences in the GoK LoS issued to Philips and GE East Africa Services Ltd on the financing structure on the financing structure that they had adopted. IKM Advocates further stated that GE and Philips had separately negotiated the terms of their respective GoK LoS with MoH, NT and the OAG & DOJ in order to take into account the provisions of the Funders' Direct Agreements (FDAs).

3.3.15 Role in the Execution of the Memoranda of Understanding

According to IKM Advocates, as per their terms of reference, they were involved in the drafting, amending and finalizing of the intergovernmental agreements between the National Government and County Governments. However, they were not involved in the implementation and negotiation

of the intergovernmental agreements as it was a matter between the national and county governments.

3.3.16 Pre-Existing Relationships with MES Service Providers

IKM Advocates denied having had any prior contact or relationship with any of successful tenderers prior to their bids being accepted. The firm further denied having acted in favor of, or promoted or defended the interests of any of the MES bidders.

3.3.17. Non-Declaration of Conflict of Interest

According to IKM Advocates, the firm had served in the panel of advocates for GE since 2010 and had continued to have engagements since. The firm however denied acting for GE on any matter related to the MES Project.

Moreover, according to IKM Advocates, at the time of their engagement as legal transaction advisors to the MES Project, the MoH had not brought to their awareness the Concept Paper for the project. The firm further denied having had any knowledge of the firms which would eventually succeed in the tender.

Having thus denied any bias or prejudice in favour of GE, against the MoH at any time during the entire MES transaction, IKM Advocates submitted that they had not considered or declared any legal, regulatory or commercial conflict in acting for the MoH.

Committee Observations

The Committee made the following observations:

i) Single-Sourcing of IKM Advocates for Legal Transaction Advisory Services under the MES Project

1. In a Special Audit of the MoH Accounts for the FY 2015/2016, the OAG raised queries regarding the unprocedural manner in which the MoH single-sourced legal transaction advisory services from IKM Advocates under the MES Project.
2. With regard to the direct procurement of IKM Advocates for MES legal transaction advisory services, the Committee observed that the MoH failed to satisfy the legal

requirements set out in section 74 of the PPDA Act 2005 (now repealed) by failing to demonstrate that IKM Advocates were the only persons capable of providing legal transaction advisory services under the MES Project, and that there lacked reasonable alternatives.

3. The Committee observed that the direct procurement of IKM Advocates contravened section 74 (3) of the PPDA 2005 (now repealed), as the procurement of the MES equipment was not so urgent as to render competitive procurement methods for legal advisory services impractical.

ii) Unprocedural Engagement of IKM Advocates by the MoH

4. Contrary to the provisions of AGs' circular dated 3rd May, 2010 (Ref.AG/1/2010) which required all client ministries to consult and seek approval of the AG before retaining the services of private advocates, the MoH irregularly engaged the services of IKM Advocates prior to the approval of the AG, or the execution of a service level agreement.
5. Services rendered by IKM Advocates during this 'informal' engagement period were highly consequential and included a legal opinion that presumably informed the decision by the MoH to vary the legal framework of the entire project from a PPP to a procurement model; and, draft contracts that were attached to the MES tender documents.
6. The MoH paid IKM Advocates KShs. 48,881,063.90 (excluding tax) being the cumulative cost for services rendered. Contrary to the law, according to submissions by IKM Advocates, the payment included the cost of services rendered during its 'informal' engagement with the 'MoH'.

iii) Conflict of Interest

7. The Committee observed that while IKM Advocates denied having had any relationship or contact with the successful bidders, by their own admission, GE and IKM Advocates had had a pre-existing client-advocate relationship from 2010 at the time of its engagement as legal transaction advisors to the MES Project.
8. The Committee further observed that according to the testimony of IKM Advocates, at the time of their engagement, the MoH was aware that they were on GEs' panel of lawyers. However, neither the firm, nor the MoH declared this conflict of interest to the OAG & DOJ.

9. A conflict of interest between the two entities was subsequently demonstrated by the fact that IKM Advocates subsequently went on to draft Government Letters of Support for GE East Africa Services Ltd (and Philips Medical Systems Nederland B.V.) that were manifestly different from the other MES contractors.
10. IKM Advocates further exhibited bias in favour of GE by pursuing the issuance of an enforceability opinion from the OAG & DOJ in the exclusive interests of the GE contract
11. Further to the above, the Committee finds that despite having participated in the preparation and drafting of the tender documents which expressly limited the eligibility of bidders to original equipment manufacturers, IKM Advocates omitted to advise the MoH that GE were not in fact original equipment manufacturers and that they therefore did not qualify to participate in the tender.
12. Based on the foregoing, the Committee came to the irresistible conclusion that, in fact, the very coming of IKM Advocates into the MES Project may have been solicited or otherwise influenced by GE.

iv) Unethical Conduct by IKM Advocates

13. The Committee observed that IKM Advocates acted unethically by accepting 'donations' amounting to USD 945,000.00 (KShs. 95,445,000 at KShs. 101 to the USD) from parties that were supposed to be acting against i.e. the MES Contractors.
14. Further to this, the Committee observed that the aforementioned 'donations' collected by IKM Advocates from the five MES contractors was almost double the KShs. 48,881,063.90 it had received from the MoH on whose behalf it was supposed to have been acting.

v) Memoranda of Understanding

15. The Committee noted that according to their own testimony, and as per their terms of reference, IKM Advocates played a role in "*...drafting, negotiating, amending and finalizing the intergovernmental agreement to be concluded between MoH and each County government, including all related schedules*".

Committee Recommendations

The Committee recommends that —

1. **The EACC and other investigatory and prosecution agencies are also urged to investigate the process of procuring the legal consultants who advised the MoH in the entire conceptualization and implementation process**

2. **Further, the EACC is urged to investigate the circumstances under which contractors to the MES project made donations that went towards legal fees to IKM Advocates and to report its findings to the Senate within 60 days; and further, to investigate how the contractors raised money to IKM advocates who were advocates of MOH in the transaction and against whom was the money billed; and**

3. **The EACC is further urged to investigate and established whether the consultancy fees were billed against the counties;**

CHAPTER FOUR
MES CONTRACTORS

4.1 Background

In February 2015, the MoH awarded leasing agreements for the provision of specialized medical equipment worth Kshs. 38 Billion under the Managed Equipment Services (MES) Project. The project comprised contractual agreements between the MoH and various contractors for the supply, installation, maintenance, replacement and disposal of various equipment, as well as training and reporting for the entirety of the contract period. The contract period was seven-years, with the possibility of an extension for an additional three years.

The contracts further provided that at the end of the contract period, the parties had the following options-

1. Include issue of fate of equipment at the end of the contract period
2. High maintenance costs at the end of the contract

4.1.1 Conceptualisation of MES Project

During the Senate's sitting held on 26th June 2013, Hon. Dr Wilfred Machage, the then Migori Senator laid the following motion on the floor of the House—

> *"THAT, aware that in the last fifty years the best equipped public hospitals were established in certain regions in Kenya to the exclusion of other regions; appreciating that the introduction of the devolved system of government, through the Constitution of Kenya 2010, was aimed at equalization of development across the country; concerned about the high maternal, infant and child mortality rates in Kenya mainly caused by lack of primary and secondary health services; the Senate resolves that the government establishes a Level 5 hospital in each of the 47 counties and Level 4 hospital in every sub-county, before the expiry of the term of the current government and provides annual reports on the development of the hospitals to the Senate through the Senate Standing Committee on Health, Labour and Social Welfare."*

The motion was voted on by the House and approved. Consequently, the Office of the Clerk of the Senate wrote a letter to the Principal Secretary, Ministry of Health dated 19th December 2013 Ref. No S/SCO/CORR/2013/002(64) informing him of the events that transpired.

(*Attached herein is a copy of the Hansard of the Senate of 26th June 2013 and a copy of the letter dated 19th December 2013 from the Office of the Clerk of the Senate sent to PS Fred Segor.*)

Through a letter dated 20th September 2013, *Ref No. MOH/DP/16/1/7/12*, the Cabinet Secretary, Ministry of Health informed the respective governors of each county that both the National Assembly and the Senate adopted similar motions relating to the establishment of hospitals and specialized care centres.

The letter further noted that the hospitals are classified according to the Norms and Standards developed by the MoH in June 2006. The Norms and Standards developed by the Ministry take into account the level of infrastructure, personnel, equipment and catchment population.

The letter of the CS concluded by stating as follows—

> *"...The Ministry of Health, through Public Private Partnership initiative, in consultation with the National Treasury is in the process of negotiating with two (2) reputable multinational companies who have expressed interest to assist equip our facilities and train personnel to enable us realise the goal of a level 5 facility in each county and a level 4 facility in each subcounty. Whilst we are currently working out the possible financial structures to support this initiative, the most likely structure will be an operating lease agreement whereby the said reputable multinational companies will place/ lease the medical equipment as lessors.*
>
> *In turn, the county government will be the lessee whilst the national government will be the principal agent in order to ensure that the budgetary allocation to the counties are applied to meet the lease obligations.*
>
> *It is from the aforementioned that I am requesting for your support and cooperation in execution of this project, in line with Article 6 (2) of the Constitution of Kenya (see Annex 1).*

(Find attached herein copies of the scanned letter dated 20th September 2013, Ref No. MOH/DP/16/1/7/12 and the communique of 22nd October 2013.)

4.1.2 Needs Assessment

In the hearings, the MoH stated that ..controverted by the COG. In March 2014, the MoH conducted a Needs Assessment aimed at assessing the readiness of counties to provide Level 4 and Level 5 services. According to submissions made by the MoH, during the needs assessment exercise, select county health facilities were assessed on the basis of available infrastructure, equipment and personnel.

Following the assessment by the Ministry of Health, equipment needs in the Counties were prioritized and categorized under seven categories (LOTS) of equipment as provided below:

LOT No.	Item
1	Theatre equipment
2	Theater, CSSD equipment
3	Laboratory equipment (Category 1)
4	Laboratory equipment (Category 2)
5	Renal equipment
6	ICU equipment
7	Radiology equipment

4.1.3 Tendering Process

In July 2014, the MoH floated a tender (Tender No. MOH/2014/2015) for the supply, installation, testing, maintenance and replacement of medical equipment and associated training for county and sub-county health facilities through a managed equipment service (MES) arrangement. The tender invited original equipment manufacturers who could also undertake managed equipment services. The abovementioned equipment was to be delivered in Lots as described in the foregoing table.

4.1.4 MES Service Providers

In February 2015, contracts under the MES contracts were awarded to various firms as provided below:

(a) Shenzhen Mindray Bio-medical LTD of China – Lot 1 dealing with Theater equipment, with 96 hospitals expected to be fully fitted with theater equipment

b) Esteem Industries Inc of India – Lot 2 dealing with CSSD and surgical equipment, with 96 hospitals expected to be equipped with sterilizing equipment complete with surgical sets for all operations.

c) Bellco SRL of Italy- Lot 5 dealing with Renal Equipment and Dialysis machines for each of the 47 Counties and 2 national referral hospitals

d) Philips Medical Systems of Netherlands – Lot 6 dealing with ICU equipment, with 11 Hospitals expected to be equipped with ICU facilities

e) General Electric of USA – Lot 7 dealing with radiology equipment, with 98 hospitals expected to be equipped with digital X-ray, ultrasound and other imaging equipment.

4.1.5 Obligations of the MoH under the MES Contracts

Under the Contracts, the obligations of the MoH included--

(a) providing of cold-water mains and electricity;
(b) nominating health human resources to be trained by the respective Contractors;
(c) paying quarterly payments for the contracts to the Contractor;
(d) providing a letter from the Attorney General of Kenya in relation to the authority of the Procuring entity to enter in to the contract;
(e) providing an original copy of a government Letter of Support duly executed by the Procuring entity; and
(f) providing an original copy of a parent company guarantee duly executed by the Procuring entity.

The MOUs executed by the MoH sought to ensure that county governments accepted the equipment, and that they carried out actions necessary for the support of the project including supplying water and electricity to target hospitals. The Contracts further transferred the responsibility of construction of facilities for the MES equipment and the connection to mains electricity to the county governments.

4.1.6 Obligations of the MES Service Providers

Under the Contracts, the obligations of the Contractor included—

(a) supplying and installing equipment at designated hospitals;

(b) maintaining the equipment supplied;

(c) repairing and replacing the equipment supplied where necessary; and

(d) training health human resources identified by the MoH.

4.1.7 Memoranda of Understanding with County Governments

Evidence was adduced by MoH that on diverse dates in 2015, it signed Memoranda of Understanding (MOUs) with 46 county governments for the supply of the MES equipment to county hospitals. The content and signing of these MOUS remains highly controversial as evidenced from the Chair COG was to the effect that MOUs that were signed only on the signature page without seeing the contents, and that they were signed under duress and blackmail (grammar). The legal validity, value and basis of these MOUs remains questionable as Bomet County, then under Governor Rutto, did not sign the MOU but MES equipment was delivered to Bomet regardless.

A summary analysis of the MOUs submitted to the Committee is contained in Annex 21.

LOT 1: THEATRE EQUIPMENT

4.2. SHENZEN MINDRAY BIOMEDICAL ELECTRONICS CO. (CHINA) AND SUBCONTRACTOR, MEGASCOPE HEALTHCARE LTD (KENYA)

Background

The MoH awarded Shenzen Mindray Biomedical Electronic Co., a company registered in China, the tender to supply theatre equipment under Lot 1 of the MES Project (Tender No. MOH/001/2014/2015).

On 6th February, 2015 the MoH and Shenzen Mindray Biomedical Electronics Co executed a contract for the supply of Lot 1 theatre equipment at an initial contract cost of USD 45,991,449.78 (using a conversion of Kshs. 4,645,136,427.78 at Kshs. 101 to the USD).

Under the contract, which was amended and restated on 6th May, 2015, a total of ninety-six (96) hospitals, two (2) hospitals from each of the 47 counties, and two (2) national referral hospitals, were selected to benefit from theatre equipment as follows:

No.	Description	Quantity
1.	Anesthetic machine with ventilator	2
2.	Electrosurgical unit	1
3.	Operating theatre lamp, ceiling mounted	2
4.	Operating theatre table, major	2
5.	Resuscitaires	1
6.	Instrument Trolley	2
7.	Linen Trolley	2
8.	Patient stretchers	3
9.	Resuscitation patient trolley	1

A variation of the contract executed on 22nd November, 2017 would see an additional seventeen (17) hospitals covered under this Lot, bringing the total number of beneficiary facilities under this Lot to one-hundred and thirteen (113). Under this variation, the contract cost of Lot 1 equipment rose by 16% to reach USD 53,645,886.84 (Kshs. 5,418,234,570.84 at Kshs. 101 to the USD).

In respect of the contract, Shenzen Mindray, the original equipment manufacturer, subcontracted Megascope Healthcare Ltd to implement civil works, installations, certifications and maintenance.

2.15.2. Submissions from the Contractor: Shenzen Mindray Biomedical Electronic Co

The Committee held a total of two hearings with respect to the contract for Lot 1 equipment: The first hearing held on 31st October, 2019 aborted owing to the lack of representation by the main contractor, Shenzen Mindray Electronic Co (China).

In the second hearing held on 7th November, 2019, the Committee met with representatives of Shenzen Mindray Biomedical Electronic Co (China) led by the Vice-President, Mr. Luntao Yin;

and, representatives of the subcontractor, Megascope Healthcare Ltd, led by its General Manager, Mr. Renne Lupalo.

Key highlights of the submissions received by the Committee are summarised below-

2.15.2.1. Execution of Lot 1 Contract for Theatre Equipment

According to the Contractor, on 6th February, 2015 the MoH and Shenzen Mindray executed a contract for the supply, delivery, installation, commissioning, maintenance and repair of Lot 1 theatre equipment at an initial contract cost of USD 45,991,449.78 (or Kshs. 4,645,136,427.78 at Kshs. 101 to the USD). The contract was restated and amended on 6th May, 2015.

Under the contract, a total of ninety-six (96) hospitals (two (2) hospitals from each of the 47 counties, and two (2) national referral hospitals) benefitted from theatre equipment as follows: anesthetic machines with ventilators, electrosurgical units, operating theatre lamps, operating theatre tables, resuscitaires, instrument trolleys, linen trolleys, patient stretchers and resuscitation patient trolleys.

2.15.2.2. Novation of Contract

According to the Contractor, on 6th May, 2015, the main contractor, Shenzen Mindray novated its contract to Mindray Medical Kenya Ltd, a fully-owned subsidiary of the parent company, for purposes of facilitating payments from the MoH.

2.15.2.3 Subcontractor

In addition, the contractor subcontracted Megascope Healthcare Ltd for purposes of implementing local services including: civil works, installations, certifications and maintenance. The subcontractor role of Megascope Healthcare Ltd was formalized through a subcontractors' deed of warranty executed by the MoH, Shenzen Mindray and Megascope Healthcare Ltd.

Despite the contractor having novated the contract to its subsidiary, Mindray Medical Kenya Ltd, under the terms of the contract, ownership of the equipment was vested in the subcontractor, Megascope Healthcare Ltd. In relation to this, all equipment supplied under Lot 1 was insured by

the main contractor, Shenzen Mindray and the subcontractor, Megascope Healthcare Ltd as joint policy holders.

2.15.3. Submissions from the Subcontractor: Megascope Healthcare Ltd

Key highlights of the submissions from Megascope Healthcare Ltd as received by the Committee during the hearing held on 7th November, 2019 are summarized below:

2.15.3.1. Early Works

Under the terms of the contract, four hospitals were listed to benefit from early works as follows: Kakamega, Homabay, Machakos and Malindi. However, having faced strong opposition to the project in Malindi, the contractor was subsequently referred to Thika Level 5 Hospital by the MoH. As such, while the contract listed Malindi DH as one of the beneficiaries under early works, during actual implementation, Malindi DH was replaced by Thika Level 5 Hospital. However, Malindi DH was duly covered in subsequent phases of the project. **2.15.3.2. Fitting Out Works and Installation of Lot 1 Equipment**

Under the initial contract, fitting out works and installation of equipment was carried out in 96 hospitals, two (2) hospitals from each of the 47 counties, and two (2) national referral hospitals. See Annex XXIII for a detailed schedule of Lot 1 equipment supplied and installed in county health facilities under the initial contract.

2.15.3.3. Additional Equipment Supplied under the Expanded MES Project

The MoH initiated a variation of contract vide a letter dated 4th October, 2017 *(see Annex XXIII)*. A subsequent Deed of Variation executed on 22nd November, 2017 expanded the project to include seventeen (17) additional hospitals as provided below:

1. Kigumo SDH (Muranga)
2. Nyamache SDH (Kisii)
3. Yala SDH (Siaya)
4. Molo SDH (Nakuru)
5. Londiani SDH (Kericho)
6. Mwala SD (Machakos)
7. Moyale SDH (Marsabit)
8. Kanyakine SDH (Meru)
9. Garissa PGH (Garissa)
10. Kakamega PGH (Kakamega)
11. Nyeri PGH (Nyeri)
12. Kisii DH (Kisii)
13. JOOTRH (Kisumu)
14. Nakuru PGH (Nakuru)
15. Embu PGH (Embu)
16. Thika DH (Kiambu)

17. Coast PGH (Momba

Under the expanded project, additional beneficiary facilities benefitted from the following equipment:

No.	Description	Quantity
1.	Anaesthetic machine(s) with ventilator	1/2
2.	Electrosurgical unit	1
3.	Operating theatre lamp, ceiling mounted	1
4.	Operating theatre table, major	1
5.	Resuscitaires	2
6.	Instrument Trolley	2
7.	Linen Trolley	2
8.	Patient stretchers	3
9.	Resuscitation patient trolley	1

See Annex XXIII for a detailed schedule of Lot 1 equipment supplied and installed in the additional health facilities under the expanded MES project.

2.15.3.4. Status of Implementation of the Contract

According to Megascope Healthcare, all equipment supplied under Lot 1 had been delivered and installed in beneficiary hospitals and completion certificates duly issued by the MoH. The issuance of the completion certificates was done upon surrender of delivery notes signed by the medical superintendent, administrative officer(s) and biomedical engineers of recipient hospitals.

2.15.3.5. Functionality Status of Lot 1 Equipment

Additionally, according to the General Manager of Megascope, all equipment supplied under Lot 1 had been installed and commissioned, and was providing the required services at the time of this inquiry.

2.15.3.6. Pricing/Cost of Equipment Supplied under Lot 1

Further, according to the General Manager, factoring in all the parameters and variables under the MES contractual agreement, the cost of the equipment supplied under the project was justified. This included the stipulated costs of instrument trolleys supplied under the project as per MoH records which indicated that a pair of instrument trolleys was supplied to each beneficiary hospital at the cost of USD 5,345 per pair (or Kshs. 539,845 at Kshs. 101 to the USD) *(see Annex 6)*. This translated to an average cost of USD 2,672 per instrument trolley (or Kshs. 269,922.50 at Kshs. 101 to the USD).

In addition to the above, in relation to the pricing of equipment, variations in the costs of similar equipment had arisen from the differential costs of servicing the equipment based on distance. For example, a charge of USD 526,989.12 was levied against Makindu Hospital for the supply, delivery and installation of Lot 1 equipment, while the charge levied against Makueni Hospital was USD 507,543.79.

Disposal of, and Residual Value of Lot 1 Equipment

Equipment supplied under Lot 1 had a lifespan guarantee of 10 years. Under the terms of the contract, 18 months to the lapse of the contract period, the MoH as the procuring entity was expected to independently verify the residual value and useful life of the equipment supplied.

According to the General Manager, Megascope, the retention of the equipment by counties beyond the stipulated lifespan of 10 years was however, not recommended for the following reasons: high failure rates, increased costs of maintenance, and, stoppage of consumables and reagents for the obsolete equipment by the manufacturer

2.15.3.9. Staff Training

Trainings were provided to user and maintenance staff under the contract as follows:

(a) *Factory Training:* One biomedical engineer nominated from each beneficiary hospital underwent factory training in China during the initial phase of the project.

(b) *Utility Training:* During installation and commissioning of the equipment, clinical and maintenance staff including nurses, doctors, theatre technicians were trained locally on the utility of the equipment.

(c) *Lifecycle training:* User and maintenance staff received refresher training during scheduled inspection and service visits by the contractor every six months.

2.15.3.10. Regulatory Status of Lot 1 Equipment

All equipment supplied under Lot 1 was duly listed by KEBS and PPB. See *Annex XXIII* for a detailed schedule of the regulatory status of Lot 1 equipment as submitted to the Committee by the Contractor.

2.15.3.11. Consumables and Reagents

The equipment supplied under Lot 1 was locked to specific consumables and reagents. Beneficiary hospitals were duly supplied with a starter pack as per the terms of the contract.

Copies of the written submission and annexures received from the Contractor are herein attached as Annex XXIII.

Committee Observations

The Committee made the following observations:

1. In respect to whether the novation of the contract relating to Lot 1 was procedural and its effect, the Committee made the following observations

   (a) that Shenzhen Mindray executed a novation in favour of Mindray Kenya. According to the CR 12 submitted to the Committee by the Registrar of companies, Mindray Medical Kenya was registered on 16th September, 2014 under registration number CPR/2014/159074. Further according to the CR 12, the directors of Mindray Medical Kenya are Qian Wenbin (Nil shares), Mindray Medical Netherlands B.V(999 shares), Mindray U.K Ltd (1 share) and Jiatang Zhang(Nil shares). As such, the Committee finds that Mindray Kenya is a fully owned subsidiary of Shenzhen Mindray.

   (b) that the contract requires under Clause 43.1 that the contractor obtain written consent before novating its rights and obligations under the contract. That the Committee was not presented with any evidence that the consent was sought.

   (c) that by virtue of the novation, the Contractor, Shenzhen Mindray, novated its rights, obligations and liabilities under the Contract and in connection with the project to Mindray Kenya, the deed of novation provides in part

   1.1 The Contractor hereby transfers all its rights obligations and liabilities under the project documents to the Nominee and the Nominee accepts the transfer. The nominee shall enjoy all the rights and benefits of the Contractor under the

Project Documents and all references to the Contractor in the Project Documents shall be read and construed as references to the nominee.

1.2 Without prejudice to clause 1.1 above the Beneficiary and the Nominee will have the right to enforce the project documents and pursue any claims and demands under the Project Documents against each other with respect to matters arising on or after effective date as if the Nominee was the original party to the Project Document instead of the contractor.

(d) that under the terms of the novation, Mindray Kenya was to enjoy the rights and benefits of the Contractor under the project documents and further, all references to the Contractor in the project documents were to be read and construed as references to Mindray Kenya.

(e) that the effect of the novation was to substitute Shenzhen Mindray who were contracted as original equipment manufacturers for Mindray Kenya which is a fully owned subsidiary of Shenzhen Mindray.

(f) that Mindray Kenya is a Kenyan limited liability company that does not manufacture any medical equipment in contravention of the terms of the tender document which indicated under clause 5 that the MOH *invited sealed tenders from original equipment manufacturers who can also undertake managed equipment service. This will involve supply, installation, testing, maintenance, repair, replacement and associated training for county and subcounty health facilities...*

(g) that, whereas the novation assigns all rights, obligations and liabilities under the Contract and all other documents which Shenzhen Mindray entered into in connection with the project to Mindray Kenya, the ownership of the equipment is curiously assigned to Megascope who is Shenzhen Mindray's subcontractor under the contract.

In respect to whether the novation was contractually binding the Committee finds

(a) that the MOH waived its rights to consent to novation under clause 43.1 of the contract when it signed the novation and that as such the novation is binding against the MOH

(b) that despite the fact that Mindray Kenya is a fully owned subsidiary of Shenzhen Mindray, the novation was used to circumvent the procurement process since had Mindray Kenya bid it would ordinarily have failed to meet the requirements of the tender and would have been disqualified by virtue of section 66 (2) which requires that *the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.*

2. In respect to who owns the equipment under Lot 1, the Committee made the following observations:

(a) that according to the contract signed on 6th February, 2015 by Shenzhen Mindray, legal ownership of the equipment is vested in Shenzhen Mindray.
(b) however, in the amendment and restatement deed dated 6th May, 2015, the same date when the contractor, Shenzhen Mindray, executes a collateral deed of warranty with Megascope, clause 18.7 of the Contract was amended to shift legal ownership of the equipment from Shenzhen Mindray to Megascope despite the existence of a novation to Mindray Kenya a fully owned subsidiary of Shenzhen Mindray.
(c) that the contractor also signed a subcontractor's deed of warranty between itself, the MOH and the subcontractor. That under the subcontractor's deed of warranty the subcontractor, Megascope, is contracted to carry out certain obligations on behalf of the Contractor and *enter into agreements with Equity Bank Kenya Limited under which Equity Bank shall make available certain credit facilities to the Subcontractor.*

In respect to who owns the equipment under Lot 1, the Committee finds

(a) that as at 6th May, 2015 the equipment is legally owned by Megascope the subcontractor of Shenzhen Mindray who novated the contract to its fully owned subsidiary Mindray Kenya on 6th May, 2015.
(b) that the Subcontractor's Deed of Warranty creates a link between the MOH and Megascope
(c) despite link created by the subcontractor's deed of warranty the MOH is exposed by the transfer of legal ownership of the equipment to a party that was not qualified to be awarded the contract, by clause 2.1 of the same deed that states that *the Beneficiary shall only be entitled to make a claim against the Subcontractor under this clause 2.1 if the contract has terminated and shall not be entitled to do so during the step-in period or after the subcontract has been novated under clause 7* which limit the rights of redress available to MOH should a dispute arise out of the contract in relation to the equipment related to the contract for Lot 1.
(d) that MOH was negligent when it signed an amendment and restatement deed that limited it rights under the contract.
(e) that MOH was negligent when it signed the Subcontractor's Deed of Warranty that also exposed the Government to the risk of being unable to enforce its rights to Lot 1 equipment in case of a dispute.
(f) that the Contract and the Subcontractor's Deed of warranty were used to circumvent the procurement process by awarding the subject matter of the contract to Megascope, a party that would otherwise not have qualified to be awarded the contract as per the term of the tender that required bidders to be original equipment manufacturers. In addition the MOH was negligent and contravened section 66 *(2)* of the PPDA that states that *the evaluation and comparison shall be done using the*

procedures and criteria set out in the tender documents and no other criteria shall be used;

(g) that due to the foregoing the subcontractor, Megascope, through the transfer of ownership of the equipment, ended up becoming the principal in a contract that it would otherwise not have been qualified to win.

3. In respect to whether the cost of equipment supplied under Lot 1 is justified and a representation of value for money, the Committee made the following observations

(a) that the cost of the equipment supplied under Lot 1 were grossly exaggerated. For instance, the Committee observed that the average cost of linen trolleys in the market ranges from Kshs. 5,000 to Kshs. 15,000 depending on quality. However, the indicated direct purchase value of a linen trolley as submitted by the contractor was USD 578 (or Kshs. 58,378.00 at Kshs. 101 to the USD). According to the MOH, under the MES Project, the cost levied against health facilities for the supply and installation of two linen trolleys was USD 6,072 (or Kshs. 613,272 at Kshs. 101 to the USD). This translated to the unconscionable cost of Kshs. 306,637 per linen trolley.

(b) that despite the fact that linen trolleys are basic equipment, the computed costs of the linen trolleys as submitted by the contractor included costs of training, maintenance, delivery, transport, insurance...etc.

(c) that in relation to the pricing of equipment, there were variances in the costs of similar equipment: For example, a charge of USD 526,989.12 (or Kshs. 53,225,901.12) was levied against Makindu Hospital for the supply, delivery and installation of Lot 1 equipment. However, for a similar quantum of equipment, the charge levied against Makueni Hospital was USD 507,543.79 (or Kshs. 51,261,922.79) despite both facilities being found within the same county. This represented a variation of USD 19,446.00 (or Kshs. 1,964,046.00 at Kshs. 101 to the USD) on servicing costs alone.

(d) that according to submissions made by the contractor, no upgrades resulting from changes in technology had been done for any of the equipment supplied under Lot 1. Further, the operability of the equipment was guaranteed by the manufacturer for 10 years.

In respect to whether the cost of equipment supplied under Lot 1 is justified, the Committee finds

(a) that the cost of the linen trolley was unjustifiable and did not represent value for money.

(b) that the MOH contravened Article 201 of the Constitution that requires that public money be used in a prudent and responsible manner by executing a contract that was exploitative.

(c) that such a large variation on servicing costs alone despite both facilities being within the same county and a mere 70km apart was unjustifiable (Annex - always convert) and did not represent value for money.

(d) that the fact that the equipment was not going to be changed often due to technological advancements brought into question the rationale procuring the equipment under the MES Model and not by use of direct purchase the cost of the equipment was not justified and as such there was no value for money.

4. In respect to whether the contractor supplied all the equipment required under Lot 1, the Committee observed that there were discrepancies in the information submitted by the MoH and by the contractor with regards to the quantities of equipment supplied and delivered to the various hospitals. For example, in Garsen Health Centre, Tana River, records obtained from the MoH indicated that two operating theatre lamps and two operating theatre tables were supplied to the facility. However, records obtained from the contractor indicated that the facility had received only one of each of the aforementioned equipment. The Committee therefore observes that there is a likelihood that the MoH may have overpaid the contractor for equipment supplied under this Lot contrary to Article 201 of the Constitution which obligates public entities to ensure prudent use of public resources.
5. In respect to whether the equipment supplied under Lot 1 is functional the Committee made the following observations
   (a) that contrary to the submissions by the subcontractor, it was questionable whether all equipment supplied under Lot 1 had been installed and commissioned by the time of this inquiry as demonstrated by the following:
      (i) Out of 96 beneficiary hospitals, the contractor submitted completion certificates for only 10 facilities as follows:

- Nanyuki DH
- Machakos Level 5 Hospital
- Maragwa DH
- Meru Level 5 Hospital
- Isiolo County Referral Hospital
- Masalani DH
- Nyahururu DH
- Nakuru PGH
- Malava DH
- Mukurweini DH (Annex)

(ii)while delivery notes were submitted for Coast PGH, Nyeri Level 5, Bungoma Level 5 and Embu Level 5 Hospitals, the contractor did not provide their completion certificates (Annex).

(iii) in addition, the 2019 MES Service Level Monitoring Report submitted by PKF Kenya, indicated that the installation of equipment in Ndanai DH, Marsabit DH, Nyamira DH, Garsen DH, Hola DH and Kacheliba SDH was pending owing to the lack of space.

(iv) Further, during a visit to Iten County Referral Hospital in Elgeyo Marakwet, the Committee found that MES theatre equipment in the facility was non-functional, and had been installed in partially constructed theatre facilities.

(b) that the MoH ignored its own findings that most counties lacked the requisite personnel and infrastructure to implement the project, in the *'2014 Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in the proposed Level 4 and 5 Facilities in the Counties' (see Annex 15).* by supplying equipment under Lot 1 that could not be used optimally and as per the submissions of the MOH remained non-functional in at least nine facilities by the time of this inquiry.

(c) that as a result of the negligence by MOH, at the end of the 7-year contractual period set to lapse in 2022, the contractor stands to cart away arguably new, unused equipment while retaining the monies spent contrary to Article 201 (d) of the Constitution which requires that public money be used prudently.

(d) that despite the MOH noting the challenges that are affecting the full implementation of the MES Contracts, the MOH provided no evidence that it had put in place any measures to assist the counties mitigate the challenges in a bid to ensure that equipment is fully functional.

6. In respect to whether payment under Lot 1 was justified, the Committee finds that the cost of the equipment delivered under Lot 1 was unjustifiable and exploitative for the following reasons-

(a) despite the fact that linen trolleys are basic equipment, the computed costs of the linen trolleys as submitted by the contractor included costs of training, maintenance, delivery, transport, insurance…etc.

(b) according to submissions made by the contractor, no upgrades resulting from changes in technology had been done for any of the equipment supplied under Lot 1. Further, the operability of the equipment was guaranteed by the manufacturer for 10 years throwing in to doubt the rationale for procuring the equipment under MES instead of outright purchase.

(c) during its visit to Garbatulla SCH in Isiolo County the Committee found a resuscitaire that had been supplied under Lot 1 still in its original packaging. Further, while the anesthetic machines, operating tables and operating lamps had

been installed, they were in a clear state of disuse, while the instrument and linen trolleys were rusty.

(d) in a visit to Iten County Referral Hospital in Elgeyo Marakwet, the Committee also found that MES theatre equipment in the facility was non-functional, and had been installed in partially constructed theatre facilities.

(e) during its visit to Uasin Gishu County, the Committee also observed that equipment that was originally allocated to Ziwa County Referral Hospital was subsequently reallocated to MTRH. Although according to Schedule 26 to the Contract, both Ziwa and MTRH are beneficiaries of the Lot 1 equipment, the Committee established that MTRH had received only one set of theatre equipment and not two as would be expected.

(f) that despite delays in implementation by the Contractor in 54 beneficiary hospitals, the contractor received payments from the MoH in contravention of section 197 (1) (i) of the Public Finance Management Act 2012 which prohibits wasteful expenditure by public entities; regulation 98 of the PFM (National Government) Regulations which prohibits advance payment of goods; and, section 45 (2) (a) (ii) of the Anti-Corruption and Economic Crimes Act, 2003 which prohibits a person from making payments from public revenues for goods not supplied in full.

7. In respect to whether the variation of the equipment under Lot 1 was prudent, the Committee made the following observations

(a) there was no evidence to suggest that counties had requested for additional equipment.

(b) that the contract for Lot 1 equipment did not provide for the extension of the project term arising from the variation of the contract initiated by the MOH. In this respect, the Committee observes that the facilities which benefited under the variation of the MES contract would benefit from the equipment for only the remaining period under the initial seven years contract. For example, Mwala Hospital which received equipment in 2019 under the variation of the MES contract in respect to Lot 1, is set to benefit from the project for only three years before the contract lapses in 2022.

(c) that as per the MoH records, equipment supplied under the Lot 1 Contract remained non-functional in at least nine facilities by the time of this inquiry.

(d) there is no evidence that the MOH has tried to capacity build the counties to enable them utilise the equipment.

(e) that the proposed variation resulted in a 16.6% increase in the cost of the project which is within the 25% threshold provided for under Regulation 31 (e) of the Public Procurement and Disposal (Amendment) Regulations, 2013.

(f) additional beneficiary facilities under the variation benefitted from the following equipment:

No.	Description	Quanti ty
•	Anaesthetic machine(s) with ventilator	1/2
•	Electrosurgical unit	1
•	Operating theatre lamp, ceiling mounted	1
•	Operating theatre table, major	1
•	Resuscitaires	2
•	Instrument Trolley	2
•	Linen Trolley	2
•	Patient stretchers	3
•	Resuscitation patient trolley	1

(g) that although the MOH letter requesting the variation had proposed 17 hospitals, the Further Amendment and Restatement Deed submitted by MoH listed only fifteen (15) beneficiary facilities. In addition, the Committee also observes that there were inconsistencies between the variation deed submitted by the Contractor, the contents of the MoH letter dated 4th October, 2019, and the Further Amendment and Restatement Deed submitted by MoH as summarized in the table below:

No.	Proposed Hospitals in letter (compare with the Further Amendment and Restatement Deed	Beneficiary hospitals as per the Further Amendment and Restatement Deed Submitted by the MoH	Beneficiary hospitals as per Variation Deed (Annex 3 b) submitted by the Contractor

•	Kigumo SDH	Bura SDH	Kigumo SDH
•	Nyamache SDH	Mpeketoni SDH	Nyamache SDH
•	Yala SDH	Takaba SDH	Yala SDH
•	Molo SDH	Eldas SDH	Molo SDH
•	Londiani SDH	Naitiri SDH	Londiani SDH
•	Mwala SDH	Maragua SDH	Mwala SDH
•	Moyale SDH	Kimbimbi DH	Moyale SDH
•	Does not appear	Mukurweini DH	Kanyakine SDH
•	Garissa PGH	Magutuni SDH	Garissa PGH
•	Kakamega PGH	Gesima SDH	Kakamega PGH
•	Nyeri PGH	Manga SDH	Nyeri PGH
•	Kisii DH	Wesu DH	Kisii DH
•	JOOTRH	Kamwosor SDH	JOOTRH

•	Nakuru PGH	Suguta- Marmar SDH	Nakuru PGH
•	Embu PGH	Port Reitz SDH	Embu PGH
•	Thika District Hospital	Does not appear	Thika District Hospital
•	Coast PGH	Does not appear	Coast PGH

(h) that while the new beneficiary hospitals under the variation to Lot 1 equipment had received similar equipment in terms of quantum, the quantum of equipment received under the variation was significantly less than what the original Lot 1 beneficiary hospitals had received. Under the variation, beneficiary hospitals received only one anesthetic machine, one operating theatre lamp and one operating theatre table as opposed to two respectively when compared to facilities that had benefited under the original contract.

(i) that the equipment delivered to the high-volume facilities under the variation to Lot 1 equipment varied in regard to quantum. For example, while Garissa PGH and Embu PGH received one anesthetic machine each, Kakamega, Nyeri, Kisii, JOORTH, Nakuru, Thika and Coast hospitals received two.

In respect to whether the variation of the equipment under Lot 1 was prudent, the Committee made the following findings

(a) the MOH contravened Regulation 9 (d) of Public Procurement and Disposal Regulations, 2006 which requires user departments, in this case, the counties, to initiate the request in a variation of contract

(b) the MOH negligently proceeded to vary the contracts to include additional facilities while being aware that facilities would be shortchanged in terms of the time for which they are to have utility of the equipment.

(c) the finds that the variation did not represent value for money since the additional hospitals would enjoy the equipment for a shorter time at the same cost as the original hospitals and that the MOH contravened Article 201 of the Constitution that requires that public money be used in a prudent manner by initiating the variation.

(d) that at the end of the 7-year contractual period set to lapse in 2022, the contractor stands to cart away arguably new, unused equipment while retaining the monies spent by the Kenyan public for delivery of the service

(e) the MOH failed to adhere to the findings of its own needs assessment report thereby resulting in imprudent use of public finances contrary to Article 201 of the Constitution that requires that public money be used in a prudent manner.

(f) whereas the variation for the contract related to Lot 1 was within the law the resultant variation per county was over 100% per annum and was therefore unjustifiable.

(g) in view of the above inconsistencies and contradictions, the Committee observes that it was impossible to establish for a fact which county health facilities had actually benefited under the variation of contract, if at all and the contradictory information cast doubt on the veracity of the information received by the MoH and the contractor. In this regard the Committee finds that the PS failed to keep proper records of the contract variation in contravention of section 197 of the PFMA.

(h) that the placement of equipment was haphazard, poorly coordinated, designed to: satisfy commercial interests; complicate monitoring and evaluation; accountability and transparency.

In respect to whether the monitoring and evaluation framework under Lot 1 was effective, the Committee made the following findings

(a) that during the implementation phase of the contract, beneficiary facilities were substituted without making the necessary adjustments to the contractual agreement. For example, equipment scheduled to be supplied to Muriranja, Kianyaga and Karatina Hospitals was instead supplied to Maragua, Kimbimbi and Mukurweini Hospitals respectively.

(b) that the MoH was negligent by making no reference to the contractual agreement prior to making the substitutions thereby making it difficult to monitor and evaluate the project thus in the event of a dispute between the Government and the contractor concerning equipment supplied to the aforementioned facilities, the Committee observes that the Government would be left exposed.

(c) that the PS failed to keep proper records of the contracts or any variations of the contracts in respect to changes in hospitals in contravention of section 197 (l) of the PFMA.

(d) that there were discrepancies in the information submitted by the MoH and by the contractor with regards to the quantities of equipment supplied and delivered to the various hospitals. For example, in Garsen Health Centre, Tana River, records obtained from the MoH indicated that two operating theatre lamps and two

operating theatre tables were supplied to the facility. However, records obtained from the contractor indicated that the facility had received only one of each of the aforementioned equipment thus this contradictory information is likely to complicate monitoring and evaluation of the project thereby significantly affecting accountability of the project.

(e) during its visit to Uasin Gishu County equipment which was originally allocated to Ziwa County Referral Hospital was subsequently reallocated to MTRH. Although according to Schedule 26 to the Contract, both Ziwa and MTRH are beneficiaries of the Lot 1 equipment

(f) that there are questions regarding what happened to equipment that was supposed to be delivered to Ziwa MTRH received only one set of theatre equipment.

8. In respect to which options are available the end of the contract term, the Committee made the following observations

(a) From the foregoing, the Committee observes that at the end of the contractual term the MOH has the following options

(i) to extend the contract for an additional three years;

(ii) to purchase the equipment at a nominal value of one US dollar(US$ 1);

(iii) to retender the services and conclude a new contract with a successor contractor; or

(iv) to terminate on the expiry of the project term

(b) that if the information by the contractor is to be believed, should the counties through the MOH opt to keep the equipment , then the equipment supplied will only provide optimal services for an additional three years after the expiry of the project term before the maintenance costs skyrocket and the increases in maintenance costs and failure rates render the equipment financially unfeasible.

(c) that the provision that the equipment could be bought at USD 1 at the end of the contractual term was just a ruse meant to hoodwink the public into thinking that the MES contract represented value for money.

9. In respect to whether the contractor carried out training of human resources under Lot 1 , the Committee made the following observations

(a) The Committee observed that training of the personnel was factored into the contract at the cost of USD 412,576.87 or (Kshs. 41,670,263.87 at Kshs. 101 to the USD). The Committee further noted that the cost was not broken down inorder to establish the actual cost items that resulted in the figure.

(b) that despite the shortfall of specialists and subspecialists identified by the MoH in the *Preliminary National Assessment Report on the Status of Infrastructure,*

Equipment and Human Resources in the proposed level 4 and 5 health facilities in the counties 2014, the contractor was not required to train any specialists or subspecialists to ensure optimum utility of the equipment.

(c) that whereas the project concept under PPP covered training of personnel for specialised care, the contract for Lot 1 after the shift to public procurement, only provides for user training and not specialist training.

10. In respect to whether the contractor the cost of training under Lot 1 represented value for money, the Committee made the following findings

(a) some of the training that was being offered was in relation to instrument trolleys, a basic piece of equipment, was unjustifiable as basic equipment did not need a training component. That the cost training did not represent value for money to the Kenyan public contrary to Article 201 of the Constitution that requires that public money be used prudently.

(b) the cost of training may have taken into account the cost of lifecycle training as a result of software upgrades and updates. However, according to the contractor, software upgrades to the equipment have not occurred and the equipment has not been replaced as it is guaranteed to last 10 years.

11. In respect to who was to supply the consumables and reagents under Lot 1 and whether equipment and consumables supplied under Lot 1 were safe for use by the Kenyan public, the Committee made the following observations

(a) that Schedule 10 clause 5 of the contract implies that, counties ought to have been receiving reagents and consumables in respect to the equipment supplied under Lot 1.

(b) that the contract in respect to Lot 1 was signed on 6th February , 2015 and the equipment under Lot 1 was imported between 2015 to date. According to KEBS the Bureau did not carry out a verification of conformity with Kenyan Standards in respect to Lot 2 equipment because of a letter from MOH letter dated 16th August, 2020, Ref. No.MOH/ADM/1/1/56/70.

(c) that the letter by MOH did not seek to give a blanket exclusion in relation to MES. That the letter was specific to surgical equipment and x ray equipment.

(d) the Contractor submitted to the Committee certificates of conformity issued by KEBS on diverse dates between 2015 and 2018 for the following equipment: infant radiant warmers, stainless steel trolleys for appliances, stainless steel trolleys for treatment, hydraulic stretchers, patient trolleys, electrosurgical units, surgical lights, operating tables, patient monitors and anesthesia machines. (See annex ...).

(e) that the PPB merely listed the equipment and consumables supplied under Lot 1 and that the Board did not carry out any independent vetting, inspection or quality

control testing to guarantee the safety, efficacy or quality of the equipment and consumables contrary to Section 35D of the Pharmacy and Poisons Act, the PPB request the National Drug Quality Control Laboratory to test imported drugs or medicinal substances with a view to determining whether such drugs or medicinal substances comply with this Act or rules made thereunder.

In respect to who was to supply the equipment and consumables under Lot 1 and whether equipment and consumables supplied under Lot 1 were safe for use by the Kenyan public, the Committee made the following findings

(a) that KEBS cannot claim to have been excluded from carrying out a verification of conformity of the equipment between 2015 and August 2016 and that KEBS failed to carry out its statutory mandate under and was negligent.

(b) that KEBSwas negligent by failing to carry out a pre-import verification of conformity as required under section 4 of the Standards Act and Legal Notice No. 78 of 15th July and was therefore negligent.

(c) that either the contractor or KEBS gave misleading or false information to the Committee in relation to whether equipment under Lot 1 underwent pre-import verification of conformity contrary to section 27 (3) (g) of the Parliamentary Powers and Privileges Act which forbids a witness from furnishing the committee with information which is false or misleading.

(d) the MOH was negligent when it wrote to KEBS seeking to ring fence the mandate of the PPB without first creating the requisite capacity for the Board to effectively carry out that mandate.

12. In respect to whether the country realised value for money in relation to the pricing and supply of the MES equipment consumables, the Committee made the following observations

(a) that under a managed equipment service arrangement, it is a reasonable expectation that recurrent costs such as the supply of consumables and reagents will be covered at no additional cost to the client. Therefore, the Committee finds that the restriction on the supply of consumables and reagents to starter kits that were only to last 3 months under the MES project was severely skewed against the government and therefore the taxpayers.

(b) that the letter dated 2nd November, 2017, Ref. No. MOH/FIN/1/A.VOL.I(229) from the MOH provides an indication of the significant and additional burden imposed on counties for the running and operation of MES equipment.

(c) that consumables and reagents under Lot 1 locked. The Committee therefore finds that contrary to Resolution 5 of the Communique dated 22nd October, 2013 issued by the Cabinet Secretary for Health and Senior Ministry Officials with Chief Executive Members for Health and Finance, and County Directors of Health, the MES contract for Lot 1 equipment did end up creating a monopoly for the contractor in respect to consumable and reagents.

In respect to whether the country realised value for money in relation to the pricing and supply of the MES equipment consumables, the Committee made the following findings

(a) that the contractors have continuously failed to comply with the provisions of the contract. Infact, from the letter dated 2nd November, 2017, Ref. No. MOH/FIN/1/A.VOL.I(229) from the then PS, Health, Mr. Julius Korir, CBS, the MoH to the NT, the Committee observes that MoH recognised that the burden of procuring reagents and consumables was not being legitimately borne by counties.

(b) that Dr. Muraguri intentionally misled the Committee by stating that all the contractors were only supposed to supply starter kits for the consumables in contravention of section 27 (3) (g) of the Parliamentary Powers and Privileges Act, 2017 which makes it an offence to wilfully make a statement or furnish a committee of Parliament with information which is false or misleading.

(c) that the contract in relation to Lot 1 precluded the possibility of a fair and competitive environment in regard to reagents contrary to the provisions of Article 227 (1) of the Constitution which obligate public entities to procure goods and services cost effectively and competitively and section 21 of the Competition Act which prohibits indirectly fixing purchase or selling prices of the consumables.

Committee recommendations

The Committee has established that the change of ownership of equipment from the contractor, Shenzhen Mindray, to the subcontractor, Megascope, indicates that the actual person who supplied the equipment was not the original equipment manufacturer. This state of affairs had implications on the pricing of the equipment and as such equipment for Lot 1 was overpriced. Further, the Committee has established that a number of the equipment supplied under Lot 1 was not functioning thus clearly indicating there is no value for money. As a result of the foregoing, the Committee therefore recommends —

1. **that the EACC investigate the circumstances surrounding the implementation of the contract relating to Lot 1 and in particular -**

   (a) the change of ownership of equipment from the contractor, Shenzhen Mindray, to the subcontractor, Megascope; and

   (b) the cost of the equipment supplied under Lot 1;

2. **that a multisectoral committee comprising a representative of the MOH, representation of the COG, a representative of the PPB, a representative of KEBS, a representative of National Treasury, a representative of OAG & DOJ and representatives of civil society in health sector be establsihed to undertake a valuation of the equipment supplied under Lot 1 to validate the viability of the equipment in**

respect to the lifecycle model in the contract and at the end of the contractual term in 2022 and report back to the Senate within 6 months.

3. that MOH re-examine the legal framework that the Pharmacy and Poisons Board and the Kenya Bureau of Standards operates to ensure they effectively discharge their mandate to protect Kenyans.

4. that the EACC and DCI to investigate the circumstances under which KEBS and PPB failed to carry out their statutory obligations to ensure the standards and safety of medical products imported under MES and in particular establish how Shenzhen Mindray and Megascope received pre-import verification of conformity certificates on various dates.

5. That EACC and DCI to investigate the circumstances under which the contract for Lot 1 equipment was varied without requests from the counties as required by Regulation 9 (d) of the Public Procurement and Disposal Regulations, 2006 (now regulation 34 (d) of the Public Procurement and Asset Disposal Regulations, 2020)

6. That EACC investigate the circumstances under which the counties paid more than 100% for variation of the MES contracts despite the fact that the variation for Lot 1 was within the 25% threshold envisaged under the law.

7. That EACC investigate the circumstances under which the cost of the equipment under Lot 1 was inflated.

8. The Competition Authority investigate the relationship between Shenzhen Mindray and Megascope and in particular the circumstances under which Megascope became the owner of the equipment.

9. Since the contractor delayed installation of the equipment, the Ministry of Health as the agent of County Governments in this transaction renegotiate for the extension of the time for the service delivered under Lot 1 at no additional cost to the Government since the counties faithfully paid for the equipment throughout.

10. The Auditor General carry out an audit of the payments made in respect to Lot 1 with a view to determining whether the payments were made in accordance with the law and the contract and submit its report to the Senate in 6 months.

LOT 2: THEATRE AND CENTRAL STERILISING SERVICES DEPARTMENT (CSSD) EQUIPMENT

4.3. ESTEEM INDUSTRIES INC (INDIA) AND SUBCONTRACTOR, DEBRA LTD LTD (KENYA)

4.3.1 Background

The MoH awarded Esteem Industries Inc., a company registered in India, the tender to supply theatre and CSSD equipment under Lot 2 of the MES Project *(Tender No. MOH/001/2014/2015).*

On 6. February, 2015 the MoH and Esteem Industries Inc. (India) executed a contract for the supply of Lot 2 theatre equipment at an initial contract cost of USD 88,027,973.32 (or Kshs. 8,890,825,305.30 at Kshs. 101 to the USD). Under the contract, which was amended and restated on 20th July, 2016, a total of ninety-four (94) hospitals, two (2) hospitals from each of the 47 counties, were selected to benefit from theatre and CSSD equipment as follows:

No.	Equipment per hospital		Quantity
1.	Autoclave		1
2.	Ultrasonic washer		1
3.	Surgical sets: - 28 sets to Level 4 Hospitals - 29 sets to Level 5 Hospitals	Amputation set	1
		Basic Laparotomy set	2
		Basic Prostatectomy set	3
		Basic Thyroidectomy set	4
		K nail set	5
		Paediatric general set	5
		Caesarean section set	1
		E.U.A set	2

		General Hysterectomy set	3
		V.V.F set	4
		Bladder washout set	1
		Catheterization set	2
		Cut down adult set	3
		Incision & Excisional biopsy	4
		Incision Tray	5
		Stitch removing set	6
		Cholecystectomy set	1
		Craniotomy set	2
		General thoracic set	3
		Urethroplasty set	4
		E.N.T general set	1
		Foreign Body (ear /nose) set	2
		Myringotomy set	3
		Tonsillectomy set	4
		Tracheostomy set	5
		Varicose vein stripper set	6
		Glaucoma set	2
		Gromet set ENT	3

A variation of the contract executed on 16th October, 2017 would see an additional twenty-four (24) hospitals covered under this Lot i.e twenty-two (22) county health facilities, and two (2) national referral hospitals, bringing the total number of beneficiary facilities under Lot 2 to one-hundred and eighteen (118). Under this variation, the contract cost of Lot 2 equipment rose by 17.7% to reach USD 103,615,896.84 (or Kshs. 10,465,205,503.07 at Kshs. 101 to the USD).

In respect of the contract, Esteem Industries Inc., the original equipment manufacturer, co-contracted Debra Ltd (Kenya) to implement civil works, installations, certifications and maintenance.

2.16.2. Submissions from the Contractor: Esteem Industries Inc (India)

The Committee held a total of two hearings with respect to the contract for Lot 2 equipment: The first hearing held on 31st October, 2019 aborted owing to the lack of representation by the main contractor, Esteem Industries Inc. (India).

In the second hearing held on 11th November, 2019, the Committee met with representatives of Esteem Industries led by the Director, Mr. Mahendra Tandon; and, representatives of the subcontractor, Debra Ltd, led by its CEO, Dr. Shadrack Kihara Mwiti.

Key highlights of the submissions received by the Committee are summarized below-

2.16.2.1. Execution of Lot 2 Contract for Theatre and CSSD Equipment

According to the Contractor, on 6th February, 2015 the MoH and Esteem Industries executed a contract for the supply, delivery, installation, commissioning, maintenance and repair of Lot 2 theatre and CSSD equipment at an initial contract cost of USD 88,027,973.32 (or Kshs. 8,890,825,305.32 at Kshs. 101 to the USD). This contract was signed by Mr. Mahendra Tandon, Director, Esteem Industries and witnessed by Dr. Mwiti, CEO, Debra Ltd. However, when the contract was subsequently restated and amended on 20th July, 2016 it was Dr. Mwiti, CEO, Debra Ltd who signed .

Under the contract, a total of ninety-four (94) hospitals, two (2) hospitals from each of the 47 counties, benefitted from theatre and CSSD equipment as follows: 94 autoclaves, 94 ultrasonic washers and assorted sets of surgical equipment.

2.16.2.2. Power of Attorney

According to the Contractor, on 18th February, 2015, it signed a power of attorney donating all authority under the contract to Dr. Shadrack Mwiti, CEO, Debra Ltd as a co-contractor. However, liability for the performance of the contract was retained by the contractor.

2.16.2.3. Subcontractor

According to the contractor, it appointed Debra Ltd to serve as a subcontractor after the signing of the contract. During the tendering stage, despite it being a mandatory requirement, the contractor did not submit the name of a local subcontractor.

2.16.2.4. Variation of Contract

Under a variation of the contract executed on 16th October, 2017, the contractor supplied theatre and CSSD equipment to twenty-four (24) additional hospitals including, twenty-two (22) county health facilities, and two (2) national referral hospitals. Under the variation, the contract cost of the Lot 2 equipment rose by 17.7% to reach USD 103,615,896.84 (or Kshs. 10,465,205,503.07 at Kshs. 101 to the USD).

2.16.2.5. Payments Received

Payments under the contract were made in respect to Esteem Industries. The first payment amounting to USD 1,239,685.00 was made by the MoH on 25th May, 2015. Thereafter, the MoH had effected quarterly payments of Kshs. 3,143,856.19 under the initial contract. The total payments received by the contractor by the time of this inquiry amounted to USD 56,217,761.05 (or Kshs. 5,677,993,866.00 at Kshs. 101 to the USD).

2.16.2.6. Previous Works in Kenya

Prior to the MES Project, in 2013, Esteem Industries supplied autoclaves to nine (9) health facilities as follows: Kihara SDH, Eldama Ravine DH, Bahati DH, Malindi SDH, Taita Taveta DH, KNH, Kanyake SDH, Mpeketoni SDH and Thika Level 5 Hospital.

2.16.3. Submissions from the Co-Contractor: Debra Ltd (Kenya)

2.16.3.1. Role of Debra Ltd during the Execution of the Contract

According to Dr. Mwiti, CEO, Debra Ltd, prior to the execution of the contract on 6th February, 2015, he received a letter from the MoH inviting him to an official signing of the contract in State House as the local agent of Esteem Industries Inc. To note, no copy of such a letter was availed to the Committee.

2.16.3.2. Status of Implementation and Utilisation of Lot 2 Equipment

Dr Mwiti further stated all equipment supplied under Lot 2 had been delivered and installed in beneficiary hospitals and completion certificates duly issued by the MoH. The issuance of the completion certificates was done upon surrender of delivery notes signed by the medical superintendent, administrative officer(s) and biomedical engineers of recipient hospitals. All autoclaves and ultrasound washers supplied under the contract were currently in use (*Annexure XXIV).*

2.16.3.3. Payment Arrangements under the Lot 2 Contract

Payments under the contract were made in respect to Esteem Industries at an Equity Bank account whose signatories included Mr. Mahendra Tandon, Director, Esteem Industries, and Dr. Shadrack Mwti, CEO, Debra Ltd. Dr Mwiti explained that, for purposes of convenience, and by virtue of power of attorney, Dr. Mwiti operated the account on behalf of Esteem Industries and was present at the opening of the account.

2.16.3.4 Replacement of Lot 2 Equipment

According to Dr Mwiti, at the time of this inquiry, Debra Ltd had replaced an initial set of autoclaves supplied to the ninety-six (96) beneficiary hospitals under the contract with new ones. However, the initial set of autoclave machines had been left in use as additional equipment across the counties .

2.16.3.5. Staff Training

According to the Contractor, it had provided training for one thousand four hundred and sixty four (1,464) hospital staff from different cadres. This included four nurses, four biomedical engineers and four support staff from each beneficiary hospital.

2.16.3.6. Regulatory Status of Lot 2 Equipment

According to.the Contractor, .all equipment supplied under Lot 2 was duly listed by KEBS and PPB. See *Annexure XXIV* for the regulatory status of Lot 2 equipment as submitted to the Committee by the Contractor.

Copies of the written submission and annexures received from the Contractor are herein attached as Annexure XXIV

Committee Observations

1. In respect to the identity of Debra Limited, its relationship with Esteem and the role it plays in regard to implementation of the Lot 2 Contract, the Committee made the following observations

   Identity of directors of Debra Limited

   (a) The Committee observed that a CR 12 dated 11th October, 2019,issued by Registrar of Companies listed the directors of Debra Limited as Shedrack Mwiti and Steven Muriuki however, according to Dr. Mwiti, Mr. Muriuki exited the company sometime in 2013 or 2014 as a director. Section 138 of the Companies Act, 2015 which requires the company to give notice to the Registrar of companies fourteen days after a person ceases to hold appointment as a director of a company.

   Debra Limited's relationship with Esteem

2. In regard to the relationship between Esteem and Debra, the Committee considered the relationship between Esteem and Debra prior to and including on 6th February 2015, the Committee made the following observations:

   (a) that the letter dated 24th November, 2014 to the MoH, stating that the contractor authorises Debra Limited to negotiate and sign on its behalf any documents in regard to the tender, is signed by an unnamed person. Mbito J when considering who can be an agent in **Provincial Construction Company & another v Attorney General [1991]KLR** stated *in law, one is said to be an agent if he acts for another with the consent of that other. One can also be deemed to be an agent of the other*

by operation of law or by an agreement. Due to the foregoing, the Committee finds that the letter dated 24th November, 2014, is not proof that the contractor had appointed Debra as its agent since the Committee cannot substantiate who signed the letter. Nonetheless, the Committee also observes that if the letter dated 24th November, 2014 is indeed signed by the managing partner of Esteem, then Esteem was not bound to appoint Debra as its subcontractor under the contract.

(b) in this regard, the Committee observes that Schedule 15 (page 62) to the Lot 2 Contract signed on 6th February, 2015, contains no information in regard to subcontractors. Therefore, the Committee finds that the assertion by Dr. Mwiti that Debra had been appointed as a subcontractor prior to 6th February, 2015 unsubstantiated.

(c) in relation to the assertion by Dr. Mwiti that he attended the signing ceremony of the Lot 2 Contract on 6th February, 2015, the Committee observes that clause 50 of the contract states that *where any information or documentation is to be provided or submitted to ...the contractor representative it shall be provided or submitted by sending the same by registered post or by hand, leaving the same at Mr. Tandon Mahendra Pratab Esteem Industries Inc., 2 EF, EPIP, Phase 1, Jharmajri, Baddi- 174103 H.P., India*. The Committee further observes that the contractor did not provide any evidence that it had invited Dr. Mwiti to the signing of the contract ceremony that was held in Statehouse. Therefore, the Committee observes that it unusual for Dr. Mwiti to have attended the signing of the contract in Statehouse on 6th February, 2015 without an invitation from the Contractor.

3. The Committee also considered the relationship between Esteem and Debra post 6th February 2015, in this respect the Committee made the following observations:
   (a) that the power of attorney signed on 5th April, 2016, states in part that *This power of attorney is made on February 18th, 2015 by Esteem Industries Inc.... the company appoints Dr. Shadrack Mwiti, acting in his personal capacity and in the capacity of legal representative/ director of Debra Limited ("Key subcontractor" under the contract and "co-contractor" by virtue of joint venture agreement dated 5.03.2015 with the contractor) a limited liability company registered in Kenya under the companies act ... as its attorney in fact(attorney in fact)*. In this regard, the Committee observes that the power of attorney purports to be retrospective in nature in that although it was signed on 5th April, 2016, the donor purports to be donating the power to Dr. Mwiti on February 18th, 2015.

(b) that the power of attorney states *the contractor declares that this power of attorney is irrevocable for the duration of the project, or any executions thereof allowed under the contract.* In this regard, the Committee observes that for a power of attorney to be considered irrevocable Dr. Mwiti the CEO/ Director of Debra, must have offered valuable consideration which would explain the description of Dr Mwiti as both a co-contractor and subcontractor within the power of attorney.

(c) that the contractor submitted that it runs Equity Bank account number 0180164319999 in the name of Esteem Industries Inc. In this respect the Committee observes that according to a letter dated 13th November, 2019 from Equity bank, the directors of this Esteem Industries Inc. are Mahendar Tandon and Vipul Tandon. The letter further states that the two directors appointed Dr. Mwiti (a director in Debra Limited, the contractor's subcontractor) to be a signatory to the account. In relation to this, the Committee further observes that according to a CR 12 issued on 2nd June, 2015 by the Registrar of Companies, Esteem Industries Inc. was registered in Kenya on 13th April, 2015 and the directors of Esteem Industries Inc. as at 2nd June, 2015 were—

(i) Mahendar Pratap Tandon (Indian)

(ii) Vipul Tandon Tandon (Indian)

(iii) Ferdinand G Muchomba- Secretary (Kenyan)

(iv)Shadrack Mwiti- Authorised person (Kenyan)

(d) that Debra Limited is not an original equipment manufacturer and as such had it bid for the tender to supply Lot 2 equipment, it would have failed to meet the requirements of the tender and would have been disqualified by virtue of the fact that it was not an original equipment manufacturer.

(e) that whereas the contractor submitted that the branding difference that saw some equipment supplied under lot 2 to Garbatullah, Isiolo and Meru beneficiary health facilities being branded 'Estem' instead of 'Esteem' may have resulted from inadvertent inscription before shipment of the equipment, the subcontractor, Debra Limited disowned the equipment altogether and disputed its source. The Committee therefore finds that the contradictions that it witnessed between the contractor and its subcontractor is a further indication that Debra is not the subcontractor as is alleged but may actually be the contractor.

In regard to the role played by Debra in respect to the contract relating to Lot 2, the Committee finds that-

(a) as at 6th February, 2015, Debra limited did not have a valid and binding relationship with Esteem in relation to the contract for Lot 2.

(b) the relationship between Esteem and Debra in respect to Lot 2 equipment prior to 6th February, 2015 is not substantiated and as such it was unusual for Dr. Mwiti to have attended the signing of the contract in Statehouse on 6th February, 2015 without an invitation from the Contractor since at 6th February, 2020, Dr Mwiti and indeed Debra were not privy to the contract.

(c) the relationship between Esteem and Debra in relation to Lot 2 prior to 5th April 2016 is suspicious and could have been orchestrated by persons other than the contractor.

(d) Dr. Mwiti must have offered valuable consideration inorder for Esteem to donate to him an irrevocable power of attorney and be described as a co-contractor of the project.Further the Committee finds that as at 5th March, 2015, Dr. Mwiti, the CEO/ Director Debra, Dr. Mwiti, was a co-contractor in relation to the contract for Lot 2 by virtue of a joint venture agreement.

(e) the power of attorney and the joint venture agreement were used to circumvent the public procurement process since, had Debra bid, it would ordinarily have failed to meet the requirements of the tender and would have been disqualified by virtue of section 66 (2) which requires that *the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.*

(f) that by virtue of the foregoing, Dr. Mwiti, the CEO/ Director Debra, has been the contractor in relation to Lot 2 equipment since 5th April, 2016.

4. In respect to who receives payment for Lot 2 Equipment, the Committee made the following observations:

(a) that the MOH pays money into an account that is not the account declared in the contract since as per the testimony of the contractor, payments in relation to Lot 2 Contract are deposited into Equity Bank account number 0180164319999 in the name of Esteem Industries Inc. Neither the MOH nor the contractor submitted before the Committee any documentary evidence showing the change in account details.

(b) that according to a letter dated 13th November, 2019 from Equity Bank the directors of the Esteem Industries Inc., the bank account in to which the payment for Lot 2 equipment is made, are Mahendar Tandon and Vipul Tandon. The letter

further states that the two directors appointed Dr. Mwiti, CEO/ Director, Debra to be a signatory to the account.

(c) that according to a CR 12, submitted by the contractor and issued on 2nd June, 2015 by the Registrar of Companies, Esteem Industries Inc. was registered on 13th April, 2015 and the directors of Esteem Industries Inc. as at 2nd June, 2015 were—

(i) Mahendar Pratap Tandon (Indian)
(ii) Vipul Tandon Tandon (Indian)
(iii) Ferdinand G Muchomba- Secretary (Kenyan)
(iv) Shadrack Mwiti- Authorised person (Kenyan)

(d) Taking all the above into consideration, the Committee confirms that Dr. Mwiti the CEO/ Director Debra has in fact been the contractor in relation to Lot 2 equipment and has been paid for works under the contract as though he were the contractor.

In regard to who receives payment in relation to Lot 2, the Committee finds that-

(a) the payments relating to Lot 2 have in fact been made in to an account that Dr. Mwiti, the CEO/ Director Debra, has been operating.

(b) due to the fact that Dr. Mwiti the CEO/ Director Debra has been operating the account in to which payment has been made and the fact that the contractor issues Dr Mwiti with an irrevocable power of attorney in relation to Lot 2 equipment, Dr Mwiti has in fact replaced Esteem Industries Inc (India) as the contractor for Lot 2 equipment.

(c) the Contractor and Dr. Mwiti colluded to circumvent the public procurement process by assigning the rights and obligations under the contract to a party who would otherwise not have won the contract.

(d) the contractor and Dr. Mwiti engaged in a fraudulent practice in contravention of section 41 of the PPDA that resulted in the MOH being deprived of the benefits of free and open competition.

(e) the PS contravened section 197 (1) (l) of the Public Finance Act, 2012 that requires the accounting officer to keep proper records by failing to keep records regarding the account details in to which money in respect to the contract for Lot 2 was to be paid.

5. In respect to whether the equipment under Lot 2 was delivered, is functional and represents value for money, the Committee made the following observations:

(a) that from the *PKF MES Service level Monitoring Report, January 2019* report, the contactor for Lot 2 equipment delayed implementation in 16 beneficiary hospitals.In this regard the Committee observes that Schedule 13 to the Contract relating to Lot 2 provided for performance deductions, however according to the *PKF MES Service level Monitoring Report, January 2019* performance deductions

relating to Lot 2 were yet to be effected almost four years after the contract was executed.

(b) that despite the delay in implementation, the contactor received its first quarterly payment when it fell due on 3rd February 2016 in accordance with clause 28 of the contract which obligates the MoH to pay the contractor each quarter when the payment falls due and provides that the contractor is entitled to receive interest on any payment not made on the due date.

(c) that neither the contractor nor the MoH presented the Committee with copies of completion certificates issued in relation to Lot 2. However, the contractor submitted delivery notes in relation to equipment supplied to various beneficiary hospitals under the contract.The Committee however notes that the contractor did not provide delivery notes from some beneficiary hospitals for verification and some of the delivery notes submitted were illegible.

(d) that from the legible delivery notes submitted, there were discrepancies in the information submitted by the MoH and by the contractor with regards to the quantities of equipment supplied and delivered to the various hospitals. For instance, whereas the delivery note in respect to Kabarnet shows that Kabarnet received 1 autoclave, 1 ultrasonic washer, 29 surgical sets; the MOH records show that Kabarnet received 3 autoclave, 2ultrasonic washers, 109 surgical sets (See Annexure XXIV)

(e) that according to the delivery notes, Garsen, Griftu, Marsabit and Ndanai were recorded as lacking three phase electricity to power the machines and Wajir is recorded as lacking three phase power and water with the requisite pressure required by the machines thereby rendering the equipment unusable.

(f) that during a county visit to Hola health facility in Tana River county, the Committee observed that various surgical sets supplied under Lot 2 lay unused, idle and still in their original packaging since the county was yet to employ the subspecialists necessary to utilise the equipment and had resulted in inviting the subspecialists needed to use the equipment during medical camps held by the county from time to time. The Committee further noted that despite Tana River county's efforts, the county had, as at the time of the inquiry, been unable to attract subspecialists who could use the vericose vein stripper set and urethroplasty set delivered.

(g) that as a result of the foregoing, the MOH ignored its own needs assessment report:*Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in the proposed level 4 and 5 health facilities in the counties 2014* , which had stated that some counties lacked specialists and the requisite infrastructure to absorb the equipment supplied under Lot 2.

(h) that Clause 34 of the contract provides that *in the case of breach by the MOH that causes a delay which has a material adverse effect on the implementation (of the*

project) that results in the contractor incurring a loss and/or expense as a direct result of the breach, the contractor would be entitled to compensation that will place the contractor in "no better and no worse" position had the relevant compensation event not occurred.

(i) that the contract does not provide for performance deductions in the case of a nonutility of the equipment by virtue of a breach by MOH and as such the contractor will still receive payments from MOH when the quarterly payment under the contract falls due regardless of whether or not the equipment is being used.

(j) that the MOUs that were executed between MoH and the forty-six (46) County Governments were generic and did not make reference to pertinent issues such as specific county needs being addressed. The Committee also reiterates that County Governments were not involved in the needs assessment exercise that led to the prioritization of equipment under the MES Project in contravention of Article 6 of the Constitution which requires *the two levels of Government conduct their mutual relations on the basis of consultation and cooperation.*

(k) that some of the equipment received under Lot 2 was of lower quality than others. For instance some equipment received in Garbatulla hospital was rusting while still in the boxes an indication of the fact that the equipment might be substandard.

(l) that for the most part the Contractor had ensured that the equipment was functional and operational. However, during the Committee's visit to Malindi, it observed that the sterilizing unit supplied to Malindi DH had a faulty filter and the contractor had taken more time than required under the maintenance provisions of the contract to remedy the situation.

(m) that the contractor had not been decommissioning or disposing of the equipment it replaced in accordance with the lifecycle model under the contract but had instead left the equipment in the hospitals. According to Dr. Mwiti, CEO, Debra Ltd the initial set of autoclaves supplied under the contract had been left for use in counties as additional equipment rather than being disposed of because they were still serviceable.

From the foregoing the Committee finds that-

(a) payments made to the contract in regard to the delayed implementation in 16 hospitals is unjustified because despite delays in implementation by the Contractor, the contractor received its first quarterly payment from the MoH when it fell due on 3rd February 2016 in contravention of Article 201 of the Constitution that requires public money be used prudently and reasonably; section 197 (1) (i) of the Public Finance Management Act 2012 which prohibits wasteful expenditure by public entities; regulation 98 of the PFM (National Government) Regulations which prohibits advance payment of goods; and, section 45 (2) (a) (ii) of the Anti-

Corruption and Economic Crimes Act, 2003 which prohibits a person from making payments from public revenues for goods not supplied in full.

(b) the MOH was negligent when it accepted unconscionable contractual provisions that resulted in MOH paying for equipment despite the fact that the equipment delivered could not be used due to lack of the necessary infrastructure or health care professionals necessary to ensure utility of the equipment.

(c) the MOH was also negligent when it failed to make the performance deductions amounting to USD 33,903 (Kshs. 3,424,203 using a conversion rate of 101) in accordance with Schedule 13 to the contract relating to equipment under Lot 2. In this regard the Committee finds this inaction by MOH may have resulted in loss of public funds.

(a) the cost of the project in relation to Lot 2 may have been inflated given the differences in the amount of equipment actually delivered to the health facilities;

(b) the MOH was negligent and contravened Article 201 of the Constitution which requires that public money shall be used in a prudent and responsible way when it ignored its own needs assessment report *Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in the proposed level 4 and 5 health facilities in the counties 2014* , which had stated that some counties lacked specialists and the requisite infrastructure to absorb the equipment supplied under Lot 2;

(c) the contractual provisions in Lot 2 were skewed against the government since the MoH, having drafted the specifications of the equipment, was aware that some of the equipment was to be delivered to areas of the country that lacked sufficient power or water to operate them but still had equipment supplied to those areas knowing full well that there was a high likelihood that the equipment would lay idle and as a result Kenya would lose money;

(d) the MOH failed to use the existing intergovernmental structure to waylay the possible loss of public finances;

(e) the lifecycle model of the equipment may have been doctored to increase the cost of the contract to the detriment of the Kenya public since if the equipment was still serviceable it is not justifiable to seek to replace the equipment during its functional lifespan.

(f) the Contractor may be unable to dispose of the equipment as required under the contract.

6. In respect to whether equipment under Lot 2 is safe for use by Kenyans, the Committee made the following observations:

(a) that some of the equipment in Garbatulla, Isiolo and Meru were inscribed 'Estem' instead 'Esteem'. The Committee further observed that the equipment inscribed 'Estem' was of lower quality than those inscribed 'Esteem'. Whereas the contractor

stated that the branding difference could have been as a result of inadvertent inscription before shipment, its subcontractor Debra Limited disowned the equipment named 'Estem'.

(b) that the equipment supplied by the contractor to Garbatulla was rusting while still in boxes, an indication of the fact that the equipment might be substandard.

(c) that the mandate of KEBS to carry out pre-import verification of standards is a duty imposed by section 4 of the Standards Act and and Legal Notice No. 78 of 15th July, 2005.

(d) that the contract in respect to Lot 2 was signed on 6th February , 2015 and the equipment under Lot 2 was imported between 2015 to date. According to KEBS, KEBS did not carry out pre-import of verification of conformity with Kenyan Standards in respect to Lot 2 because of a letter from MOH dated 16th August, 2020, Ref. No.MOH/ADM/1/1/56/70. In this respect, the Committee observes that the letter by MOH is dated 16th August 2016. The Committee therefore observes that KEBS cannot claim to have been excluded from carrying out a verification of conformity of the equipment between 2015 and August 2016.

(e) that the letter by the MOH made reference to surgical equipment and that surgical equipment is part of the equipment that was delivered under Lot 2.

(f) that although KEBS asserted that it did not carry out pre-import verification of conformity, the contractor submitted to the Committee certificates of conformity No.S2015/07/30148 issued by KEBS on 31st July, 2015, S2015/08/302508 issued by KEBS on 7th August, 2015 and S2015/08/303087 issued by KEBS on 12th August, 2015.

(g) that the Contractor did not submitted any KEBS certification pre-dating July, 2015 yet according to the contractor, equipment to Homabay, Machakos, Thika and Kakamega county was installed and commissioned between May and June, 2015.

(h) that the PPB merely listed the equipment and consumables supplied under Lot 2 and that the PPB did not carry out any independent vetting, inspection or quality control testing to guarantee the safety, efficacy or quality of the equipment and consumables contrary to Section 35D of the Pharmacy and Poisons Act which allows the PPB to request the National Drug Quality Control Laboratory to test imported drugs and medicinal substances to determined whether the drugs and medicinal substances comply with the Pharmacy and Poisons Act or rules made thereunder.

Due to the foregoing, the Committee finds

(a) that KEBS was negligent when it failed to confirm the standards of the equipment delivered under Lot 2 as required under section 4 of the Standards Act Legal Notice No. 78 of 15th July, 2005.

(b) that the PPB failed to carry out any independent vetting, inspection or quality control testing of the equipment to guarantee the equipments safety, efficacy or quality of the drugs and medicinal substances supplied under Lot 2.

(c) that the questionable, unsatisfactory and dysfunctional role of KEBS and PPB in the discharge of their statutory mandate in the MES project left Kenyans severely exposed.

7. In respect to who is supposed to supply consumables and reagents under the contract and whether the reagents, the Committee observes

   (a) that consumables under Lot 2 were locked.

   (b) that contrary to Resolution 5 of the Communique dated 22nd October, 2013 issued by the Cabinet Secretary for Health and Senior Ministry Officials with Chief Executive Members for Health and Finance, and County Directors of Health, the MES contract for Lot 2 equipment did end up creating a monopoly for the contractor in respect to consumable and reagents.

8. In respect to whether the variation under Lot 2 was prudent and whether it represents value for money, the Committee made the following observations

   (a) that the MoH was not the only user department that the variation was to affect. In this regard, the MoH did not provide the Committee with any evidence that it had received requests from the counties seeking the variation before it sought to vary the contract on behalf of counties.

   (b) that the contract for Lot 2 equipment did not provide for the extension of the project term arising from the variation of the contract initiated by the MOH. In this respect, the Committee observes that the facilities which benefited under the variation of the MES contract would benefit from the equipment for only the remaining period under the initial seven years contract and as such the variation did not represent value for money.

   (c) nonetheless, that the proposed variation resulted in a 17.7% increase in the cost of the project which is within the 25% threshold provided for under Regulation 31 (e) of the Public Procurement and Disposal (Amendment) Regulations, 2013. However, the Committee observes with concern that whereas the variation was within the law, the resultant variation per county was over 100% per annum.

9. In respect to whether the contractor carried out training under Lot 2, the Committee made the following observations

   (a) that the contractor carried out the user training as required by the contract. However, the Committee notes that the MES contract did not require the contractor to train any specialists or subspecialists yet in order to use some of the surgical equipment provided under the Lot, there was a need to have subspecialists to ensure optimal utility of the equipment.

(b) that whereas the project concept under PPP covered training of personnel for specialised care, the contract for Lot 6 after the shift to public procurement, only provides for user training and not specialist training.

In this regard, the Committee finds that the MoH failed in its duty to ensure value for money since it failed to take in to account the findings of its report titled *Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in the proposed level 4 and 5 health facilities in the counties 2014* that highlights the magnitude of inadequacy of specialist doctors by procuring equipment for hospitals that lacked the subspecialists that could use the equipment.

10. In respect to whether the MOH effectively carried out monitoring and evaluation of Lot 2, the Committee made the following observations
    (a) that during a visit to Isiolo CRH, some of the equipment supplied under Lot 2 was labelled 'Esteem' while others were simply labelled 'Estem'. When the matter was brought to the attention of the contractor and subcontractor,the contractor submitted that the branding difference may have resulted from inadvertent inscription before shipment whereas the subcontractor Debra Limited disowned the equipment altogether and disputed its source. The Committee therefore finds that the contradictions arising from the equipment delivered under Lot 2 were suggestive of the fact that counterfeit equipment was supplied under the contract.
    (b) that the MOH pays money into an account that is not the account declared in the contract since as per the testimony of the contractor, payments in relation to Lot 2 Contract are deposited into Equity Bank account number 0180164319999 in the name of Esteem Industries Inc. Neither the MOH nor the contractor submitted before the Committee any documentary evidence showing the change in account details.
    (c) that the contractor had not been decommissioning or disposing of the equipment it replaced in accordance with the lifecycle model under the contract but had instead left the equipment in the hospitals. According to Dr. Mwiti, CEO, Debra Ltd the initial set of autoclaves supplied under the contract had been left for use in counties as additional equipment rather than being disposed of because they were still serviceable.

11. In regard to whether monitoring and evaluation of Lot 2 was effective, the Committee finds
    (a) the MOH failed in monitoring and evaluation since it failed to note that the contractor had delayed implementation in 16 hospitals until the report by PKF in 2019.
    (b) that the MoH contravened section 197 (1) (l) of the Public Finance Act, 2012 that requires the accounting officer to keep proper records when it failed to record to

the change of account details related to payment made in respect to the contract for Lot 2 equipment.

(c) that the MOH had failed to carry out an effective monitoring and evaluation criteria that has lead to the contractor leaving equipment in the hospitals that should have been deinstalled and decommissioned in accordance to clause 18.8 of the Contract.

(d) that the lack of itemisation of the cost components complicates monitoring and evaluation of Lot 2 equipment in respect to consideration of value for money. In this regard, the Committee finds that the MOH was negligent in not requiring the itemisation of the costs of the equipment.

(e) that the monitoring and evaluation of Lot 2 is complicated by the fact that the cost of Lot 2 is not itemised into product price; consumables; installation; fitting works; training; maintenance; financial costs insurance costs and other project execution costs.

12. In respect to whether the cost of Lot 2 represents value for money, the Committee made the following observations

(a) that the cost of Lot 2 is not itemised into the product price, consumables, installation, fitting works, training, maintenance, financial costs, insurance costs and other project execution costs.

(b) that prices of equipment supplied under Lot 2 were grossly exaggerated. For example, according to MoH records, a stitching removal set which typically comprises a suture tray, a pair of scissors and a pair of tongs was supplied to counties at the unconscionable cost of Kshs.398,849.00. That is more than 80 times the average cost of similar equipment in the market at Kshs. 5,000.00 per set.

(c) that according to the MoH the cost of an autoclave is valued at USD 79,244.70 or (Kshs. 8,003,714.7 using a conversion rate of 101). The subcontractor informed the committee that the total cost of the equipment under Lot 2 would be 7 million under outright purchase terms, while under MES the cost of the equipment is only 6 million. The contractor further informed the committee that the equipment has not undergone software updates. The committee therefore observes that the MoH relied on an exaggerated price list for the MES equipment that may have resulted in the over pricing of the contract.

(d) that according to the delivery notes relating to Lot 2 equipment, Garsen, Griftu, Marsabita and Ndanai were recorded as lacking three phase electricity to power the machines supplied. In addition, Wajir was recorded as lacking three phase power and water with the requisite pressure required by the machine. In Tana River, the Committee observed that various surgical sets supplied under Lot 2 lay unused, idle and still in their original packaging since the county was yet to employ the subspecialists necessary to utilise the equipment.The committee therefore observes that the MOH ignored the findings of *Preliminary National Assessment Report on*

the Status of Infrastructure, Equipment and Human Resources in the proposed level 4 and 5 health facilities in the counties 2014 by failing to take in to account the ability of the target health facilities to absorb the equipment in regard to availability of electricity and cold water mains. Further, the committee notes that the *Risk Assessment Report* dated 26th November, 2014 submitted by PKF to MoH, failed to identify lack of necessary utility infrastructure to support the project as one of MES project risks. Therefore, the Committee observes that the MOH failed in its monitoring and evaluation of Lot 2 equipment since it failed to capture the challenges associated with Lot 2 equipment. The Committee further finds that Lot 2 equipment that is laying idle due to lack of electricity, water or specialists shows that Lot 2 equipment does not represent value for money.

(e) that the contractor had not been decommissioning or disposing of the equipment it replaced in accordance with the lifecycle model under the contract instead the contractor would leave the equipment in the hospitals. According to Dr. Mwiti, CEO, Debra Ltd, the initial set of autoclaves supplied under the contract had been left for use in the hospitals as additional equipment rather than being disposed of because they were still serviceable. The Committee therefore finds that the lifecycle model of the equipment must have been doctored to increase the cost of the contract to the detriment of the Kenyan public since if the equipment was still serviceable it is not justifiable to seek to replace the equipment during its functional lifespan. The Committee therefore finds that the MOH contravened Article 201 of the Constitution that requires that public money be used in a prudent manner, by designing the Lot 2 project in a manner that results in wastage of public resources.

(f) that the price of the contract is not delineated the Committee is unable to establish how much of the total contract price relates to decommissioning or maintenance of the equipment. However, if the cost of maintaining the old equipment is factored into the MES contract, then it is clear that the MoH increased the cost of the contract significantly by requiring that the equipment be replaced in the manner contained in the lifecycle model, since according to the contractor the equipment maintenance costs are supposed to increase significantly after the time it is supposed to be replaced.

(g) that had counties been allowed to procure the equipment on their own, similar equipment may have been procured at a fraction of the cost. In this regard the Committee also finds that had counties been consulted, the counties would have raised the alarm on the highly exaggerated cost of the equipment under the MES project in comparison to prevailing market rates. In this regard, the Committee finds that not only did the MOH contravene Article 6 of the Constitution by failing to consult county governments but it also contravened Article 201 (d) of the Constitution that requires that *public money shall be used in a prudent and*

responsible way by failing to ensure that the cost of the project represented value for money.

13. In respect to which options are available under Lot 2 at the end of the contractual term, the Committee made the following observations:
    (a) that at the end of the contractual term the MOH has the following options
        (i) to extend the contract for an additional three years;

        (ii) to purchase the equipment at a nominal value of one US dollar(US$ 1);

        (iii) to retender the services and conclude a new contract with a successor contractor; or

        (iv) to terminate on the expiry of the project term

    (b) that PKF, in its Risk Assessment Report for the financial advisory for the MoH MES tender dated 26th November, 2014, highlights that MoH risks increased costs of repairs, replacement of parts or maintenance of the equipment should it opt to keep the equipment past the term of the contract a fact that was also corroborated by the contractor during its testimony before the Committee. However, the MOH did not provide the Committee with any evidence that the MoH used this information to negotiate better terms with the contractor for the people of Kenya.
    (c) that the provision that the equipment could be bought at USD 1 at the end of the contractual term was just a ruse meant to hoodwink the public into thinking that the MES contract represented value for money.

Committee findings

Due to the foregoing the Committee finds that-

(a) the equipment delivered under Lot 2 was inscribed 'Estem' instead of 'Esteem' is suggestive of the fact that counterfeit equipment was supplied under the contract.
(b) the contractor had knowledge of the equipment inscribed 'Estem' and that the subcontractor was trying to mislead the Committee. The Committee further finds that either the contractor or the subcontractor wilfully furnished the Committee with information which is false or misleading in contravention of section 27 (3) (g) of the Parliamentary Powers and Privileges Act, 2017.
(c) KEBS cannot claim to have been excluded from carrying out a pre-import verification of conformity of the equipment between 2015 and August 2016 by the letter dated 16th August, 2020, Ref. No.MOH/ADM/1/1/56/70 and that nevertheless the statutory obligation to undertake quality inspection of imports pursuant to Section 4 of the Standards Act and Legal Notice No. 78 of 15th July, 2005, cannot be ousted by a letter from the MOH.

(d) KEBS failed to carry out its statutory mandate under section 4 of the Standards Act and Legal Notice No. 78 of 15th July and was therefore negligent.

(e) either the contractor or KEBS gave misleading or false information to the Committee in relation to whether equipment under Lot 2 underwent pre-import verification of conformity contrary to section 27 (3) (g) of the Parliamentary Powers and Privileges Act.

(f) the Pharmacy and Poisons Board failed in its mandate to independently vet, inspect or carry out quality control testing for both the equipment and reagents under Lot 2.

(g) the MOH was negligent when it wrote to KEBS seeking to ring fence the mandate of the PPB without first creating the requisite capacity for the PPB to effectively carry out that mandate.

(h) the status of the equipment delivered under Lot 2 in regard to safety is questionable since the equipment was not vetted or inspected as required under the law.

(i) the contract in relation to Lot 2 precluded the possibility of a fair and competitive environment in regard to reagents contrary to the provisions of Article 227 (1) of the Constitution which obligate public entities to procure goods and services cost effectively and competitively and section 21 of the Competition Act which prohibits indirectly fixing purchase or selling prices of the consumables.

(j) the MoH contravened regulation 9 (d) of Public Procurement and Disposal Regulations, 2006 (now regulation 34 (d) Public Procurement and Disposal Regulations, 2020) which requires the user department to initiate the variation of the contract, when it varied the contract in relation to Lot 2 without a requests from the counties

(k) the MOH negligently and in contravention of Article 201 of the Constitution that requires that public money be used in a prudent manner, proceeded to vary the contracts to include additional facilities while being aware that facilities would be shortchanged in terms of the time for which they are to have utility of the equipment.

(l) the cost levied per county in respect to the variation of the contract relating to Lot 2 was unjustifiable since according to the contract the variation only amounted to a 17.7% increase in the cost of the project.

(m) the MOH was negligent when it ignored its own report titled *Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in the proposed level 4 and 5 health facilities in the counties 2014* that highlights the magnitude of inadequacy of specialist doctors by procuring equipment under Lot 2 that required subspecialists that MOH knew or ought to have known were not available in a significant number of counties.

(n) the lack of itemisation of the cost components in relation to Lot 2 equipment complicates monitoring and evaluation of Lot 2 equipment in respect to consideration of value for money.

(o) the cost of Lot 2 equipment was grossly exaggerate and that MOH relied on an exaggerated price list and a doctored lifecycle model that resulted in the overpricing of the contact relating to Lot 2.The Committee further finds that the MOH contravened Article 201 of the Constitution that requires that public money be used in a prudent manner, by designing the contract relating to Lot 2 in a manner that results in wastage of public resources.

Committee recommendations

The Committee has established that the irrevocable power of attorney issued to Dr. Mwiti by Esteem is an indication of the fact that the contract under Lot 2 was actually novated to Dr. Mwiti and by extension Debra Limited in contravention of the contractual requirement for novation. The Committee further established that this 'novation' has had implications on the implementation of the contract resulting in equipment that should have been disposed of, being left in the hospitals despite the fact that the contract required the equipment to be changed at end of its useful lifespan. Further, the Committee has established that equipment supplied under Lot 2 still remains non-functional due to both lack of the infrastructure necessary and specialists or subspecialist needed to ensure the optimal use of the equipment. This clearly indicates that there is no value for money. As a result of the foregoing, the Committee therefore recommends

1. **EACC investigate the circumstances surrounding the implementation of the contract relating to Lot 2 and in particular -**
   (a) **the circumstances that led to Dr. Mwiti, CEO/ Director Debra Limited having an irrevocable power of attorney relating to Lot 2 and operating the account in to which the payment in relation to Lot 2 is made; and**
   (b) **the cost of the equipment supplied under Lot 2**

2. **A multisectoral committee composed of a representative of the MOH, representation of the COG, a representative of the PPB, a representative of KEBS, a representative of NT, a representative of OAG & DOJ undertake valuation of the equipment supplied under Lot 2 to validate the viability of the equipment in respect to the lifecycle model in the contract and at the end of the contractual term in 2022 and report back to the Senate in 6 months.**

3. **MOH re-examine the legal framework that the Pharmacy and Poisons Board and the Kenya Bureau of Standards operates to ensure they effectively discharge their mandate to protect Kenyans.**

4. EACC and DCI to investigate the circumstances under which KEBS and PPB failed to carry out their statutory obligations to ensure the standards and safety of medical products imported under MES and in particular establish how Esteem Industries Inc. received pre-verification of certificates on various dates.

5. EACC and DCI to investigate the circumstances under which the contract for Lot 2 equipment was varied without requests from the counties as required by Regulation 9 (d) of the Public Procurement and Disposal Regulations, 2006 (now regulation 34 (d) of the Public Procurement and Asset Disposal Regulations, 2020).

6. Anti-Counterfeit Authority to inspect equipment delivered under Lot 2 and in particular equipment delivered to Garbatulla, Isiolo and Meru labelled 'Estem' instead of ' Esteem'.

7. EACC investigate the circumstances under which the counties paid more than 100% for variation of the MES contracts despite the fact that the variation for Lot 2 was within the 25% threshold envisaged under the law.

8. EACC investigate the circumstances under which the cost of the equipment under Lot 2 was inflated including the circumstances that led to replacement of equipment under Lot 2 even when the equipment is still serviceable and take necessary action on the persons found culpable.

9. Competition Authority investigate the relationship between Esteem and Debra and in particular the circumstances under which Dr. Mwiti was became a co-contractor of Esteem in relation to Lot 2.

10. Since the contractor delayed installation of the equipment, the Ministry of Health as the agent of County Governments in this transaction renegotiate for the extension of the time for the service delivered under Lot 6 at no additional cost to the Government since the counties faithfully paid for the equipment throughout.

11. Auditor General carry out an audit of the payments made in respect to Lot 2 with a view to determining whether the payments were made in accordance with the law and the contract and submit its report to the Senate in 6 months.

LOT 5: DIALYSIS EQUIPMENT

4.4 BELLCO SRL (ITALY) AND SUBCONTRACTOR, ANGELICA MEDICAL SUPPLIES LTD

4.4.1. Background

The MoH awarded Bellco SRL, a company registered in Italy, the tender to supply renal equipment under Lot 5 of the MES Project *(Tender No. MOH/001/2014/2015).*

On 6th February, 2015 the MoH and Bellco SRL (Italy) executed a contract for the supply of Lot 5 renal equipment at an initial contract cost of USD 23,691,059 (or Kshs. 2,392,796,959.00 at Kshs. 101 to the USD). To note the Contract was executed on behalf of Bellco SRL. by Ms. Mary Matu the majority shareholder of Angelica Medical Supplies.

Under the contract, which was amended and restated on 6th May, 2016, a total of forty-nine (49) hospitals, one (1) hospital from each of the 47 counties and two (2) national referral hospitals, were selected to benefit from renal equipment as follows:

No.	Category of Equipment	Type of Equipment	No. of Units
1.	Dialysis	Dialysis Machine	5
		Dialysis Bed	2
		Raw Water Reservoir	1
		Dialysis Chair	3
		Defibrillator	1
		Suction machine	1
		Vital Signs Machine Monitor	2
		Oxygen Concentrator	1

		UPS	1
2.	Water Plant	Water Treatment Plant	1
3.	Starter Kit: Hemodialysis Bloodlines	Drainage Bag	250
		Percutor	250
		Arterial & Venous Transducer	250
		Infusion Set	250
		Recirculator	250
4.	Starter Kit: Low Flux Dialysers	Surface Area 1.7 m	100
		Surface Area 1.9 m	150
5.	Starter Kit: Fistula Needles	Arteriovenous fistula Gauge F16, pairs	250
		Arteriovenous fistula Gauge F17, pairs	250
		Subclavian catheters- adult	10
		Subclavian catheters- child	3
		Permanent catheters – adult	10
		Permanent catheters – child	3
6.	Starter Kit: Drugs and Chemicals	Bicarbonate Cartridge 650-750gms	250
		Bicarbonate concentrate 10 litres	250

A variation of the contract executed on 22nd November, 2017 at the cost of USD 5,001,892.00 (or Kshs. 505,191,092.00 at Kshs. 101 to the USD) led to the expansion of the project to nine (9) of the original beneficiary hospitals and five (5) additional facilities as indicated below:

a) Deployment of additional equipment to nine (9) original beneficiary hospitals:
    1. Nakuru PGH
    2. Kakamega PGH
    3. Kisii Level 5
    4. Machakos Level 5
    5. Coast PGH
    6. Jaramogi Oginga Odinga Teaching and Referral Hospital
    7. Kerugoya District Hospital
    8. Ol Kalou District Hospitals
    9. Nanyuki District Hospital

b) Expansion to an additional five (5) hospitals as follows
    1. Gatundu Level 5 Hospital
    2. Naivasha Sub-District Hospital
    3. Nyamache Sub-District Hospital
    4. Othaya District Hospital
    5. Meru Level 5 Hospital

With the expansion, the total number of beneficiary facilities under Lot 5 rose from forty-nine (49) to fifty-four (54). Under this variation, the contract cost of Lot 5 equipment rose by 21.1% to reach USD 28,692,951.00 (or Kshs. 2,897,988,051.00 at Kshs. 101 to the USD).

In respect of the contract, Bellco SRL, Italy., the original equipment manufacturer, sub-contracted Angelica Medical Supplies Ltd to implement local services which included civil works, installation, commissioning, certifications, maintenance and replacement.

4.4.2. Submissions from Bellco Srl (Italy) /Angelica Medical Supplies Ltd

The Committee held a total of two hearings with respect to the contract for Lot 5 equipment: The first hearing held on 31st October, 2019 aborted owing to the lack of representation by the main contractor, Bellco SRL (Italy).

During the second hearing held on 3rd December, 2019, the Committee met with the legal representative of Bellco SRL (Italy), Ms. Mary Matu, on the basis of a Power of Attorney executed in her favour, and evidence of resolutions of the Board of Directors of Bellco SRL (Italy) ratifying the *same (Annex XXV)*. Representatives of the subcontractor, Angelica Medical Supplies Ltd, led by one of its directors, Mr. Daniel Matu were also in attendance.

To note, Ms. Mary Matu, who appeared before the Committee as the legal representative of Bellco SRL on the basis of Power of Attorney, was also the CEO/Director of the subcontractor, Angelica Medical Supplies Ltd at the time of the meeting. She however, clarified to the Committee that she was not appearing in her latter capacity as CEO, Angelica Medical Supplies Ltd.

4.4.3 Power of Attorney

Bellco SRL executed a power of attorney in favour of Ms. Mary Wanja Matu of Angelica Medical Supplies on 18th February, 2015. The power of attorney empowered Ms. Matu to execute, deliver, approve and amend the MES contract, and all agreements in respect of Lot 5 for the purpose of compliance with the terms and conditions of the tender. The power of attorney issued to Ms. Matu on 18th February, 2015 was ratified by the Board of Bellco Srl on 25th May, 2015.

4.4.4 Tender

Angelica Medical Supplies Ltd was enjoined to Bellco SRL (Italy) at the tendering stage. To this extent, Ms. Mary Matu, Director and CEO of Angelica Medical Supplies Ltd, bid for the tender and signed the tender documents on behalf of Bellco SRL.

4.4.5 Execution of the Lot 5 Contract for Renal Equipment

On 6th February, 2015 the MoH and Bellco SRL executed a contract for the supply, delivery, installation, commissioning, maintenance and repair of Lot 5 renal equipment at an initial contract cost of USD 23,691,059 (or Kshs. 2,392,796,959.00 at Kshs. 101 to the USD). According to her own testimony, the contract was signed by Ms. Mary Matu as the legal representative of Bellco SRL. Further, on the basis of the power of attorney, Ms. Matu executed the amendment and restatement deed to the contract on 6th May, 2016.

Under the contract, Bellco SRL was obligated to install 49 dialysis centres: one in each of the forty-seven (47) counties, and two national referral hospitals i.e Kenyatta National Hospital and the Moi Teaching and Referral Hospital. The dialysis centres installed in each beneficiary hospital consisted of the following: five dialysis machines, two dialysis chairs, three dialysis beds, defibrillators, patient monitors, suction machines and a water treatment plant.

The contract also required the contractor to do renovations necessary to bring the facilities up to standard with the WHO guidelines on dialysis.

4.4.6 Subcontractor

The contractor, Bellco SRL, subcontracted Angelica Medical Supplies Ltd to implement local services including: civil works, installation, commissioning, certifications, maintenance and replacement. The subcontractor role of Angelica Medical Supplies Ltd was formalized through a subcontractors' deed of warranty executed by the MoH, Bellco SRL and Angelica Medical Supplies Ltd on 6th May, 2016.

4.4.7 Early Works

Under the terms of the contract, the four hospitals that benefited from early works included: Machakos, Thika, Kakamega and Homa Bay. All early works were initiated, implemented and completed within 2015.

4.4.8 Variation of the Contract

On 22nd November, 2017, Ms. Mary Matu executed a variation of the contract on behalf of the contractor at the cost of USD 5,001,892.00 (or Kshs. 505,191,092.00 at Kshs. 101 to the USD). According to submissions made by Ms. Matu, the variation of the contract led to the expansion of the project as follows:

1. Doubling of capacity at eleven (11) beneficiary hospitals, and
2. Installation and commissioning of equipment in five (5) additional hospitals.

With the expansion of the project, the total number of Lot 5 beneficiary hospitals rose to fifty-four (54). Equipment supplied under the variation was installed and completed by 2017

2.17.2.7. Ownership of the Equipment

According to submissions made by Ms. Mary Matu, ownership of the equipment was vested in both Bellco SRL and Angelica Medical Supplies Ltd. In relation to the same, all equipment supplied under Lot 5 was insured by Angelica Medical Supplies Ltd.

2.17.2.8. Payments under the Lot 5 Contract

Payments made under the contract were made in respect of Bellco SRL (Italy) to a Cooperative Bank Account (Parliament Road) of which Ms. Mary Matu was the sole authorised signatory. The account was opened specifically for the MES contract at the time of bidding. At the time of inquiry, the MoH had effected payments amounting to Kshs. 1.6 Billion.

According to submissions made by Ms. Matu, Bellco SRL were paid off for the equipment supplied through a loan. As such, monies deposited in the Cooperative Bank Account were being used for purposes of servicing the loan. However, despite having already been paid off for the equipment, Bellco SRL still retained certain obligations such as training and ensuring that the equipment supplied was functional.

2.17.2.9. Status of Implementation

All equipment supplied under Lot 5 had been delivered and installed in beneficiary hospitals and completion certificates duly issued by the MoH. The issuance of the completion certificates was

done upon surrender of delivery notes signed by the medical superintendent, administrative officer(s) and biomedical engineers of recipient hospitals

2.17.2.10. Functionality Status of Lot 5 Equipment

According to Ms. Mary Matu, all equipment supplied under Lot 5 had been installed, and commissioned, and was providing the required services by the time of this inquiry.

2.17.2.11. Staff Training

The contractor alleged that it had been conducting user trainings at Kenyatta National Hospital, Nakuru Provincial General Hospital, Moi Teaching and Referral Hospital and Coast Provincial General Hospital. The total number of personnel trained under the contract included two doctors, and four-hundred (400) renal nurses.

2.17.2.12. Regulatory Status of Lot 5 Equipment

All equipment supplied under Lot 5 was duly listed by KEBS and PPB. See *Annex XXV* for the regulatory status of Lot 2 equipment as submitted to the Committee by the Contractor.

2.17.2.13. Reagents and Consumables

Beneficiary hospitals were supplied with a three (3) month starter pack as per the terms of the contract. Following the depletion of their starter packs, counties were required to make the necessary arrangements to purchase the consumables and reagents necessary to operate the equipment.

Initially, counties sourced the reagents and consumables directly from the subcontractor, Angelica Medical Supplies Ltd. Subsequently, owing to late payments and high debts by some counties, Angelica Medical Supplies shifted its business strategy to supply the consumables and reagents through KEMSA instead. Because of the economies of scale enjoyed by KEMSA, coupled with its reliability in terms of payment, the goods were supplied to KEMSA at costs 15-20% cheaper than that supplied to counties

With regards to pricing, prior to shifting its strategy to supply counties through KEMSA, Angelica Medical Supplies applied differential pricing of its consumables and reagents based on proven ability to pay: higher costs were levied against counties with debts and a known history of late payments, while counties with an established reputation for prompt payment were supplied at lower costs.

Further, according to Ms. Matu, all the equipment supplied under Lot 5 operated on an open system. As such, the consumables and reagents supplied were not specific to the equipment *per se*, and counties were at liberty to source viable alternatives from the market. However, for purposes of standardisation, counties had been advised to source their consumables and reagents specifically from the manufacturer.

2.17.2.14. Replacement of Equipment

By the time of this inquiry, the contractor alleged that she had replaced various Lot 5 equipment, including: a burnt water plant in Isiolo CRH, and all the original dialysis machines that had been installed in Migori County Referral Hospital following an infection. The above mentioned equipment were replaced as part of the contractors' obligations. By the time of writing this report, there was no record to corroborate this assertion.

Copies of the written submission and annexures received from the Contractor are herein attached as Annexure XXV.

Committee Observations

The Committee made the following observations:

1. In respect to the relationship between Ms. Mary Matu and Angelica Medical Supplies Limited, the subcontractor under the contract relating to Lot 5 , the Committee observed that according to a CR 12 dated 11th October, 2019, issued by Registrar of Companies, listed Ms. Mary Wanja Matu, Mr. Daniel Njuguna Matu and Mr. Nicholas Gitonga Matu as the directors of Angelica Medical Supplies Limited a company registered in Kenya on 20th January, 2003 under registration number C. 101711.

2. In respect to the relationship between Ms. Mary Matu and Bellco SRL, the contractor under the contract relating to Lot 5 prior to 18th February, 2015, the Committee made the following observations

(a) that from the minutes of the meeting the Board of Bellco held on 25th May, 2015, the Committee observes that Angelica is the sole distributor of products of Bellco in Kenya.

(b) that Ms. Matu and Bellco had engaged in a 'partnership' that resulted in Bellco being awarded the tender to supply services under Lot 5 and that Ms. Matu tendered in the name of Bellco for the supply of services under Lot 5.

(c) that as at the time of bidding, Ms. Matu had not been granted a power of attorney to act on behalf Bellco and as such lacked the requisite legal capacity to submit tender documents on behalf of Bellco.

3. In respect to the relationship between Ms. Mary Matu and Bellco SRL, the contractor under the contract relating to Lot 5 post 18th February, 2015, the Committee made the following observations

(a) that on 18th February, 2020, Bellco SRL signed a power of attorney in favour of Ms. Matu which the Board ratified on 25th May, 2015. The power of attorney read in part that it *appoints Ms. Mary Wanja Matu, acting in the capacity of legal representative of Angelica Medical Supplies as its attorney in fact(attorney in fact) and gives her full authority...to represent the company in connection with the manufacturing process to be pursued the company under the tender, granting the powers to execute, deliver, approve and amend the managed equipment services contract...deed or agreement...Carry out any and all further actions which may be necessary for the purposes of execution and fulfillment of the supply contract.*

In respect of the relationship between Ms. Matu and Bellco, Ms. Matu and Angelica and Bellco and Angelica, the Committee finds

(a) that Ms. Matu misrepresented facts in order to influence the tender in favour of Bellco contrary to section 41 of the PPDA.

(b) that the power of attorney authorised Ms. Matu to carry out all actions under and in relation to the contract after 18th February, 2015.

(c) that the veracity of the engagement of Ms. Matu and Bellco could not be established since Bellco's directors did not sign any documents relating to the contract and did not present themselves before the Committee. In relation to this, the Committee notes that at the time of the inquiry, Bellco had donated a power of attorney to Ms. Matu allowing her, to among other things make representations before the Committee by virtue of the clause 3 therein which provides that Ms. Matu may *carry out any and all further actions which may be necessary for the purposes of execution and fulfillment of the supply contract.*

(d) that the partnership between Bellco and Angelica was orchestrated solely with the aim to circumvent the procurement process and deprive the procuring entity of the benefits of free and open competition.

4. In respect to whether Ms. Matu had the authority to bid on behalf of Bellco and execute the Contract dated 6th February, 2015, the Committee made the following observations

(a) that Ms. Matu received a power of attorney from Bellco on 18th February, 2015 that was subsequently ratified by Bellco's Board on 25th February, 2015.

(b) that the tender document stated that *the Ministry of health now invites sealed tenders from original equipment manufacturers who can also undertake managed equipment service. This will involve supply, installation, testing, maintenance, repair, replacement and associated training for county and subcounty health facilities...*

(c) that neither Ms. Matu nor Angelica are original equipment manufacturers.

(d) that Ms. Matu informed it that Angelica Medical Supplies had paid off Bellco in relation to the contract for Lot 5 equipment and that Angelica had taken full charge of the project.(See Hansard).

In respect to whether Ms. Matu had the authority to bid on behalf of Bellco and execute the Contract dated 6th February, 2015, the Committee finds

(a) that the tender committee and the MOH erred when they allowed Ms. Matu to submit a bid and participate in a procurement process that was reserved for original equipment manufacturers

(b) that the MOH and the tender committee contravened section 66 (2) of the PPDA which requires that *the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used.*

(c) that Ms. Matu submitted a tender in the name of Bellco prior to getting a power of attorney to act on its behalf.

(e) that as at 6th February, 2015, Ms. Matu lacked the requisite authority to execute the contract on behalf of Bellco by virtue of section 40 of the Companies Act.

(f) that the MOH was negligent and contravened section 40 of the Companies Act when it allowed Ms. Matu to execute the contract in relation to Lot 5 despite lacking the requisite capacity to contract on behalf of Bellco.

(g) that Ms. Matu fronted Bellco SRL (Italy), an original equipment manufacturer as the bidder and contractor with the intention to eventually assign the rights and obligations under the contract in relation to Lot 5 to Angelica a party who would otherwise not have won the contract.

(h) that Angelica and Bellco colluded to submit a tender in the name of Bellco that they intended all along to transfer to Angelica, a party, which is not an original equipment manufacturer and therefore would not have been qualified had it bid since it would have failed to meet the requirements under section 66 (2) which requires that *the evaluation and comparison shall be done using the procedures and criteria set out in the tender documents and no other criteria shall be used*

(i) that Bellco remains a stranger to the contract and that the partnership between Bellco and Angelica was orchestrated solely with the aim to circumvent the procurement process and deprive the procuring entity of the benefits of free and open competition.

(j) that the contractor and Ms. Matu engaged in a fraudulent practice in contravention of section 41 of the PPDA that resulted in the MOH being deprived of the benefits of free and open competition.

5. In respect to the ownership of the equipment under Lot 5, the Committee made the following observations

(a) that Bellco an original equipment manufacturer was awarded the tender in relation to Lot 5. The Committee notes that clause 18.7 of the contract provides that *the equipment shall at all times be legally owned by the Contractor and beneficially owned by the procuring entity (MOH)...*

(b) that Clause 43.1 of the Contract provides that *no Party shall be entitled to assign, novate, charge or otherwise transfer or dispose of its rights or obligations under this contract, whether in whole or in part, without prior written consent of the other Party.* In this regard, despite Ms. Matu's assertions that the contract had been transferred, Ms. Matu failed to produce evidence of the alleged transfer.

(c) that Ms. Matu operates the account into which the contractual payments are made and as such a presumption of ownership of the equipment may arise.

(d) that any transfer of rights and liabilities under the contact, including the transfer of the contract itself must comply with clause 43.1. of the Contract which requires that the consent of MOH be sought.

In respect to the ownership of the equipment under Lot 5, the Committee finds

(a) that the contract under Clause 18.7 recognises Bellco as the legal owner of the equipment.

(b) that Ms. Matu, Bellco and Angelica failed to follow the contractual procedure set out in Clause 43.1 that requires the consent of MOH be sought before making a transfer under the contract.

(c) that the actions of Ms. Matu, Bellco and Angelica to novate the contract outside the contractual procedure set out under Clause 43.1 of the contract relating to Lot 5 have left the Government severely exposed to the risk of being unable to enforce its rights to Lot 5 in case of a dispute.

(d) that the actions of Ms. Matu, Bellco and Angelica were orchestrated to circumvent the tender requirement that bidders in the project should be original equipment manufacturers and

(e) that was in contravention of section 41 of the PPDA which provides any person involved in a fraudulent practice in any procurement proceeding.

(f) that Angelica fronted Bellco as the contractor in order to participate in a bid that it would otherwise not have participated in.

6. In respect to who gets paid for the equipment under Lot 5, the Committee made the following observations

(a) that payments made under the contract were made to a Cooperative Bank Account (Parliament Road) to which Ms. Mary Matu was the authorised signatory.

(b) that Ms. Matu, has for all intents of purposes, replaced Bellco in the execution of the contact relating to Lot 5 and is now acting as as the contractor.

7. In respect to whether the contractor supplied all the equipment related to the contract for Lot 5 and whether the equipment is functional, the Committee made the following observations

(a) that during the county visits to Kilifi, Mombasa and Tana River counties, the Committee received reports that equipment related to Lot 5 was functional and that the subcontractor had carried out scheduled maintenance of the equipment. The county representatives informed the Committee that upon being notified of a fault, the subcontractor would report to the affected hospital within 24hours to repair the equipment.

(b) that according to the *PKF Managed Equipment Services (MES) Service Level Monitoring report*, the dialysis machine in various hospitals is recorded to have been faulty 87 times, the water treatment plant in various hospitals is recorded to have been faulty 8 times and the dialysis bed in various hospitals is recorded to have been faulty 2 times in 2017 alone. Therefore, the Committee observes with concern that the cost of the equipment may have been inflated to accommodate the high expense associated with the cost of maintaining the equipment. Further, the Committee observes with concern that the high failure rate of the equipment may be an indication of the equipment being of poor quality.

(c) that the high failure rate of the equipment related to the contract for Lot 5 does not represent value for money.

8. In respect to whether the equipment, consumables and reagents under Lot 5 are safe for use by kenyans, the Committee made the following observations

(a) that the contract in respect to Lot 5 was signed on 6th February, 2015 and the equipment under Lot 5 was imported between 2015 to date. According to KEBS the Bureau did not carry out a verification of conformity with Kenyan Standards in respect to Lot 5 equipment because of a letter from MOH letter dated 16th August, 2020, Ref. No.MOH/ADM/1/1/56/70.

(b) that the letter by MOH is dated 16th August 2016. The Committee therefore finds that KEBS cannot claim to have been excluded from carrying out a verification of conformity of the equipment between 2015 and August 2016.

(c) that, if the assertions by KEBS are to be believed, then KEBS failed to carry out its statutory mandate under and was negligent.

(d) that the letter by MOH did not seek to give a blanket exclusion in relation to all equipment. That the letter was specific to surgical equipment and x-ray equipment.

(e) that even if the letter by the MOH could be used by KEBS as a reason for escaping its duty under Section 4 of the Standards Act, the exclusion did not relate to equipment delivered under Lot 5. Due to the foregoing, the Committee finds that, KEBS was negligent in failing to carry out its statutory mandate to ensure the standards of equipment imported under Lot 5.

(f) that although KEBS asserted that it did not carry out a verification of conformity with Kenya Standards in relation to Lot 5, the Contractor submitted certificates of conformity issued by Kenya Bureau of Standards between 2016 and 2019 in regard to the equipment delivered under the contract. in this respect the Committee observes that section 27 of the Parliamentary Powers and Privileges Act.

(g) that the PPB merely listed the equipment and consumables supplied under Lot 5.

(h) that the Board did not carry out any independent vetting, inspection or quality control testing to guarantee the safety, efficacy or quality of the equipment and consumables contrary to Section 35D of the Pharmacy and Poisons Act, Section 35D of the Pharmacy and Poisons Act that requires the Board to request the National drug Quality Control Laboratory to test imported drugs or medicinal substances with a view to determining whether such drugs or medicinal substances comply with this Act or rules made thereunder.

9. In respect to who supplies the consumables and reagents under Lot 5, the Committee made the following observations

(a) that from the minutes of the Bellco Board dated 25th February, 2015 read that Lot 5 Contract may have been designed to create a monopoly for the supply of consumables by the Contractor.

(b) that Clause 27.3 of the contract for Lot 5 provides *the Contractor shall procure that sufficient stocks of goods, consumables, durables, equipment and material are held in order to comply with its obligations under this Contract.* The Committee further observes that Schedule 10, Clause 5 of the contract provides that *the contractor will supply, maintain and replace...all maintenance and operational consumables.* The Committee also observes that Schedule 14 to the contract relating to the cost of Lot 5 equipment provides that the cost of consumables for the project term is USD 3,421,129.31(or Kshs. 345,534,060.31).

(c) that during the meeting of the Board of Bellco on 25th May, 2015, the CFO informs the Board *the part of supply reserved for Bellco, as sole supplier, regards dialysis machines(formula), treatments(complete kits for bicarbonate dialysis) and reverse osmosis systems for water treatment* ... In this regard, the Committee deduces that the design of the contract in relation to Lot 5 was such that a monopoly was created in contravention of section 21 of the Competition Act.

(d) that the Cabinet Secretary for Health mislead the county officials during a meeting held on 22nd October, 2013 held at the Multimedia University when he undertook on behalf of government to ensure that *measures will be taken to ensure that existing legislation in procurement and Public Private Partnership are used to avoid the problem of monopolising the initiative.*

(e) that equipment could not be optimally used without the requisite consumables. This is admitted by PS, Health, Mr. Julius Korir, CBS, in a letter to NT dated 2nd

November, 2017, Ref. No. MOH/FIN/1/A.VOL.I(229) where he writes... *The consumables were not factored during the award of the tenders. However, after implementation of the project, it has been established that the equipment in each of the 5 lots cannot be used optimally without the requisite consumables. The Ministry intends to procure the consumables for the 98 hospitals for the remaining period of the MES contracts and therefore requires KShs. 500,000,000.00 for the supply of consumables for MES equipment* .In this regard the Committee finds that the MOH was negligent in its design of the contract for Lot 5 equipment and as such is in breach of Article 227 of the Constitution that obligates a state organ when contracting *for goods or services to do so in accordance with a system that is fair equitable, transparent , competitive and cost-effective.*

(f) that although Ms. Matu stated that the equipment delivered under Lot 5 was not locked to consumables and reagents under Lot 5 were locked.

(g) that contrary to Resolution 5 of the Communique dated 22nd October, 2013 issued by the Cabinet Secretary for Health and Senior Ministry Officials with Chief Executive Members for Health and Finance, and County Directors of Health, the MES contract for Lot 5 equipment did end up creating a monopoly for the contractor in respect to consumable and reagents.

10. In respect to a monopoly perpetuated by KEMSA in respect to consumables and reagents under Lot 5, the Committee made the following observations

(a) that KEMSA, after consulting the contractors, had used direct procurement to procure reagents and consumables for Renal (Lot 5) and Radiology (Lot 7) equipment from Angelica Medical Supplies Limited which the manufacturers had informed it was their local agent.

(b) that KEMSA directly procured Angelica to supply Lot 5 consumables in contravention of section 74 of the PPDA which requires that *a procuring entity use direct procurement if there is only one person who can supply the goods, works or services being procured; and there is no reasonable alternative or substitute for the goods, works or services.*

(c) that KEMSA's decision to undertake direct procurement, resulted in deliberately monopolising the market for reagents and consumables for Lot 5 equipment under the MES project in favour of Angelica in contravention of section 74 of the PPDA which states that *a procuring entity may use direct procurement ...as long as the purpose is not to avoid competition.*

(d) that while KEMSA negotiated the prices of Lot 5 consumables, this did not translate into any tangible cost-savings by counties. Indeed, in the case of renal consumables

(e.g. hemodialysis blood lines, bicarbonate cartridge powder and acid concentrate) KEMSA supplied to counties at prices higher than Angelica.

In respect to whether the equipment, consumables and reagents under Lot 5 are safe for use by Kenyans, the Committee finds as follows-

(a) that the costing of the consumables under Schedule 14 to the contract is incontrovertible evidence that the contractor was to supply all maintenance and operational consumables in respect to the equipment supplied under Lot 5.

(b) that Ms. Matu and Angelica mislead the Committee by claiming the contract did not obligate the contractor to supply consumables. In this regard, the Committee finds that Ms. Matu contravened section 27 (3) (g) of the Parliamentary Powers and Privileges Act, 2017 which makes it an offence to wilfully make a statement or furnish a committee of Parliament with information which is false or misleading.

(c) that either the contractor or KEBS wilfully furnished the committee with information which is false or misleading in contravention of section 27 (3) (g) of the Parliamentary Powers and Privileges Act, 2017.

(d) that the contractor did not provide it with evidence of certificates of conformity issued prior to April 2016 despite the contractor installing equipment in various hospitals in 2015 including Machakos Level 5 hospital in 26th May, 2015; Homabay Hospital in 11th August, 2015; and Jaramogi Oginga Odinga Teaching and Referral Hospital in 28th December, 2015.

(e) that the Pharmacy and Poisons Board failed in its mandate to independently vet, inspect or carry out quality control testing for both the equipment and consumables under Lot 5.

(f) that the MOH failed to ensure the cost effectiveness of Lot 5 equipment and as such contravened Article 201 of the Constitution that requires that public money be used in a prudent manner.

(g) that the MOH was negligent when it wrote to KEBS seeking to ring fence the mandate of the PPB without first creating the requisite capacity for the Board to effectively carry out that mandate.

(h) that the contract precluded the possibility of a fair and competitive environment contrary to the provisions of Article 227 (1) of the Constitution which obligates public entities to procure goods and services that are cost effectively and competitively and section 21 of the Competition Act which prohibits indirectly fixing purchase or selling prices of the consumables.

11. In respect to whether the variation of the equipment under Lot 5 was prudent, the Committee made the following observations

(a) that according to the deed of variation, the variation led to the expansion of the project to nine (9) of the original beneficiary hospitals and five (5) additional facilities With the expansion, the total number of beneficiary facilities under Lot 5 rose from forty-nine (49) to fifty-four (54).

(b) that despite the assertion by MoH, the Committee found no evidence to suggest that counties had requested for additional equipment.

(c) that the proposed variation resulted in a 17.7% increase in the cost of the project which is within the 25% threshold provided for under Regulation 31 (e) of the Public Procurement and Disposal (Amendment) Regulations, 2013.

(d) that whereas the variation was within the law, the resultant variation per county was over 100% per annum.

(e) that the contract for Lot 5 equipment did not provide for the extension of the project term arising from the variation of the contract initiated by the MOH.

(f) that the facilities which benefited under the variation of the MES contract would benefit from the equipment for only the remaining period under the initial seven years contract. For example, Gatundu Level 5 Hospital which received equipment on 30th September, 2019 under the variation of the contract in respect to Lot 5, is set to benefit from the project for only three years before the contract lapses in 2022.

(g) that despite the fact that only 14 county hospitals benefited from the variation, all the 47 counties were required to pay the additional amount associated with the variation. In this regard the Committee finds that the MOh acted in an inequitable manner by spreading the cost to all 47 counties. In addition the Committee finds that the MOH contravened Article 201(b) of the Constitution that requires the public finance system promote an equitable society.

(h) that the variation did not represent value for money since the additional hospitals would enjoy the equipment for a shorter time at the same cost as the original hospitals. In this regard the Committee notes that the MOH contravened Article 201 of the Constitution that requires that public money be used in a prudent manner by initiating the variation.

In respect to whether variation of the equipment under Lot 5 was prudent, the Committee finds as follows-

(a) that the MOH contravened Regulation 9 (d) of Public Procurement and Disposal Regulations, 2006 which requires user departments, in this case, the counties, to initiate the request in a variation of contract.

(b) that the resultant variation in the cost levied per county was unjustifiable.

(c) that the MOH negligently proceeded to vary the contracts to include additional facilities while being aware that facilities would be shortchanged in terms of the time for which they are to have utility of the equipment.

12. In respect to whether the contractor carried out training of human resources under Lot 5, the Committee made the following observations

(a) that the contractor carried out the user training as required by the contract. However, the Committee notes that the MES contract did not require the contractor to train any specialists or subspecialists yet in order to use some of the surgical equipment provided under the Lot, there was a need to have subspecialists to ensure optimal utility of the equipment.

(b) that whereas the project concept under PPP covered training of personnel for specialised care, the contract for Lot 6 after the shift to public procurement, only provides for user training and not specialist training.

13. In respect to whether the MOH was effective in monitoring and evaluating Lot 5 equipment, the Committee made the following observations

(a) that the PKF *MES Service level Monitoring Report, January 2019*, showed that the contractor delayed installation of equipment in 32 county hospitals. According to the report, as a result of this delay, the MoH ought to have deducted a total of USD 58,250.00 (or Kshs. 5,883,250.00) from the contractors' first and quarterly payments. However, the MOH failed to provide evidence that any such performance deductions were ever applied against the contractor by the MoH . In this regard, the Committee finds that the MOH was negligent for not making the deductions as required under the contract

(b) that the cost of Lot 5 does not itemise the cost of installation, fitting out works, maintenance, financial costs, insurance costs and other project execution costs.The Committee therefore finds that the lack of itemisation of the cost components complicates monitoring and evaluation of Lot 5 equipment in respect to consideration of value for money. In this regard, the Committee finds that the MOH was negligent in not requiring the itemisation of the costs of the equipment.

14. In respect to whether the country realised value for money in relation to the pricing and supply of the MES equipment consumables, the Committee made the following observations

    (a) that the cost of Lot 5 equipment is itemised into product price, consumables and training. The Committee finds that the lack of itemisation of the of installation, fitting out works, maintenance, financial costs, insurance costs and other project execution costs complicates monitoring and evaluation of Lot 5 equipment in respect to consideration of value for money.

    (b) that the introduction of a limitation in respect of the supply of consumables and reagents in relation to Lot 5 equipment to starter kits that were only to last 3 months was severely skewed against the government and therefore the taxpayers. In this regard the Committee finds that the MOH was negligent.

15. In respect to which options are available the end of the contract term, the Committee made the following observations

    (a) that at the end of the contractual term the MOH has the following options

        (i) to extend the contract for an additional three years;

        (ii) to purchase the equipment at a nominal value of one US dollar(US$ 1);

        (iii)to retender the services and conclude a new contract with a successor contractor; or

        (iv) to terminate on the expiry of the project term

    (b) that if the information by the contractor is to be believed, should the counties through the MOH opt to keep the equipment , then the equipment supplied will only provide optimal services for an additional three years after the expiry of the project term before the maintenance costs skyrocket and the increases in maintenance costs and failure rates render the equipment financially unfeasible.

    (c) that the provision that the equipment could be bought at USD 1 at the end of the contractual term was just a ruse meant to hoodwink the public into thinking that the MES contract represented value for money.

    (d) that beyond the guaranteed lifespan of the equipment the cost of maintaining the equipment will increase exponentially. In this regard the Committee observes that the cost of maintenance of the equipment beyond its guaranteed lifespan may not represent prudent use of public finances.

Committee recommendations

The Committee has established that Bellco and Angelica transferred the rights and responsibilities under the contact for Lot 5 in contravention of the contractual requirement for novation. The Committee further established that this 'novation' had the effect of circumventing the tender requirements that required that the bidders be original equipment manufacturers. Further, the Committee established that equipment supplied under Lot 5 was reported to have had multiple faults. This is an indication that the maintenance costs of the equipment may be high and therefore result in increased costs of the contract relating to Lot 5. Due to the foregoing, this is a manifestation that there may have been no value for money. As a result of the foregoing, the Committee therefore recommends

1. **EACC investigate the circumstances surrounding the implementation of the contract relating to Lot 5.**
2. **A multisectoral committee composed of a representative of the MOH, representation of the COG, a representative of the PPB, a representative of KEBS, a representative of NT, a representative of OAG & DOJ undertake valuation of the equipment supplied under Lot 5 to validate the viability of the equipment in respect to the lifecycle model in the contract and at the end of the contractual term in 2022 and report back to the Senate in 6 months.**
3. **MOH re-examine the legal framework that the Pharmacy and Poisons Board and the Kenya Bureau of Standards operates to ensure they effectively discharge their mandate to protect Kenyans.**
4. **EACC and DCI to investigate the circumstances under which KEBS and PPB failed to carry out their statutory obligations to ensure the standards and safety of medical products imported under MES and in particular establish how Bellco Industries Inc. received pre-import verification of conformity certificates on various dates.**
5. **EACC and DCI to investigate the circumstances under which the contract for Lot 5 equipment was varied without requests from the counties as required by Regulation 9 (d) of the Public Procurement and Disposal Regulations, 2006 (now regulation 34 (d) of the Public Procurement and Asset Disposal Regulations, 2020)**
6. **EACC investigate the circumstances under which the counties paid more than 100% for variation of the MES contracts despite the fact that the variation for Lot 5 was within the 25% threshold envisaged under the law.**

7. **Competition Authority investigate the relationship between Bellco and Angelica and in particular the circumstances under which Angelica became the contractor in relation to Lot 5.**

8. **Since the contractor delayed installation of the equipment, the Ministry of Health as the agent of County Governments in this transaction renegotiate for the extension of the time for the service delivered under Lot 5 at no additional cost to the Government since the counties faithfully paid for the equipment throughout.**

9. **Auditor General carry out an audit of the payments made in respect to Lot 5 with a view to determining whether the payments were made in accordance with the law and the contract and submit its report to the Senate in 6 months.**

LOT 6: INTENSIVE CARE UNIT (ICU) EQUIPMENT

4.5. PHILIPS MEDICAL SYSTEMS NEDERLAND B.V., AND SUBCONTRACTOR, PHILIPS EAST AFRICA LTD

4.5.1 Background

The MoH awarded Philips Medical Systems Nederland B.V., a company registered in the Netherlands the tender to supply ICU equipment under Lot 6 of the MES Project *(Tender No. MOH/001/2014/2015).*

On 6th February, 2015 the MoH and Philips Medical Systems Nederland B.V. executed a contract for the supply of Lot 6 ICU equipment at an initial contract cost of USD 36,492,176.00 (or Kshs. 3,685,709,776.00 at Kshs. 101 to the USD). The contract was amended and restated on 1st April, 2016 and is expected to terminate on 1st April, 2023.

Under the terms of the contract, ICU equipment was to be delivered to a total of eleven (11) county hospitals as provided below:

No.	County	Hospital

1.	Kiambu County	Thika DH (Level IV);
2.	Kwale County	Msambweni (Level V)
3.	Nyeri County	Nyeri PGH (Level V)
4.	Kakamega County	Kakamega PGH (Level V)
5.	Kisumu County	JOOTRH (Level V)
6.	Kisii County	Kisii DH (Level V)
7.	Nakuru County	Nakuru PGH (Level V)
8.	Machakos County	Machakos PGH (Level V)
9.	Embu County	Embu PGH (Level V)
10.	Mombasa County	Coast PGH (Level V)
11.	Garissa County	Garissa PGH (Level V)

The ICU equipment that was expected to be delivered to each of the abovementioned hospitals included:

- 6 ICU beds with mattresses;
- 6 ripple mattresses;
- 1 Central Monitoring Unit with bedside monitor;
- 3 HDU Beds complete with mattresses;
- 3 Bedside Monitors;
- 10 Respirators/ ventilators Adult;
- 4 Respirators/ Ventilators, Paediatric;
- 2 Neonatal CPAP;
- 12 Infusion Pump;
- 12 Syringe pump;
- 2 Resuscitation trolley/ crash cart;
- 10 Suction vacuum bottle;
- 3 Suction machine;
- 6 Pulse oximeters;
- 10 Bedside lockers;
- 10 Laryngoscope with blades, Adult;
- 10 Laryngoscope with blades, Paediatric;
- 1 Refrigerators, blood;
- 1 Refrigerators, food;
- 1 Refrigerators, drugs;
- 1 Temporary pacemakers;
- 3 Portable cardiac monitor;
- 2 Cardiac stethoscopes, Adult;
- 2 Cardiac stethoscopes, Paediatric;
- 2 Resuscitation transport trolleys;
- 2 Resuscitaires, Newborn;
- 3 Patient Trolley;
- 3 Spot light;
- 15 Drip stand;

- 1 Microwave oven;
- 2 Trolley dressing;
- 2 Trolley general purpose;
- 2 Trolley instrument;
- 12 Washing basins;
- 2 Baby cots;
- 1 Electric kettles;
- 6 Nebulizers;
- 2 Defibrillators;
- 2 Magill forceps adult;
- 2 Magill forceps pediatric;
- 1 Medical gas plant (oxygen and vacuum);
- 1 Medical gases piping system
- 1 Bedside electrical system

A variation deed was executed on 22nd November, 2017. The variation resulted in ICU equipment being assigned to the following three (3) additional hospitals:

1. Narok Level 5 Hospital (Narok County)
2. Meru Level 5 Hospital (Meru County)
3. Moi Teaching and Referral Hospital (MTRH)

As well as equipping the aforementioned hospitals with ICU equipment as indicated above, the variation also included the supply of diagnostic equipment considered crucial to the proper functioning of ICU facilities i.e. Blood Gas Analysers and Electrocardiography equipment.

With the variation, the total number of beneficiary facilities covered under the contract rose to fourteen (14) hospitals and the contract sum of Lot 6 equipment rose by 16% to reach USD 45,256,008.00 (or Kshs. 4,570,856,808.00 at Kshs. 101 to the USD).

In respect of the contract, Philips Medical Systems Nederland B.V., the original equipment manufacturer subcontracted two companies as follows:

a) Philips East Africa Ltd to implement civil works, installations, certifications and maintenance.
b) Skyluck Construction Ltd to carry out renovation works.

4.5.2 Committee Hearings with Philips Medical Systems Nederland B.V./Philips East Africa Ltd

The Committee held a hearing with representatives of Philips Medical Systems Nederland B.V. and Philips East Africa Ltd led by Mr. Ralph Assies, Director, Philips Medical Systems Nederland B.V., on 31st October, 2019

2.18.2.1. Role of the Contractor in the Initiation of the MES Project

According to Philips, as a global leader in medical supplies and equipment, and as part of its normal public relations and marketing strategy, the Contractor had participated in various fora organised by the MoH to discuss mechanisms for equipping health facilities across the country prior to the MES Project. However, the company had not been directly involved in influencing the conceptualisation, initiation or roll-out of the MES project by the MoH.

2.18.2.2. Execution of the Contract

According to Philips on 6th February, 2015 the MoH and Philips Medical Systems Nederland B.V (Philips) executed a contract for the supply, delivery, installation, commissioning, maintenance and repair of Lot 6 ICU equipment at an initial contract cost of USD 36,492,176.00 (or Kshs. 3,685,709,776.00 at Kshs. 101 to the USD).

Under the contract, the Philips was obligated to install eleven (11) Intensive Care Units in the following county health facilities:

1. Thika Level 5 Hospital (Kiambu County)
2. Msambweni Level 5 Hospital (Kwale County)
3. Nyeri PGH (Nyeri County)
4. Kakamega PGH (Kakamega County)
5. JOORTH (Kisumu County)
6. Kisii Level 5 Hospital (Kisii County)
7. Nakuru PGH (Nakuru County)
8. Machakos Level 5 Hospital (Machakos County)
9. Embu PGH (Embu County)
10. Coast PGH (Mombasa County)
11. Garissa PGH (Garissa County)

The ICU facilities installed in each beneficiary hospital consisted of six ICU beds, three HDU beds, six ripple mattresses, one central monitoring unit with a bedside monitor, three bedside monitors, ten adult ventilators, four paediatric ventilators and other accessory equipment. The contract also required the contractor to do the renovations necessary to bring the facilities up to standard with the WHO guidelines on dialysis.

2.18.2.3. Variation of the Contract

According to Philips a variation of the contract was executed on 22nd November, 2017. The variation covered an additional three (3) hospitals as follows:

1. Narok Level 5 Hospital (Narok County)
2. Meru Level 5 Hospital (Meru County)
3. Moi Teaching and Referral Hospital

The additional facilities received similar equipment as the original beneficiary hospitals under the contract. In addition, diagnostic equipment considered crucial to the proper functioning of ICU facilities was also supplied to all beneficiary hospitals i.e. Blood Gas Analysers and Electrocardiography equipment.

2.18.2.4. Subcontractors

According to Philips in the execution of the contract, the Contractor subcontracted two companies as follows:

Philips East Africa Ltd to implement local services including civil works, installation, commissioning, certifications, maintenance and replacement. Philips East Africa Ltd was a fully owned subsidiary of Philips Medical Systems Nederland BV. Skylark Construction Ltd to carry out renovation works.

2.18.2.5. Status of Implementation of Lot 6 Contract

According to Philips, by the time of this inquiry, the Contractor had fully implemented the installation and commissioning of ICU equipment in 13 out of 14 project sites as follows: Thika, Machakos, Nakuru, Nyeri, Embu, Coast PGH, Garissa, Kakamega PGH, JOORTH, Kisii Level 5

, Narok, MTRH and Msambweni Level 5. In relation to the implementation of the project at Meru Level Hospital, the Contractor submitted that:

1. Under the terms of the contract, the Contractor was required to carry out renovation of existing buildings. During the initial stages, a suitable building for renovation was identified at the hospital.
2. However, the County Government of Meru subsequently opted to abandon the initial site and construct a new building altogether.
3. There had been undue delays at the site, and as at the time of the meeting, works were only 50% complete.
4. Despite the delays, the contractual period was set to end at the same time as all other beneficiary sites in 2023. Thus, regardless of the time the ICU equipment would actually be installed and commissioned at the hospital, at the lapse of the contract on 1st April, 2023, Meru would also determine.
5. At the time of this inquiry, ICU equipment meant for Meru Level 5 was still lying at the Contractors' warehouse in Eindhoven, Netherlands awaiting dispatch.
6. No payments had been received by the Contractor in respect to Meru Level 5 Hospital.

2.18.2.6. Functionality Status of Lot 6 Equipment

According to Philips, all equipment, save for equipment meant for Meru Level 5 Hospital, supplied under Lot 6 had been installed, commissioned, and was providing the required services by the time of this inquiry. Based on patient demand and the availability of staff, some hospitals were operating at full ICU capacity (e.g. Kakamega PGH) while others were operating at lower capacity (e.g Msambweni Level 5 Hospital).

2.18.2.7. Financial Model

The financial model of contract included the following components: fitting out works, supply of equipment, training, maintenance, labour, works done, spare parts etc.

2.18.2.8. Payments Received

According to Philips payments were effected by the MoH on a quarterly basis. The Contractor raised separate quarterly invoices for the original and variation contracts as provided below:

a) *Initial Contract for eleven (11) facilities:* USD. 1.3 M (or Kshs. 131,300,000.00 at Kshs. 101 to the USD) per quarter.

b) *Variation Contract for the three (3) additional facilities:* USD 438,000.00 (or Kshs. 44,238,000.00 at Kshs. 101 to the USD) per quarter.

In the case of payments under the variation, owing to the pending status of Meru Level 5 Hospital, the Contractor received only two-thirds of the payment indicated in the invoice. - Payments were up to date save for the latest payment which was due to be paid at the time of the inquiry. To this effect, out of a total contract sum of USD 45M, the Contractor had received payments amounting to USD 19,049,505.70 (or Kshs. 1,924,000,075 at Kshs. 101 to the USD) by the time of this inquiry.

2.18.2.9. Pricing/Costing of Equipment

The Contractor disowned the cost figures of ICU equipment obtained by the Committee from the MoH. For example, when questioned whether they had supplied two adult cardiac stethoscopes at the cost of USD 24,876.14 (Kshs. 2,512,490.15 million at a conversion rate of Kshs. 101 to the USD) as indicated in the MoH records, the Contractor clarified that they had actually supplied the stethoscopes at a cost of Kshs. 4,500.00 per unit.

2.18.2.10. Staff Training

According to Philips, it had provided user and maintenance staff under the contract as follows:

a) *End User Training:* Staff trained under this category included doctors, nurses, clinicians, cleaners etc.

b) *Shadow Training:* Under this category, four nurses received shadow training at KNH and MP Shah hospitals.

At the time of the enquiry, the contractor informed the Committee that it had trained a total of 61 biomedical engineers and 57 nurses against a contractual obligation of 13 biomedical engineers

and 52 nurses, respectively (the contract required the Contractor to train four nurses and one biomedical engineer at each of the 13 operational sites).

2.18.2.11. Regulatory Status of Equipment

According to Philips all equipment supplied under Lot 6 was duly listed by KEBS and PPB. The contractor also submitted that the equipment supplied in the Lot was also in conformity with international EU regulations and ISO standard (see Annex XXVI)

2.18.2.12. Reagents and Consumables

According to Philips, beneficiary hospitals were duly supplied with a starter pack as per the terms of the contract. Beyond providing the starter pack, under the terms of the contract, Philips was not obligated to supply reagents or consumables. However, it had acted to ensure their availability in the Kenyan market. To note, none of the equipment supplied under Lot 6 was closed to any specific reagent or consumable.

According to Philips it had achieved an uptime of 98% or higher in all its installed equipment at all sites as stipulated by the contract.

2.18.2.13. Equipment Replacements and Upgrades

According to Philips, the tender documents raised by the MoH had underestimated the capacity of micro-gas plants needed in the Kenyan context. To remedy this, the Contractor supplied higher capacity units than specified in the tender documents at no additional cost to MOH. With regards to equipment replacements, Philips stated that contractually, they were only obligated to replace the ripple mattresses supplied under the contract at the lapse of six years. Further, according to the contractor most of the equipment supplied under Lot 6 had a lifespan guarantee of 7 years.

2.18.2.14. Disposal of, and Residual Value of Lot 6 Equipment

According to Philips at the end of the contractual period in April, 2023, the contract provided for the following scenarios: continued provision of maintenance services of the installed equipment by the Contractor at an agreed service fee for an additional three years; retention of equipment by

County Governments with maintenance of equipment at own cost ; and 18 months to the lapse of the contract period, the MoH as the procuring entity was expected to independently verify the residual value and useful life of the equipment supplied. Based on the findings, a transfer price of the equipment would be negotiated between the MoH and the Contractor.

Copies of the written submission and annexures received from the Contractor are herein attached as Annexure XXVI

4.5.3 Committee Observations

The Committee made the following observations:

1. In respect to the role of Philips in the conceptualisation and design of the MES project, the Committee made the following observations:

   (a) that, Ms. Sicily Kariuki, the then CS, Health identified Philips Medical Systems Nederland B.V Ltd as one of the 'two reputable multinational companies' that the then CS, Health, Mr. James Macharia had referred to in a letter to all County Governors dated 20th September, 2013 . In the said letter, Mr. Macharia laid out plans by the MoH to place/lease medical equipment in Level 4 and 5 hospitals across the country through a PPP initiative and stated in part

   > *The Ministry of Health, through Public Private Partnership initiative, in consultation with the National Treasury is in the process of negotiating with two (2) reputable multinational companies who have expressed interest to assist equip our facilities and train personnel to enable us realise the goal of a level 5 facility in each county and a level 4 facility in each subcounty. Whilst we are currently working out the possible financial structures to support this initiative, the most likely structure will be an operating lease agreement whereby the said reputable multinational companies will place/ lease the medical equipment as lessors.*

   (b) that collaboration between the MoH and the 'two reputable multinational companies' was further elaborated in the MoH's *Concept Paper on Leasing of Equipment and Infrastructure Improvement in Public Health Facilities under Public Private Partnership* in which it is stated, '*The Ministry is in the process of initiating dialogue with major global manufacturers of some of the specialised equipment for further consideration and involvement in the project, including Philips Inc and General Electric Inc. Ltd* ".The MoH would eventually go on to

shift from the PPP initiative in favor of a procurement process through a MES model.

(c) that despite the shift from the proposed PPP initiative by the MoH, Philips Medical Systems Nederland B.V. went on to successfully bid for the supply of ICU equipment under Lot 6 of the new MES procurement model. The contract value of the supply of ICU equipment under Lot 6 was USD 36,492,176.00 (or Kshs. 3,685,709,776.00 at an exchange rate of Kshs. 101 to the USD). This was equivalent to at least 7.9% of the total contract value of what was to become popularly known as the MES project

2. In respect to whether the contractor delivered all the equipment required by the contract relating to Lot 6 and whether the equipment is functional, the Committee made the following observations:

(a) that the ICU equipment installed in MTRH and Coast General was working optimally.

(b) that according to PKF *Medical Equipment Services (MES) Service Level Monitoring Report January, 2019*, the equipment supplied under Lot 6 had the lowest recorded faults resulting in breakdown in the year 2017.

(c) that according to the PKF *MES Service level Monitoring Report, January 2019*, the contractor delayed implementation in all 11 hospitals. For instance, Kisii DH was commissioned on 22nd November, 2016, Garissa PGH was commissioned on 16th March 2017, Embu PGH was commissioned on 23rd December, 2017, Msambweni Hospital was commissioned on 3rd October, 2017.

3. In respect to whether the cost of equipment under Lot 6 is justified, the Committee made the following observations:

(a) that despite the delay in implementation in 11 hospitals, the contractor received the first quarter payment when it fell due on 28th October, 2016 in accordance with the requirements of clause 28 of the contract which obligates the MoH to pay the contractor each quarter when the payment falls due and provides that the contractor is entitled to receive interest on any payment not made on the due date.

(b) that according to the *PKF MES Service level Monitoring Report, January 2019*, there was a delay in implementation of Lot 6 in all the original 11 hospitals e.g. implementation of Kisii DH was delayed by 259 days. Cumulatively Lot 6 was delayed by a total time of 1,647 days. That although Schedule 13 to the Contract relating to Lot 6 provided for performance deduction according to the *PKF MES*

Service level Monitoring Report, January 2019 the deductions were yet to be effected almost three years after the contract was executed.

(c) that the cost of equipment delivered under Lot 6 was highly exaggerated. For instance, according to the MOH, the cost of two adult cardiac stethoscopes supplied by the contractor to Lot 6 is USD 24,876.14 (equals Kshs. 2,512,490.14 million at a conversion rate of Kshs. 101 to the USD).

(d) that Philips and Dr. Muraguri disowned the cost of the equipment submitted by MOH as exaggerated and Philips clarified that it had actually supplied the stethoscopes at a cost of Kshs. 4,500.00 per unit.

(e) that according to Schedule 9 Part 2, Philips equipment only amounted to 17% of the items that were delivered under Lot 6. The Committee further observes that while Philips is an OEM, over 80 % of the equipment supplied under Lot 6 was actually sourced from other OEMs an indication that the cost may be exaggerated.

(f) that according to the PKF *MES Service level Monitoring Report, January 2019*, the MoH was in accordance with clause 28 of the contract penalised USD 153,503.00 (or Kshs. 15,503,803 at Kshs. 101 to the USD) for late payments and from the contractor's letter dated 5th July , 2019, to the MOH, the MoH was also required to pay interest amounting to USD 7,779.06 (or Kshs. 785,685.06 at Kshs. 101 to the USD) in late payments under the variation contract.

(g) that the MOH had the necessary funds to make the payments since at the time in question, counties had already been charged for the equipment including the variation under the contract in relation to Lot 6 equipment under the CARA.

4. In respect of who pays for Lot 6 equipment, the Committee observes that the County Allocation of Revenue Act has consistently borne the budget item 'Conditional Grant-Leasing of Medical Equipment' since FY 2015/16. Under the Conditional Grant to counties, the MoH received a total of Kshs. 95 Million (FY 2015/2016 to FY 2017/2018), then Kshs. 200 Million (FY 2018/2019) and subsequently, Kshs. 131 million (FY 2019/2020) from each of the 47 counties for purposes of paying for the equipment under the MES Project.

   The Committee therefore finds that the counties pay for Lot 6 equipment.

5. In respect to whether the contractor carried out training, the Committee makes the following observations:

   (a) that Clause 26.8 of the Contract obligates the contractor to ensure that there is a sufficient number of trained staff to provide the services envisaged under the Contract. Schedule 9, appendix 2 of the contract further provides for the training

of four (4) ICU nurses and one (1) biomedical engineer at each of the beneficiary hospitals. From the County visits the Committee observed that the contractor met the requirement to train the personnel.

(b) that whereas the project concept under PPP covered training of personnel for specialised care, the contract for Lot 6 after the shift to public procurement, only provides for user training and not specialist training.

6. In respect to whether the equipment and consumable supplied under Lot 6 for the use by the Kenyan Public, the Committee made the following observations:

(a) On the regulatory status of the equipment supplied under Lot 6, the Committee noted that the PPB merely listed the equipment but failed to carry out any independent vetting, inspection or quality control testing of the equipment to guarantee the equipments safety, efficacy or quality of the drugs and supplies contrary to Section 35D of the Pharmacy and Poisons Act, and Section 9 (3) of the KEMSA Act which requires all drugs and supplies to be registered by the PPB.

(b) Further, the contractor did not provide evidence that it had registered and listed the consumables it delivered to the county hospitals in accordance with Regulation 3 of the Pharmacy and Poisons (Registration of Drugs) Rules.

7. In relation to whether the variation of Lot 6 was procedural and justified, the Committee observes

(a) that according to Regulation 9 of the Public Procurement and Disposal Regulations, 2006 requires user departments. In this case, counties ought to have initiated the requests that led to the variation of contract. However, no evidence was adduced to prove that the variation of the contract was requested by the counties

(b) that clause 34.1.2 of the Contract provides that a variation of the contract is a delay event and a delay event shall not result ib the extension of the project term.

(c) that despite this provision the MOH went ahead to vary to the contract in 2017 to include an addition three hospitals and seek to have the contractor deliver additional equipment to all the facilities that was crucial to the proper functioning of ICU facilities.

(d) that to date the equipment for Meru Level 5 is still lying at the Contractors' warehouse in Eindhoven, Netherlands awaiting dispatch since the building in which the equipment is to be installed is not complete.

(e) that due to the unconscionable term under clause 34.1.2, if the equipment for Meru Level 5 is installed the contractual period for that equipment is set to determine at

the same time as other beneficiary sites. Thus, at the lapse of the contract on 1st April, 2023, the term of the service under Lot 6 in respect to Meru Level 5 will also determine.

(f) that although the MOH submitted that the variation in the charge to counties from 95 Million to 200million and later to 131 million, was partly due to the cost of variation of the various MES contacts.

(g) that, despite the delay above Meru is still paying for the equipment as evidenced under CARA. However, as per the testimony of both the Contractor and MOH no payments had been received in respect to Meru Level 5 Hospital.

From the foregoing the Committee finds that-

(a) the MOH contravened Article 201 of the Constitution that requires prudent use of public money by accepting the exaggerated prices quoted in the value list it provided in respect to the cost of Lot 6 equipment that may have occasioned loss of public funds and may not represent value for money.

(b) the MOH contravened section 197 (1) (i) that forbids wasteful expenditure when it accepted exaggerated prices in relation to Lot 6. For instance the the Committee finds that the cost of the stethoscope alone was inflated to be 575 times more than the cost at which Philips supplied.

(c) despite the delay in implementation in 11 hospitals, the contractor received the first quarter payment in contravention of Article 201 of the Constitution that requires public money be used prudently and reasonably; section 197 (1) (i) of the Public Finance Management Act 2012 which prohibits wasteful expenditure by public entities; regulation 98 of the PFM (National Government) Regulations which prohibits advance payment of goods; and, section 45 (2) (a) (ii) of the Anti-Corruption and Economic Crimes Act, 2003 which prohibits a person from making payments from public revenues for goods not supplied in full.

(d) the MOH was negligent when it failed to make to make performance deductions amounting to USD 54, 568 (Kshs. 5,511,368 using a conversion rate of 101) in accordance with Schedule 13 to the Contract relating to equipment under Lot 6 thereby resulting in loss of public funds.

(e) the cost of the equipment that was delivered under Lot 6 was highly exaggerated in the records maintained by MOH. For instance, the cost of one bedside locker is priced at USD 12,947.2 or Kshs.1,346,488.00; a drip stand is USD 12,523.85 or Kshs. 1,264,908.85, a microwave oven is USD

12,805.81 or Kshs. 1,293,386.81 and a wash basin is USD 12,900 or Kshs. 1,302,900. In this respect, the MOH may have occasioned loss of public funds.

(f) most of the equipment under Lot 6 was supplied by OEMs other than Philips, as a result the Committee surmises that the cost of Lot 6 equipment may have been exaggerated to include any mark up costs associated with Philips' sourcing for the equipment from other OEMs.

(g) the MoH was also negligent and contravened Article 201 of the Constitution that requires prudent use of public finances when it, despite having the money to pay the contractor in relation to equipment relating to Lot 6, failed to make payments under the contract when they fell due thereby occasioning accrual of interest charges pursuant to clause 28 of the Contract.

(h) the MOH irregularly and illegally initiated variations of the contracts on behalf of counties contrary to Regulation 9 of the Public Procurement and Disposal Regulations, 2006

(i) the MOH was negligent when it varied the contract in relation to Lot 6 being aware that the contractual term could not be extended on the basis of a variation requested by MOH.

(j) the MoH was negligent when it failed to ensure the award of Lot 3 and 4 relating to laboratory equipment that was required to ensure the optimal use of ICU equipment delivered under Lot 6.

8. In respect to which options are available at the end of the term of the contract, the Committee made the following observations

(a) that at the end of the contractual term the MOH has the following options

(i) to extend the contract for an additional three years(clause 3.2 of Part A);

(ii) to purchase the equipment in the event of expiry of the Contract for the sum of the net book value or the impaired net book value in accordance with scheduled 18 (clause 18.7);

(iii) to retender the services and conclude a new contract with a successor contractor(Schedule 18 Part B & Part G); or

(iv)to terminate on the expiry of the project term (Schedule 18 Part B paragraph 3)

(b) that the contractor stated that the equipment may not provide optimal services after the expiry of the project term before the maintenance costs skyrocket and the

increases in maintenance costs and failure rates render the equipment financially unfeasible.

(c) that if beyond the guaranteed lifespan of the equipment the cost of maintaining the equipment will increase exponentially then the cost of maintenance of the equipment beyond its guaranteed lifespan may not represent prudent use of public finances or value for money.

(d) that the contract is silent on the contractor's role in disposal of the equipment should the counties opt to exercise their option to purchase the equipment

4.5.4 Committee Recommendations

The Committee has established that Philips was already negotiating with the MOH to lease/ place equipment in the public health facilities before the MES project. The Committee further established Philips eventually won the contract to supply Lot 6 equipment under the MES project. In addition, the Committee established that Philips equipment only makes up 17% of the equipment delivered under Lot 6 with the rest being sourced by Philips from other original equipment manufacturers. This possibly affected the pricing of the equipment. Further, the Committee established that the records of MOH in respect to the pricing of the equipment delivered under Lot 6 bears grossly exaggerated prices of the equipment supplied. Due to the foregoing, the Committee has established that the cost of Lot 6 may not represent value for money. As a result of the foregoing, the Committee therefore recommends–

1. **EACC investigate the circumstances under which the cost of the equipment under Lot 6 was inflated and take necessary action on the persons found culpable.**
2. **Competition Authority investigate the relationship between Philips and the MOH and in particular the circumstances under which Philips was awarded the tender for Lot 6 equipment.**
3. **Since the contractor delayed installation of the equipment, the Ministry of Health as the agent of County Governments in this transaction renegotiate for the extension of the time for the service delivered under Lot 6 at no additional cost to the Government since the counties faithfully paid for the equipment throughout.**
4. **Auditor General carry out an audit of the payments made in respect to Lot 6 with a view to determining whether the payments were made in accordance with the law and the contract and submit its report to the Senate in 6 months.**
5. **A multisectoral committee composed of a representative of the MOH, representation of the COG, a representative of the PPB, a representative of KEBS, a representative of NT, a representative of OAG & DOJ undertake valuation of the equipment supplied under Lot 6 to validate the viability of the equipment in respect to the**

lifecycle model in the contract and at the end of the contractual term in 2023 and report back to the Senate in 6 months.

6. EACC and DCI to investigate the circumstances under which KEBS and PPB failed to carry out their statutory obligations to ensure the standards and safety of medical products imported under MES and in particular establish how Philips received pre-verification of certificates on various dates.

7. EACC and DCI to investigate the circumstances under which the contract for Lot 6 equipment was varied without requests from the counties as required by Regulation 9 (d) of the Public Procurement and Disposal Regulations, 2006 (now regulation 34 (d) of the Public Procurement and Asset Disposal Regulations, 2020)

8. EACC investigate the circumstances under which the counties paid more than 100% for variation of the MES contracts despite the fact that the variation for Lot 2 was within the 25% threshold envisaged under the law.

9. The Auditor General carry out a forensic audit to establish what happened to the money that was deducted from the Counties after the financial year 2018/19 and 2019/2020

LOT 7: RADIOLOGICAL EQUIPMENT

4.6 GE EAST AFRICA SERVICES LTD

4.6.1. Background Information on GE East Africa Services Ltd

GE East Africa Services is a wholly owned subsidiary of the General Electric Company. It was incorporated on 1st March 2005 under the Companies Act, CAP 486. At the time of submitting its bid for the MES project, the shareholders of GE East Africa Services Limited, both wholly owned subsidiaries of the General Electric Company were as follows:

a) GE Energy Europe BV: 99.999981% of the shares in GE East Africa Services Limited; and

b) GE Holdings Luxembourg & Co. S.A.R.L: 0.000019% of the shares in GE East Africa Services Limited.

General Electric East Africa Ltd was awarded the contract to supply Lot 7 (Radiological) equipment at a contract value of USD 238,279,502.00 (or Kshs. 24,066,229,702.00 at an exchange rate of Kshs. 101 to the USD). This was equivalent to at least 52% of the total contract value of what was to become popularly known as the MES project.

According to the terms of the contract, Lot 7 equipment was to be delivered to Level 4-6 hospitals, as follows:

Item Code	Equipment Category	Hospital Level
MOH-7-01	CR System/ Carestream CR Classic DV6850	L4, L5. L6
MOH-7-02	Digital General X-Ray Machine, Floor Mounted/Brivo DRF	L4, L5
MOH-7-02	Digital General X-Ray Machine, (Ceiling Mounted with Two-digital flat panel detector systems)/DEFINIUM 6000	L6
MOH-7-03	Mammography unit, Digital/SENOGRAPHE CRYSTAL	L5

MOH-7-03	Mammography unit, Digital/ SENOGRAPHE ESSENTIAL	L6
MOH-7-04	Mobile X-Ray Unit/ Mobile X-Ray Unit Optima XR 220 AMX	L4,L5,L6
MOH-7-05	C-Arm X-Ray Imaging/OEC 9900 Surgery C-Arm	L4,L5,L6
MOH-7-06	OPG Machine/Carestream CS 9000 3D	L5,L6
MOH-7-07	Ultrasound Unit/LOGIQ F6	L4
MOH-7-07	Ultrasound Unit/LOGIQ F8	L5, L6

Key subcontractors to the contract were identified as Seven Seas Technologies Ltd (Project Management and Field Services) and Carestream (Supply and maintenance of Dental Equipment).

4.6.2 Committee Hearings with Representatives of General Electric East Africa Ltd

General Electric East Africa Ltd was awarded the contract to supply Lot 7 (Radiological) equipment at a contract value of USD 238,279,502.00 (or Kshs. 24,066,229,702.00 at an exchange rate of Kshs. 101 to the USD). This was equivalent to at least 52% of the total contract value of what was to become popularly known as the MES project.

The Committee invited the Contractors representatives of General Electric East Africa Ltd led by its CEO, Ms. Brenda Gin Nottingham on diverse dates as follows: 31st October, 2019, 12th November, 2019; and, 18th November, 2019 (*Annex 'XXII'*).

A. Was GE East Africa Services Ltd an Original Equipment Manufacturer as per the requirements of the Tender?

The Contractor informed the Committee that it was a subsidiary of the main General Electric Company and submitted the Parent Company Guarantee within the contract as well as a history of the Company as proof of its connection to the main GE conglomerate. The Contractor further submitted the company's CR12. The CR12 identified the major shareholders of the company as follows:

a) GE Power Netherlands BV
b) GE Holdings Luxembourg & Co SARL

The Committee invited the Contractors representatives of General Electric East Africa Ltd led by its CEO, Ms. Brenda Gin Nottingham on diverse dates as follows: 31st October, 2019, 12th November, 2019; and, 18th November, 2019 (*Annex 'GEA1'*).

However on all three hearings with the Committee, the Contractor failed to satisfy the Committee's key queries namely—

A. Whether GE East Africa Services Limited are original equipment manufacturers as per the tender requirements
    a. GE East Africa by their own admission stated that they were not original equipment manufacturers in Kenya
    b. They stated that they were merely agents of the global GE Entity.
    c. Further E East Africa submitted an Attesting Secretary's certificate dated 4th September 2014 demonstrating that GE East Africa Services Limited is a wholly owned subsidiary of the General Electric Company and GE East Africa Services Limited demonstrating that GE met the eligibility criteria of an Original Equipment Manufacturer.

B. Whether GE East Africa had the legal capacity to execute the contract with the Ministry of Health
    a. GE East Africa failed to produce the power of attorney that the Committee requested as proof that it had capacity to execute the Contract
    b. GE East Africa further stated that Mr Okwenda did not require a power of attorney to execute the contract based on the provisions of section 37(2) of the Companies Act, 2015 which states as follows:

        "a document is validly executed by a company if it is signed on behalf of the company by a director of the company in the presence of a witness who attests the signature".

    c. Upon a complete failure to demonstrate that there had been a valid power of attorney allowing it to bid and execute the Lot 7 Contract on behalf of GE, GE East Africa stated that it had the

Section 48(1) of the Public Procurement and Disposal Act(repealed) states that a procuring entity shall reject all tenders, which are not responsive in accordance with section 64 of the Act. The Act states at section 64 as follows—

'(1) A tender is responsive if it conforms to all the mandatory requirements in the tender documents.

(2) The following do not affect whether a tender is responsive—

(a) minor deviations that do not materially depart from the requirements set out in the tender documents; or

(b) errors or oversights that can be corrected without affecting the substance of the tender.

(3) A deviation described in subsection (2)(a) shall—

(a) be quantified to the extent possible; and

(b) be taken into account in the evaluation and comparison of tenders.'

The Public Procurement and Disposal Regulations, 2006(repealed) states that the Evaluation Negotiations, Inspection and Acceptance Committee constituted under regulation 16(1) shall—

(a) adhere to the compliance and evaluation criteria set out in the tender documents in undertaking in carry out the technical and financial evaluation of the tenders or proposals received by the procuring entity;

(b) evaluate the tenders within a period of fifteen days after the opening of the tenders; and

(c) carry out the tender evaluation with all due diligence.

Hansard Reports of the Committees Hearings with GE East Africa Ltd are attached herein under Annex 22.

4.6.3 Committee Observations on the Lot 7 Contract

In light of the fact that General Electric was not adequately represented in any of the hearings it was invited to attend by the Committee, the following section is based on the Committee's observations, and own analysis of documentation submitted by the Contractor and the MoH:

1. In light of the fact that General Electric was not adequately represented in any of the hearings it was invited to attend by the Committee, the following section is based on the Committee's observations, and own analysis of documentation submitted by the Contractor and the MoH:

2. Despite being granted the opportunity to present itself before the Committee a record three times, the Contractor failed to comply with the Committee's threshold for adequate representation as demonstrated by the following:
   (i) failure to present *bona fide* shareholder(s) of the company;
   (ii) failure to produce Power of Attorney despite several assurances to the Committee on the same; and
   (iii)failure to present any of its subcontractors i.e Seven Seas Technologies Ltd and Carestream Health Dubai.

3. More significantly, the tender document issued by the MoH invited only original manufacturers of medical equipment to bid under the MES project. Despite not being an original manufacturer of equipment, GE East Africa Services Limited was awarded the tender to supply Lot 7 (Radiology) equipment *vide* an award letter *(Ref: MOH/PS/1/1/VOL VI(118))* dated 21st November 2014. The award letter was signed by Dr. Nicholas Muraguri, the then Director of Medical Services on behalf of the Principal Secretary, the Ministry of Health.

4. The MoH therefore illegally awarded the contract as it failed to adhere to its own tender requirements for OEMs. In doing so, the Ministry of Health violated procurement laws in particular, section 48 of the Public Procurement and Disposal Act that states that procuring entities shall reject all tenders which are not responsive in accordance with section 64 of the Act and regulation 16 of the Public Procurement and Disposal Regulations, 2006.

5. Moreover, in allowing a party that was not qualified for the tender nor an original equipment manufacturer for the machinery being purchased, the MoH exposed the Government of Kenya to potential risk of loss. This is due to the fact that Kenyan law holds that subsidiary companies are separate entities from their parent companies therefore any liabilities falling on the subsidiary will not be borne by the parent company.

B. Role of GE East Africa Services in the conceptualization of the MES Project

During its hearing with the MoH dated 22nd October, 2019, Ms. Sicily Kariuki, CS, Health had identified General Electric East Africa Ltd as one of the 'two reputable multinational companies' that the then CS, Health, Mr. James Macharia had referred to in a letter to all County Governors dated 20th September, 2013.

In the said letter, Mr. Macharia laid out plans by the MoH to place/lease medical equipment in Level 4 and 5 hospitals across the country through a PPP initiative.

Committee Observations

The Committee further makes the following observations in respect to the role of GE East Africa Services in the conceptualization stage and process of the MES Project—

6. Vide a letter dated 27th February, 2015, then CS, Health, Hon. James Macharia sought the approval of the AG to extend the mandate of IKM Advocates. The letter further sought the AGs' approval for the MoH to accept funding in the form of a 'donation' from GE East Africa, a contractor in the MES Project, for the further engagement of IKM Advocates in the additional scope of services. In his letter dated 23rd April, 2015, the then Attorney General, Prof. Githu Muigai, EGH, SC granted his approval subject to the conclusion of a fresh service level agreement to be approved by his office. The AG further granted approval for the 'donation' by GE on the understanding that it was to be made gratis, without any expectations of preferential treatment in the MES Project. To note, contrary to the express directive of the AG, the Committee did not find evidence to suggest that the MoH and IKM subsequently executed a new Service Level Agreement for the additional scope services.

7. Further, the Committee finds that the AG was deliberately misled on the issue of the 'donation' by GE: Whilst the AG granted approval for GE to fund the extended mandate of IKM Advocates through a 'donation' in actuality, IKM Advocates received a total of USD 945,000.00 (equivalent to KShs. 95,445,000 at an exchange rate of KShs. 101 to the USD) from the five original MES service providers as follows:
   (a) Shenzhen Mindray Biomedical Electronics Company: USD 75,000.00 (equivalent to KShs. 7,575,000 at an exchange rate of KShs. 101 to the USD).
   (b) Esteem Industries: USD 50,000.00 (equivalent to KShs. 5,050,000 at an exchange rate of KShs. 101 to the USD).
   (c) Belleo SRL: USD. 50,000.00 (equivalent to KShs. 5,050,000 at an exchange rate of KShs. 101 to the USD).
   (d) Philips Medical Systems Nederland B.V: USD. 170,000.00 (equivalent to KShs. 17,170,000 at an exchange rate of KShs. 101 to the USD).
   (e) GE East Africa Services Ltd: USD. 600,000.00 (equivalent to KShs. 60,600,000 at an exchange rate of KShs. 101 to the USD.

8. The Committee observes that contrary to the terms under which the 'donation' by GE was approved for additional scope services, IKM Advocates acted unethically by accepting the 'donation' from parties that they were supposed to be acting against. Further to this, the Committee observed that the amount collected by IKM Advocates from the five contractors was almost double the KShs. 48,881,063.90 it had received from the MoH on whose behalf it was supposed to have been acting.

C. Functionality of Lot 7 Equipment and Value for Money aspect

9. Article 227 of the Constitution obligates state organs and public entities to contract goods and services in a fair, equitable, transparent, competitive and cost effective manner.

10. In September 2016, the MoH issued a RFP inviting firms to tender for Service Level Monitoring of the MES Project through a restricted tender. PKF Kenya bid and was awarded the tender and consequently contracted to provide service level monitoring for a period of two years on 1st February, 2017.

11. The assignment was aimed at assisting the MoH to ensure that the MES project was implemented to the required standards, and in accordance with the performance parameters of the agreements with the service providers. During the two (2) year period, PKF undertook monitoring at ninety-eight (98) MES supported health facilities and submitted quarterly and other ad-hoc reports. A final Quarterly MES Service Level Monitoring report dated 20th March, 2019 raised key issues in relation the MES Project, including:
    a. Failure by the MoH to recover performance deductions from MES service providers amounting to USD 408,126.00(Ksh 41,220,726 at a rate of USD$1= KES 101) contrary to the provisions of the contract;
    b. Delays in the implementation, installation, and commissioning of MES equipment in several health facilities;
    c. Lack of MES project services in at least twenty-seven (27) hospitals owing to the lack of personnel, electricity and/or water.
    d. Inconsistencies between the payment schedules and stipulated end dates of MES contracts;
    e. Delayed submissions of the financial models for the year 2018/2019 by MES contractors;
    f. Penalties amounting to USD 4,183,290 levied against the MoH by contractors owing to late payment; and,
    g. Pending installation and commissioning of theater equipment in six hospitals owing to delays in completion of renovation or construction works of theatre facilities

12. According to the MES Service Level Monitoring Final Quarterly Report (January, 2019) by PKF Kenya, out of all the MES equipment, radiology equipment under lot 7 of the Contract awarded to GE East Africa Services Limited, had logged the highest number of equipment breakdowns with a total of 550 faults reported in 2017, and 663 in 2018. Of these, the most affected equipment were digital General X-Ray machines, ultrasound units, and mobile X-Ray units

13. According to documentation received from the MoH, Digital General X-Ray machines were installed but non-functional in sixteen (16) hospitals including Bondo, Chebiemit, Garbatulla, Garsen, Gucha, Kacheliba, Kapenguria, Kehancha, Keroka, Likoni, Makindu, Mwingi, Ndanai, Nyambene, Tharaka, and Endebess Hospitals.

14. Furthermore, during the Committee's site visit to Garba Tulla Sub-District Hospital in Isiolo County, the General X-Ray machine was found only partially installed with parts of

it lying on the floor of the radiology department in its original polythene packaging. In addition, the Ultrasound machine and C-Arm and mobile X-Ray units were evidently not in use and still in their original packaging.

15. The Committee thus observed that the value for money aspect of the Lot 7 Contract had not been achieved

4.6.4 Recommendations on the Lot 7 Contract

The Committee has established that GE East Africa was already negotiating with the MOH to lease/ place equipment in the public health facilities before the MES project. The Committee further established GE East Africa eventually won the contract to supply Lot 7 equipment under the MES project.

The Committee also established that equipment supplied under Lot 7 was reported to have had multiple faults. This is an indication that the maintenance costs of the equipment may be high and therefore results in increased costs of the contract relating to Lot 7. Moreover, the Committee has established that equipment supplied under Lot 7 still remains non-functional due to both lack of the infrastructure necessary and specialists or subspecialist needed to ensure the optimal use of the equipment. In view of the foregoing, the Committee has established that the cost of Lot 7 may not represent value for money. As a result, the Committee therefore recommends—

1. **That GE East Africa Services Limited, was not an Original Equipment Manufacturer and further, it did not possess a valid power of attorney at the time of executing of the contracts. Therefore, the Lot 7 Contract is *void ab inito* and should not be binding on the Government of Kenya;**

2. **That in consideration of the lack of due diligence on the part of the Ministry of Health; and the relationship between GE and the MoH Legal Consultants IKM & Co advocates, the EACC and other investigatory authorities are urged to undertake expeditious investigations into the circumstances through which an unqualified contractor, GE East Africa Services Limited, was awarded the Lot 7 contract to supply radiological equipment.**

3. **That the Committee urges the DPP to take prosecutorial action against the representatives of GE East Africa Services Limited pursuant to section 27(3)(g) of the Parliamentary Powers and Privileges Act, 2017 following their uncooperative, arrogant and dishonest disposition towards the Committee in its multiple attempts to hoodwink it into accepting its false legal capacity as a valid party to the Lot 7 contract.**

4. **That the Office of the Audtior-General and the EACC commence an urgent investigation into the lot 7 contract on the grounds of the inordinately high failure rate of GE Equipment supplied under lot 7 Contract and the high performance penalties levied against the Government of Kenya and report its findings to the Senate in 60 days.**

4.7 THE HEALTHCARE INFORMATION TECHNOLOGY (HCIT) CONTRACT

4.7.1 Background

On 4th July, 2017 the MoH issued a national open tender (MOH/CRS/ONT/001/ 2017 - 2018) for the provision of Healthcare Information Technology (HCIT) solutions for the Managed Equipment Services Project. The open tender followed a prior attempt by the MoH to single source HCIT services by tender from GE East Africa as a component of the Lot 7 MES contract for Radiological Equipment.

The HCIT project as envisaged, entailed the deployment of a Hospital Information System (HIS) and supporting ICT infrastructure across ninety-eight (98) hospitals, including two (2) hospitals per county and four national referral hospitals, as well as the provision of training and capacity-building for users.

Following a successful bid, the tender was awarded to SST Technologies Group Ltd on 21st August, 2017. A contract between the company and the MoH was subsequently executed on 2nd October, 2017 at the cost of USD 47,569,731.00. At the time, this was equivalent to Kshs. 4,943,417,903.68 at the then exchange rate of Kshs. 103.90 to the USD.

Ultimately, the HCIT Project stalled owing to the contractors' inability to secure a Letter of Support from the MoH. On 19th November, 2019, the MoH terminated the contract under what remain unclear circumstances.

In conducting its investigations on the circumstances that led to the stalling of the project, and the subsequent termination of the contract, the Committee met with the following persons/parties:

1. Seven Seas Technologies Group Ltd;
2. The MoH;
3. Office of the Attorney General (AG)
4. Mr. Julius Korir, CBS, PS, State Department of Youth; and, former PS, Health (February 2017 - February 2018)
5. Eng. Peter K. Tum, OGW, PS, State Department for Labor; and, former PS, Health (March 2018 - March 2019)
6. Mr. Moranga Morekwa, HSC, Chair, MES Project Implementation Committee and members of the MES Implementation Committee: (2014 to Dat

To note, at the time of this investigation, the HCIT Project and the procurement processes leading to its signing were under active investigation by the Directorate of Criminal Investigations vide inquiry file number 246/2019.

The following section provides a summary of the Committee's findings and observations in respect of the above.

4.7.2 Seven Seas Technologies Group Ltd (SST)

The Committee held four hearings with representatives Seven Seas Technologies Group Ltd (SST) led by the CEO Mr. Michael Macharia, on 18th September, 2019; 25th September, 2019; 18th November, 2019; and, 14th February, 2020.

4.7.3 HCIT Tender

1. The MoH issued an national open tender (MOH/CRS/ONT/001/ 2017 - 2018) for the provision of Healthcare Information Technology (HCIT) solutions for the Managed Equipment Services Project on 4th July, 2017.
2. The open tender followed a prior attempt by the MoH to single source HCIT services by tender from GE East Africa as a component of the Lot 7 MES contract for Radiological Equipment. However, the prohibitive cost of GEs' bid at USD 113,973.763 (or Kshs. 11,841,873,97 at the then exchange rate of Kshs. 103.9 to the USD), led to the cancellation of this tender.
3. As envisaged by the tender, and in line with the Kenya National e-Health Strategy, the project intended to leverage on ICT as a means of promoting the full operationalisation of MES services.
4. Following a successful bid, SST Technologies Group Ltd was issued with a notification of award letter by the MoH on 21st August, 2017 *(see Annexure XXVII)*.

4.7.4 Execution of the HCIT Contract

1. On 2nd October, 2017, the MoH and SST executed a contract for the provision of a HCIT platform under the MES Project at a contract sum of USD 47,569,731.00. At the time, this was equivalent to Kshs. 4,943,417,903.68 at the then exchange rate of Kshs. 103.9 to the USD.
2. Under the contract, SST was obligated to deploy a Hospital Information System (HIS) and supporting ICT infrastructure across ninety-eight (98) hospitals, including two (2) hospitals per county and four national referral hospitals, as well as provide to training and capacity-building for users.

4.7.5 Objectives of the HCIT Project

According to the contractor, the HCIT Project was meant to deliver the technology pillar of the UHC Agenda. Specifically, the project was intended to:

1. Leverage on the MES Project to build a national e-health backbone, and enhance interoperability of the fragmented health system;

2. Empower MoH to have real time data on the clinical impact of MES infrastructure and have real-time visibility of MES equipment in order to better manage vendor Service Level Agreements;
3. Enable the National and County Governments to have full visibility of Kenya's health data and statistics;
4. Connect medical experts online across Kenya for purposes of providing digital tele-diagnostic services;
5. Enhance provision of nationwide healthcare data for national research, innovation and healthcare development.

4.7.6 Expected Benefits of the Project to Kenyans

According to the contractor, had the project been successfully implemented, Kenyans would have appropriated the following expected benefits:

1. Ease of access to specialised healthcare by Kenyans in remote and far flung places.
2. Leveraging ICT to promote equitable access to healthcare for all Kenyans regardless of socioeconomic status.
3. Leveraging of technology to promote prompt diagnosis and timely treatment of patients.
4. Improved efficiency and cost-effectiveness of hospitals by implementing tracking mechanisms to reduce wastage of drugs and other consumables.
5. Optimization of medical resources through understanding patterns and distribution of diseases across the country.
6. Revenue growth and loss protection through the implementation of accurate tracking and timely reporting of revenue collections.
7. Optimization of the national referral system.
8. Efficient drug procurement and distribution across the country.
9. Generation of a unique medical ID and personalised secure Electronic Medical and Health Record (EMR/EHR) by each Kenyan.
10. Enhanced medical research through enhanced data.

4.7.7 Positive Impacts that would have been realised from the Successful Implementation of the Project

According to the Contractor, had it been successful, the HCIT Project would have represented the biggest ICT project implemented by a Kenyan company. The successful implementation of the project would have been realised the following positive impacts:

1. Creation of high-value jobs including but not limited to, data scientists, network engineers, software engineers, security engineers etc.
2. Unlocking of the much-touted digital health revolution through emerging technologies.
3. Creation of Centres of excellence in healthcare education and research.
4. Increased investment flow into the country, with over 40 local suppliers competitively bidding to work on the national centre alone.
5. Promotion of local entrepreneurs, small and medium enterprises (SMEs) and financial institutions through partnerships to deliver the project using local resources.
6. Promotion of the development and growth of local digital start-ups.

4.7.8. Stalling of the Project and Status of Implementation as at the time of this Inquiry

The project stalled in August 2018 at 15% completion owing to delays by the Government in issuing a GoK Letter of Support. Prior to the stalling of the project, SST had made significant progress in implementing the project as demonstrated below:

1. *Completion of Phase 1 Milestones:* The Contractor completed Phase 1 milestones as stipulated in the contract to the satisfaction of the MoH. The Phase 1 milestones were implemented in KNH and included:
    a) Development of blue books for the data center, national operating center, radiology hub, training room and operating room;
    b) Development of a Data Center;
    c) Development of a Network Operations Center;
    d) Fit Out of a Radiology Hub;
    e) Renovation of a Reporting Room; and,
    f) Fit Out of a Radiology Training Room.
2. *Quarter 2 Milestones:* Further to the above, the Contractor imported equipment valued at USD 5M in readiness for Quarter 2 activities.

3. On completion of the aforementioned works, the Contractor raised an invoice (Invoice No. 2202) amounting to USD 2,378,486.54 in a letter to the MoH dated 30th April, 2019 (*see Annex 'XXVVII'*)
4. Having duly inspected the works, in a memo dated 22nd June, 2018 (*see Annex 'XXVVII'*) the MoH signed off payments amounting to USD 2,114,555.98 in respect of the project.
5. However, as at the time of this inquiry, almost one and a half years after the completion of Phase 1 Milestones, the Contractor had yet to receive any payments from the MoH.

4.7.9 Funders' Direct Agreement (FDA)

1. In accordance with Annexure II, schedule 4 of the tender documents (see *Annexure 'XXVVII'*) on 7th May, 2018, a Funders' Direct Agreement (FDA) was executed between the MoH as the 'Procuring Entity', Kenya Commercial Bank as the 'Funder', and SST as the 'Contractor. The signatories to this document were as follows:
   a) Mr Peter K. Tum, the Principal Secretary, MoH,
   b) Mr Michael Macharia, the Chief Executive Officer, SevenSeas Technologies Limited; and,
   c) Mr. George Mutiga, the Head Trade Finance, Kenya Commercial Bank.

   Please see *Annex 'SST6'* for a copy of the FDA.
2. Clause 3 of the Tripartite Agreement set out the obligations to be carried out by the Procuring Entity as follows:

   3.1 The Procuring Entity undertakes to the Funder that it shall:

   a) Provide the Funder with any copy of termination notice issued or received in respect of the MES Contract;

   b) Not agree to any changes in relation to the MES Contract which change Clause 43.3.2 Assignment to Assignees/Funders of the MES Contract without the Contractor procuring the prior written consent of the Funder and providing a copy to the Procuring Entity;

   c) Perform its obligations in accordance with and pursuant to the MES Contract in respect of its payment obligations;

d) *To procure the provision of an original copy of the Government Support Letter duly executed by the National Treasury, Kenya as provided under Schedule 2(GOK Support Letter) of the MES Contract .*

4.7.10 Government of Kenya Letter of Support (LoS)

1. The requirement of an original copy of a GoK Letter of Support (LoS) as an obligation of the Procuring Entity (i.e. the MoH) was an integral part of the tender documents as contained part 3(2) of the tender documents (see *Annexure 'XXVVII'*).
2. Further, as per Schedule 2 of the Contract, the MoH as the 'Procuring Entity' was obligated to provide an original copy of a GoK Letter of Support (LoS) as one of the completion documents to the contract.
3. In addition, the issuance of a GoK LoS by the MoH was one of the obligations set out in the Funders' Direct Agreement executed on 7th May, 2018 (see *Annexure 'XXVVII'*).
4. The issuance of the GoK LoS was predicated on the satisfactory performance and timely attainment by the Contractor of set project milestones as per the contract specifications.
5. Accordingly, in letters addressed to the MoH dated 30th April, 2018 (see *Annexure 'XXVVII'*), 6th June, 2018 and 22nd June, 2018 (see *Annexure 'XXVVII'*), the Contractor provided the MoH with a status of implementation of the project, including invoices for works duly carried out.
6. Failure by the MoH to issue the GoK LoS despite several attempts by the Contractor rendered the company incapable of raising the necessary funding to execute the rest of the project thus leading to its stalling. The Contractor claimed that the delays had resulted in the accumulation of huge demurrage fees at the Jomo Kenyatta International Airport.

4.7.11 Termination of the HCIT Contract

1. In a letter dated 18th November, 2019, the MoH terminated the HCIT contract with SST and issued the company with a forty (40) -days notice to vacate the project site on four grounds as summarised below:

a) That the contract contained several clauses which imposed obligations that did not conform to the tender documents, more particularly, the issuance of an original copy of a Government Letter of Support;

b) That the Funder's Direct Agreement that was executed between KCB, the MoH and SST on 7th May, 2018 was not envisaged in the tender documents, and was contrary to the provisions of section 135(2) of the Public Procurement and Asset Disposal Act 2015 as executing it was akin to the Government securing financing for its own requirement;

c) That the company lacked the requisite financial capacity to execute the contract as it had been unable to mobilise any funding without a Government Letter of Support; and,

d) That the contract contravened section 135(2) of the Public Procurement and Asset Disposal Act which requires an accounting officer to enter into a written contract with the person submitting the successful tender.

2. In a letter dated 25th November, 2019 the Contractor responded to the aforementioned allegations by the MoH as summarised below:

a) That the Government LoS was provided for in the tender documents under Annexure II, part 3, page 19, the main purpose of which was to ring-fence capital and insulate the Contractor and its lenders from risk;

b) That the Funders Direct Agreement was a fundamental component of the tender documents as contained in Annexure II, schedule 4;

c) That while the Funders' Direct Agreement obligated the Government to meet its payment obligations under the HCIT contract, it did not impose any financial responsibilities on the Government to raise financing for its own requirement as alleged;

d) That the company had demonstrated full commitment and willingness to meet its contractual obligations as demonstrated by its execution of Phase 1 of the project without funding and without the GoK LoS. However, it was unable to raise the additional funds required to continue with the project as its financiers were unwilling to waive the condition of the issuance of a GoK LoS;

e) That the issue of the GoK LoS and outstanding payments due to the Contractor had been canvassed and resolved in several meetings of the National Steering Committee for the project which was co-chaired by the Cabinet Secretaries of Health and ICT, and in which the Office of the Attorney General was represented for the relevant minutes); and,

f) That section 135(2) of the Public Procurement and Disposal Act was not applicable as the Government LoS was an integral part of the tender documents.

No response to the above mentioned letter was received from the MoH.

3. In a further effort to resolve the matter, in a letter to the MoH dated 10th December, 2019 the Contractor proposed arbitration as a dispute resolution mechanism, However, this letter too went unresponded from the MoH.
4. Having received no responses from the MoH, the Contractor instructed its legal counsel who wrote to the Office of the Attorney General in a letter dated 13th December, 2019, seeking its intervention in the matter (*see Annex bb*).

4.7.12 Contractual Provisions Relating to the Termination of the Contract

The termination of the contract by the MoH had a financial bearing, and activated clause 39.2 of the termination provisions in the contract as summarised below:

1. *Voluntary Termination by the MoH upon issuance of ninety (90) days notice to SST: Under clause 39.2, the MoH shall pay Seven Seas for services rendered and an additional amount equivalent to 80% of the remaining outstanding contractors' fees;*
2. *Termination in the event of Default by the Procuring Entity: Under schedule 18, part F, the MoH shall pay SST any pre-payments made to third parties, outstanding quarterly payments, redundancy costs and loss of profit computed in accordance with the formula provided;*
3. *Termination in the event of Default by the Contractor: Under schedule 18, part E, MoH shall pay SST costs incurred for services rendered, outstanding quarterly service payments and acquired equipment at the depreciated asset value; and,*
4. *Termination upon Expiry of Term: Under schedule 18, any new Contractor engaged by the MoH must pay SST the fair market value of the equipment as consideration for transfer of ownership.*

4.7.13 Economic Impact of Terminating the Contract

1. To implement the project, the company had hired several staff, including Kenyans, with requisite skills in Data Security, Enterprise Architects, Network Engineers, and Commercial Managers etc. The staff would have received a total compensation of Kshs. 1,700,000,000 over the period of the contract translating to Kshs, 480,000,000 .00 revenues to the GoK in taxes.
2. The company was forced to declare one hundred and ten (110) redundancies between November 2018 and June 2019 due to the financial impact of the delay in the issuance of the Government Letter of Support.
3. Total cumulative loss of Kshs. 2,050,00,000 in outsourced services from sixty-one (61) local SMEs ranging from construction, ICT cabling, insurance, travel, ICT consultants etc. This would have translated to approximately Kshs. 410,000,000.00 in revenue to the Government through Withholding Tax, Duties, VAT etc.
4. Loss of Kshs. 15-20 Billion in Direct Foreign Investments from potential investors who had committed to injecting equity in the Company to fund the project as well as assist the company use the Kenyan experience to scale the same to other African governments.

4.7.14 Way Forward as Proposed by the Contractor

The Contractor stated his willingness to amicably resolve the stalemate with the MoH and proposed the following as a way forward to ensure the effective delivery of the project:

STAKEHOLDER	ISSUES TO ADDRESS
MoH	- Champion the project as a key transformation project for the health sector; - Appoint a full-time, independent and experienced third party ICT Technical Project Manager and project management team to drive the project; - Approve and launch the project BluePrint and Workflows; - Facilitate a Project Technical Committee and draft TORs for all the members; - Provide a command and control center for HCIT data operations; - Pay for 1st Milestone of work delivered amounting to USD 2.1M. - Provide the brand strategy for marketing the project to Kenyan

	citizens; - Facilitate meetings with interrelated agencies critical to the project; and, - Provide liaison between the Contractor and level 6 hospitals.
Office of the Attorney General	- Give approval for LoS to be issued by the National Treasury. - Alternatively, re-negotiate payment terms and exclude Letter of Support.
National Treasury	- Issue GoK LoS to the Contractor for purposes of unlocking the funding required to execute the project.
Min. Interior	- Give approval for integration of HCIT to Huduma Number for purposes of enabling real time patient information through a national mobile electronic medical record
Min. ICT	- Integration of HCI into Huduma Number and other SAGAs (NHIF, KEMSA, PPB). - Last Mile Fibre connectivity to all ninety eight (98) beneficiary hospitals to ensure availability of service
COG	- Give necessary support to ensure timely project delivery. - CEC Health to champion project in the counties.

Copies of the written submission and annexures received from the Contractor are herein attached as Annexure XVII'.

4.7.15 Ministry of Health (MoH)

The Committee met with the then Cabinet Secretary of Health, Mrs. Sicily Kariuki in a meeting held on 18th February, 2020 that was aimed at getting clarification on matters that had arisen with regard to the HCIT contract.

Key highlights from the meeting are provided below:

1. On 4th July, 2017, the MoH issued an international competitive tender for the provision of HCIT solutions for the MES Project.
2. Seven Seas Technologies Ltd (SST) was awarded the tender *vide* a notification of award letter dated 21st August, 2017 signed by the Head of Procurement (MoH), for and on behalf of the Permanent Secretary (see *Annex 'SST2'*). Likewise, the acceptance of the award by SST was addressed to the Head of Procurement in the MoH contrary to the law.
3. The contract between the Government of Kenya through the MoH and SST was executed

on 2nd October, 2017, at a total contract cost of USD 47,569,731.00 (Kshs. 4,943,417,903.68).

4. During the evaluation of tenders, five bidders were disqualified at the technical stage. Of the six tenderers who bidded for the contract, SST alone proceeded to the financial evaluation stage.
5. Other than relying on the quoted price from the successful bidder, the MoH did not independently verify value for money despite the fact that the financial evaluation was essentially non-competitive.
6. Further, contrary to the law and the provisions of the tender documents, the MoH did not prepare a Due Diligence Report or visit at least three (3) sites to establish completion of similar works by the bidder.
7. The HCIT contract contained several clauses that were not founded on the tender documents, and which imposed obligations to the MoH that did not conform to the tender document: more particularly, the unconscionable clause obligating the Ministry to provide a Government of Kenya Letter of Support and a Funders Direct Agreement.
8. This obligation, contained in Clause 2.3 of the Contract, was introduced in an unsanctioned contract negotiation meeting between officials of the MoH and the top management of SST in a meeting held at Burch Resort, Naivasha on 9th September, 2017 .As the Cabinet Secretary she was not made aware of this meeting. In addition, no appointment letter was in record at the MoH appointing the Contract Negotiation Committee that effected the said changes in the contract.
9. The import of Clause 2.3 of the contract as read with Schedule Two of the contract was that the GoK LoS was a condition precedent to the commencement of the commercial contract since it was to be delivered on or before the commencement date.
10. The HCIT Contract, having been a competitive and open national tender, ought not to have been subject to negotiations. The introduction of such a substantive matter into the contract ought to have led to the cancellation and re-tendering of the tender by the Accounting Officer.
11. On the strength of the minutes of the aforementioned contract negotiation meeting held at Burch Resort, Naivasha, it was evident that the original tender documents did not contain a requirement for the MoH to provide a GoK LoS to the Contractor.

12. The Office of the Attorney General declined to provide clearance for the GoK LoS as no risks, commercial or political, had been identified to justify its issuance. Further, that the terms were prejudicial to the MoH.
13. The issuance of the GoK LoS was not supported by the National Treasury and Planning Policy on Issuance of Government Support Measures which was published in October, 2018. Under the policy, GoK Letters of Support can only be issued under exceptional circumstances considered strategic and of public interest as approved by the Cabinet.
14. Further, the Funders' Direct Agreement (FDA) executed between the MoH, the Contractor and KCB Ltd on 7th May, 2018 was an illegality as it was not envisaged under the tender documents. It also went contrary to the provisions of section 135(2) of the Public Procurement and Asset Disposal Act, 2015. A key requirement of the FDA was the provision of a GoK LoS by the MoH.
15. Two subsequent letters by the then PS Julius Korir requesting the National Treasury to expedite the issuance of the GoK LoS were never brought to the attention of the Cabinet Secretary and were therefore unprocedural.
16. In a letter to the MoH dated 1st August, 2019, the Contractor conceded that the company was facing grave financial headwinds and was thus abandoning the project. According to the letter, any further progress of the project was hinged on the MoH providing a GoK LoS necessary for enabling the Contractor mobilise funding from its financiers. The Contractors' upfront expectation to be issued with a GoK LoS was borne out of a sense of entitlement, and undermined the ability of the MoH to exercise financial risk management.
17. The cancellation of the HCIT Contract by the MoH on 18th November, 2018 was done on the advice of the Office of the Attorney General, and was further justified by the following reasons:
    a) Prolonged abandonment of the site by the Contractor;
    b) Failure by the Contractor to meet all or any of the milestones as stipulated in the contract;
    c) Lack of the contractors' financial wherewithal to execute the contract;
    d) Lack of satisfaction for value for money as required by the law;
    e) Introduction of prejudicial terms into the contract; and,
    f) Flawed processes that invalidated the contract, such as, the issuance of the letter of

award by a person other than the Accounting Officer contrary to the provisions of the law.

18. SSTs' Security Bond Policy (No. 120a053829517) issued by ICEA Lion General Insurance on 28th August, 2017 expired on 27th August, 2018. As such, at the point of the termination of the contract, the contractor did not have a valid security bond as required by law.
19. Prior to the termination of the contract, the MoH did not give formal notice to the Contractor. However, the Contractor was made aware of the plans of the MoH to terminate the contract by way of the technical team that was dealing with the contract. He subsequently made several failed attempts to solicit the CS and PS for a resolution through emissaries.
20. Following the cancellation of the contract, the Contractor wrote to the MoH threatening to move the matter to court in fourteen (14) days time. The matter was subsequently progressed to the Office of the Attorney General for advice. Following the lapse of the fourteen (14) days, the Contractor once again wrote to the MoH seeking arbitration.
21. While the HCIT Contract would have served as the nexus connecting all other components of the MES Project, the loss of this component was mitigated by the fact that some of the installed equipment under the MES Project had ICT capabilities. Further, in collaboration with WHO, the MoH was in the process of developing District Health Information Software (DHIS2) for purposes of relaying data.
22. The position of Mr. Morekwa as the Chairperson of the MES Implementation Committee was superfluous as it was neither recognised in the structure of the MES Project, nor backed by law.
23. The fact that the project had elicited such uncommon interest; was full of intrigue; was conducted in an flawed and opaque manner by junior officials within the MoH; and, that most correspondences relating to a project had been carried out at a level below the Accounting Officer cast doubt on the transparency and legality of the project as a whole.

Copies of the written submission and annexures received from the MoH in relation to the HCIT Project are herein attached as Annex 'XXVII'.

4.7.16 Office of the Attorney General (AG)

With specific regards to the HCIT Contract, the Committee met with representatives of the Office

of the Attorney General led by the Solicitor-General Kennedy Ogeto, in a meeting held on 13th February, 2020.

4.7.17 Submissions by the Office of the Attorney General & DOJ

The Office of the Attorney-General is established vide Article 156 of the Constitution. As the principal legal adviser of the Government, the Attorney General represents the Government in court, and serves to promote, protect and uphold the rule of law.

Section 5 of the Office of the Attorney General Act, 2012 mandates the Attorney-General the responsibility of negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies.

Circular Ref. No. AG/1/2010 titled "Government Legal Advisory Services' dated 3rd May, 2010 required the involvement of the Office of the Attorney General in the negotiation and drafting of contracts. A further Circular dated 1st March, 2019 required all State departments and agencies to submit contracts and agreements to the Office of the Attorney General for review prior to signing. (*Annexure XIV*)

4.7.18 Approval Process of the HCIT Contract

The Contract was signed and duly executed by the MoH and SST Technologies Ltd on 2nd October, 2017. The Office of the Attorney General was not involved in negotiating, drafting, vetting, clearance and approval of MES contracts, including the HCIT contract as required by law.

- attribute

The Office of the Attorney General became aware of the existence of the HCIT Contract through a letter from the National Treasury dated 14th December, 2017 seeking legal clearance to issue a GoK LoS in respect of the HCIT Contract. The Office of the Attorney General was however, not furnished with a copy of the contract until 21st September, 2018 - almost a year after the contract had been signed.

4.7.19 Termination of the HCIT Contract

The MoH wrote to the Office of the Attorney General expressing its intention to terminate the HCIT Contract vide letters dated 13th June, 2018; 25th June, 2019; and, 12th July, 2019.A

Professional Opinion prepared by the Ministry set out the reasons for the termination as non-performance based on the factors below:

a) Abandonment of the Kenyatta National Hospital site for a period of sixteen (16) months.

b) Delayed commencement of service provision by a period of ten (10) months.

c) Lack of completion of milestones as per the provisions of the Contract;

d) Works that the Contractor was supposed to undertake being either incomplete or not done.

e) Lack of a budgetary provision for the Contract for the FY 2018/2019

4.7.20 Review of the Signed Contract and the Tender Documents

The procurement process leading to the HCIT Contract was done through a national open tender dated 4th July, 2017. There were a total of six bidders, five of whom were found non-responsive during the technical evaluation. Only SST proceeded to financial evaluation.

4.7.21 Due Diligence

Clause 2.12.3(b) of Section 1 of the tender documents required bidders to have 'the financial, technical and production capability necessary to perform the contract.

Clause 2.27.4 of the Appendix to Instructions to Tenderers required the MoH to 'carry out due diligence before signing of the contract to ascertain bidder's capacity to deliver, financial capability and visit at least three sites where the bidder has completed similar works'. (cite)

Section 83(1) of the Public Procurement and Asset Disposal Act 2015 required an evaluation committee to conduct due diligence *'and present the report in writing to confirm and verify the qualifications of the tenderer who submitted the lowest evaluated responsive tender to be awarded the contract in accordance with this Act'.*

However, contrary to the express requirements of the tender documents and the procurement law, no due diligence was carried out by the MoH on SST as required by the tender documents. Further, no site visits were conducted by the MoH to establish completion of similar works by the bidder as required in the tender documents.

4.7.22 Value for Money

Article 227 of the Constitution obligates state organs and public entities to contract goods and services in a fair, equitable, transparent, competitive and cost effective manner.

According to a Professional Opinion by the MoH dated 18th August, 2017 recommending the award of tender to SST, quoted prices were only subjected to an online market survey to check whether they were competitive. No report indicating the methodology and parameters considered in this online market survey were ever availed by the MoH.

As such, as the only successful bidder at technical level, SST was subjected to a financial evaluation in what were essentially uncompetitive circumstances: The Ministry relied on the quoted price from the bidder, and no effort was made to independently and objectively verify value for money. Further, contrary to a Circular dated 1st March, 2018, the Ministry did not sign a Value for Money Declaration in respect to the HCIT contract.

The Office of the Attorney General was in receipt of a letter dated 10th February, 2020 from the Directorate of Criminal Investigations indicating that the HCIT Contract and the procurement process leading to its signing was under active investigations vide inquiry file number 246/2019.

4.7.23 Review of the Signed Contract

Section 135(2) of the Public Procurement and Asset Disposal Act, 2015 requires an Accounting Officer of a Procurement Entity to enter into a written contract with a successful bidder based on the tender documents.

The contract executed by the MoH and SST Technologies Ltd contained terms which highly exposed the Government and which were not based on the tender documents as required by law.

Clause 3.13 of the Draft Form of the HCIT Contract which was part of the tender documents provided for the Procuring entity to terminate the Contract by notice at any time.

However, Clause 39.2 of the signed contract fundamentally departed from this position by introducing a highly prejudicial clause in favor of the Contractor by eroding the Procuring entity's right to terminate for convenience as contemplated in the tender documents; and, requiring the Procuring Entity to pay the Contractor for services already undertaken at the time of termination, and, an additional amount equivalent to 80% of the remaining outstanding Contractors fee.

4.7.24. Government of Kenya Letter of Support (LoS)

Clause 2.3 of the Contract obligated the Procuring Entity to deliver to the Contractor a Government LoS duly executed by the Ministry of Finance, and a Funders Direct Agreement as conditions precedent to the commencement of the commercial contract.

Having regard to the huge financial and legal exposure to the Government, requests for clearance for the issuance of Government Letters of Support in favor of SST Technologies were declined by the Office of the Attorney General through letters dated 16th January, 2018 and 10th July, 2018 based on the following reasons:

a) Lack of involvement of the Office of the Attorney General in negotiating or vetting the contract.

b) A moratorium on issuance of letters of support pending the finalization and publication of a Policy on Issuance of Government Support Measures.

c) Unclear financing mechanisms for the HCIT Solutions Project;

d) Absence of a due diligence study to ascertain the viability of the project;

e) Lack of provision within the Contract and the schedules thereto to justify the issuance of a LoS to SST Technologies Ltd.

4.7.25 Funder's Direct Agreement

The MoH executed a tripartite Funders Direct Agreement with KCB Bank Ltd and SST Technologies Ltd on 7th May, 2018. This agreement was not a requirement in the tender documents

supplied to the Office of the Attorney General.The Agreement contained unconscionable terms that highly exposed the Government, such as:

a) Clause 3.1.2.2 of the Agreement which required the MoH to bear the burden of procuring the provision of an original copy of a Government Letter of Support duly executed by the National Treasury;

b) The requirement that the MoH provide the Funder (KCB Bank) with a copy of any termination notice issued or received in respect of the contract;

c) Committing the MoH not to agree to any changes in relation to the Contract in respect of assignees/funder without the Contractor procuring prior written consent by the Funder; and

d) Clause 39.2 on voluntary termination of the contract which states that the Procuring Entity shall pay to the contractor for all services undertaken, and an additional amount equivalent to eighty(80) percent of the remaining outstanding Contractor's fees as detailed under Schedule 13(Payment mechanism) *(Annexure XXVII)*.

Based on the foregoing, the Attorney General found that the Agreement unfairly exposed the Government to liabilities to third parties.

4.7.25 Termination of the HCIT Contract

Based on the foregoing irregularities and illegalities in the procurement process and in the Contract, the Office of the Attorney General advised the Ministry to proceed to terminate the contract based on: the abandonment of the site by the Contractor for a period of sixteen (16) months; lack of budgetary allocation in the FY 2019/2020 for the project; as well as serious irregularities and illegalities such as the lack of due diligence, lack of satisfaction of the value for money requirement, and the introduction into the contract of clauses that were prejudicial to the Government contrary to the requirements of Section 135 of the Public Procurement and Asset Disposal Act, 2015.

The written submission and annexures received from the Office of the Attorney General are herein attached as Annexure 'XIV'

4.7.26 Mr. Julius Korir, CBS, PS, State Department of Youth; and, former PS, Health (February 2017 - February 2018)

i. Background

Mr. Julius Korir, CBS, PS, State Department of Youth was the Permanent Secretary for Health between February 2017 and February 2018. It was during his tenure as PS, Health that the tendering for the HCIT Project was conducted, and the contract between the MoH and Seven Seas Technologies Ltd executed. It was also during his tenure that the monies levied against counties for the implementation of the MES Project were varied from Kshs. 95M to Kshs. 200M. The Cabinet Secretary responsible for Health during this period was Ambassador Cleopa Kilonzo Maillu, former CS, Health (2015-2018).

ii. Submissions by Mr. Julius Korir, CBS, PS, State Department of Youth; and,former PS, Health (February 2017 - February 2018)

The Committee held a hearing with PS Julius Jorir on 21st February, 2020. The hearing was aimed at getting clarification on matters that had arisen with regard to the HCIT contract.

iii. Clarifications in Relation to the HCIT Project

The HCIT Project was conceptualised as a critical component to realizing the full benefit of the MES Project. The project was aimed at leveraging technology to share limited specialised expertise, and ensure access to MES services in remote, underserved areas.

The MoH first approached GE East Africa Ltd (GE) to provide HCIT solutions for the MES Project as a component of the Lot 7 MES contract for Radiological Equipment. However, the subsequent quote given by GE was prohibitive in cost thus compelling the MoH to opt for a national open tender. - load in one statement and attribute collectively.

Following a successful bid, the tender was awarded to Seven Seas Technologies Ltd (SST). A contract between the MoH and SST was subsequently executed on 2nd October, 2017. The relaying of the notification of award to SST by Mr. P.N. Mwangi as the Head of Procurement, MoH was proper and correct in law and procedure, as the award letters were issued carried out by the Ministry with the other contractors.

Prior to the execution of the contract, as then PS, Mr. Korir set up a technical team to ensure that the HCIT contract was in conformity with the tender documents. No foreign material or mischievious clauses were introduced into the contract prior to its execution, and both the original tender documents and original contract contained requirements for the issuance of a GoK Letter of Support (LoS) and a Funders' Direct Agreement.

To this effect, as then PS for Health, Mr. Korir wrote to the National Treasury requesting them to facilitate the issuance of a GoK LoS . However, unlike other MES contractors who were promptly issued with GoK Letters of Support, in the case of SST the matter became long and protracted.

On the question of conducting due diligence, prior to executing the HCIT contract, SST had demonstrated its capacity as subcontractors to the Lot 7 contract responsible for establishing the Local Area Network (LAN) required to connect the radiology equipment in all beneficiary hospitals. It was on this basis that the MoH satisfied itself on the question of due diligence. This was further evinced by a letter from the PS Susan Mochache, Ministry of Health to the Solicitor General dated 2nd May 2019 ref no MOH/LEG/ADM/1/29

In the above-mentioned letter, the PS further stated that the budget for the MES project is lumped into a one line item namely 1081104400- Managed Equipment Services.

On the question of the legitimacy of the HCIT Project Implementation Committee headed by Mr. Morekwa, he stated that the Committee was properly constituted by himself in a letter dated 6th November 2017.

iv. Cross-Cutting Issues

The variation in monies levied against counties for the implementation of the MES Project from Kshs. 95M to Kshs. 200M resulted from:

(a) Variations in the contracts for ICU, renal, theatre and CSSD equipment

(b) The roll-out of HCIT as a stand alone project;

(c) The roll out of Lots 3 and 4 for laboratory equipment.

According to the PS, the variations for previous MES contracts were done within the set 25% ceiling as provided for in the Public Procurement and Disposal Act.

However, the monies levied against counties under the MES project were adjusted from Kshs. 95M to Kshs. 200M by the National Treasury without reference to the MoH.

4.7.27 Eng. Peter K. Tum, OGW, PS, State Department for Labor; and, former PS, Health (March 2018 - March 2019)

i. Background

Eng. Peter Peter K. Tum, OGW, PS, State Department of Youth was the Principal Secretary for Health between March 2018 and March 2019 having succeeded Mr. Julius Korir, CBS. It was during his tenure as PS, Health that the Funders' Direct Agreement between MoH, SST and KCB Ltd was executed. The Cabinet Secretary responsible for Health during this period was Ms. Sicily Kariuki, former CS, Health (February 2018 - March, 2020).

ii. Submissions by Eng. Peter K. Tum, OGW, PS, State Department for Labor; and, former PS, Health (March 2018 - March 2019)

The Committee held a hearing with PS (Eng) Peter Tum on 21st February, 2020. The hearing was aimed at getting clarification on matters that had arisen with regard to the HCIT contract.

1. At the time PS (Eng.) Peter Tum joined the MoH, the MES Project was already ongoing. As such, the major role that he played was in facilitating payments to MES Contractors.
2. The execution of the HCIT contract pre-dated his tenure at the MoH.
3. In the execution of the Funders' Direct Agreement for the HCIT Project, he signed on behalf of the MoH having satisfied himself that it was in conformity with the tender documents and the contract.
4. In furtherance of the requirements of the HCIT contract, as then PS for Health, Eng. Tum wrote to the National Treasury requesting them to facilitate the issuance of a GoK LoS

5. On the question of the legitimacy of the MES Implementation Committee headed by M.r. Morekwa, the Committee was properly constituted prior to his joining the MoH as captured during his handing over, and was thus legitimate in the HCIT process.
6. To facilitate payments in relation to the MES Project, he relied on the advice and technical guidance of the MES Implementation Committee.
7. During his tenure, no payments were made to SST in relation to the HCIT project.

4.7.28 Mr. Moranga Morekwa, HSC, Chair, MES Project Implementation Committee and members of the MES Implementation Committee: (2014 to Date)

i. Submissions by Mr. Moranga Morekwa, HSC, Chair, MES Project Implementation Committee and members of the MES Implementation Committee: (2014 to Date)

The Committee held a hearing with members of the MES Implementation Committee led by Mr. Moranga Morekwa on 21st February, 2020. The hearing was aimed at getting clarification on matters that had arisen with regard to the HCIT contract.

ii. Clarifications in Relation to the HCIT Project according to Mr. Morekwa.

The HCIT Contract was not submitted to the Office of the Attorney General (AG) for review as the contract did not meet the Kshs. 5 Billion threshold set by section 134(2) of the Public Procurement and Disposal Act, 2015 which states that an accounting officer of a procuring entity shall ensure that all contracts of a value exceeding Kenya shillings five billion are cleared by the Attorney-General before they are signed.

However, the MoH had legal representation from the Office of the AG during the process of drafting and negotiating the HCIT Project in the person of a seconded Legal Counsel identified as Ms. Betty Soi.

According to his testimony, Mr. Morekwa's involvement in the MES Project began during the evaluation of the tenders in 2014. After the execution of the MES contracts, the then CS Health,

Mr. James Macharia appointed the MES Project Implementation Committee headed by Mr. Morekwa to manage the implementation of the MES Project vide an appointment letter dated 26th February, 2015 (see *Annex marked XXVII)*. The term limit of the committee was not defined in the appointment letter.

In a letter dated 6th November 2017., following the successful execution of the HCIT contract, the then PS, Health, Mr. Julius Korir appointed the HCIT Project Implementation Committee headed by Mr. Morekwa. Other members appointed to the Committee were as follows:

1. Dr Laban Thiga - Radiology Department
2. Eng. Kenneth Iloka - Biomed
3. Mr. Peter Cheburet - HIS Department
4. Mr Eric Ndiritu - ICT Department
5. Mr. Peter Mwangi - Supply Chain Department

In his capacity as Chair of both the MES Project Implementation Committee and the HCIT Project Implementation Committee, Mr. Morekwa stated that he had interacted with the then CS, Health, Ms. Sicily Kariuki, on several occasions on matters relating to the MES and HCIT projects.

iii. Cross-Cutting Issues

The committee had duly informed the MoH regarding all non-functioning equipment installed under the MES project. Key issues affecting the functionality of equipment installed under the MES project included lack of staff, lack of water and lack of adequate electricity.

The Committee was informed that MESIC had not been able to transfer non-functional equipment to sites that would have been better able to utilise them as it met resistance.

Committee Observations

After hearing and reviewing the set of submissions regarding the termination of the contract from the Ministry of Health and the Contractor, the Committee made the following observations —

1. that the Contractor had commenced works as per the Q1 Schedule and had kept the Ministry aware of its activities through written update and status reports dated 6th June 2018 and 22nd June 2018;

2. that the Ministry defied the directives from the Office of the Attorney-General to submit contracts for review to the Office of the Attorney-General which were issued in Circular Ref. No. AG/1/2010 titled '*Government Legal Advisory Services*' dated 3rd May, 2010 which required the involvement of the Office of the Attorney General in the negotiation and drafting of contracts. A similar Circular dated 1st March, 2019 required all State departments and agencies to submit contracts and agreements to the Office of the Attorney General for review prior to signing.

3. From the submissions of the Attorney-General, the Committee further noted that the accounting officer of the Ministry of Health had failed to submit a value for monay declaration in contravention of the AG's requirement.

4. That the tender and the contract contained unconscionable clauses that posed a serious risk to the Government of Kenya, in particular clause 39.2 on termination, Schedule 2(Completion documents) and the Draft Funder's Direct Agreement.

5. That the matter of the issuance of a GoK Letter of support was noted as early as the Contract Negotiation Meeting held on 9th September 2017 at Burch Resort, Naivasha;

6. The Committee further notes that the Ministry of Health in various meetings encouraged the Contractor to continue works and further assured the Contractor that it would obtain a letter of support from the National Treasury.

7. That the Ministry's termination of the Contract bore a serious risk of loss to the Government of Kenya as its officials had made multiple false representations to the Contractor.

8. The Committee directly witnessed other false representations from the Ministry of Health in the submissions of the Cabinet Secretary, Ms Sicily Kariuki. The CS categorically denied knowledge of the existence of the HCIT MES Implementation Committee as evidenced in the written submissions dated 17th February 2020. This was despite the Committee presenting to the CS clear evidence of the abovementioned minutes of the meetings of 9th September 2017 at Burch Resort, Naivasha; on 2nd December 2017; 26th June 2018 at Afya House and the 31st July 2018 meeting at Afya House, Nairobi

9. The Committee also noted further misrepresentations from the Ministry from the submissions made by the Office of the Attorney-General and in particular, the National Treasury letter to the Attorney-General dated 14th December 2017(*Ref No. DGIPE/PPP/22/7 'C'*);

10. From the foregoing, the Committee concludes that the Ministry of Health and its officers involved in the MES project undertook a series of false representations primarily to the Contractor on the issuance of a GoK Letter of Support.

11. The Committee also takes cognisance of the tenets of common law as regards misrepresentation and the provisions of the Public Finance Management Act which states at section 196(4), (6) and (7) as follows—

> *"(4) A public officer shall not borrow money, issue a guarantee, indemnity or security or enter into any other transaction that binds or may bind the national government entity or a county government entity to any future financial obligation, unless the borrowing, guarantee, indemnity, security or other transaction is authorised by this Act or by any other written law and, in the case of loans or guarantees, is within the limits provided under this Act;*
>
> *(6) A public officer who contravenes this section commits an offence and on conviction is liable to a term of imprisonment not exceeding two years or to a fine not exceeding one million shillings, or to both.*

(7) Where a national government entity or a county government entity—

(a) engages in an action that it is prohibited from doing by this Act; or

(b) fails to comply with an obligation imposed on it by this Act,

a public officer who assisted or facilitated the act, or who was a party to, or contributed to, the failure, commits an offence and on conviction is liable to a term of imprisonment not exceeding two years or to a fine not exceeding one million shillings, or to both in addition to provisions under Article 226(5) of the Constitution"

12. The Committee further notes the provisions of section 27(3)(f) and 27 (4) of the Parliamentary Powers and Privileges Act, 2017 which states as follows—

"(3) A person commits an offence where the person—

(f) with intent to deceive or mislead Parliament or a committee, produces a false, untrue, fabricated or falsified document, or

(g) wilfully furnishes Parliament or a committee with information which is false or misleading or makes a statement before Parliament or committee that is false or misleading.

(4) A person who commits an offence under subsection (3) is liable, on conviction, to a fine not exceeding five hundred thousand or a term of imprisonment not exceeding one year or to both such fine and imprisonment."

In view of the aforementioned provisions of law, the Committee finds that Ms. Sicily Kariuki is liable to punitive action as prescribed by the Parliamentary Powers and Privileges Act, 2017.

13. Furthermore, section 9 of the Public Officer Ethics Act, states that a public officer shall carry out his duties in a way that maintains public confidence in the integrity of his office whilst section 10 of the same Act states that a public officer shall carry out his duties in accordance with the law.

14. Section 8 of the Leadership and Integrity Act, 2012 states that aState office is a position of public trust and the authority and responsibility vested in a State officer shall be exercised by the State officer in the best interest of the people of Kenya. Section 9 of the same Act states that Subject to the Constitution and any other law, a State officer shall take personal responsibility for the reasonably foreseeable consequences of any actions or omissions arising from the discharge of the duties of the office.

15. The provisions of section 9 of the Public Officer Ethics Act is reflected in section 11 of the Leadership and Integrity Act, 2012. It is further noted that section 10 of the Leadership and Integrity Act, 2012 states that—

> *'A State officer shall, to the best of their ability—*
>
> *(a) carry out the duties of the office efficiently and honestly;*
>
> *(b) carry out the duties in a transparent and accountable manner;*
>
> *(c) keep accurate records and documents relating to the functions of the office; and*
>
> *(d) report truthfully on all matters of the organization which they represent.'*

Section 29 of the Leadership and Integrity Act, 2012 further states that a State officer shall not knowingly give false or misleading information to any person.

16. The Committee takes cognisance of the multiple egregious violations of the abovementioned acts of law by the officials in the Ministry of Health and in particular, CS Sicily Kariuki and Mr Moranga Morekwa.

17. the officials of the MoH who were involved in the tendering process of the HCIT project and the signing of the contract with Seven Seas Technologies are liable to criminal penalties prescribed under section 196(3),(4),(6),(7) which states inter alia—

> *'(3) A public officer shall not enter into any obligation that has financial implications for the national government budget or a county government budget unless the obligation is authorised by the Constitution, an Act of Parliament or an Act of a County Assembly.*

(4) A public officer shall not borrow money, issue a guarantee, indemnity or security or enter into any other transaction that binds or may bind the national government entity or a county government entity to any future financial obligation, unless the borrowing, guarantee, indemnity, security or other transaction is authorised by this Act or by any other written law and, in the case of loans or guarantees, is within the limits provided under this Act

(6) A public officer who contravenes this section commits an offence and on conviction is liable to a term of imprisonment not exceeding two years or to a fine not exceeding one million shillings, or to both.

(7) Where a national government entity or a county government entity—

(a) engages in an action that it is prohibited from doing by this Act; or

(b) fails to comply with an obligation imposed on it by this Act,

a public officer who assisted or facilitated the act, or who was a party to, or contributed to, the failure, commits an offence and on conviction is liable to a term of imprisonment not exceeding two years or to a fine not exceeding one million shillings, or to both in addition to provisions under Article 226(5) of the Constitution..'

18. The public officers involved in the HCIT Project and the signing of the contract are liable to face adverse civil proceedings under section 202(2) of the Public Financial Management Act, 2012 which states as follows—

'(2) The National Treasury may, by civil proceedings brought in a court of competent jurisdiction, recover damages from a public officer for any loss for which the officer is liable under subsection (1)'

Committee Recommendations

The Committee makes the following recommendations in respect of the HCIT Contract—

1. **That all the EACC and other investigatory agencies commence investigations into the circumstances surrounding the termination of the HCIT Contract;**

2. That all persons found liable for breach of the law in the aforementioned investigations be prosecuted; and

3. That in the event that the termination of the HCIT Contract results in a loss of public money due to a breach on the part of the Government, the National Treasury urgently undertakes civil proceeedings against public officers found liable for the loss of money emerging from the termination in accordance with section 202 of the Public Finance Management Act, 2012.

CHAPTER FIVE

COUNTY VISITS TO BENEFICIARY HOSPITALS UNDER THE MES PROJECT

5.0 INTRODUCTION

In furtherance of its mandate to investigate and establish the facts surrounding the leasing of medical equipment, the *Ad-Hoc* Committee to Investigate the Managed Equipment Services (MES) Project visited several counties aimed at establishing-

1. Dates when MES equipment was delivered, installed and commissioned (including supporting documents);
2. Specifications of the equipment received under the MES project;
3. Functionality status of the equipment received under the MES project;
4. Utilization of the equipment received, and its impact on health service delivery in the particular county;
5. Whether a Needs Assessment to establish the Countys' needs was conducted. And if so, whether the County was involved;
6. Whether the equipment received corresponded to the actual needs of the County;
7. Whether the equipment received under the MES project duplicated equipment that had already been procured by the County. Where applicable, the indicative cost of the corresponding equipment that was procured by the county;
8. Whether the county was receiving consumables and reagents from the service providers. If not, where the county was sourcing them from and for how much. In addition, whether the equipment was operating on an open system (can use reagents or consumables from multiple suppliers) or closed (can only use reagents/consumables from a specific supplier);
9. Details on maintenance and servicing of MES equipment;
10. Additional costs that the county had borne in relation to implementing the project including power upgrades, renovations and infrastructural development, hiring and training of specialized personnel etc;
11. Challenges/issues identified in relation to implementing the project.
12. Where applicable, plans/measures that the county had put in place to ensure uninterrupted service delivery at the lapse of the contractual period.

The criteria used in the selection of the counties to be visited included: presence of a high volume or Level 5 hospital; reported challenges in the utilization of the MES equipment by the MoH; and, beneficiaries of the expanded MES project (i.e one of the 21 hospitals that benefited from additional equipment under the MES project. Based on the foregoing, the Committee visited a total of eight counties as provided below-

1. Mombasa
2. Kilifi
3. Kwale
4. Tana River
5. Isiolo
6. Meru
7. Uasin Gishu
8. Elgeyo Marakwet

In addition to the above, the Committee visited Moi Teaching and Referral Hospital which was one of the four national referral hospitals that was a beneficiary of the MES project.

5.1.1 Isiolo County

5.1.1.1 Background

According to submissions by the MoH, Isiolo County received MES equipment worth USD 8,207,824.35 (KShs. 828,990,259.30 at KShs. 101 to the USD) under the MES Project as provided below-

a) Isiolo District Hospital: USD 4,849,323.22 (KShs. 489,781,645.20 at KShs. 101 to the USD).
b) Garbatulla Sub-District Hospital: USD 3,358,501.13 (KShs. 339,208,614.10 at KShs. 101 to the USD)

According to reports by the MoH, of the equipment received by Isiolo County under the MES project, only the General X-Ray Unit in Garbatulla Sub-County Hospital was not in use by November, 2018.

A detailed breakdown of the value of equipment received by the county as submitted by the MoH is provided under Annex 'MoH8'.

5.1.1.2. Garbatulla Sub-District Hospital (Garbatulla SDH)

The Committee visited Garbatulla SDH on 5th November, 2019, where they were met by the Medical Superintendent, Dr. Gitome and various members of the hospital management team.

Committee Findings

The Committee's findings in relation to the visit are summarized below-

1. *Equipment Received by Garbatulla Sub-District Hospital:* In accordance with documentation received from the MoH, the Committee confirmed that the hospital had benefited from the following equipment under the MES Project:

    a) Theatre Equipment
    - Two anesthetic machines with ventilator
    - One electrosurgical unit
    - One operating theatre lamp
    - Two operating theatre tables
    - One resuscitaire
    - Two instrument trolleys
    - Two linen trolleys
    - Three patient stretchers
    - One resuscitation patient trolley

    b) Theatre instruments and CSSD Equipment
    - Twenty-eight (28) surgical sets
    - One autoclave
    - Two ultrasonic washers

    c) Radiology Equipment
    - One CR system
    - One digital X-Ray System
    - One mobile X-Ray Unit
    - One C-Arm unit
    - One Ultrasound unit

    Of the aforementioned equipment, the Committee found that the hospital was yet to receive one (1) autoclave machine by the time of the visit.

2. *Delivery, installation and commissioning of the equipment:* According to the hospital Biomedical Engineer, MES equipment was delivered on various dates from November, 2015.
3. *Needs Assessment:* The hospital management reported that prior to the delivery of the equipment, MoH officials visited the hospital and carried out a survey on its infrastructure, personnel, water and electricity needs. However, no report was subsequently shared with the hospital management.
4. *Utilization and Functionality Status of MES equipment:* According to the hospital management, equipment received under the MES project was not in optimal use at the facility owing to lack of specialized personnel, insufficient electricity and inadequate water. For example, despite having received a General X-Ray machine in 2018, the machine was yet to be put to use owing to the lack of a Radiologist and lack of three-phase electricity at the facility. Likewise, the theatre was only being used for minor surgical procedures such as wound cleaning owing to the lack of specialized personnel.
5. *Training:* According to the hospital management, two biomedical engineers at the hospital had received training in China for the operation of the Autoclave machines received under the project. No specialist training for any of the hospitals' personnel had been provided under the MES project.
6. *Maintenance and Servicing of the Equipment:* The hospital management reported that MES service providers regularly and periodically visited the hospital for purposes of servicing and maintaining the equipment.
7. *Impact of MES Equipment on Service Delivery:* According to the hospital management, the installed MES equipment had had a limited impact in improving service delivery in the facility owing to lack of specialized personnel, lack of three-phase electricity necessary to operate the machines, and inadequate water.
8. *Functionality status of MES equipment:* During a tour of the hospital, the Committee found that the theatre was evidently not in use, surgical sets received through the MES project were still in their original packaging, instrument and linen trolleys were rusty, and the theatre was dusty and in a general state of uncleanliness.

9. In the radiology department, the Committee found the General X-Ray machine only partially installed. In addition, the ultrasound machine and C-Arm and mobile X-Ray units were evidently not in use and still in their original packaging.

5.1.1.3 Isiolo County Referral Hospital

The Committee visited Isiolo County Referral Hospital on 5th November, 2019, where they were met by the Deputy Governor, Dr. Abdi Issa and members of the county leadership and management including the Deputy County Commissioner and the Chief Officer of Health.

Committee Findings

The Committee's findings in relation to the visit are summarized below:

1. *Equipment Received by Garbatulla Sub-District Hospital:* In accordance with documentation received from the MoH, the Committee confirmed that the hospital had benefited from the following equipment under the MES Project:

    a) Theatre Equipment
        - Two anesthetic machines with ventilator
        - One electrosurgical unit
        - Two operating theatre lamps
        - Two operating theatre tables
        - One resuscitaire
        - Two instrument trolleys
        - Two linen trolleys
        - Three patient stretchers
        - One resuscitation patient trolley

    b) Theatre Instruments and CSSD Equipment
        - Twenty-nine (29) surgical sets
        - Two autoclaves
        - Two ultrasonic washers

    c) Renal Equipment
        - One raw water reservoir
        - One water treatment plant
        - Five dialysis machines

- Three Dialysis
- Two dialysis beds
- One defibrillator
- One suction machines
- Two vital signs monitors
- Two oxygenator

d) Radiology Equipment

- One CR system
- One digital X-Ray System
- One mammography unit
- One mobile X-Ray Unit
- One C-Arm unit
- One OPG Unit
- One Ultrasound unit

2. *Delivery, installation and commissioning of the equipment:* The county leadership reported that the MoH had delivered and installed MES equipment on diverse dates since 2015.
3. *Needs Assessment:* According to the county leadership, Isiolo County was not involved in the Needs Assessment exercise that was conducted by the MoH in 2014. As such, the MES project was rolled out before the county was in a position to absorb the equipment.
4. *Utilization and Functionality Status of MES equipment:* The county reported that except for a mammogram machine, all other equipment provided to the facility under the MES project were in use. However, the county leadership reported that the operationalization of some of the equipment had been delayed owing to lack of the requisite specialized personnel e.g the CT scan. To address this challenge, the county had outsourced the provision of CT scan services to a private entity.
5. *Specialised Health Personnel:* With regard to specialised health personnel, the county reported that the lack of adequate specialized personnel to operate the equipment was a key challenge: Out of 30 doctors in the county, 13 were reported to be away on post-graduate training.
6. *Training:* The county reported that two biomedical engineers at the hospital had received training in China for the operation of the autoclave machines received under the project. In

addition, they reported that two radiographers had received training on operating the radiological equipment. However, no health worker within the facility had received specialist training under the MES project.

7. *Maintenance and Servicing of the Equipment:* The county reported that MES service providers regularly and periodically visited the hospital for purposes of servicing and maintaining the equipment. In addition, the county reported that the MES service providers responded to complaints and issues regarding the equipment in a timely and efficient manner.
8. *Reagents and Consumables:* The county referral hospital received its supply of consumables and reagents for MES equipment from KEMSA. However, the reagents were reported to be expensive and locked to the specific MES equipment. This had led to increased operational costs of the equipment.
9. *Impact of MES Equipment on Service Delivery:* The county reported that MES equipment had had a significant impact on health service delivery by bringing specialized services closer to the people e.g renal services.
10. *Value for money:* The county reported that the cost of the equipment that the county was paying for under the project was out of proportion to its actual value: While the equipment received under the project had proven helpful in improving health service delivery in the county, a greater impact would have been realized if counties had been allowed to purchase the equipment directly, and in accordance with their specific needs and capacity.
11. With regards to addressing the challenges observed in Garbatulla SDH, the county health leadership stated that plans were underway to recruit two additional doctors for the hospital and install three-phase electricity at the hospital.

5.1.1.4 Committee Observations from Isiolo County visit

The Committee made the following observations with regard to the Isiolo County visit:

1. The needs assessment exercise conducted by the MoH had failed to involve the county government and hospital structures. As such, some of the equipment supplied under the project did not correspond to the county's actual needs.

2. MES equipment had been installed before the county was in a position to effectively absorb it. This had led to delays in operationalization of the equipment to the detriment of the county.
3. Except for the CSSD machine, the Committee found that theatre and radiology equipment under the MES project in Garbatulla SDH was non-functional owing to lack of requisite personnel, and inadequate water and electricity. These findings were contrary to reports received from the MoH which indicated that all MES equipment in Isiolo County was operational except for the General X-Ray machine at Garbatulla SDH.
4. Lack of the requisite specialized personnel, lack of adequate water and insufficient electricity were key challenges hampering the successful implementation of the MES project in the county.
5. Training for health personnel in the county had focused on short, operational courses. No specialized training for health personnel in the county had been provided under the project.
6. There was a large disparity in the standard of implementation of the MES project between Isiolo County Referral Hospital and Garbatulla SDH: Whereas almost all the equipment in Isiolo County Referral Hospital was operational and in good working condition, the MES project at Garbatulla SDH had been poorly implemented as demonstrated previously in this report.

5.1.2 Meru County

5.1.2.1 Background Information

According to submissions by the MoH, Meru County received MES equipment worth USD 8,100,460.40 (KShs. 818,146,500.40 at KShs. 101 to the USD) as follows:

a) Meru Level 5 Hospital: USD 4,374,332.22 (KShs. 441,807,532.00 at KShs. 101 to the USD)
b) Nyambene Sub-District Hospital: USD 3,726,128.18 (KShs. 376,338,946.20 at KShs. 101 to the USD)

Additional hospitals in the county that benefited from the project included Maua District Hospital and Kanyakine Hospital. According to documentation received from the MoH, of the equipment received by Meru County under the MES project, ICU and Renal equipment were the only equipment not in use by November, 2018 owing to ongoing construction works.

A detailed breakdown of the value of equipment received by the county as submitted by the MoH is provided under Annex 'MoH8'.

5.1.2.2 Meru Level 5 Hospital

The Committee visited Meru Level 5 Hospital on 5th November, 2019, where they were met by the CECM for Health, Mr. Misheck Mutuma and various members of the county health management team.

Committee Findings

The Committee's findings in relation to the visit are summarized below:

1. *Equipment Received by Meru Level 5 Hospital:* In accordance with documentation received from the MoH, the Committee confirmed that the hospital had benefited from the following equipment under the MES Project:

a) Theatre Equipment

- two anesthetic machines with ventilator
- one electrosurgical unit
- two operating theatre lamps
- two operating theatre tables
- one resuscitaire
- two instrument trolleys
- two linen trolleys
- three patient stretchers
- one resuscitation patient trolley

b) Theatre Instruments and CSSD Equipment

- Twenty-nine (29) surgical sets
- two autoclaves
- two ultrasonic washers

c) Radiology Equipment

- One CR system
- One digital X-Ray System
- One mammography unit
- One mobile X-Ray Unit

- One C-Arm unit
- One OPG Unit
- One Ultrasound unit

In addition, the Committee confirmed that the hospital was scheduled to receive ICU equipment pending the completion of construction works at the hospital.

2. *Delivery, installation and commissioning of the equipment:* The county reported that MES equipment had been delivered to Meru Teaching Referral Hospital on diverse dates from 2015. The county further reported that it was yet to receive renal equipment and a CT scan machine from the MoH despite reassurances on the same.
3. *Delays in installation of ICU equipment:* The county reported that the delivery, installation and commissioning of ICU equipment had been delayed pending completion of the construction of an ICU center.
4. *Functionality status of MES equipment:* According to the county, all installed equipment in Meru Level 5 hospital was in use at the time of this inquiry. With regard to Nyambene SDH, the county reported that the operationalization of the digital X-Ray machine had been delayed owing to insufficient power. Further, MES equipment in Maua Hospital was reported as non-functioning owing to lack of three-phase power and lack of a dedicated transformer.
5. *Training:* The County reported that all staff had received the training necessary for operating equipment received under the MES project.
6. *Maintenance and servicing:* The County reported that servicing and maintenance services by MES service providers was responsive and timely.

Kindly see Annex 8 for a detailed summary of the MES Project as provided by the Meru County health team.

5.1.2.3 Committee Observations from Meru County visit

The Committee made the following observations with regard to the Meru County visit:

1. The needs assessment exercise conducted by the MoH had failed to involve the county government and hospital structures. This had resulted in the installment of equipment that was still not yet in use in some facilities by the time of this inquiry e.g. MES equipment in

Maua Hospital was reported to have been non-functional since 2015 owing to the lack of three-phase electricity and a dedicated transformer.

2. The Committee found that MES equipment at the facility was in use and in good general working condition.
3. The Committee observed that the hospital was yet to receive renal equipment and a CT scan despite receiving reassurances on the same from the MoH. In addition, the installation of ICU equipment at Meru Level 5 Hospital had been delayed by ongoing construction works.

5.1.3 Mombasa County

According to submissions by MoH, Mombasa County received MES equipment worth USD 11,238,779.78 (KSHs. 1,135,116,758.00 at KShs. 101 to the USD) broken down as follows:

a) Coast Provincial General Hospital: USD 8,031, 601.91 (KShs. 811,191,791.90 at KShs. 101 to the USD).
b) Likoni Sub-District Hospital: USD 3,207,177.87 (KShs. 323,924,877.00 at KShs. 101 to the USD).

The county signed its MOU with the MoH to receive equipment under the MES Project on 19th June, 2015. Under the original MES contracts, the county received equipment in Likoni Hospital and Coast Provincial General Hospital (CPGH). Subsequently, Port Reitz Hospital was added as part of the variation of the MES contracts and it was to receive theatre and CSSD equipment.

The Committee visited Mombasa County in November, 2019, where they were met by the CECM for Health, the Chief Officer in charge of Medical Services, the Chief Executive Officer for Coast General Hospital, and the County Director for Health. During the visit, the Committee visited the following health facilities:

a) Coast Provincial General Hospital
b) Likoni SDH
c) Port Reitz Hospital

5.1.3.1 Committee Findings from Mombasa County Visit

The Committee made the following findings in relation to the Mombasa County visit:

1. *Equipment received by Mombasa County:* During the visit, the Committee confirmed that Mombasa County had received MES equipment as submitted by the MoH under *Annex 'MoH8'*.
2. *Installation and functionality of the Equipment*: The county reported that X-ray equipment delivered to Likoni Hospital was not functioning optimally due to the lack of electricity. Further, the county was yet to receive Lot 1 and Lot 2 equipment meant for Port Reitz Hospital under the variations of the contracts;
3. *Replacement of equipment*: The county reported that autoclaves and trolleys supplied under Lot 2 had been replaced. However, the old autoclaves and trolleys were still in the hospitals.
4. *Needs Assessment*: According to the county leadership, Mombasa County was not involved in the needs assessment exercise that was conducted by the MoH in 2014.
5. *Training:* The county confirmed that training was ongoing for their medical personnel on the use of the MES equipment.
6. *Specialists:* According to the testimony of the county, for purposes of facilitating use of the MES equipment, the county had invested in training specialists and subspecialists. At the time of conducting the visit, CPGH had forty specialists.
7. *Reagents:* The county reported that it had been buying MES reagents and consumables from KEMSA. However, they noted that KEMSA was unable to ensure 100% fill rate.
8. *Impact of MES equipment Hospital Revenue:* According to the county, the MES project had resulted in increased revenue for the county from 14 million per month to 30 million per month.

5.1.4. Kwale County

The county signed a MOU with the Ministry of Health to receive equipment under the MES Project on 6th May, 2015. The Committee Kwale County in November, 2019, where they met the CECM for Health and other county health officials. During the visit, the Committee visited Kilifi County Referral Hospital and Malindi Sub-County Hospital in Malindi town.

5.1.4.1 Committee Findings from Kwale County Visit

The Committee made the following findings in relation to the Kwale County visit:

a) Kilifi County Referral Hospital

1. *Equipment received by Kwale County:* During the visit, the Committee confirmed that Kwale County had received MES equipment as submitted by the MoH under *Annex 'MoH8'*.
2. *Needs Assessment:* Kwale County reported that it had not been made aware of the needs assessment exercise by the MoH prior to the project. The hospital further submitted that it had not been involved in the identification of equipment, negotiation and pricing of the MES equipment.
3. *Impact of MES equipment in service delivery*: Kwale County reported that the MES equipment was useful, and that it had increased demand for specialised services. For example, the hospital reported that it now received 80 to 100 x-ray patients including referrals from Hola and Lamu.
4. *Delivery of the equipment:* - The hospital reported that MES equipment was delivered on diverse dates in 2015. In addition, the county reported that the contractor for Surgical and CSSD Equipment (Lot 2) delivered a replacement autoclave in 2019.
5. *Functionality status of the equipment:* The hospital reported that all MES equipment was delivered, installed and functional.
6. *Maintenance and Servicing:* The hospital reported that servicing and maintenance services by MES service providers was responsive and timely. It further reported that it had procured a deionizer and endozime solution in order to ensure that the water used by the autoclave does not have items that could cause corrosion.
7. *Purchase of Reagents:* The hospital reported that it had been buying MES reagents and consumables from KEMSA. However, they noted that KEMSA was unable to ensure 100% fill rate.
8. *Training of Hospital staff*: The hospital confirmed that various staff had received training from the contractors as follows: five nurses, one medical officer, one consultant, one nutritionist and one pharmacist were trained by Angelica Medical.
9. *Lack of specialists and subspecialists:* The hospital reported that owing to the lack of the requisite specialised personnel, it was referring patients requiring ICU, radiology, neurosurgery and paediatric surgery services.

10. *Value for Money Assessment:* The county confirmed that while it had not conducted a comparative analysis of the cost of equipment received by each county to determine the value for money, the MES model was expensive compared to outright purchase by counties.

b) Malindi District Hospital

1. *Installation and functionality of the equipment:* The hospital reported that the MRI, mammogram and renal machines supplied to the county were installed in Malindi District Hospital and functioning.
2. *Malfunctioning equipment:* During the visit, the Committee found that the contractor was yet to replace a faulty water filter in the autoclave.
3. *Maintenance of the equipment:* The hospital reported that servicing and maintenance services by MES service providers was responsive and timely. For example, GE scheduled maintenance visits every three months.
4. *Delayed Implementation:* The hospital reported that the commissioning of the renal unit in the hospital was delayed from 15th May 2016 to 6th September 2016 resulting in a 114 days delay.
5. *Training of Health Personnel:* The hospital reported that five (5) radiographers were trained by GE in the GE training centre in Nairobi.
6. *Specialists:* Owing to the lack of a radiologist, the hospital reported that it had engaged a specialist in Mombasa County to read the results. The county had however sent doctors for a three year training course on radiology and two of the specialists are expected back in the year 2020.

5.1.5 Tana River County

According to submissions by the MoH, Tana River County received equipment worth USD 8,142,140.23 (KShs. 822,356,163.20 at KShs. 101 to the USD) broken down as follows:

a) Hola District Hospital: USD 4,849,323.22 (KShs. 489781645.20 at KShs. 101 to the USD); and,

b) Garsen Health Center: USD 3,292,817.01 (Kshs. 332,574,518.00 at KShs. 101 to the USD).

The county signed a MOU with the MoH to receive equipment under the MES Project on 24th June, 2015.

The Committee visited Tana River County in November, 2019 where they met with the County Commissioner, CECM in charge of Health in Tana River County, the County Director of Health and County Secretary. During the visit, the Committee visited the following health facilities:

1. Hola District Hospital
2. Garsen Hospital
3. Bura Hospital

5.1.5.1 Committee Findings from Tana River County Visit

In relation to the Tana River County visit, the Committee made the following findings and observations:

1. *Needs Assessment*: The county reported that the MoH did not involve it in the needs assessment exercise. Rather, they were invited to attend an inception meeting where they were informed what equipment would benefit Garsen and Hola Hospital.
2. *Installation and functionality of the equipment:* - The county reported that the radiology equipment received by Hola District Hospital was fully functional. The county had however experienced challenges operationalising the renal unit owing to lack of the requisite infrastructure and personnel. The county further reported that it had installed one functional theatre at Hola DH under the MES project. However, it had been unable to use the specialised surgical sets since it lacked the necessary sub-specialists.
3. *Training:* The county reported that it had 16 doctors out of which 5 were pursuing post graduate training in surgery, radiology, family health and pharmacy. The county further reported that it was training a radiologist in Moi University who was expected to graduate by 2020.

4. *Telemedicine:* The county reported that it had partnered with a consultant in Kenyatta National Hospital to interpret the results originating from the radiology equipment.
5. *Replacement of equipment*: The county reported that Esteem, the contractor that supplied (Lot 2) equipment, had replaced an autoclave with a new one. However, the old autoclave was still in the hospital.
6. In Bura Hospital, the Committee found that the hospital had received one instrument trolley instead of two, one patient stretcher instead of three under the MES project.
7. The Committee further established that at Bura SDH, only the digital X-ray, the CR printing system, ultrasound machine, HCIT PACs solution, the autoclave machine and the ultrasonic washer were functional, while the surgical instruments were partly in use.

5.1.6 Elgeyo Marakwet County

5.1.6.1 Background Information

According to submissions by the Ministry of Health Elgeyo Marakwet County received equipment worth USD 8,232, 356.15 (KShs. 831,467,971.20 at KShs. 101 to the USD) under the original MES contracts as follows:

a) Iten County Referral Hospital (CRH): USD 4,893,282.53 (KShs. 494,221,535.50 at KShs. 101 to the USD); and,
b) Chebiemit Sub-County Hospital: USD 3,339,073.62 (KShs. 337,246,435.60 at KShs. 101 to the USD).

According to documentation received from the MoH, of the equipment received by Elgeyo Marakwet County under the MES project, the following were not in use by November, 2018:

a) Theatre equipment in Kamwosor SDH owing to lack of an anesthetist and theatre nurses.
b) Theatre equipment in Chebiemit Hospital owing to lack of theatre nurses.
c) Digital X-Ray machine in Chebiemit Hospital owing to lack of adequate electricity.

5.1.6.2 Iten County Referral Hospital

The Committee visited Iten County Referral Hospital on 7th February, 2020 where they were met by the CEC Member in charge of Health and various members of the hospital management team.

5.1.6.3 Committee Findings

The Committee's findings in relation to the visit to Iten County Referral Hospital are summarized below:

1. *Equipment Received by Iten County Referral Hospital:* During the visit, the Committee confirmed that Iten County Referral Hospital had received MES equipment as submitted by the MoH under *Annex 'MoH8'*.
2. *Delivery, installation and commissioning of the equipment:* According to the Biomedical Engineer, MES equipment was delivered on diverse dates from November, 2015.
3. *Additional Equipment:* The hospital reported that it had received an extra set of theatre equipment (i.e theatre lamp, theatre table and anaesthetic machine), and a CT scan on request from the National Government. However, none of the additional equipment requested for was operational at the time of the visit.
4. *Utilization and Functionality Status of MES equipment:* Of the equipment received under the MES project, the Committee found that only the renal and (some of the) radiology equipment was functional at the time of the visit.
5. *Non-functional theatre equipment in partially constructed theatre:* Further, the Committee found that theatre equipment was yet to be operationalised owing to the lack of adequate infrastructure to support its use. As reported by the county, at the initiation of the MES project, it had undertaken to construct a new theatre. However, the newly constructed theatre had failed to meet the required user standards thus necessitating additional renovation works that were still ongoing at the time of the visit. Nevertheless, the theatre equipment had been installed and was awaiting commissioning.
6. *CT Scan:* The hospital had received a CT scan from the National Government on request from the county government. The need for a CT scan was justified by the need to reduce referral cases to the Moi Teaching and Referral Hospital. However, despite the CT scan machine being delivered and installed, it was yet to be commissioned and operationalised owing to the lack of appropriate electricity panels to sustain its energy requirements.
7. *Training:* Two biomedical engineers at the hospital had received training in China for the operation of the Autoclave machines received under the project.

8. *Functionality Status of MES Equipment at other MES Beneficiary Hospitals in the County*
   Other hospitals that had benefited from MES equipment in the county included Chebiemit and Kamwosor Sub-County Hospitals.
9. Of the equipment received at the two additional hospitals, only the mobile X-Ray machine at Chebiemit Sub-County Hospital, and the CSSD machine at Kamwosor Sub-County Hospital were reported functional.
10. In the case of Chebiemit Sub-County Hospital, the theatre equipment had been delivered, installed and commissioned. However, the county had been unable to put it to use owing to the lack of the requisite personnel.

Following the meeting, the hospital management conducted the Committee through a tour of the hospital. Of the equipment received under the MES project, the Committee observed that most of the renal and radiology equipment was in use. However, several issues and challenges in relation to the theatre equipment were noted during the tour as summarized below:

a) *Theatre:* Theatre lamps had been installed in two theatres that were still undergoing construction. Surgical sets received through the project were still in their boxes and in storage.
b) *Radiology:* The CT Scan and C-Arm machines were not in use.

5.1.6.4 Committee Observations

In relation to the MES project in Elgeyo Marakwet County, the Committee made the following observations:

1. MES equipment had been installed before the county was in a position to effectively absorb it. This had led to delays in operationalization of the equipment to the detriment of the county.
2. Despite not being in a position to utilise the MES equipment already provided, the county government had requested for additional equipment being theatre equipment and a CT scan machine. However, none of these were operational at the time of the visit owing to the lack of the requisite infrastructure and personnel.

3. Elgeyo Marakwet County had reportedly incurred significant overhead costs in implementing the MES project. For example, to operationalise the radiology equipment, the county had undertaken to upgrade to three phase electricity at Iten County Referral Hospital. In addition, the county had incurred significant expenditure constructing, and then renovating its theatre in order to enable it to absorb the theatre equipment that it had received under the project.
4. Lack of the requisite specialized personnel, lack of adequate water and insufficient electricity were key challenges hampering the successful implementation of the MES project in the county.
5. Training for health personnel in the county had focused on short, operational courses. No specialized training for health personnel in the county had been provided under the project.

5.1.7 Uasin Gishu County

5.1.7.1 Background Information

According to the Ministry of Health, Uasin Gishu County received equipment worth USD 8,210,110.11 (KShs. 829,221,121.10 at KShs. 101 to the USD) broken down as follows:

a) Ziwa Sub-District Hospital: USD 4,849,323. 22 (KShs. 489,781,623.00 at Kshs. 101 to the USD).

b) Burnt Forest Sub-District Hospital: USD 3,360,786.89 (KShs. 339,439,475.90 at KShs. 101 to the USD.).

5.1.7.2 Ziwa County Referral Hospital

The Committee visited Ziwa County Referral Hospital on 7th February, 2020. It was met by the CEC Member in charge of Health. She was accompanied by various members of the hospital management team. The Committee's findings in relation to the project are summarised below:

5.1.7.3 Committee Findings

The Committee made the following findings durings its visit to Ziwa County Referral Hospital:

1. *Equipment Received by Sub-District Hospital:* According to a letter to the County Governor from the Ministry of Health dated 17th October, 2019 *(see Annex 'MoH20')* the list of equipment allocated to the hospital under the MES Project was as summarised below:

    i) Theatre instruments and CSSD equipment

    - Twenty-nine (29) surgical sets
    - One (1) Autoclave
    - One (1) ultrasonic washers

    ii) Renal Equipment

    - One (1) raw water reservoir
    - One (1) water treatment plant
    - Five (5) dialysis machines
    - Three (3) Dialysis Chairs
    - Two (2) dialysis beds
    - One (1) defibrillator
    - One (1) suction machines
    - Two (2) vital signs monitors
    - Two (2) oxygenators

    iii) Radiology Equipment

    - One (1) CR system
    - One (1) digital X-Ray System
    - One (1) Mammography Unit
    - One (1) mobile X-Ray Unit
    - One (1) C-Arm unit
    - One (1) OPG Unit
    - One (1) Ultrasound unit

2. Theatre equipment that was initially allocated to Ziwa County Referral Hospital was subsequently reallocated to Moi Teaching and Referral Hospital (MTRH) as follows:

    - Two (2) anesthetic machines with ventilator
    - One (1) electrosurgical unit
    - Two (2) operating theatre lamp

- Two (2) operating theatre tables
- One (1) resuscitaire
- Two (2) instrument trolleys
- Two (2) linen trolleys
- Three (3) patient stretchers
- One (1) resuscitation patient trolley

3. However, the County Government of Uasin Gishu had protested the Ministry's decision to reallocate the theatre equipment to MTRH. According to the county officials, Turbo Sub-County Hospital ought to have been considered instead owing to the fact that it was a county facility and that it had a functional theatre.
4. *Needs Assessment:* The County Government of Uasin Gishu reported that it had not been consulted on their specific equipment needs. This fact was demonstrated by the fact that theatre equipment was initially allocated to Ziwa County Referral Hospital despite the fact that it had no functional theatre.
5. *Utilization and Functionality Status of MES equipment.* The county reported that all renal equipment received under the MES project was functional at the time of the visit.
6. With regard to the radiology equipment received under the project, the Committee found that only the C-Arm machine was not in use owing to the lack of a functional theatre.
7. With regard to theatre equipment, the Committee found that except for three basic surgical sets, the theatre instruments received under the program had not been put to use owing to the lack of functional theatre facilities.
8. *Impact of MES Equipment on Service Delivery:* The county reported that the MES equipment had had a significant impact on health service delivery by bringing specialized services closer to the people. Its impact had been most especially realized in the provision of renal services. By bringing dialysis services closer to the people, the county reported that expensive referrals to MTRH had been minimized.
9. *Training:* According to the county, two biomedical, four nephrology nurses, radiographers and nutritionists at the hospital in relation to the MES project.
10. *Costing of MES Equipment:* The county reported that it had undertaken a local market survey to establish the total value of all equipment allocated to the county. Results of the

market survey had revealed that the total value MES equipment allocated to the county was Kshs. 84,952,000.00 as follows:

a) Ziwa County Referral Hospital: Kshs. 54,176,000.00 (including theatre equipment which was subsequently reallocated to MTRH).
b) Burnt Forest Sub County Hospital: Kshs. 30,776,000.00.

11. *Hospital Upgrading:* The county reported that it was at advanced stages of upgrading Ziwa County Referral Hospital to Level 5 status. To this effect, the county was in the process of expanding the facility to a 350-bed hospital with all the facilities attendant to a Level 5 hospital, including theatre.

5.1.7.4 Committee Observations

In relation to the Uasin Gishu County visit, the Committee made the following observations:

1. The Needs Assessment exercise conducted by the Ministry of Health had failed to involve the county government and hospital structures. As such, it was debatable whether the equipment supplied under the project corresponded to the county's actual needs.
2. Theatre equipment reflected in the equipment allocation list received by the Committee from the Ministry of Health indicated that it had been allocated to Ziwa County Referral Hospital. However, the Committee found that it was reallocated to MTRH. However, the C-Arm machine and theatre instruments were left at the facility despite not having a functional theatre. The demonstrated that the decision by the MoH to reallocate the equipment was thus arbitrary and ill-informed.
3. Further, the decision by the MoH to reallocate theatre equipment to Moi Teaching Referral Hospital had failed to take into account viable alternative county health facilities such as Turbo Sub-County Hospital.
4. Findings of the market survey conducted by the county were suggestive that the cost of MES equipment was grossly exaggerated.
5. Training for health personnel in the county had focused on short, operational courses. In addition, four nephrology nurses received specialized training for the provision of renal services.

5.1.7.5 Moi Teaching and Referral Hospital.

5.1.7.5.1 Background Information

Moi Teaching and Referral Hospital (MTRH) is a national referral hospital providing specialised health services. It covers the entire western Kenya region as a Level 6B facility covering 21 counties with a population of over 24 million Kenyans. According to submissions received from the Ministry of Health, MTRH received equipment worth USD 2,893,881.95 under the MES project.

5.1.7.5.2 Meeting with Representatives of the MTRH Board and Senior Management

The Committee visited MTRH on 7th February, 2020, where they were met by the met by the Chair of the MTRH Board of Management, Hon. Joseph Lagat and the Hospital CEO, Dr. William Aruasa.

Committee Findings

The Committee's findings in relation to the visit are summarized below:

1. *Equipment Received by MTRH:* According to MoH records, MTRH benefitted from the following equipment under the MES Project:
   i. *Theatre Equipment*
      - Two (2) anesthetic machines with ventilator
      - One (1) electrosurgical unit
      - Two (2) operating theatre lamp
      - Two (2) operating theatre tables
      - One (1) resuscitaire
      - Two (2) instrument trolleys
      - Two (2) linen trolleys
      - Three (3) patient stretchers
      - One (1) resuscitation patient trolley

   ii. *Renal Equipment*
      - One (1) raw water reservoir
      - One (1) water treatment plant
      - Five (5) dialysis machines
      - Three (3) Dialysis

- Two (2) dialysis beds
- One (1) defibrillator
- One (1) suction machines
- Two (2) vital signs monitors
- Two (2) oxygenators
- One (1) CR system
- One (1) digital X-Ray System
- One (1) mobile X-Ray Unit
- One (1) C-Arm unit
- One (1) OPG Unit
- One (1) Ultrasound unit

iii. *Radiology Equipment*

2. According to MTRH, the theatre equipment had initially been allocated to Ziwa County Referral Hospital. The reallocation to MTRH had been disputed by the County Government of Uasin Gishu. However, the Ministry of Health had since clarified that the theatre equipment belonged to MTRH.
3. *Memorandum of Understanding:* According to MTRH, the hospital had not signed an MOU with the MoH in relation to the MES Project.
4. *Disclosure of the lease agreement:* MTRH further testified that they had not received full disclosure on the leasing agreements despite several requests to the MOH.
5. *Delivery, installation and commissioning of MES equipment:* According to MTRH, MES equipment was delivered on diverse dates from 2015.
6. *Utilization and Functionality Status of the MES Equipment:* All equipment received under the MES project was functional and fully utilised by the hospital.
7. *Impact of MES Equipment on Service Delivery:* MTRH submitted that all equipment supplied under the MES Project was relevant to the hospital's needs and had had a positive impact on service delivery, particularly in the radiology and renal departments.
8. *MTRH's Experience with Placement vs Leasing Contracts in Acquisition of Medical Equipment:* In addition to the renal dialysis machines received under the MES Project, the hospital had acquired 10 dialysis machines on a placement contract with Frensius Medical Care Deutschland GmbH. According to MTRH, under the agreement, the contractor had placed the dialysis machines at no cost to the hospital save for the purchase of consumables. As with the MES arrangement, ownership of the machines

was retained by the contractor who also met the costs of maintenance.

From its experience with the placement model, MTRH recommended its adoption as a method of sourcing medical equipment based on the following advantages:

a) Transfer of costs of repairs and service maintenance to the contractor;
b) Transfer of investment cost to the contractor;
c) Guaranteed delivery of services from the contractor as the return on investment was dependent on the utilization of consumables;
d) Increased efficiency of procurement procedures;

5.2 COMMITTEE RECOMMENDATIONS FROM COUNTY VISITS

Following the visits carried out by the Committee in the select beneficiary hospitals under the MES Project, the Committee makes the following recommendations—

1. **that while the Counties were not fully consulted in the MES project, they should act in accordance with the Constitution and in particular, Article 43(1)(a), Article 232(1) and the part II of the Fourth Schedule by ensuring the operationalization of the MES Equipment within the beneficiary hospitals; and**

2. **that in the spirit of ensuring the efficiency of devolution under Article 174, the counties should develop a clearly defined system of revenue stream wherein money generated from the project is accounted for.**

CHAPTER SIX
COMMITTEE FINDINGS AND FINAL RECOMMENDATIONS

6.0 GENERAL OBSERVATIONS AND RECOMMENDATIONS

The Committee, in accordance with its mandate, and in consideration of all the submissions, testimonies and evidence - both written and oral- presented before it, made the following findings and specific recommendations:

6.1 THE MES PROJECT

The Committee in its finding noted that the Managed Equipment Services (MES) project was a public interest project that was intended to benefit the public through operationalizing the Constitutional right to the highest attainable standard of health outlined in respect to Article 43(1)(a) of the Constitution. However, the persons involved in the conceptualization and implementation of the project from start to finish, implemented the project in a manner that violated the very Constitution and the sacred principles that the project was originally conceived under.

In fact, the Committee has established that the MES project appears to have been conceived like a criminal enterprise shrouded in opaque procurement processes and aimed at benefitting a few commercial interests. The Committee noted with concern that this is the only project where conditional grants meant for county governments and appropriated under the County Allocation of Revenue Acts, are deducted at the source and transferred to the Ministry of Health instead of being deposited in the respective County Revenue Fund.

Moving forward, the Committee recommends that the money meant for the project should be deposited to the County Revenue Fund as required by the Constitution and Section 109 of the Public Finance Management Act, 2012.

6.2 THE PROCUREMENT MATTERS

The Committee has established that the entire procurement process in the MES project from the conceptualization of the project to its implementation, is shrouded with secrecy and smells of irregularities and illegalities. The Committee has further established that some of the

equipment in the MES project was either overpriced, substandard, delivered late, or undelivered at all, were not inspected/veted by the relevant government agencies and thus the full positive effect of the MES project has not been felt by the people of Kenya.

In addition, the Committee established that despite the Ministry of Health carrying out a needs assessment, which confirmed that counties lacked adequate capacity to absorb the equipment, the Ministry still went ahead to procure medical equipment for counties in full awareness that the same equipment would not be optimally used. The Committee therefore determined that the procurements were done so as to advance private commercial interests that were supply driven rather than needs at the expense of the Kenyan public and in contravention of Article 201.

The Committee therefore recommends that all public officers found culpable of irregularities and illegalities committed in the furtherance of the adverse commercial interests which were at the expense of the people of Kenya be prosecuted and be barred from holding public office.

Furthermore, the Committee recommends that all private entities and persons found culpable of participating in the irregular and illegal acts in the procurement and implementation of MES project be barred from doing any business with both levels of the Government.

6.3 FORENSIC AUDIT

The committee recommends that the Office of the Auditor General to immediately undertake a forensic audit of the entire MES project with a view to establishing —

(a) the initial amount of monies budgeted for the project;
(b) the total monies so far deducted from the counties;
(c) the amount that the National Treasury has so far released to the Ministry of Health under the project;
(d) the amount of monies that the Ministry of Hospital has paid to suppliers;
(e) paper trail of all payments from the Ministry of Health to the contractors and the specific amounts paid to the individual contractors;
(f) the vote head under which the money is deposited at the Ministry of Health;

(g) status of the monies released to Ministry of Health from the National Treasury on account of contracts that were never awarded under the MES project i.e. Lots 3 and 4; or contracts awarded and subsequently terminated e.g. HCIT; or payment by counties for equipment not delivered but for which the monies have been released to the Ministry of Health e.g. the Meru ICU equipment which is still pending in Netherlands; and

(h) the justification for the variations undertaken by the Ministry of Health and funds released by the National Treasury noting that the variations was above the legal requirement of 25%.

The office of the Auditor General should undertake this forensic audit as a priority and report back to the Senate within 6 months from the date of resolution of the Senate on this report.

6.4 FURTHER INVESTIGATIONS BY RELEVANT INVESTIGATORY AGENCIES

The Committee observes that whereas the implementation of the MES project may have been well intended, it also provided opportunity for some officers to defraud the public. This is demonstrated in the conceptualization, initiation, procurement processes, contracting, and pricing of the goods and services. MES project was not lucky in this regard. Some of the issues raised during the inquiry manifest clear incidences of maladministration or criminal conduct. Where allegations are made of a criminal nature, it may be the case that due to the Committee's limited mandate, the Committee may not make conclusive findings. The matters are nevertheless serious in nature and require the relevant investigatory organs of Government to pursue. The Committee's view therefore is that some of the issues raised and established during this inquiry process merit further investigations.

Accordingly, the Committee recommends that the Ethics and Anti-Corruption Commission investigates these matters and takes appropriate action within ninety (90) days and report to the Senate on action taken.

6.5 THE OBSERVANCE OF THE CONSTITUTION

Article 3 of the Constitution obligates every person to respect, uphold and defend the Constitution. Further, Article 6(2) provides that the governments at the national and county levels are distinct and interdependent and shall conduct their mutual relations on the basis of consultation and cooperation. Article 189(1)(a) provides that the Government at either level shall perform its functions, and exercise its powers, in a manner that respects the functional and institution integrity of the Government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level.

The Committee implores all state officers, public officers and government agencies that whatever the importance or urgency of an undertaking, the constitutional principles relating to functions and status of government at either level must be observed. They must not derogate from the constitution

6.6. LEGISLATIVE INTERVENTIONS

6.6.1. Involvement of the A-G in contractual matters;

There appears to be a disconnect between the functioning of the office of the Attorney General and other government agencies that appears to benefit from the legal advice and guidance from this office. There is need for clarity on both policy and law that whenever the Government or its agencies are involved in an undertaking, there must be clear input from the state law office. The advice of the AG to state agency should be binding and not a matter of debate to arrive at some findings.

There appears to be a disconnect between the functioning of the Office of the Attorney General and other government departments and agencies. This disconnect has served as a loophole which certain officers and agencies have exploited to arrive at pre-determined outcomes at the cost of the rule of law. Furthermore, there needs to be reform in the process of legal guidance from the Office of the Attorney General in order to avoid undue correspondence between institutions that may be used to obfuscate deeds of malfeasance.

6.6.2 Role of KEBS and PPB

Role of KEBS and PPB on matters relating to medical equipment, drugs etc is not clear. It is apparent that the mandate of the Ministry of Health agencies e.g. KEBS and PPB on matters concerning public health standards and safety should be clearly recognized and adhered to by the parent Ministry.

The questionable, dysfunctional and unsatisfactory actions of KEBS, KEMSA and PPB in discharging their statutory role in the MES project left Kenyans severely exposed to health risks. The apparent negligence observed by the Committee point to a legislative gap wherein there is no statutory penalty for their dereliction of duty. In view of the foregoing, the **Committee recommends that –**

(a) an audit to establish the reasons why the three statutory bodies are failing to carry out their statutory roles;

(b) a thorough investigation into the negligent conduct of the officers of these agencies with a view to determining and prosecuting all officers found culpable of negligent acts; and

(c) legislative reform to strengthen safety standards of the abovementioned organisations.

6.6.3 Urgent and Immediate audit of the entire project

MES is a classic case of a good idea executed badly. It is without doubtable that there are gains to be made from the MES Project. Moving forward, the committee recommends that after a thorough audit, a fresh engagement be undertaken to salvage what is remaining of the project. In the event that the contract is not extended, there needs to be a post MES strategy so that the investment does not go to waste. The audit should commence immediately as soon as the Report is adopted and report back to the Senate within six months.

The Committee recommends that an audit be undertaken and a fresh engagement commenced in order to streamline the National Government & county governments to analyse and formulate a way forward on the MES project. There is a need for a post-MES strategy to ensure that the MES equipment does not go to waste. In undertaking this audit, the committee proposes the establishment of a multisectoral committee comprising a representative of the MOH, representation of the COG, a representative of the PPB, a representative of KEBS, a representative of National Treasury, a

representative of OAG & DOJ and representatives of Civil Society Groups operating in the health sector to undertake a valuation of the equipment supplied under MES project in order to validate the viability of the equipment in respect to the lifecycle model in the contract and at the end of the contractual term in 2022 and and advise on the way forward. The Multisectoral Committee should report back to the Senate within 6 months.

This particular audit should commence and conclude in three (3) months with the findings reported to the Senate.

6.6.4 County Governments and MES

The committee has established that County Governments have not embraced the MES project with exception of a few; Those that have positively embraced MES are Mombasa. The committee urges County Governments to urgently put the equipment in use for the benefit of the public. Each County Governments to file with the Senate a status report of all equipment received, status of functionalities, how they intend to use them in the remainder of the period and how they are going to deal with the equipment post MES project. Report to be filed within six months.

It has emerged that the county governments have never embraced MES project with the exception of a few. (such as Mombasa). The Committee directs the county governments to utilize the equipment that is lying unused in county hospitals. The County governments are therefore directed to issue a status report detailing the MES equipment received; status of the payments made for MES and forward the report to the Senate within 6 months of the directed. Audit.

6.7 SPECIFIC OBSERVATIONS AND RECOMMENDATIONS

Breach of the Constitutional Objects of Devolution and Provisions on Intergovernmental Relations

1. The Constitution of Kenya 2010 establishes two distinct and interdependent levels of government: the national and county governments. In recognition of the distinct and interdependent nature of the two levels of government, Article 6 (2) of the Constitution

obligates the two levels of government to conduct their mutual relations on the basis of consultation and cooperation. Further, Article 189 (1) of the Constitution requires each level of government to perform its functions, and exercise its powers in a manner that respects the functional and institutional integrity of government at the other level.

2. The conceptualization and design of the MES project was not conducted in accordance with the constitutional provisions on intergovernmental cooperation as envisaged in Article 187 of the Constitution. Further, its implementation did not respect the functional and institutional integrity of counties as required by Article 189(1) of the Constitution. This fact is underlined by the fact that, in implementing the MES Project, the national government through the Ministry of Health overstepped its policy role to implement roles and functions that were constitutionally under the domain of county governments in the absence of an explicitly written Agreement between the levels of government.

3. The Memoranda of Understanding (MOUs) that were executed between MoH and the 46 county governments did not equate an explicit written Agreement between the two levels of government as required by Article 187 of the Constitution and Sections 25 and 26 of the Intergovernmental Relations Act. Not only were they generic across the 47 counties, they also did not make reference to pertinent issues to be expected in such an agreement such as: the specific county needs being addressed, the amounts being expended by the national government on behalf of the county, details of beneficiary hospitals and/or the specific equipment that each facility would receive.

4. The project assumed a highly centralized approach that was incognizant of the distinct and unique needs of each of the 47 county governments. In contravention of Article 6 of the Constitution which requires the two levels of government to conduct their mutual relations on the basis of consultation and cooperation, county governments were not involved in the needs assessment exercise that led to the prioritization of equipment under the MES Project. Consequently, the equipment supplied under the project was not tailored to suit the unique and specific needs of each county. As a result, in various instances, equipment supplied under the MES project duplicated equipment already in use at county level.

5. Even where counties received duplicate equipment, the MOU did not make provision for counties to exchange the equipment for what was more relevant to their needs. Further to this, the same MOU forbade the counties from transferring duplicate equipment from the primary beneficiary hospital to another county health facility whose needs it may have better served.

6. Counties did not receive full disclosure on the contracts executed on their behalf by the MoH and the contracted companies. As a result, the county authorities were unable to verify what equipment they were expecting to receive. In some cases, contractors ended up delivering less equipment to some hospitals than was projected by the MoH.

Impact of MES on Health Service Delivery

7. Where it was successfully implemented, the MES project realized a positive impact on health service delivery through improved access to specialised and emergency care. For example, in the third quarter of 2019 alone, 28,902 surgeries were conducted in MES beneficiary hospitals. Further, the provision of renal dialysis services was expanded from 5 public hospitals previously, to 54 with 1,265 dialysis patients having been attended to with 198,256 dialysis sessions within the same period. Accessibility to critical care had also improved under the project with 1036 patients receiving ICU care in the third quarter of 2019 alone.

The Committee observes that MES is a classic case of a good idea executed badly. It is without doubtable that there are gains to be made from the MES Project.the MES project being on its fifth year, the Office of the Auditor General should undertake an urgent audit of the entire project including how the funds so far paid by Counties have been used, the state of the equipment and the extent to which the project has met its objectives, and recommend to the Senate on the best way forward. This audit should be undertaken immediately and report back to the Senate within 6 months from the date of this Resolution

Shift of the MES Project from a Public Private Partnership (PPP) Initiative

8. The MoH initiated the MES Project under a PPP model in consultation with the National Treasury in 2013. The MoH subsequently terminated its relationship with the National Treasury under the PPP model in an unprocedural and irregular manner, the timing of which was suspect as it coincided with the stage at which a feasibility study was set to be conducted in accordance with set PPP procedures.
9. The legal framework upon which the MES project was ultimately undertaken was the Public Procurement and Disposal Act 2005 (now repealed), and the Public Procurement and Disposal Act (Regulations) of 2006. The circumstances under which the project shifted from a PPP to a public procurement remain unclear.

The Committee recommends that the current PPP framework is laborious and time-consuming. There is a need to review the PPP Act to streamline the lengthy and laborious approval processes, and address the operational challenges that have been encountered under the existing PPP framework.

Irregularities in the Procurement Process

10. The Ministry violated existing procurement laws and regulations, and failed to comply with regulation 17 of the Public Procurement and Disposal Regulations 2006, and Legal Notice No. 107 of 2013 which require signed minutes of an Inspection and Acceptance Committee prior to making payments for goods received.
11. The Ministry of Health also procured financial advisory services for the MES Project from PKF Kenya Ltd through a restricted tendering process at a contract sum of Kshs.

9,634,960.00. The reason provided by the Ministry of Health for procuring these services through a restricted tendering process was time constraints. However, given the fact that the project was a major project with huge financial implications and a high level of public interest, the Ministry ought to have procured the financial advisory services through a competitive process.

The Committee recommends investigations into the circumstances under which the consultany services were procured and action be taken against officers found culpable.

Lack of Involvement of the Key Government Departments and Agencies in the Execution of the MES Project

12. The MoH executed the MES project without the involvement of key government stakeholders including the Office of the Attorney-General and the Pharmacy and Poisons Board.

Poor Coordination and Implementation of the MES Project by the MoH

13. As per the findings of the Committee during its county visits, the MES Project had been poorly coordinated and implemented by the MoH across the counties. This was characterised by lack of proper records as to the exact equipment allocated to specific counties. For instance, while documentation received from the MoH had indicated that Elgeyo Marakwet County had received three sets of theatre equipment, during its visit, the Committee found that the county had received five sets of equipment, none of which was functional. In addition, there were anomalies in the information received from the MoH and the status on the ground. For example, during its visit to Garbatulla SDH, the Committee found that none of the MES equipment was functioning save for a CSSD machine. However, the MoH had reported that all equipment was functional save for the digital General X-Ray machine. In addition, the Committee found that the MoH made an arbitrary decision to reallocate theatre equipment from Ziwa County Referral Hospital to MTRH despite the availability of a viable alternative hospital. That is, Turbo SDH. MES equipment had been installed before the county was in a position to effectively absorb it. This had led to delays in operationalization of the equipment to the detriment of the

county. Except for the CSSD machine, the Committee found that theatre and radiology equipment under the MES project in Garbatulla SDH was non-functional owing to lack of requisite personnel, and inadequate water and electricity. These findings were contrary to reports received from the MoH which indicated that all MES equipment in Isiolo County was operational except for the General X-Ray machine at Garbatulla SDH.

Wide Inter- and Intra County Disparities in the Status of Implementation of the MES Project across Counties

14. There were wide inter- and intra-county disparities in the status of implementation of the MES project across the counties that were suggestive of the level of political goodwill, leadership and commitment to implement the MES project at county level:

For example, during its visit to Isiolo County, the Committee found that there was a large disparity in the standard of implementation of the MES project between Isiolo County Referral Hospital and Garbatulla SDH: Whereas all the equipment in Isiolo County Referral Hospital was operational and in good working order, none of the equipment supplied to Garbatulla SDH was functional save for a CSSD machine.

In Elgeyo Marakwet County, the Committee found that theatre equipment had been installed in partially constructed theatre facilities at Iten County Referral Hospital. Moreover, of the theatre and radiology equipment supplied to Chebiemit and Kamwosor Sub-County Hospitals, only the mobile X-Ray machine at Chebiemit SCH and the CSSD machine at Kamwosor SCH were reported functional.

This was in direct contrast to the Committee's findings in MTRH and Meru and Mombasa counties where all equipment supplied under the MES Project was found to be operational and in good working condition. Moreover, in these counties, the Committee found that the MES project had resulted in improvements in health service delivery and increased revenue collection.

The wide inter- and intra party

County Requests for Additional Equipment under the MES Project

15. Despite the fact that most counties were yet to utilise MES equipment already supplied during the initial phase of the project, some counties had nonetheless requested the MoH

for additional equipment under the expanded MES project. Further, even in counties were , the county government had requested for additional equipment being theatre equipment and a CT scan machine. However, none of these were operational at the time of the visit owing to the lack of the requisite infrastructure and personnel.

Non-Regulation of MES Medical Equipment

16. There is currently no regulatory system in place for medical equipment. The equipment, reagents and consumables supplied under the MES project had been merely listed by both KEBS and the PPB. No independent vetting, inspection or quality control testing of the equipment was carried out by either KEBS or PPB thus compromising the health and safety of Kenyans.

Irregular Authorization of Withdrawal of Funds towards the MES Project

17. Disbursements towards the MES project were approved by the Controller of Budget in the absence of an explicitly written Agreement between the two levels of government as required by Article 187 of the Constitution and Sections 25 and 26 of the Intergovernmental Relations Act. In the absence of such an Agreement, due process was not followed in authorizing payments towards the MES project. Further, the Office of the Controller of Budget failed to ensure the accountable and fair use of public resources in respect to the MES Project.

Matters Arising in Relation to the Conditional Grant to Counties

18. Monies towards the payment of the government's contractual obligations under the MES project were captured as conditional grants to county governments in the various County Allocation of Revenue Allocation Acts since the FY 2015/2016. However, the conditional grants related to the MES project were unusual in that they did not enter the County Revenue Fund as required by the Public Finance Management Act but were rather, deducted at source and paid directly to MES service providers.
19. According to submissions received from the Ministry, the value of equipment received varied from USD. 7,971,365.00 to USD. 11,392,388.00 across the counties. However, despite the fact that the equipment received was neither standard in value nor quantum,

the Ministry applied a blanket standard rate of first, Kshs. 95 Million, then Kshs. 200 Million and subsequently, Kshs. 131 million across all 47 counties.

20. Further, in the absence of evidence of national disbursement schedules indicating specific allocations to the four (4) national referral health facilities that benefited under the MES Project, this Committee found that conditional grants to counties may have been used to subsidize equipment supplied to national referral hospitals under the MES Project.
21. Furthermore, when the contract was varied to add 21 beneficiary hospitals to the MES project, the added costs were spread across all 47 counties as opposed to the specific counties that had benefited from the additional equipment. As such, in effect, poorer counties with less infrastructure and personnel were used to subsidize richer counties and national health referral facilities with the capacity to absorb the equipment.

Needs Assessment

22. In March 2014, the Ministry of Health conducted a needs assessment exercise aimed at assessing the readiness of Counties to provide specialized services on the basis of available infrastructure, equipment and personnel. The exercise led to the prioritization of equipment supplied under the MES project. To note, County Governments were not consulted or involved in the exercise. The findings of the exercise are contained in the '2014 Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in the proposed Level 4 and 5 Facilities in the Counties'.
23. With regards to availability of specialized personnel, the Ministry appears to have ignored its own findings and recommendations as contained in the report which notes that the *"provision of specialized health services is still very weak due to inadequate specialized human resources."* It goes further to note that the *"delivery of comprehensive services requires availability of at least specialist in all categories …"*. Data provided in the report indicated the following availability of various specialized cadres in 2014: Physicians (18%); Obstetricians/Gynaecologists (14%); Orthopedic Surgeons (14%); Radiologists (32%); Paediatricians (21%); General Surgeons (22%); Burns Nurses (3%); Theatre Nurses (15%) etc. The Report further noted that more than ten (10) counties did not have even one specialist. However, the Ministry went on to fast track the roll-out of the MES Project despite their own assessment demonstrating that counties lacked the requisite

specialized personnel. To note, lack of specialized personnel to operate the equipment has since been identified as one of the key challenges hindering the successful implementation of the MES Project.

24. On availability of equipment, the same report *(Annex 17)* notes that the availability of various equipment varies from 60-90% in the counties. For example: General X-Ray Machines, 54% availability: Anesthetic machines, 65%; Autoclaves: 86%; Cesarean Section Sets: 86%; Operating Theatre Lamp: 62% etc. However, despite finding that the various equipment prioritized under the project were already available in at least 60% of county health facilities, the Ministry went on to carry out a blanket allocation of equipment across the counties. This had consequently led to cases of duplication of equipment. In Laikipia County for example, functional X-Ray and theatre equipment that had been procured by the National Government prior to devolution had to be removed to make way for new X-Ray and theatre equipment supplied under the MES project.

25. Further, the aforementioned report noted that the infrastructure available for specialized diagnostic radiological services ranged from 1-109% across the counties. The import of which was that from the onset, there already existed wide infrastructural disparities between the counties: While some counties exceeded the infrastructural requirements necessary to absorb the equipment envisaged under the project, others had only 1% of the infrastructure required. Despite this, the Ministry went on to fast track the roll-out of the MES Project at a time when most counties did not have the infrastructure necessary to enable them absorb the equipment. As a result, five years down the line, various counties were yet to operationalize MES equipment owing to lack of adequate water or electricity, and/or ongoing construction works.

26. The net effect of the MoH ignoring its own findings in the needs assessment report is that to date, MES equipment has remained non-functional in several health facilities across the 47 counties owing to the lack of the requisite specialized personnel, infrastructure, water and electricity. Had the MES Project been implemented in a stepwise and progressive manner that factored in the need to address these challenges, more impact would have been realized from the MES Project.

Functionality Status of MES Equipment

27. On the functionality status of the equipment, according to documentation received from the Ministry, MES equipment was yet to be put to use in several county health facilities by the time of this inquiry. For example, theatre equipment was non-functional in ten (10) counties including Tana River, Wajir, Elgeyo Marakwet, Trans Nzoia, West Pokot, Vihiga, Muranga, Samburu and Machakos owing to a variety of reasons including lack of requisite personnel and infrastructure. Additionally, Digital General X-Ray services were still unavailable in 16 county health facilities owing to the lack of three-phase electricity. Affected counties included Siaya, Elgeyo Marakwet, Isiolo, Tana Rive, Kisii, West Pokot, Migori, Nyamira, Mombasa, Makueni, Kitui, Bomet, Meru, Tharaka Nithi and Trans Nzoia. Regardless, payments were still being effected for the equipment installed in the affected counties.
28. To note, during its verification visits to the counties, the Committee found inconsistencies in the functionality status of MES equipment as reported by the MoH, and the actual reality on the ground. For example, the Committee found that in Garbatulla Sub District Hospital, only the CSSD machine was operating optimally. This was contrary to reports received from the Ministry of Health which had indicated that all MES equipment in Isiolo County was operational except for the General X-Ray machine at Garbatulla SDH.
29. In Elgeyo Marakwet County, despite not being in a position to utilise the MES equipment already provided, the county government had requested for additional equipment being theatre equipment and a CT scan machine. However, none of these were operational at the time of the visit owing to the lack of the requisite infrastructure and personnel.

Varied Status of Implementation of the MES Project across the Counties

30. There were inter- and intra-county disparities in the implementation of the MES Project. For example, there was a large disparity in the standard of implementation of the MES project between Isiolo County Referral Hospital and Garbatulla SDH: Whereas almost all the equipment in Isiolo County Referral Hospital was operational and in good working order, the MES project at Garbatulla SDH had been poorly implemented with most MES equipment lying idle. In the neighbouring county of Meru, most installed equipment was functional and in good use.

Financial Advisory Services

31. In their submissions to the Committee, both the Office of the Auditor General and the Ministry of Health noted that it was the financial advisory provided by PKF Kenya that guided the Ministry's decision to opt for leasing rather than outright purchase of equipment.

Value for Money

32. Article 227 of the Constitution obligates state organs and public entities to contract goods and services in a fair, equitable, transparent, competitive and cost-effective manner.
33. PKF Kenya developed a Public Price Comparator that was used by the Ministry as a basis for evaluating the responsiveness of bidders. The Public Price Comparator was based on common equipment used in Kenya. The base costs were derived from an '*average of different prices obtained from at least three manufacturers*. However, costing for the equipment was done by Lot without providing a breakdown of each individual component under each Lot. In the absence of a costing to indicate how prices for each Lot were ultimately arrived at, the Committee found that the decision by the Ministry to cost the contracts by Lot rather than by individual equipment component provided an opportunity to disguise the actual value of equipment and to inflate costs.
34. The cost of the equipment supplied under the MES Project was grossly exaggerated as demonstrated by a schedule submitted to the Committee by the Ministry on the value of equipment received by each county. Some examples include:

Equipment	**Units**	**Value (USD) as submitted by the Ministry)**	**MES Unit Cost in USD**	**MES Unit Cost in Kshs (converted at Kshs.103 at 1 USD)**	**Average Market Based on Committee's Investigations**
Instrument Trolley	2	5,345	2,672.50	275,267.50	15,000.00
Linen Trolley	2	6,072	3,036.00	312,708.00	25,000.00

Patient Stretchers	3	64,475	21,491.00	2,213,573.00	30,000.00
Resuscitation Patient Trolley	1	16,037	16,037.00	1,651,811.00	50,000.00
Stitching Removal Set	4	15,796	3,949.00	406,747.00	5,000.00

From the table above, common basic equipment was supplied, on lease, at several times the normal market price. For example, a stitching removal set which typically comprises a suture tray, a pair of scissors and a pair of tongs, was supplied to counties at the unconscionable cost of Kshs. 406,747.00. That is more than 80 times the average cost of similar equipment in the market. Simple instrument trolleys were supplied at 18 times the average cost etc.

35. Even the cost of the specialized equipment supplied under the project was heavily exaggerated. (insert example of GE's equipment).
36. Independent investigations by counties had also revealed evidence to suggest that the value of equipment supplied to counties under the project was grossly exaggerated. For instance, Kitui County conducted an Internal Inventory and Market Survey on the MES equipment supplied to the county found that it had a total value of Kshs. 331,542,230.00. This was 2.5 times less than the estimates provided by the Ministry which indicated that equipment supplied to Kitui County was USD 8,032,770.00 (or Kshs. 827,375,310 at a conversion rate of Kshs. 103 to the USD).
37. In addition to the above, counties reported having procured similar equipment to that supplied under the MES project at a fraction of the cost.

Illegal and Irregular Variation of Monies Charged to Counties

38. With regards to the variation of the costs effected against counties from Kshs. 95 million at the start of the program to Kshs. 200 million in the FY 2018/2019 and then Kshs. 131 million in the subsequent financial year, the Ministry submitted the following justifications:

(a) Expansion of the MES Project to include an additional 21 hospitals at a contract sum of KEs. 3,700,808,413.00.

(b) Procurement of HCIT Solutions at a contract value of Kshs. 4,756,773,074.00

(c) Procurement of Laboratory Equipment at an estimated cost of Kshs. 1.1 Billion

(d) Service Level Monitoring and Administration at a cost of Kshs. 98,548,722.00

39. Of these reasons, the HCIT Solutions contract had stalled and no payments had been effected by the time of this inquiry. Further, Laboratory Equipment was never procured owing to irresponsive bids by potential suppliers. As such, basing the variations on these two components was unjustifiable.

40. Further, the Ministry unjustifiably opted to spread the cost of equipping 21 additional hospitals under the expanded MES project to all 47 counties at a cost of Kshs. 3,700,808,413.00. Owing to the fact that the Ministry had justified the expansion of the MES Project by citing requests from counties, the additional costs ought to have been applied exclusively to the actual 21 counties that had applied and benefited from the expanded project.

Unfair Competition and Monopolization of the MES Project

41. The enactment of the Health Laws (Amendment) Act 2019 granted KEMSA a near absolute monopoly in the supply of drugs to public health facilities countrywide. The law, which amended Section 4 of the KEMSA Act, provides a Kshs. 2 million penalty or five years imprisonment, or both, for anyone who purchases drugs from other entities. As a result, county governments are obligated to source all their health products and supplies from KEMSA. This has had serious implications in fostering a fair and competitive environment for the procurement and supply of health products.

42. All the reagents and consumables supplied by KEMSA in relation to the MES project are sourced from a single local agent i.e Angelica Medical Supplies Limited. The agent was invited to supply the reagents and consumables through a direct tendering process on the advice of the original manufacturers. Further, the renal and radiology equipment supplied under the MES project are locked to the specific reagents and consumables that are supplied by this single local agent. Based on the foregoing, despite enjoying economies of scale, it is questionable

whether the reagents and consumables supplied by KEMSA under the MES project are sourced at the most competitive rates.

Reagents and Consumables

43. Conflicting information was provided by various stakeholders on which party under the MES contracts was ultimately responsible for supplying reagents and consumables. While both the Ministry of Health and the MES service providers indicated that it was the responsibility of the county governments, according to Schedule 10, Clause 5 of the contract for Shenzen Mindray Biochemical Ltd, the contractor was obligated to supply, maintain and replace all maintenance and operational durables in respect of the equipment and all maintenance and operational consumables. However, the contractor only supplied starter kits of consumables with the equipment with counties thereafter being required to purchase any additional consumables.

Additional Costs Borne by Counties

44. To accommodate the equipment supplied under the MES project, county governments were constrained to incur costly and unforeseen expenditure in infrastructural development and recruitment/training of specialized personnel. These costs had not been factored into county budgets or CIDPs. As such, counties were forced to reallocate funds from other votes to accommodate the project.

45. Further, the monies necessary for the procurement of reagents and consumables were not factored into the conditional grants. As such, sourcing reagents and consumables had imposed a significant and additional cost to counties for the running and operation of MES equipment.

Imprudent Use of Public Resources

46. The MoH failed to exercise prudent use of public resources as illustrated by the following:

- The Ministry of Health had incurred penalties totaling up to the sum of USD 4,183,290.00 owing to delayed payments in respect of the MES projects by the time of this inquiry.
- Equipment supplied under the MES Project continued to be delivered counties at the time of this investigation with counties reporting having received various equipment on diverse

dates from 2015 to present. However, this Committee found that payments to contractors were effected regardless of the actual dates equipment was delivered, installed and commissioned in county health facilities.

- Installation of MES equipment in counties that had no capacity to absorb it: For instance, five years after the project was initiated, radiological equipment in Endebess Hospital in Trans Nzoia County was yet to be installed owing to the lack of the necessary infrastructure.

Termination of the HCIT Contract

47. The HCIT Solutions contract between the Ministry of Health and Seven Seas Technologies Ltd was terminated unlawfully.
48. While the contract did not meet the necessary threshold of Kshs. 5 Billion which mandates the involvement of the Office of the Attorney General in contracts involving public entities, best practice dictates that the MoH ought to have involved the Office of the Attorney General as the legal adviser of government.
49. Several factors led to the project getting stalled including, but not limited to: lack of a budgetary allocation in the FY 2019/2020 for the project contrary to Section 44 (2)(a) of the Public Procurement and Asset Disposal Act, 2015; and, failure by the Ministry of Health to provide the contractor with a Government Letter of Support despite several documented assurances to the contractor.
50. The obligation for the MoH to provide a Government Letter of Support was contained in both the tender documents and the signed contract.
51. The Contractors financial capability to execute the HCIT Solutions contract was incumbent upon receiving this Government Letter of Support. However, the MoH was unable to fulfil its obligation in providing this letter as it had failed to received clearance from the Office of the Attorney General. To note, the Office of the Attorney General provided clearance for Government Letters of Support to all other contractors under the MES project.
52. That being said, the contract in itself was highly prejudicial to the Government, and marred by serious irregularities and illegalities in the procurement process. For instance, no due diligence was conducted by the Ministry of Health to ascertain the financial capability of the Contractor.

Further, the Ministry did not independently and objectively establish value for money before entering into the contract.

53. If the Contractor successfully obtains a court judgement against the Ministry of Health, the taxpayer stands to lose an inordinate sum of money due to the Ministry's failure to abide by the terms of the Contract and the laws of Kenya.

54. Any losses of money from the actions of the Ministry would mean that Article 201(d) of the Constitution has been breached by the public officers involved in the termination of the contract. Furthermore, if the court makes judgement in favour of the Contractor, these officers are liable of having committed an offence as stipulated under section 197 of the Public Finance Management Act, 2012 and are liable to face the penalties prescribed in section 199 and 202 of the same Act.

Issues, Distortions, Inconsistencies and/or Irregularities arising from the other MES Contract

55. *Shenzen Mindray Biomedical Ltd:* The Committee noted the following issues and inconsistencies in relation to the MoH contract with Shenzen Mindray Biomedical Co. Ltd:

- According to documentation received from the MoH, the contractor delivered varied quantities of the following equipment to the various hospitals: anaesthetic machines, electrosurgical units, operating theatre lamps and operating tables to different hospitals. Only the linen trolleys, instrument trolleys, patient stretchers and resuscitation patient trolleys delivered to the various hospitals were consistent in terms of quantum. In some instances, MoH records a higher number of equipment delivered to county hospitals than that recorded by the Contractor. This was likely to have led to overpayments by MoH resulting in loss of public finances.
- There were inconsistencies in regard to beneficiary hospitals under the contracts. These inconsistencies are likely to have resulted in non-performance of contractual obligations by the contractor and loss of money by the government.
- Completion certificates were issued to the contractor by the Ministry despite inconsistencies in regard to the equipment supplied to each county health facility.
- The MES contract provides under Clause 5.4 (page 13) that MoH is obligated to supply at its own cost, throughout the operational term, electricity in order to enable the contractor

comply with its contractual obligations. Through the MOU signed between the respective counties and MoH, MoH transferred this obligation to the counties.

- Under the variation of contract, equipment received by the additional hospitals was the same in terms of quantum. However, the quantity of the equipment under the variation was less than that under the original contract. additional equipment received varied from hospital to hospital in terms of quantum

56. *Philips Medical Systems of Netherlands:* The Committee noted the following issues and inconsistencies in relation to the MoH contract with Philips Medical Systems of Netherlands:
    - The contractor disputed the value attached to the equipment by MoH in the MES Cost Distribution per County claiming that the cost therein was inflated. In the list submitted by MoH one bedside locker is priced at USD 12,947.2 or Kshs.1,346,488.00; a drip stand is USD 12,523.85; a microwave oven is USD 12,805.81 and a wash basin is USD 12,900.
    - In a letter dated 27th May, 2019, the contractor surcharged MoH USD 53,482.89 or Kshs. 5, 401,771.89 (using a conversion rate of 101) for late payment in regard to Q 9 (April - June 2018), Q 10 (July- September 2018), Q11 (October-December 2018). Via letter dated 5th July 2019 and 7th August, 2019, the contractor surcharged MoH USD 7,739.06 or Kshs. 785,685.06 (using a conversion rate of 101) for late payment in regard to Q12 (Jan.-March 2019) and Q5 Variation contract. According to documents supplied by the contractor, the total amount that was to be paid to the contractor with regard to the late payment penalties was USD 61,261.95 or Kshs. 6,187,456.95 (using a conversion rate of 101). This indicated a lack of prudent use of public resources on the part of the Ministry of Health.
    - The MES contract provides under Clause 5.4 (page 15) that MoH is obligated to supply at its own cost, throughout the operational term, electricity in order to enable the contractor comply with its contractual obligations. Through the MOU signed between the counties and MoH, MoH obligates the counties to supply the electricity.

57. *General Electric:* The Contractor failed to comply with the Committee's requirement to present *bona fide* directors of the original manufacturing company. As such, the Committee only accepted written submissions from the company.

58. *PKF Kenya:* The Committee noted the following issues and inconsistencies in relation to the MoH contract with PKF Kenya:

- The PSC outright purchase figures provided by the consultant were almost exactly double the original contract prices for all the Lots even though the consultant indicated that by the time of its report it had had no access to the bid prices by the MES supplier. This is likely to have provided room for over pricing of the MES services by the contractors and subsequent upward variation of the contract prices by all suppliers.
- PKF Kenya submitted a value for money (VfM) assessment report for the MES project to the Ministry of Health on 17th October 2014, in a record 3 days after signing of the contract on 13thOctober 2014 despite the contract period being 44 days. This raises doubts as to whether actual work was done considering that the assignment anticipated the PKF Kenya to travel to familiarize itself with locations of the Hospital.
- According to submissions received from the Ministry of Health, MES tenders were opened and evaluated based on the Public Sector Comparator developed by PKF. Further, in its submissions to the Committee, the Office of the Auditor General noted that it was the financial advisory provided by PKF Kenya that guided the Ministry's decision to opt for leasing rather than outright purchase of equipment. Further, that it was the Public Sector Comparator developed by PKF Kenya that formed the basis for the awarding of tenders.

Replacement and Upgrading of MES Equipment

59. A minimal number of equipment supplied under the MES Project had ever been upgraded and replaced by the time of this inquiry. What equipment had actually been replaced mostly consisted of common basic equipment such as trolleys and stretchers. To note, part of the justification provided by the Ministry for opting for the added costs of a managed equipment service was the added advantage of access to equipment upgrades and replacements. However, in this respect, the benefit accrued to Kenya was minimal.

Limited utility in retention of MES equipment beyond the stipulated contract period:

60. Most equipment supplied under MES contract have limited lifespan guarantees following which failure rates and cost of maintaining the equipment is likely to increase. This implies that if counties exercise the option to retain the equipment after the end of the contract, the equipment will only be optimal for a limited number of years before increases in maintenance costs and failure rates render them financially unviable.

Direct Purchase vs Lease for basic equipment

61. Most equipment supplied under the MES project did not require frequent changes in technology. As such, there was no value for money by acquiring the equipment through MES rather than by outright purchase.

Inadequacy of Existing Laws for the Procurement of Capital-Intensive Medical Technologies and Equipment

62. Existing laws and regulations for the procurement of, appropriate use and disposal thereof of capital-intensive medical technologies and equipment are inadequate. In recognition of the fact that the health sector has specific procurement requirements which may not be adequately addressed in the general procurement laws, a public procurement manual for the health sector which was issued in 2008. However, the manual is outdated as it was based on the now repealed Public Procurement and Disposal Act of 2005, which has since been replaced by the Public Procurement and Asset Disposal Act of 2015.

63. In order to regulate medical technologies, reduce expenses and prevent uncontrolled growth, there is a need to regulate high-cost care and investments in medical equipment. In the case of the Netherlands, hospitals must acquire special licenses from the line Ministry prior to investing in new, specialized and expensive medical equipment. A similar system is used in parts of Canada and Spain. In Quebec and Catalonia, for example, authorization is required from a regional authority to acquire certain technologies, such as imaging, radiation therapy, and pacemaker implantation. For purposes of establishing super specialized services, written authorization must be given by the Minister of Health. France has also developed a system of regulating medical technology by mapping health needs according to region. The Ministry of Health defines the need, and hospitals, by law, must receive approval from the Ministry to establish specialised services. This includes installing major medical equipment such as CT scanners, and MRI machines. Other countries, for example, Sweden and the United Kingdom, have adopted a regional approach to specialised services.

ADOPTION OF THE REPORT OF THE SENATE ADHOC COMMITTEE ON MANAGED EQUIPMENT SERVICES

We, the undersigned Members of the Senate Ad-Hoc Committee on Managed Equipment Services, do hereby append our signatures to adopt the Report- :

8TH SEPTEMBER, 2020

Sen. Dullo Fatuma Adan, CBS, MP Chairperson .....

Sen. Moses Wetang'ula, EGH, MP Vice Chairperson .....

Sen. Paul Githiomi Mwangi, MP Member.....

Sen. Justice (Rtd.) Stewart Madzayo, MP Member.....

Sen. Judith Pareno, MP Member.....

Sen. (Dr.) Christopher Langat, MP Member .....

Sen. Enoch Wambua, MP Member.....

Sen. Mary Seneta, MP Member.....

Sen. Millicent Omanga, MP Member.....

LIST OF ANNEXURES

NAME		DETAIL OF ANNEXURE DOCUMENT
Annexure I	—	Motion forming the Ad Hoc Committee
Annexure II	—	MoH Concept Paper "*Leasing of Equipment and Infrastructure Improvement in Public Health Facilities under Public Private Partnership,*"
Annexure III	—	Ministry of Health Letter dated 20th September 2013(*Ref No. MOH/DP/16/1/7/12*) to County Governors, CS James Macharia
Annexure IV	—	Letter dated 10th June 2015(*Ref No. COG/6/40 Vol 6*) from Chairperson, Council of Governors to Chief Executive, Ethics and Anti-Corruption Commission
Annexure V	—	2014 Preliminary National Assessment Report on the Status of Infrastructure, Equipment and Human Resources in the proposed Level 4 and 5 Facilities in the Counties
Annexure VI	—	List of stakeholders who appeared before the Committee
Annexure VII	—	Minutes of Committee and minutes of meetings held during the Netherlands Visit
Annexure VIII	—	Office of the Auditor-General, Special Audit of the MES Project
Annexure IX	—	Written submission of the Office of the Auditor-General
Annexure X	—	Letter from Mr Julius Korir,PS Ministry of Health to the National Treasury dated 2nd November 2017, Ref No MOH/FIN/1/A.VOL1(229)
Annexure XI	—	Written submissions from the Office of the Controller of Budget dated 22nd October 2019 *Ref No OCOB/SEN/002/Vol.II(25)*
Annexure XII	—	Written submissions from the Ministry of Health
Annexure XIII	—	Written submissions from the Council of Governors
Annexure XIV	—	Bundles of documents submitted by the Office of the Attorney General and the Department of Justice dated 13th February 2020 and 11th March 2020
Annexure XV	—	Written submissions from KEMSA
Annexure XVI	—	Written submissions from the Pharmacy and Poisons Board
Annexure XVII	—	Written submissions from KEBS
Annexure XVIII	—	Written submissions from the National Treasury

Annexure XIX	—	Written submissions from PKF Kenya
Annexure XX	—	Written submisisons from SPA Info-Suv
Annexure XXI	—	Written submissions from IKM Advocates
Annexure XXII	—	Written submissions from GE East Africa Services Limited
Annexure XXIII	—	Written submissions from Shenzhen Mindray
Annexure XXIV	—	Written submissions from Esteem Inc.
Annexure XXV	—	Written submissions from Bellco SRL
Annexure XXVI	—	Written submission from Philips EA
Annexure XXVII	—	Written submisisons from Seven Seas Technologies Limited
Annexure XXVIII	—	Written submission from KELIN
Annexure XXIV	—	Copy of the Hansard meeting with GE East Africa Limited
Annexure XXV	—	Copy of Hansard of meeting with Dr Cleopa Mailu and Mr James Macharia
Annexure XXVI	—	Copy of letter from Dr Cleopa Mailu to Clerk of Senate
Annexure XXVII	—	Copy of submissions made by Prof. Fred Segor.