

REPUBLIC OF KENYA



NATIONAL ASSEMBLY

TWELFTH PARLIAMENT– THIRD SESSION

DIRECTORATE OF COMMITTEE SERVICES

THE PUBLIC ACCOUNTS COMMITTEE

**REPORT ON THE EXAMINATION OF THE
REPORT OF THE AUDITOR-GENERAL ON THE
FINANCIAL STATEMENTS FOR THE INDEPENDENT
ELECTORAL AND BOUNDARIES COMMISSION**

FOR THE

YEAR ENDED 30TH JUNE 2017

FEBRUARY 2019

AS AMENDED AND ADOPTED BY THE HOUSE ON 23RD APRIL, 2019

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ABBREVIATIONS

BVR	- Biometric Voter Register
KIEMS	- Kenya Integrated Elections Management System
NIMS	- National Identity Management Systems
RTS	- Result Transmission System
CRMS	- Candidates Registration Management System
SIS	- Safran Identity Security
PPADA	- Public Procurement and Asset Disposal Act
DSCM	- Director Supply Chain Management
DCEO SS	- Deputy Chief Executive Officer Support Services
ICTA	- Information Communication Technology Authority
UNDP	- United Nations Development Program
MNO	- Mobile Network Operators
FPE	- Fresh Presidential Elections
CMA	- Capital Markets Authority

1.0. CHAIRPERSON'S FOREWORD

Honourable Speaker, on behalf of the Public Accounts Committee (PAC), and pursuant to Standing Order 199, it is my pleasant duty and honor to present to the House the report of the Committee on the audited financial statement of the Independent Electoral and Boundaries Commission (IEBC) for financial year 2016/2017. This report is unique in the sense that the audit went beyond the financial year under review and covered part of the 2017/2018 financial year in order to capture all expenses related to the August 2017 General Elections and the repeat October 2017 presidential election.

The Committee held a total of 12 sittings during which it received both written and oral evidence from the Chairman, Commissioners, Accounting Officer, former Commissioners and former Accounting Officer of the IEBC on the audit queries raised by the Auditor-General. In addition, a number of key suppliers of the IEBC were invited and granted opportunity to tender evidence before the Committee. Minutes of the Committee's meetings are annexed to this report.

Honourable Speaker, the Committee's interaction with the IEBC officers (both Commissioners and Secretariat staff, former and current) during the hearings was a most humbling experience. It was, truly, an encounter with impunity. Not a single officer was willing to take responsibility for the glaring illegalities and/or irregularities that characterized the management of public funds duly appropriated by Parliament for use by the electoral body. It was all blame game. The picture that emerged was that of an IEBC that was held hostage by incessant battles of supremacy between the Chairman and the Chief Executive Officer.

Honourable Speaker, during our inquiries, it was clear right from the outset that prudent management of public resources by the IEBC had been sacrificed at the altar of self aggrandisement. Speculators and wheeler-dealers had a field day as internal controls, where they existed, failed or were made to fail spectacularly.

From the analysis of the evidence that was placed before the Committee, it is safe to conclude that, perhaps, the true cost of the August 2017 General Elections and the repeat October 2017 presidential election may never be known. But one thing is clear; it is a cost that was highly inflated and the taxpayers did not get value for the investment. In the same vein, the actual amount of public money that was lost from the manipulation of procurement processes and creative accounting may never be fully ascertained.

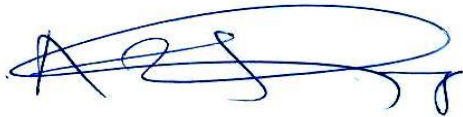
Honourable Speaker, this report should be considered as a first step in dealing decisively with the rot that has come to be associated with the IEBC for a long time now. It should lay the foundation for a fresh start. The relevant investigative agencies should move with dispatch, pick up from where we have left and undertake thorough investigations with a view to prosecuting all individuals found culpable, indiscriminately.

Clearly, in the circumstances, the continued existence of the IEBC, as currently constituted, even for one extra day, is untenable. Parliament must provide leadership by developing a clear roadmap to midwife a seamless transition from the current order of management of elections to a totally new order. Particular emphasis should be put in creating a robust organizational structure with in-built accountability mechanisms to guard against mismanagement and misuse of public funds in future.

In conclusion, Honourable Speaker, I wish to register my appreciation to fellow Honourable Members of the Committee, the Offices of the Speaker and the Clerk of the National Assembly, the Office of the Auditor General and the National Treasury. Special appreciation also goes to the Directorate of Committee Services and, in particular, members of the Committee secretariat who have had to go beyond the normal call of duty to make the production of this report possible.

The commitment and devotion to duty of all those involved in this arduous task made the work of the Committee and production of this report a success. I thank each one of them.

Honorable Speaker, on behalf of the Public Accounts Committee, I now wish to table the report and urge the House to adopt it and the recommendations therein.

A handwritten signature in blue ink, appearing to be 'James Opiyo Wandayi', written in a cursive style.

HON. JAMES OPIYO WANDAYI, MP

2.0. INTRODUCTION

2.1 Establishment of the Public Accounts Committee

The Public Accounts Committee was established on Monday, 18 December 2017, pursuant to Article 124 of the Constitution and the National Assembly Standing Order 205.

2.2 Mandate of the Committee

The Public Accounts Committee (PAC) is mandated under Standing Order 205 (2) of the National Assembly Standing Orders to examine the accounts showing the appropriations of the sum voted by the House to meet the public expenditure and of such other accounts laid before the House as the committee may deem fit.

The Committee oversees the expenditure of public funds by ministries, state departments, commissions and independent offices, to ensure value for money and adherence to government financial regulations and procedures. The Committee executes its mandate on the basis of annual and special audit reports prepared by the Office of the Auditor General.

2.3 Guiding Principles

In the execution of its mandate afore-stated, PAC is guided by core constitutional and statutory principles on public finance management, as well as established customs, traditions, practices and usages. These principles include:

1) Constitutional Principles on Public Finance

Article 201 provides for the fundamental principles that "...shall guide all aspects of public finance in the Republic..." These principles are, inter alia:

201(a) there shall be openness and accountability, including public participation in financial matters;

201(d) public money shall be used in a prudent and responsible way; and

201(e) financial management shall be responsible, and fiscal reporting shall be clear.

PAC places a premium on these principles, among others, and has been guided by them in the entire process that has culminated in this report.

2) Direct Personal Liability

Article 226(5) of the Constitution is emphatic that **"If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not"**.

PAC has hoisted high this constitutional provision as the basis for holding each individual

Accounting Officer and other Public Officers directly and personally liable for any loss of public funds under their watch. The Committee has and will continue to invoke this provision in its recommendations to hold those responsible personally accountable. It is envisaged that it will serve as a deterrent measure.

3) Obligations of Accounting Officers

Section 68 (1) of the Public Finance Management Act, 2012 provides, inter alia, that: **“An accounting officer for a national government entity, Parliamentary Service Commission and the Judiciary shall be accountable to the National Assembly for ensuring that the resources of the respective entity for which he or she is the accounting officer are used in a way that is lawful and authorized, and effective, efficient, economical and transparent.”**

This provision obligates all accounting officers to appear before the Public Accounts Committee of the National Assembly to respond to audit queries in their respective ministries/state departments or agencies.

And section 74 (2) of the same PFM Act stipulates that: **“If a Cabinet Secretary reasonably believes that an accounting officer is engaging in or has engaged in improper conduct within the meaning of subsection (4), the Cabinet Secretary shall: -**

- i. **Take such measures as may be provided in regulations; or**
- ii. **Refer the matter to the relevant office or body in terms of the statutory and other conditions of appointment or employment applicable to that accounting officer.”**

This section empowers the appointing authority to discipline errant accounting officers, which could include revoking their appointment. This provision has sealed a long-standing loophole that has previously seen accounting officers continuously commit or preside over fiscal indiscipline and malpractice in their ministries, departments and agencies.

PAC strongly holds the view that these provisions of the law were intended to be fully deployed to give effect to the high principles in Article 201 of the Constitution stated hereinabove, to ensure prudent and responsible use of public funds.

2.4 Committee Membership

Chairperson

Hon. James Opiyo Wandayi, MP
Ugunja Constituency

Orange Democratic Movement Party

Vice- Chairperson

Hon. Jessica Nduku Kiko Mbalu, MP
Kibwezi East Constituency

Wiper Democratic Movement Kenya Party

Members

Hon. Junet Mohammed Nuh, MP
Suna East Constituency

Orange Democratic Movement Party

Hon. Maj. (Rtd.) (Dr.) Eseli Simiyu, MP
Tongaren Constituency

Ford- Kenya Party

Hon. Tom J. F. Kajwang, MP
Ruaraka - Constituency

Orange Democratic Movement Party

Hon. Christopher Nakuleu Doye
TurkanaNorth Constituency

Jubilee Party

Hon. Patrick Makau King'ola, MP
Mavoko Constituency

Wiper Democratic Movement Kenya Party

Hon. Florence Mwikai Mutua, MP
Woman Representative - Busia County

Orange Democratic Movement Party

Hon. Mathias Robi Nyamabe, MP
Kuria West Constituency

Jubilee Party

Hon. (Dr.) Otiende Amollo, MP
Rarieda Constituency

Orange Democratic Movement Party

Hon. Gideon Koske Kimutai, MP
Chepalungu Constituency

Chama Cha Mwananchi Party

Hon. Francis Kuria Kimani, MP
Molo Constituency

Jubilee Party

Hon. Samson Ndindi Nyoro, MP
Kiharu Constituency

Jubilee Party

Hon. Peter Francis Masara, MP
Suna West Constituency

Independent Member

Hon. Michael Thoyah Kingi, MP
Magarini Constituency

Orange Democratic Movement Party

Hon. James Gichuhi Mwangi, MP
Tetu Constituency

Jubilee Party

Hon. Daniel Kipkogei Rono, MP
Keiyo South Constituency

Jubilee Party

Hon. Qalicha Gufu Wario, MP
Moyale Constituency

Jubilee Party

2.5 Committee Secretariat

Oscar Namulanda

Principal Clerk Assistant II

Nebert Ikai

Third Clerk Assistant

Joash Kosiba

Senior Fiscal Analyst

Sidney Okumu Lugaga

Legal Counsel II

Caroline M. Njue

Research Officer III

Salat Abdi Ali

Senior Serjeant at Arms

Elijah Ichwara

Audio Officer II

3.0. GENERAL OBSERVATIONS AND RECOMMENDATIONS

1. The Committee observed that there were instances of outright conflict in the functions of the CEO and that of the Chairman of IEBC. Such conflicts arose mainly on procurement matters and especially the procurement of KIEMS Kits and other election materials, contrary to section 11A of the IEBC Act.

Parliament should move with speed to strengthen the IEBC by revisiting the legal framework and the general policy guidelines while taking into account the recommendations of the Kriegler Commission in order to resolve tension between the offices of the Chairman and the CEO by having their functions clearly spelt out and accountability appropriately assigned as envisioned under section 11A of the Independent Electoral Boundaries Commission Act.

2. During evidence gathering it emerged that the Chairman of the Commission acted contrary to section 16 (1) of the Leadership and Integrity Act, section 12 of the Anti-Corruption and Economic Crimes Act and section 12 of the Public Officers and Ethics Act, which provide that state officers or public officers shall use the best efforts to avoid being in a situation where personal interest conflicts with official duties. Mr. Chebukati as the Chairman of the Commission presided over a Commission that allocated cases to a law firm to which he was a founder partner without prior disclosure of that fact. This compromised on his integrity and presents a situation of conflict of interest and incompatibility.

It also emerged that the other Commissioners demonstrated conflicts of interest in relation to procurement of the KIEMS kits where the Commissioners voted in favour of their preferred suppliers as evidenced in MINUTE 12-15/03/2017 of the Special Plenary Meeting held on 31st March, 2017.

The Committee recommends that upon adoption of this report, the relevant investigative agencies should institute investigations on the conduct of the Commissioners involved with a view to initiating prosecution where culpability is established.

3. The Commissioners failed to exercise oversight while the Secretariat demonstrated poor or lack of prior planning which plunged the electoral body into crisis after crisis, that compelled the Commission to undertake direct procurement of all critical goods and services in a manner that was contrary to provisions of Article 227(1) of the Constitution in so far as it did not embody a process that was fair, equitable, transparent, competitive and cost-effective.

The inertia exhibited by the leadership of the IEBC has eroded public confidence in the institution's capacity, as currently constituted, to execute its constitutional mandate whilst safeguarding public interest.

4. The National Treasury and the Auditor-General should assist the Commission undertake verification of all pending bills with a view to expedite the settlement of all genuine payments due to the suppliers in order to save the public from incurring additional costs that may arise from protracted legal disputes with such suppliers. The team should also institute mechanisms to recover all monies that might have been paid to suppliers improperly. Investigations should also be undertaken, and if impropriety is established, appropriate action taken against all the officers involved.
5. The Accounting Officer should at all times ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services as provided for in section 68(2)(e) of PFM Act 2012 and section 103 of the Public Procurement and Asset Disposal Act, 2015.
6. The CEO, Mr. Ezra Chiloba, signed contracts worth Kshs. 4,312,046,372.00 without the contractors providing performance guarantees contrary to the provisions of section 142 (1) of the Public Procurement and Asset Disposal Act, 2015. Upon adoption of the Report, the relevant investigative agencies should undertake an investigation with a view to initiating prosecution if culpability is established. The Commission should at all times ensure that performance guarantees are executed before signing a contract in accordance with section 142 (1) of the Public Procurement and Asset Disposal Act, 2015.
7. The Accounting Officer should always be guided by the Average Price List or Market Price Index published by the Public Procurement Regulatory Authority that is designed to assist all heads of procuring entities, accounting officers and all public officials involved in the procurement function with the necessary information to comply with the aforesaid legal requirement and in turn deliver value for money in the public service and comply with section 54(2) of Public Procurement and Asset Disposal Act, 2015 that prohibits all transactions by public officials in which standard goods, works and services are procured at unreasonably inflated prices.

Within three months of adoption of this report, the Public Procurement Regulatory Authority should publish an updated Average Price List in light of the fact that the last Average Price list was published pursuant to the provisions of section 30 of the Public Procurement and Disposal Act, 2005.

8. The Commission should establish framework contracts with more than one supplier so that it is not held hostage when it comes to pricing with the aim of ensuring that resources of the Commission are used in a way that is effective, efficient and economical pursuant to the provisions of section 68(1)(b) of Public Finance Management Act, 2012.

4.0. BASIS FOR COMMITTEE RECOMMENDATION FOR VACATION OF OFFICE

The Secretariat

There seemed to be an unending tug of war and tuff-fencing between the Secretariat and the Commissioners. In the clear lack of policy direction from the Commissioners, the Secretariat operated as if the Commissioners did not exist. In the ensuing scenario the Senior Staff of the Secretariat, Individually and collectively, failed to plan, execute or implement the policies and strategies of the Commission as envisioned under section 11A(b) of the Independent Electoral and Boundaries Commission Act, 2011. It was apparent to the Committee that this failure was deliberately designed to plunge the Commission into a crisis that compelling the Commission to resort to direct procurement of all critical goods and services in a manner that was contrary to Article 227(1) of the Constitution. Consequently, the Kenyan taxpayer did not get value for money. The Committee highlights the following instances as the basis for its recommendations for the removal from office of the senior staff of the Commission:

1. Mr. Ezra Chiloba – CEO

Whereas the Committee notes that he has since been removed from the Commission, the Committee particularly makes the following observations with regard to his role as CEO:

- a) Poor planning and mismanagement of the procurement processes in relation to the whole election process of both August and October 2017, thereby creating an environment of opaqueness, secrecy and anxiety. This, inevitably, contributed to the escalation of the cost of the 2017 General Elections.
- b) Failure to inculcate the spirit of team work and collegiality with the Commissioners and not providing information to the Commission in a timely manner, thus creating loopholes that were exploited to subvert the proper functioning of the Commission.
- c) Exposing the Commission to high risks by not demanding performance bonds before signing contracts. For instance, he awarded a contract for BVR IBM Server infrastructure maintenance and KIEMS infrastructure security monitoring solutions through direct procurement at a cost of Kshs.452,006,003.77 which solution was eventually not utilized during the 2017 General Elections.
- d) Purchase of 149,640.5GB extra data bundles valued at Kshs.127,625,926 which were eventually not used for the intended purposes during the 2017 General Elections, thereby occasioning extra burden to the taxpayers.

2. Mr. Marjan Hussein – Deputy CEO

- a) As the Deputy CEO Operations Logistics and Support Services, he was the Chairman of the Commission Tender Committee and he misled the CEO into signing BVR IBM Server infrastructure Maintenance and KIEMS infrastructure security monitoring solutions contract among others against the provisions of the Public Procurement and Assets Disposal Act, 2015.
- b) He allowed receipt of some election materials for Fresh Presidential Elections way long after the required delivery dates and after completion of the election exercise. For instance, the security seals that were supplied late by Far East Company Limited whose payment is still contentious to date.

3. Ms. Praxedes Tororey – Director, Legal Services

- a) Failure to provide sound legal advice to the Commission with regard to the requirement for performance bonds before execution of contracts exposing the Commission to high financial risks.
- b) Failure to provide sound legal advice to the CEO on direct procurement of various election materials during the General Elections contrary to section 103 of the Public Procurement and Asset Disposal Act, 2015.

4. Mr. James Muhati – Director, ICT

- a) Failed to provide sound technical advice to the Commission on specifications relating to procurement of BVR IBM server infrastructure maintenance and KIEMS infrastructure security monitoring solution through direct procurement at a contract sum of Kshs.452,006,003.77, thereby occasioning wastage of public resources.
- b) Failure to advise the Commission appropriately on technical specifications relating to procurement of Oracle database and security solutions worth of Kshs. 273,643,447.00, thereby occasioning wastage of public resources.
- c) Failure to provide appropriate advice on technical specification on procurement of data bundle requirement for the election worth Kshs.1,800,579,512.00, thereby occasioning wastage of public resources.

5.0. WITNESSES AND SITTINGS

Mr. Marjan Hussein the Accounting Officer and the Ag. Secretary for the Commission appeared before the Committee on 30th October 2018, 31st October, 2018, 26th November, 2018, 27th November, 2018, 29th November, 2018, 3rd December, 2018 and 4th December, 2018 to adduce evidence on the audited Financial Statements of Vote 203 the Independent Electoral and Boundaries Commission. The Committee held a total nine sittings in the period of the examinations, during which submissions were presented before the Committee on the queries raised by the auditor general. The investigations were guided by the aforementioned audit issues. Minutes of the Committee's sittings and the submissions tabled by the Accounting Officer are annexed to this report. He was accompanied by the following Officials:

- 1. Mr. Boya Molu - Commissioner;**
- 2. Mr. Wafula Chebukati - Chairman;**
- 3. Mr. Osman Ibrahim - Director Finance;**
- 4. Mr. James Muhati - Director ICT;**
- 5. Mr. Bernard O. Nyachieo - Ag. Director Procurement;**
- 6. Mr. Chrispine Owiyo - Ag. Director Legal and Public Affairs;**
- 7. Mr. Andrew K. Limo - Communication Manager;**
- 8. Mr. Clifford Kipkemoi - Finance Officer;**
- 9. Mr. Wilfred Lusi - M/FA Chairs Office;**
- 10. Mr. Andrew K. Limo - Communication Manager**

FINANCIAL STATEMENTS FOR VOTE 203

The queries raised by the Auditor General are outlined in the paragraphs as follows:

Basis for Qualified Opinion

1.0 Inaccuracies in the financial statements

1.1 Variances between the financial statements and the ledger

Account balances reflected in the financial statements for the year ended 30 June, 2017 differs with the ledger balances. As a result variances totaling Kshs.631,972,981.00 have been noted on various Heads. The Commission has not carried out reconciliation or given any explanation for this material anomaly.

Submission by Accounting Officer

The Accounting Officer stated that it was true that there were variations between the financial statements and the trial balance. The variances were mainly occasioned by the following;

- i. The Commission prepared the financial statements applying the International Public Standards of Accounting Accrual - IPSAS basis which recognizes expenses as incurred and not when paid. The financial statements are therefore based on the IPSAS Accrual basis of accounting while the IFMIS Trial Balance is based on the IPSAS Cash basis of accounting hence the variances.
- ii. The variance of Kshs.123, 222,923.85 relates to capital expenditure on the supply and delivery of communication and ICT network equipment. These items were wrongly captured in the financial statements and have since been corrected. The figure of Kshs.51, 887,109.98 relates to accrued expenditure recognized during the 2016/17FY. This was wrongly classified as maintenance of computer. It has since been reclassified under internet connection
- iii. The variance of Ksh 168,892,472 was occasioned by:
 - (a) Wrong posting/double posting of KSh 121,292,690 being part payment of Taxes to KRA for KIEMS purchased. This posting has since been reversed.
 - (b) An omission of purchase of computer parts amounting to Ksh. 47,600,000(Circuit Business Systems). The entry has been included in the Fixed Asset Register (FAR).
- iv. The variance under item 2210300 is attributed to the adjustments for prepayments (un-surrendered imprest) as at 30th June, 2017 based on IPSAS Accrual basis. The adjustments were incorporated in the revised financial statements that were submitted to the auditors on 3rd July 2018. The revised financial statements have addressed all the issues raised.

Committee Observations and Findings

- i. **Revised financial statements addressing all the issues relating to all variances between the financial statements and the ledger as raised by the Auditor General were resubmitted to the Auditor General on 3rd July 2018 for review and verification.**
- ii. **The Committee marked the matter as resolved.**

Committee Recommendations

Accounting Officer must at all times ensure that reconciliations are done in time and the complete financial statements submitted to the Auditor General within three months after close of the Financial Year as provided for in Article 229 (4)(h) of the Constitution and section 81 (4)(a) of the Public Finance Management Act 2012.

1.2 Understatement of cash and cash equivalents

The statement of financial position as at 30 June, 2017 reflects cash and cash equivalents balance of Kshs.4, 499,870,000. However, the accuracy of the balance cannot be confirmed due to Kshs.72, 385,205 (over) and Kshs. 241,257,652(under) between the balances reflected in the

financial statements and the reconciled Cash Book. No reconciliation or explanation has been provided for the difference between two sets of records.

Submission by Accounting Officer

The Accounting Officer stated the following:

i. Regional Accounts Variances

The cash and bank balances reflected in the financial statements were prepared based on the initial Board of Survey (BOS) Reports from regional offices. A review of the Expenditure Reports from the regions indicated that funds disbursement to the regions for the period under review were erroneously recorded in the books of accounts for the five regions identified.

The errors were adjusted as part of post balance sheet events in the books and also in the revised financial statements. The correct figures have been captured in Note 12 Cash and Bank of the revised financial statements.

ii. Mortgage Variances

The financial statements were based on the disbursed funds to the Commission's Mortgage Fund reflected in IFMIS Trial Balance instead of the actual Mortgage Ledger balances. The difference was a mortgage amount that had been disbursed to the staff. The Financial Statements were revised to reflect actual Mortgage Ledger balances.

iii. Car Loan Variances

The financial statements were based on the disbursed funds to the Commission's Car Fund balance reflected in IFMIS Trial Balance (of Kshs.100M and the opening Car Loan balance of Kshs. 26.098M) instead of the actual Car Loan Ledger balances. The difference is a car loan amount that had been disbursed to the staff reflected under Car Loan Fund accounts receivables.

The financial Statements were revised to reflect actual Car Loan Ledger balances.

The adjustments were incorporated in the revised financial statements that were submitted to the auditors on 3rd July 2018. The revised financial statements have addressed all the issues raised.

Committee Observations and Findings

- i. Revised financial statements addressing all the issues relating to understatement of cash and cash equivalents as raised by the Auditor General were resubmitted to the Auditor General on 3rd July 2018 for review and verification.**

- ii. **The committee marked the matter as resolved.**

Committee Recommendations

The Accounting Officer must at all times ensure that reconciliations are done in time and the complete financial statements submitted to the Auditor General within three months after close of the Financial Year as provided for in Article 229 (4)(h) of the Constitution and section 81 4(a) of the Public Finance Management Act 2012.

1.3 Understatement of Appropriations-In-Aid (A-I-A)

The Statement of comparison of budget and actual amounts reflects A-I-A totaling Kshs.142,773,000 while the statement of financial performance reflects an amount of Kshs.131,179,000 against the same account item resulting to a difference Kshs.11,594,000, which has not been reconciled or explained.

Submission by Accounting Officer

The Accounting Officer stated that it was true that there was a difference of Kshs. 11,594,000 in AIA amount reflected in the Statement of Comparison of Budget and Actual amounts and the AIA reflected in the Statement of Financial Performance. The difference of Kshs.11, 594,000.00 was as a result of arithmetical error in the excel worksheets. The actual AIA received was Kshs. 131,791,068.00 as per the detailed AIA list attached for audit review.

Further, examination of records revealed that the Commission received Kshs.16,408,399 from United Nations Development Project - UNDP on 13 September 2016 which was posted in the Cash Book on 20/9/2016. However, the receipt has not been disclosed in the statement of financial performance for 2016/2017.

The Accounting Officer stated that it was also true that the grant of Kshs.16,408,399 from UNDP was not disclosed in the unaudited financial statements. This was an omission.

The Commission had received grant support from UNDP to pay the casuals during the Mass Voter Registration I. UNDP only paid directly the net amount due to the registration officials since UNDP is tax exempt. UNDP therefore requested the Commission to process the statutory deductions (PAYE & NSSF) for the Voter Registration Assistants on its behalf hence transferring the said amount to KCB account. This was part of approved UNDP support budget.

An adjustment was made and a revised set of financial statements together with the receipt voucher (F.O 17) and payment Vouchers were availed for audit verification. The adjustments have been incorporated in the revised financial statements that were submitted to the auditors on 3rd July 2018. The revised financial statements have addressed all the issues raised. In addition, the Commission received interest from the KCB call account no.1138835137 amounting

Kshs.2,314,024.25 (USD.21,960.94 @105.37) which has equally not been disclosed in the financial statements.

The Accounting Officer acknowledged the omission of interest income of Kshs.2,314,024.25 earned from Call Deposit account as part of income/AIA in the 2016/2017 financial statements. This has been disclosed under Note 5. Grants from International Organizations (Page 24) of the revised financial statements.

The adjustments have been incorporated in the revised financial statements that were submitted to the auditors on 3rd July 2018. The revised financial statements have addressed all the issues raised.

Committee Observations and Findings

- i. The variation in the Statement of comparison of budget and actual amounts arose because:**
 - (a) The unaudited financial statements did not disclose the grant of Kshs.16,408,399 from UNDP;**
 - (b) The Commission did not include interest income of Kshs.2,314,024.25 earned from Call Deposit account as part of income/AIA in the 2016/2017 financial statements.**
- ii. The revised financial statements addressing all the issues relating to Appropriations-In-Aid of Kshs.11,594,000 as raised by the Auditor General were resubmitted to the Auditor General on 3rd July 2018 for review and verification.**
- iii. The committee marked the matter as resolved.**

Committee Recommendations

- i. The Accounting Officer must at all times ensure that reconciliations are done in time and the complete financial statements submitted to the Auditor General within three months after close of the Financial Year as provided for in Article 229 (4)(h) of the Constitution and section 81(4)(a) of the Public Finance Management Act 2012.**
- ii. The Accounting Officer should take appropriate action against officers responsible for the anomalies.**

1.4 Unsupported account payables

The statement of financial position and Note 17 to the accounts as at 30 June, 2017 reflects a balance of Kshs.6,077,358,000.00 against accounts payables. However, the schedules provided for audit review reflects an amount of Kshs.3,354,467,114.58 resulting to unsupported difference of Kshs.2,722,890,885.42 which has not been analyzed. Further, the Commission amended

Financial Statement in which Note 18 now reflects a balance of Kshs.2,680,742,000.00 against Pending Bills which were not supported with Payment Vouchers.

Submission by Accounting Officer

The Accounting Officer stated that it was true that some payment vouchers in support of pending bills were not availed to the auditors due to audit time constraints and the incomplete state of payments documents related to the 2017 general election.

UNSUPPORTED ACCOUNT PAYABLES			
S/NO.	ITEM	AMOUNT	REMARK
1	ACCOUNTS PAYABLE OPENING BALANCE AS AT 01.06.2017	634,455,272.56	ANNEX 1.4.1
2	REVISED HQ LIST OF PENDING BILLS AS AT 30.06.2018	1,896,885,476.45	ANNEX1.4.2
3	HQ LIST OF LEGAL PENDING BILLS 2016-2017	437,037,758.94	ANNEX1.4.3
4	ACCRUALS SETTLED IN 2016-2017 FY	(287,636,987.62)	ANNEX1.4.4
TOTAL PAYABLES		2,680,741,520.33	

Pending bills summary and supporting schedules were availed to the auditor for verification before the audit exit meeting.

Committee Observations and Findings

- i. Some payment vouchers in support of pending bills were not availed to the auditors due to audit time constraints and the incomplete state of payments documents related to the 2017 general election.**
- ii. The explanation by the Accounting Officer that a of summary the Pending bills and supporting schedules were availed to the Auditor General for verification before the audit exit meeting was not satisfactory insofar as it did not explain failure to provide vouchers to support pending bills of Kshs.2,680,742,000.00 for audit review.**
- iii. No explanation was availed for failure to provide the schedules and analysis of the unsupported difference of the amount of Kshs.2,722,890,885.42 for audit review.**
- iv. The matter was marked as unresolved**

Committee Recommendations

- i. The Accounting Officer must at all times ensure that reconciliations are done in time and the complete financial statements submitted to the Auditor General within three months**

after close of the Financial Year as provided for in Article 229 (4)(h) of the Constitution and section 81(4)(a) of the Public Finance Management Act 2012.

- ii. **The Accounting Officer should ensure that the National Treasury keeps up-to-date financial and accounting records that comply with provisions of Section 68(2) of the PFM Act 2012 and that the complete financial and accounting records are presented within three (3) months after the close of the financial year pursuant to the provisions of Article 229 of the Constitution of Kenya 2010 and Section 68(2) (k) of the PFM Act 2012.**
- iii. **The Accounting Officer should take appropriate action against the officers responsible for the anomalies.**

1.5 Outstanding imprests

The financial statements for the year ended 30 June, 2017 reflects under Note 12 temporary Imprests totaling to Kshs.24,171,000.00 which ought to have been surrendered on or before 30 June, 2017 but was still outstanding as at that date. No reasons have, however, been provided for failure to surrender or account for the imprests.

Submission by Accounting Officer

The Accounting Officer noted that the Commission conducted the general elections on 8th August 2017 while the financial year ended on 30th June 2017.

The end year closure coincided with the implementation of general elections activities that could not have been avoided. The staff both from the field and the headquarters who were involved in the implementation of such activities were to be facilitated for successful conduct of the elections. This forced the officers to hold imprest for activities which were ongoing during the closure of the financial year. The imprests have since been surrendered and cleared from the imprest register.

Examination of the Imprest registers revealed variations between the balance of Kshs.24,171,000.00 reflected in the financial statements and the amount of Kshs.12,395,874.00 reflected in the imprest register, resulting in a variance of **Kshs.11,775,126.00 which has not been reconciled or explained.**

The Accounting Officer further noted that that the variance of KSh. 11,775,126.00 refers to the imprest which had been surrendered but not cleared in the imprest register as at 30.06.2017 due to the workload related to the general election. The imprests were later cleared and the imprest register adjusted as below:

1.5 RECONCILIATION OF OUTSTANDING IMPRESTS IN THE 2016-2017 FY			
S/NO.	ITEM	AMOUNT	REMARK
1	IMPRESTS OUTSTANDING AS PER UNAUDITED FIN. STMNTS	24,170,819.00	Annex 1.5.1
2	LESS: IMPRESTS SURRENDERED AND UPDATED BEFORE AUDIT	11,774,959.00	Annex 1.5.2
3	OUTSTANDING IMPRESTS AS PER THE REVISED STATEMENTS	12,395,874.00	Annex 1.5.3

Reconciliation between Kshs.24, 171,000.00 reflected on the financial statements and Kshs.12, 395,874.00 reflected on the imprests register is attached for your audit review.

Committee Observations and Findings

- i. The revised financial statements addressing all the issues relating to a variance from the outstanding imprests of Kshs.11,594,000.00 as raised by the Auditor General were submitted to the Auditor General for review and verification.**
- ii. The Committee marked the matter as resolved.**

Committee Recommendations

- i. Accounting Officers must at all times provide complete financial records, corresponding imprests records to the Auditor General within the stipulated period of three months after close of the Financial Year as provided for in Article 229 (4)(h), and section 81 (4)(a) of the Public Finance Management Act, 2012.**
- ii. The Accounting Officer must at all times discharge his or her responsibilities in management of Public finances as provided for in Section 68 of the Public Finance Management Act, 2012.**

OTHER MATTERS

1.6 Purchase of Kenya Integrated Election Management Systems (KIEMS) Kit

(i) Award of the Contract

Records at IEBC show that the contract for supply of 45,000 Kenya Integrated Elections Management Systems - KIEMS Kits was awarded to a firm on 31 March 2017 at a contract sum of Kshs.4, 196,300,000 through direct procurement method.

Submission by Accounting Officer

The Accounting Officer stated that the use of direct procurement method was duly approved by the Accounting Officer. The justification was as follows:

1. Urgency of KIEMS Acquisition so as to meet legal timelines in the Election Laws (Amendments) Act 2016, Election Laws (Amendments) Act 2017, Amendments to the Elections (General Regulation) and Elections (Technology) Regulations 2017 which were enacted in March, 2017. These laws and regulations required the Commission to acquire and implement the technology in 120 days prior to the August, 2017 General Election.
2. Threat to national security due to election timelines not being observed.
3. As demonstrated by the table below there was a protracted legal war between vendors which had the capacity to undermine the credibility of the election.

Open Tender	Application for the Review	Determination of the Review	Fresh Application for review	Termination of the Tender
13 th Dec, 2016 to 2017	29 th Dec, 2016	17 th January, 2017	22 nd February, 2017	9 TH March, 2017

4. Following amendment of the law, the Commission was expected to integrate technology i.e. political party nomination of candidates, candidate registration, candidate nomination and verification of the register of voters, Election Day identification and results transmission. These activities ran from April, 2017 to August, 2017. Considering that the Election Day was not changing, the Commission was compelled to resort to the method of direct procurement in order to meet the election timelines.
5. Need for compatibility and seamless system integration. This justification was used pursuant to section 103 (2) (d) of the Public Procurement and Asset Disposal Act, 2015.
6. Need to avoid vendor wars as experienced in 2012 when different vendors were contracted to provide different components of the system resulting to challenges in use of technology.
7. There was a need for additional services (functionalities) to the existing BVR system which had been sourced and supplied by Safran Morpho.
8. There was a need for standardization in voter identification to minimize the risk of voter rejection during identification and increasing effectiveness and efficiency.

(ii) Scope and Components

- Supply, installation, configuration, testing and commissioning of the KIEMS Kits
- Software licenses and royalties
- Training
- Technical support

(iii) Audit Findings

The KIEMs kits, power banks, protective cases and SD Cards were procured for General Election and Fresh Presidential Election totaling Kshs.856,254,499.00 relating to Fresh Presidential Election as tabulated below:

Description	Quantity	Unit price (\$)	Total (\$)
Morpho tablets	1500	542.66	813,990
Rugged rubber protection	2000	13.41	26,820
Protective carrying casing	3000	15.57	46,710
Power banks	5000	29.76	148,800
Training	1	2,494,639	2,494,639
Election day technical support	1	4,187,040	4,187,040
Logistics, storage, warehousing	1	508,205	508,205
Ten TB of data consumption on public portal	10	2535	25,350
Backup infrastructure (cloud service)	1	776,857	776,857
Total in \$(USD)			9,028,411
Total in Kshs. (at rate of 94.84)			856,254,499

Committee Observations and Findings

- i. Even though the Auditor General did not make an adverse finding on the acquisition of KIEMS in terms of the procurement process, he highlighted the fact that the IEBC spent an additional Kshs. 856,254,499 on KIEMS. At the hearings, both the Commission and Mr. Chiloba stated that the additional costs arose from the following:**
 - **A significant number of KIEMS Kits were locked in various warehouses (Embu, Kirinyaga, and Marsabit) following a court order for preservation of Election materials; and some were replacement kits for those that were faulty after the 8/8/2017 GE.**

- Additional Power banks were ordered for remote polling stations that did not have adequate electricity as a risk mitigation measure following the 8/8/17 experience.
 - Additional training was necessitated by the modification of the system following the Supreme Court ruling on 1/9/2017 and the fact that the system had been modified.
 - Election support was enhanced based on the experience on 8/8/17 GE. The support moved from the 47 counties to 290 constituencies.
 - The requirement for logistics, storage and warehousing for FPE were same as the August election. Kits had to be retrieved from the field to a central warehouse and operation centre and dispatched back to the field.
 - The additional ten terrabytes of data was required for the transmission of results form 34A and form 34B using the Results Transmission System. During 8/8/2017 GE the Commission transmitted Form 34B using Secure File Transfer Protocol (SFTP) that did not require additional bundles.
 - There was need for cloud hosting services for purposes of the Fresh Presidential Election because Safran Morpho did not have adequate time to configure and test the local environment.
- ii. The Committee took note that costs were incurred for the Fresh Presidential Election. This cost could have been avoided had IEBC performed its duty appropriately in the August 2017 elections.
- iii. During the hearings, a number of important issues arose based on the submissions. It was clear that there was tension and confusion between the Secretariat and the Commissioners when it came to procurement. For example, evaluation of tender is governed by the Public Procurement and Asset Disposal Act, 2015 where the *evaluation committee* makes recommendations to the *accounting officers* for an award to be made. The Committee found it strange that the Commissioners sat somewhere in plenary and voted over the procurement without following the law. The Committee believes that this was the beginning of contestation within the Commission. It seems that this was the trend in many other procurements. When the Chairman of the Commission appeared before the Committee, the Committee found it a bit startling for him to deny their role in the procurement of KIEMS when the minutes signed by him showed otherwise.
- iv. There were clear attempts by external actors – vendors and politicians - to influence the procurement of KIEMS kits. For example, some commissioners wanted some other

companies such as *Smartmatic* while others wanted *Safran*. The evidence found in minutes shows a Commission that was indecisive or under immense influence and did not know what to do. The Committee's view is that discord on critical procurements in the Commission is systemic because of external influence. Parliament must find a way of taming such in future through legislation.

- v. The law on procurement of KIEMS was such that certain timelines ought to have been observed by the Commission. If the Commission felt that the law placed unnecessary pressure on it they should have gone for direct procurement in the first place. The Commission ought not to have commenced the open tender process if there was evidence that timelines were strict. As early as December 2016, the Commission had a chance to proceed with direct procurement subject to stakeholder consultation and laid out conditions for direct procurement. However, it failed to do so and instead proceeded with open tender then went back to direct procurement. This was a waste of useful time.

Committee Recommendations

- i. Parliament should review the legal framework to address institutional challenges of the Commission in as far as procurement procedures are concerned. This should include decision-making matters in procurement, that is, the role of the Commissioners and Secretariat.
- ii. The Chairman of the Commission and the rest of the Commissioners should be held to account for misleading the Committee on their role in procurement matters.
- iii. A thorough verification be undertaken on the inventory of the additional items under KIEMS as enumerated by the Auditor General in order to establish their status and future use.
- iv. Both Commissioners and Secretariat should follow the laid down procedures as per the Public Procurement and Assets Disposal Act as well as the circulars issued by the Public Procurement Regulatory Authority especially on segregation of functions.

2.0 Supply, Delivery, Implementation, and Commissioning of Network Transmission

- 2.1 The Commission contracted three (3) major mobile network operators to transmit election results through their networks for the General Election (GE) and Fresh Presidential Election (FPE) at Kshs.1,047,826,338 and Kshs.297,688,852, respectively, totalling Kshs.1,345,515,190. In an effort to achieve the objective, the Commission segmented the country into three (3) zones and tasked each mobile subscriber with the responsibility of connecting KIEMS kits at polling stations to IEBC National Tallying Centre.

However, audit has revealed that out of the total contract sum of Kshs.1,345,515,190 for purchase of goods and services relating to result transmission, an amount of Kshs.555,424,638 was not effectively utilized due to late delivery of goods and services or non-delivery and non-provision of the same as follows:

(i) Excess Purchase of Data Bundle

149,640.5 GB of data bundle valued at Kshs. 127,625,926.00 were procured from the three (3) Service Providers. However, analysis of actual SIM cards' data usage revealed that 605.3 GB valued at Kshs.515,269.00 were utilized, resulting in unutilized, expired and wastage of 149,035 GB of data bundle valued at Kshs.127,109,656.00.

Submission by Accounting Officer

The Accounting Officer stated that as part the Commission's risk management and mitigation strategy for the results transmission in order to guarantee the availability, reliability, security and efficiency of the RTS network, the Commission did the following:

- i) As opposed to using one network mobile operator, the commission engaged all the 3 operators as a consortium of what was referred to as the consortium of Mobile Network Operators
- ii) The Commission also sought the involvement of the CA as the industry regulator to offer Technical advice during engagements with the MNOS
- iii) The MNOS /IEBC/ETAC divided the country into 13 Zones
- iv) The MNOS were equally allocated zones as either the Primary or Secondary operator on basis of among other risk considerations of-
 - (a) The technical risks such as network failure, coverage or availability
 - (b) The political risk management where the Commission needed to ensure that any malicious technology sabotage within any service provider does not affect the electoral process on a wider scale. Thus the need to distribute the risks
- v) Each KIEMs tablet had two SIM cards slots [Dual SIM] for purposes of redundancy; only one of the SIM cards was to be used at a time to manage the risks. Each was adopted as either Primary or secondary by the two different MNOs
There were a total of 40,883 polling stations and 45,000 KIEMS kits which included spares and training kits. This required in total 90,000 SIM Cards

Mitigation for areas without 3G network coverage

Based on the report submitted to Senate and Parliament by the Communications Authority of Kenya, it was confirmed that only 78% of the country had 3G network which was only concentrated in the main cities and towns as opposed to the countryside where the Commission conducts the elections. The CA's recommendation was that the Commission required Thuraya to guarantee 100% transmission of election results.

A further assessment with the CA and the MNOs confirmed that the 3G network could be used for transmission. However, about 11,000 polling stations were in areas without 3G coverage. To mitigate this and based on the above recommendation, the Commission acquired the Thuraya technology (modems) which were distributed at the 290 Constituency tallying centres, 47 county tallying centres and the rest among the 11,000 polling stations. It is important to note that where the polling station could not transmit, Thuraya transmission was available at the constituency and county tallying centres.

It was important to note that the use of Thuraya technology is usually expensive. The choice of unlimited data bundles option for Thuraya for 5 days was the cheapest option available for the Commission. The only other options available then were for a minimum contract period of one month and were more expensive. The Commission negotiated for a customized 5-day package which is cheaper compared to the others. Where the two SIM cards would not be used due to poor network, the Presiding Officer (PO) would resort to use of the Thuraya. The Thuraya was to be used as the last resort.

The Commission had a total of 40,883 polling stations out of this about 11,000 did not have 3G network coverage. This is the basis that the Thuraya solution was introduced to support areas where there was no 3G coverage. The Thuraya was provided as a third option for the result transmission in these regions. The Thuraya was provided by one of the MNOs. It was part of the consortium solution.

The risk mitigation was also informed by the experience of the result transmission in the 2013 General Elections and the need to improve on the availability of the results transmission infrastructure and network.

The Data Bundles

In order to electronically transmit data in our case the text and image results – data bundles are required for the Thuraya and the SIM Cards

The Data bundles were procured as per the Commission's and Elections Act 2016 legal requirements for the results transmission for the General Election.

The data bundles from the MNOs are usually time-bound and expire on a daily, weekly or monthly basis. In the case of results transmission for election, the Commission procured monthly data bundles package.

The product/tariff of the data bundles available from the MNO was a monthly subscription where the resource was bound to expire if unutilized.

The Data Bundle requirement for the Election

The 500MB per SIM card data bundles monthly tariff procured by the Commission was informed by the following requirements for the month of May, June, July, August, September and October 2017 after an assessment/analysis:

- a) Production Environment this for setting up and testing each KIEMS Kit with SIM card
- b) Voter Verification May 10 2017 (30 days’ activity) – transmit Logs of verified voters
- c) Load and Stress Testing of the backhaul links connectivity of the MNOS to the 90,000 SIM cards
- d) Countrywide Simulation of Technology as required by law- On 9th June 2017- transmission testing was done across the country in some polling stations
- e) Countrywide Simulation of Technology 31st July 2017 – 2nd Testing of transmission
- f) Training of Elections Officials.
- g) General Election 2017
- h) Fresh Presidential Election 26 October 2017

It was important to note that the data bundles were pre-loaded two months to the elections for purposes of supporting the items a) to f) above and another pre-loaded for the election month to support items g) and h).

For purposes of monitoring and auditing the election system security for the results the system was activated two days before, during and two days after the election date, in this case 6th August 2017 to 10th August 2017 and from 24th October 2017 to 28th October 2017 for the Fresh Presidential Elections and among other activities the system captures is bundle utilization , and this is the report the Auditors relied on which does not include the activities a- f above as there was no need to monitor this.

The table below explains the analysis of total bundles procured for one election:

No. Polling stations	Primary SIM card bundles	Secondary SIM card bundles	Total capacity for one election
45,000	500MB	500MB	45TB

	Bundle per SIM card	August General Elections (No. of SIM cards)	Fresh Presidential Elections (No. of SIM cards)	TOTALS (b+c)	TOTAL BUNDLES FOR ONE MONTH (GB) (a x d)/1000	TOTAL BUNDLES (GB) FOR TWO MONTHS
Safaricom	500MB	25,889	42,133	68,022	34,011	68,022
Airtel	500MB	31,298	30,918	62,216	31,108	62,216
Telkom	Unlimited	24,365	16,892	41,257	Unlimited	Unlimited
Thuraya	Unlimited for five days	1,000	553	1,553 (not added because only bundles were topped up for the first 1,000)	Unlimited	N/A
TOTALS		81,552	89,943			

In summary, the data bundles procured by the Commission is a product of the mobile network operators and was a monthly data bundle tariff which expires if unutilized after 30 days. The Commission for the purpose of the preparation for elections procured the data bundles for various activities as shown above for the months of May, June, July, August and September.

The data used by the auditors is only a subset of the total requirements for all these activities and was picked from a different context of election-day monitoring.

Committee Observations and Findings

- i. The submission by the Accounting Officer that the data bundles procured by the Commission is a product of the mobile network operators and was a monthly data bundle tariff which expires if unutilized after 30 days and further, that the Commission for the purpose of the preparation for elections procured the data bundles for various activities elucidated for the months of May, June, July, August and September appears reasonable.**
- ii. The submission by the Accounting Officer that the data used by the auditors is only a subset of the total requirements for all these activities and was picked from a different context of election-day monitoring indicates that there may be need to conduct a performance audit to establish whether there was value for money in the purchase of the data.**

Committee Recommendations

Within six months of tabling of this report, the Auditor-General should undertake a comprehensive performance audit to evaluate, whether there was value for money in the purchase of data bundles of 149,640.5GB valued at Kshs. 127,625,926.00 and submit the report to Parliament with a view to inform any changes that may be necessary in the planning and procuring of data for future election activities.

(ii) Examination of Payment Vouchers

Examination of Payment Vouchers relating to purchase of Thuraya IP+ SIM loaded with unlimited data bundles for five (5) days and others supplied has revealed the following information:

PV No.	PV Date	Delivery No.	Delivery Date	Qty	Amount (Kshs.)
266	25.09.17	142940	2. 08.17	700	
		8832	22.07.17	300	639,028,488.00
1502	26.01.18	144444	24.08.17	553	273,869,352.07
		Sim Cards			
1118	8.12.17			1000	167,681,672.00
Total				2553	1,080,579,512.07

An audit review of records revealed anomalies as follows:

(a) Mismanagement of 553 Thuraya Modems and SIM Cards Loaded with Data

Delivery Note Number 144444 attached to Payment Voucher No. 1502 indicate that 553 Thuraya Modems and SIM Cards loaded with Data were delivered on 24 August 2017. However, records maintained on Stores Ledger Card S3 Number 427532 and Counter Receipt Voucher S 13 Number 5939334 show that these goods were received on 5 October 2017 and 17 January 2018 respectively.

The goods with a value of Kshs.303,822,247 included in one (1) invoice paid through Payment Voucher Nos. 266 and 1502 were therefore, not used for the intended purposes.

Submission by Accounting Officer

The Thuraya Modems were procured in accordance with the contract for Supply and Delivery, Installation, Implementation, Commissioning of Network for Result Transmission System Tender No. IEBC/56/2016-2017. The intended purpose of the Thuraya Modems as stated in clause 8.2 of the contract is for use during the General Elections of 8th August 2017 and any subsequent presidential run-off election, and by-elections and referendum during the duration of the contract.

It was not true that the 553 Thuraya modems and SIM cards were received on 5/10/2017 and 17/1/2018. The goods were delivered at the warehouse on 25/8/2017 and inspected on 4/9/2017 as per the attached delivery note No. 144444, S3 Card No.427532;427509;427501, Counter Issue & receipt Vouchers and inspection report (Annex 9B). The Thuraya modems and SIM cards were distributed and the bundles of all the 1553 Thuraya modems were activated on 24/10/2017 and were used during the Fresh presidential Elections as per your assertion in query 2.4(iii). Further, the Commission continues to use the modems for subsequent elections.

(b) Procurement of additional 1,000 Thuraya SIM Cards Loaded with Data

Records further show that the Commission purchased additional 1,000 Thuraya SIM Cards loaded with Data valued at Kshs. 119,663,280.00 for use during Fresh Presidential Election and the amount was included in Payment Voucher Number 1118.

However, the audit has revealed that these SIM Cards were not delivered, and therefore, on 17 October 2017, the Commission re-activated and re-used 1553 SIM Cards earlier purchased for the General Elections.

In the circumstances, the lawfulness, authorization and value for money of the expenditure of totaling Kshs.119,663,280.00 cannot be confirmed as required under Section 68 (1) (a) and (b) of the Public Finance Management Act, 2012.

Submission by Accounting Officer

The 1000 Thuraya modems used during the General Elections (GE) were loaded with data bundles which expired five (5) days after activation and therefore could not be re-used for the Fresh Presidential Election (FPE).

For FPE, the Commission had 1553 Thuraya modems of which 1000 had their bundles utilized in 8/8/17 Election as explained above. The remaining 553 which were delivered after 8/8/2017 as per Clause 7.11.2 of the contract had unused bundles. Therefore, the Commission only procured data bundles for 1000 Thuraya modems (NOT SIM cards) because they had been utilized before, during and after August 2017 GE.

It was worth noting that the Thuraya SIM cards were never procured separately, but rather they were in-built in the Thuraya modems and delivered with bundles. Upon expiry of bundles, the Commission did not buy additional SIM cards again but rather topped up the bundles for the 1000 sim cards.

Committee Observations and Findings

- i. The submission by the Accounting Officer that the Thuraya modems and SIM cards were distributed and the bundles of all the 1553 Thuraya modems were activated on**

24/10/2017 and were used during the Fresh presidential Elections, appears to be inconsistent with the table submitted (by the Accounting Officer) under paragraph 7.0.i that seems to indicate that only 1000 Thuraya sim cards were topped up for the FPE because their 5 day bundles were finished. It would highly unlikely that all 1553 modems were activated only activated on 24/10/2017.

- ii. The submission of the Accounting Officer that 553 Thuraya modems and SIM cards were received on 5/10/2017 and 17/1/2018, delivered at the warehouse on 25/8/2017 and inspected on 4/9/2017 appears to corroborate the Auditor General's observation that goods with a value of Kshs.303,822,247.00 included in one (1) invoice paid through Payment Voucher Nos. 266 and 1502 were therefore, not used for the intended purposes which was to act as back-ups for the GE.
- iii. Pursuant to the submission of the Accounting Officer that the Thuraya modems and SIM cards were meant to act as back up where there was a failure for from SIM cars from the MNO at a Presidential Election, the Committee observed with great reservation that there would be much value in future use as PEs are held one every five years.

Committee Recommendations

- i. Within six months of tabling of this report, the Commission should undertake a comprehensive audit to evaluate the viability of using the 1553 Thuraya modems and SIM cards for future elections and submit the report to Parliament with a view to inform any changes that may be necessary in the planning and procuring of data for future election activities.
- ii. The Commission further purchased 31,928 other additional SIM Cards for use on 26 October 2017. However, records show that 23,261 SIM Cards were received and distributed to Constituencies, leaving a balance of 8,667 SIM Cards whose unit price is Kshs.515.00 that were purchased at Kshs. 4,463,505.00 but were not delivered.

Submission by Accounting Officer

The Accounting Officer stated that it was not true that the Commission purchased 31,928 sim cards from Airtel Networks Ltd and distributed only 23,261. The Commission ordered for 31,298 SIM Cards which were all delivered and installed in KIEMS kits as per the Delivery Note No.146935, inspection report and distribution list.

Committee Observations and Findings

The submission of the Accounting Officer that the Commission ordered for 31,298 SIM Cards which were all delivered and installed in KIEMS kits as per the Delivery Note No.146935, inspection report and distribution list (attached to the submission) appears to indicate that the Commission did not avail documentation required under section 68(2)(n) of the Public Finance Management Act, 2012 that requires all Accounting Officers at all times to ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring goods.

Committee Recommendations

Accounting Officers must at all times ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services as provided for in Section 68(2)(e) of PFM Act 2012 and section 103 of the Public Procurement and Asset Disposal Act, 2015.

(c) Undelivered SIM Cards from Another Firm

The Commission also purchased other 27,237 SIM Cards from another firm for use on 8 August 2017. However, records show that 26,674 SIM Cards were received and distributed to Constituencies, leaving a balance of 563 SIM Cards whose unit price is Kshs.650 that were purchased at Kshs. 365,950.00 but were not delivered.

Submission by Accounting Officer

The Accounting Officer stated that it was not true that the Commission received 26,674 SIM Cards from Telkom Kenya Ltd. The Commission ordered for 27,237 SIM Cards which were fully delivered and paid for as per delivery notes dated 19th June 2017 for 26,674 and another one dated 20 July 2017 for 900. Invoice No.HEA17091769270 and delivery notes are attached. The payment voucher no. 541 for the same is available for audit review.

Committee Observations and Findings

The submission of the Accounting Officer that the Commission ordered for 27,237 SIM Cards which were fully delivered and paid for as per delivery notes dated 19th June 2017 for 26,674 and another one dated 20 July 2017 for 900. Invoice No.HEA17091769270 (attached to the submission) appears to indicate that the Commission did not avail documentation required under section 68(2)(n) of the Public Finance Management Act, 2012 that requires all Accounting Officers at all times to ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring goods.

Committee Recommendations

Accounting Officers must at all times ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing

of goods and services as provided for in Section 68(2)(e) of PFM Act 2012 and section 103 of the Public Procurement and Asset Disposal Act, 2015.

2.2 Management of 1,000 Thuraya modems and sim cards loaded with data

Audit has revealed that the first batch of 700 and 300 Thuraya Data Modems and Sim Cards with unlimited data bundle were delivered and distributed to the Constituencies before the General Election. However, records show that only 339 modems and SIM Cards with data usage of only 4 GB were used.

Indications are that the Commission did not evaluate the actual data required, which would have been the basis for determination of actual cost. Further, the Commission has not clarified why it was not necessary to negotiate for post payment arrangements that would have guaranteed payment for actual data utilized.

Submission by Accounting Officer

Results Transmission using the Thuraya modems was one of the three alternative methods the Commission used to assure business continuity. It was not expected that all the methods will be used at the same time. Transmission using the Thuraya modems was to be used in event of failure of the other alternative methods. This was risk mitigation measure as per Elections Amendment Act 2016 Section 39(1) (C) and 44; and Election (Technology) Regulations.

As redundant links, the Thuraya modem solution was to ensure 100% network availability at all times. This necessitated the use of the 1000 Thuraya modems during the GE. The unlimited package was the only option that was least expensive and did not require a longer-term contract.

With regard to negotiation for postpaid arrangement, none of the Mobile Network Operators (Safaricom, Airtel and Telkom) had a tariff where they give bundles to customers on credit and then later on pay for actual data utilized. The customer either purchases a pre-determined bundle size or load airtime and consumes data on the go.

Committee Observations and Findings

Value for money was not achieved in above procurement

Committee Recommendations

Within six months of the adoption of this report, the Commission must develop an election management policy that will regulate the management of utilization of data on modems and

sim cards loaded and the policy shall contain parameters for evaluating the actual data required as the basis for determination of actual cost.

2.3 Failure to provide payment vouchers and other documents

In addition, the Commission has not provided for audit review Payment Voucher and other supporting documents used to pay M/s Telkom for 16,825 SIM Cards claimed to have been used for the Fresh Presidential Election. The Commission is, therefore, in breach of Section 9 (1) (e) of Public Audit Act, 2015.

Submission by Accounting Officer

Payment voucher no. 949 amounting to Kshs 30,362,362.00 for the provision of SIM Cards, SLA Management APN, and APN Backhaul and services was paid on 2017/18 financial year and does not relate to the year under review (i.e. 2016/17).The voucher is however available for audit verification.

Committee Observations and Findings

- i. The Committee observed that the Commission “needs assessment” did not exhaustively look into alternatives of procuring especially data bundles. Owing to what they called backup, they ended procuring excess bundles some of which were not used. It is also apparent that Mobile Service Providers did not want to give IEBC a special treatment on type of bundles to purchase.**
- ii. The Committee noted that the purchase of Thuraya Modems was not properly planned. While most other requirements had been budgeted for, the need for Thuraya satellites was an afterthought. As a result the execution was not optimal use of resources. A further analysis shows that the former commissioners had planned for the election well in advance but the plan had to be reviewed by the new team. Although it is the mandate of the Commission to review plans and strategies, it is important that Parliament revisits its approach of replacing Commissioners. Late replacement leads to situations where key plans end being distorted, as was the case for satellites procurement.**
- iii. There was also disagreement as to whether or not the data bundles were loaded on the Thuraya SIM cards. This matter has since been clarified based on the evidence brought before the Committee. The Commission needs to improve on its record management at the stores and coordinate better its logistics functions.**

Committee Recommendations

- i. The Commission should in future conduct comprehensive needs assessment including alternatives when procuring data bundles.**
- ii. A review of the satellites purchased to establish whether there is value for money in terms of future utilization.**
- iii. The Commission should improve its store record management using ICT systems that are readily available in the market.**
- iv. MNOs should be compelled to provide cost-effective services to the Commission when it comes elections management. Election management is a public interest issue that should not attract profit.**

3. Procurement of data centres and back up infrastructure (cloud services)

A letter Ref No. GIS/BUMEA/LL/2017-0000027822 dated 28 June 2017 and IEBC's response Ref No. IEBC/ADM/5/17 dated 30 June 2017 confirms installation of Database on the NTT Cloud based platform in London UK from 29 June to 30 September 2017.

According to the addendum to the evaluation report dated 28 September 2017, the supplier had admitted inability to install Result Transmission Systems (RTS) in the local environment due to time and technical constraints.

Indications under Paragraph 6 of the scope of work contained in the Terms of Engagement for Safran Identity and Security Limited dated 17 October 2017 are that, the supplier was contracted by the Commission to install and configure backup and backend infrastructure (Cloud Service) which included installation of RTS application; Data Base and System Security and monitoring access as may be requested.

3.1 Audit Findings

In all, IEBC spent on Back Up Infrastructure (Cloud Services) for Supply and implementation of IEBC primary and secondary data centres for General Election and Fresh Presidential Election respectively Kshs.249,128,933.52 and Kshs.73,677,117.88.00. The Commission was to build a new converged server for primary data center and disaster recovery site to support its electoral technology requirements and other Commission IT operations. The data centers were to provide a seamless access and high availability service to comply with provision of all election laws. The tender was evaluated and awarded to a contractor at a tender sum of Kshs.249,128,933.52 on 21 March 2017.

Examination of records revealed that the contractor has been paid the entire contract amount of Kshs.249,128,933.52 for delivery of hardware. However, the Commission paid the vendor before testing and commissioning of the equipment.

Other related expenditure were the following:

Services	Contract Value Kshs
Provision of IBM server infrastructure and KIEMs security monitoring solution	452,006,003.77
Provision of Oracle database and security solution	273,643,447.00
Provision of Co-location services for data centre and disaster recovery site	28,035,283.68
	753,684,734.45

Contract for BVR IBM server infrastructure maintenance and KIEMS infrastructure security monitoring solution was awarded through direct procurement method to a firm at Kshs.452,006,003.77 on 17 July, 2017 for a period of one (1) year ending in June 2018. The Commission has explained that Kshs.83,094,240.00 has so far been paid out of Kshs.452,006,003.00 and the contract has been terminated.

These expenditure unless implemented judiciously for on-going back up and data centre infrastructure, could lead to nugatory investment. The investment was anticipated to include;

- (a) Vulnerability and event management
- (b) Cyber security operations center (CSOC)
- (c) SOC automation
- (d) Web application firewalls
- (e) Anti-distributed denial of service solution
- (f) Next generation firewalls, email security and licenses
- (g) Network discovery and compliance solution
- (h) Training on deployed security solutions
- (i) One-year hardware warranty and technical support

Submission by Accounting Officer

The Accounting Officer stated that it was not true that the Commission paid the vendor before testing and commissioning of the equipment. The contract for the supply, delivery, installation, commissioning and support of the IEBC primary and secondary datacenter hardware and storage was signed on 22/03/2017, delivery of the equipment done on 30th June 2017 (delivery note and technical test and acceptance done on 11th July 2017 by contract implementation committee. The vendor issued the warranties on 13 June 2017 and Payment made on 14th September 2017 after all the above requirements had been met.

With regard to sourcing of IBM server infrastructure and KIEMs security monitoring solution using direct procurement the Commission used the method pursuant to section 103(2) (d) of the Public Procurement and Asset Disposal Act, 2015 which provides the following:

“the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies shall be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question”

The BVR System in use was acquired by the Commission in 2012 and holds critical data on the register of voters. The current voters register is hosted in IBM server infrastructure.

With regard to auditor’s comment on nugatory investment the Commission would like to respond as follows:-

The Commission was not only acquiring the IBM security solution for the 8th August 2017 General Election support but also to secure its internal systems and network which are used in the day to day operations of the Commission’s mandate including the elections as indicated in the IBM terms of reference.

The BVR system runs on IBM servers, IBM conducted an assessment which showed that the maintenance of the servers were out of warranty. The assessment report indicated that the support was critical.

The provision of IBM Server Infrastructure and KIEMS security monitoring solution contract included the following: -

- a. Maintenance of the BVR server’s infrastructure. This was delivered before the election as per attached IBM Maintenance report.
- b. Security Operation center was used during the 8/8/2017 GE as per IBM sign off Report
- c. Supply of other security monitoring solutions for the GE

Deliverable item number (c) above was not implemented because IBM terminated the contract on 9th October 2017. All the unverified deliverables i.e. item (a) to (i) in the audit query fall under this deliverable.

The Commission undertook a joint verification exercise with IBM on June 2018 to determine the value of the work done up to the point of termination for discharge of liability if any. Following this exercise IBM have delivered as shown in the table below;

#	SOLUTION	QTY	PRICE SCHEDULE (INCL 16% VAT)	DEMAND LETTER (INCL 16% VAT)	PENDING
1.	Supply and installation of the security information and event management solution (SIEM)-qradar	2	615,568.51	197,000.00	418,568.51
2.	Supply and Installation of a Vulnerability and patch management solution.	2	30,244.39	30,000.00	244.39
3.	Provision of Cyber Security Operations Center (CSOC)	1	720,214.86	689,500.00	30,714.86
5.	Supply and Installation of the Web Application Firewall (WAF)	2	193,389.98	147,000.00	46,389.98
7.	Supply and Installation of the Next Generation Firewalls	4	85,578.90	2,900.00	82,678.90
8.	Supply and Installation of the Unified Threat Management (UTM) & Email Security solution.	2	304,427.07	264,000.00	40,427.07
10.	Supply and Installation of Hardware Servers	2	197,767.24	149,000.00	48,767.24
11.	SOC services: Implementation services and Project Management Services	2	770,160.25	394,000.00	376,160.25

#	SOLUTION	QTY	PRICE SCHEDULE (INCL 16% VAT)	DEMAND LETTER (INCL 16% VAT)	PENDING
14.	Maintenance and Support Services for the BVR servers	LOT	190,133.28	62,300.00	127,833.28
	TOTAL		4,351,743.32	1,935,700.00	2,416,043.32

- i. The \$800,000 was mandatory payment upon execution of the contract.
- ii. The IBM deliverables are totaling to \$ **1,935,700.00** according to their demand based on the joint verification exercise between IBM and IEBC. However, the Commission is in the process of validating the termination process in accordance with the terms of the contract which carries with it penalties and surcharges and shall be applied accordingly before the payment of the balances.
- iii. The Commission confirms that a number of deliverables have been installed and are in use in the daily operations in supporting the technology and security of the Commission's operations. For the pending deliverables, which mainly involves installation, configuration, and commissioning, the Commission will complete the respective project deliverables accordingly once the contract settlement process is complete.

With regard to provision of colocation services amounting to Kshs. 28,035,283.68 the Commission would like to respond as follows: -

The Commission's Datacenter based at Anniversary Towers, 17th floor, was commissioned in 2010. Its location, proximity to ground floor, accessibility and environmental conditions are not ideal for the magnitude of the Commission's operation. Equally the data centre was already obsolete in all aspects.

This is what informed the Commission's decision to procure co-location services with a modern data center facility for the Commission's day to day operations and elections, and to recruit a manager to be specifically responsible for this function. The co-location data centre services are currently in use for the operations of the Commission and will remain in use for at least the next 5 years.

With regard to investment of Kshs. 273,643,447.00 for provision of Oracle Database and Security the Commission would like to provide the following representation: -

The need to procure Oracle database licenses was a requirement for the installation of KIEMS. Following a review and assessment of the Commission's technology environment and security systems by Oracle there was need to ensure proper security of the Commission's database systems that utilize the same. The solution procured mainly consisted of the following deliverables;

- a. The supply of Oracle Enterprise licenses.
- b. Installation of the Oracle enterprise management solution.
- c. Installation of Audit vault and Database Firewall.

All above deliverables were supplied and used during the GE and FPE, and are currently installed in the local data Centre. This was confirmed by the KENAO Auditors.

Committee Observations and Findings

The Committee observed that all above deliverables were supplied and used during the GE and FPE, and are currently installed in the local data Centre. This was confirmed by the KENAO Auditors.

Committee Recommendations

The Commission should expedite the settlement of all genuine payments due to the suppliers in order to save the public from incurring additional costs that would arise from potentially protracted legal disputes.

3.2 Change of Mode of Result Transmission Infrastructure

Although it has been explained that the technical specifications for new converged primary and secondary data centers was to support its electoral technology requirements and other Commission's IT operations, whose primary purpose was to aid transmission of election results among other functions, the Commission changed result transmission system to what is casually referred to as "cloud services".

In the circumstances, it is not possible to confirm the lawfulness and value for money for the expenditure totaling Kshs.249,128,933.00 relating to Primary and Secondary Data Centers as required under Section 68(1)(a) and (b) of the Public Finance Management Act, 2012.

Submission by Accounting Officer

The Accounting Officer stated that it was not true that the only primary purpose of the servers was to aid transmission of election results. The Commission was replacing its aging infrastructure as per the terms of reference in the contract provided. The Commission has since migrated all its servers including results transmission systems and data bases into this infrastructure.

Committee Observations and Findings

- i. The explanation by the Accounting Officer that the Commission was replacing its aging infrastructure as per the TORs in the contract was unsatisfactory in light of the fact that the it did not explain the casual change of the result transmission system to “cloud services” and therefore the Committee could not establish the lawfulness and value for money for the expenditure totaling Kshs.249,128,933 relating to Primary and Secondary Data Centers as required under Section 68(1)(a) and (b) of the Public Finance Management Act, 2012.**
- ii. The Committee marked the matter was marked as unresolved**

Committee Recommendations

Within 6 months of the adoption of this report, pursuant to the provisions of section 38 of the Public Audit Act, the Office of the Auditor General should conduct a procurement audit to establish the lawfulness and value for money for the expenditure totaling Kshs.249,128,933 relating to Primary and Secondary Data Centers as required under Section 68(1)(a) and (b) of the Public Finance Management Act, 2012.

4. Purchase of oracle database and security solution

(i) Background and Award of Contract

Examination of records show that a vendor was instructed through unreferenced letter dated 13 April, 2017 to offer review and assessment of election technology. The vendor submitted a report on 3 May, 2017 and on 23 May, 2017 the Commission developed Terms of Reference based on the vendor’s recommendations.

The contract for supply and provision of the database and Security solution was awarded through direct procurement to the same vendor at a contract sum of Kshs.273,643,457.00 within three (3) days starting with tender opening on 29 May, 2017, evaluated and negotiated on 30 May, 2017 and awarded on 31 May, 2017.

(ii) Audit Findings

(a) Unplanned Expenditure

The Commission procured these licenses at Kshs. 273,643,457.00 Examination of records shows that the ICT department at IEBC requisitioned the purchase of Database Solutions and Licenses at a cost of Kshs. 80,000,000.00 There appears to have been an excess expenditure of Kshs.193,643,457.00

Submission by Accounting Officer

The Accounting Officer stated that with regard to supply and provision of the database and security solution using direct procurement the Commission used the method pursuant to section 103(2) (a) of the Public Procurement and Disposal Act, 2015 which provides the following: -

“the goods, works or services are available only from a particular supplier or contractor, or a particular supplier or contractor has exclusive rights in respect of the goods, works or services, and no reasonable alternative or substitute exists”

The IEBC voters’ registration data is hosted in an Oracle database platform. Oracle is the only service provider for Oracle licenses for database and related services.

The User directorate requisitioned for the purchase of Oracle licenses at an estimated cost of Ksh. 80,000,000.00. The Commission had planned to only procure the Oracle licenses. However, KPMG Audit report provided insight on the status of the database of register of voters which informed the need for the review and assessment of the Commission’s technology. Oracle technologies were in this regard engaged to undertake the review.

After a review and assessment of the Commission’s technology, it became clear that the extra funds were required to purchase Oracle database and security solution to adequately address the gaps identified. This required additional funding which was then sought in the 2017/2018 financial year to bridge the budget gap and the same approved by the National Treasury on 30th August 2017.

The Commission further, reviewed its procurement plan which was approved by the Accounting Officer to facilitate the procurement of the oracle database and security solution. It should be noted that, no procurement process can be initiated before budget availability and approved procurement plan in IFMIS.

Committee Observations and Findings

- i. The Commission had planned to only procure the Oracle licenses.**
- ii. The KPMG Audit Report on the status of the database of register of voters informed the need for the review and assessment of the Commission’s technology and consequently, additional funds to the tune of Kshs.193,643,457 were incurred to purchase the Oracle database and security solution to adequately address the gaps identified.**
- iii. The matter was marked as resolved.**

Committee Recommendations

Accounting Officers should always ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring of goods and

services as provided for in Article 229 (4)(h) of the Constitution and section 68(2)(e) of the Public Finance Management Act, 2012.

(b) Audit Verification

An audit verification revealed that the Database had been installed at IEBC but another contractor had not installed the Results Transmission System (RTS) application and the vendor had not implemented the Real Application Cluster (RAC) for the Results Transmission System and Database Vault.

Submission by Accounting Officer

He Accounting Officer stated that it was true that the vendor had not installed the Results Transmission System (RTS) application in the local environment due to time and technical constraints. However, the installation of Database and RTS was done on the NTT Cloud based platform

It was also true that another vendor did not implement the Real Application Cluster (RAC) for the result transmission system that allows up to 100 instances of a single database. The vendor installed a single database instance of the RTS database for purposes of elections. However, a meeting between Oracle and IEBC held on 4th May 2018 agreed on plan to implement the RAC.

All the milestones for the project have been delivered except for the implementation of Real Application Cluster (RAC). The cost of RAC has been withheld until the component is fully implemented. Further, the Commission has not made all the payments and will only pay when all milestones are satisfactorily achieved.

All the other Oracle database deliverables were implemented as expected and the system was operational and functional. This was confirmed by the auditor general. The Inspection and Acceptance certificates are available for audit review.

Committee Observations and Findings

- i. The Commission must ensure that Oracle fully performs its part of the contract.**
- ii. The Commission should ensure independent assessment of ICT requirements to avoid potential conflict of interest in cases such as IBM and Oracle.**
- iii. The process of procuring Oracle was full of intrigues and must be investigated to establish who brought Oracle to the Commission in the first place.**

Committee Recommendations

- i. The Commission should expedite the settlement of all genuine payments due to the suppliers in order to save the public from incurring additional costs that would arise from potentially protracted legal disputes.**
- ii. Within six months of the adoption of this report, the Cabinet Secretary to the National Treasury must ensure that the Accounting Officer of the Commission adheres to recommendation under paragraph 1 and report to Parliament.**

5. Procurement of co-location services for data centre and disaster recovery site

Audit of contract of procurement of Co-Location Services for Data Centre and Disaster Recovery Site revealed unsatisfactory matters as follows:

Award of Contract to Un-Prequalified Bidder

The Commission through letters Ref IEBC/ADM/5/18 dated 22 August 2016 and Ref. No. IEBC/ADM/5/18 dated 22 August 2016 addressed to Kenya Revenue Authority and Capital Markets Authority respectively requested for names and contacts of various service providers who positively responded to their tender for provision of data center co-location services.

In response, the two (2) agencies provided the required information through letters Reference No. CMA/PROC/1/063 dated 29 August 2016 and Ref No. KRA/5/1003/44 dated 7 September 2016.

However, in unclear circumstances, the tender evaluation committee recommended the award of the contract to a firm which was not listed in responses, therefore, could not provide service for Co-location Services for Data Centre and Disaster Recovery Site at a tender sum of Kshs. 23,111,083.68.

Further, the contract was again varied by Kshs.4,924,200.00 and awarded to the firm at Kshs. 28,035,283.68 for which no explanation has been provided.

We reiterate the earlier recommendation that these expenditures unless implemented judiciously for on-going back up and data centre infrastructure, could lead to nugatory investment.

Submission by Accounting Officer

The Accounting Officer stated that the Commission noted that the issue of Colocation of Secondary site is a security issue from risk management point of view. According to best practices, the 'hot site facility' for an organization should not be known. In accordance with the above assertion, The Commission wrote to the CMA and KRA as part of knowledge sharing process which did not form the basis for the procurement of collocation services.

From their responses, the Commission noted that the firms that had expressed interest in their tenders were not owners of the collocation facilities but were only sub dealers. It is worth noting that the process above was not meant to prequalify any company to the Commission.

The Commission used restricted tendering method pursuant to section 102(a) and (c) of PPAD Act, 2015 and Section 54(4) of PPD Regulations 2006 to engage M/s Telkom which was totally different from the listing of firms provided by the CMA and KRA. Attach approval for use of restricted tender.

In the evaluation report the Evaluation Committee noted that the bidder had provided connectivity and replication links as options at a cost of Kshs.4,924,200.00 The evaluation committee further noted replication link as a necessary requirement for the two Colocations sites to work. The professional opinion dated 16th May 2017, paragraph 4.4, noted importance of replication links and recommended award of the same. This was approved by the Accounting Officer on 17th May 2017. Attached are the Evaluation Reports and the Professional Opinion.

In regard to nugatory investment, the Commission has since migrated all its hardware servers and database systems to the co-location sites and the sites are optimally being utilized for the intended purpose.

Committee Observations and Findings

- i. The variation of Kshs. 4,924,200.00 arose from an evaluation report by the Evaluation Committee which determined that the connectivity and replication links as a necessary requirement for the two Colocations sites to work.**
- ii. In regard to nugatory investment, the Commission has since migrated all its hardware servers and database systems to the co-location sites and the sites are optimally being utilized for the intended purpose.**
- iii. There appears to be a systematic challenge in the model employed in planning and evaluating its “needs assessments” for various projects at the Commission.**

Committee Recommendations

- i. Pursuant to the recommendation by the Auditor General, the Commission should ensure that the Data Centre is fully operational in order to obtain value for money.**
- ii. The Commission should carry out another needs assessment to establish if the services from IBM are required, if so, act accordingly.**

6. Supply and Delivery of Ballot Papers for Elections, Statutory Declaration Forms and The Register of Voters

Although records show that the contract was awarded through open tender, restricted tendering and later direct procurement, the Commission has not provided letters of notification and contract documents for all the three (3) different methods of procurement awarding the same contract.

Further, records show double payment of Kshs.20,484,474.00 through invoice No. 2017/1024 and No. 2017/10245 dated 23 October 2017 and 24 October 2017 respectively were issued by the Supplier for the same service of printing of ballot papers, election forms and poll registers for use during the General Election and Fresh Presidential Election. The Commission explains that Kshs.15,500,000.00 has so far been recovered, leaving a balance of Kshs.4,981,474.00.

Submission by Accounting Officer

The Accounting Officer stated that the Commission had provided the above reported documents in its submission to the Auditor General on 3rd July 2018. The documents for open tender, restricted and direct procurement are available for audit review:

- i. Notification of award and the contract documents for the open tender
- ii. Notification to the bidders of the decision of the Public Procurement Review Board terminating the procurement process for restricted tender
- iii. Notification of award and contract documents for the direct procurements

The Accounting Officer stated that it was true that the Commission overpaid the supplier by Ksh 20,484,474.00. However, an amount of 15.5m has since been recovered by the Commission. The vendor, without concurrence of the Commission, retained Ksh 4.5m since the Commission had outstanding invoices as follows:

Sl. No	Date	AGPP Invoice	Description	Amnt in USD	IEBC PO No.	Amount received	Remark
1	24-Apr-14	IEBC - K240414	Othaya ballot paper & forms	5,498.04	1718854		Payment pending
10	10-Aug-15	IEBC - K100815	North Ugenya Balots	1,751.66	1779264		Payment pending
11	06-Feb-16	IEBC-K060216-1	Nyongares Ballots	2,142.25			Payment & PO
			Masogaleni Ballots	1,950.03			pending
13	19-May-16	IEBC - K190516	Ngobit Ballots	2,368.14	1065		Payment &
			West Uyoma Ballots	1,918.62			revised PO

Sl. No	Date	AGPP Invoice	Description	Amnt in USD	IEBC PO No.	Amount received	Remark
			Lelmokwo/Ngechek Ballos	3,113.14			pending
15	18-Mar-17	IEBC - K150317-1	Maji Mazuri Ballots	2,742.08	1359		Payment pending
30	23-Oct-17	2017/10241	Presidential Forms	103,168.			Payment pending
32	15-Mar-18	5	Byelection ballots - NA Kitui West + CAW Kinondo + CAW Ruguru	20,920.4			Payment pending
			Unapplied receipt			296,125.	Unapplied
GRAND TOTAL				145,573.2		296,125	
				Account Balance		150,551	refunded

Committee Observations and Findings

- i. The Accounting Officer submitted that the Commission had provided documents relating to open tender, restricted and direct procurement to Auditor General on 3rd July 2018 for audit review.
- ii. The Vendor retained Ksh 4.5m since the Commission had outstanding invoices without concurrence of the Commission.

Committee Recommendations

- i. The Commission should fully recover any overpayment made to Al Ghurair for the supply of ballot papers and forms.
- ii. The relevant investigative agencies should investigate the process of procuring ballot papers and more particularly on claims that the Chairperson of the Commission together with others attempted to influence the award of the tender for ballot papers against the procurement procedure.
- iii. Within six months of the adoption of this report, the Cabinet Secretary to the National Treasury must ensure that the Accounting Officer of the Commission adheres to recommendation under paragraph 1 and report to Parliament.

- iv. Within six months of the adoption of this report, the investigative agencies must ensure that they enforce the recommendation under paragraph 2, take appropriate follow-up action and report to Parliament.**

7. Supply and Delivery of Ballot Boxes for the General Elections

Examination of records shows that the Commission awarded the lowest evaluated contract for the supply and delivery of 106,000 ballot boxes for the general elections to an engineering works contractor at a contract sum of Kshs. 196,100,000.00 (or Kshs.1,850 per unit).

Change of Contract Price

Records show that the Commission procured additional 42,927 ballot boxes for Fresh Presidential Election at a unit rate of Kshs.2,500.00 instead of Kshs.2,250.00 offered by the supplier resulting in an excess payment of Kshs.10,731,750.00.

Further, the Commission has not justified change of unit cost from the initial amount of Kshs. 1,850.00 to Kshs. 2,500.00 from the firm without a validly executed contract. Indications are that there was an attempt to vary the contract which has resulted in total excess payment of Kshs. 27,902,550.00.

In addition, a verification undertaken in twenty-eight (28) sampled counties across the country revealed that there was inconsistencies on issued ballot boxes maintained at IEBC warehouse in Nairobi compared with actual receipts in the field resulting in a variance of 9,101 ballot boxes which have not been adequately accounted for.

Submission by Accounting Officer

The vendor, Ms. Belgon Engineering Works Ltd, specializes in fabrication works including fabrication of ballot boxes and lids. The firm has previously supplied the Commission with fabricated ballot boxes and the same used in various elections.

The Commission started procurement process under tender IEBC/44/2017/18 where the bidder quoted a unit price of Kshs.2,250.00 for the additional 42,927 ballot boxes for Fresh Presidential Election. The notification of award dated 29th September was issued and was accepted by the Supplier on 2nd October 2017. However, the supplier expressed inability to meet the deadline for 26th October 2017 election because of time constraints.

On 4th October 2017 the supplier held a meeting with the Commission to express his concerns and on 5th October 2017 he followed it a letter proposing a way forward which involved a combination of local and international production. This involved addition cost in terms of freight amounting to

USD 302,335.00. The Commission abandoned the tender because of cost implication and risk related to late delivery. No contract was signed.

The Commission initiated a fresh direct procurement which closed on 10th October 2017. The supplier made an offer of Kshs. 2,500 per unit which was awarded. The supplier accepted the award. Contract was signed with the supplier on 17th October 2017.

The increase in unit price from Kshs. 1,850.00 to Kshs. 2,500.00 was occasioned by shorter delivery timelines required for the Fresh Presidential Election than required for the General Election. The supplier's production capacity was not adequate to produce the required quantity within less than two weeks necessitating deployment of extra resources by the suppliers.

It is not true that there were inconsistencies of records on issued ballot boxes maintained at the IEBC warehouse. Attached is Stores Ledger and Control Card (S3) 427668; 860510; 860512; Delivery Notes and Supporting Copies of counter receipt (S13) No. 5939312 and Issue Voucher (S12)

Committee Observations and Findings

- i. The Commission started procurement process under tender IEBC/44/2017/18 where the bidder quoted a unit price of Kshs.2,250.00 for the additional 42,927 ballot boxes for Fresh Presidential Election. However, the supplier expressed inability to meet the deadline for 26th October 2017 election because of time constraints and proposed a design variation of USD 302,335.00. The Commission terminated the tender.**
- ii. The Commission initiated a fresh direct procurement and awarded the tender to Ms. Belgon Engineering Works Ltd at an offer of Kshs. 2,500.00 per unit.**
- iii. The increase in unit price from Kshs. 1,850.00 to Kshs. 2,500.00 was occasioned by shorter delivery timelines required for the Fresh Presidential Election than required for the General Election.**
- iv. There appears to be a systematic challenge in the model employed in planning and evaluating its "needs assessments" for various projects at the Commission.**

Committee Recommendations

The Commission should establish framework contracts with more than one supplier so that it is not held hostage when it comes to pricing with the aim of ensuring that resources of the Commission are use in a way that is effective, efficient and economical pursuant to the provisions of section 68(1)(b) of Public Finance Management Act, 2012.

8. Supply and delivery of badges

Examination of records show that the Commission awarded a contract for the supply and delivery of 550,381 badges on 20 March, 2017 to a construction company at a contract sum of Kshs. 44,030,480.00.

Audit Findings

(a) Alteration of Contract Price Schedule

Examination of the Form of tender revealed interlineations on quantity, unit cost and the total price figures show that the initial contract amount was Kshs.9,554,370.00, however, it was later cancelled and changed to Kshs.44,030,480.00 for the supply of 550,381 badges. No satisfactory explanation was provided for change resulting in excess payment of Kshs.34,476,110.00 whose value and authorization cannot be confirmed in accordance with Section 68(1)(a) and (b) of the Public Finance Management Act, 2012.

Submission by counting Officer

The Accounting Officer stated that it was true that there was alteration on the form of tender in the bid document. However, the alterations were made by the bidder before submitting the bid documents and the same duly counter signed.

From the tender opening minutes and register, the quoted price tender sum of Ksh. 44,030,480 is consistent with the form of tender amount. The quantities were also consistent with the addendum to the tender advert. Find attached tender opening register, tender opening minutes, form of tender IEBC/31/2016-2017 page 33 and 35 of the bid document and the notice of the addendum to the tender.

Committee Observations and Findings

- i. The initial explanation of the Accounting Officer was not satisfactory to the extent that it did not expound on the reasons that informed the alterations that were made by the bidder before submitting the bid documents resulting in excess payment of Kshs.34,476,110.00 whose value and authorization cannot be confirmed in accordance with Section 68(1)(a) and (b) of the Public Finance Management Act, 2012 and section 54 (2) of the Public Procurement and Asset Disposal Act, 2015.**
- ii. However, when the supplier was subsequently invited to give evidence before the Committee, he was able to justify the changes on the bid documents to the satisfaction of the Committee.**

Committee Recommendations

- i. Accounting Officers must always be guided by the Average Price List published by the Public Procurement Regulatory Authority that is designed to assist all Heads of Procuring Entities, Accounting Officers and all public officials involved in the procurement function with the necessary information to comply with the aforesaid legal requirement and in turn deliver value for money in the public system and comply with section 54(2) of PPAD, 2015 that proscribes all transactions by public officials in which standard goods, works and services are procured at unreasonably inflated prices.**
- ii. Within three months of tabling of this Report, the Public Procurement Regulatory Authority must publish an updated Average Price List in light of the fact that the last Average Price list was published pursuant to the provisions of section 30 of the Public Procurement and Disposal Act, 2005.**

(b) Variation of Contract Price

Further, the Commission varied quantities of badges and procured 712,997 additional badges from the same supplier at Kshs.57,038,160.00 resulting in variation of contract price by 130% contrary to Section 139 (6) of the Public Procurement and Asset Disposal Act, 2015.

Submission by Accounting Officer

The Accounting Officer stated that it was not true that there was price variation of the badges by 130%, rather the first contract relating to tender no. IEBC/31/2016-2017 was awarded to Ms. Talyani Construction and General Supplies at unit cost of Kshs.80 to supply 550,381 badges and the second requisition of 712,977 badges was sourced from the same supplier at unit cost of Kshs.80 through direct procurement as per Accounting Officer approval dated 26th April 2017. There was therefore no price variation.

Committee Observations and Findings

The explanation by the Accounting Officer that it was not true that there was price variation of the badges by 130%, rather that there was a variation in the amount to be supplied, that is 550,381 badges under tender no. IEBC/31/2016-2017 and 712,977 badges under the second tender was satisfactory.

Committee Recommendations

Accounting Officers must at all times ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services as provided for in Section 68(2)(e) of PFM Act 2012.

Delivery Costs

Although records show that the cost for delivery of 550,381 badges to seventeen (17) Regional offices across the country was included in initial contract sum of Kshs.44,030,480.00, these badges were delivered in Nairobi through Counter Receipt Number 5982572 on 30 June, 2017.

Submission by Accounting Officer

The Accounting Officer stated that it was true that the supplier did not deliver to the regions as per the bid document. The Commission wrote to the supplier in June 2018 requesting for refund and also referred the issue to the legal office to institute a recovery proceedings (Annex 28).

Committee Observations and Findings

- i. The explanation by the Accounting Officer that the Commission wrote to the supplier in June 2018 requesting for refund and has instituted a recovery proceedings as the supplier did not deliver to the regions as per the bid document was satisfactory.**
- ii. However, when the supplier, Ms. Talyani Construction and General Supplies, appeared before the Committee, they submitted that the decision to deliver the badges to a central location in Nairobi arose from a round-table meeting the Commission had with suppliers earlier on. No evidence was produced to support this claim, though. The supplier further submitted that they had in fact mobilized adequate logistics and were prepared to deliver the badges to the 17 regional offices before the latter decision was arrived at.**
- iii. Further, the Committee established that there was no actual costing of the transport element in the contract for the supply of the badges and, indeed, the Commission's letter asking for a refund did not indicate the amount to be refunded.**

Committee Recommendations

- i. Within six months of the adoption of the report, the Accounting Officer must table a report before Parliament indicating the status of proceedings to recover the cost for delivery of 550,381 badges to seventeen (17) Regional offices across the country from Ms. Talyani Construction and General Supplies.**
- ii. The Accounting Officer must at all times ensure that contracts are watertight and that any decision to vary any provision of the contract should be in writing to avoid creating loopholes that could lead to unavoidable costly litigation.**

(c) Audit Verification

An audit verification undertaken in thirty (30) sampled counties across the country revealed that there were inconsistencies on issued badges maintained at IEBC warehouse in Nairobi compared with actual receipts in the field resulting in a variance of 170,298 badges which have not been accounted for.

In this circumstance, it is not possible to confirm that IEBC procured badges whose total cost is Kshs. 101,068,640 using a system that is fair, equitable, transparent, competitive and cost effective as required under Article 227 (1) of the Constitution of Kenya, 2010.

Submission by Accounting Officer

The Accounting Officer stated that it was not true that there were inconsistencies of records on issued badges maintained at the IEBC warehouse. He stated that the stores ledger and control card (S3) delivery notes and supporting copy of counter receipt (S13) No. 5982572 and issue vouchers (S12) were attached.

Committee Observations and Findings

The submission by the Accounting Officer was insufficient insofar as there was no explanation offered for a variance of 170,298 badges arising from inconsistencies on issued badges maintained at IEBC warehouse in Nairobi compared with actual receipts in the field.

Committee Recommendations

- i. Within three months of the adoption of the report, the Auditor General must table a report before Parliament indicating the findings of the review and verification of the stores ledger and control card (S3) delivery notes and supporting copy of counter receipt (S13) No. 5982572 and issue vouchers (S12).**
- ii. The Commission should employ the use of ICT (Information and Communication Technologies) to improve on its record management especially in the field.**

9. Supply of gas lamp mantles

(i) Irregular Award of Contract

Examination of Paragraph 2.24 of Appendix to Instructions to Tenders MR 9 of the tender documents required that each bidder was expected to submit a sample in a sealed envelope. The purported winning bidder did not submit a sample, therefore, was non-responsive.

Records also show that the Commission did not eliminate the firm from the process, instead awarded the contract for supplying gas lamp mantles to the same firm at Kshs.5,489,000 contrary to Section 86(1) of the Public Procurement and Asset Disposal Act, 2015.

Submission by Accounting Officer

The Accounting Officer stated that Ms Matkal Co. Ltd submitted a sample during the tender opening which was recorded in the sample register as entry number 25 but was inadvertently omitted in the tender opening Minutes. The bidder therefore was responsive during the preliminary evaluation stage and all the subsequent evaluation stages as indicated in the tender evaluation reports.

Committee Observations and Findings

The submission by the Accounting Officer that a sample during the tender opening which was recorded in the sample register as entry number 25 but was inadvertently omitted in the tender opening Minutes was insufficient as no tender opening minutes were submitted in support of the submissions.

Committee Recommendations

Accounting Officers must at all times ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services as provided for in Section 68(2)(e) of PFM Act 2012.

(ii) Direct Procurement

Examination of documents has further revealed that the Commission ordered additional mantles at Kshs.10,710,336 through direct procurement.

Submission by Accounting Officer

Tender no. IEBC/12/2016/17 was a competitive open tender while the second procurement for fresh presidential election was a direct procurement duly approved by the Accounting Officer as per section 103(2) (b) and (d) for purposes of standardization. The Accounting Officer attached approval for direct procurement, notification for award, and acceptance letter from the supplier.

Committee Observations and Findings

- i. The Accounting Officer obtained approval from the Commissioners for direct procurement under section 103 (2)(b) and (d) of PPAD, 2012.**

Section 103(2) (b) and (d) of PPAD, 2012 provides:

“(2) A procuring entity may use direct procurement if any of the following are satisfied—

- (b) due to war, invasion, disorder, natural disaster or there is an urgent need for the goods, works or services, and engaging in tendering proceedings or any other method of procurement would therefore be impractical, provided that the circumstances giving rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory conduct on its part;..**

- (d) the procuring entity, having procured goods, equipment, technology or services from a supplier or contractor, determines that additional supplies shall be procured from that supplier or contractor for reasons of standardization or because of the need for compatibility with existing goods, equipment, technology or services, taking into account the effectiveness of the original procurement in meeting the needs of the procuring entity, the limited size of the proposed procurement in relation to the original procurement, the reasonableness of the price and the unsuitability of alternatives to the goods or services in question;”**

- ii. The Committee did not receive an explanation on the aspects of standardization that the Commission relied on for the direct procurement.**

Committee Recommendations

Accounting Officers must at all times ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services as provided for in Section 68(2)(e) of PFM Act 2012 and section 103 of the Public Finance Management Act, 2012.

(iii) Audit Verification in the Field

An audit verification undertaken in twenty-nine (29) sampled counties across the country revealed that there were inconsistencies on issued gas lamp mantles maintained at IEBC warehouse in Nairobi compared with actual receipts in the field resulting in a variance of 66,540 gas lamp mantles which have not been adequately accounted for.

Submission by Accounting Officer

The Accounting Officer stated that it was not true that there were inconsistencies of records on gas lamp mantles maintained at the IEBC warehouse. Attached is Stores ledger and control card (S3)860860; 427635; 860604, delivery notes and supporting copies of counter receipt (S13) No. 5939304 and issue voucher (S12).

Committee Observations and Findings

The submission by the Accounting Officer was insufficient insofar as there was no explanation offered for a variance of 66,540 gas lamp mantles arising from inconsistencies on gas lamp mantles maintained at IEBC warehouse in Nairobi compared with actual receipts in the field.

Committee Recommendations

- i. Within three months of the adoption of the report, the Auditor General must table a report before Parliament indicating the findings of the review and verification of the Stores ledger and control card (S3)860860; 427635; 860604, delivery notes and supporting copies of counter receipt (S13) No. 5939304 and issue voucher (S12).**
- ii. The Commission should employ the use of ICT (Information and Communication Technologies) to improve on its record management especially in the field.**

9. Supply and delivery of security seals

Examination of records revealed that tender for supplying 3,696,000 security seals was awarded to a contractor at Kshs.19,588,800 (or Kshs.5.30 per unit cost) and contract signed on 22 March 2017.

(i) Audit Findings

Examination of invoices and delivery notes revealed that the contractor supplied 2,001,600 security seals valued at Kshs.10,608,480 on 22 July, 2017 leaving balance of 1,694,400 valued at Kshs.8,980,320.

On 4 August, 2017, the Commission ordered 500,000 additional security seals valued at Kshs. 24,500,000 (or Kshs.49 per unit cost) from another contractor through direct procurement. Although the Commission has explained that the unit prices of seals differ due to the metallic nature of the latter, audit verification did not observe any metallic seals as they were of similar quality.

In unclear circumstances, the Commission did not cancel contract for undelivered security seals numbering 1,694,400 and the supplier went ahead to deliver these seals on 19 October, 2017 therefore, were not used for the intended purposes.

In the circumstance, it is not possible to confirm that Kshs.44,088,800 was incurred lawfully and effectively as required under Article 229(6) of the Constitution.

Submission by Accounting Officer

The Accounting Officer stated that it was true that the Commission contracted MS Far East to supply 3,696,000 security seals at unit cost of ksh.5.30. It is also true that the same suppliers supplied 2,001,600 seals only before the election causing a deficit of 1,694,400. Security seals are key strategic materials of which the polling would not proceed without.

The Commission did not anticipate that M/s Far East Limited would not meet its contractual obligation to supply fully the required seals by 2nd August 2017 6 days to the election. To salvage the situation the Commission resorted to use of direct procurement method to avert a constitutional crisis that may have threaten public health, welfare, safety, or damage of property.

Due to short delivery timelines, change of procurement method and change of specifications the prices increased from Ksh 5.3 to Ksh 49 per unit.

The specifications for the initial order made through open tender was for customized plastic seals that required manufacturing prior to the supply. These are not off-the-shelf seals.

Due to the limited time, the Commission had no alternative but to acquire off-the-shelf seals that are regularly used and readily available. The Commission therefore changed the specifications from plastic to wire seals (metal) which cost more. Attached are revised specifications, direct procurement approval, evaluation report and professional opinion.

It was true that the Commission did not terminate the contract with MS Far East connections. However, appropriate measures have been taken to terminate the contract.

The Commission has NOT acknowledged the receipt of the seals from MS Far East connections neither has it paid Ksh 19,588,800.

Committee Observations and Findings

- i. The Supplier delivered 1,694,400 security seals numbering on 19th October, 2017 that were not used for the general election as intended.**
- ii. The explanation by the Accounting Officer that the Commission has taken steps to terminate the contract, has not acknowledged the receipt of the seals from MS Far East connections and has not paid Ksh 19,588,800 was insufficient as it was not accompanied with appropriate documentation.**

Committee Recommendations

Accounting Officers must at all times ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services as provided for in Section 68(2)(e) of PFM Act 2012 and section 103 of the Public Finance Management Act, 2012 and the Public Procurement and Asset Disposal Act, 2015.

(ii) Audit Verification in the Field

An audit verification undertaken in thirty-two (32) sampled counties across the country reveals that there were inconsistencies on issued security seals maintained at IEBC warehouse in Nairobi compared with actual receipts in the field resulting in a variance of 579,169 which have not been accounted for.

Submission by Accounting Officer

The Accounting Officer stated that not true that there was inconsistencies of records on issued security seals maintained at the IEBC warehouse. Attached is Stores ledger and control card (S3), delivery notes and supporting copies of counter receipt (S13) and issue voucher (S12).

Committee Observations and Findings

The submission by the Accounting Officer was insufficient insofar as there was no explanation offered for a variance of 579,169 security seals arising from inconsistencies on security seals maintained at IEBC warehouse in Nairobi compared with actual receipts in the field.

Committee Recommendations

- i. Within three months of the adoption of the report, the Auditor General must table a report before Parliament indicating the findings of the review and verification of the Stores ledger and control card (S3), delivery notes and supporting copies of counter receipt (S13) and issue voucher (S12).**
- ii. The Commission should employ the use of ICT (Information and Communication Technologies) to improve on its record management especially in the field.**
- iii. The Commission should award contracts to only reliable suppliers.**
- iv. The Commission should consider blacklisting M/s Far East Limited for non-delivery.**

11. Supply, Delivery, Installation Implementation and Commissioning of Wide Area Network in Two Hundred and Ninety (290) New Locations, Eighteen (18) Existing Sites and Provision of Dedicated Internet Services

(i) Award of Contract

The tender for supply, delivery, installation, implementation and commissioning of Wide Area Network (WAN) in two hundred and ninety (290) new locations, eighteen (18) existing sites and provision of dedicated internet services was advertised in the three local dailies and the Commission website on 16th January, 2017. Bids appear to have been evaluated and the contract was awarded to a firm at Kshs.128,472,393 on 10 April 2017 for a three-year contract period.

(ii) Audit Inspection

(a) Test of Internet Network

Although Paragraph 6.5.1 of the contract document requires that the Commission shall inspect and/or test the services to confirm their conformity to the contract specification, records appear to indicate that internet services were never tested despite the fact that the commission has paid Kshs.117,965,958 (or 90% of the contract price) through payment voucher number 1832 and 4098 both dated 30 June 2017.

Submission by Accounting Officer

The Accounting Officer stated that it was not true that the internet services were never tested to confirm their conformity to the contract specifications. The Implementation of the WAN project had several milestones which included installation, testing and commissioning of the 308 LAN/WAN sites.

Each of the 308 sites were tested separately, as per the attached WAN/LAN project Sign-offs which included confirmation of physical installation, equipment's delivered and internet services installed. After the sign off of the project, the sites were transitioned to operations mode for the routine support.

Committee Observations and Findings

The explanation of the Accounting Officer that each of the 308 sites were tested separately and the documentation submitted, that is, WAN/LAN project Sign-offs which included confirmation of physical installation, equipment's delivered and internet services installed are satisfactory and should have been availed to the Auditor General pursuant to the provisions of section 68(2)(n) of the Public Finance Management Act, 2012.

Committee Recommendations

Accounting Officers must at all times ensure that they provide the Auditor General, where relevant, with any information it may require to fulfil its functions as provided for in Section 68(2)(n) of the PFM Act 2012.

(b) Audit Verification of Internet Services

Verification of internet networks in thirty-five (35) counties indicates that Wide Area Network (WAN) which was supposed to be installed in constituency offices were not working. It appears that IEBC did not take adequate measures to assure the requisite service level expectations.

Even though this was not part of the contract, a further test on telephone communication system at the regional offices also revealed that they were not working.

Submission by Accounting Officer

The Accounting Officer stated that the internet service was installed in all the 290 constituency offices. This was verified and confirmed by the KENAO auditors in the sampled counties. The installation and commissioning was signed off and the sites were transitioned to operations mode for the routine support.

It was important to note that internet availability can be affected by downtime from time to time and when it happens, it is resolved through the support and SLA provisions. Any issues of reliability and availability of the services at the field offices are handled through the incidence management procedures on a day to day basis.

In the run up to 2017 General elections, the Commission managed to register over 14,000 candidates to contest for various elective positions using the Candidate Registration Management System which was accessed through this Wide Area Network.

The Telephone Communication system was not part of the LAN/WAN project. The telephones in the 17 former regional offices and national warehouse were installed in 2012 and are all in operation

Committee Observations and Findings

- i. The explanation of the Accounting Officer and documentation submitted in support that internet availability can be affected by downtime from time to time and when it happens, it is resolved through the support and SLA provisions and that any issues of reliability and availability of the services at the field offices are handled through the incidence management procedures on a day to day basis was reasonable.**

- ii. **The explanation of the Accounting Officer that the Telephone Communication system was not part of the LAN/WAN project and that the telephones in the 17 former regional offices and national warehouse were installed in 2012 and are all in operation, was insufficient insofar as no documents were submitted in support of the explanation and the explanation did not allege that the telephones were working.**

Committee Recommendations

- i. **Within six months of tabling of this report, the Auditor-General should undertake a comprehensive performance audit to evaluate, whether there was value for money in the procurement of internet services valued at Kshs.117,965,958 (or 90% of the contract price) through payment voucher number 1832 and 4098 both dated 30 June 2017 and submit the report to Parliament for tabling and debate.**
- ii. **Accounting Officers must at all times ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services as provided for in Section 68(2)(e) of PFM Act 2012 and section 103 of the Public Procurement and Asset Disposal Act, 2015.**

12. Irregular procurement of transport services

(i) Award of Contract

The Commission invited open tenders for provision of transport services during the General Elections of 2017 in all the forty-seven (47) county offices. The opening and evaluation of these tenders is reported to have been done on the same day in all county offices.

(ii) Audit Findings

Audit verification undertaken in thirty-five counties revealed that the Commission did not have procurement officers at that time therefore, lacked capacity to procure these transport services at counties. Therefore, most of the contracts were awarded based on predetermined budgetary allocation issued from the headquarters. In the absence of competition and fair award of contracts, it is not possible to confirm that expenditure of Kshs.1,142,653,945 was fully controlled and that the value for money was obtained on transport services as required under Section 68(1)(a) and (b) of The Public Finance Management Act, 2012.

Submission by Accounting Officer

The Accounting Officer stated that it was not true that County offices lack capacity to procure transport service. The Accounting Officer delegated the procurement function to the county election managers for purposes of approving procurements within their respective counties.

In addition, the Commission has within its establishment 17 qualified supply chain assistants serving all the counties in the field. The Commission had clustered the counties into 17 Regions of which the available qualified staff provided procurement related support services to the counties under their respective regions. Further, the Commission in some instances utilized the procurement professionals either at the county government or at the district.

Committee Observations and Findings

- i. The submission of the Accounting Officer that the Commission clustered the counties into 17 Regions supported by 17 Supply Chain Assistants and further, the Commission in some instances utilized the procurement professionals either at the county government or at the district appears to be an admission that the Commission did not have procurement officers at that time therefore, lacked capacity to procure these transport services at counties.**
- ii. The submission that 17 Supply Chain Assistants aided by unspecified county procurement professionals to supervise 17 regions of a cluster of counties does not appear to demonstrate or to confirm that expenditure of Kshs.1,142,653,945 was fully controlled and that the value for money was obtained on transport services as required under Section 68(1)(a) and (b) of The Public Finance Management Act, 2012.**
- iii. The Commission appears to have failed in ensuring that all applicable staffing systems and standards were followed when procuring of human resource services as provided for in Section 68(2)(e) of PFM Act 2012 and the Public Procurement and Asset Disposal Act, 2015.**

Committee Recommendations

Accounting Officers must at all times ensure that all applicable staffing systems and standards are followed when procuring of human resource services as provided for in Section 68(2)(e) of PFM Act 2012 and the Public Procurement and Asset Disposal Act, 2015.

13. Supply of BVR kit internal batteries

The contract for supply of 8000 BVR kits internal batteries was awarded to a firm at Kshs.47,600,000 on 17 January 2017 through restricted tendering method.

However, examination of documents in support of procurement of BVR Internal batteries revealed that batteries were procured, delivered in the stores but have not been totally utilized to date. Management maintains that the batteries are usable and that out of 8,000, 3003 batteries have been used and expects to use the rest in future. The IEBC should reevaluate usability of the stock to

ensure that expenditure totaling Kshs.47,600,000 was effective in accordance with Section 68(1)(a) and (b) of the Public Finance Management Act, 2012.

Submission by Accounting Officer

The Accounting Officer stated that it was true that the Commission procured 8000 internal batteries from Circuit Business Systems. The supplier delivered the batteries on diverse dates and the Commission has been issuing them on need to do basis to the areas where there is no existing power from the national grid.

The internal batteries are consumables that are required from time to time and continue to be issued, as is the case currently in the on-going Continuous Voter Registration.

It's important to note that these batteries are internal batteries for laptops whose shelf life on average is 3 – 5 years. They are therefore used as spare parts for maintenance of office laptops and as a backup and replacement to field BVR Kits, which are about 10 thousand.

Committee Observations and Findings

The explanation by the Accounting Officer that the Commission procured 8000 internal batteries from Circuit Business Systems which it has been issuing on a “need to do basis” to the areas where there is no existing power from the national grid was not sufficient in as far as it failed to demonstrate that expenditure of financial resources amounting to Kshs.47,600,000 was incurred in an effective way pursuant to the provisions of section 68(1)(a) and (b) of the Public Finance Management Act, 2012.

Committee Recommendations

- i. Within three months of adoption of this Report, the Commission should reevaluate usability of the stock to ensure that expenditure totaling Kshs.47,600,000 is effective in accordance with the provisions of section 68(1)(a) and (b) of the Public Finance Management Act, 2012 and table a report before Parliament.**
- ii. The Commission should ensure there is value for money for the batteries procured for voter registration.**

14. Provision of strategic communication and integrated media campaign consultancy services

(i). Award of the contract

The Commission awarded the contract for the media campaign consultancy services to a bidder who had initially quoted Kshs.764, 393,224.00. Prior to the award, two bidders who tied in the combined score were invited for negotiations as per Section 131(6) of Public Procurement and

Asset Disposal Act, 2015. The Commission eventually entered into the contract on 27 July 2017 for Kshs.350,001,353. The consultant issued invoice No. PD-011576 on the same day demanding payment of Kshs.105, 001,124.00. The invoice amount was paid through voucher No. 155 on 1 September, 2017. The contract required 30% payment on provision of an inception report.

(ii). Payment before confirmation of Delivery of Services

The contract inspection and acceptance report availed for audit verification was dated November, 2017 indicating that the payment was made before the confirmation of delivery of services. The Commission provided a revised media plan which indicated a media campaign that was concentrated over three weeks (24 July to 13 August 2017).

(iii). Cost of Production of Digital Infomercials

The records of the negotiations between the Commission and the two bidders invited for negotiations indicate that it would not be necessary to produce different infomercials for online / digital platforms. The same infomercials produced for television would be the ones to be placed in the online platforms: youtube, twitter, facebook, integral, eskimi, ghafla, tuko among others. However, management explained that the infomercials on TV were different from online infomercials. The contract sum included an amount of Kshs.13,154,161.00 being cost of producing infomercials for digital platforms. No satisfactory explanation was provided why this was the case.

Submission by Accounting Officer

The Accounting Officer stated that the inception report was the first milestone which entailed the preparation and submission of the strategic media plan. The revised media plan was completed and submitted on 27th July 2017. The payment of Kshs. 105,001,124.00 made on 1 September, 2017 was in fulfilment of the clause 6.4 of the contract to tender no. IEBC/45/2016-2017.

It was true that the contract inspection and acceptance report was dated November, 2017. However, the inspection and acceptance report was not the basis of making the 1st instalment but rather it was a project implementation report meant to be used for the subsequent payments.

The 70% outstanding balance will only be paid after verification and satisfactory delivery as per the contract.

Committee Observations and Findings

- i. The explanation of the Accounting Officer that payment of Kshs. 105,001,124.00 made on 1 September, 2017 was in fulfillment of the clause 6.4 of the contract to tender no. IEBC/45/2016-2017 does not appear to elucidate whether the payment was on provision of an inception report.**

- ii. **However, the supplier, Scanad, while appearing before the Committee, was able to demonstrate that all the key milestones as contained in the contract had been met in due time.**
- iii. **The Committee further established that some of these milestones were fulfilled months after the 2017 General Elections as was envisaged in the contract.**
- iv. **The Committee noted with satisfaction that the supplier submitted an accounts reconciliation statement to the Commission after the first round of Presidential Election in 2017.**

Committee Recommendations

- i. **Within six months of adoption of this Report, the Commission must develop and table before Parliament a strategic communication and integrated media campaign manual to be used as a guideline for future election communication requirements by the Commission.**
- ii. **The Commission should expedite the settlement of all genuine payments due to the supplier in order to save the public from incurring additional costs that would arise from potentially protracted legal disputes.**

15. Unauthorized notification of awarded contracts

Examination of tender documents and contracts show that winning bidders for tenders amounting to Kshs.1,217,057,023.67 were notified of their award by the Head of Procurement instead of the Accounting Officer contrary to Section 87 (1) of the Public Procurement and Asset Disposal Act, 2015.

Submission by Accounting Officer

The Accounting Officer stated that it **was** true that the head of procurement unit signed the notification of award. The Accounting Officer delegated the authority to approve the awards pursuant to section 69(4) of the PPAD Act 2015.

Committee Observations and Findings

The explanation of the Accounting Officer that he delegated the authority to approve the awards pursuant to section 69(4) of the PPAD Act 2015 was reasonable. However, the Committee notes that there was no document tabled in support of the submission that he delegated authority in writing.

Committee Recommendations

Accounting Officers must at all times ensure that they provide the Auditor General, where relevant, with any information it may require to fulfil its functions as provided for in Section 68(2)(n) of the PFM Act 2012.

16. Failure to provide performance security

Examination of records further show that tenders amounting to Kshs.4,312,046,372 were not supported by the relevant performance security of 10% of the contract price contrary to Section 142 (1) of the Public Procurement and Asset Disposal Act, 2015.

Submission by Accounting Officer

For Fresh Presidential Elections, the Commission used suppliers for the GE who had performed satisfactorily. Supplier payments will only be made upon satisfactory performance is confirmed

Procedures have been put in place to require performance guarantees before signing of contracts in future to strengthen controls around performance security.

Committee Observations and Findings

The explanation of the Accounting Officer that the Commission used suppliers for the GE who had performed satisfactorily was inadequate to explain the Commission's failure to comply with the provisions of Section 142 (1) of the Public Procurement and Asset Disposal Act, 2015 to award tenders amounting to Kshs.4,312,046,372 without support of the relevant performance security of 10% of the contract price.

Committee Recommendations

- i. Accounting Officers must at all times ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services as provided for in Section 68(2)(e) of PFM Act 2012 and section 103 of the Public Procurement and Asset Disposal Act, 2015.**
- ii. Within three months of the adoption of this report, the Commission must table before Parliament procedures that have been put in place to ensure performance guarantees before signing of contracts pursuant to the provisions of section 142 (1) of the Public Procurement and Asset Disposal Act, 2015.**

17. Undisclosed Court Awards to the Commission

Audit examination of documents for various court cases revealed that the court awarded Kshs.66,300,000.00 to the Commission due to various court petitions during the financial year 2015 - 2016. However, no evidence has been provided for audit to show that dues have been collected from the respective legal firms. Further, the dues have not been disclosed as receivable in the financial statements. The receivables from non-exchange transactions balance of Kshs.1,403,784,000.00 is, therefore, not fairly stated in the financial statements.

Submission by Accounting Officer

The Commission has endeavored to recover costs awarded in its favor from the various petitioners. This entails filing bills of costs against persons adjudged by the Court to be liable to pay costs. This is however hampered by the fact that taxation of costs in court takes a while to process. Recovery of costs is dependent on successfully securing certificates from taxing officers in Court followed by appropriate execution proceedings.

Further, some petitions were filed by indigent litigants acting as surrogates for politicians out to cushion themselves against award of costs. Recovery of costs thus becomes a challenging endeavor.

Where the Commission has been awarded costs, and the same has not been taxed, it cannot therefore, indicate the exact amounts awarded. It can only indicate that an order for costs has been made in its favour.

The Commission had previously written to the law firms which represented the Commission on those matters on 28th May 2015, 10th February 2016 and 28th November 2017 asking for an update on the process of recovery of the costs. Copies of correspondences attached.

The Commission has since recovered costs in Kakamega Petition No. 7 of 2013-Arthur Kibira Apungu vs IEBC & Another for Kshs.300,000/- and in Machakos Petition No.6 of 2013-Party of Independent candidate vs IEBC for Kshs. 2, 225,076/-.

On the issue of disclosure in the financial statements as receivables, the Commission made a disclosure on court awards under Note 23 Contingent Assets and Liabilities (Page 32) of the revised/audited financial statements.

Committee Observations and Findings

- i. The Commission has recovered costs in Kakamega Petition No. 7 of 2013-Arthur Kibira Apungu vs IEBC & Another for Kshs.300,000.00 and in Machakos Petition No.6 of 2013-Party of Independent candidate vs IEBC for Kshs. 2, 225,076/-.**

- ii. **The explanation by the Accounting Officer that the process of recovery of costs is dependent on successfully securing certificates from taxing officers in Court followed by appropriate execution proceedings which is a lengthy process is reasonable.**

Committee Recommendations

Within 6 months of the adoption of this report, the Commission must table a report before Parliament detailing the status of recovery of costs.

18. EZRA CHILOBA SUBMISSION

Mr. Ezra Chiloba started by stating that it was his pleasure to appear before the Committee. He stated that he received the committee's letter of invitation in which it requested that he appears before the committee to shed more light on matters relating to the Auditor General's report on 2016-2017 financial statement of Independent Electoral and Boundaries Commission (the Commission). The invitation letter expressly stated that he had been adversely mentioned. He supposed, by some of his former colleagues who have already appeared before the committee. The letter however, was silent on the specific areas for which his responses were required.

He was pleased that with the opportunity, he would be able to clarify and set the record straight on concerns relating the Commission's financial management in the period under review. He did so, first, as the Accounting Officer at the time, and second, as a citizen concerned about the effectiveness and the efficiency in the public service. He had the privilege to serve in different capacity in both local and international public sector organizations. He mentioned that all through his career, he had been described by his fellow colleagues and acquaintances as a distinguished professional, dedicated to excellence and committed to integrity.

He stated that he joined the Commission in February 2015 at the age of 37 through a very competitive process led by PwC. Knowing what this appointment meant for his career and life in general, he set out to make a difference. Every time he reflects on his tenure in his capacity of the Chief Executive Officer (CEO) of the Commission, he can say without fear of contradiction that they did well despite the difficulties experienced.

He noted that they have listened to narratives that are largely shaped by what he may refer to as "strategic misrepresentation" about the financial management by the Commission in relation to the 2017 elections. **But the reality is that they registered significant improvements in the management of funds allocated to the Commission relative to previous experiences.** He stated that the Committee was invited to the opinion by the Auditor General. In 2017, the Commission was given "**a qualified opinion.**" In 2013, the Commission received an "**adverse opinion.**" This was despite the many challenges experienced during the procurement of different goods and

services for the elections. Without underestimating the queries raised by the Auditor General, someone familiar with elections in Kenya should be asking, how they actually achieved that.

Under normal circumstances, it would have been prudent to allow the Accounting Officer to oversee the audit process and provide clarification before any final report is made. However, he noted that he never had such a chance. He was denied every opportunity to carry out his duties as the Accounting Officer during the audit process. He stated that he has reason to believe that it was part of the scheme to have a report that does not reflect the true state of affairs. Having reviewed the audit queries, he is certain that each of them could have been expounded and put into context had there been adequate support from his office. Today, we would have been looking at a different report. He noted that it had not banished his spirit to remain true to self, be forthright with facts, and above all, be called to account. And that was why he was there that day.

He stated that he would provide the general context of the expenditure for the period under review before running through his responses to the specific audit queries. Towards the end, he would conclude and make some recommendations on the governance issues relating to financial management by the Commission.

He mentioned that the evidence he presented to the committee must be understood from the point of view that he had limited access to all relevant information for reasons that are in the public domain. He stated that he was attaching evidence that he was able to access either on his computer, or from the Internet, submissions from other witnesses, given by volunteers, and in some cases, his own recollection and reflection on events.

GENERAL CONTEXT

He stated that:

- i) **Planning Context:** The planning of the 2017 General Election started in 2015 when they launched a 5-year strategic plan. As a Commission, they had clarity of purpose of where they wanted to be in five years' time. They believed that the Commission would be a great institution if it delivered on three main outcomes; namely; *(1) delivering elections that are efficient, effective and credible; (2) building a respected corporate brand in the provision of electoral services; and (3) ensuring improved and sustained public confidence and participation in the electoral process.*
- ii) In December 2015, the Commission also prepared and shared with the country the 2017 election roadmap with specific details of what needed to be done to ensure credible polls. The activities were accompanied by a budget that was widely scrutinized and eventually approved by Parliament. It was their commitment and his in particular, to apply the resources effectively, efficiently and be accountable to the people of Kenya in accordance with our Constitution.

- iii) The early planning for elections was critical to avoid the pitfalls and challenges experienced in the run-up to the 2013 General Election. Early planning also meant early procurement, early testing of technology, adequate time for training of election officials and sufficient voter education and public outreach programme. Upon approval of the elections budget, as early as July 2016, the Commission commenced the procurement process for critical materials for the elections. This was through open tender process. They never planned to procure materials and services through direct or restricted tendering unless circumstances dictated. As one of his colleagues used to say, “2017 was the most planned for elections.” those who complain that they were not aware that over 100 contracts tenders were floated, do not understand the planning context of the 2017 elections. But then the question would be: why?
- iv) **Policy and Governance Context:** while they planned and started execution of the election programme well in advance, two major events happened with less than a year to the election. First, Parliament changed the law on elections, in particular, on electoral technology, voter register, party nominations and limiting the timelines related to these activities.
- v) Second, Parliament changed the governance structure of the Commission. A new team of Commissioners assumed office just seven months to the elections. These had far-reaching implications not just on procurements of goods and services for the elections, but also election management in general. Indeed, the Commission that planned for the election two years earlier was not the same Commission that finally implemented the election plan. That was beginning of what he refers to as “*a conflict of visions*” in terms of the corporate leadership of the Commission.
- vi) He noted that he was privileged to work with the two commissions: the Issack Hassan Commission and the Chebukati Commission. The two teams were different in terms of: leadership approach; understanding the role of commissioners; understanding the segregation of roles between commissioners and secretariat; understanding the basic principles of strategy and risk management; and understanding the procurement policy in the public sector. He wished show how these different approaches contributed to some of the major audit queries being raised by the Auditor General.
- vii) He stated that the role of commissioners *vis-a-viz* that of management on procurement issues were a source of never ending tensions and confusion within the organisation. In as far as he was concerned, the operating policy on public procurement is very clear in terms of segregation of roles. His experience, however, was that with the new Commissioners, it was difficult to draw the line between their role and that of the Secretariat leading to violation of the principle of segregation of roles. Today, it is very easy for some of the Commissioners to argue that according to the Public Financial Management Act (2012), the CEO is

accountable. While that is true, it is important that the same Commissioners are held to account for what he considers undue interference in the procurement process.

- viii) The Public Financial Management Act (2012), the Public Procurement and Assets Disposal Act (2015) and Article 229 of Constitution of Kenya, are very specific on the roles of the Accounting Officer. In a nutshell, the Accounting Officer is responsible for financial management including procurement. The Independent Electoral and Boundaries Commission Act, 2011, designates the CEO of the Commission as the Accounting Officer. Further, every year the Cabinet Secretary in charge of National Treasury designates the CEO of the Commission as the Accounting Officer in accordance with PFMA (2012). In his capacity as the Accounting Officer, the CEO performs very specific duties for which he or she is accountable to the people of Kenya through parliament. Mr Chebukati calls this “*absolute responsibility.*”
- ix) In 2009 and 2014, the Public Procurement Regulatory Authority and the Office of Head of Public Service issued two circulars respectively in an attempt to clarify the role of the Management teams and Boards on issues of procurement. The circulars acknowledged the important role of boards in procurement oversight, but they limited that role to approval of the annual budgets, approval of annual procurement plans, and receiving update in the implementation of the plans through relevant board committees. With the principle of segregation of roles, even the Accounting Officer, performs roles that are very specific. He/she cannot usurp the powers allocated to specific committees set up in accordance with the procurement law. Indeed, owing to the transition that happened in January 2017, the principle of segregation on matter of procurement was the most misunderstood and misapplied by the Chebukati-led team.
- x) In February 2018, the Commissioners and the CEO were trained on corporate governance by the experts from the Kenya School of Government. After the training, it was clear that the Commission needed to fast-track the development governance policy documents. In particular, we agreed that we would develop a board charter as a way of addressing the apparent conflict between the roles of Secretariat and the Commissioners. Unfortunately, as soon as we left the training, a campaign was initiated to get him out of office. He stated that he was not sure that the board charter was ever developed. He stated that as the Committee retreats to reflect on the evidence presented before it, he invites the Committee to seriously reflect upon the immediate and long-term detriments of the current governance structure in relation to financial management within the Commission.

A. SPECIFIC RESPONSES TO AUDIT QUERIES

- i) **Purchase of KIEMS Kit:** He concurred with the responses provided by Acting CEO, Hussein Marjan on the procurement of KIEMS. However, he wished to provide further clarification as follows:

- a. The Auditor General **does not** make an adverse finding with regard to the procurement of KIEMS. He believed that the Auditor highlighted the same in order to provide information on one of the major procurements for the Commission.
- b. Further, the Auditor General had not taken any issue with the fact that KIEMS was purchased through direct procurement. The issue of direct procurement was raised in the June 2017 draft report before the management team provided clarifications. Accordingly, in their final report, the mode of procurement became a non-issue.
- c. However, since the issue of direct procurement of KIEMS was extensively discussed at this Committee, he wished to further clarify that the decision to go for direct procurement was a collegiate decision supported at the highest policy level of the Commission. The direct procurement was carried out in accordance with the law as per the details provided by the Acting CEO in his submissions.
- d. He had seen a statement issued by Mr. Chebukati which was misleading and a misrepresentation of facts. This was unfair to the public and he wished to put the record straight. The Commission met severally and it is on record that direct procurement for KIEMS had been considered way before the meeting of 31 March, 2017. Indeed, on 28 February, 2017, when approving direct procurement for KIEMS, the intention of the Commission was that Secretariat writes to Safran expressing intention to retain their services. In a further meeting held on 15 March, 2017, after reviewing the status of KIEMS procurement, the Commission directed Secretariat to lease the equipment with immediate effect. Mr. Chebukati also failed to point out that the Commission held a plenary meeting on 18 March, 2017, where the decision on an alternative procurement process was agreed upon. The fact that some members did not vote for direct procurement of Safran is a classic example of how not to conduct a procurement process. The law on procurement provides the procedure of making awards. Once the evaluation committee has made a recommendation to award, the Head of Procurement prepares a professional opinion on the process, which will guide the Accounting Officer in approving the award. But in the case of KIEMS and a number of other procurements, the Commission demanded to have the evaluation reports and professional opinions before the award of contracts. Given this situation, He stated that he kept wondering and sometimes loudly:
 - *When Plenary votes on an evaluation committee report, is it not converting itself into an evaluation committee?*
 - *What happens if the majority members of Plenary vote against the award as recommended the by evaluation committee can the Accounting Officer reject such a decision?*

- *What if there were external interests seeking to influence the award of the tender through Plenary?*

e. He recalled that one of the bidders made a case for leasing equipment that had previously been used elsewhere. Under the request by the Chairman, Smartmatic made their pitch to a few Commissioners, the ICT team and himself. In a subsequent plenary meeting, the Commission adopted a resolution to lease the system from the company even when the proposal by Management team was to upgrade some BVR kits to be used for the mandatory May 10th voter verification exercise. (*Plenary Minutes*).

f. After the Commission cancelled the KIEMS open tender and resolved to contract Safran through direct procurement, Smartmatic wrote to the Commission detailing how they had a better offer than Safran. The letter was received 2 days before the contract between the Commission and Safran. He stated that he had reason to believe that the Smartmatic’s push had something to do with the voting on 31 March, 2017. The decision to go for direct procurement must always be anchored in law; there are conditions precedent including urgency, technological compatibility, standardization, to just mention a few, that must be fulfilled. While Smartmatic could have offered the leasing option, it was clear that Smartmatic’s offer was not favoured by the context we were working in.

ii) The Auditor’s report lists additional items that were purchased for Fresh Presidential Election as shown below:

<i>Description</i>	<i>Quantity</i>	<i>Unit price (\$)</i>	<i>Total (\$)</i>
Morpho tablets	1500	542.66	813,990
Rugged rubber protection	2000	13.41	26,820
Protective carrying casing	3000	15.57	46,710
Power banks	5000	29.76	148,800
Training	1	2,494,639	2,494,639
Election day technical support	1	4,187,040	4,187,040
Logistics, storage, warehousing	1	508,205	508,205
Ten TB of data consumption on public portal	10	2,535	25,350
Backup infrastructure (cloud service)	1	776,857	776,857

Total in \$	9,028,411
Total in Kshs. (at rate of 94.84)	856,254,499

- iii) He mentioned that he took note that the Auditor General has not made adverse finding on the purchase of additional items. Further, the Commission has not provided a written response on the same. He believed the Acting CEO should respond adequately as well. That said, the Commission made these additional purchases for a number of justifiable reasons as follows:
- g. A significant number of KIEMS Kits were locked in various warehouses (Embu, Kirinyaga, and Marsabit) following a court order for preservation of Election materials; and some were replacement kits for those that were faulty after the 8/8/2017 GE.
 - h. Additional Power banks were ordered for remote polling stations that did not have adequate electricity as a risk mitigation measure following the 8/8/17 experience.
 - i. Additional training was necessitated by the modification of the system following the Supreme Court ruling on 1/9/2017 and the fact that the system had been modified.
 - j. Election support was enhanced based on the experience on 8/8/27 GE. The support moved from the 47 counties to 290 constituencies. The requirement for logistics, storage and warehousing for FPE were same as the August election. Kits had to be retrieved from the field to a central warehouse and operation centre and dispatched back to the field.
 - k. The additional ten TB of data was required for the transmission of results form 34A and form 34B using the Results Transmission System. During 8/8/2017 GE the Commission transmitted Form 34B using Secure File Transfer Protocol (SFTP) that did not require additional bundles.
- iv) There was need for cloud hosting services for purposes of the Fresh Presidential Election because Safran did not have adequate time to configure and test the local environment. Taking the above factors into account, we can conclude that the additional purchases were necessitated by the circumstances surrounding the fresh election; hence justified.
- v) He stated that had seen reports in the media where Mr Chebukati denies having knowledge of Phase II KIEMS contract. He noted that as it can be seen from a series of Plenary meetings, that is not true. The Commission had engaged on Safran issue from 4 September, 2017, all the way to 29 September, 2017.

Supply, Delivery, Implementation and Commissioning of Network Transmission

- i) **Excess Purchase of Data Bundle:** The Auditor General observed that 149,640.5 GB of data bundle valued at Kshs.127,625,926.00 were procured from the three (3) Service Providers and only 605.3 GB valued at Kshs.515,269.00 were utilized, resulting in unutilized, expired and wastage of 149,035 GB of data bundle valued at Kshs.127,109,656.00.
- ii) In terms of response, he wished to associate himself with the submissions made by Acting CEO Mr Hussein Marjan as well as the ICT Director Mr James Muhati. However, he emphasised that the decision to have two SIM cards per kit was informed by the need to mitigate the risk of failure of overreliance on one. This approach meant that redundancy costs (the cost of an additional SIM card and bundles) had to be absorbed by the Commission. In terms of projection, 50% of the bundles would not be utilized in the best-case scenario. My understanding is that there was a collegiate decision taken by the Elections Technical Committee (ETAC) which brought together members of the MNOs, political parties representatives, regulatory agencies and the Commission on the issue of network coverage and transmission.
- iii) **Mismanagement of 553 Thuraya Modems and SIM Cards loaded with Data:** The Auditor General points out various issues on the procurement of SIM Cards and data bundles for results transmission. He endorsed the position taken by Acting CEO on all aspects relating to the procurement of SIM Cards and bundles. However, He wished to state that he was aware that 1,000 satellite devices were delivered before the August 8 elections and were used in those elections. He was also aware that 553 devices were delivered after the August 8 elections but before the October elections. While 1,000 devices were used in the August elections, 1,553 deployed for the October 2017. If it is true that the records show conflicting dates of delivery, then that would be an issue of store record management at the warehouse and not because of non-delivery.
- iv) **Additional 1,000 Thuraya SIM Cards Loaded with Data:** His understanding was that with regards to satellite devices, the SIM Cards were in-built in the hardware. As a result, for the second there was no purchase of additional SIM Cards but rather the provisioning and re-activation of the in-built SIM Cards. The re-activation was necessary since the August 8 provisioning had expired as per the terms of the contract.
- v) For purposes of perspective, he wished to state that the decision to procure satellites was endorsed by the Commission Plenary. The Plenary approved the proposal to acquire 1000 – 1500 satellite devices for purposes of boosting the network. The cost was estimated at Kshs 550,000,000 – 825,000,000

Undelivered SIM Cards: The Acting CEO had provided evidence with regards to the undelivered SIM Cards.

- i) One of the questions that arose during one of the sessions in this Committee was the type of SIM Cards purchased by the Commission. He wished to reiterate that these were special SIM cards specifically manufactured and configured for the Commission. These were APN-SIM cards. The SIM cards could only be used for the KIEMS Kit transmission and nothing else. The SIM Cards could not be used on any other gadgets. The SIM Cards could only be used for data and not voice. It would not be proper to compare the cost of the ordinary SIM Cards to the cost of the special SIM Cards offered to the Commission (*Refer to tender specifications as submitted by the Commission*).
- ii) It was important to also point out that the three MNOs went out of their way to support the Commission through technical support partly because of the reputational risk they would suffer had the system not worked. It was everyone's interest to ensure that the right thing was being done at the time. Owing to the technical complexity involved in setting up the system, it requires technical knowledge for one to understand the issue of redundancy, how satellite works and special nature of SIM cards offered to the Commission.

Procurement of Data Centres and Backup infrastructure (Cloud Services)

- i) **Cloud Service Infrastructure:** The use of cloud services was a mitigation measure to the delayed arrival and installation of servers for the primary and secondary data centres. Due to impending timelines to test and configure the KIEMS kits, the Commission resolved to acquire cloud services based on the technical advice from ICT team from Safran and IEBC. Cloud services are rental data centre services offered offsite provided by **specialized companies** such as NTT, Amazon, Microsoft, Google, to just mention a few. The services were to be obtained by Safran on behalf of the Commission and would last for an initial of period of 4 months for the 8 August, 2017 election. The cost was estimated at EUR 320,38.
- ii) In the Fresh Presidential Election, the Commission requested Safran to install the RTS in the local environment in addition to back-up cloud service infrastructure. However, Safran were categorical that the time remaining before the FPE was not adequate to install and test the RTS in the local environment. As a matter of fact, as early as 9 September 2017, Safran had indicated that for them to proceed to support the Commission for the FPE, then Cloud infrastructure would be the option given due to time the constraints. This was also pointed out in the negotiations. So, it is not true that Safran was contracted to install RTS in the local environment before the October 2017 election. The agreement was that installation of the RTS would happen after the election.
- iii) **Payments to Data Centre Contractor:** The Auditor correctly observed that the "Commission was to build a new converged server for the primary data centre and disaster recovery site to support its electoral technology requirements and other Commission ICT operations." In addition, he wished to point out that the investment was necessary for the Commission's longer-term ICT operations for purposes of efficiency. Indeed, before this

procurement, the Commission did not have a functional data center neither did it have a disaster recovery site for any of its operations. The Acting CEO has confirmed that Kshs. 249,128,933 was paid after delivery of hardware before testing and commissioning of the equipment. The evidence of testing, inspection and acceptance has been provided by the Commission.

- iv)* The Auditor took note of additional expenditures and commitments i.e. *provision of IBM server infrastructure and KIEMS security monitoring solution; provision of Oracle database and security solution; and provision of co-location services for data centre and disaster recovery site.* he agreed with the Auditor when he said that “these expenditures unless implemented judiciously for on-going back-up and data centre infrastructure, could lead to nugatory investment.” In other words, the Auditor General having understood that the investments were for long-term purpose, it was important that the Commission maximises the benefits.
- v)* **Contract for IBM:** The Commission approved the contracting of IBM to provide hardware, security monitoring software and technical support toward the election as well as global ICT infrastructure. The estimated cost was USD 4,351,800. He was aware that only part of the contract was performed. In the meantime, IBM terminated the contract because the Commission did not make payments within the timeframe expected. He knows that the ICT team carried out an assessment of performance up until the point of termination and made recommendations to the Commission.
- vi)* Based on his recollection of status of ICT infrastructure at the Commission, it would be prudent for the Commission to conclude the implementation of all these infrastructures including re-negotiation with IBM over the terminated tender. Since this investment was for long functionality of the Commission’s ICT systems, failure to implement the projects would leave the Commission in a worse off position.
- vii)* **Change of Mode of Results Transmission:** The Auditor had raised issue with the expenditure of Kshs. 249,128,933.00 relating to primary and secondary data centre given that the Commission used the Cloud Service for the elections. He wished to reiterate what he had highlighted above on the cloud infrastructure. The procurement of the data centre was for long-term use by the Commission for all its ICT operations including electoral technology Owing to delays in the delivery of the data centre infrastructure, the choice for Cloud Service for purposes of the election was the best decision in the circumstance. The decision to go cloud did not render the investment in Primary and Secondary data center nugatory.
- viii)* **Purchase of Oracle database and Security Solution:** It was true that the Commission directly procured the services of Oracle and signed the contract on 31 May 2017. The decision to procure Oracle solution arose from a series of engagements between the

Commission and Oracle. These engagements were informed by the fact that the BVR system was run on Oracle Software. In the 2016/2017 Procurement Plan, the Commission had set aside Kshs. 80 million for the purchase of Oracle licenses.

- ix)* However, on 4 April 2017, Oracle requested, through the office of Commission Chairman for a meeting to discuss partnership. Following the meeting, where all Commissioners were present, the CEO was requested to formally invite Oracle Kenya Ltd to carry out an assessment of the current status of BVR and make recommendations on interventions. Oracle Kenya Ltd carried out the assessment and a report was presented to the Commission on or about 4 May 2017. Oracle Kenya Limited then offered the Commission a solution as shown in the assessment report. If I recollect correctly, he stated that he thinks the Commission considered a Gold-Platinum solution as offered by Oracle. It was at this meeting that the Commission approved the engagement of Oracle to provide software and security solution to the Commission.
- x)* Although the Commission had initially included the Oracle Licenses as part of the KIEMS tender, the position was reconsidered pending the outcome of the assessment undertaken by Oracle. As a result, the scope of Oracle solution changed from mere licenses to a solution that included Oracle database licenses, database security and technical support. Therefore, the cost of the solution increased from the initial budget of Ksh 80 million to Ksh 273 million. The scaled-up solution was a corporate decision of the Commission led by the Mr. Chebukati.
- xi)* In terms of installation of the RAC for purposes of the election, he wished to emphasize the submission by the Acting CEO that indeed the installation was carried out on the Cloud Infrastructure.

Procurement of co-location services for data centre and disaster recovery site

- i)* **Un-qualified Bidder:** The Auditor General makes observation that the Commission awarded a contract to a firm that was not part of those on the lists provided by the Capital Markets Authority and Kenya Revenue Authority. He agreed with the Acting CEO's submission on this query but he wished to provide further clarification. The main reason we went for a list from CMA and KRA was that we, as the Commission, did not have a wide list of potential bidders for purposes of restricted tendering. Accordingly, we approached KRA and CMA to share with us their respective lists as part of "knowledge of the market" information sharing as per Section 71 (4) (d) of PPADA. Based on the feedback and the requirement by the Commission, 6 firms were invited to participate in the restricted tender. Only three bidders responded leading to Telkom Kenya being awarded the contract.
- ii)* The Commission granted the approval for procurement of co-location sites. However, the process of procurement could only proceed after a mapping had been carried out by an

assessment team. The concern then, was, the risk of ending up to commit to a firm that did not guarantee the security and sustainability of the new data centre

Supply and delivery of ballot papers for elections, statutory declaration forms and the register of voters

- i) **Availing Letters of Notification and Contract Documents:** The Auditor stated that that the contract was awarded through open tender, restricted tendering and later direct procurement, and that the Commission has not availed the letters of notification and contract documents in all the three (3) different methods of procurement awarding the same contract contrary to Section 9(1)(e) of Public Audit Act (2015).
- ii) In response, he wished to clarify that Al Ghurair was initially awarded the contract through open tender and subsequently through direct procurement. The Court terminated the open tender contract in February 2017. The second award under direct procurement was in June 2017. In the alleged restricted tender, he wished to state that there was no award neither was there a contract signed since the process was terminated following the PPRB decision.
- iii) **Overpayment:** With regards to the claimed overpayment, he did not have much details of the reconciliation undertaken by the Commission. However, he believed the Acting CEO was able to answer the query to the Committee’s satisfaction.

Supply and Delivery of Ballot Boxes for the General Elections

- i) **Variation of contract for ballot boxes:** Although the Auditor makes some factual statements on the ballot boxes contract, he wished to state that there was a misinterpretation of those facts. The Acting CEO has explained the mode of procurement, price variation and contract status. That said, he wished to provide additional information and perspective emanating from the context as summarised in the table below.

Options	Qty	Unit Price (Kshs)	Sub-Total (Kshs)	Logistics (Kshs)	Total Cost (Kshs)	Comments
2017 General Election	106,000	1,850.00	196,100,000	0.00	196,100,000	The vendor had over 6 months to order and ship the quantities to Kenya. The increased quantities also impacted on price.
2017 FPE Option 1	42,927	2,250.00	96,585,750	30,233,500.00	126,819,250	The cost of airlifting 19,900 was to be borne by the Commission. This

						was to be procured separately. The Commission was to assume the risk of non-delivery.
2017 FPE Option 2	42,927	2,500.00	107,317,500	0.00	107,317,500	The vendor agreed to bring in additional moulds to increase local capacity. The cost included purchase of 3 additional moulds and increased man-hours to work on the project to ensure timely delivery.
SAVINGS: Option 2 - Option 1 =						19,501,750.00

- a. The second contract was carried out under direct procurement in compliance with the law and was not a variation as alleged.
- b. Comparing the timelines under the FPE and General Election, the vendor had over six months to manufacture ballot boxes in China and transport them by ship. This option is always cheaper. In the FPE, the vendor did not have the luxury of time. It would be wrong to assume that the prices would remain the same under the different contexts.
- c. It was true that the vendor had initially offered to supply ballot boxes for the FPE at Kshs. 2,250 per box. This price was on condition that the vendor produces 21,000 ballot boxes locally and 19,900 boxes in China. The vendor had strict delivery timelines and limited local capacity. For this option, the Commission was to cater for the freight costs, which would involve airlifting the 19,000 boxes at an estimated cost of US\$302,335 (approx. Kshs. 30,233,500). This would have pushed the cost of ballot boxes for the FPE to Kshs. 126,819,250. But more importantly, the vendor was transferring the risk of delayed delivery of the 19,900 ballot boxes to the Commission. In the event that the vendor produced the ballot boxes in China but the Commission failed to airlift them on time (which was likely), then responsibility would have shifted to the Commission 100%. Clearly, this was not a viable option despite the fact that the Commission had commenced procurement on those terms. After assessing the cost implication and risk involved, the Commission opted to start fresh negotiations with the vendor. Under the second option, the vendor had to acquire new moulds from China to increase the local production capacity. Further, more workers had to be retained to work through a 24-hour operation to

ensure that the last box is delivered to the Commission not later than 24 October 2017. Due to the acquisition of the new moulds from China and additional operational capacity, the vendor adjusted their price to Kshs. 2,500. This explains the final contract price of Kshs. 107,317,500.00. And with this option, the Commission was not just able to save up to **Kshs. 19,501,750.00**, but achieved the objective of having the requisite numbers of ballot boxes in readiness for the FPE. In other words, there was no excess payment as expressed in the Auditor's report.

- ii) On actual receipt of ballot boxes in the field, the Acting CEO has produced, he believed, the relevant documents to confirm receipts.

Supply and Delivery of Badges

- i) **Alteration of Contract Price Schedule:** The Acting CEO has explained the variation on the issue of interlineations on the price schedule. The alterations were made by the supplier before submission of tender documents since the countersigned figures are consistent with the quantities advertised for as well as the minutes of the tender opening committee. In essence, there was no excess payment as evidenced from the documentation
- ii) **Variation of Contract:** He concurred with submissions by the Acting CEO that this was not a variation of contract but a direct procurement after the user established that a category of badges was inadvertently not advertised in the initial open tender.
- iii) **Delivery costs:** If indeed it was true that the badges were not delivered to directly to counties but at Nairobi Warehouse, then the Commission should demand refund for distribution costs.
- iv) **Verification:** The Acting CEO has responded and attached the S3 delivery notes, counter receipts S13 and issue vouchers S12 as evidence of distribution of badges to the field.

Supply of Gas Lamp Mantles

- i) **Irregular Award of Contract:** The Acting CEO has presented evidence showing the M/S Matkal Co. Ltd duly submitted their sample.
- ii) **Variation of Contract:** The Acting CEO has confirmed that this was not a variation but a new procurement through direct procurement
- iii) **Audit Verification in the field:** The Acting CEO has provided evidence denying any inconsistencies

Supply and Delivery of Security Seals

- i) It was true that following the failure by M/S Far East Limited to deliver the required amount of seals on time, the Commission took steps to ensure that adequate numbers of seals are availed in readiness for the elections. They took into account that security seals were part of the strategic materials for the elections. The Commission's effort to ensure that M/S Far East delivered on time did not bear fruits. The Commission went out of its way to find an alternative solution including borrowing from the other Electoral Commissions, buying from a manufacture in South Africa and another in China, and seeking intervention from UNDP to no avail. The only available option was to take the offer given by M/S Ramaas Supplies. We had very little room to negotiate given the time constraints and the specifications being different.
- ii) The Acting CEO confirms that whilst M/S Far East Ltd delivered the balance of the seals, the same has not been acknowledged, neither has the payment been made. I would personally find it difficult to justify payment for late delivery.
- iii) **Audit Verification:** The Acting CEO has provided evidence with regards to actual deliveries in the field.

Supply, Delivery, Installation, Implementation and Commissioning of Wide Area Network in 290 New Locations, 18 existing sites and provision of dedicated Internet services.

- i) **Test of Internet Network:** The Acting CEO has provided evidence on the question of testing of the LAN/WAN.
- ii) **Audit Verification of Internet Service:** The Acting CEO has provided evidence on the question of testing of the LAN/WAN

Irregular Procurement of Transport Services

- i) **Award of Contract:** On the award of contracts for transport at the county level, he agreed with the submissions by the Acting CEO. But he wished to also add that the Commission required over 30,000 vehicles to service the 40,883 polling stations across the country. This requires coordination and understanding of the context of each region or county. So, given the diversity of the counties, the Commission, based on previous experiences in field operations, and established guidelines on transport procurement. These guidelines were useful in helping county officers in determining the awards of contracts.
- ii) The tenders were advertised on the same day and were processed at the same time. For purposes of efficiency and effectiveness, the Commission clustered the counties. Based on the outcome of this exercise, contracts were awarded to the various suppliers in the respective regions. He believed that there was value for money and that county offices are

able to account for the transport expenditure in a more systematic manner compared to previous approach.

- iii) A point to note is that more often than not, on the Election Day, all vehicles in constituencies are usually hired by the Commission to provide transport services. There are some constituencies that do not have enough vehicles and have to rely on other areas. And that is the nature of election operations.

Supply of BVR Kit Internal Batteries

- i) It was true that 8,000 batteries were procured as a measure to improve the operation capacity of the BVR kits during the Mass Voter Registration exercise. It is also true that by the end of the Mass Voter Registration in March 2017, 3000 had been used. He believed that the Commission is still in a position to use the remaining batteries for future voter registration exercise or indeed for any other purpose that it may deem fit in line with its mandate.

Provision of Strategic Communication and Integrated Media Campaign Consultancy Services

- i) **Award of the contract:** It was true that the contract with vendor was signed on 27 July 2017. But that was 14 days later after the notification of award was issued. Pending the finalization of the contract a significant amount of work had been undertaken by the vendor including preparation of adverts both for print, radio and television. The invoice being raised on the same day of contract signing was informed by this context in addition to the fact that the first milestone was the delivery of an inception report. Therefore, the payment was consistent with the terms of the contract. But it is important to also mention that owing to the cash flow challenges at the time, the Commission was only able to pay in September 2017.
- ii) **Payment made before confirmation of delivery:** My understanding was that the only payment made to the vendor was in accordance with the terms of the contract. As stated, this was a payment pursuant to the delivery of an inception report. The inspection and verification report referred to was meant to confirm the overall performance of the contract for purpose of final payments. So, it cannot be true that payments were made before verification of performance.
- iii) **Cost of production of digital informercials: (Please refer to submissions by the Commission)**

His overall submission on the media campaign is that the Commission became captive to “vendor wars” and delays in decision-making at the policy level. We had two cases at the Review Board that affected the timelines of delivery. At the policy level, the argument was

whether or not we needed the media campaign in the first place and whether the procurement was necessary. Owing to the delays, it became necessary to concentrate media campaigns within a short period including selection of prime-time airings in an attempt to reach out to as many Kenyans as possible. This should be a good lesson for the Commission in future interventions.

- iv) In terms of decision-making, the Plenary became a venue of stalling this decision. The issue was discussed five times at Plenary with contradictory views. This led to the Voter Education Committee taking over the evaluation report and presenting the same to Plenary.
- v) He is aware that the Commission recommended that the term of the contract be reduced from 12 months to 4 months. This was made under the assumption that cost would significantly reduce. As is the case for major media campaigns, the cost for advertising is always very high. They were aware that most of the costs would go into advertising and the cost for the PR component on need basis would be negligible. Although we signed the contract for 12 months (*which was not oversight*), we held a meeting with the vendor and agreed that the contract would last for only 4 months based on the Commission decision. Indeed, as soon as the 4 months lapsed, Scanad stopped providing the services.

Irregular Award of contracts

- i) **Unauthorised Notification of awarded contracts:** Although, it was true that the head of procurement unit signed some notification of awards, they were only exercising delegated authority. We had over one hundred contracts being signed over the period. They took the position that once the Accounting Officer had approved the award of contract as recommended by the evaluation committee and head of procurement in accordance with sections, then a notification of award could be signed off by either the head of procurement or the deputy CEO. A notification of award was not approval of contract but rather a communication of the decision of the accounting officer. We believe that the Accounting Officer should be able to delegate such tasks.
- ii) **Failure to provide performance Security:** He did not have the details, especially the specific contracts where the performance security were missing, but he believed that they could be a context for each of the situation. Overall, he would argue that in most cases it could have been an inadvertent omission.

B. GENERAL OBSERVATIONS

- i) In order to assist this Committee to understand some of the decisions on procurement matters within the Commission, he had analysed relevant Plenary Minutes as provided a summary

of key decisions. With respect to the FPE, the Commission on 4 September 2017 approved the proposal to undertake relevant procurements through direct procurement due to time constraints.

CONCLUSION AND RECOMMENDATIONS

ii) In conclusion he stated that, what I sought to show was that each of the audit queries has an explanation that is logical and evidence-based. That evidence has been placed before you. But most importantly, context has been provided to explain the issues. He solely believes that the story would have been much different had he been available during the audit process. He would have rendered his support to the independent audit and most of these queries would not have arisen.

iii) When it comes to audits, he was always guided by Lord Justice Lopes quote:

"It is the duty of an auditor to bring to bear on the work he has to perform that skill, care and caution which a reasonably careful, cautious auditor would use. What is reasonable skill, care and caution must depend on the particular circumstances of each case. An auditor is not bound to be a detective, or, as was said to approach his work with suspicion, or with a forgone conclusion that there is something wrong. He is a watchdog, not a bloodhound. He is justified in believing tried servants of the company in whom confidence is placed by the company. He is entitled to assume that they are honest and rely upon their representations, provided he takes reasonable care." Kingston Cotton Mills Co. (1896).

iv) What happened in his case, was that a few members of the Commission decided to send him on compulsory leave in order to invite the Auditor General to undertake a comprehensive audit. But, instead, what happened was a continuation of an engineered internal audit, which they used to frame a narrative that there was something wrong at the Commission and that the CEO was solely responsible. The internal audit was actually to pre-empt the Auditor General's findings. When the Auditor General came up with the draft report in June 2017, he was fully aware that some members of the Commission released the same draft to the media with the sole purpose of reinforcing their misconception about the Secretariat. This explains why they were where they are. The loss of Ksh.9billion at IEBC would mean that there was absolutely no money for any of the critical procurements at the commission in the period under review. Nothing could be further from the truth!

v) In as much as he did not participate in the audit process, he wished to correct the notion that has been created that Kshs. 9 billion was lost. He stated that he was aware, that in June 2018, the Auditor General pointed out that the Commission had procured goods and services worth Kshs. 9.2 billion through **direct procurement**. According to the draft report, the Commission was required to justify the direct procurement. Following clarification provided

by the Management team of IEBC, the Auditor General was able to drop that issue. That is why you do not find that in the final report.

- vi) Amidst the governance crisis that the Commission faced in the last six months to the elections, he remained steadfast, focused and resilient enough to ensure that election materials and services are procured in accordance with the law. Under his leadership, they were able to swim against the strong tide and carry out the elections.
- vii) He stated that as the Committee retreats to write its report, he wanted the committee to appreciate the fact that there was and there still is a governance crisis at the Commission. We must be rational and honest enough to address it once and for all. The following are some of the questions you will need to consider:
 - (i) Does the Commission require full-time or part-time commissioners?
 - (ii) Should we have executive commissioners modelled along Ghana or should we have non-executive Chairman with a powerful office of the CEO e.g. Botswana?
 - (iii) What are the specific limits of decision-making on procurement for Commissioners?
 - (iv) What does oversight role of Commissioners mean in the context of segregation of responsibilities on procurement as envisaged by the PPADA and the PFMA?
- viii) Finally, he stated that his greatest lesson thus has been the weight that comes with leadership in an institution which is a constant political bull's eye. The tenacity of individuals appointed to these offices is what ultimately defines the institution.

FURTHER SUBMISSIONS

On 8 February 2019, Mr. Ezra Chiloba prepared a supplementary brief upon request by the Public Accounts Committee of the National Assembly for further information after his first appearance in relation to the subject matter. In particular, the brief addressed the following three main issues: conflict of interest in relation to Cootow & Associates Advocates, conflict of interest in the procurement of ballot papers and emerging issues in plenary minutes with relevant documentation attached where available. The brief stated as follows:

Conflict of Interest: Cootow & Associates

1. Immediately after the August 2017 elections were concluded, as expected, the various candidates dissatisfied with the election outcomes lodged petitions in various parts of the country. The Commission had a list of pre-qualified firms from which it selected the various law firms to represent it. Cases were allocated to law firms following a certain criteria including location, expertise and past working relations with the Commission.

2. It is a known fact that Cootow & Associates was founded by the Mr. Wafula Chebukati. In 2016, Cootow & Associates was pre-qualified to provide legal services to the Commission; a year before the Mr. Chebukati joined the Commission. In 2017, immediately after the elections, the law firm happened to be awarded contracts to represent the Commission in a number of petitions. My research shows that the firm represented the Commission in the following cases:
 - a. Ikolomani Constituency Member of National Assembly
 - b. Likoni Constituency Member of National Assembly
 - c. Kilifi Constituency Member of National Assembly
 - d. Kwale County Women Member of National Assembly
 - e. Mombasa County Women Member of National Assembly
 - f. Mombasa County Assembly Party List
 - g. Nairobi County Assembly Party List
 - h. Migori County Governor
3. The above cases (could be verified independently), based on the approved legal fee structure, will cost the Commission about Kshs. 30 million. This cost does not include cases that went on appeal.
4. the Accounting Officer had the responsibility to ensure that contracts in all matters were awarded in accordance with the law. Most letters of appointments of advocates in relation to the petitions were signed after the fact (*post-facto*). In other words, the letters were signed after the cases had already been allocated and advocates were already in court on behalf of the Commission. This was *fait accompli*.
5. He mentioned to PAC in his earlier appearance that when he came across the fact that Cootow & Associates had been allocated cases, he immediately alerted Mr. Chebukati who indicated to me that he had resigned from the law firm who informed him that in as much as he might have resigned, the decision to have Cootow & Associates representing the Commission was going to be major problem. Noting that the firm was already representing the Commission, Mr. Chiloba reluctantly signed the letters.
6. Mr. Chiloba had every reason to believe that Mr. Chebukati had all along known or facilitated the allocation of work to his former law firm. This is based on my own experience working with him and reports. He received from some of his former colleagues. The following are some of the incidents:
 - a. He was the Chairman of the Legal Committee whereby he presided over meetings that discussed legal representation and fees (See *Annex 1: Memo on legal representation to the Director of Legal Services*). This would later find their way to plenary meetings where he chaired.

- b. He had direct contact with the Legal Directorate and rarely referred the issues to the Office of the Accounting Officer.
 - c. Not long after his appointment, Mr Chebukati complained to Mr. Chiloba that a former commissioner, who was the Chairman of the Legal Committee, never gave him (read Cootow & Associates) work despite the two having known each other. The assumption Mr. Chebukati made was that the Legal Committee awards contracts to law firms. This was farther from the truth and/or legal position.
 - d. As soon as Mr. Chiloba was sent on compulsory leave and tensions started building up within the Commission, Mr. Chebukati started preparing his own defense on the issue of the Cootow & Associates. For instance, he wrote to the Ag. Director of Legal Directorate to confirm in writing that as the Chairman of the Legal Committee he did not influence the award of contracts for legal services (*Memo can be obtained from the Commission*).
 - e. In the Petition No. 429 of 2017 (*petition was for removal of Mr. Wafula Chebukati, Commissioners and CEO*), Mr. Chiloba knew that the law firm on record for the Commission was that of S.M. Kilonzo & Associates Advocates. Later it emerged that Cootow & Associates had been given separate instructions to represent the Commission without his knowledge as the Accounting Officer. Who issued the instructions to Cootow & Associates?
 - f. In the case of Migori County gubernatorial petition Mr. Chiloba is aware that a different law firm had been given instructions to represent the Commission. However, this would later be changed to Cootow & Associates under unclear circumstances.
7. The Committee asked him about the integrity of the Mr. Chebukati and the other Commissioners. The issue of Cootow & Associates is a matter that requires a legal inquiry that touches on the integrity of the Mr. Chebukati. There was a clear conflict of interest in the manner in which he conducted himself in running the affairs of the Commission. Any ordinary citizen assessing this situation will no doubt have little confidence in the operations of the Commission.
8. Fundamentally, despite being aware that his “former” law firm had been contracted, Mr. Chebukati failed to take steps (*which he ought to have taken in the first meeting of the Commission or as soon as he became aware*) to manage the potential conflict of interest in relation to his former law firm. This is contrary to Section 16(1) of the Leadership and Integrity Act, Section 42 of the Anti-Corruption and Economic Crimes Act, Section 12 of the Public Officers Ethics Act, which provides that a State officer or a public officer shall use the best efforts to avoid being in a situation where personal interests conflict or appear to conflict with

the State officer's or public officer's official duties. It is also contrary to paragraph 3 of the Code of Conduct for Members and Employees of the Commission as contained in the Fourth Schedule of the Independent Electoral and Boundaries Commission Act.

Conflict of Interest: Ballot Paper Tender

9. It is no secret that the Commission was involved in several legal battles over the procurement of ballot papers. While the Commission had awarded the contract to Al Ghurair Printing and Publishing, the award had been challenged severally in the Court of law. The final challenge was in the Court of Appeal. The Commission had met severally over the issue of procurement of ballot papers from Al Ghurair.
10. However, while the matter was still in the Court of Appeal awaiting judgment, the Chairman managed to persuade a majority of Commissioners present to have ballot papers for presidential elections be procured from another company other than Al Ghurair. At the meeting, a number of firms were discussed as options. Immediately the vote was obtained, the Mr. Chebukati asked Mr. Chiloba to join him in his office. While in his office he pulled a document from under his table and handed it over to me. "Please take note that we never met," he said. Mr. Chiloba was surprised but did not show it. As they were still discussing, Commissioner Roselyn Akombe joined them. Mr. Chiloba could read from the body language that the two knew about the document.
11. The document was basically a proposal from a company called Ren-form to offer ballot paper printing services to the Commission. The Ren-form proposal letter was dated 14 July 2017 (*Annex 2: Letter from Ren-Form*). Upon receipt of the letter, the Chairman arranged to have a plenary session on 17 July 2017 to secure a vote that would nullify the Al Ghurair contract (*Annex 3: Extract of Draft Minutes of the 195th Plenary Resolution pages 2-10*). There is no doubt that the proposal by Ren-form was known to Mr. Chebukati and (most probably Dr. Akombe). Why did they not feel free to have the name of Ren-form discussed at the Plenary like all others before the decision was reached? Who requested Ren-form to submit a proposal?
12. On 18 July 2017, Mr. Chebukati wrote to Mr. Chiloba demanding to know how far he had gone to procure an "international company" to supply ballot papers in line with Plenary resolution (*Annex 4: First Memo from Chebukati to the CEO*). Upon reading the memo, he alerted him about the Commission's resolution to procure an alternative company – which could have been a local or international company – and not "an international company". He wrote another memo correcting the language (*Annex 5: Second Memo from Chebukati to the CEO*). There is no doubt in my mind that the company he wanted Mr. Chiloba to follow up with was Ren-form – after all he had given Mr. Chiloba their proposal – and with immediate action, no much work was needed. On 20 July 2017, the Court of Appeal confirmed the contract to Al Ghurair and as a result, Mr. Chebukati's wishes could not be granted.

13. The issue Mr. Chiloba had with Mr. Chebukati's approach on this matter was the lack of transparency and apparent abuse of process. The following questions are important:

- a. Why did he not disclose to the Plenary that while they were considering an alternative company to print ballot papers, he had actually received a proposal from Ren-form?
- b. Why did he write to me immediately he had handed over to me the proposal by Ren-form?
- c. Why did he not support Al Ghurair even after the Court of Appeal decision?

14. This is another clear indication of lack of transparency and integrity on the part of Mr. Chebukati that warrants further inquiry.

Emerging Issues in Minutes of Plenary

15. Mr. Chiloba also mentioned to the Committee in his last appearance that on 2 August 2017, the Commission without any formal notice, convened a meeting at the Bomas of Kenya, in what Mr. Chebukati termed verification of minutes since they joined office. Remember that this was at the peak of election preparations. The meeting took place in the absence of the Commission Secretary as required under Paragraph 9 (1) of the Second Schedule of the IEBC Act. They took over 12 hours re-confirming and confirming plenary minutes. The following day, Mr. Chebukati forwarded to Mr. Chiloba via memo the reconfirmed minutes for signature. Good corporate governance practice demands that the Secretary prepares the minutes signs and forwards them to the Chairman.

16. Although in principle the minutes reflected the resolutions, the discussions as recorded were not a true picture of what transpired. The motivation, in my own view was fear – fear of taking responsibility over critical decisions of the Commission. And that is a leadership question. For example, in KIEMS procurement, it would appear that the commissioners who voted against the KIEMS are the only who had their voices recorded. As a matter of fact, the Chairman gave each commissioner a chance to justify his or her position. In the draft minutes, what each commissioner said is recorded. However, in the final minutes, only dissenting voices were captured. There were cases where the Commission issued express instructions in separate meeting to procure KIEMS services from Safran (earlier meeting) and Smartmatic (lease option), but that was not captured in the final minutes.

17. The questions Mr. Chiloba posed to the Committee to consider are: whether indeed the meeting that took place to confirm the minutes was legal - was there a meeting anyway? What would have been the motivation of the commissioners if not shunning responsibility?

Conclusion

18. In conclusion, Mr. Chiloba wished to reiterate the position he took in an earlier appearance that each audit query has an explanation that is logical and evidence-based. Had Mr. Chiloba participated in the audit process as the Accounting Officer at the time, he had no doubt in his mind that the story would have been different. He never had that opportunity!
19. Narratives have been created on what transpired in the Commission at the time – unfortunately, most of them are not anywhere closer to the truth. In order to dispense justice and for the country to draw constructive lessons, the Committee should really be cautious not to be led by the headlines that have shaped stories around IEBC.
20. On the three issues raised in this brief, there was definitely potential conflict interest in as far as the conduct of Mr Chebukati is concerned and the failure by the other commissioners to hold him to account.
21. Last but not least, the Commission has structural and systemic challenges that ought to be fixed in good time before the next election. Structural challenge relate to the design of the organisation in terms of roles of commissioners and secretariat; full-time or part-time commissioners; and procedure for appointing commissioners. On systemic issues, compromises made in appointment of commissioners and delays in their appointment result in doubt on institutional capabilities, stability and sustainability.

19.0 CHEBUKATI'S RESPONSE TO SUBMISION BY OTRHER WITNESSES

1.0 INTRODUCTION

- 1.1 The National Assembly's Public Accounts Committee (PAC) held proceedings in respect of examination of the issues posed in the Report of the Auditor-General on Financial Statements of

the Independent Electoral and Boundaries Commission for the Year Ended 30th June, 2017, including the Fresh Presidential Election of 26th October, 2017. The Commission as well as its former Commissioners and former employees have variously appeared before the PAC where various deliberations have been held.

- 1.2 It has come to the notice of the Commission that various inaccurate adverse misrepresentations have been reported in the media as being levelled before PAC against the Commission, Commission Chairman and serving Commissioners. We also perused the copies of the Handsard of 29th November, 2018 and 3rd December, 2018 and same issues are confirmed.
- 1.3 The Commission, in exercise of the right of reply, wishes to make the following clarifications:

2.0 COMMISSION GOVERNANCE

- 2.1 The roles of the Commission as outlined in Section 11A(a) of the IEBC Act 2011 are formulation of strategy, policy, and oversight. To exercise these functions, the Commission has created several Committees including Finance and Procurement Committee. The membership to these Committees is agreed upon by all Commissioners, and is influenced by the Commissioners area of competency, professional orientation and experience. Therefore, there is no situation where anyone is forced to become a member of any committee as alleged by the former Commissioners.

The Finance and Procurement Committee was chaired by Amb. Dr. Paul Kurgat and included Ms. Consolata Nkatha Maina and Ms. Margaret Mwachanya as members.

The role of each Committee is to receive, consider and recommend to Plenary various requests from management. The position of the Committee is presented to the Plenary by the respective Chairpersons of the Committees for consideration.

3.0 ROLE OF THE COMMISSION IN PROCUREMENT PROCESS

- 3.1 In exercise of the strategy and policy formulation roles, the Commission approves the Commission Annual Work Plan, MTEP Budget and Annual Procurement Plan.
- 3.2 Implementation of the Annual Work Plan and Annual Procurement Plan is tasked to Secretariat. However, the Commission exercises its oversight role by requiring the Secretariat to present periodic progress implementation reports to Commissioners. These reports are normally processed through the Finance and Procurement Committee, whose resolutions are tabled by the Chairperson of the Committee before Plenary meetings. It is during such briefs that the Commission may address any challenges encountered by the Secretariat during implementation of the Procurement Plan.

- 3.3 If for any reason, the Commission is not satisfied with the implementation process or it comes to the attention of the Commission that there could be malpractices during the implementation process of the Procurement Plan, the Commission may request Internal Audit, Auditor General or other investigation agencies to probe any irregularities and report to the Commission. If the results of audit/investigations establish culpability by any officer, appropriate disciplinary procedures are invoked. This is part of the oversight role of the Commission.
- 3.4 As indicated above, the resolutions of a Committee are presented by the Chairperson of that Committee to Plenary for consideration. In the case of Finance and Procurement Committee, the Chairman was Commission Amb. Dr. Paul Kurgat. Therefore, the Committee’s recommendations were meant to guide Plenary on the way forward.
- 3.5 The Commission on diverse occasions received management papers on progress reports from management on procurement on certain strategic election materials. Ordinarily, these reports would have been channeled through the Finance and Procurement Committee whose membership are Amb.Kurgat (Chairperson), Ms.Consolata Nkatha, and Ms. Margaret Mwanchanya as members. Since this Committee never held meetings prior to the August elections, the Secretariat in view of the urgency of procuring election materials, found it necessary to bring the papers direct to Plenary. The said management papers made requests to Plenary on the way forward in respect to procurement of strategic election material.

In all matters where direct procurement was used Plenary acted on papers presented by management which papers clearly show that such decisions had already been made to so procure by Accounting Officer. The papers were basically for point of information and notification by Plenary. Please refer to Annex 1 at page 7.

4.0 PROCUREMENT OF KENYA INTEGRATED ELECTORAL MANAGEMENT SYSTEM KITS (KIEMS)

- 4.1 It has been alleged that we interfered and had some interests in the purchase of KIEMS Kits. The following chronology of events will make the position clear:

Table 4.1: KIEMS Procurement Milestones

#	Milestone	Date
1.	Approval of Annual Work Plan 2016/2017	4th July,2016
2.	Approval of Procurement Plan 2016/2017	

#	Milestone	Date
3.	International Open Tender Advertisement for Tender No. IEBC/32/2016-2017 for supply, delivery, installation, testing, commissioning and support of KIEMS	16th December,2016 & addendum on 18th January,2017
4.	Pre-Bid Conference	23rd December,2016
5.	Tender opening of Tender No. IEBC/32/2016-2017	2nd January,2017
6.	Appointment of Tender Evaluation Committee for Tender No. IEBC/32/2016-2017	1st February,2017
7.	Application for Review at PPARB	29th December,2016
	Appeal of Review Board	29th December,2016
8.	PPARB issues orders freezing procurement process following application by Ms. Avante International Technology	23rd February,2017
9.	PPARB orders freezing procurement process lifted	9th March,2017
10.	Director Supply Chain Management requests for Interim/Progress Evaluation Report	17th February,2017
11.	Issue of Tender Evaluation Report recommending tender award to Ms. Gemalto Ltd.	21th February,2017
12.	Issue of professional opinion advising against award of Tender No. IEBC/32/2016-2017 to Ms. Gemalto Ltd	20th March,2017
13.	Issue of letter terminating Tender No. IEBC/32/2016-2017	21st March,2017
14.	Approval of direct procurement Tender No.IEBC/39/2016-2017 for supply, delivery, installation, testing, commissioning and support of KIEMS for General Elections.(Approved by CS/CEO)	23rd March,2017
15.	Invitation to Bid & Issuance of Tender Documents	23th March,2017
16.	Opening of tender bid	25th March,2017
17.	Appointment of Tender Evaluation/Negotiation Committee Tender No. IEBC/39/2016-2017	24th March, 2017
18.	Issue of Tender Evaluation/ Negotiation Report for Tender No. IEBC/39/2016-2017	30th March,2017
19.	Issue of Professional Opinion for award of Tender No.IEBC/39/2016-2017 to Ms. Safran Identity & Security	30th March,2017
20.	Notification of Tender award to Ms. Safran Identity & Security	31st March,2017
21.	Acknowledgement of Tender No. IEBC/39/2016-2017 by Ms. Safran Identity & Security	31st March,2017
22.	Signing of Contract for Tender No. IEBC/39/2016-2017	31st March,2017

4.2 From the above, it is clear that most decisions and milestones on the procurement of KIEMS Kits had been done before the Commission assumed office late January, 2017.

When the Commission was informed by the Secretariat on the termination of Tender No. IEBC/32/2016-2017, we proposed that they explore other options including upgrading the existing BVR Kits, Conversion and leasing of the kits from other Election Management Bodies who have used similar kits before. However, the former CEO ignored the recommendations by Plenary yet the time to the General Elections was running out. It is at this juncture that the former CEO advised the Plenary that the only option available was single sourcing from Ms. Safran Identity & Security. It is with this background in mind that the decision of the Plenary Meeting of 31st Mach, 2017 should be viewed. Some Commissioners were disappointed that the former CEO was taking the Commission for a ride and voted against the idea of single sourcing. Others thought that the CEO should be given benefit of doubt and supported the idea given that there was no time for any other decision as the election day was fast approaching.

- 4.3 The termination of Tender No. IEBC/32/2016-2017, which the Evaluation Committee had recommended be awarded to M/s. Gemalto, may not have been done in good faith. An Internal Audit Report on procurement for the period 2016/2017 and issued in December, 2017 concluded that the reasons given for the termination of the tender were spurious and do not hold any water; and could have been used as a pretext to justify single sourcing from M/s. Safran Identity & Security. The report noted that the reason of inadequate budget provision (Budget was Kshs 3.8 Billion) was not tenable because, whereas M/s. Gemalto quoted Kshs. 5.2 Billion (inclusive of Voter Registration module), it was subsequently awarded to M/s. Safran Identity & Security at Kshs.4.19 Billion (Exclusive of Voter Registration module). If M/s. Gemalto Ltd had been given an opportunity for negotiation given the budget provision and leaving out voter registration module, the price difference may not have been significant. Section 131(d) of Public Procurement and Asset Disposal Act 2015 provides for negotiation where the lowest evaluated price is in excess of available budget. The provision for negotiation was also agreed upon as resolution No. 7.1 of the pre-bid Conference of 23rd December, 2016. The fact that this provision was not invoked casts aspersions on integrity of the procurement process.
- 4.4 It should be noted that the above process was undertaken before the current Commission assumed office.
- 4.5 It is also important to note that M/s. Safran Identity & Security participated in the initial tender but was disqualified at the technical evaluation stage because it did not meet the criteria of minimum years in operation. The first mandatory requirement was that the bidder must submit a copy of the incorporation certificate valid for the last ten (10) years. M/s. Safran Identity & Security submitted incorporation certificate of nine years (9), and thus was rejected by the Evaluation Committee. This condition was subsequently relaxed during single sourcing to read seven (7) years thus M/s. Safran Identity & Security qualify.

4.5 The above process serves to show that even by the time the matter was brought before Plenary, the outcome was already predetermined in favor Ms. Ms. Safran Identity & Security and the Commissioners had little options at that stage.

5.0 THE INTERNAL AUDIT PROCESS

- 5.1 As for the allegations on targeted investigations tailored to oust the former CEO, we wish to point out that this was not the first time that the Commission requested Internal Audit to conduct specific investigations. There are other instances where the Commission had received allegations of malpractices leveled against Commission officers, for which Internal Audit was directed to verify. The findings sometimes cleared the officers against the allegations while other allegations are confirmed and appropriate disciplinary action taken. Thus, saying that the former CEO was unfairly targeted is misleading. The decision to conduct audit of major procurement for the 2017 General Elections and the Fresh Presidential Elections was arrived at during the Plenary meeting of 16th March, 2018 where all the Commissioners and former CEO were present. The Interim Internal Audit Report was presented to Plenary on 6th April, 2018. When the findings of the interim audit report pointed to possible culpability by the former CEO, it was decided that he proceeds on leave to facilitate conclusion of the audit without possible interference. This is the point at which there was resistance from some Commissioners on the decision to request the former CEO to step aside. What raised even more suspicion is the fact that the Commissioners who resisted, and eventually resigned, as a result of the decision to conduct the audit were all members of the Finance and Procurement Committee. It would appear they knew something about the procurement process that they did not want audited.
- 5.2 Ms. Margaret Mwachanya has contended that part of the reason she resigned is because of the decision to undertake internal audit of the procurement process for the General Election material and Fresh Presidential Elections; and the questions given by the Chairman which were to form the basis of the audit. We wish to state that it is not the correct position. Ms Margaret Mwachanya was not in the said Plenary of 6th April, where the decision to send the former CEO compulsory leave was made. She was attending training in Dubai for the award of an “honorary Doctorate” (refer to Annex 2(a,b&c) for evidence that she was out of the Country at that time). Thus, she could not have disagreed with the Chairman as she was not at the meeting. Therefore, she misled the Committee that she was at the meeting while she was actually out of the country.
- 5.3 It should also be noted that the Directorate of Audit, Risk and Compliance operates with an Annual Risk-Based Work Plan which is approved by the Audit and Risk Committee. The Work Plan prioritizes the areas to be audited each financial year based on their risk rating. Audit of procurement is always done every year because of the risk it carries. Therefore, the audit of procurement was going to be done anyway even without prompting by the Commission or the Chairman. As indicated in paragraph 4.3 to 4.6 below, the first phase of procurement of KIEMS

Kits had already been audited between April to December, 2016, and the audit highlighted various malpractices. It should be noted that the Audit and Risk Committee is chaired by, and comprises of external independent members, with only one Commissioner representing the Commission. Therefore, the Commission cannot influence its operations.

6.0 FRONTING FOR SUPPLIERS

6.1 On the claims that the Chairman and some Commissioners were fronting for specific vendors, we wish to clarify that this is not true. What is true is that supplier/vendors are in the business of promoting their products/services to whoever they think is influential in an organization. Therefore, by virtue of their positions, the Chairman and the Commissioners, are targets of these promotions; and thus end up receiving a lot of unsolicited visits and write-ups by prospective vendors on what they can supply to the Commission. It is in this context that the Chairman and some Commissioners received solicitations from various vendors whom they have not known before. We wish to state that at no time did the Chairman or Commissioners front any vendor or influence the procurement process. We routinely forwarded any enquiries to the CEO. Please refer to Annex 3,4,5,6,7 and 8 for some of such enquiries). Any evidence to the contrary should be made available rather than issuing careless unsubstantiated allegations.

6.2 The contention by the CEO that he was somehow directed to initiate procurement form from Ms. Smartmatics as evidenced by what he referred to as handwritten minute notes is not correct. This is because the handwritten minutes were not in the custody of the former CEO. They were kept under lock and key by Ms Decimah M'Mayi, the officer taking minutes at the time. Therefore, whatever he relied on is not the official position of the Commission, and the actual handwritten minutes on this matter are available for inspection.

7.0 PROCUREMENT OF LEGAL SERVICES

7.1 Procurement of legal services is usually done through prequalification of suppliers. Once the prospective firms submit their tenders, they are evaluated and those meeting the requirements are placed on the list of prequalified suppliers to serve for a specific period. The legal firm of Ms. Cootow & Associates Advocates was registered to provide legal services for the financial periods 2015/2016,2016/2017&2017/2018. The process of prequalification and registration is done by Secretariat. Work allocation to specific registered law firms, is done by the Director Legal and Public in consultation with the Chief Executive Officer (CEO).

From the foregoing, it is clear that the Chairman had not joined the Commission when the law firm, Ms. Cootow & Associates Advocates, was prequalified and registered in the Commission's list of prequalified suppliers in 2015. Therefore, the Chairman had no role

in its shortlisting and registration. The Chairman also had no role in the allocation of work to the law firm after joining the Commission.

It should be noted that, in keeping with good corporate governance and as required in the Chapter 10 of Constitution of Kenya 2010, the Chairman resigned as a partner of the law firm Ms. Cootow & Associates Advocates immediately he was appointed as the Chairman of the Commission. This was to avoid any conflict of interest. Please refer to Annexes 9, 10 and 11 for copies of the resignation letter and the affidavit affirming the same.

8.0 CONFIRMATION OF PLENARY MINUTES AT THE BOMAS OF KENYA

8.1 It is true that the Commission convened a meeting on the 2nd of August, 2017 at Bomas of Kenya to confirm minutes of some meetings. The officer who took those Plenary minutes, Ms. Decimah M'Mayi, had confided in the Chairman that there were variances between hand written minutes and the typed minutes presented to Plenary for confirmation. The procedure was for the officer to take minutes and type them forward the soft copy to the CEO for perusal and thereafter printing of fair copies for presentation to Plenary for confirmation. The observation of the officer was that in many instances the CEO made significant changes to minutes such that they were at variance with the actual resolutions of Plenary. This position was also noted by Mr. Marjan Hussein Marjan, who at times took minutes when Ms. M'Mayi was not available. He confirmed that the CEO made changes to the minutes whenever a soft copy was forwarded to him.

It is therefore in light of these issues that the Commission on 2nd August, 2017 convened a meeting in Bomas of Kenya but the CEO declined to attend. He had been keeping minutes of meetings without forwarding them to Plenary for confirmation. The Commissioners went through the minutes against the official handwritten notes and upon being satisfied forwarded them to the CEO for signature and safe custody.

8.2 It should be noted that when the Commission came into office they realized many of the minutes of the previous Commission had never been signed. Therefore, the Commission was determined to put an end to this culture which is against good corporate governance.

Response to Further Submission by Mr. Ezra Chiloba is attached – Annex 2.

20.0 MILCAH CHEBOSIS SITATI

Ms. Milcah Chebosis Sitati, IEBC Manager stated that the Public Accounts Committee (PAC) in a letter dated 30th November, 2018 invited her to appear before it on 3rd December, 2018 at 3.00pm to provide clarifications on the Kenya National Office audit report.

She stated that she presented herself before the Committee and during the verbal interview the Committee directed that she presents a written submission in regard to the Audit report while specifically shedding light on the following matters that had risen in the course of the discussions:

- a) The structure of the Supply Chain functions at the Commission putting emphasis on the role of the Manager Warehouse and Logistics.
- b) The difficulty working environment I experienced during the procurement for the 2017 General Elections and thereafter Fresh Presidential Election.
- c) An overview of Direct Procurement in IEBC.
- d) The role of Commissioners in Elections Procurement.

The PAC sought her clarifications on the following basis;

- i) IEBC on making clarifications on the responses to the audit queries made adverse allegations on her role in the procurement process;
- ii) Gaps had been realized in the roles and responsibilities at the IEBC in the course of clarifying the audit responses.

The Committee noted and acknowledged that;

- i) Although the invitation letter had referred to her as the Ag. Director Supply Chain Management, her substantive position at the Commission is Procurement Manager. The current Ag. Director Supply Chain Management is Mr. Benard Nyachieo since her acting period lapsed on 8th June, 2018.
- ii) She noted that she was not involved in the responses submitted by the IEBC since she was currently on compulsory leave following the Public Service circular No. OP/CAB.39/1A of 4th June, 2018. She cannot access the reference documents for the audit queries raised since the circular had directed no access to the office until cleared.
- iii) She has been away for the Vetting process since 18th June 2018 to date and therefore lack documentation to refer to comprehensively, she made the clarifications based on what er memory could recall then.
- iv) She had gone through the vetting process but was informed by the National Treasury through a follow up call that her clearance was pending awaiting conclusion of the audit report.

20.1.My Designation at the IEBC

She noted that she joined the Commission in November 2012 as a Senior Procurement Officer. In 2nd April, 2015 she was retrospectively appointed as Acting Procurement Manager with effect from 2nd September, 2014. This was after the Procurement Manager; Mr. Benard Nyachieo was deployed to the Directorate of Voter Registration and Electoral Operations as the Manager Logistics to replaced Mr. Geoffrey Lemiso reporting to the Director Voter Registration and Electoral Operations.

In September, 2014 the IEBC made an open National advertisement for 7 positions of senior Management staff including the Position of Procurement Manager. In the same advert a new position of the Manager Warehousing was advertised.

In April 2015 I was designated the Procurement Manager after competitive recruitment, the position which I hold to date

In 2016, the Commission advertised twice for the position of the Director Supply Chain Management after approval by Plenary to have the Procurement Function upgraded to a Directorate level but the recruitment was never concluded.

In July 2016, the Director of Supply Chain Management Mr. Lawy Aura was seconded from the National Treasury upon request by the Commission.

In June 2017 the Director Supply Chain Management Mr. Lawy Aura was deployed back to the National Treasury.

On 8th June 2017 she was appointed as Ag. Director Supply Chain Management for a period of six months. The CEO forwarded handing over report by Mr. Lawy Aura on 14th June, 2017.

The Commission advertised the position of the Director Supply Chain Management on 13th April, 2018. Recruitment has not been concluded. Her deployment on an acting capacity as the Ag. Director Supply Chain Management (Ag. DSCM) was later retrospectively extended to 8th June, 2018.

By the time she was leaving for compulsory leave as directed by the Ag. CEO and the Commissioners my acting tenure had lapsed and therefore was being sent on compulsory leave as the Procurement Manager. The substantive office that she holds at the IEBC to date is MANAGER PROCUREMENT.

The position of the Director Supply Chain Management is currently vacant as recruitment was not concluded but Mr. Bernard Nyachieo has been appointed as the Ag. Director Supply Chain Management.

The current IEBC structure identifies the Director Supply Chain Management and not Ag. Director Supply Chain Management as the Head of the Procurement function.

20.2 Further Clarifications to the KENAO Audit Queries

20.2.1 Purchase of Kenya Integrated Election Management Systems (KIEMS)

The procurement manager stated that it was a direct procurement. The Procurement Unit received a request from the user department after approval by the Accounting Officer. The Procurement unit was not involved in identification of the supplier(s) for all Election Technologies acquired under direct procurement as the vendors had already been indicated in the Procurement requisitions.

She noted that the procurement process of KIEMS was under the tenure of Mr. Lawy Aura as the Director Supply Chain Management and Substantive Head of the Procurement Unit was appointed much later as the Secretary of the Inspection and Acceptance Committee which she declined due to the following reasons:

- i) The Director Supply Chain Management rejected my verbal professional advice that due to the complexity of the contract it was prudent to set up a Contract Implementation Committee Team (CIT) pursuant to Section 151 of the PPADA, 2015 rather than an Inspection and Acceptance Committee.
- ii) This was informed by the fact that the Commission was not acquiring gadget but a complete system. Inspection and Acceptance by the would have been done progressively by the CIT on different milestones to ensure complete acquisition of a system that not only fully met the Technical Specifications but had viability when tested on its performance.
- iii) Although the appointment letter was dated 7th April, 2017 it was only sent to my email on 11th April 2017 and I responded conveying my apologies when I saw it on 12th April, 2017 while at the Central Nyanza Regional Office where I had gone to prepare specifications of the General Elections services having been earlier assigned by the Accounting Officer.
- iv) It was contradictory that appointment letter had indicated that the Committee was required to submit the Inspection and Acceptance report on 10th April, 2017, yet the letter was emailed on 11th April, 2017. Any mandates executed on this letter after 10th April, 2017 would have been regarded retrospective contravening Section 69(2) of the PPADA, 2015.
- v) Key to note is that by the time I had left the office no goods had been delivered, neither was there any further communication on the anticipated delivery of the goods.
- vi) The precedence of the previous experience had been that a member of the procurement unit would be replaced with a colleague to facilitate progress of work in working committees.

- vii) However when I came back to the office, I made a follow up with the members of that appointed committee in my office immediately where they also acknowledged having received no further communication on adjustments of the timelines neither had they received any documentation for the exercise. We agreed that the following documents be obtained first;
 - a) The Procurement Requisition
 - b) The Technical specifications (Terms of Reference)
 - c) The Blank Tender Document
 - d) The Bid document submitted by the supplier
 - e) The Evaluation or Negotiation reports
 - f) The Professional Opinion
 - g) Signed Contract
- viii) She also mentioned that she went to request for these documents from the Director Supply Chain Management (DSCM) Mr. Aura, who informed her that the Procurement Officer Mr. James Kahonga was the only one who knew where the documents were. But on inquiry James Kahonga declined to have any documents as they had been submitted to the DSCM.
- ix) She followed up with an email and waited for the documents only to receive a show cause letter (dated 13th April 2017) on 18th April, 2017 at 12.44pm. She formally learnt from the show cause letter that the goods arrived on 13th April, 2017.
- x) In her response to the show cause, she however recommended/advised that the Inspection and Acceptance for Tender No. IEBC/39/2016-2017: Supply, Delivery, Installation, Testing, Commissioning and Support of the Kenya Integrated Elections Management System (KIEMS) to be carried out as follows;
 - a) The Contract Implementation Committee be appointed to carry out the inspection pursuant to Section 151 of the PPADA, 2015 and NOT the Inspection and Acceptance Committee since the procurement was complex and specialized in nature;
 - b) The user department should issue a certificate pursuant to Section 150(3) of the PPADA, 2015
 - c) The Commission to seek guidance from PPRA on interpretation of the inspection process for KIEMS being a complex contract if they didn't agree with my proposal
 - d) All the provisions required for inspection including testing of all the equipment in line with the Terms of Reference and the sample submitted to ascertain its functionality should be availed
 - e) Since the dates to submit the report Inspection and Acceptance on the appointment letter (10th March 2017) was surpassed by the delivery dated of the equipment (13th April, 2017), a fresh appointment would have been prudent to avoid contravention of the process. The appointment may consider a Contract Implementation Team rather than an Inspection and Acceptance committee due to the complexity of the contract.
 - f) However I sought the guidance and advice of the Accounting Officer on the way forward whether to continue with the Inspection and Acceptance Committee as appointed.

- xi) She stated that she did not receive any feedback from the show cause to date but was excluded from the major preceding of the procurement function since the Director of Supply Chain Management chose to work directly with other officers junior to me and sidelined me in the Directorate/departmental operations.
- xii) She only later got in contact with the documentation for the KIEMS procurement when she was tasked to engage the vendor M/s Safran Identity & Security for the provision of election technology support for the fresh presidential election of the KIEMS after Mr. Lawy Aura left the Commission.

20.3 Fresh Presidential Election: Contract for Tender No.IEBC/34/2017-2018: provision of election technology support for the fresh presidential election of the KIEMS.

20.3.1 Initiation of the procurement

She stated that:

- a) DICT requisitioned the engagement of Safran Identity and Security (SIS) for the Fresh Presidential election technology support.
- b) There was an existing contract with SIS for the sale of hardware, services and licenses of software for KIEMS
- c) The user department recommended the use of the existing contract to provide technology support for the FPE
- d) The Commission had less than 35 days to the FPE date; 26th October, 2017 which could not be changed as would lead to a constitutional crisis
- e) There was limited time to use any other procurement method except Direct Procurement pursuant to Section 103(3(d) of the PPADA, 2015 under specially permitted pursuant to Section 57(1-2)(a) of the PFMA 2017
- f) The National Treasury approved the Commission's for the use of specially permitted procedure under direct procurement.

20.3.2 Recommendation for award

She stated that:

The direct procurement procedure was followed as prescribed in the PPADA, 2015 as there was an existing contract whose warranty period was to expire in March 2018.

The Accounting Officer approved the recommendation of the Evaluation Committee for the award of the tender for the provision of Election Technology Support for FPE of the KIEMS to SIS.

20.4. Supply, Delivery, Implementation and Commissioning of Network Transmission

The Commission contracted 3 major Mobile Network Operators (MNOs) to transmit election results for a period of 3 years under a framework contract on an “as and when required” basis. The quantities procured were as per the user department’s requisition. The deliveries were based on the framework contract.

20.4.1 Procurement of Data Centre and Backup Infrastructure (Cloud Services)

The Procurement Unit sought approval to use Direct Procurement based on the justifications provided by the user department.

The technical specifications were prepared by the user department. The initial effort by the Procurement Unit to have an inclusive specification committee for global information was not supported.

The Implementation of all ICT contracts rested with the user department pursuant to Section 150(3) of the PPADA, 2015 and this was brought to the attention of the user department. Procurement Unit was not privy to the termination of the IBM contract

The aspect validating the termination process of a contract is not provided for in the public procurement procedure. The user department pursuant to Section 150(3) provided implementation reports for purposes of ascertaining delivery of goods and services

20.4.2 Purchase of Oracle Database and Security Solution

The Evaluation Committee for the Supply, Delivery, Installation, Testing, Commissioning and Support of KIEMS had noted that Oracle License is a standard product of the Oracle Company. The Evaluation report indicated that the evaluation criterion was not clear and thus the item was never evaluated. The Committee recommended that the Oracle Licenses be re-tendered as it was a new requirement that was not part of the original open tender number IEBC/32/2016-2017

The Procurement Unit was not privy on how the vendor was identified but the requisition from the user department had indicated that the Licenses be acquired directly from Oracle Technology Systems Kenya Limited.

The Implementation of all ICT contracts rested with the user department pursuant to Section 150(3) of the PPADA, 2015 and this was brought to the attention of the user department

The separation/segregation of ICT services on the basis of security denied the Commission the Total Cost of Ownership and economies of scale thus stand-alone contracts that were meant to be integrated.

20.4.3 Procurement of Co-location Services for Data Centre and Disaster Recovery Site

The Procurement Manager was not involved in the procurement of the Co-location services and is not able to remember the procurement preceding to offer clarifications

20.5 Supply and Delivery of Ballot Papers for Elections, Statutory Declaration Forms and the Register of Voters

She stated that the documents being requested for were available in the Commission. Payment was made through Letter of Credit that was managed by the finance function and part of the payment was through RTGS. They should issue a credit note to cancel the overpayment.

20.6 Supply and Delivery of Ballot Boxes for General Elections

There was no change of contract price since the FPE procurement was a separate tendering process with different technical specifications, requisition, tender number, procurement method and contract number. During the open Tender M/s Belgon Engineering was the only technically successful firm.

The contract for the KES. 1,850 was through open tender for the General Elections which was advertised in September, 2016 and awarded in January, 2017 seven months to the General Elections for the supply of 60 litre transparent ballot boxes with white lids

The proposal for KES. 2,250 had two options:

- a) the counter offer to introduce 45litre ballot boxes that did not meet the technical specifications. The supplier had proposed to manufacture the 45ltr and 60ltr boxes concurrently to meet timelines.
- b) the supplier producing some of the ballot boxes locally based on the production capacity of one mould and others in China but the Commission meets the freight charges.
- c) This tender was cancelled as the 45ltr capacity was not within the range of the dimensions for the specifications of the ballot boxes. The Commission in all its tenders had applied the strategy of Total Cost of Ownership and didn't not find it prudent getting involved in the aspects of delivery during acquisition of election materials as an effort of mitigating risks.
- d) The proposal was therefore not accepted by the Commission. This offer was rejected by the Commission for reasons of standardization and risk mitigation.

The Supplier had agreed to start mobilization for production immediately he receives the notification of award.

The KES. 2,500 price was for the supply and delivery of 60 litre transparent ballot boxes with charcoal grey lids whereby the supplier had informed the following;

- a) Procurement of an additional mould to be air lifted;
- b) Procurement of additional materials which some would be airlifted;
- c) Overtime working hours for factory staff

The indecisiveness or rather delayed decision making was due to the concerned obligation of the Project team and the Commission in terms of deciding the Technical Specifications of the Ballot Box for FPE. The Commission had procured ballot boxes at KES. 2500 in 2013 General Elections.

20.7 Supply and Delivery of Badges

She stated that:

The function of logistics in the Commission is designated under the Directorate of Voter Registration and Electoral Operations previously held by Mr. Geoffrey Lemiso, upon which after he left the Commission Mr. Benard Nyachieo was transferred from his position as the Procurement Manager to the Warehouse and Logistics Manager a position he substantively still holds to date.

The documents for all non-strategic General Election Materials had been prepared with a provision to have the respective suppliers distribute the materials to the Commission's 17 regional Warehouses after inspection and acceptance at the Main Warehouse. This was supposed to have been catered for in the cost (price) of the item.

The distribution list was also part of the tender document and was not only shared by the user department, but also to the Inspection and Acceptance Committee and the Warehouse and Logistics Manager. The signed contract also indicated the point of delivery in the special conditions of the contract.

Due to the massive number quantities, the inspection of the badges just like for all other materials was done through sampling and the supplier cleared for distribution to the regional warehouses.

The action of the Warehouse Manager erroneously receiving part of the badges (the 550,381 badges and not the second delivery of 712,977) cannot be inadvertently be considered as a failure on the procurement unit since the Warehouse Manager doubles up as the Logistics Manager whose core function was NOT only attending to stores receipts but also manage distribution of the materials. For this reason it defeats logic on the failure to separate the materials to be directly delivered by the supplier from those that were to be delivered by the Commission under the contracted M/s Postal Corporation of Kenya.

The Manager Warehouse and Logistics worked closely with the Inspection and Acceptance Committee, the UNDP consultant and the user department, having been shared the list of all materials and nothing would have stopped the Warehouse Manager and Logistics Manager to ascertain and source for any information before making hasty errors.

In view of the above the Procurement Unit was limited in preventing the anomaly hereby realized. The Procurement Unit was not aware that the badges had been received in the Main Warehouse. I am not aware of the purported writing to the Supplier in June 2018.

When was the telephone call made by the Warehouse and logistics Manager?????? My understanding as a Procurement Professional calls for all procurement matters to be communicated through written because this are Financial Management issues and cannot be casually treated as alleged by the Warehouse and Logistics Manager. If for sure the matter would have been brought to my attention I would have insisted that its put in written and nothing would have stopped me from informing and advising management to seek a remedy.

20.8 Supply of Gas Lamp Mantles

I am not able to remember this procurement. Given the opportunity to access the documents I will be able to give my view and clarify accordingly.

20.9 Supply and Delivery of Security Seals

a) Procurement of Security Seals from M/s Far East Connection Limited

The Commission had signed a contract through Open Tender with M/s Far East Connection Limited for the supply and delivery **Three Million Six Hundred and Ninety Six (3,696,000)** Security Seals.

The Commission had made its need assessment based on Forty Four Thousand (44,000) projected polling stations and a contingency of 5%. The actual number of polling station was 40,883 and therefore the Two Million, Five Hundred and seventy Five, Six Hundred and Twenty – Nine(2,575,629=(40883 polling stations X 6 ballot boxes X 10 seals) + (5% of the total seals)). The supplier made a partial delivery of Two Million, One Thousand Six Hundred seals (2, 0001, 600) resulting to a deficit of security seals for the 2017 General Elections.

The Manager Warehouse & Logistics in a Memo dated 5th January, 2018and received o 8th January, 2018 notified the Procurement Unit on the delivery of the balance of 1,694,400 seals to the Warehouse.

The procurement unit sought the various clarifications from the Manager Warehouse & Logistics vide a Memo dated 8th January, 2018.

The Manager Warehouse & Logistics had not provided the sought clarification for an informed management decision on inspection and acceptance.

The delivery notes, invoices, inspection report and S13 for the seals supplied by M/s Far East had not been submitted to the Procurement Unit by the Manager Warehouse and logistics for processing payment.

In view of the above the Procurement Unit informed the office of the DCEO (Ag. CEO).

b) Procurement of Security Seals from M/s Ramaas Limited

She stated that:

Following the partial delivery of Security seals, the user department (Directorate of Voter Registration and Education) requisitioned for the procurement of security seals to carter the deficit resulting from the partial delivery made by M/s Far East Connection Limited

The user department informed that there was an urgent need for approximately 500,000 security seals required for the 2017 General Elections. The Commission sought approval from the National Treasury to use specially permitted procedure.

The National Treasury did not responded immediately. There were less than Four days to the 8th August, 2017 General Elections. The seals were required to be distributed within all the 290 constituencies in country.

The Procurement Unit made several efforts to source for alternative suppliers through email and telephone conversation for purposes of engaging them for the procurement process within the limited time. This entailed even contacting suppliers of other electoral materials and seeking assistance from other Electoral Management Bodies like South Africa Electoral Commission. M/s Ramaas was identified as being able to have had the off-the shelf metal security seals.

The Procurement Unit therefore engaged M/s Ramaas Ltd through direct procurement method as the only viable option under Section 103(2) (b) of PPAD Act 2015, since the minimum time for Open Tendering and restricted method was not practical to meet the set date for the General Elections.

The National Treasury however in their response dated 7th August, 2017 had recommended the use of an alternative procurement method prescribed under Section 92 of the PPADA, 2015 and more so retrospective approvals pursuant to Section 69(1)(2) and (3).

Section 103(2) (b) of PPAD Act 2015 applied by the Commission “..... ***Or there is an urgent need for goods, works or services and the engaging in tendering proceedings or any other method of procurement would therefore be impractical, provide that the circumstances giving***

rise to the urgency were neither foreseeable by the procuring entity nor the result of dilatory contact on its part”

The failure by M/s Far East Limited to supply fully the required seals was not foreseeable nor due to the dilatory contact of the Commission but the need realized then was urgent.

c) The Price of KES. 49.00 per seal

The specifications for the initial order made through open tender was for customized plastic seals that required manufacturing prior to the supply. This are not off-the shelf seals.

Due to the limited time the Commission had no alternative but to acquire off-the shelf seals that are regularly used and readily available. The user department therefore changed the specifications from plastic to wire seals (metal) that are readily available.

Therefore there was no loss of KES. 21,850,000 as the specifications were varied.

d) Excess procurement of 500,000 Security seals

The clarification on quantities is as shown in the table below;

S/ No	Item Description	Quantity
1	Original Contract projected quantities	3,696,000
2	Delivered	2,001,600
3	Deficit on original contract	1,694,400
	Actual requirement for 40,883 polling stations	2,575,629
	Deficit on requirement	574,029
4	Additional order	500,000
5	Total Seal Procured	2,501,600

Although the user department in their Memo dated 2nd August, 2017 requested for procurement of 1,600,000 seals based on the projected quantities only 500,000 were procured based on the actual requirement then. There was neither excess procurement of 500,000 seals nor loss of KES. 24,500,000. The prices and delivery times offered from bidders contacted are as shown below:

S/ No	Supplier	Seal Type	Lead Time	Delivery Date	Qty	Unit Price (KES)	Total Price(KES)
1.	Precise Industrial	Plastic Green	6 days	8/8/2018	500,000	Didn't quote	-
2.	Integrity Control Systems (Pty)Ltd – South Africa	Plastic with metal insert (Blue and yellow)	10 weeks	Mid October, 2017 JKIA	500,000	22.78	6,836,335
3.	Emptor International (HK) Ltd-China	Plastic Green	16 days	19/8/2017 JKIA	500,000	37.94	18,973,424
		Plastic assorted colours	3 days	6/8/2018 JKIA	500,000	38.50	19,260,176
4.	Ramaas Ltd	Assorted plastic with metal insert	1 day	4/8/2018 To regional warehouses	500,000	49	24,500,000

20.10 Procurement of Transport Services

The Counties were clustered into regions where the Supply Chain Assistant is stationed and Opening and Evaluation of the bids was carried out at the same location, where they were accommodated.

20.11 Failure to Provide performance security

She stated that:

Contract preparation and signing in the Commission is the responsibility of the Directorate of Legal and Public Affairs and the Accounting Officer, the Procurement Unit is only required to provide the bid documents, Evaluation report and the copy Professional Opinion.

The Procurement Unit incorporates the provision of performance security as provided in the standard tender document used for sourcing bids.

Management may need to incorporate the Procurement Unit in the process of contract preparation in future

20.12 General Overview of the Audit report

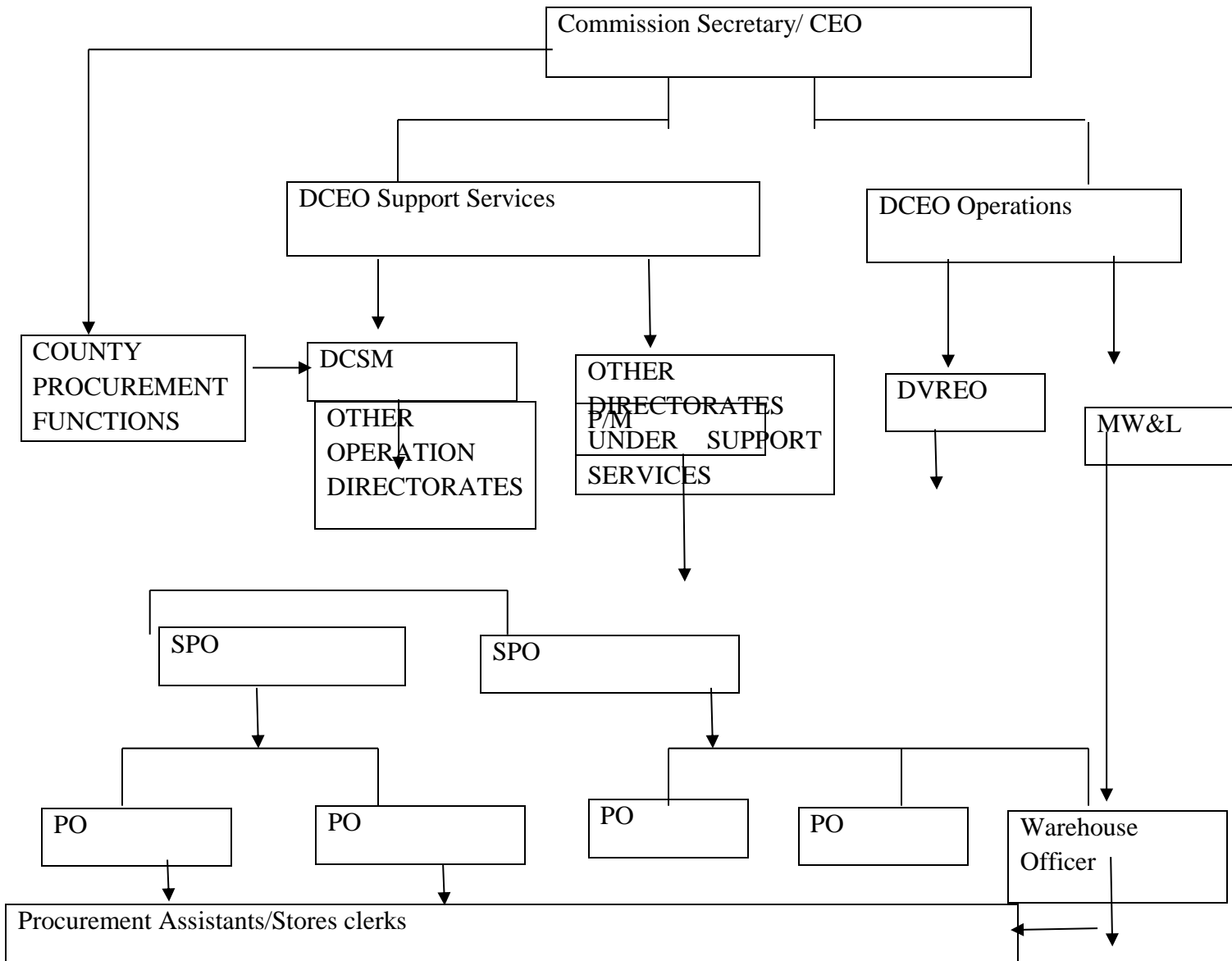
The compulsory leave denied me the opportunity to participate to the audit query responses considering that I bear a wide range of not only institutional memory but the technical capability in the conceptualization of the procurement function at the IEBC. Her responsibility as the Manager Procurement and the period she has worked at the Commission's critical department in the complete electoral cycle could not have been underestimated in participating in the audit process.

The standard professional and objective approach would have been consultation with all the key players in the Commission’s procurement function to reflect a corporate comprehensive response that would guide the esteemed Parliamentary Committee that looked forward for correct and truthful information for a constructive recommendation and way forward.

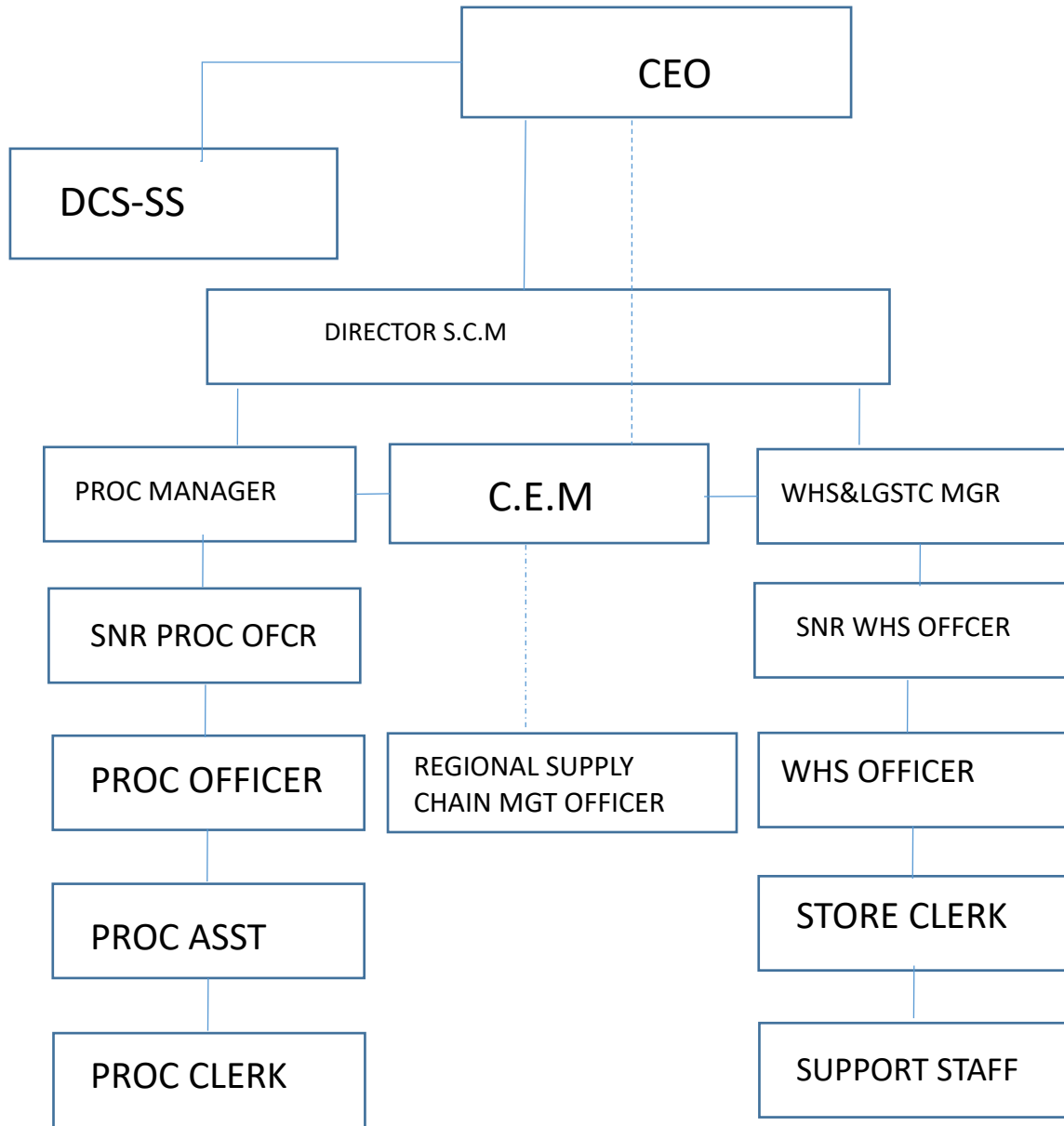
I am looking forward to forming a team with my colleagues in all matters that will require my attention once the vetting process is concluded, because I believe that the management of the 2017 General Elections and thereafter the Fresh Presidential elections had good intent and benevolence.

21.0 The IEBC Procurement Structure

21.1 The Current Structure of the IEBC Procurement Function is as illustrated below:



Proposed Ideal Supply Chain Management IEBC Structure



21.2 Manager Warehouse and Logistics

She stated that:

Although Mr. Benard Nyachieo is referred to as the Manager Warehouse and Logistics (MW&L) it's not clear whether he reports to the Director Supply Chain Management.

During the period under which she was Ag. DSCM she neither approved his leave nor appraised him. They always worked as co-departments.

In the period under which the Commission developed the performance appraisal tool he declined to belong to the Directorate of Supply Chain Management.

Although he is designated as the Manager Warehouse and Logistics in the Commission's structure there is no such position, what exists is Manager Logistics since the Manager Warehouse position was never filled.

22.0. Difficult Working Environment

She stated that:

The period she had worked at the Commission had been characterized with difficult moments that arose due to my professional approach in handling matters procurement.

The core mandate of any procurement professional not only lies in acquisition of goods and services but more critical in making sure that this is done within the provision of the legal framework established under the public procurement procedure.

After the 2013 General election and the whole experience encountered in the procurement function called for strict adherence to the public procurement processes. This was at many times looked at as rigidity and bureaucracy leading to the belief that compliance to the procurement law was difficult.

The key allegation was delays arising from following the process and management seemed to belief this narrative.

At one point a UNDP consultant had been deployed to the Procurement Unit but they failed to work together and he had to go as he didn't believe only in the Public Procurement laws but didn't have knowledge of the Procurement law and regulations. This led to a lot of difference in opinion and procedure most of the time as he always advocated for international practices rather other than Kenyan procurement laws

When we began preparation for the 2017 General Elections after the development and approval of the Multi-Year Procurement Plans – 2016/2017-2017-2018, she insisted on the appointment of Specification Committees that incorporated other public entities for support of comprehensive specifications that entailed Total Cost of Ownership to avoid fragmented procurements that were not only costly but inefficient.

She had advised training on procurement processes for Commission staff and the approach of Framework contracts on “as and when required “basis for major election goods and services to avoid reactive procurements.

The situation got worse with Management when she proposed the invitation of IT officials from the Ministry of ICT, the ICT Authority (ICTA) and the Kenya Bureau of Standards after I had received the initial requisitions for the procurement of ICT items.

The DCSS Mr. Marjan H Marjan my immediate supervision disregarded my advice and action but when he had gone to Naivasha for a certain workshop she managed to get the approvals from the Accounting Officer – Mr. Ezra Chiloba.

We only got officers from ICTA at the start and when they looked at the specifications they found out that the specifications had identified a certain model and therefore lacked the universal outlook that would promote competition. There was slight argument between the team leader and Mr. Marjan. The ICTA staff left the process in protest.

During this period there was a bitter relationship between me and the DCSS Mr. Marjan whereby most of the time she would find difficult working with him and therefore sought the intervention of the Accounting Officer. She applied for two weeks annual leave but instead she was sent on 30 days compulsory leave without reasons.

She stated that she objected the compulsory leave and sought the intervention of the Commissioner Mohamed Alawi in charge of Procurement and Finance and when he didn't seem to assist me she called the Chairman Justice and Legal Committee Chair who intervened and was verbally recalled back by the CEO. She has never received explanation for the compulsory leave to date.

It never took long before the Director of Supply Chain Management was seconded from the National Treasury. She handed over to him and shortly after he settled he chose to work directly with my juniors alienating me from processes. He disregarded all my attempts to make contribution towards the operations of the procurement function.

She was given a show cause later on allegations that were not true which when she sought the intervention of Commissioner Kurgat who was in charge of procurement and Commissioner Boya

Molu in charge of the Human Recourse the Accounting Officer said he was misled by the DCEO SS Mr. Marjan and the DSCM Mr. Aura.

Several times DCEO SS Mr. Marjan had instituted audits on false allegations but the audit reports didn't find her culpable or liable.

She always believed that sticking to procedure led to the difficult working environment at the Commission.

The management of the stores had huddles of the designated Warehouse and Logistics Manager's decision not to report to me but choosing to report to the Directorate of Voter Registration.

When she took over the Directorate of Supply Chain Management on 14th June, 2017 as the Ag. DSCM there was so much pressure and reactive proposals based on the state of affairs and last minute preparation for the General Election. Balancing the negative impression created with the long alienation from the department functions with the several pending issues that called for my attention to make them right was stressful considering that some of the staff and management were looking at me as an "outsider".

During the Fresh Presidential procurement the Commission had constituted a Project Team headed by the DCEO SS Mr. Marjan reporting to Plenary. The team gave unprofessional and verbal directives which lead to delayed decision making as most time was wasted in meetings to persuade them to comply with the procurement laws. The team as constituted is not defined in the procurement law and therefore responsibility and accountability gaps were eminent.

23 Direct Procurement at the IEBC

The IEBC was prepared that the country would be holding the General Election on August 8, 2017. As per the Elections Operations Plan, the Commission was to secure reputable firms with capacity to supply electoral goods and services as early as 2016. Given the unpredictable nature of elections beyond the General Election, framework contracts were deemed suitable.

The phenomenon of Direct Procurement at the IEBC was occasioned by two incidences;

- a) The Commission encountered legal challenges in the procurement process. These lead to reduction in the time to the periods to the General Election making it difficult to identify supplier for some key items using open tender method. Limited time to the General Elections made these procurements really urgent in consideration that some of these items were major for a credible free and fair election.
- b) The General Election in Kenya is a constitutional requirement. The process of procurement of goods and services for elections should be timely. If delayed due to external interventions it becomes an urgent need which if not met may lead an election that is not

be credible. The 2017 General Elections would have been an imminent threat to public welfare, safety and damage to property if the goods and services were not procured. The 8th August, 2017 General Election date was ultimate and could not be changed.

- c) There was limited time left to the 8th August, 2017 such that engaging in tendering proceedings or other procurement methods would be impracticable. Direct procurement therefore was the only option in the PPADA, 2015 that met the circumstances of the Commission as prescribed in *Section 103(2) (b) of the PPADA, 2015*
- d) Changes in some Commission policies directly affected timely procurement like revision of some specifications and proposals on new acquisitions. The constitution of the new Commission six months to the General Elections to some extent caused the need for direct procurement as some of these decisions were being made at the tail end.
- e) Failure by some suppliers to deliver on time resulted to seeking alternative suppliers to mitigate the deficit in materials and services required.
- f) Pre-existing contracts – there some ongoing contracts or goods previously acquired from some suppliers that were used as justifications for direct procurement for purposes of compatibility or standardization as provided in *Section 103(2)(d) of the PPADA, 2015*

The Fresh Presidential Election had been scheduled to happen within 60 days after the Supreme Court's ruling of the nullification of the General Election's presidential results.

The 60 days included all the other electoral activities like planning, budgetary approval and procurement planning. No procurement can be initiated without budgetary approval.

The procurement of services and goods for this election therefore resulted to direct procurement due to

- a) Pre-existing contracts and buying additional materials and services from the previous suppliers for purposes of standardization and compatibility. This was a repeat election and therefore the understanding of the need to hold factors constant to get similar goods and services hence direct procurement pursuant to *Section 103(2)(d) of the PPADA, 2015*.
- b) *Section 103(2)(b) of the PPADA, 2015* was also applicable occasioned by an Urgent need considering the mood in the country. Failure to procure goods and services would have made the situation worse leading to the threat to life and destruction of property.

24.0. The Commissioners Role in Procurement

The Commission's policy decisions were made in plenary. It would be difficult to determine their role in procurement unless one sat in Plenary or accessed the Plenary Minutes.

Implementation of procurement policies was however under the approval of the Accounting Officer with the support of the DCSS under which the Directorate of Supply Chain Management fall.

The approval and directions to the Directorate of Supply Chain Management came from the Accounting Officer and the DCS SS who interact with Plenary directly.

25.0. Submission by Amb. Paul Kurgat former Commissioner IEBC

The commissioner submitted that:

1. He personally knew that the role of Commissioners was restricted to Policy formulation and Oversight
2. He was of the Opinion that the internal Audit conducted by the Chairperson ought to have included all 9 departments. The Chairman seeking audit for a single department was ill motive.
3. He couldn't understand why the Chairperson was requesting for an internal audit while the Officers from the Office of the Auditor General were onsite

26.0. Submission by Ms. Margaret Mwachanya former Commissioner IEBC

The Commissioner submitted that:

1. The role of Commissioners was restricted to Policy formulation and Oversight
2. She left IEBC because of her principles, she also felt that her opinion was not taken in decision making
3. That she voted on the procurement of KIMS in line with the paper submitted to plenary by the secretariat.
4. She differed with the Chairpersons in initiating internal audit while Auditors from the Office of the Auditor General were onsite.
5. The course she undertook was on leadership and was attended by several senior public servants and that she graduated with Honorary Doctorate because of her personal contribution to leadership.

27.0. Submission by Mr. Lawy Aura former Director Procurement

The Procurement Director in regards to provision of strategic communication and integrated media campaign consultancy services submitted that:

1. The law provides for negotiations when the bidders arrive to a tie.
2. The scores were very close and he advised on the statistical tie to provide room for two more bidders in the negotiations.
3. The letters written for procurement of collocation system to KRA and CMA were done way before he assumed Office.

28.0. Submission by Ms. Praxedis Torerei former Director Legal

The former Director Legal submitted that:

1. The legal department participates during the procurement only during preparation, drafting and review of contracts.
2. The director legal does not sit in Commission meeting and only advice the Commission when her advice is sought in writing.
3. No any legal advice was sought by the plenary or the CEO in regards to procurement.

29.0. Submission by Mr. Michael Kairu Managing Director Belgon Engineering Company

The Managing Director Belgon Engineering Company submitted that:

1. The time frame given by the IEBC was inadequate to supply such an amount.
2. After persistent calls from the Commission he borrowed a mould from a local plastic manufacturer and modified it to fit the Commission's specification.
3. Due to short notice, he had to procure materials locally of which they were more expensive.

30.0. Submission by Mr. Nicholas Nesbitt, the Country General Manager, IBM East Africa

Mr. Nicholas Nesbitt, the Country General Manager, IBM East Africa appeared before the Committee accompanied by the following officers:

- | | | |
|------------------------|---|------------------------------------|
| 1. Mr. Benjamin Mann | - | Chief Operations Officer |
| 2. Ms. Angela Ambetsa | - | Legal Counsel |
| 3. Mr. Humphrey Lilech | - | Government and Regulatory Affairs, |
| 4. Mr. Lewi Maina | - | Client Executive |
| 5. Mr. Peter Gachuhi | - | Kaplan & Stratton |
| 6. Ms. Esther Kinyenje | - | Kaplan & Stratton |

and submitted as follows:

IBM Eastern Africa

The word IBM means International Business Machines. IBM Eastern Africa Private Limited Company is a company incorporated in East Africa through registration and is wholly owned by IBM Global Corporation based in the United States of America. **IBM Eastern Africa is is company that helps clients leverage technology to grow their businesses and overcome challenges.** IBM has been operating directly in East Africa since 1958. **IBM has transformed -** Now a Cognitive solutions company powered by Cloud. New East Africa Headquarters established in Kenya in 2010 overseeing operations across 8 countries including Tanzania, Uganda, Burundi, Rwanda, Ethiopia, South Sudan and Djibouti. Its comprehensive line of offerings, including services, software and systems are designed for exceptional price performance, manageability and

ease of use. **IBM's local business partner network** also has experience across multiple industries, delivering affordable and customizable solutions; developed based on industry insights. Long term partnerships within the **telecommunications, government, and financial services sectors** have allowed us to focus on providing innovative solutions which speak to the needs of local citizens.

IBM oversees and provides technical support for IBM partners based in Africa such as providing licensing agreements. IBM Kenya is a marketing division/ entity of IBM Eastern Africa. IBM EA is an independent entity and does not have any operational links with IBM France.

Support Services: In July, 2017 IBM was contracted by IEBC to provide maintenance services for Servers that are stationed in Kenya. The process was initiated through an invitation by IEBC, to wit, the communication was formal and Mr. Nicholas Nesbitt, committed to provide the said communication. Between, Jan–April 2017 IBM then proceeded to undertake an assessment of the equipment; the latter had been in place since the 2012 election. Thereafter, IEBC contracted IBMEA through direct procurement to provide maintenance services for IEBC servers based in Kenya. The services were provided under the presumption that they were to be utilized during the General Elections scheduled for 8th August, 2017. IBMEA was informed at the last minute that IEBC had resolved to use cloud servers stationed in France. IBMEA were not aware of the agreement between IBM France and Safran Morpho or Safran Morpho and IEBC relating to cloud servers.

2012 General Elections: IBMEA had no role in the procurement of equipment by IEBC and Safran Morpho and IBM France. This is because, even though IBM GLOBAL owns IBM France and IBME, the latter and the former are independent entities that have no operational links.

Soliciting favours: No one from or behalf of IEBC sought any favours from IBMEA including at the point of pitching for the contract. IBM has a policy that does not allow staff to offer a gift above USD \$25. IBM do not have any contact with the Ministry of Information, Communication and Technology before, or during the process of procuring the contract with IEBC.

31.0. Submission by Ms. Corinne Mbiaketcha, the Managing Director, Oracle Technology Systems (Kenya) limited

Ms. Corinne Mbaiketcha, the Managing Director, Oracle Technology Systems (Kenya) limited appeared before the Committee accompanied by the following officers:

- | | | |
|------------------------|---|-------------------|
| 1. Ms. Hanifa Shakombo | - | Counsel, Oracle |
| 2. Mr. Evans Monari | - | Partner, Bowmans |
| 3. Mr. Effie Omondi | - | Counsel, Bowmans |
| 4. Ms. Lynette Etemesi | - | Counsel, Bowmans |
| 5. Mr. Peter Gachuhi | - | Kaplan & Stratton |
| 6. Ms. Esther Kinyenje | - | Kaplan & Stratton |

and submitted as follows:

Oracle East Africa

Oracle Corporation is an American multinational computer technology corporation headquartered in Redwood Shores, California. The company specializes primarily in developing and marketing database software and technology, cloud engineered systems, and enterprise software products — particularly its own brands of database management systems. The company also develops and builds tools for database development and systems of middle-tier software, enterprise resource planning (ERP) software, customer relationship management (CRM) software, and supply chain management (SCM) software.

Oracle Technology Systems (Kenya) Limited (OTS) is a subsidiary of the Oracle Corporation. In April 2017, IEBC approached Oracle by way of an invitation letter to conduct a security assessment. The basis of the invitation was OTS was the original equipment manufacturer. OTS undertook the assessment upon attaining the necessary approvals through its internal structure. Upon delivery of its report, IEBC awarded a contract to OTS for license, implementation of options and advanced customer support. On 29th May, 2017, Oracle submitted its security assessment report. On 26th May, 2017, IEBC issued Oracle with an invitation to tender. On 29th May, 2017 Oracle submitted its quotation. Thereafter there was a subsequent negotiation to reduce the quotation from Kshs 273,182,000 to Kshs 264,600,000. On 31st May, 2017 the contract was awarded and signed. OTS ensured that its internal matrix on compliance was met before undertaking the contract. On June 8, 2017 the system was scheduled to be tested.

The election could not have run without Oracles database. Oracle has only received payment amounting to USD \$30,000 of the contract sum and has been in the process of negotiating for payment of the remaining amount but is yet to receive responses from the National Treasury, Ministry of ICT and IFMIS.

Soliciting favours: No one from or behalf of IEBC sought any favours from Oracle including at the point of pitching for the contract. Oracle did not have any contact with the Ministry of Information, Communication and Technology before, or during the process of procuring the contract with IEBC.

32.0 Submission by Safran Identity Security (IDEMIA)

Mr. Matthew Foxton jointly with Mr. Olivier Charlanes, the Executive Vice-President and Executive Committee Member/ Senior Vice-President respectively, appeared before the Committee and submitted as follows:

1. The Company regrets that it was not able to appear before the Committee on 11th February, 2019, this was due to miscommunication of which they wrote to the Committee through the Clerk's office via a letter dated 13th February, 2019 to explain the same.
2. They confirmed that they finally received another of invitation on 18th of February, 2019: in which they were invited 'IDEMIA' to appear before the Committee, to assist the Committee in relation to its examination of accounts of the Independent Electoral and Boundaries Commission for the Financial Year 2016/17 as expressed by the Auditor General's Report.
3. IDEMIA is justifiably concerned about some of misconceptions and misapprehensions about its business; and is pleased that with this opportunity it will be able to clarify and set the record straight on possible concerns relating to its interaction with the IEBC a solemn institution within Kenya.

BACKGROUND by Mr. Matthew Foxtton the Executive Vice-President

4. He submitted that IDEMIA is a French group of great repute globally; resulting from the coming together in 2017 of two key worldwide leaders in the identity sector: Oberthur Technologies and Safran Identity and Security.
5. IDEMIA is arguably the worldwide leader in police biometric systems: its biometric algorithms and solutions are used by more than eighty (80) police services around the world including the Federal Bureau of Investigations (FBI), Interpol, Germany's BKA, and numerous African countries such as Kenya, South Africa, Chad, Botswana or Ethiopia.
6. IDEMIA is also the leading provider of US government endorsed identities for trusted civil and commercial transactions. IDEMIA counts a staggering 13,000 employees around the world, including 2000 Research & Development experts and 13 Research & Development centers across the globe. In the next 5 years, IDEMIA's Research & Development investment is planned to reach 1 Billion Euros.
7. With close to \$3 billion in revenues and more than 135 governmental customers in civil identity solutions, IDEMIA serves clients in 180 countries and is the natural leader in the **identity industry**, combining the strongest customer references and project experience.

8. IDEMIA has a worldwide industrial footprint to optimize responsiveness and customer proximity relying on a network of State-of-the-art factories covering all regions and Service centers established in more than 30 countries around the world.

Chronology of IDEMIA's creation

9. He submitted that Morpho, part of the aeronautical Group SAFRAN, signed a first contract with the IEBC in 2012 for the supply of Biometric Voter Registration (BVR) kits (importantly Morpho was not contracted to supply any other components, especially no deliverables linked to the transmission of results of 2013 General Elections).
10. Renamed 'SAFRAN Identity & Security' in June 2016, Morpho came together with Oberthur Technologies (OT) in May 2017 giving rise to a new company called OT-Morpho, which ended up being renamed IDEMIA in October 2017.
11. He reported that these name changes were duly notified to the IEBC in two letters dated July 7, 2016 and June 13, 2017. (The letters were tabled to the Committee)

IDEMIA in Kenya by Mr. Olivier Charlanes, Vice-President

12. He submitted that IDEMIA has been present since 2008 on police and security systems support.
13. In 2012, IDEMIA was selected to contribute to the very first step of the 2013 general election process. IDEMIA provided a Biometric Voter Registration (BVR) system to the IEBC to produce a credible and secure voter register.
14. He reported that the same system has been maintained ever since, and complemented in 2017 with 45,000 devices deployed over more than 40,000 polling stations across Kenya to organize the voter verification and results transmission in the scope of the 2017 general elections (the Kenya Integrated Election Management System – KIEMS). The system was reused for the 26th October 2017 Fresh Presidential Elections.
15. In 2018, IDEMIA was contracted by the Ministry of Interior and Coordination of the National Government for the provision of 31,500 mobile biometric kits to be used in a national population registration.
16. IDEMIA is currently in the process of establishing a new branch in Kenya, scheduled to open later this year, an indication of the Company commitment to investing in Kenya and supporting its growth

(1) KIEMS contract for General Elections

17. He submitted that an initial tender for KIEMS was released on 15/12/2016, requesting a submission from the bidders on 9/1/2017, IDEMIA took part in the process.
18. Upon cancellation of the initial tender, which happened on 21/03/2017, IDEMIA received the same day a letter of intent from the IEBC formalizing IEBC's willingness to engage IDEMIA to supply, deliver, install, commission, test & support an "Integrated Election Management System". In the letter, IEBC highlighted the fact that due to the limited time to fulfil its legal obligation, they were willing to engage IDEMIA via a direct procurement.
19. After a new submission offer on 25/03/2017, IDEMIA received a notification of award on 25/3/2017 and signed the KIEMS contract with the IEBC on 31/03/2017.
20. He reported that the remaining time to execute General Elections was extremely short: only 20 weeks from contract signature to the General Elections voting day, which took place on 8/8/2017.
21. To execute this contract for General Elections, IDEMIA provided the following equipment, licenses and services:
 - Delivery of 45.000 KIEMS kits, which include the KIEMS tablet and its accessories.
 - Installation, configuration, testing & commissioning of the KIEMS system, which includes:
 - o Voters verification (EVI) o Results Transmission System (RTS)
 - o Candidates Registration Management System (CRMS)
 - o Integration of the KIEMS solution with the existing Biometric Voters Registration system (BVR)
 - o The provision of Software licenses and royalties for the KIEMS system
 - Preparation of 10.000 KIEMS kits for the verification exercise (configuration, reception & inventory)
 - Preparation of 45.000 KIEMS kits for the General Elections (reconfiguration)
 - Election Day technical training
 - Election Day technical support

22. He reported that as the program unfolded, the following additional equipment & services were requested by IEBC and delivered by IDEMIA in order to adapt to the tight schedule of the General Elections:
- Provision of cloud services for RTS
 - Change request for customization of RTS software
 - Change request for CRMS external portal
 - Change request for increasing the production capacity in preparation of Kits for the elections
23. IDEMIA executed the program within due time, which ultimately allowed it to manage the General Elections according to the customer's requirements.

(2) KIEMS contract for Fresh Presidential Election

24. He reported that on 1/9/2017, Supreme Court of Kenya decided to nullify the presidential election which took place on 8/8/2017 and requested to schedule a Fresh Presidential Election on 17/10/2017.
25. On 19/9/2017, IDEMIA received a letter from IEBC approving the selection of IDEMIA as the provider of services for this Fresh Presidential Election. Time constraints made it impossible for the IEBC to contract & deploy an alternative election system.
26. On 28/9/2017, IDEMIA was invited for final negotiations. The contract for Fresh Presidential Election was signed on the same day.
27. In order to execute this contract for Fresh Presidential Election, IDEMIA provided the following equipment and services:
- Preparation of 45.000 KIEMS kits (reception, inventory and reconfiguration)
 - Delivery of KIEMS kits replacement and spare parts (SD cards, tablets)
 - Upgrade, installation & configuration of the KIEMS system
 - Election Day technical training
 - Election Day technical support
28. He reported that the allocated time to see this program through was nothing short of succinct: 7 weeks between the Supreme Court decision to cancel the election and the effective date for

Fresh Presidential Election. The elections were delayed 10 days and finally took place on 26/10/2017.

29. In order to secure the availability of the Election system for Election Day, IDEMIA was committed to executing its contract on time at expected quality level and according to IEBC's request:

- IDEMIA worked without contract until 28/9. At that point, 60% of IDEMIA's contract was delivered. IDEMIA took significant risk in doing so.
- IDEMIA mobilised technicians to provide field support for 290 constituencies.
- The local factory had to operate night shifts, more than 350 Kenyans were hired by IDEMIA at some point in time to speed up deliveries.
- The late confirmation on 13/10/2017 of the RTS workflow evolution required for FPE.
- The risk taken by the company to handle the program nationwide, under very strict time frames.
- The security measures taken by IDEMIA to provide full protection to the company staff. The said protection started shortly before the date of the General Elections.

30. He reported that for Fresh Presidential Election, both the costs of the program and the program management were justified by the exceptional context in which the elections took place.

31. The prices were approved as they were quoted by the IEBC, after several rounds of price negotiations to cope with the customer's expectations.

32. Hon. Chairman, Hon Committee, IDEMIA executed the program within due time, which ultimately allowed it to manage the General Elections according to the customer's requirements.

(3) KIEMS system hosting

33. He submitted that according to the contract requirements, the Result Transmission System (RTS) hosting platform was to be (1) local and (2) provided on 17/04/2017 by the IEBC.

34. As the local platform was not made available on time, the IEBC asked IDEMIA to put an alternative strategy in place. IDEMIA responded positively to that demand, thus exceeding our contractual services.

35. In June 2017, IDEMIA proposed the alternative solution to host the RTS on a private cloud platform. IEBC accepted this proposal as an action to reduce the risks of the Elections program.

36. He reported that from a security perspective, an internal audit of the platform used for the General Elections done by Verizon certified that the investigations lead identified no evidence to suggest that anything had jeopardized the integrity of the RTS system.

37. Furthermore, the following audits were done & tests reports were provided to IEBC before the Fresh Presidential Election:

(a) Functional and performance tests:

- Full functional and performance tests reports were shared with IEBC
- A third-party company audited the methodology & functional tests results

(b) Security tests:

- Full reports shared with IEBC, including penetration tests
- Independent penetration tests performed by Orange

38. IDEMIA executed the program within due time, which ultimately allowed it to manage the General Elections according to the customer's requirements.

39. After both elections, RTS data were handed over to the IEBC on 15/2/2018. The databases and virtual servers used for both elections were copied on a dedicated space of the local infrastructure in May 2018, giving IEBC access to the both elections' data.

40. The RTS system hosted by NTT was shut down on 16/1/2019, after repeated notifications sent to the IEBC on the matter.

Hon Chairman and Hon Committee,

- Kenyan elections are complex and cannot be compared to any other elections.
- IDEMIA has worked in many countries, and the Kenyan election solution is unique but far ahead compared to that of other countries.
- IDEMIA remains above many of its competitors in terms of technical solution and project management.

Conclusion

43. IDEMIA fulfilled its assignment for Kenya's IEBC with professionalism and rigour. It was engaged by the IEBC to carry out very specific tasks, which it successfully accomplished in respect of both the original and rerun elections.
44. All internal and external audits conducted on IDEMIA's systems revealed that it successfully achieved its general election goals for the IEBC.
45. They carried out their duties totally impartially, they are an ethically-minded company and they have no wish to be caught up as scapegoats in Kenyan politics.
46. He reported that, in 2017, some IDEMIA collaborators had even been threatened of death, here in Kenya. Nevertheless, they kept performing an outstanding job in ensuring that KIEMS worked properly and securely during the two elections, so as to ensure a fair and neutral election process then trustful results.
47. Even following the Supreme Court's September 1, 2017 ruling, IDEMIA accepted to extend its engagement and kept supporting the IEBC in the democratic process so as to ensure open, free and fair Kenyan elections. Therefore, as of September 2017, IDEMIA provided an updated software, additional KIEMS hardware and support services for the October 26, 2017 presidential election rerun.
48. Further the High Court's October 11 ruling and the IEBC's resulting official decision to include eight candidates in the Fresh Election caused the company considerable unexpected work, such as:
 - Writing new software for the KIEMS kits to include the new candidates list.
 - Updating once again the 45,000 KIEMS kits with the new configuration.
 - Configuring the RTS system again to include the new candidates list.
49. Despite this challenging context, IDEMIA and all its people are proud to have been able to successfully fulfill their engagements to support Kenyan democracy, and humbly reaffirm today how positively it can consider the outcome of both 2017 elections, as it has been publically stated by the International Community observers (UE, Carter Center, etc.).
50. IDEMIA has undertaken successfully several election projects in Africa. It considers that elections are the most challenging projects to set up. But they also are the most rewarding as they are a fundamental bloc in the development of a country.

51. IDEMIA is most glad to have supported this great country in assisting in the management of the 2017 Kenyan elections. It was a great challenge for IDEMIA in terms of time, technology and security constraints noting the novelty of the solution offered. IDEMIA is incredibly proud to have supported Kenya and served its citizens.

Committee Observations and Findings

- i. When asked of the Local Address, he submitted that the Company was in the process of registering a local associate.**
- ii. When asked of other contracts they are undertaking in the country, he submitted that they have the Following live contracts with the Government of Kenya:**
 - I. Contract with the Police Department on finger print equipment (Biometrics)**
 - II. State Department of Interior on population Registration - NIMS**
- iii. When asked whether he can table his contractual obligation to the Committee, he undertook to table a soft copy immediately after the meeting.**
- iv. He admitted that he was selected through a direct procurement process**

33.0. COMMITTEE RECOMMENDATIONS

- i. Parliament expedites the strengthening of IEBC by reviewing the legal framework and the general policy guidelines while taking into account the recommendations of the Kriegler Commission. Further, Parliament considers reviewing or repealing section 11A of the IEBC Act relating to the functions of the Commission and the secretariat, to bring clarity to the constitutional functions of the Commission vis-a-vis the administrative functions of the secretariat.**
- ii. It also evident that Commissioners demonstrated conflicts of interest in relation to procurement of the KIEMS kits where the Commissioners voted in favour of their preferred suppliers as evidenced in MINUTE 12-15/03/2017 of the Special Plenary Meeti emerged that the other Commissioners demonstrated conflicts of interest in relation to procurement ng held on 31st March, 2017.**

The Committee recommends that upon adoption of this report, the relevant investigative agencies should institute investigations on the conduct of the Commissioners involved with a view to initiating prosecution where culpability is established.

- iii. The Secretariat demonstrated poor or lack of prior planning which plunged the electoral body into crisis after crisis, that compelled the Commission to undertake direct procurement of all critical goods and services in a manner that was contrary to provisions of Article 227(1) of the Constitution in so far as it did not embody a process that was fair, equitable, transparent, competitive and cost-effective.**

The inertia exhibited by the leadership of the IEBC has eroded public confidence in the institution's capacity, as currently constituted, to execute its constitutional mandate whilst safeguarding public interest. To that end, the Commissioners, the Chief Executive Officer and the Directors who were involved in the unlawful procurement should vacate office immediately upon adoption of this report to allow for the much-needed reforms to be effected to restore public confidence in the Independent Electoral Boundaries Commission.

- iv. The National Treasury and the Auditor-General should assist the Commission undertake verification of all pending bills with a view to expedite the settlement of all genuine payments due to the suppliers in order to save the public from incurring additional costs that may arise from protracted legal disputes with such suppliers. The team should also institute mechanisms to recover all monies that might have been paid to suppliers improperly. Investigations should also be undertaken, and if impropriety is established, appropriate action taken against all the officers involved.**

- v. **The Accounting Officer should at all times ensure that all applicable accounting and financial controls, systems, standards, laws and procedures are followed when procuring or disposing of goods and services as provided for in section 68(2)(e) of Public Finance Management Act 2012 and section 103 of the Public Procurement and Asset Disposal Act, 2015.**
- vi. **The CEO, Mr. Ezra Chiloba, signed contracts worth Kshs. 4,312,046,372.00 without the contractors providing performance guarantees contrary to the provisions of section 142 (1) of the Public Procurement and Asset Disposal Act, 2015. Upon adoption of the Report, the relevant investigative agencies should undertake an investigation with a view to initiating prosecution if culpability is established. The Commission should at all times ensure that performance guarantees are executed before signing a contract in accordance with section 142 (1) of the Public Procurement and Asset Disposal Act, 2015.**
- vii. **The Accounting Officer should always be guided by the Average Price List or Market Price Index published by the Public Procurement Regulatory Authority that is designed to assist all heads of procuring entities, accounting officers and all public officials involved in the procurement function with the necessary information to comply with the aforesaid legal requirement and in turn deliver value for money in the public service and comply with section 54(2) of Public Procurement and Asset Disposal Act, 2015 that prohibits all transactions by public officials in which standard goods, works and services are procured at unreasonably inflated prices.**

Within three months of adoption of this report, the Public Procurement Regulatory Authority should publish an updated Average Price List in light of the fact that the last Average Price list was published pursuant to the provisions of section 30 of the Public Procurement and Disposal Act, 2005.

- viii. **The Commission should establish framework contracts with more than one supplier so that it is not held hostage when it comes to pricing with the aim of ensuring that resources of the Commission are used in a way that is effective, efficient and economical pursuant to the provisions of section 68(1)(b) of Public Finance Management Act, 2012.**

M/S. IDEMIA (formerly *Morpho*, *OT Morpho*, *SAFRAN Identity & Security*)

- ix. **Noting the Committee's Conclusions and Observations on pages 120 - 126, relating to IDEMIA regarding its engagements in Kenya, the House further recommends-**

- (a) **THAT, the Directorate of Criminal Investigations and the Director of Public Prosecutions undertakes investigations and institutes appropriate criminal action under section 974(3) of the Companies Act against M/S.. IDEMIA in its current name and in its former names of M/S. *Morpho, OT Morpho, SAFRAN Identity & Security*, its officers and local representatives for having purported to do business with the IEBC before being registered as a foreign company by the Registrar of Companies and noncompliance with the mandatory provisions of sections 974(1) as read together with sections 975 and 979 of the Companies Act, No. 17 of 2015;**
- (b) **THAT, pursuant to the provisions of section 41 of the Public Procurement and Asset Disposal Act, 2015, the Public Procurement Regulatory Authority Board investigates, within sixty (60) days, the conduct of M/S. IDEMIA (*formally operating as Morpho, OT Morpho, SAFRAN Identity & Security*) and if it finds the company culpable, enters the names of the company in the central repository of debarred firms and ensures that the firm is precluded from participating, award or entering into any kind of procurement contract payable using public funds under any state department or agency in the Republic of Kenya for a period of 10 years;**
- (c) **THAT, all contracts entered into between the company known as M/S. IDEMIA in its current name herein or in its former names of *Morpho, OT Morpho, SAFRAN Identity & Security* and the IEBC be investigated and if found to have contravened sections 974, 975, 979 or any other section of the Companies Act or any other law, be nullified;**
- (d) **THAT, the IEBC takes immediate legal action to recover all monies unlawfully paid under the contract(s) entered into between itself and M/S. IDEMIA in its current name herein or in its former names of *Morpho, OT Morpho, SAFRAN Identity & Security* or otherwise howsoever; as the contracts were entered into in contravention of the mandatory provisions of sections 974 as read together with sections 975 and 979 of the Companies Act; and,**
- (e) **THAT, the Attorney General and the Cabinet Secretary for the National Treasury ensures compliance with the resolution of the House under recommendation 9 (b) and any state of public offer who contravenes the said resolution be held personally liable.**

34.0. BASIS FOR COMMITTEE RECOMMENDATION FOR VACATION OF OFFICE

The Secretariat

There seemed to be an unending tug of war and tuff-fencing between the Secretariat and the Commissioners. In the clear lack of policy direction from the Commissioners, the Secretariat operated as if the Commissioners did not exist. In the ensuing scenario the Senior Staff of the Secretariat, Individually and collectively, failed to plan, execute or implement the policies and strategies of the Commission as envisioned under section 11A(b) of the Independent Electoral and Boundaries Commission Act, 2011. It was apparent to the Committee that this failure was deliberately designed to plunge the Commission into a crisis that compelling the Commission to resort to direct procurement of all critical goods and services in a manner that was contrary to Article 227(1) of the Constitution. Consequently, the Kenyan taxpayer did not get value for money. The Committee highlights the following instances as the basis for its recommendations for the removal from office of the senior staff of the Commission:

11. Mr. Ezra Chiloba – CEO

Whereas the Committee notes that he has since been removed from the Commission, the Committee particularly makes the following observations with regard to his role as CEO:

- e) Poor planning and mismanagement of the procurement processes in relation to the whole election process of both August and October 2017, thereby creating an environment of opaqueness, secrecy and anxiety. This, inevitably, contributed to the escalation of the cost of the 2017 General Elections.
- f) Failure to inculcate the spirit of team work and collegiality with the Commissioners and not providing information to the Commission in a timely manner, thus creating loopholes that were exploited to subvert the proper functioning of the Commission.
- g) Exposing the Commission to high risks by not demanding performance bonds before signing contracts. For instance, he awarded a contract for BVR IBM Server infrastructure maintenance and KIEMS infrastructure security monitoring solutions through direct procurement at a cost of Kshs.452,006,003.77 which solution was eventually not utilized during the 2017 General Elections.
- h) Purchase of 149,640.5GB extra data bundles valued at Kshs.127,625,926 which were eventually not used for the intended purposes during the 2017 General Elections, thereby occasioning extra burden to the taxpayers.

12. Mr. Marjan Hussein – Deputy CEO

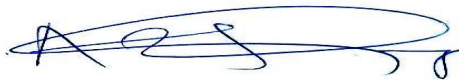
- c) As the Deputy CEO Operations Logistics and Support Services, he was the Chairman of the Commission Tender Committee and he misled the CEO into signing BVR IBM Server infrastructure Maintenance and KIEMS infrastructure security monitoring solutions contract among others against the provisions of the Public Procurement and Assets Disposal Act, 2015.
- d) He allowed receipt of some election materials for Fresh Presidential Elections way long after the required delivery dates and after completion of the election exercise. For instance, the security seals that were supplied late by Far East Company Limited whose payment is still contentious to date.

13. Ms. Praxedes Tororey – Director, Legal Services

- c) Failure to provide sound legal advice to the Commission with regard to the requirement for performance bonds before execution of contracts exposing the Commission to high financial risks.
- d) Failure to provide sound legal advice to the CEO on direct procurement of various election materials during the General Elections contrary to section 103 of the Public Procurement and Asset Disposal Act, 2015.

14. Mr. James Muhati – Director, ICT

- d) Failed to provide sound technical advice to the Commission on specifications relating to procurement of BVR IBM server infrastructure maintenance and KIEMS infrastructure security monitoring solution through direct procurement at a contract sum of Kshs.452,006,003.77, thereby occasioning wastage of public resources.
- e) Failure to advise the Commission appropriately on technical specifications relating to procurement of Oracle database and security solutions worth of Kshs. 273,643,447.00 thereby occasioning wastage of public resources.
- f) Failure to provide appropriate advice on technical specification on procurement of data bundle requirement for the election worth Kshs.1,800,579,512.00, thereby occasioning wastage of public resources.



SIGN:..... DATE: ..27/02/2019.....

**HON. JAMES OPIYO WANDAYI, MP
CHAIRPERSON**